Environmental Hearing Board

Adjudications and Opinions

2011
VOLUME I

COMMONWEALTH OF PENNSYLVANIA
Thomas W. Renwand, Chief Judge and Chairman

JUDGES

OF THE

ENVIRONMENTAL HEARING BOARD

2011

Chief Judge and Chairman	Thomas W. Renwand
Judge	Michelle A. Coleman
Judge	Bernard A. Labuskes, Jr.
Judge	Richard P. Mather, Sr.
Acting Secretary	Maryanne Wesdock

Cite by Volume and Page of the
Environmental Hearing Board Reporter

Thus: 2011 EHB 1

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FOREWORD

This volume contains all of the adjudications and opinions issued by the Environmental Hearing Board during the calendar year 2011.

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

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ACTING SECRETARY TO THE BOARD

SAYREVILLE SEAPORT ASSOCIATES ACQUISITION COMPANY, LLC T/A SAYREVILLE SEAPORT ASSOCIATES, L.P.	:	
v.	:	**EHB Docket No. 2010-127-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: January 4, 2011**

OPINION AND ORDER
ON MOTION TO DISMISS

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board denies the Department's motion to dismiss for lack of jurisdiction an appeal from a Departmental letter that says that contaminated soil generated at an appellant's site cannot be accepted at any facility in Pennsylvania that has been approved to beneficially use waste materials as regulated fill. The letter appears to be a final, appealable action.

OPINION

Sayreville Seaport Associates Acquisition Company, LLC T/A Sayreville Seaport Associates, L.P. ("Sayreville") filed this appeal from a letter it received from the Department of Environmental Protection (the "Department"), which reads as follows:

> This letter is in response to your June 30, 2010, e-mail to Todd Wallace in follow up to our June 16, 2010, meeting. The e-mail concerned the status of the Form U proposal to send contaminated soil from the Sayreville, NJ site to the Cumberland County

> Landfill and the potential of sending the contaminated soil to the Hazleton Creek Property (HCP) site for use as regulated fill.
>
> The Department's Southcentral Regional Office considered the Form U proposal submitted by the Cumberland County Landfill and disapproved the proposal. I have attached a copy of the disapproval notice that was sent to the Cumberland County Landfill for your information.
>
> Regarding your other request, the Department believes that this contaminated soil cannot be accepted by HCP or any other facility approved to beneficially use waste materials as regulated fill under the Department's residual waste general permit WMGR096 or as clean fill pursuant to the Department's Management of Fill Policy. Environmental due diligence performed on this waste identified concerns related to naturally occurring radioactive material (NORM) and technologically enhanced naturally occurring radioactive material (TENORM). The beneficial use of waste with radioactive concerns as regulated fill or clean fill may adversely effect human health or the environment, and therefore the Department's Fill Management policy does not apply.
>
> If you have any further questions or comments concerning this subject, please contact me.

The letter is signed by Stephen Socash, Chief, Division of Municipal and Residual Waste.

The Department has moved to dismiss this appeal. It argues that Socash's letter is not a final action that is subject to review by this Board. It says that Sayreville has gone about seeking approval to use its contaminated soil in the wrong way. It says that Sayreville is required to apply for and obtain its own determination of applicability (DOA) to operate under the general permit authorizing the beneficial use of contaminated fill, even though Sayreville wants to use the fill on the HCP site, which is already covered by a DOA. In the Department's view, until Sayreville files such an application and the Department acts upon it, the Department's letter should be considered nothing more than a meditative rumination contemplating the Department's inchoate beliefs on the subject. Sayreville, of course, argues the opposite.

In order to determine whether a Departmental letter is appealable, we consider such

factors as the specific wording of the communication, its purpose and intent, its practical impact, its apparent finality, its regulatory context, and the relief the Board can provide. *Borough of Kutztown v. DEP*, 2001 EHB 1115, 1121-24. Here, as in our recent decision in *Perano v. DEP*, EHB Docket No. 2009-119-L (Opinion issued May 26, 2010), the factor that attracts our immediate attention is the regulatory context of the matter. As we said in *Perano*, "[i]f a regulatory process exists for requesting a Department action, we certainly expect that that process will normally be utilized." *Id.*, slip op. at 7.

The problem with the Department's argument in this case, just as in *Perano*, is that it is not clear as a matter of law that Sayreville is attempting to bypass an applicable regulatory process. Sayreville contends that only a person who intends to "operate" a facility that accepts residual waste under the Department's general permit must submit an application for a DOA. The operator of the site--here, HCP--has already obtained that DOA. From that point forward, HCP is only required to supply certain "information" (presumably similar to a Forum U) in order to accept new waste streams at the site, according to Sayreville. In other words, no application is required to accept new sources of waste at a facility that is already registered to operate under the general permit.

If it is true that Sayreville has bypassed proper procedures, the Department does not explain why its letter does not mention that fact. Instead, the letter on its face clearly indicates that the Department considered Sayreville's request on its merits. If proper regulatory procedures exist, the Department itself appears to have ignored them. A hearing with post-hearing briefing will undoubtedly help us clear up the confusion regarding whether there are any procedures that must be followed in this situation. For now, there is nothing about the regulatory context of this matter that compels the conclusion as a matter of law that the Department's letter

is anything other than a final, appealable action.

With respect to the wording of the letter, the Department places great stock on the fact that it only expressed a "belief" that Sayreville's contaminated soil cannot be approved for beneficial use. We believe that the Department's characterization of its determination as a belief is not particularly significant. We believe that expressing a position in terms of a belief does not necessarily connote a tentative or provisional position. A person who says he believes in God and country in no way intimates by that choice of words that his feelings are temporary or conditional. There is nothing in the Department's letter that anticipates further consideration is available. Any reasonable person reading the Department's letter would understand that further efforts to obtain an approval would almost certainly not be worthwhile. The letter without a doubt tells Sayreville: "Don't bother." It applies to *any* facility in Pennsylvania, which is to say site-specific considerations are irrelevant. It says that the soil "cannot be accepted" and it explains that the prohibition is because of the material's radioactive content, which leaves no room for negotiation or reconsideration. It concludes that the Department's fill policy "does not apply," which very much sounds like a final legal determination.

As to the other *Kutztown* factors, the practical impact of the letter is that Sayreville cannot beneficially use its waste as fill. The purpose of the letter is not to request additional information or direct Sayreville's attention to proper procedures that must be followed; it is to make a final determination regarding the suitability of the material for use as fill anywhere in Pennsylvania because of the nature of the material. Finally, the Board may be in a position to offer meaningful relief. For example, if the Department itself has employed improper procedures, we could remand with instructions to follow such procedures. The fact that we may not be in a position to award relief specific to the HCP site because HCP has not applied to

accept the material does not mean that we are in no position to award *any* meaningful relief.

Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

SAYREVILLE SEAPORT ASSOCIATES ACQUISITION COMPANY, LLC T/A SAYREVILLE SEAPORT ASSOCIATES, L.P.	:	
v.	:	**EHB Docket No. 2010-127-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 4th day of January, 2011, it is hereby ordered as follows:

1. The Department's motion to dismiss is **denied.**

2. The Order of November 24, 2010 staying discovery pending resolution of the Department's motion to dismiss is **rescinded.**

3. The Appellant's motion to compel, which was previously denied without prejudice pending resolution of the Department's motion to dismiss, is **granted.** The Department shall respond to the Appellant's document request on or before **January 28, 2011** and make Stephen Socash and David Allard available for depositions at a mutually agreeable time and place.

ENVIRONMENTAL HEARING BOARD

BERNARD A. LABUSKES, JR.
Judge

DATED: January 4, 2011

c: DEP Bureau of Litigation:
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MARYANNE WESDOCK
ACTING SECRETARY TO THE BOARD

PAUL LYNCH INVESTMENTS, INC.	:	
	:	
v.	:	**EHB Docket No. 2010-151-M**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: January 7, 2011**

OPINION AND ORDER ON
INABILITY TO PREPAY CIVIL PENALTY

By Richard P. Mather, Sr., Judge

Synopsis

The appellant has failed to produce sufficient evidence to demonstrate that it is financially unable to prepay a $5,000 civil penalty or post an appeal bond. To the contrary, the evidence produced by the appellant establishes that the appellant is an ongoing business entity with a net value of more than $7,000,000. Appellant's claim that it is unable to post an appeal bond or pre-pay the $5,000 civil penalty strains credulity for the reasons set forth in this opinion. The appeal will be dismissed unless the Appellant prepays or posts a bond by February 7, 2011.

OPINION

Paul Lynch Investments, Inc. ("Paul Lynch Investments" or "Appellant") filed an appeal from the Department of Environmental Protection's (the "Department's") assessment of a $5,000 civil penalty against it for alleged violations of the Air Pollution Control Act, 35 P.S. § 4001 *et seq*. Paul Lynch Investments is a corporation. Paul Lynch ("Mr. Lynch"), the president and

secretary of Paul Lynch Investments, signed a verification attached to the notice of appeal stating that Paul Lynch Investments does not have the ability to prepay the $5,000 civil penalty assessment, as required under the Act, which provides, in part:

> When the department proposes to assess a civil penalty, it shall inform the person of the proposed amount of the penalty. The person charged with the penalty shall then have thirty (30) days to pay the proposed penalty in full, or, if the person wishes to contest the amount of the penalty or the fact of the violation to the extent not already established, the person shall forward the proposed amount of the penalty to the hearing board within the thirty (30) day period for placement in an escrow account with the State Treasurer or any Commonwealth bank or post an appeal bond to the hearing board within thirty (30) days in the amount of the proposed penalty, provided that such bond is executed by a surety licensed to do business in the Commonwealth and is satisfactory to the department.
>
> . . .
>
> Failure to forward the money or the appeal bond at the time of the appeal shall result in a waiver of all legal rights to contest the violation or the amount of the civil penalty unless the appellant alleges financial inability to prepay the penalty or to post the appeal bond. The hearing board shall conduct a hearing to consider the appellant's alleged inability to pay within thirty (30) days of the date of the appeal. The hearing board may waive the requirement to prepay the civil penalty or to post an appeal bond if the appellant demonstrates and the hearing board finds that the appellant is financially unable to pay. The hearing board shall issue an order within thirty (30) days of the date of the hearing to consider the appellant's alleged inability to pay.

35 P.S. § 4009.1(b). Under this provision, an appellant must prepay the civil penalty unless the Board, after a hearing, finds that the appellant is financially unable to pay.

When an appellant asserts that it is unable to prepay a penalty or post an appeal bond, the Board is to hold an evidentiary hearing on that question. *Carl L. Kresge & Sons, Inc. v. DEP*, 2001 EHB 511, 515 (citing *Pilawa v. DEP*, 689 A.2d 141 (Pa. Cmwlth. 1997); *Twelve Vein Coal v. DER*, 561 A.2d 1317 (Pa. Cmwlth. 1989)). We held an evidentiary hearing regarding the Appellant's claim of inability to prepay the civil penalty on December 15, 2010.

It is well established that the Appellant bears the burden of proving that it is unable to prepay or post an appeal bond in the amount of the civil penalty. 35 P.S. § 4009.1(b); *See*

Kresge, 2001 EHB at 515; *Hrivnak Motor Company v. DEP*, 1999 EHB 437, 441; *Heston S. Swartley Transportation Co., Inc. v. DEP*, 1999 EHB 88, 89; *Goetz v. DEP*, 1998 EHB 955, 964-65. This burden is a considerable one. It is not enough to simply file a signed verification regarding inability to prepay and then testify to that effect. Rather, to satisfy its burden, the Appellant must:

> [p]roduce hard evidence that gives the Department a reasonable opportunity to challenge the claim and this Board a reasonable opportunity to independently assess the claim. That evidence must, among other things, include proof of the appellant's assets and liabilities. In the absence of hard evidence, the Legislature's objective in requiring prepayment could too easily be thwarted without sufficient proof or substantial justification.

Hrivnak, 1999 EHB at 441 (citing *Swartley*, 1999 EHB at 89.)

In previous decisions, the Board listed the types of evidence it looks for in determining whether the appellant established its claim of inability to prepay. Such evidence includes:

1. Recent financial statements;
2. Income tax returns;
3. Information regarding accounts and notes receivable;
4. Information regarding marketable securities owned by appellant;
5. Information regarding interests appellant owns in closely held corporations or partnerships;
6. Information regarding intangible property owned by appellants;
7. Information regarding vehicles owned by appellant;
8. Information regarding real estate owned by appellant;
9. Information regarding oil, gas, or mineral rights owned by appellant;
10. Information regarding recent loan applications filed by appellant;
11. Information regarding insurance policies naming appellant as the insured or beneficiary; and
12. Information regarding property appellant recently sold for value or transferred as a gift.

Kresge, 2001 EHB at 516 (citing *Goetz*, 1998 EHB at 67-68 n. 9; *Swartley*, 1999 EHB at 89).

The Board will only excuse an appellant from the prepayment/bonding obligation if making the prepayment would result in undue financial hardship. *Hrivnak*, 1999 EHB at 442. An undue financial hardship occurs if making the prepayment or submitting a bond would

interfere with the appellant's ordinary and necessary expenses, considering the appellant's current and reasonably anticipated future needs. *Id.*

At the hearing, Paul Lynch testified on behalf of Paul Lynch Investments, Inc. The Department presented the expert testimony of its financial investigator, James C. Bixby, CPA. Mr. Bixby testified that, in his opinion and based mainly on his review of the 2009 Income Tax Return for Paul Lynch Investments, Paul Lynch Investments has the ability to post the $5,000 bond. After a review of the evidence and testimony in this matter, we conclude that Paul Lynch Investments failed to meet its burden of demonstrating its financial inability to prepay or post an appeal bond.

At the hearing, Paul Lynch testified that he is unable to prepay the penalty or post an appeal bond because Paul Lynch Investments has no cash flow, no line of credit, and can not obtain a commercial loan in light of recent changes to banking regulations that do not permit such loans. (Notes of Transcript ("T.") 11, 12, 13, 14, 22, 31, 32, 64). In support of his arguments, Mr. Lynch provided, and the parties jointly stipulated to, the following exhibits:

A. 2008 U.S. Income Tax Return and Schedules, Form 1120S, for Paul Lynch Investments, Inc.

B. 2009 U.S. Income Tax Return and Schedules, Form 1120S, for Paul Lynch Investments, Inc.

C. Deed dated January 1, 2002 between Paul P. Lynch and Marcia L. Lynch and Paul Lynch Investments, Inc.

D. Deed dated January 8, 2004 between the Lawrence County Tax Claim Bureau and Paul Lynch Investments, Inc.

E. Deed dated August 17, 2004 between Gary McQuiston and Dana McQuiston, *et al.* and Paul Lynch Investments, Inc.

F. Deed dated January 1, 2005 between L & P Investments, Inc. and Paul Lynch Investments, Inc.

G. Deed dated June 15, 2005 between Universal-Rundle Corporation and Paul Lynch Investments, Inc.

H. Deed dated January 5, 2006 between Mathew Leivo & Sons, Inc. *et al.* and Paul Lynch Investments, Inc.

I. Deed dated May 30, 2008 between Jacqueline Schwartz, Charles L. Simon and Linda Simon and Paul Lynch Investments, Inc.

J. Deed dated May 18, 2009 between Hoss's restaurant Operations, Inc. and Paul Lynch Investments, Inc.

K. Deed dated August 12, 2009 between David Lynch and Carol Lynch and Paul Lynch Investments, Inc.

L. Articles of Agreement for Deed dated June 9, 2010 between Estate of Walter J. Novak and Paul Lynch Investments, Inc.

M. Deed dated June 15, 2010 between First National Bank of Pennsylvania and Paul Lynch Investments, Inc.

N. Deed dated August 17, 2010 between the Tax Claim Bureau of Lawrence County, Pennsylvania and Paul Lynch Investments, Inc.

O. Notice of Return and Claim addressed to Paul Lynch Investments, Inc. regarding Permanent ID 8 85600 2009.

P. Notice of Return and Claim addressed to Paul Lynch Investments, Inc. regarding Permanent ID 7 77800 2009.

Q. Notice of Return and Claim addressed to Paul Lynch Investments, Inc. regarding Permanent ID 25 338800 2009.

R. Notice of Return and Claim addressed to Paul Lynch Investments, Inc. regarding Permanent ID 25 338900 2009.

S. Notice of Return and Claim addressed to Paul Lynch Investments, Inc. regarding Permanent ID 1 43300 2009.

T. Notice of Return and Claim addressed to Paul Lynch Investments, Inc. regarding Permanent ID 1 51400 2009.

U. Mortgage dated September 10, 2008 between Paul Lynch Investments, Inc. and NexTier Bank, N.A. for $350,000.

V. Mortgage dated August 10, 2009 between Paul Lynch Investments, Inc. and NexTier

Bank, N.A. for $350,000.

W. Memorandum of Lease dated June 30, 2010 between Paul Lynch Investments, Inc. and East Resources Management LLC.

X. Subordination of Lien dated May 19, 2009 between Shareholders, Paul Lynch Investments Inc. and Paul P. Lynch and NexTier Bank, N.A.

Y. Assignment of Rents dated August 10. 2009 between Paul Lynch Investments, Inc. and NexTier Bank, N.A.

The Appellant's arguments fall well short of satisfying its burden of providing the Board with sufficient hard evidence to allow the Board to independently verify that Paul Lynch Investments is unable to prepay the civil penalty or post an appeal bond. In fact, the evidence on the record before us suggests exactly the opposite: that the Appellant is able to satisfy its prepayment/bonding obligation without causing it undue hardship. First, the Appellant is an ongoing business entity that has a net value of more than $7,000,000 based on Mr. Lynch's own estimate of the value of the Appellant's assets. (Appellee Ex. A; T. 48.) The Appellant's tax returns indicate that annual income from Appellant's operations was $367,775 in 2008 and $405,177 in 2009. (Stipulated Exs. A and B.) Appellant's claim that it is unable to prepay a $5,000 civil penalty or post an appeal bond strains credulity based upon Mr. Lynch's own estimate of the enormous value of the assets owned by the company. (Appellee Ex. A.)

Furthermore, Mr. Lynch himself suggested another avenue he could pursue to generate the $5,000 necessary to satisfy the prepayment/bonding obligation: he could sell one of the many real estate properties owned by Paul Lynch Investments. (T. 14, 22.) Mr. Lynch testified that the company owns "a lot of property," mostly commercial and industrial real estate. (T. 9.) Although Paul Lynch Investments has not sold any property in two or three years because of the sagging real estate market, and selling property could take time in this market, Mr. Lynch nevertheless concedes that "the only way I'd know to pay [the civil penalty] is we could go out

and we could sell the property." (T. 22.) We should be clear about the Appellant's burden. It is not enough to show that it would be inconvenient or otherwise difficult satisfy prepayment/bonding requirements. Rather, the Appellant must show that it does not have *any* means available to it that would not cause undue hardship. Here, we simply can not conclude that the Appellant met its burden where there is testimony that it could sell property to prepay the penalty and, all the while, no claim or evidence showing that the sale of property would cause the Appellant any undue hardship.[1]

Nor are we moved by Mr. Lynch's argument that he is unable to obtain a commercial loan because of recent changes in banking regulations. We were not provided with any citation or other reference to the specific regulations to which Mr. Lynch is referring. We are not convinced that, in the absence of any hard corroborative evidence, a company with almost $5 million in total assets (Stipulated Ex. B) is unable to attain a $5,000 loan based on a somewhat vague and unsupported reference to new banking regulations.[2] Moreover, we have no way of verifying Mr. Lynch's testimony that his attempts to attain a loan failed because he did not provide us with any corroborating documentation such as loan applications or loan application denials. (T. 23, 67.) Mr. Lynch conceded that his efforts to attain a loan were limited to two banks located in New Castle, Pennsylvania, and that he did not even consider other banks when applying for a loan. (T. 33.) In light of all this, the Appellant failed to convince the Board that all reasonable options to obtain a loan to satisfy its prepayment/bonding obligation have been exhausted.

---

[1] Mr. Lynch also alluded to equipment in a restaurant owned by Paul Lynch Investments that he wishes to sell. (T. 36-37.) Thus, we identified another potential cash source that could help satisfy the prepayment obligations and would not result in undue financial hardship.

[2] Mr. Bixby also testified that the Appellant has equity in its properties in the amount of $7.8 million. The term equity, in this sense, refers to the fair market value of the properties owned by the Appellant minus mortgages outstanding. (T. 57.)

Lastly, Mr. Lynch testified that he loaned several million dollars to Paul Lynch Investments in order to satisfy past financial obligations. (T. 13, 34-35.) Mr. Lynch stipulated that he, in his individual capacity, has the financial ability to prepay the $5,000 penalty, and he testified that he estimates his personal wealth to be $10 million to $20 million and that he is "very liquid." (T. 26.) Nevertheless, Mr. Lynch refuses to loan Paul Lynch Investments money to satisfy its obligation to prepay the $5,000 penalty because, in his view, the Department is "picking on him" and "the whole thing is a sham." (T. 35.) As a result of his personal feelings toward the Department, Mr. Lynch admitted that he is "not *willing* to cooperate in any which way." (T. 35.) (emphasis added). Based on the record before us, it is apparent that Mr. Lynch has the ability to loan Paul Lynch Investments $5,000 and that, given his financial standing, such a loan will not result in undue financial hardship to him or the company. His unwillingness to continue his routine business practice of paying the Appellant's debts, as done in the past, does not relieve the Appellant of its legal obligation to prepay the civil penalty under the Air Pollution Control Act.

In short, a showing of the Appellant's *unwillingness* to prepay a civil penalty falls well short of the requisite demonstration of hard evidence of an *inability* to do so. Under the Air Pollution Control Act, Paul Lynch Investments has a legal obligation to prepay the $5,000 civil penalty. It appears based on the record before us that the Appellant has several avenues available to it to satisfy this obligation. The Appellant must comply with the law and prepay the civil penalty in order to be entitled to pursue its appeal.

Accordingly, we issue the following Order.

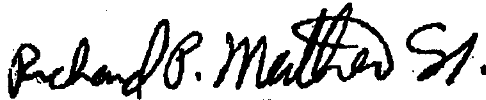
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PAUL LYNCH INVESTMENTS, INC.	:	
	:	
v.	:	**EHB Docket No. 2010-151-M**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 7th day of January, 2011, it is ordered that the Appellant shall prepay the civil penalty or post an appeal bond in accordance with Section 9.1 of the Air Pollution Control Act, 35 P.S. § 4009.1, by **February 7, 2011**, or the appeal will be dismissed.

ENVIRONMENTAL HEARING BOARD



RICHARD P. MATHER, SR.
Judge

DATED: January 7, 2011

c: **DEP Bureau of Litigation:**
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MARYANNE WESDOCK
ACTING SECRETARY TO THE BOAF

FRANK T. PERANO	:	
	:	
v.	:	**EHB Docket No. 2009-067-L**
	:	**(Consolidated with 2010-033-L**
COMMONWEALTH OF PENNSYLVANIA,	:	**and 2010-104-L)**
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION and TILDEN TOWNSHIP,	:	**Issued: January 11, 2011**
Permittee	:	

OPINION AND ORDER ON MOTION FOR SANCTIONS

By Bernard A. Labuskes, Jr., Judge

Synopsis

In response to a motion for sanctions for spoliation of evidence pertaining to emails that were deleted by an appellant, the Board finds that the appellant was under a duty to preserve evidence and the appellant breached that duty by deleting potentially relevant emails after litigation was reasonably anticipated.. The appellant's spoliation of evidence if not remedied will result in prejudice to the Department. As a result, the appellant is instructed to take all measures reasonably necessary to retrieve the emails. The Board will evaluate the appellant's efforts at the hearing on the merits and, if those efforts are not fruitful, the Board when issuing its final Adjudication may draw an adverse inference against the appellant.

OPINION

This consolidated matter involves appeals by Frank T. Perano ("Perano") of the Department of Environmental Protection's (the "Department's") April 15, 2009 order directing Tilden Township to revise its official Act 537 Plan to address a future sewage disposal need at

Perano's Pleasant Hills Mobile Home Park and a March 9, 2010 Consent Order and Agreement between the Department and Tilden Township that resolved the Township's appeal from the Department's April 15, 2009 order. Also consolidated in this matter is Perano's appeal of the Department's denial of his NPDES permit renewal application for the Pleasant Hills sewage treatment plant. In a nutshell, the Department believes that Perano has shown that he is unable or unwilling to consistently operate the plant in accordance with its permit, so it is requiring Perano to shut the plant down and connect the mobile homes to public sewers.

The Department has filed a motion for sanctions. The Department contends that Perano engaged in systematic spoliation of evidence by deleting discoverable emails. The Department asserts that Perano's failure to take adequate steps to preserve discoverable documents merits sanctions and it requests that the Board, at a minimum, impose costs and find that incidents referenced in six entries in a logbook maintained by one of the plant's operators that described problems at the plant be deemed unauthorized releases of sewage in violation of the Clean Streams Law. The Department also requests that we find as a sanction that Perano is unwilling and/or unable to comply with the terms of his NPDES permit.

In his response, Perano concedes that his employees deleted emails but he argues that they did so in order to make additional computer disk space available and not to hide anything. He says that once he became aware in the Fall of 2009 that emails related to litigation matters were being deleted, his employees were verbally instructed to stop deleting messages. He ultimately distributed a document retention policy to his employees in February 2010, and he retained the services of a data recovery firm to recover deleted emails from James Perano's computer. The firm recovered at least 15,000 emails, some of which have been turned over to the Department, and Perano is in the midst of reviewing those emails to identify any additional

emails that are relevant to this appeal.

We held a hearing on July 21, 2010 to address the Department's motion, at which both parties presented evidence. We thereafter granted the parties' joint request for a stay of proceedings pending settlement discussions. Those discussions were unsuccessful and we lifted the stay. We are now in a position to address the Department's motion.

Perano's initial contention is that the Department's motion is premature because discovery is still underway in this appeal and he is continuing to review emails that have been recovered to date. We agree that it is too early to decide what, if any, sanction should ultimately be imposed in this case if Perano does not eventually turn over all relevant emails. It is not yet clear that all pertinent erased emails are permanently gone, and in fact, we know that some have been recovered. It is not too early, however, to evaluate Perano's efforts to comply with his discovery obligations to date, give Perano an opportunity to correct his shortcomings, and advise him of the likely consequences of his failure to correct those shortcomings. The Department's motion is not premature in the sense that it is better for Perano to correct errors now than wait until the hearing and suffer avoidable consequences later.

Under long-established Pennsylvania law, a party cannot benefit from its own withholding or destruction of evidence. *Koken v. Colonial Assurance Co.*, 885 A.2d 1078, 1100 n.7 (Pa. Cmwlth. 2005), *aff'd*, 893 A.2d 98 (Pa. 2006); *Duquesne Light Co. v. Woodland Hills School Dist.*, 700 A.2d 1038, 1050 (Pa. Cmwlth. 1997). Although the rule against spoliation in the context of a discovery motion might be thought of as simply one aspect of the general obligation to turn over discoverable material in litigation, the rule actually predates discovery in its modern form by a substantial margin. *See McHugh v. McHugh*, 20 A. 410 (Pa. 1898). Spoliation is "the destruction or significant alteration of evidence, or the failure to preserve

property for another's use as evidence in pending or reasonably foreseeable litigation." *Phillips v. Potter*, 2009 U.S. Dist. LEXIS 40550 (W.D. Pa., May 14, 2009) (quoting *Mosaid Technologies, Inc. v. Samsung Electronics Co.*, 348 F. Supp. 2d 332, 335 (D. N.J. 2004)); *Centimark Corp. v. Pegnato & Pegnato Roof Management, Inc.*, 2008 U.S. Dist. LEXIS 37057 (W.D. Pa., May 6, 2008) (same).[1] Sanctions may be imposed against a party who is guilty of spoliation. Sanctions are within the Board's discretion and may range from an order to submit to further discovery, to cost-shifting, fines, adverse inferences, preclusion, and even summary judgment in severe cases. *Eichman v. McKeon*, 824 A.2d 305, 313 (Pa. Super. 2003). *See also Pension Committee v. Banc of American Securities*, 685 F. Supp. 2d 456 (S.D.N.Y. 2010); *Zubulake v. USB Warburg*, 229 F.R.D. 422 (S.D.N.Y. 2004); *Zubulake v. USB Warburg*, 220 F.R.D. 212 (S.D.N.Y. 2003).

Although spoliation principles first evolved in cases involving tangible things, there is no question that the rule against spoliation applies to written records and electronically stored information (ESI) such as emails. *Koken*, 885 A.2d at 1100 n.7. *See Diocese of Harrisburg v. Summix Development Company*, 2010 U.S. Dist. LEXIS 49069 (M.D. Pa., May 18, 2010) (breach of contract claim involving alleged destruction of emails); *Phillips*, *supra* (Title VII retaliation claim for alleged spoliation of electronically stored information); *Kvitka et al. v. The Puffin Co., LLC*, 2009 U.S. Dist. LEXIS 11214 (M.D. Pa., Feb. 13, 2009) (awarding sanctions in a fraud-based claim); *Centimark Corp.*, *supra* (awarding spoliation inference jury instruction as a sanction where the underlying claims involved, *inter alia*, breach of contract and unjust enrichment); *Healthcare Advocates, Inc. v. Harding et al.*, 497 F. Supp. 2d 627 (E.D. Pa. 2007) (copyright infringement claim). The rule against spoliation applies in Board proceedings. In

---

[1] We are, of course, not bound by federal case law, but we may refer to it for its persuasive value particularly where, as here, the Pennsylvania Supreme Court has adopted a federal court's holding as the applicable standard.

DEP v. Neville Chemical Co., 2005 EHB 212, although we did not impose sanctions, we discussed the rule against spoliation in the context of a motion in limine related to a Department employee's notes in a civil penalty action under the Clean Streams Law.

At the risk of stating the obvious, a party cannot be sanctioned for destroying evidence that it had no duty to preserve. The obligation to preserve evidence arises when a party knows or should have known that litigation is pending or likely and the party knows or should have known that the evidence could be relevant in that litigation. *See Creazzo v. Medtronic*, 903 A.2d 24, 29 (Pa. Super. 2006). *See also Phillips, supra*; *Centimark Corp., supra; Kvitka, supra*; *Zubulake, supra*; *Pension Committee, supra.* The actual filing of a claim is not necessary. *Winters v. Textron, Inc.*, 187 F.R.D. 518, 520 (M.D. Pa. 1999) (finding that knowledge of even a potential claim is sufficient to impose a duty to preserve evidence).

Perano's duty to preserve evidence attached no later than February 1, 2008, even though actual litigation did not commence until May 15, 2009. James Perano, Perano's General Manager in charge of the day-to-day operations of Perano's mobile home parks, testified that, as a result of meetings with the Department, he anticipated no later than February 1, 2008 that litigation over the Pleasant Hills plant would ensue. (Notes of Transcript page ("T.") 34-35.) Thus, as of February 1, 2008, Perano had a duty to preserve emails related to operation of the plant.

Spoliation occurs if potentially relevant evidence generated after the operative date is lost or destroyed. Here there is no dispute that Perano erased pertinent emails that the company knew or should have known would be relevant. (T. 13, 23-24.) In fact, it is conceded. (See Perano Response ¶¶ 4, 21, 24, 29, 31, 33.) Remarkably, Wanda Bartholomew, a Perano employee at Pleasant Hills partially responsible for operation of the plant, testified that she

continued to erase emails as late as January 2010. (T. 11-13.) Perano did not verbally instruct employees to retain emails until at least October 2009 (T. 25, 36, 40), which instruction was ignored, apparently without consequence, and he did not distribute a written email retention policy until February 2010 (T. 26, 35-37, 40). No one asked Bartholomew to look for or save emails as late as January 2010. (T. 11-13.) There was no effort to save emails on flash drives or discs. (T. 24.) Perano's written policy only applies to company-owned computers although employees use their own computers to conduct company business. (T. 47.) The retention policy that Perano belatedly distributed is not particularly clear and has been interpreted by at least one employee as an instruction to delete pertinent emails. (T. 22.) Perano has retained the services of a data recovery firm, Kroll Ontrack, to retrieve deleted emails from James Perano's computer, and some of those emails have reportedly been recovered from that computer, but no such effort has been employed for the computers of other key employees such as Bartholomew and Leanne Heller, Perano's operations manager. (T. 48.)

Parties who suffer from the effects of spoliation are often left to wonder what the destroyed evidence might have revealed. Here, however, we know that at least some of the emails were relevant to the operation of the plant, which is at the heart of this matter. We know this because some emails have already been turned over. In addition, Heller confirmed that there were deleted emails regarding the operation of the plant. (T. 22.) Furthermore, the Department has been able to point to log entries on March 2, June 12, and August 11 and 12, November 26, and December 2, 2007 which indicate that Bartholomew emailed Leanne Heller, the operations manager at Pleasant Hills, regarding operational problems at the plant. For example, the logbook entry on June 12, 2007 read "EQT [equalization tank] 99 1/2% percent full already splashing out, will email Leanne." The entry on August 11, 2007 said the EQT was "still like 95% full...wrote

Leanne note." The entry on November 26, 2007 detailed problems at the plant and said "emailed Leanne about all of this." The entry on December 2, 2007 said "EFT [effluent tank] brown in color litely w/debris? Emailed Leanne." The entry on March 2, 2007 said "called Steve office. Left message and major problems, called Leanne." The entry on August 12, 2007 said "called everyone yesterday & today. No one called back. Doing what I can...What a mess."[2] We do not imagine that the Bartholomew emails referenced in her log book are the only relevant emails that were generated. Thus, there is no question in this matter that Perano knew or should have known that emails were relevant or potentially relevant in the litigation.

Now that we have determined that spoliation occurred, we must decide what to do about it. Pennsylvania follows the analysis established by the Court of Appeals for the Third Circuit in *Schmid v. Milwaukee Elec. Tool Corp.*, 13 F.3d 76 (3d Cir. 1994). In *Schmid*, the plaintiff was injured while using an allegedly defective circular saw. The district court granted judgment as a matter of law in favor of the defendant on the ground that the plaintiff's expert disassembled the saw and failed to preserve the allegedly defective parts. On appeal, the primary issue raised was whether the district court erred by striking the testimony of the plaintiff's expert witness in its entirety as a sanction. In concluding that the sanction was too harsh under the circumstances, the Third Circuit found the following factors to be relevant:

> (1) the degree of fault of the party who altered or destroyed the evidence,
>
> (2) the degree of prejudice suffered by the opposing party, and
>
> (3) whether there is a lesser sanction that will avoid substantial unfairness to the opposing party and, where the offending party is seriously at fault, will serve to deter such conduct in the future.

Id. at 79.

In *Schroeder v. Commonwealth*, 710 A.2d 23 (Pa. 1998), the Pennsylvania Supreme

[2] Heller later told Bartholomew to tone down her remarks. (T. 15.)

Court adopted verbatim the three-part test established in *Schmid*, reasoning that "fashioning a sanction for the spoliation of evidence based upon fault, prejudice, and other available sanctions will discourage intentional destruction." *Id.* at 27. *Schroeder* involved a claim against a truck manufacturer. The trial court granted summary judgment for the defendant on the ground that the plaintiff failed to preserve the allegedly defective product, a truck manufactured by the defendant. The Commonwealth Court affirmed. The Pennsylvania Supreme Court, however, reversed and remanded, finding factual disputes regarding the plaintiff's efforts to preserve the truck. After adopting and applying the *Schmid* factors, the Court found that the record did not reflect a sufficient degree of fault or prejudice to justify granting summary judgment. The court found that a lesser sanction, such as an instruction to the jury that an adverse inference may be drawn from the plaintiffs failure to preserve the evidence, would be more appropriate. The *Schroeder/Schmid* factors remain the law of the Commonwealth. *Koken*, 885 A.2d at 1100; *Manson v. SEPTA*, 767 A.2d 1, 5 (Pa. Cmwlth. 2001); *Eichman*, 824 A.2d at 314.

With respect to Perano's degree of fault, we find that Perano's conduct was at least negligent. Some courts hold that *any* destruction of evidence after the duty to preserve attaches is, by definition, negligent. *Zubulake*, 220 F.R.D. at 220. Although we do not need to go that far, it is abundantly clear from our review of the record that Perano failed to exercise due care. James Perano is an experienced and sophisticated businessman who should have known better than to destroy relevant information. In fact, he did. He prepared a document retention policy incorporating a litigation hold in 2007, but he "forgot about it" and never distributed it until 2010, two years after litigation was anticipated. (T. 35-37). As to lower-level employees, Perano's company had a duty to take reasonable steps to install, enforce, and reinforce an unambiguous retention policy that included a litigation hold in a timely and effective manner.

This was not done.

Although the presence or absence of bad faith is relevant in selecting the appropriate sanction for spoliation, it is not a prerequisite. *Eichman*, 824 A.2d at 314. Although Perano was undoubtedly negligent, we discern no deliberate attempt to hide anything in order to gain a litigation advantage, which serves to temper our sanction in this case.

The Department has been prejudiced by Perano's failure to turn over the requested emails. The Department has a right to obtain documents that "are relevant to the subject matter involved in the pending action." Pa.R.C.P. 4003.1. The erased emails are certainly relevant. Although there may be other evidence of plant malfunctions, such as the plant's discharge monitoring reports, the emails may relate to different incidents. Furthermore, admissions against interest by a party have obvious probative value, not only regarding the malfunctions, but as to the cause of those malfunctions, Perano's knowledge of the malfunctions, and what measures he took to correct the situation.

Perano has failed to fully cure the prejudice. To begin with, there is some discrepancy about how many emails have been recovered so far. Perano suggested in his response to the motion that 15,000 deleted emails have been recovered, but at the hearing, James Perano testified that 57,000 emails have been recovered. (T. 44.) In any event, only the computer belonging to James Perano was sent to Kroll Ontrack. No other employees' computers were sent to the data recovery firm. (T. 41, 48.) Although at least three of the four emails specifically identified in the Department's motion have since been recovered and turned over to the Department (T. 6-7, 45-46), it is not yet known just how many other relevant emails have been lost in their entirety (T. 49).

We are required to impose the least severe sanction that will avoid substantial unfairness

to the opposing party (the Department) and, where the offending party (Perano) is seriously at fault, will serve to deter such conduct in the future. *Schroeder*, 710 A.2d at 27. As discussed above, Perano is "seriously at fault." Nevertheless, our overriding objective is to decide cases on the merits. It is not yet clear that all pertinent emails are irretrievably lost. Therefore, as a first step, we direct Perano at his own expense and within 30 days to take all measures reasonably necessary to retrieve and produce all nonprivileged electronically stored information that is responsive to the Department's discovery requests. This effort must include not only the emails retrieved from James Perano's computer, but all other computers that were used to generate or receive emails related to operation of the Pleasant Hills plant, including but not limited to Heller's and Bartholomew's computers as well.[3]

We will evaluate Perano's compliance at the upcoming hearing on the merits. If there has been full compliance with our Order, no further sanctions will be necessary. If compliance is inadequate, we may infer as part of our comprehensive review of the entire record when we prepare our Adjudication that the destroyed evidence would have been unfavorable to Perano. This is the functional equivalent of a spoliation jury instruction and is considered one of the least onerous penalties commensurate with conduct such as Perano's. *See, e.g., Eichman*, 824 A.2d at 315 (adverse inference proper despite little responsibility and no bad faith); *Mt. Olivet Tabernacle Church v. Wiegand Division*, 781 A.2d 1263, 1273 (Pa. Super. 2001), *aff'd*, 811 A.2d 565 (Pa. 2002) (adverse inference not imposed but would have been within the bounds of court's discretion despite little fault or prejudice); *Pia v. Perrotti*, 718 A.2d 321, 325 (Pa. Super. 1998), *app. denied*, 737 A.2d 743 (Pa. 1999) (adverse inference charge appropriate despite little

[3] Because Perano allowed his employees to conduct company business on their personal computers, our directive applies to those computers as well. A party may not escape its duty to produce otherwise discoverable materials by claiming that communications were generated on a privately owned computers, any more than a party can escape a duty to produce a document because he used his own pen to write it.

responsibility and prejudice).

Accordingly, we issue the following Order.

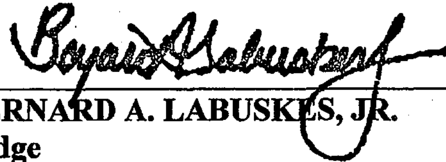
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

FRANK T. PERANO	:	
	:	
v.	:	**EHB Docket No. 2009-067-L**
	:	**(Consolidated with 2010-033-L)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and TILDEN TOWNSHIP, Permittee	:	

ORDER

AND NOW, this 11th day of January, 2011, it is hereby ordered that the Department's motion for sanctions is **granted** in accordance with the foregoing Opinion.

ENVIRONMENTAL HEARING BOARD



BERNARD A. LABUSKES, JR.
Judge

DATED: January 11, 2011

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MARYANNE WESDOCK
ACTING SECRETARY TO THE BOARD

READING ANTHRACITE COMPANY	:	
	:	
v.	:	**EHB Docket No. 2008-225-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: January 11, 2011**

ADJUDICATION

Per Curiam

Synopsis:

The Board sustains an appeal to a provision of an authorization to mine on the basis that the provision is merely a statement of future intent with respect to a matter which is not yet an actual matter of real controversy before the Board at this time.

FINDINGS OF FACT

1. The Department is the agency with the duty and authority to administer and enforce the Surface Mining Conservation and Reclamation Act, Act of May 31, 1945, P.L. 1198, *as amended*, 52 P.S. § 1396.1, *et seq.* ("Surface Mining Act"); the Coal Refuse Disposal Control Act, Act of September 24, 1986, P.L. 1040, *as amended*, 52 P.S. §§ 30.51, *et. seq.* ("Coal Refuse Act") The Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §§ 691.1, *et seq.*; the regulations promulgated pursuant to SMCRA, found at 25 Pa. Code, Chapters 86 and 88; Section 1917-A of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, *as amended*, 71 P.S. § 510-17 ("Administrative Code"), and the rules and regulations promulgated

thereunder.

2. Reading Anthracite Company ("Reading Anthracite"), the Appellant, is a corporation with its principal place of business located at 200 Mahantongo Street, Pottsville, Schulkyll County, PA 17901.

3. Reading Anthracite is the holder of a Surface Mine Permit No. 54773006 for its Buck Run operation ("Buck Run Permit") containing five phases. Appellant Exhibit ("App. Ex.") 1; Department Exhibit ("DEP Ex.) 12; N.T.[1] 180.

4. Reading Anthracite and the Department have a long-standing disagreement about whether there has been appropriate reclamation of an earlier mining location under the Buck Run Permit, *i.e.*, the Thomaston mine location, which is phase 3 of the mining under the Buck Run Permit, which dispute has been ongoing since 2003 or 2004. N.T. 136, 153-54; DEP Ex. 10.

5. This is an appeal of "Special Condition No. 6" of the July 14, 2008 authorization of the Department to mine the St. Kieran mining location, which is Phase 5, App. Ex. 1; N.T. 8, 126.

6. Special Condition No. 6 reads as follows:

> Pending resolution of the reclamation requirement/liability on the "Phase 3, Buck Run/Thomaston" Operation, the Department will no (sic) accept nor authorize any plans to increase the areas authorized by the Authorization to Mine No. 1673-54773006-35 (169.07 acres) or any request for bond release for this site ($1,731,711.90 existing excess bond)."

7. A two day trial was held by the Honorable Michelle A. Coleman beginning on August 10, 2009 in the Harrisburg Courtroom of the Board.

DISCUSSION

Reading Anthracite bears the burden of proof in this matter. Pursuant to Board Rules "a

[1] Notes of Testimony will be cited as "N.T."

party appealing an action of the Department shall have the burden of proof when a party to whom a permit approval or certification is issued protests one or more aspects of its issuance or modification." 25 Pa. Code § 1021.122(c)(3). The burden upon Reading Anthracite is to show by a preponderance of the evidence that the Department's action of adding "Special Condition No. 6" to the St. Kieran's Authorization to Mine was inappropriate. *Smedley v. DEP*, 2001 EHB 131.

The Buck Run operation contains five phases which include the Thomaston operation and St. Kieran's operation. After Reading Anthracite was finished mining the Thomaston phase it moved to St. Kieran's. On July 14, 2008 the Department granted Reading Anthracite authorization to mine St. Kieran's adding Condition No. 6, which provides:

> Pending resolution of the reclamation requirement/liability on the 'Phase 3, Buck run/Thomaston' Operation, the Department will no (sic) accept nor authorize: any plans to increase the areas authorized by this Authorization to Mine No. 1673-54773006-35 (169.07 acres) or any request for bond release for this ..site ($1,731,711.90 existing excess bond).

This appeal is about the approval of the St. Kieran mining location. "Special Condition No. 6" which involves the Thomaston mining location is really not a "condition" of this approval in the usual sense or in the sense of the term "condition" to a permit discussed in *Harriman Coal Corp. v. DEP*, 2000 EHB 960. "Special Condition No. 6" more resembles a pronouncement of future intent to act, or not act, as the case may be, if there were a future request to mine or a bond release request. As such, it is premature since no request for additional mining or bond release is currently pending before the Department. For the same reason, in the context of this approval of the St. Kieran's mining location, the dispute about whether the Thomaston location has been properly reclaimed or not is not relevant or pertinent.

If any such future request to mine or request for bond release were made by Reading

Anthracite then the Department would take that request under consideration and could, perhaps, deny the request based on the assertion that the Thomaston mine location had not been appropriately reclaimed. Should a future request for additional authorization to mine or request for bond release come in from Reading Anthracite, the Department, we are certain, will review such a request under the applicable regulations such as 25 Pa. Code § 86.15-16 and/or 25 Pa. Code § 86.171 and make a decision which may, perhaps, involve a denial on account of the Thomaston location reclamation situation. Then, assuming an appeal of any such denial or denials, the matter of the Thomaston mine location reclamation would be relevant. Likewise, the Department has, and has had at its disposal during the rather long duration of the Thomaston location reclamation disagreement, other more immediate action options open to it should it desire to force the Thomaston reclamation matter into a case over which the Board would have jurisdiction if appealed.

For these reasons, we find that "Special Condition No. 6" is really just a precatory statement of present future intent about an event which may or may not happen in the future and, as such, it does not properly belong in this authorization. We will therefore sustain the appeal as to "Special Condition No. 6" and it shall be stricken from the authorization.

CONCLUSIONS OF LAW

1. Reading Anthracite bears the burden of proof pursuant to 25 Pa. Code § 1021.122(c)(3).

2. "Special Condition No. 6" is not a condition of a permit, it is a statement of future intent about an event which may or may not occur in the future.

3. As such, it should not be part of this authorization.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

READING ANTHRACITE COMPANY	:	
	:	
v.	:	**EHB Docket No. 2008-225-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 11th day of January, 2011, it is hereby ordered that "Special Condition No. 6" is hereby stricken from the Department's authorization.

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Chairman and Chief Judge

MICHELLE A. COLEMAN
Judge

BERNARD A. LABUSKES, JR.
Judge

MICHAEL L. KRANCER
Judge

The concurring opinion of Judge Richard P. Mather, Sr. is attached.

DATED: January 11, 2011

c: **DEP Bureau of Litigation**
Attention: Connie Luckadoo, Library

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READING ANTHRACITE COMPANY	:	
	:	
v.	:	**EHB Docket No. 2008-225-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

CONCURRING OPINION OF
JUDGE RICHARD P. MATHER, SR.

I concur with the Board's decision to sustain Reading Anthracite's appeal, but I am concerned with certain aspects of the Department's overall approach to address the underlying dispute concerning reclamation at the Thomaston site and I write this concurring opinion to highlight my concerns.

Additional Findings of Fact

1. Reading Anthracite reaffected the Thomaston site by mining it under its 1994 Permit and its mining operations generated excess spoil materials that it is required to reclaim. N.T. 214, 222, 290.

2. The Department specifically asked Reading Anthracite for revised plans regarding reclamation at its Thomaston site to address the excess spoil material on the site. N.T. 108, 119, 134, 139, 143-44, 170, 299-01.

3. The currently approved 1994 reclamation plan for the Thomaston operation is flawed because there is excess spoil material that was not anticipated and that prevents Reading Anthracite from meeting the approved proposed backfilling line. N.T. 187, 194, 201, 215-16, 217-19, 291.

4. Reading Anthracite has not provided the Department with a calculation for the remaining reclamation at the Thomaston site which the Department requested and Reading

Anthracite has not provided the Department with a revised reclamation plan for the Thomaston site to address the excess spoil material which the Department had also requested. N.T. 127, 129-30, 131, 164, 170, 213-14, 223.

5. Permit Condition No. 6 announces the Department's intentions to not accept or approve any future permit modification to increase areas authorized by the 2008 Authorization or any future requests for a bond release for the site.

6. Permit Condition No. 6 does not direct Reading Anthracite to do anything or prevent Reading Anthracite from taking any action, but it merely signals that the Department intends to deny any future application for a permit modification to increase mining areas or for a bond release until the reclamation dispute regarding the excess spoil material is resolved.

7. The Department added Permit Condition No. 6 to the St. Kieran's permit modification to prompt Reading Anthracite to submit a "proper" reclamation plan for Thomaston reclamation. N.T. 139-40, 160.

Concurring Opinion

While it is clear that the Department has the authority to condition Reading Anthracite's mining permit to add meaningful conditions, Condition No. 6 is not an appropriate nor effective means to finally resolve the outstanding dispute between the parties concerning the reclamation of the Thomaston site. To examine the appropriateness and effectiveness of Condition No. 6, I will need to examine the background of the dispute concerning reclamation at the Thomaston site and the reasons why the Department selected Condition No. 6 as the means to resolve the outstanding dispute.

The dispute over Reading Anthracite's obligation to reclaim piles of spoil material at its Thomaston operation is at the heart of this appeal. The Department asserts that Reading

Anthracite is responsible to properly reclaim these spoil piles and Reading Anthracite claims no further responsibility to reclaim these spoil piles. Although the Department acknowledged that it has several regulatory tools to direct resolution of this dispute and has had more than ample opportunities to use these other regulatory tools, the Department decided to add Condition No. 6 to the St. Kierans Authorization issued on July 14, 2008 to prompt Reading Anthracite to finally address its disputed reclamation obligation. For the reasons set forth below, Condition No. 6 is neither a timely, nor an appropriate nor an effective means to produce resolution of the outstanding reclamation dispute.

According to the Department, the Department became aware of Reading Anthracite's outstanding reclamation obligation at its Thomaston site "over time".[2] Exactly when the Department became aware of the situation or when the Department informed Reading Anthracite that it had an outstanding reclamation obligation is a mystery that the Department neglects to address. In 2003-2004 timeframe, the Department issued a series of Inspection Reports to Reading Anthracite in which the Department documented its concern about reclamation of the spoil piles at the Thomaston site. DEP's Exhibit 1; Reading Anthracite Exhibit 11. From the 2003-2004 timeframe the Department is on record of asserting that Reading Anthracite is obligated to properly reclaim the excess spoil piles it created at its Thomaston site and had communicated this to Reading Anthracite.

From the record before the Board, it does not appear that the Department took any meaningful action to address or resolve the dispute over Reading Anthracite's reclamation obligation at Thomaston during the four to five year period between issuing the above referenced

[2] In it brief, the Department states that "over time it became clear that the amount of spoil on the site far exceeded RAC's original estimates . . ." and that "the Department brought this to RAC's attention and indicated that RAC needed to address the large excess spoil piles."

Inspection Reports and its July 14, 2008 action to approve the permit modification containing Condition No. 6 at issue in this appeal. The Department was aware it had the authority to order Reading Anthracite to reclaim the spoil piles, but it did not. Department's brief, p. 8, 23, 28. The Department was aware it had the authority to require Reading Anthracite to modify its approved reclamation plan including cross sections, but it did not. Department's brief, p. 5, 27. The Department was aware it had the authority to direct Reading Anthracite to eliminate a public or attractive nuisance that presented significant safety considerations, such as the spoil piles in question, but it did not. Department's brief, p. 16-17. Rather than use its regulatory authority to direct Reading Anthracite to address its outstanding reclamation obligation, the Department apparently tried to use it powers of persuasion.

The Department attempts to explain its years of no meaningful regulatory action to resolve the outstanding reclamation dispute by indicating the Department thought it was "prudent" to "work with" Reading Anthracite to resolve the longstanding dispute. Department's brief, p. 8, 28. The Department indicates that some time during this four to five year timeframe, it asked Reading Anthracite to revise its reclamation plan for the Thomaston site, to address the excess spoil and also requested that Reading Anthracite provide it with calculation to quantify the amount of excess spoil that was present at the Thomaston site. Department's brief, p. 9, 29. According to the Department, Reading Anthracite has not provided either of the requested items, but again the Department has decided not to elevate the status of its request to an order to direct Reading Anthracite to provide the requested plan revision or calculations of volumes of excess spoil.

Condition No. 6 is itself further evidence of the Department's longstanding and

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Department's brief, p. 2.

apparently overwhelming desire to "work with" Reading Anthracite to resolve the outstanding dispute concerning reclamation of excess spoil piles at the Thomaston site. Condition No. 6 is, however, not an appropriate or an effective regulatory tool to address this longstanding dispute. This conclusion became evident upon review of the exact nature of the Departments' action under appeal and the context in which the appeal arises.

Reading Anthracite wanted Department approval (a new authorization to mine) to begin mining a new phase of the Buck Run Permit, and it filed an application No. 54773006C13 to mine Phase 5, the St. Kierans site. At about the same time and pursuant to the Department's surface coal mining bonding regulations, 25 Pa. Code §§ 86.141-190, and related Technical Guidance, Reading Anthracite submitted its 2008 Annual Bond Review to the Department for approval.[3] In response to Reading Anthracite's 2008 Annual Bond Review and its application to bond and mine additional areas the Department decided that current bond amounts are "sufficient" and therefore the Department did not request additional bonds. The Department also issued Authorization to Mine No. 1673-5477306-35 for the Phase 5 St. Kierans site, which authorized an additional 168.07 acres for mining.

The Authorization to Mine No. 16733-5477306-35 for the St. Kierans site included Condition No. 6 that was the Department's attempt to resolve the longstanding reclamation dispute at the Thomaston site (Phase 3). Condition No. 6 is the only aspect of the new Authorization to Mine that Reading Anthracite has challenged. The Department added Condition No. 6 to prompt Reading Anthracite to submit a "proper" reclamation for the Thomaston site.

[3] The Technical Guidance document is entitled "Conventional Bonding for Land Reclamation-Coal" and the Annual Bond Review is the mechanism that a permittee uses to document reclamation progress and the reclamation liability is "equal to or below the cost for the Department to complete" the required reclamation. Page 13 of Technical Guidance document (web site). An Annual Bond Review is not the regulatory mechanism to request a bond release.

Department's supplemental brief, p. 4. The Department wants a "proper" reclamation plan because the currently approved plan is flawed because it does not reflect current site conditions and the excess spoil piles that Reading Anthracite created and that were not anticipated.

Reading Anthracite asserts that Condition No. 6 "freezes" its excess bonds on the Buck Run permit and blocks any future permit modification to increase the areas that Reading Anthracite can mine. A close examination of Condition No. 6 reveals that this condition neither freezes excess bond nor blocks future permit modifications.

Permit Condition No. 6 is a poorly worded statement of the Department's future intentions. Condition No. 6 does not direct Reading Anthracite to do anything, and it does not prevent Reading Anthracite from taking any action. It simply states that until an outstanding dispute concerning Reading Anthracite's reclamation obligation is resolved the Department will not accept or approve any application for future bond release or applications for future permit modifications. The condition describes what the Department plans to do in the future.

There are detailed and binding regulatory requirements governing the Department's receipt and review of applications for permit modifications and bond releases, including criteria to issue or deny such applications. Condition No. 6 announces the Department's intentions to not accept nor approve either of these types of application in the future until the outstanding reclamation dispute is resolved. Nothing in Condition No. 6 prevents Reading Anthracite from filing an application for a permit modification under 25 Pa. Code § 86.15-16 or a request for a bond release under 25 Pa. Code § 86.171.

If Reading Anthracite filed such applications, the Department would review such applications under the regulatory requirements governing permit modifications and bond releases, including the detailed criteria for approval or denial of permit modifications at 25 Pa.

Code § 86.37 and bond releases at 25 Pa. Code § 86.172. Condition No. 6 does not affect these regulatory requirements in any way, and the Department would still need to justify any future decisions to deny a request for a permit modification or bond release under these detailed regulatory requirements if there were appeals from these future Department actions. Condition No. 6 merely announces that the Department intends to deny any future requests for permit modifications or bond release until the dispute concerning reclamation at the Thomaston site is resolved.

I recognize that there is some irony in Condition No. 6 that announces the Department's intention not to issue any more future permit modifications. The July 14, 2008 permit modification allows what Condition No. 6 announces will not be allowed again in the future. If the Department really wanted to pursue timely resolution of the outstanding reclamation dispute, it could have denied the permit modification it issued on July 14, 2008.

Again, the Department attempts to explain the apparent inconsistency of its actions by asserting that the Department issued the July 14, 2008 bonding increment, including Permit Condition No. 6, "in an attempt to accommodate RAC's request" because Reading Anthracite had indicated to the Department that "it needed to have St. Kieran increment approved as soon as possible." Department's brief, p. 31; Department's Proposed Finding of Fact 31. According to the Department, Reading Anthracite's need for the new bonding increment "as soon as possible" and the Department's overwhelming desire to "accommodate" Reading Anthracite prompted the Department to issue the St. Kierans bonding increment without resolution of the outstanding reclamation dispute. The Department included Permit Condition No. 6 as a half-hearted attempt to prompt resolution of the outstanding reclamation dispute by signaling that future permit modifications and bond release requests would be denied pending resolution of the reclamation

dispute.

The failure of the Department to take direct or decisive action to resolve the outstanding reclamation dispute with Reading Anthracite has needlessly complicated an otherwise relatively straightforward dispute between the parties and it has forced the Board to consider the appeal under the currently approved reclamation plan and cross sections that the Department now asserts are fundamentally flawed because they do not reflect actual site conditions and the large amounts of excess spoil that currently exists on the Thomaston site. Without more meaningful Department action, the Board is required to evaluate the case by examining the meaning of the pink lined spoil storage areas on cross sections in a reclamation plan that were submitted over sixteen years ago and do not reflect current site conditions.

At the end of this appeal, the outstanding reclamation dispute still continues more than seven years after the Department first issued its Inspection Reports in which the Department documented Reading Anthracite's disputed reclamation obligation. The excess spoil piles still remain unreclaimed and the Department is no closer to ending this longstanding dispute than it was in 2008. The permit Condition No. 6 has not resolved the outstanding reclamation dispute. It merely documents the continued existence of the dispute and signals that the Department will take action in the future to deny application for permit modifications or bond release if the reclamation dispute is not resolved. Although I recognize that the Department's intentions to "work with" and "accommodate" a regulated entity will often result in improved environmental protections, there are times when the Department needs to abandon this approach and direct a regulated entity to take required steps to protect the public health and safety and the environment. If the Department truly believes that Reading Anthracite is legally responsible to properly reclaim the excess spoil piles it created on the Thomaston site that currently presents a

real risk to the public's health and safety and the environment, the Department, by its own admission, has express regulatory authority to order Reading Anthracite to properly address this outstanding reclamation obligation that has unfortunately lingered around for more than eight years since the Department first documented this outstanding obligation in its Inspection Reports in 2003.

RICHARD P. MATHER, SR.
Judge

DATED: January 11, 2011

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MARYANNE WESDOCK
ACTING SECRETARY TO THE BOARD

LINDA SCHLICK	:	
	:	
v.	:	**EHB Docket No. 2010-180-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and CHESAPEAKE APPALACHIA, LLC, Permittee	:	**Issued: January 14, 2011**

OPINION AND ORDER ON MOTION FOR LEAVE TO AMEND NOTICE OF APPEAL

By Michelle A. Coleman, Judge

Synopsis:

The Board denies in part a motion for leave to amend a notice of appeal. The motion seeks to include challenges to Departmental actions that currently are untimely to which the Board does not have jurisdiction. The Board grants the motion in as far as it related to the originally appealed permits.

OPINION

The Appellant, Linda Schlick ("Appellant" or "Schlick"), filed a notice of appeal on November 24, 2010 objecting to the Department's issuance of permits to Chesapeake Appalachia, LLC ("Chesapeake" or "Permittee") to develop gas wells near Appellant's property in Rush Township, Susquehanna County. At the time of filing her appeal she was proceeding as a *pro se* appellant. At the current time, counsel has entered an appearance on her behalf, and filed a Motion for Leave to File Amended Notice of Appeal on December 23, 2010.

Schlick's Notice of Appeal objected to the issuance of Permit Nos. 115-20454, 115-20455, 115-20456 and ESX10-115-0039 ("October Permits") which were granted by the Department to Chesapeake on October 20, 2010. The Appellant claims that she received notice of these permits on October 25, 2010 through research on the eFacts system. Motion for Leave, ¶ 4. The Appellant now seeks to amend her notice of appeal to include Permit Nos. 115-20413, 20414, 20415, 20416 and ESX10-115-0022 ("July Permits") issued in July, 2010.

As evidenced by the U.S. Postal Service Certified Mail Receipt on May 24, 2010 Schlick received copies of Chesapeake's applications for the July Permits (excluding Permit ESX10-115-0022). On May 25, 2010 Schlick signed the Permit Application's Record of Notification/Written Consent Form that indicates the landowner's approval of the well location and waived the 15-day objection period for the July Permits (Permit ESX10-115-0022). Chesapeake Exhibit A. The Permit applications were then submitted to the Department on June 8, 2010 and the Permits were issued on July 20, 2010. Permit No. ESX10-115-0022 was issued by the Department on July 7, 2010 and notice was published in the *Pennsylvania Bulletin* on July 24, 2010. *See* 40 Pa.B. 4163.

The Board's jurisdiction attaches to review final actions by the Department that are appealed within thirty days of the action being published in the *Pennsylvania Bulletin*, if the action is not published in the bulletin then an appeal must be filed within thirty days of actual notice. 25 Pa. Code § 1021.52(a)(2). An appeal or complaint may be amended as of right within 20 days after the filing. 25 Pa. Code § 1021.53(a). Our rules also allow for a motion for leave to amend beyond the 20 day period. Section 1021.53(b) provides:

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

25 Pa. Code § 1021.53(b).

We find that the Appellant's motion for leave to amend its notice of appeal to include the July Permits cannot be granted because an appeal of those Permits is untimely. Schlick was aware that the applications for the July Permits (excluding Permit ESX10-115-0022) were being submitted to the Department for approval. Even if we accept her claim that she was not aware of their issuance on July 20, 2010, she does state that she was aware of their issuance when she conducted a search on October 25, 2010, as stated in her amended notice of appeal. Motion for Leave, Exhibit A, 2, d. For whatever reason, she only filed an appeal of the October Permits.

The Appellant argues that the "types of issues that Ms. Schlick seeks to raise in her appeal, concerning the nature of the alleged defects in the permits – such as the inadequate distance between the well site and water resources – are the same with regard to the October 2010 permits as with the July 2010 permits." Appellant's Memorandum in Support, p. 2. Yet, she provides no authority to allow her notice of appeal to be amended to include objections to five separate Department actions. While we understand that the July permits and the October permits involve the same gas well development project, they are all separate permit actions and the Appellant had thirty days after notice to file an appeal of the permit action. (A Permit renewal was a separate departmental action from the Permit revision even though it involved the same coal company and the same coal mine. *See Hopwood v. DEP*, 2001 EHB 1254.)

Appellant claims she was aware of all the permits on October 25, 2010, thus under our rules she had thirty days from that date to file an appeal of each of those permits. We have held in the past that "an appeal may be amended to add additional grounds or objections challenging a Departmental action, but it may not be used as a device to file an untimely appeal from an entirely separate Departmental action." *Robachele, Inc. v. DEP*, 2006 EHB 373, 375, *citing*

Hopwood v. DEP, 2001 EHB 1254, 1258.

The July Permit ESX10-115-0022 was published in the *Pennsylvania Bulletin* on July 24, 2010, according to our rules Schlick had thirty days from the date of publication to file an appeal and failed to do so. Thus, we cannot expand our jurisdiction to include challenges to any of the July Permits which are untimely filed. Chesapeake raises no objections to any other issues raised in the amended notice of appeal. Essentially the amended notice of appeal does not add anything significantly different from the original notice of appeal with respect to the October Permits. The Department does raise the issue of Appellant's failure to attach affidavits to the motion for leave, but because the Department's objections to the motion stem solely from the untimely filing of the July Permits and we are disallowing a challenge to the July Permits, we will not address the affidavit issue raised by the Department. We, therefore, grant the motion to the extent it relates to the October Permits.

Accordingly, we enter the following Order.

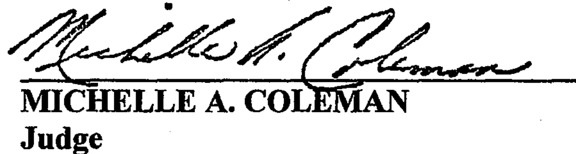
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

LINDA SCHLICK	:	
	:	
v.	:	**EHB Docket No. 2010-180-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and CHESAPEAKE APPALACHIA, LLC, Permittee	:	

ORDER

AND NOW, this 14th day of January, 2011, it is hereby ordered that Appellant's Motion for Leave is denied in part and granted in part. The Board will allow the amended notice of appeal to include any new challenges to the October Permits (Nos. 115-20454, 115-20455, 115-20456 and ESX10-115-0039), but denies any challenge to the July Permits (Nos. 115-20413, 20414, 20415, 20416 and ESX10-115-0022).

ENVIRONMENTAL HEARING BOARD



MICHELLE A. COLEMAN
Judge

DATED: January 14, 2011

c: **DEP Bureau of Litigation:**
Connie Luckadoo, Library

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MARYANNE WESDOCK
ACTING SECRETARY TO THE BOARD

LOUIS R. KRAFT, LOUIS KRAFT COMPANY, KRAFT CONCRETE PRODUCTS, INC., AND ESTATE OF LOUIS W. KRAFT	:	
v.	:	**EHB Docket No. 2010-042-M**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: January 28, 2011**

OPINION AND ORDER ON MOTION FOR SUMMARY JUDGMENT

By Richard P. Mather, Sr., Judge

Synopsis

The Board grants the Department's dispositive motion and dismisses this appeal from an order asserting violations of the Solid Waste Management Act, 35 P.S. § 6018.101 *et seq.* and the Waste Tire Recycling Act, 35 P.S. § 6029.101 *et seq.* for the unpermitted disposal of solid waste and waste tires on Appellants' property. The Board finds that the Appellants' response to the motion does not demonstrate that any material facts are in dispute. The Board further finds that the Department demonstrated its authority to issue the order and finds the terms of the order to be reasonable and appropriate under the circumstances thus entitling it to judgment as a matter of law. Appellants failed to raise any other legitimate defense to the order.

OPINION

The subject of this appeal is an administrative order from the Department of Environmental

Protection (the "Department") to Louis R. Kraft, Louis Kraft Company, Kraft Concrete Products, Inc., and Estate of Louis W. Kraft (collectively, "Appellants") issued pursuant to the Solid Waste Management Act ("SMWA"), 35 P.S. §§ 6018.101-6018.1003, the Waste Tire Recycling Act ("WTRA"), 35 P.S. §§ 6029.101-6029.115, and Section 1917-A of the Administrative Code of 1929, 71 P.S.§§ 510-17.

The facts, as set forth by the Department in its Motion for Partial Summary Judgment[1], are undisputed by the Appellants.[2] The Appellants are owners of a parcel of real estate located in Sugar Creek Borough, Venango County, Pennsylvania ("Kraft Property"). Louis R. Kraft ("Kraft") is the President of Kraft Company and Kraft Concrete. On September 2, 2009, the Department conducted an inspection of the Kraft Property in response to a complaint received by the Sugarcreek Borough Police. During the inspection, Mark J. Cresswell, a Solid Waste Specialist with the Department, observed: 1) a large pile of partially burned tree limbs, PVC pipe, one-gallon and five-gallon cans, a garden hose, a hydraulic hose and construction/demolition waste; 2) a separate pile of demolition waste; 3) a minimum of five additional burn piles, (collectively, "waste") and 4) approximately 300 truck and tractor tires. ("waste tires.") The Appellants concede that the Kraft Company generated

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[1] The Department's motion is labeled a Motion for *Partial* Summary Judgment. However, the motion argues that, based on undisputed facts, it is entitled to judgment as a matter of law and requests that the Board dismiss the appeal. We fail to discern how this constitutes a motion for *partial* summary judgment and will treat the motion, for practical purposes, as a motion for summary judgment.

[2] Although required to do so under our rules, the Appellants failed to file a response to the Department's statement of undisputed material facts either admitting or denying or disputing each of the facts in the Department's statements, including citations to the portion of the record controverting the material fact. 25 Pa. Code § 1094a(f)(2). Appellants also attached a memorandum in opposition to the Department's motion that likewise failed to directly controvert any of the Department's statement of undisputed material facts or cite to relevant portions of the record that would indicate a disputed fact. Appellant's failure to comply with the Board's rules means the Department's statement of undisputed facts is uncontested. This recitation of facts is largely taken from the Department's verified and uncontested statement of undisputed material facts accompanying its motion for summary judgment.

and transported the items to the Kraft Property and further concede that neither the Appellants, nor anyone else, have been issued a permit authorizing the operation of a solid waste disposal facility at the Kraft Property. On September 9, 2009, the Department issued a Notice of Violation to Kraft Concrete. On November 3, 2009, the Department conducted a follow-up inspection and observed that the waste and waste tires remained on the Kraft Property. Similarly, follow-up inspections on December 23, 2009 and February 5, 2010 revealed that the waste and waste tires remained on the property. On March 1, 2010, the Department issued an Administrative Order ("order") that required the Appellants to: 1) immediately cease transporting solid waste to the Kraft Property; 2) submit documentation showing when and where the solid waste previously removed from the Kraft Property was disposed; and 3) remove the waste and waste tires to a permitted disposal facility. As of the date of the Department's order, some of the waste and waste tires remained at the Kraft Property. At least some of the waste tires have been on the Kraft Property for at least two years.

The Appellants' response failed to conform to the Board's rules in several ways. First, Rule 1021.94a requires a response to be filed within 30 days of the date of service of the motion. 25 Pa. Code § 1021.94a(f). The Department's motion was electronically filed on October 29, 2010, and the certificate of service attached to the motion indicates that Appellants' counsel was served electronically on that same day. Thus, the Appellant had until Monday, November 29, 2010 to timely file its response. Although the Appellants' response is dated November 29, 2010, the operative filing date is the date the Board receives the response. 25 Pa. Code § 1021.32. Board did not receive the response until Wednesday, December 1, 2010, two days past the 30-day deadline. More importantly, the Board's rules require that the response contain, *inter alia*, a response to the movant's statement of undisputed facts that must include citations to the portion of the record

controverting a material fact. The citation must identify the document and specify the pages or specific portions of exhibits relied upon to demonstrate the existence of a genuine issue as to the fact disputed. 25 Pa. Code § 1094(f). As stated above, the Appellants' response contained no response to the Department's statement of undisputed facts and also failed to cite or refer to any specific document, exhibit, or other portion of the record to show the existence of a disputed material fact. Notwithstanding these obvious shortcomings, we will nevertheless consider the Appellants' response in deciding the Department's motion. *See PUSH v. DEP*, 1998 EHB 194 (denying motion to quash response to summary judgment where response was filed one day late, reasoning that where the underlying motion for summary judgment raises important issues that should be decided on their merits, such a penalty would be too severe.)

As a general rule, the Board may grant a motion for summary judgment where the pleadings, depositions, answers to interrogatories and admissions, together with any supporting affidavits, show that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as matter of law. 25 Pa. Code § 1021.94a(1); *Angela Cres Trust of June 25, 1998 v. DEP*, 2007 EHB 111, 114; *Snyder Bros., Inc. v. DEP*, 2006 EHB 978, 980. "The record is to be viewed in the light most favorable to the nonmoving party, and all doubts as to the presence of a genuine issue of material fact must be resolved against the moving party." *Albright v. Abington Mem'l Hosp.*, 696 A.2d 1159, 1165 (Pa. 1997). "[S]ummary judgment is granted only in the clearest of cases, where the right is clear and free from doubt...." *Lyman v. Boonin*, 635 A.2d 1029, 1032 (Pa. 1993). The granting of summary judgment is appropriate when a limited set of material facts are truly undisputed and the appeal presents a clear question of law. *Bertothy v. DEP*, 2007 EHB at 254, 255; *CAUSE v. DEP*, 2007 EHB 101, 106.

Where the Department issues an order which is appealed, it is the Department who bears the burden of proof. 25 Pa. Code § 1021(b)(4). In order to prevail, the Department must prove (1) the factual basis for the enforcement action, (2) that the enforcement action was authorized by law, and (3) that the order was reasonable. *Martz v. DEP*, 2006 EHB 988, 992.

The Department's factual recitation in its motion and supporting materials is supported by citations to the Appellants' notice of appeal and interrogatory responses wherein the Appellant concedes many of the material facts.[3] The uncontested facts establish that materials were brought onto the Kraft Property and some materials have remained there for two years. The facts further establish that no permit was issued for the disposal of waste on the Kraft Property. We find that these uncontested facts establish a factual basis for the Department's action. Thus, we next must determine whether the record demonstrates that the Department met its burden of proving that the order was both lawful and reasonable.

The Department argument that the order was lawful begins with the proposition that the Appellants were disposing of "waste" and "waste tires," as defined by the SWMA and the WTRA, on the Kraft Property. Thus, the Department continues, the Kraft Property constitutes a "solid waste disposal area" and "facility" under the Act thereby subjecting it to regulation and permitting under the SWMA and WTRA. Interestingly, the only allegation that the Appellants purport to challenge is that the materials that were observed on the Kraft Property constitute "waste" or "waste tires" under the SWMA or the WTRA. The Appellants argue in their response that they consistently challenged the designation of the items on the property as "waste" or "waste tires" in its discovery responses and that the Department has not asserted sufficient evidentiary support to show that these items are

[3] As noted above these material facts are not contested or disputed pursuant to the Board's rules.

"waste" and "waste tires" under the SWMA or WTRA. The Appellants also argue that the Department failed to make a showing that the tires on the property pose a specific health risk. Finally, we note that the Appellants' notice of appeal objects to the Department's order because, although conceding the existence of 300 tires on the Property, they deny that other wastes were present on the Property.

First, we note that the Department is not required to show that the tires pose a specific health risk or are otherwise a nuisance. *Starr v. DEP*, 2003 EHB 360, 369. Rather, the site is deemed a statutory nuisance if SWMA violations are found to have occurred. *Id.*; 35 P.S. § 6018.601 ("any violation of any provision of the [SWMA]...shall constitute a public nuisance.").

Second, we find that the undisputed facts, together with our review of relevant portions of the record, establish that both tires and other materials, including metals, wood, hoses, and burned wood were present on the Property. The Appellants concede that 300 tires were present on the Kraft Property in the notice of appeal. Later in the notice of appeal, the Appellants state "A garbage bag of waste...was removed on September 1, 2009.... This included some clean buckets, small pieces of plastic pipe, garden hose, and wood." This contradicts the Appellants' denial of the presence of such items on the Property and constitutes a clear admission that the items were present on the Kraft Property at some point in time. Moreover, the inspection reports and the photographs attached thereto clearly demonstrate the presence of such items at the site. The inspection reports and verified affidavit that are included with the Department's motion further show that the items were on the property at least as early as September 2, 2009. Likewise, the most recent inspection report dated July 13, 2010 indicates that "approximately 200 large truck equipment tires" remain on the Property.

Having disposed of the Appellants' contention that certain items were not present on the

Property, we must next determine whether these items constitute "waste" or "waste tires" under the SWMA or WTRA. Solid waste is defined in the SWMA act "any waste, including but not limited to, municipal, residual or hazardous wastes, including solid, liquid, semisolid or contained gaseous materials. The term does not include coal ash or drill cuttings." 35 P.S. § 6018.103; 25 Pa. Code § 271.1.[4] A waste tire is defined as "a tire that will no longer be used for the purpose for which it was originally intended. The term includes a tire that has been discarded." The Board previously held that waste tires situated at a site may constitute solid waste under the SWMA. *Starr v. DEP*, 2003 EHB 360, 368 (citing *Starr v. DEP*, 607 A.2d 321, 323-24 (Pa. Cmwlth. 2992)); *see also Commonwealth v. Packer*, 798 A.2d 192, 196-97)(Pa. 2002) (discarded whole used tires are waste within the meaning of the SWMA); *Booher v. DER*, 612 A.2d 1098, 1101-02 (Pa. Cmwlth. 1992) (same).

Importantly, we initially note that when a motion for summary judgment is made and properly supported, the opposing party may not rest upon the mere allegations or denials of its pleading. Rather, its response, by affidavit or as otherwise provided in Rule 1021.94a, must set forth specific facts rising from evidence in the record showing that there is a genuine issue for hearing. *Rozum v. DEP*, 2008 EHB 731, 734. Here, we find the Department's motion to be properly supported. The Appellants, therefore, in arguing that the items do not comprise "waste" or "waste tires" were required to point to any specific fact or piece of evidence that would suggest that the items observed by the Department on the Kraft Property are not "waste" or "waste tires" within the meaning of the SWMA or the WTRA. The Appellants did not provide any such supporting evidence. Again, appellants fail to provide what our rules require. Instead, the Appellants offered

[4] The Department also notes that the items on the Kraft Property may constitute "municipal waste" and/or

only a general reference to its interrogatory responses wherein they denied that the items are "waste" and "waste tires." In essence, Appellants merely relied on their own denials in discovery responses to meet their burden of setting forth specific facts from evidence that the tires, hoses, cans, demolition waste and other debris were not "waste" or "waste tires."[5]

Despite the serious shortcoming with Appellants', we will nevertheless examine the Appellants' contention that these items do not constitute "waste" or "waste tires." First, Appellants admit in their notice of appeal that the tires may be used "to economically construct 4 foot high retaining crib walls on the property" and thus have conceded that the tires will not be used for their intended purpose thereby satisfying the definition of "waste tire" under the WTRA. 35 P.S. § 6029.204. The fact that these tires might have some value to the Appellants does not mean they are not "waste." *Starr v. DER*, 1991 EHB 494, 499; *aff'd* 607 A.2d 321 (Pa. Cmwlth. 1992). Moreover, the photographs attached to the Department's inspection reports depict piles of tires and other refuse including pipes, drums, wood, and other unrecognizable metals and the verified affidavit of Mark Cresswell documents the presence of such items on the Kraft Property. The photographs show these materials to be strewn on the ground, some of it partially buried or burned. The uncontested record before the board established that these materials satisfy the definitions of "waste" and "waste tires" and nothing on the record suggests otherwise.

The Appellants' response also fails to challenge any other facts or allegations raised in the Department's motion. Nevertheless, we will examine the Department's remaining arguments to

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"residual waste," as defined by the SWMA.

[5] Appellants also attached to their response several documents that appear to be invoices indicating some of the waste was removed. These documents are not properly marked or specifically referenced in the response. Indeed, many of the documents are not legible.

determine whether the undisputed facts and the established record entitle the Department to judgment as a matter of law.

The Department argues that the Appellants "disposed" of the tires and waste. The SWMA recognizes four activities relating to non-hazardous waste: storage, treatment, processing and disposal. The SWMA defines "disposal" as:

> The incineration, deposition, injection, dumping, spilling, leaking, or placing of solid waste into or on the land or water in a manner that the solid waste or a constituent of the solid waste enters the environment, is emitted into the air or is discharged to the waters of the Commonwealth.

35 P.S. §6018.103. Moreover, the definition of "storage" sets forth the following presumption: "It shall be presumed that the containment of any waste in excess of one year constitutes disposal. This presumption may be overcome by clear and convincing evidence to the contrary." 35 P.S. §6018.103. The Department alleges that the transporting and dumping of the materials on the Kraft Property, and the presence of the materials on the property for more than two years, constitutes "disposal" under the act. To support its claims, the Department cites to the Appellants' notice of appeal and interrogatories, attached to the motion, where the Appellants admit to bringing the items to the Kraft Property and further admit that at least some of the items remained on the property for more than two years. The Appellants admission that waste tires have been on the Property for more than two years places the presumption in effect. The Appellants again fail to point to any evidence, let alone any clear and convincing evidence, that would convince us that the Appellants' activities do not constitute "disposal" under the SWMA. Likewise, our independent review of the record reveals nothing that would cause us to question that the dumping of the "waste" and "waste tires" constitutes "disposal" within the meaning of the SMWA.

Finally, the Department argues that the Kraft Property constitutes a "facility"[6] and a "solid waste disposal area" under the SWMA.[7] Here again, Appellants do not dispute this designation and fail to point us to any portion of the record that would suggest that Kraft Property might not be so designated under the SWMA. Based on the established facts and our independent review of the record, we find nothing that would cause us to question the designation of the property as a "facility" or "solid waste disposal area" under the SWMA.

We will also examine whether the Department satisfied its burden of showing that the directives of its order were reasonable. Here again, the Appellants failed to challenge the reasonableness of the order or point to any evidence suggesting the order was unreasonable. Nevertheless, we will examine reasonableness of the order by examining the "nexus between the measures prescribed in the order and the asserted violation" to determine if the "measures are an effective means of resolving the violations." *Starr v. DEP*, 2003 EHB 360, 379 (Judge Coleman, *Concurring*). The uncontested facts and record establish that the Appellants were disposing of solid waste on their property without a permit. The Department has the discretion to issue orders "as it

---

[6] "Facility" is defined as "All land, structures and other appurtenances or improvements where municipal or residual waste disposal or processing is permitted or takes place, or where hazardous waste is treated, stored or disposed." 35 P.S. § 6018.103.

[7] Section 501 of the Act, which requires permits and licenses, states

> It shall be unlawful for any person or municipality to use, or continue to use, their land or the land of any other person or municipality as a solid waste processing, storage, treatment or disposal area without first obtaining a permit from the department as required by this act: Provided, however, That this section shall not apply to the short-term storage of byproducts which are utilized in the processing or manufacturing of other products, to the extent that such byproducts are not hazardous, and do not create a public nuisance or adversely affect the air, water and other natural resources of the Commonwealth: And provided further, however, That the provisions of this section shall not apply to agricultural waste produced in the course of normal farming operations nor the use of food processing wastes in the course of normal farming operations provided that such wastes are not classified by the board as hazardous. 35 P.S. §6018.103.

deems necessary to aid in the enforcement of the provisions" of the SWMA. 35 P.S. § 6018.602(a). The order required the Appellants to immediately cease transporting solid waste to the Kraft Property, to submit documentation regarding when and where waste was previously disposed, and to dispose the waste and waste tires at a permitted facility. We are satisfied that the remedial measures imposed by the order are reasonable and an appropriate exercise of the Department's discretion to resolve the Appellants' violations in a timely manner.

In short, the record before the Board establishes that there are no genuine issues of fact regarding whether the Department has proven the facts underlying its order, that the order was authorized by applicable law, and that the order is reasonable and appropriate under the circumstances. Accordingly, we issue the following Order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

LOUIS R. KRAFT, LOUIS KRAFT COMPANY, KRAFT CONCRETE PRODUCTS, INC., AND ESTATE OF LOUIS W. KRAFT	:	
v.	:	**EHB Docket No. 2010-042-M**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 28th day of January, 2011, the Department of Environmental Protection's Motion for Summary Judgment is **granted**. The appeal is dismissed, and the docket will be marked closed and discontinued.

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Chairman and Chief Judge

MICHELLE A. COLEMAN
Judge

BERNARD A. LABUSKES, JR.
Judge

Richard P. Mather Sr.

RICHARD P. MATHER, SR.
Judge

DATED: January 28, 2011

c: **Department Litigation:**
Attention: Connie Luckadoo

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MARYANNE WESDOCK
ACTING SECRETARY TO THE BOAR

PINE CREEK VALLEY WATERSHED ASSOCIATION, INC.	:	
v.	:	**EHB Docket No. 2005-249-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, ROCKLAND TOWNSHIP, Permittee and LEON E. SNYDER, Intervenor	:	**Issued: January 31, 2011**

OPINION AND ORDER ON ATTORNEY'S FEE INTEREST

By Bernard A. Labuskes, Jr., Judge

Synopsis:

The Board denies a request under Section 8101 of the Judicial Code, 42 Pa.C.S § 8101, for interest on an award of attorney's fees because that section does not apply to proceedings before the Environmental Hearing Board.

OPINION

On December 8, 2008, we awarded Pine Creek Valley Watershed Association, Inc. ("Pine Creek") $102,698.44 in costs and attorney's fees pursuant to Section 307(b) of the Clean Streams Law, 35 P.S. § 691.307(b), in two related appeals. (*Pine Creek Valley Watershed Assoc. Inc. v. DEP*, EHB Docket No. 2005-249-MG; *Lipton v. DEP*, EHB Docket No.2007-026-MG.) The Department of Environmental Protection (the "Department") appealed the award of fees and costs to the Commonwealth Court. The Commonwealth Court affirmed. The Department's

petition for allowance of appeal to the Supreme Court was denied. On November 9, 2010 the Department paid Pine Creek the costs and attorney's fees award ordered by the Board on December 8, 2008.

We must now address Pine Creek's second supplemental application for attorney's fees and costs for the appellate litigation, as well as for interest on the December 8, 2008 award. The Department agreed to pay appellate fees and costs (*see* Board's Order issued October 14, 2010), but refused to pay interest on the original amount awarded. The second application seeks a total of $13,173.80 from the Department: $10,668.80 in interest on the amount awarded to Pine Creek by the Board's original award and $2,505.00 in attorney's fees for preparation of the second application and memorandum in support. Pine Creek makes it very clear in its application that it is not seeking interest pursuant to the Clean Streams Law. Rather, it is only seeking interest pursuant to Section 8101 of the Judicial Code, 42 Pa.C.S § 8101. The Department opposes Pine Creek's application for interest. Thus, the only issue remaining is whether Pine Creek is entitled under the Judicial Code to interest on the award of attorney's fees.

Section 8101 of the Judicial Code provides that "a judgment for a specific sum of money shall bear interest at the lawful rate from the date of the verdict or award, or from the date of the judgment, if the judgment is not entered upon a verdict or award." 42 Pa.C.S. § 8101. The Commonwealth Court has held that the Judicial Code only applies to components of the unified judicial system, unless the term "tribunal" is used in the language of a specific section. *Board of Probation and Parole v. Baker*, 474 A.2d 415, 416 (Pa. Cmwlth. 1984). *See also Krushinski v. DEP*, 2008 EHB 579, 587, *aff'd*, 2207 CD 2008 (Pa. Cmwlth. filed October 31, 2008); *STOP, Inc. v. DEP*, 1992 EHB 207, 210-11. This Board is not a component of the unified judicial system, *see* 42 Pa.C.S. §§ 102 and 301, and "tribunal" is not specifically mentioned in Section

8101. Therefore, Section 8101 does not provide a basis for awarding interest on our fee award. Furthermore, Section 8101 refers to "judgments" but this Board enters adjudications and orders, not judgments. In addition, even if we were a component of the unified judicial system, there is no Pennsylvania authority for the proposition that Section 8101 applies to an award of attorney's fees. Such awards are generally thought of as ancillary to "judgments," the term used in Section 8101.

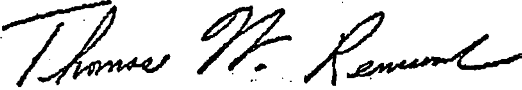
Since Section 8101 is the only section relied upon by Pine Creek, its second supplemental application must be denied as it relates to interest. Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PINE CREEK VALLEY WATERSHED ASSOCIATION, INC.	:	
	:	
v.	:	**EHB Docket No. 2005-249-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, ROCKLAND TOWNSHIP, Permittee and LEON E. SNYDER, Intervenor	:	

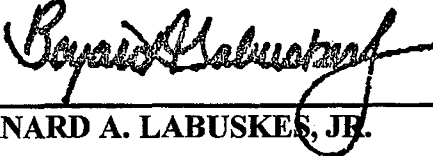
ORDER

AND NOW, this 31st day of January, 2011, it is hereby ordered that the Appellant's request for interest in its Second Supplemental Application for Attorney Fees and Costs for Appellate Court Fees and Interest is **denied.**



THOMAS W. RENWAND
Chairman and Chief Judge

MICHELLE A. COLEMAN
Judge



BERNARD A. LABUSKES, JR.
Judge

Judge Richard P. Mather, Sr. is recused from this matter.

DATED: **January 31, 2011**

c: **DEP Bureau of Litigation:**
Connie Luckadoo, Library

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MARYANNE WESDOCK
ACTING SECRETARY TO THE BOARD

ROBERT A. GADINSKI, P.G., Appellant And MR. AND MRS. FRANK BURKE, Intervenors	:	
v.	:	**EHB Docket No. 2009-174-M**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and GILBERTON COAL COMPANY, Permittee	:	**Issued: February 1, 2011**

OPINION AND ORDER
ON PERMITTEE'S MOTION IN LIMINE

By Richard P. Mather, Sr., Judge

Synopsis

The Board denies a permittee's motion in limine which seeks to exclude from evidence two Department guidance documents and a regulation not in effect when the Department issued a permit to permittee. The Board finds that it is not precluded from considering these materials.

OPINION

Robert A. Gadinski, P.G. ("Gadinski") filed this appeal to object to the Pennsylvania Department of Environmental Protection's (the "Department") issuance of a surface mining permit revision to the Gilberton Coal Company ("Gilberton") allowing the Beneficial Use of Coal Ash at a pit referred to as the Locust Summit Project located on the Northern side of Ashland/Manahoy Mountain, in Northumberland County, PA. The permit in question revised surface mining permit no. 49773204C8 was issued after and contingent upon the Department's

investigation of the site and the Department's requirement that Gilberton follow specific water quality monitoring instructions. Gadinski objects to the issuance of the permit and asserts that these investigations and requirements are insufficient to insure the safety and maintenance of neighboring water sources. He proposes to support this assertion, at least in part, by citing two of the Department's guidance documents and expert opinion regarding recent proposed policy statements from the Environmental Protection Agency. "Certification Guidelines for the Chemical and Physical Properties of Coal Ash Beneficially Used at Mines" Guidance Document No. 563-2112-224 dated April 6, 2009, Permittee's motion in limine Exhibit B ("Guidance Document 224"); "Mine Site Approval for the Beneficial Use of Coal Ash" Guidance Document No. 563-2112-225 dated April 6, 2009, Permittee's motion in limine Exhibit C ("Guidance Document 225"); Expert Report of Dr. Bryce F. Payne Jr., Permittee's motion in limine Exhibit F.

Gilberton filed a motion in limine before this Board seeking to preclude the introduction of these materials into evidence on the basis that the Board must only consider the law in effect as of the date that the permit was issued when considering the Department's decision. In support of this motion, Gilberton cites the Statutory Construction Act's prohibition on the interpretation of statutes to have a retroactive effect unless such an effect is "clearly and manifestly so intended by the General Assembly". 1 Pa. C.S.A. § 1926. Additionally, he argues that the Commonwealth Court has held that the "presumption against retroactive application" applies to regulations as well, and rightly points out that case law before the Board has followed such a precedent on numerous occasions. *Klesh v. Commonwealth of Pennsylvania, Department of Public Welfare*, 423 A.2d 1348, 1350 (Pa. Cmwlth. 1980); *See e.g. Eastern Consolidation and Distribution Services, Inc. v. DEP*, 1999 EHB 312.

This matter differs substantially from the precedents cited by Gilberton because the materials identified in the motion in limine are not Commonwealth regulations. Commonwealth regulations are promulgated according to the notice and comment procedures described in the Commonwealth Documents Law. *See* 45 P.S. §§ 1102-1602, *see also Dauphin Meadows, Inc. v. DEP*, 2000 EHB 521, 523. The two guidance documents make no such claim, stating instead that each document ". . . establishes the framework within which DEP will exercise its administrative discretion in the future . . . the policies and procedures herein are not . . . a regulation". Guidance Document 224 at i; Guidance Document 225 at i. Neither guidance document is a Commonwealth regulation. Similarly, the proposed EPA policy changes and regulations are only proposed and not yet in effect. Even if EPA's proposed regulations were final, they would still not be directly applicable in Pennsylvania as a matter of Pennsylvania State law. Neither, therefore, could be applied conclusively as the relevant law in this case. Thus, there is no issue of retroactive application of relevant law.

At this phase in litigation, it is not yet apparent whether these materials cited by Gadinski will be relevant at trial and may have a tendency to make any fact that could determine the outcome of this appeal more or less probable. *See* Pa.R.Ev. 401. "Whether evidence has a tendency to make a given fact more of less probable is determined by this Board in the light of reason, experience, scientific principles, and other testimony offered in the appeal." *The Rail Road Action and Advisory Committee v. DEP*, 2009 EHB 472, 474 (*citing* Pa.R.Ev. 401, *Official Comment*). Consequently, the extent of relevant evidence can be quite broad, especially when considering the breadth of our review. The Board conducts a *de novo* review to determine whether the Department's action is supported by the evidence. *Pennsylvania Trout v. DEP*, 863 A.2d 93 (Pa. Cmwlth. 2004). Our review is not limited to the facts available or considered by

the Department at the time that the decision was made, and the Board may substitute its own discretion for that of the Department. 2009 EHB at 476-477, *Pequea Twp. v. Herr*, 716 A.2d 678 (Pa. Cmwlth. 1998). Nor is our review to decide whether the Department's decision was correct at the time it was made, "[r]ather, the pertinent question is whether we should approve the nonfinal action *now* and convert it into a final action *now*. Therefore, any evidence generated up until now is potentially relevant." 2009 EHB at 476. Because the Board may consider facts that the Department did not consider when it made its permit decision, it is premature to exclude all references to the challenged documents.

Gadinski's response in opposition to the motion in limine identifies the challenged materials as pertinent to demonstrate whether the Department's decision to issue the permit is arbitrary and an abuse of discretion. Without a better basis or context to determine whether these materials will have a probative value, it is premature to preclude their admission entirely prior to the scheduled evidentiary hearing. The Board will, nevertheless, allow Gilberton to raise appropriate objections to specific questions about the materials it sought to exclude entirely in the context of specific objections at the scheduled hearing.

Accordingly, we order as follows.

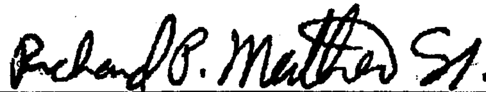
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ROBERT A. GADINSKI, P.G., Appellant And MR. AND MRS. FRANK BURKE, Intervenors	:	
v.	:	**EHB Docket No. 2009-174-M**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and GILBERTON COAL COMPANY, Permittee	:	

ORDER

AND NOW, this 1st day of February, 2011, upon consideration of the Permittee's motion in limine and the Appellant's response thereto, it is hereby ordered that the Permittee's motion in limine is **denied.**

ENVIRONMENTAL HEARING BOARD



RICHARD P. MATHER, SR.
Judge

DATED: February 1, 2011

c: **DEP Bureau of Litigation:**
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FRANK T. PERANO	:	
	:	
v.	:	**EHB Docket No. 2009-067-L**
	:	**(Consolidated with 2010-033-L**
COMMONWEALTH OF PENNSYLVANIA,	:	**and 2010-104-L)**
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION and TILDEN TOWNSHIP,	:	**Issued: February 1, 2011**
Permittee	:	

OPINION AND ORDER ON MOTION FOR RECONSIDERATION

By Bernard A. Labuskes, Jr., Judge

Synopsis

In denying a motion for reconsideration from an order directing an appellant to take all reasonable steps necessary to retrieve and produce improperly deleted electronically stored information at his own expense, the Board holds that the appellant's obligation to respond to discovery requests is not limited by the fact that the Department is not able to identify particular missing emails. If the Department were able to identify every missing email without discovery it would not need discovery to obtain this information.

DISCUSSION

Frank T. Perano ("Perano") has asked us to reconsider and withdraw our Opinion and Order of January 11, 2011, which granted in part the Department of Environmental Protection's (the "Department's") motion for sanctions. We found in that Opinion and Order that Perano had violated his duty to preserve electronically stored information (ESI) after litigation with the Department was reasonably anticipated. We found – and there was no dispute – that at least

some of the ESI subject to Perano's spoliation was relevant or calculated to lead to the discovery of admissible evidence. We, therefore, directed Perano to take all measures reasonably necessary to retrieve and produce all nonprivileged ESI that is responsive to the Department's discovery requests. We left it to Perano to identify in the first instance what ESI is responsive to the Department's discovery requests. We deferred a ruling on the Department's request for sanctions going to the merits (such as an adverse inference) pending our review at a later date of Perano's efforts to comply with our Order.

Petitions for reconsideration of interlocutory orders are unnecessary and disfavored in most cases. "Reconsideration is an extraordinary remedy and is inappropriate for the vast majority of the rulings of the Board." 25 Pa. Code § 1021.151 (Comment); *DEP v. Pecora*, 2007 EHB 156, 159. Parties requesting reconsideration of an interlocutory order must satisfy the criteria for reconsideration of a final order *and* demonstrate that "extraordinary circumstances" justify reconsideration of the matter. 25 Pa. Code § 1021.151(a); *DEP v. Angino*, 2005 EHB 905, 907; *Earthmovers Unlimited, Inc. v. DEP*, 2003 EHB 577, 578-79. Petitions for reconsideration of final orders will only be granted for "compelling and persuasive reasons," which include the following:

> (1) The final order rests on a legal ground or a factual finding which has not been proposed by any party.
> (2) The crucial facts set forth in the petition:
> (a) Are inconsistent with the findings of the Board.
> (b) Are such as would justify a reversal of the Board's decision.
> (c) Could not have been presented earlier to the Board with the exercise of due diligence.

25 Pa. Code § 1021.152(a).

Perano argues that reconsideration of our Order is warranted because we made a factual finding which was not proposed by any party. The factual finding that we are said to have made

is that there is in fact ESI that is responsive to the Department's discovery requests that Perano did not produce. Interestingly and perhaps tellingly, Perano does not actually claim in his motion that no such ESI exists. Indeed, Perano made no such claim at the hearing on the Department's motion. Instead, Perano makes the rather curious argument that the Department must prove that additional ESI exists that is responsive to the Department's discovery request before he has an obligation to produce it, and the Department has made no such showing.

In support of his argument, Perano notes that Wanda Bartholomew, one of his employees involved in the operation of the plant whose emails were destroyed, testified during her deposition that she noted in her logbook every time she sent an email to her supervisor, Ms. Heller. Perano says that he has already turned over three of the four emails referenced in Bartholomew's logbook. Putting aside the fact that one of the emails has still not been produced, once again we see that Perano avoids asserting that there are in fact no additional emails. Rather, Perano argues that the Department has not *proven* that any such emails from Bartholomew exist beyond the three that have been produced. Therefore, Perano seems to contend that he is excused from turning over anything else in discovery.

It is important to point out as an initial matter that our Opinion and Order is not limited to Bartholomew's emails to Heller. Bartholomew's logbook entries referencing emails were simply the outward sign that eventually led the Department to discover that emails had been systematically destroyed on a company-wide basis. Perano had not previously or otherwise revealed the emails or their destruction. Perano made no effort to retrieve the deleted ESI until the Department filed its motion for sanctions and his effort at that point was limited to a protracted and unfinished review of emails from James Perano's computer. No effort had been made to retrieve ESI from other computers used to conduct company business, such as

Bartholomew's or Heller's. Thus, there is no way to know at this point the extent of the spoliation without the further investigation called for in our Opinion.

Bartholomew's isolated deposition testimony was not repeated at the hearing on the Department's motion, and we do not otherwise find it to be particularly credible. In any event, it hardly compels a conclusion that no further investigation is justified or that the Department can rest assured knowing that there were only three emails that were relevant or reasonably calculated to lead to the discovery of admissible evidence on any computer used to conduct company business. To the contrary, we noted in our Opinion that it is difficult to imagine that a modern company that relies heavily on email (James Perano's computer apparently stored 57,000 emails) generated only four emails regarding the operation of the Pleasant Hills treatment plant. We stand by that statement and rely upon it as part of our basis for holding that Perano's efforts to date to comply with his discovery obligations are demonstrably incomplete.

In any event, Perano is simply incorrect in asserting that we made a factual finding that there is in fact ESI that is responsive to the Department's discovery requests that he has not produced. Although it is difficult to believe there is no additional ESI beyond that already identified and partially produced, we made no attempt in our Opinion to define the extent of Perano's spoliation. Rather, we directed Perano to conduct an investigation to determine the extent to which such additional ESI, if it exists, can be retrieved. We do not view our Opinion as expanding discovery obligations that Perano already had. Our Opinion stands for the proposition that Perano may not avoid his discovery obligations simply by claiming that ESI has been erased. Perano must take all measures reasonably necessary to retrieve pertinent ESI, but his obligation only extends to "nonprivileged information that is responsive to the Department's requests." (Opinion at 10.) If taking all measures reasonably necessary reveals that there is in fact no

additional responsive ESI, Perano can simply certify as much in his discovery responses. On the other hand, if additional pertinent ESI existed but has been irretrievably lost, consequences as described in the Opinion may follow.

We did not hold in our Opinion that consequences *will* follow. It is important to understand that there is a distinction between a spoliation analysis in the context of discovery and a spoliation analysis in the context of a ruling on the merits. Perano's argument that the Department must prove that there is missing evidence before he has any obligation to do anything in response to discovery requests would have made more sense in the context of a spoliation analysis relating to a merits sanction (e.g. summary judgment or an adverse inference). We suspect that Perano is correct that a spoliation sanction related to the determination of the merits would only be appropriate if relevant evidence has in fact been destroyed, but as we discussed in our Opinion, a decision regarding a sanction going to the merits is premature in this case. *This case involves spoliation in the context of discovery.* In this context, it is not the Department's responsibility to prove that additional ESI exists before Perano has an obligation to respond to the Department's discovery requests. A party does not need to have ESP to obtain another party's ESI through discovery. If the Department knew exactly what ESI had been generated and subsequently destroyed, it would not need discovery to discover it.

Just as the Department cannot know at this point what emails need to be produced, it is not possible for this Board at this point to define what emails are "responsive to the Department's discovery requests." Perano conceded at the hearing on the Department's motion that there are deleted emails responsive to the Department's requests. He has already turned over some of them. It is his responsibility to determine in the first instance whether there are any others.

As we said in our Opinion, the Board's overriding objective is to decide appeals on their merits. Depending upon Perano's compliance with his discovery obligations, it may eventually be shown that no relevant evidence has been irretrievably lost, and/or that the Department has suffered no prejudice, and/or that an adverse inference or other sanction is inappropriate for other reasons. The main point for now is that the final answer to these questions must await Perano's further reasonable investigation to retrieve and produce all nonprivileged ESI that is responsive to the Department's discovery requests. In the meantime, we see no reason to reconsider our Order that Perano must do what he can to rectify his improper spoliation.

Accordingly, we issue the Order that follows.

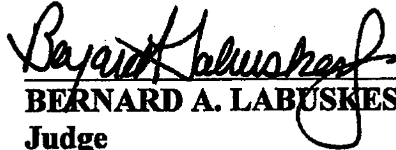
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

FRANK T. PERANO	:	
	:	
v.	:	**EHB Docket No. 2009-067-L**
	:	**(Consolidated with 2010-033-L)**
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION and TILDEN TOWNSHIP,	:	
Permittee	:	

ORDER

AND NOW, this 1st day of February, 2011, it is hereby ordered that Perano's motion for reconsideration is **denied**.

ENVIRONMENTAL HEARING BOARD



BERNARD A. LABUSKES, JR.
Judge

DATED: February 1, 2011

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MARYANNE WESDOCK
ACTING SECRETARY TO THE BOAR

PA WASTE, LLC	:	
	:	
v.	:	**EHB Docket No. 2008-249-L**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION and CLEARFIELD COUNTY,	:	**Issued: February 2, 2011**
Intervenor	:	

OPINION AND ORDER
ON APPLICATION FOR ATTORNEY'S FEES AND COSTS

By Bernard A. Labuskes, Judge

Synopsis

An appellant's application for attorney's fees and costs under the Costs Act is denied because the Costs Act expired in 2007.

DISCUSSION

PA Waste, LLC ("PA Waste") filed this appeal from the Department of Environmental Protection's (the "Department's") denial of its application for a permit for a proposed landfill in Boggs Township, Clearfield County. We found that the Department improperly required PA Waste to meet a "suitability test" and remanded the permit application back to the Department for further consideration. *PA Waste v. DEP*, EHB Docket No. 2008-249-L (Adjudication issued Nov. 19, 2010). PA Waste has now applied for attorney's fees and costs pursuant to 71 P.S. § 2031, *et seq*., which was entitled "Award of Fees and Expenses for Administrative Agency Actions" and was commonly referred to as the Costs Act. The Department has filed a motion to

dismiss the application because it is made pursuant to an expired statute.[1] PA Waste has not responded to the Department's motion.

PA Waste's application must be denied. The application is based entirely on the Costs Act and that statute expired on July 1, 2007, *see* 1997 P.L. 378 § 1, which was before the Department denied PA Waste's application, before this appeal was filed, and three years before we issued our Adjudication. PA Waste did not cite any other statutory basis for its application and it has not opposed the Department's motion to dismiss. Although the Board's rules regarding fee applications under the Costs Act are still in place, the Environmental Hearing Board Rules Committee is in the process of deleting the rules as obsolete,[2] and the rules do not provide a basis for fees independent of the Costs Act itself.

Accordingly, we enter the Order that follows.

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[1] Our rules do not provide for a motion to dismiss a fee application. Therefore, we will treat the Department's motion as its response to the application under 25 Pa. Code § 1021.173.

[2] *See Environmental Hearing Board Rules Committee Minutes*, Jul. 8, 2010, *available at* http://ehb.courtapps.com/content/Minutes080710.pdf.

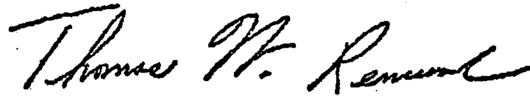
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PA WASTE, LLC	:	
	:	
v.	:	**EHB Docket No. 2008-249-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and CLEARFIELD COUNTY, Intervenor	:	

ORDER

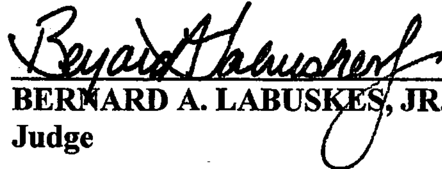
AND NOW, this 2nd day of February, 2011, the Appellant's application for attorney's fees is **denied.**

ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Chairman and Chief Judge

MICHELLE A. COLEMAN
Judge



BERNARD A. LABUSKES, JR.
Judge

Judge Richard P. Mather, Sr., recused himself and did not participate in this matter.

DATED: February 2, 2011

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MARYANNE WESDOCK
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DONALD BEYERL	:	
	:	
v.	:	**EHB Docket No. 2010-053-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: February 9, 2011**

OPINION AND ORDER
ON MOTION TO DISMISS

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board dismisses an appeal of an assessment of civil penalties where an appellant failed to prepay the civil penalty, post a bond, or demonstrate his inability to prepay the penalty.

OPINION

Donald Beyerl ("Beyerl") filed this appeal from an assessment of civil penalties in the amount of $9,375 issued by the Department of Environmental Protection (the "Department") to Route 8 Properties, LLC ("Route 8") for violations of the Storage Tank and Spill Prevention Act ("Storage Tank Act"), 35 P.S. §§ 6021.101-6021.2104. In his *pro se* notice of appeal Beyerl stated "[w]e are filing this appeal without an attorney so we cannot explain the reasons at this time will do so when it comes to court." We issued an Order directing Beyerl to perfect his appeal by, among other things, listing specific objections to the Department's action. When he failed to respond, we issued a rule to show cause why the appeal should not be dismissed for

failure to abide by the Board's Order and failure to perfect the appeal. Beyerl belatedly responded with a letter containing a brief listing of objections to the Department's action under appeal. We then issued an Order deeming the appeal to be perfected without prejudice to the right of any party to challenge the finding of perfection by filing an appropriate motion.

The Department did not challenge the finding of perfection or take any action in the case that we are aware of until December 2010 when we scheduled the matter for a hearing. At that point, the Department filed a motion to, among other things, dismiss the appeal for failure to prepay the civil penalty assessment as required by the Storage Tank Act. We issued an Order on January 4 directing Beyerl to respond to the Department's motion or take other action by February 7, 2011. Beyerl has not responded to the Department's motion.[1]

Section 1307(b) of the Storage Tank Act, 35 P.S. 6021.1307(b), requires a party appealing an assessment of civil penalties to prepay that penalty within thirty days or post an appeal bond.[2] An appellant who claims to be financially unable to prepay a penalty may submit a verified statement of his inability to pay with his notice of appeal, which if contested by the Department will prompt a hearing to determine whether the party is, in fact, unable to comply with the prepayment obligation. 25 Pa. Code §§ 1021.54a and 1021.55. *See generally Pilawa v. DER*, 698 A.2d 141, 143 (Pa. Cmwlth. 1997); *Paul Lynch Investments v. DEP*, EHB Docket No. 2010-151-M (Opinion issued January 7, 2011); *Hrivnak Motor Company v. DEP*, 1999 EHB

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[1] We also note that Beyerl has not filed his pre-hearing memorandum, which was due on February 4, 2011 in preparation for the hearing scheduled to begin on February 24.

[2] Section 1307(b) of the Storage Tank Act reads in relevant part:

> The person charged with the penalty shall then have 30 days to pay the proposed penalty in full or, if the person wishes to contest the amount of the penalty or the fact of the violation, forward the proposed amount of the penalty to the Department within the 30 day period for placement in an escrow account. . .or post an appeal bond to the department within 30 days in the amount of the proposed penalty. . . . Failure to forward the money or the appeal bond shall result in a waiver of all legal rights to contest the violation or the amount of the penalty.

35 P.S. § 6021.1307(b).

437, 438-43. Where, as here, a party fails to prepay the penalty, post a bond, demonstrate an inability to pay, or otherwise respond in any way to the Department's motion to dismiss for failure to prepay, he must be deemed to have waived his appeal rights and the appeal must be dismissed. *Sorrentino v. DEP*, 2008 EHB 8, 9; *She-Nat v. DEP*, 1996 EHB 544, 545.

Accordingly, we issue the Order that follows.

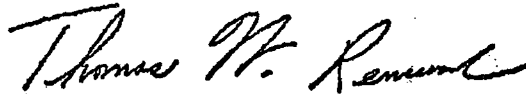
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DONALD BEYERL	:	
	:	
v.	:	**EHB Docket No. 2010-053-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 9th day of February, 2011, it is hereby ordered that the Department's motion to dismiss is granted and this appeal is dismissed. The pre-hearing conference scheduled for February 13, 2011 and the hearing scheduled to begin on February 24, 2011 are cancelled. The Department's motion to continue the hearing is denied as moot.

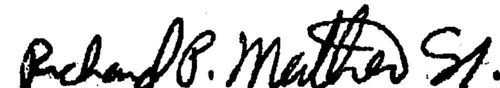
ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Chairman and Chief Judge

MICHELLE A. COLEMAN
Judge

BERNARD A. LABUSKES, JR.
Judge



RICHARD P. MATHER, SR.
Judge

DATED: February 9, 2011

c: **DEP Bureau of Litigation**
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MARYANNE WESDOCK
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PINE CREEK VALLEY WATERSHED ASSOCIATION, INC.

v.

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, DISTRICT TOWNSHIP SUPERVISORS, Permittee, JEFFREY LIPTON, Intervenor, and LOUISE MOYER, BRIAN MOYER, JACQUELINE MOYER, RICHARD HOBBS, DOUGLAS LITCHERT and DANELLE LITCHERT, Provisional Intervenors

EHB Docket No. 2009-168-L

Issued: February 15, 2011

OPINION AND ORDER ON MOTION TO EXCLUDE EXPERT TESTIMONY

By Bernard A. Labuskes, Jr., Judge

Synopsis:

The Board denies a motion to exclude expert testimony because there is a legitimate dispute about whether the application of the methodology used by the expert is generally accepted in the scientific community. The Board will resolve the issue at or following the hearing on the merits.

OPINION

Pine Creek Valley Watershed Association, Inc. ("Pine Creek") has filed a motion asking us to preclude the Intervenors' proposed expert witness, Derron LaBrake, from testifying. The motion also seeks to limit expert testimony from Sunli Desai, Allyson McCollum, and Mark Sigouin, the Department of Environmental Protection's (the "Department's") proposed expert

witnesses, to the extent their testimony relates to LaBrake's methodology.

Pine Creek's motion is made pursuant to Pennsylvania Rule of Civil Procedure 207.1.[1] Rule 207.1 creates a procedure for testing "novel scientific evidence" in advance of a trial. Rule 207.1 allows a party to file a pretrial motion asking the court to exclude expert testimony that relies upon novel scientific evidence as inadmissible under Pennsylvania Rules of Evidence 702 and 703.[2] An initial problem with Pine Creek's motion is that the Pennsylvania Rules of Civil Procedure do not apply to Board proceedings unless our rules or applicable portions of the

---

[1] Rule 207.1 reads as follows:

> (a) If a party moves the court to exclude expert testimony which relies upon novel scientific evidence, on the basis that it is inadmissible under Pa.R.E. 702 or 703,
>
> (1) the motion shall contain:
>
> (i) the name and credentials of the expert witness whose testimony is sought to be excluded,
>
> (ii) a summary of the expected testimony of the expert witness, specifying with particularity that portion of the testimony of the witness which the moving party seeks to exclude,
>
> (iii) the basis, set forth with specificity, for excluding the evidence,
>
> (iv) the evidence upon which the moving party relies, and
>
> (v) copies of all relevant curriculum vitae and expert reports;

Pa.R.Civ.P. 207.1(a).

[2] Pennsylvania Rule of Evidence 702 reads:

> If scientific, technical or other specialized knowledge beyond that possessed by a layperson will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise.

Pa. R. E. 702.

Pennsylvania Rule of Evidence 703 reads:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inference upon the subject, the facts or data need not be admissible evidence.

Pa. R. E. 703.

Administrative Code provide otherwise. *See Solebury Township v. DEP*, 2007 EHB 244, 246; *Borough of Edinboro v. DEP*, 2003 EHB 725, 769-70; *Hrivnak Motor Co., v. DEP*, 1999 EHB 437, 439; *Herbert Kilmer v. DEP*, 1999 EHB 905, 907; *Berwind Natural Resources v. DER*, 1985 EHB 356, 358. Our rules, however, do allow for motions in limine, 25 Pa. Code § 1021.121, and such motions are a proper vehicle for addressing evidentiary matters in advance of the hearing, *M&M Stone Co. v. DEP*, 2009 EHB 213, 220; *Angela Cres Trust v. DEP*, 2007 EHB 595, 596; *Dauphin Meadows v. DEP*, 2002 EHB 235. Therefore, we will treat Pine Creek's motion as a motion in limine.

When determining whether expert testimony may be offered on a particular scientific subject, Pennsylvania follows the standard set forth in *Frye v. United States*, 293 F. 1013 (D.C. 1923). *See* Pa.R.E. 702 (comment); *Grady v. Frito-Lay, Inc.*, 839 A.2d 1038, 1043-44 (Pa. 2003); *McManamon v. Washko*, 906 A.2d 1259, 1273 (Pa. Super. 2006); *Exeter Citizens Action Committee v. DEP*, 2005 EHB 306, 333-34. The *Frye* standard provides that an expert opinion based on a scientific technique is admissible if the technique is generally accepted as reliable in the relevant scientific community. *Grady,* 839 A.2d at 1044; *Dennis Groce v. DEP,* 2006 EHB 856, 927. It is up to the proponent of the scientific evidence to demonstrate that the underlying theory upon which the expert testimony will be predicated meets the test of "general acceptance." *See Grady*, 839 A.2d at 1045; *Groce*, 2006 EHB at 927. It is the methodology that must be generally accepted in the field, not necessarily the expert's conclusions that are derived therefrom. *Grady*, 839 A.2d at 1045. The evidentiary screening function served by the *Frye* test is not implicated every time science comes into the hearing room; rather, it applies only to proffered expert testimony involving novel science. *Commonwealth v. Dengler*, 890 A.2d 372, 382 (Pa. 2005); *Commonwealth v. Delbrindge*, 859 A.2d 1254, 1260 (Pa. 2004).

Deciding whether a particular methodology is generally accepted in a scientific community obviously requires us to consider the views of the scientific community. *Grady*, 839 A.2d at 1044-45 ("[r]equiring judges to pay deference to the conclusions of those who are in the best position to evaluate the merits of scientific theory and technique when ruling on admissibility of scientific proof, as the *Frye* rule requires, is the better way of insuring that only reliable expert scientific evidence is admitted at trial.") In a way, resolving a *Frye* dispute itself requires expert opinion. The experts need to tell us whether a method is generally accepted in their field. There is certainly no prohibition against the expert who is proposing the use of allegedly novel methods testifying that the methods are generally accepted. Opposing experts may of course disagree. We evaluate the credibility of the testimony just like any other expert testimony, and a meaningful evaluation of credibility is difficult without taking live testimony. Thus, where there are conflicting expert views, this is simply another version of a battle of the experts.

There is a fine line between methodology and conclusions. Indeed, the entire construct is somewhat artificial. The fundamental job of a court is to ensure that bogus opinions based upon junk science are not presented to what some people fear might be impressionable jurors. *Blum v. Merrell Dow Pharmaceuticals, Inc.*, 705 A.2d 1314, 1317 (Pa.Super. 1997), *aff'd*, 764 A.2d 1 (Pa. 2000). Although the Members of this Board are, perhaps, not quite as impressionable, bogus opinions obviously waste time and do not aid us in our search for the truth. In a setting such as ours, questions regarding the methods used by an expert may go more to the weight of the opinions than their admissibility. The weight to be given to an expert's opinion depends upon many factors and "as the fact finder, weighing credibility and selecting among competing expert testimony is one of our most basic and important duties." *UMCO Energy, Inc. v. DEP*, 2006

EHB 489, 544-45, *aff'd*, 938 A.2d 530 (Pa. Cmwlth. 2007)(*en banc*), *citing Bethayres*, 1990 EHB at 580. The *Frye* standard "is an exclusionary rule of evidence. As such it must be construed narrowly so as not to impede admissibility of evidence that will aid the trier of fact in the search for truth." *Trach v. Fellin*, 817 A.2d 1102, 1104 (Pa. Super. 2003).

To be precise, the question presented by Pine Creek's motion is not so much whether the subject methodology or the application of that methodology to the situation at hand is generally accepted, as it is whether we should make that decision *now*. It would seem that a Rule 207.1 approach to resolving a *Frye* issue makes the most sense in advance of a jury trial, where the court can exercise its gatekeeping function regarding the proper foundation for expert testimony without wasting the time of a jury. Obviously, that consideration does not apply to Board proceedings. Where there is a legitimate dispute between opposing experts, we have repeatedly refused to resolve such questions in the context of summary judgment motions. *CMV Sewage Company, Inc. v. DEP*, EHB Docket No. 2009-105-L (Opinion & Order issued July 22, 2010), slip op. 2; *Pileggi v. DEP*, EHB Docket No. 2009-044-C (Opinion & Order issued March 26, 2010), slip op. 6; *ADK Development v. DEP*, 2009 EHB 251, 253-54. The same approach applies to motions in limine. While we do not wish to entirely rule out the possibility of a *Frye* motion in limine being an appropriate vehicle for resolving the question in an EHB appeal, we suspect that resolving such questions at the hearing itself will almost always be the better approach.

Pine Creek's point of contention in this appeal is that LaBrake utilizes a formula that was developed for use with *constructed* wetlands to make conclusions regarding *natural* wetlands. Pine Creek's motion argues, with the support of its expert's affidavit, that LaBrake's use of the constructed-wetlands methodology in analyzing the impacts upon and function of natural

wetlands has not been shown to be generally accepted in the scientific community.[3] For that reason, Pine Creek argues that we should consider LaBrake's testimony to be unacceptable novel science to the extent that it is being applied to natural wetlands and LaBrake should be precluded from providing expert testimony founded upon that application of the methodology.

The Department and Intervenors respond that LaBrake's application of the methodology to natural wetlands, at least under the circumstances of this case, is generally accepted. They point out that the methodology is derived from an accepted engineering textbook. They say that the Department's experts reviewed the methodology and agree that a model for constructed wetlands is appropriate for use in assessing issues regarding natural wetlands.

It is clear that we are presented with a legitimate dispute among experts. Pine Creek's expert says that the application of the methodology is not generally accepted; the Department's and Intervenor's experts say that it is. We see no merit in attempting to resolve this dispute in advance of the hearing.

Although we are denying Pine Creek's motion, the motion has served the valuable function of telegraphing that there is a legitimate question regarding that part of the foundation for the experts' opinions that relates to the general acceptance of the methodology used. Not every case requires a *Frye* analysis. Indeed, thankfully, the vast majority do not. Here, however, the Department and Intervenors are on notice that they will need to establish this foundation before the Board can ultimately accept opinions based upon the proffered application of the methodology.

Accordingly, we issue the Order that follows.

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[3] Other arguments made in Pine Creek's motion (such as its argument that it is legally impermissible for the Department to allow the use of exceptional value wetlands as a sewage treatment facility) go well beyond its *Frye* arguments and will not be considered here.

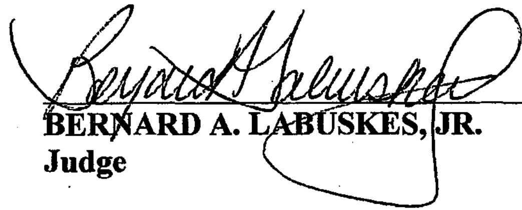
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PINE CREEK VALLEY WATERSHED ASSOCIATION, INC.	:	
v.	:	**EHB Docket No. 2009-168-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, DISTRICT TOWNSHIP SUPERVISORS, Permittee, JEFFREY LIPTON, Intervenor, and LOUISE MOYER, BRIAN MOYER, JACQUELINE MOYER, RICHARD HOBBS, DOUGLAS LITCHERT and DANELLE LITCHERT, Provisional Intervenors	:	

ORDER

AND NOW, this 15th day of February, 2011, it is hereby ordered that Pine Creek's motion to exclude all expert testimony based upon the methodology of Derron LaBrake is denied without prejudice.

ENVIRONMENTAL HEARING BOARD



BERNARD A. LABUSKES, JR.
Judge

DATED: February 15, 2011

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MARYANNE WESDOCK
ACTING SECRETARY TO THE BOARD

PINE CREEK VALLEY WATERSHED ASSOCIATION, INC.	:	
v.	:	**EHB Docket No. 2009-168-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, DISTRICT TOWNSHIP SUPERVISORS, Permittee, JEFFREY LIPTON, Intervenor, and LOUISE MOYER, BRIAN MOYER, JACQUELINE MOYER, RICHARD HOBBS, DOUGLAS LITCHERT and DANELLE LITCHERT, Provisional Intervenors	:	**Issued: February 24, 2011**

OPINION AND ORDER ON
MOTION TO EXCLUDE DOCUMENTS

By Bernard A. Labuskes, Jr., Judge

Synopsis:

The Board denies a motion to exclude documents because there is no categorical prohibition on the admission into evidence of expert reports. The Board will rule on the admissibility of the documents on a case-by-case basis if they are moved for admission at the hearing.

OPINION

Pine Creek Valley Watershed Association, Inc. ("Pine Creek") has filed a motion in limine pursuant to 25 Pa. Code § 1021.121 asking us to exclude certain proposed exhibits listed in the Department of Environmental Protection's (the "Department's") pre-hearing memorandum. Pine Creek has identified a large number of the proposed exhibits as "expert

reports" and argues that they are, as a result, inadmissible hearsay.[1] To be clear, unlike the party who filed a motion in limine in *Sunoco, Inc. v. DEP*, 2003 EHB 482, Pine Creek is not using the expert reports as a vehicle for objecting to the substance of the experts' opinion testimony. Rather, in the immediate context it is simply objecting to the admission of the reports themselves.[2]

The relatively common practice in administrative proceedings of experts submitting written testimony *in lieu of* direct testimony is not followed by this Board. *See* 25 Pa. Code § 1021.123(d) (superseding 1 Pa. Code §§ 35.138 and 35.166 (relating to prepared expert testimony)). Pine Creek is technically correct that expert reports, as such, are hearsay. They are, after all, out-of-court statements offered for the truth of the matters asserted. Pa.R.E. 801(c). They typically are not made under oath. They are essentially discovery tools that may be used as alternatives to detailed answers to interrogatories and expert testimony summaries in pre-hearing memoranda. They serve to define the four corners of the expert's testimony. Pa. R. Civ. P. 4003.5 (c). They should not, however, be thought of as trial exhibits. *DEP v. Angino*, 2006 EHB 278, 283; *Sunoco*, 2003 EHB at 484; *Kleissler v. DEP*, 2002 EHB 617, 621; *Land Tech Engineering v. DEP*, 2000 EHB 1133, 1138.[3]

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[1] Pine Creek also asks us to exclude documents that it identifies as a module concerning Longswamp Township "which was not part of the appeal and thus is not relevant." Pine Creek gives us nothing else to go on. The Department answers that a small portion of the site in question is in Longswamp Township. We will be in a much better position to assess the relevance of these exhibits at the hearing itself.

[2] Pine Creek expands somewhat on its argument in a reply to the Department's response, but such replies are not permitted under our rules and will not be considered. 25 Pa. Code § 1021.91(g).

[3] The Department makes a number of arguments in support of its belief that expert reports are not hearsay, all of which are wrong. It argues that reports are "relevant and therefore admissible." However, hearsay and relevance are entirely separate and unrelated concepts. It argues that reports are admissible under the business records exception to the hearsay rule if they are submitted to the Department as part of its permit review and are maintained in the Department's files. (*See* 42 Pa.C.S. § 6108; Pa.R.E 803(6).) However, this argument dramatically overextends the scope of the business records exception. Among other things, a business record must be compiled by the business (here, the Commonwealth) itself, and the exception does not include opinions and diagnoses. Pa.R.E. 803(6) (comment). The Department argues that reports of others that are relied upon by experts in forming their opinions are admissible as an exception to the hearsay rule. It is true that an expert may rely upon reports of others if they are of a type reasonably relied upon by experts in that field, Pa.R.E. 703, but that reliance does not provide an

Having said that, parties can and often do agree to the admission of expert reports. *Kleissler*, 2002 EHB at 621. We encourage that practice because the reports are a very helpful tool in understanding experts' testimony when we prepare our Adjudications. Even without agreement, parts of reports are often independently admissible as demonstrative evidence. This case, for example, involves complex mathematical formulae. We tremble at the thought of trying to follow those calculations based upon oral testimony alone.

Still further, if a testifying expert adopts his previously produced report in the course of explaining his opinion during his direct testimony at the hearing, the expert essentially converts the statements into statements made at trial under oath, and the expert is subject to cross-examination on those statements. We see no point in insisting in every case that the expert orally repeat each and every statement in the report on the record. The practice seems archaic and unnecessary in our nonjury setting.

The use of a report to support live testimony is an efficient and effective way of explaining an expert's opinions. The opposing party's ability to understand, confront, and attack the opinion is, if anything, enhanced. In this era of tremendous budgetary pressures and exorbitant litigation costs, it is imperative that this Board be receptive to hearing procedures that conserve the Board's and the parties' resources without compromising due process rights. We see the incorporation of expert reports into direct testimony as one procedure that that may aid in that pursuit.

With theses considerations in mind, we decline Pine Creek's invitation to create an absolute, across-the-board prohibition on the admission into evidence of expert reports. Rather, so long as the report's author testifies about his conclusions, adopts his report on the record

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independent basis for admitting the underlying report. Indeed, Rule 703 is designed to make it clear that experts may on occasion rely upon *inadmissible* material.

under oath, and is subject to cross-examination, we will exercise our judgment regarding the admissibility of expert reports on a case-by-case basis.

Pine Creek also complains that the same report should not be able to be used as a report in support of a permit application and an expert report for use in litigation. We do not see why not. The purpose of an expert report is to describe the expert's opinion and the basis therefor to the opposing side. The Board requires a summary of expert testimony in the pre-hearing memorandum so that it has a preview of the forthcoming testimony as well. 25 Pa. Code § 1021.104(a)(5).[4] If a report prepared in support of a permit application serves those purposes, it may be used as the expert report if it is identified for that use. There is no conceivable reason, other than a pointless veneration of form over substance, to insist upon the preparation of a separate report called an "expert report." The Board's rules are designed to aid in the search for truth, not as a mechanism for incurring unnecessary expense and wearing the opposition down.

Finally, in order to perform our function of conducting an independent review, the Board needs to see what the Department saw in its review of a permit application. Submittals to the Department constitute its record of decision and are admissible if for no other purpose than to explain why the Department acted the way it did. To the extent that the documents that Pine Creek points to prove to be inadmissible as hearsay expert opinions, they may nevertheless need to be admitted to explain the Department's course of conduct. Pine Creek itself acknowledges that the Intervenors' experts will be available to testify as to their reports' contents, which as discussed above may well be enough to support their admission.

Thus, it is clear that we cannot make a determination of whether to exclude from

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[4] Attaching expert reports to the pre-hearing memorandum as numbered "exhibits" is not necessarily objectionable. An expert report identified as an exhibit in a pre-hearing memorandum, as with any listed exhibit, does not necessarily result in the Board admitting the document into evidence.

evidence the enumerated documents in Pine Creek's motion at this point. The documents have not been moved into evidence. If they are to be moved, the extent of the proffer has not been revealed. If they are to be admitted as expert reports, we will need to hear the expert's testimony before ruling. For these reasons, we are unable to make a determination on the admissibility of the documents in the context of Pine Creek's motion in limine.

Accordingly, we issue the Order that follows.

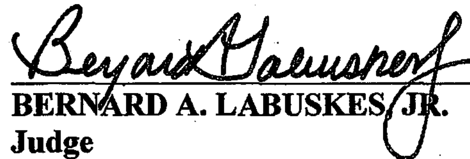
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PINE CREEK VALLEY WATERSHED ASSOCIATION, INC.	:	
v.	:	**EHB Docket No. 2009-168-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, DISTRICT TOWNSHIP SUPERVISORS, Permittee, JEFFREY LIPTON, Intervenor, and LOUISE MOYER, BRIAN MOYER, JACQUELINE MOYER, RICHARD HOBBS, DOUGLAS LITCHERT and DANELLE LITCHERT, Provisional Intervenors	:	

ORDER

AND NOW, this 24th day of February, 2011, it is hereby ordered that Pine Creek's motion in limine to exclude from evidence certain Department exhibits is **denied**.

ENVIRONMENTAL HEARING BOARD



BERNARD A. LABUSKES, JR.
Judge

DATED: February 24, 2011

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v.	**EHB Docket No. 2010-102-M**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and NEWFIELD APPALACHIA PA, LLC, Permittee	**Issued: March 4, 2011**

OPINION AND ORDER
ON APPELLANT'S MOTION FOR AN EXTENSION OF TIME

By Richard P. Mather, Sr., Judge

Synopsis

The Board grants the Appellants first request for an extension of discovery to allow for depositions where the extension will not prejudice any party or lead to a delay in the scheduled hearing. The Board will allow all parties to conduct discovery until March 24, 2011.

OPINION

Before the Board is an appeal of the Department of Environmental Protection's (the "Department's") decision to issue an oil and gas well permit to Newfield Appalachia PA, LLC ("Newfield") by appellants Damascus Citizens for Sustainability ("Damascus"), the Delaware Riverkeeper, the Delaware Riverkeeper network (collectively, "Delaware Riverkeeper") and several individual appellants. This matter is still at preliminary stages of litigation, the scheduled

period for discovery has recently expired and the hearing will be held in several months. Before this matter is presented on the merits to the Board, the Appellants now move for an extension of time for purposes of discovery to conduct depositions of Department personnel.

The Appellants assert that additional time for discovery is necessary for several reasons. They indicate that Delaware Riverkeeper has recently secured representation by outside counsel after the expiration of scheduled discovery. Counsel for Damascus has never practiced before the Board, and is unfamiliar with our discovery practices. Further, issues presented for consideration in this appeal and the related appeals before the Board have and may continue to be affected by administrative hearings being conducted by the Delaware River Basin Commission. Appellants claim that such litigation, having come first in time, demanded the immediate attention of all of the parties over the need to conduct discovery in the present matter.

The Department and Permittee have jointly responded to the Appellants' motion in opposition to any extension of discovery. They argue that the Appellants have had ample time to conduct discovery, and failed to engage in any discovery during the appointed period set out by our Order. Further, they assert that the Appellants can point to no "good cause" for an extension, and ask us to reject each of the Appellants' arguments as insufficient bases for the Board to grant an extension. Finally, they accurately point to language in Board precedent discussing the importance of diligent pursuant of appeals and parties' entitlement to rely upon the deadlines set by the Board. These remain important considerations.

The Department and Permittee have also jointly filed a contingent motion to conduct discovery and for a status conference. In their motion, the Department and the Permittee ask that, if the Board decides to reopen discovery they also be allowed to conduct discovery comparable to what the Appellants are allowed. While the Board would have extended the

discovery deadline for all parties, without the request, the request is useful to address any uncertainty about the scope of the discovery extension and it signals the Department's and the Permittee's contingent interest in also pursuing limited discovery during any discovery extension period.

The Department and the Permittee also asked the Board to schedule a status conference following the close of a discovery extension to discuss a number of items. The Board will decide this request after the Appellants have an opportunity to respond. In light of this discovery extension until March 24, 2011, the Board anticipates that there will be ample time to decide whether to schedule a status conference after a response is filed and to schedule such a status conference if the Board decides to grant the request.

To properly manage our responsibility to regulate prehearing discovery, the Board recognizes that we must adequately balance the need to move matters to conclusion while providing parties with enough time to prepare their cases. *Collier v. DEP*, Slip op. issued Nov. 16, 2010; 25 Pa. Code § 1021.102(a). In doing so, the Board has broad discretion to decide how discovery will and will not be conducted. *DEP v. Neville Chemical Co.*, 2005 EHB 1, 3. In general, the deadlines imposed by our orders are important, and parties must be able to rely upon them when preparing for litigation. *Id* at 4. However, the discovery deadlines we set are imposed almost immediately after we open a docket for consideration and the Board grants nearly every first request to extend discovery deadlines. *Id.* Here, the Board believes that a short extension of the discovery deadline is warranted under these circumstances.

The Appellants believe that the additional time will allow them to better prepare for litigation, and we have no reason to believe that that will not be the case. The Department and the Permittee will also directly benefit in light of their contingent request to conduct discovery

during the extension period. Because the Board has not issued an order granting a supersedeas limiting the Permittee's rights to exercise the appealed permit, we do not believe the objecting parties will be prejudiced by this single extension until March 24, 2011 which will not lead to the delay of the scheduled hearing. In fact, all parties benefit from well informed opponents in litigation, who may be better suited to agree to factual stipulations limiting the need for presentations of evidence on certain matters at hearing. *See Capelli v. DEP*, 2006 EHB 426, 427.

The Board has already scheduled the hearing dates for this appeal, and the limited time for additional discovery is consistent with these dates. We are not interested in delaying the scheduled hearing in this matter, or otherwise postponing the resolution of this appeal. Thus, an additional extension of discovery is unlikely. The Board expects that the parties will work together to make the best use of this limited discovery extension.

Accordingly, we issue the order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DAMASCUS CITIZENS FOR SUSTAINABILITY, THE DELAWARE RIVERKEEPER, DELAWARE RIVERKEEPER NETWORK, MR. JAMES R. WILSON, MR. JONATHAN B. GORDON AND MSSRS. THOMAS AND MICHAEL COONEY	:	
v.	:	**EHB Docket No. 2010-102-M**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and NEWFIELD APPALACHIA PA, LLC, Permittee	:	

ORDER

AND NOW, this 4th day of March, 2011, upon consideration of the Appellant's motion for an extension of time to complete discovery, and the Department and Permittee's contingent motion filed thereafter, it is hereby ordered that the motions are **granted**. All discovery shall be completed by **March 24, 2011**. This Order does not modify the dates set out in our Order scheduling prehearing memoranda and the hearing in this matter.

ENVIRONMENTAL HEARING BOARD

RICHARD P. MATHER, SR.
Judge

DATED: March 4, 2011

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MARYANNE WESDOCK
ACTING SECRETARY TO THE BOAR

MCKISSICK TRUCKING INC.	:	
	:	
v.	:	**EHB Docket No. 2011-007-M**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: March 8, 2011**

OPINION AND ORDER
ON DEPARTMENT'S MOTION TO DISMISS

By Richard P. Mather, Sr., Judge

Synopsis

The Board grants the Department's motion to dismiss and dismisses an appeal that was filed one day late because the Board does not have jurisdiction over an untimely appeal. The Appellant did not file a response to the Department's motion.

OPINION

On December 13, 2010, the Department of Environmental Protection (the "Department") issued an Assessment of Civil Penalty to McKissick Trucking, Inc. ("McKissick") in the amount of $1,566.25 for violations of the Solid Waste Management Act at a facility in Venango County. In its Notice of Appeal, Appellant states that it received the Assessment on December 14, 2010. On January 14, 2011, McKissick appealed the Department's penalty assessment to the Board. The Department filed a motion to dismiss the appeal on the basis that the appeal is not timely.

Under our rules, a response to a dispositive motion may be filed within thirty days after the dispositive motion has been served. That time having elapsed, McKissick has not responded

to the Department's motion to dismiss, and the Department's motion is now ripe for our consideration.

A motion to dismiss will be granted by the Board where the moving party is clearly entitled to judgment as a matter of law and there is no dispute over any issue of material fact. *Spencer v. DEP,* 2008 EHB 573, 574; *Eljen Corp. v. DEP*, 2005 EHB 918. Under our rules, the Board only has jurisdiction over timely appeals. 25 Pa. Code § 1021.52(a); *Rostokosky v. DER*, 364 A.2d 761 (Pa. Cmwlth. 1976)("[T]he untimeliness of the filing deprives the Board of jurisdiction"). Where the Department has directed or issued its decision to a party, that party must file its appeal within thirty days after it receives written notice of the action, unless a different time period is specified by statute. 25 Pa. Code § 1021.52(a)(1); *Spencer v. DEP*, 2008 EHB 573, 574. Therefore, except in the very rare circumstances where an appeal *nunc pro tunc* will be granted, the Board, lacking jurisdiction over untimely appeals, will grant a motion to dismiss where an appeal in question has in fact been filed after the deadline set by our rules. *See* 25 Pa. Code § 1021.53a; *see also Bass v. Commonwealth*, 401 A.2d 1133 (Pa. 1979).

We find it clear that McKissick has filed its appeal more than thirty days after receiving the Department's notice of the action by certified mail. McKissick received the Department's letter on December 14, 2010, but did not file its appeal until January 14, 2010, thirty one days later. *See* 1 Pa. Code § 31.12; *see also Spencer* at 574 (The Board computes time according to the regulations governing the practice and procedure before agencies of the Commonwealth). Further, the Solid Waste Management Act does not provide appellants with any additional time to file an appeal of a Department issued according to that act. 35 P.S. §§ 6018.101 *et. seq*. It is important to note that McKissick has elected not to contest these basic underlying facts by filing a response. Therefore McKissick's appeal is untimely by one day, and the Board lacks

jurisdiction to hear the appeal. *See Pedler v. DEP*, 2004 EHB 852, 854; *Burnside Township v. DEP*, 2002 EHB 700, 703 (An appeal filed one day late will be dismissed).

Accordingly, we issue the order that follows.

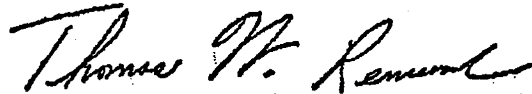
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MCKISSICK TRUCKING INC.	:	
	:	
v.	:	**EHB Docket No. 2011-007-M**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

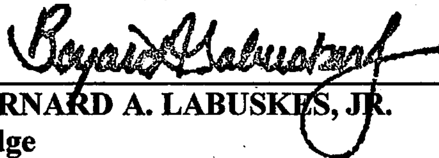
AND NOW, this 8th day of March, 2011, it is hereby ordered that the Department's motion to dismiss is **granted**, and the appeal docketed at Docket No. 2011-007-M is hereby **dismissed**.

ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Chairman and Chief Judge

MICHELLE A. COLEMAN
Judge



BERNARD A. LABUSKES, JR.
Judge

RICHARD P. MATHER, SR.
Judge

DATED: March 8, 2011

c: **DEP Bureau of Litigation:**
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MARYANNE WESDOCK
ACTING SECRETARY TO THE BOARD

BOROUGH OF OLD FORGE	:	
	:	
v.	:	**EHB Docket No. 2010-181-L**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	**Issued: March 10, 2011**
PROTECTION and ALLIANCE SANITARY	:	
LANDFILL, Permittee	:	

OPINION AND ORDER ON
MOTION FOR PROTECTIVE ORDER

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board grants a motion for a protective order in part where a permittee seeks to conduct depositions of fourteen officials of an appellant municipality that is challenging the Department's approval of the permittee's landfill expansion.

OPINION

This appeal concerns the Department of Environmental Protection's (the "Department's") issuance of a permit modification to Alliance Sanitary Landfill ("Alliance") to allow for the expansion of its permitted waste facility located near the Appellant, the Borough of Old Forge (the "Borough"). The Borough has filed a motion for a protective order in response to Alliance's service of fourteen deposition notices upon each member of the Borough's Council and its environmental committee. The motion asks us to excuse the fourteen named public officials from attending depositions because it asserts that most of the named individuals do not have any independent knowledge of any facts at issue in the appeal. The Borough asserts that Alliance's

strategy in holding fourteen depositions is actually to harass the Borough and cause it to incur significant costs to defend multiple depositions. The Borough in its motion does, however, identify four individuals served with deposition notices that it believes may have information responsive to proper discovery. The Borough all but concedes that the depositions of those four individuals[1] can be taken without its objection. Accordingly, in order to allow discovery to proceed in an expeditious manner, we issued an Order on February 22, shortly before the scheduled depositions, allowing those depositions to go forward, while reserving judgment on the depositions of the other ten individuals. The purpose of this Opinion and Order is to address the Borough's motion with respect to those ten people.

Alliance opposes the Borough's motion.[2] Alliance says that all of the would-be deponents "gained relevant knowledge of the facts underlying this appeal during public meetings and private executive sessions." It says they "also took actions outside of public meetings and private executive sessions that relate directly to the facts underlying this appeal." The key "action" would seem to be the filing of the appeal, but Alliance also cites letters to the local newspapers, a campaign advertisement, and an email to a Department employee from the municipal officials, all in opposition to the landfill expansion. Alliance has offered to limit depositions to three hours each, and to hold them in Wilkes-Barre.

Before turning to the merits of the discovery dispute, we note that Alliance has filed a "supplemental response" in opposition to Old Forge's motion for a protective order. Alliance did not request permission to file a "supplemental response." Our rules do not allow for "supplemental responses" in connection with discovery motions. Alliance has made no effort to explain why it has gone beyond that which is permitted in our rules regarding discovery motions,

[1] Anthony Pero, Lou Stazi, Bill Toman, and Buddy Kania.
[2] The Department has not weighed in one way or the other.

which provide for a motion, a response, and optional memoranda in support thereof. 25 Pa. Code § 1021.93. *Cf.* 25 Pa. Code § 1021.91(g)(no replies to discovery motions unless the Board orders otherwise). To the extent the "supplemental response" is intended as a petition for reconsideration of our Order of February 22, there is really nothing to reconsider from Alliance's perspective because we allowed four depositions and reserved judgment on the other ten. Furthermore, Alliance makes no attempt to satisfy the strict criteria for reconsideration of an interlocutory order. *See* 25 Pa. Code § 1021.151. In any event, we suspect that reconsideration of a ruling on a discovery motion will almost never be appropriate. To the extent that the "supplemental response" is intended as something other than a petition for reconsideration, absent unusual circumstances not present here, we insist that parties raise all of their arguments in one response, not seriatim responses raised in multiple filings. For these reasons, we have not considered Alliance's "supplemental response" in our deliberations.

The Borough filed a reply to Alliance's supplemental response. Although we do not necessarily fault it for doing so given the unusual nature of Alliance's filing, the reply further illustrates why "supplemental responses" are problematic. Instead of one prohibited filing, we have two. Because we have not considered Alliance's "supplemental response," we also will not consider the Borough's reply.

The rules of the Board provide that discovery proceedings are generally governed by the Pennsylvania Rules of Civil Procedure. 25 Pa. Code § 1021.102(a). Accordingly, parties may seek "discovery regarding any matter, not privileged, which is related to the subject matter of the pending litigation so long as the information sought appears reasonably calculated to lead to the discovery of admissible evidence." *Northampton Twp. v. DEP*, 2009 EHB 202, 205; Pa.R.Civ.P. 4003.2. Discovery proceedings are overseen by the Board, which has broad discretion to ensure

that parties have adequate opportunities to obtain discovery while also limiting discovery as necessary. *DEP v. Neville Chemical Co.*, 2005 EHB 1, 3-4. "Among other things, the Board may issue a protective order when appropriate to protect a person from unreasonable annoyance, embarrassment, oppression, burden, or expense." *Chrin Bros. Inc. v. DEP,* 2010 EHB 805, 811; Pa.R.Civ.P. 4012.

The Board exercises its discretion to issue a protective order in various situations. By way of example, the Board has prevented broad depositions of the members of citizens groups where the depositions appear to search out the source of anonymous complaints or threaten to chill first amendment rights through inconvenience and harassment. *See Chrin Bros. Inc., supra*; *Northampton Twp., supra.* We have also restricted the depositions of public officials and party's attorneys where appropriate. *See PDG Land Development, Inc. v. DEP*, 2007 EHB 284; *see also PA Waste, LLC v. DEP*, 2010 EHB 77.

Alliance seeks to depose the Borough's Zoning Officer, Paul Papi. The Borough's opposition to this deposition is difficult to appreciate. The Borough in its motion rather curiously says that Papi "has potentially relevant information only to the extent that potential violations of the Old Forge Zoning Code are at issue in this appeal." The statement is curious because the Borough in fact raises objections related to zoning in its notice of appeal. (*See, e.g.,* ¶ 98.) Papi has been personally involved in the Borough's ongoing zoning dispute with the landfill and the litigation related thereto. Alliance adds that it offered to cancel Papi's deposition if the Borough agreed to withdraw the objections in its notice of appeal relating to zoning. The Borough apparently refused this offer, which removes all doubt that its motion for a protective order lacks any merit with respect to Papi. His deposition may proceed.

The remaining nine people that Alliance wants to depose are all said to be members of

Borough Council and/or its environmental committee.[3] One person, Michele Petrini Avvisato, is the mayor of the Borough, but neither the Borough nor Alliance suggests that her status sets her apart for separate consideration. Alliance's goal with respect to all of the individuals appears to be to nail down why the Borough opposes the expansion.

It is not readily apparent to us why Alliance needs thirteen different Borough officials to explain why the Appellant, the Borough, opposes the landfill expansion. Whether and why the individuals *personally* oppose the expansion does not strike us as particularly significant. It may turn out that the individuals have unique or more substantive knowledge than meets the eye, but there is no indication that that is the case right now. Common sense and experience suggest that thirteen depositions of the Appellant's officials focused on the bases for the appeal will be unnecessarily duplicative and shed very little light on the factual issues that will ultimately define this Board's resolution of the matter, while at the same time imposing significant burden and expense on the Borough.

Discovery in this matter is in the earliest stages. Additional discovery may reveal that deposing the nine individuals will add value that we do not currently appreciate. For example, the depositions of the four officials that we allowed to go forward in our earlier Order may support Alliance's position with respect to the nine who have received a reprieve. If that turns out to be the case, Alliance may petition us for relief from the protective order. We would also add that the Borough will be precluded from calling as a witness any person who it did not make available for deposition in response to Alliance's request.

Accordingly, we issue the Order that follows.

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[3] The nine individuals are Mary Rose Fumanti, Vince Picculini, Joseph Ferrett, Bobby Giacometti, Robert Semenza, Dominic Vender, Michele Petrini Avvisato, Brian Rinaldi, and Tom Scarnato.

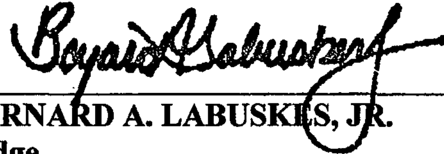
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BOROUGH OF OLD FORGE	:	
	:	
v.	:	**EHB Docket No. 2010-181-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and ALLIANCE SANITARY LANDFILL, Permittee	:	

ORDER

AND NOW, this 10th day of March, 2011, in consideration of the Borough of Old Forge's motion for a protective order and Alliance's response thereto, and further to our Order of February 22, 2011, it is hereby ordered that the deposition of Paul Papi may go forward. The Borough's motion is **granted** as to Mary Rose Fumanti, Vince Picculini, Joseph Ferrett, Bobby Giacometti, Robert Semenza, Dominic Vender, Michele Petrini Avvisato, Brian Rinaldi, and Tom Scarnato.

ENVIRONMENTAL HEARING BOARD



BERNARD A. LABUSKES, JR.
Judge

DATED: March 10, 2011

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MARYANNE WESDOCK
ACTING SECRETARY TO THE BOAF

GLENN J. MYERS :
:
v. : **EHB Docket No. 2010-096-M**
:
COMMONWEALTH OF PENNSYLVANIA, :
DEPARTMENT OF ENVIRONMENTAL : **Issued: March 15, 2011**
PROTECTION :

OPINION AND ORDER
ON DEPARTMENT'S MOTION TO COMPEL

By Richard P. Mather, Sr., Judge

Synopsis

The Board grants an unopposed motion to compel where an appellant has failed to respond the Department's discovery requests.

OPINION

Glenn J. Myers ("Myers") filed this *pro se* appeal of the Department of Environmental Protection's (the "Department's") compliance order, issued to Myers, for unauthorized earth-moving activity on a landslide-prone area under the Dam Safety and Encroachments Act, the Clean Streams Law and the rules and regulations thereunder. Although the litigation is still in the discovery phase of litigation, this is not the first time the parties have raised concerns with the Board. The Department has previously had considerable difficulty in contacting Myers for the purposes of conducting discovery and other pre-hearing matters and, on January 7, 2011, we granted the Department's unopposed motion to extend discovery until March 27, 2011. In addition, on January 7, 2011 we also conducted a telephone conference call between the parties

to discuss the need for Myers to communicate with the Department to respond to its discovery requests, and to advise Myers on the possibility of retaining *pro bono* counsel. Thereafter, the Department again attempted to contact Myers to discuss whether Myers has sought the assistance of counsel. Having failed to respond to the Department's communications, the Department filed this motion to compel Myers to communicate his, and his "engineer-soil scientist['s,]" availability to the Department for depositions and to respond to interrogatories and requests for documents.[1] Myers has not chosen to file a response to the Department's motion within the appointed time.

Under applicable discovery rules: "a party may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action. . ." Pa . . . R.C.P. 4003.1; *See* 25 Pa. Code § 1021.102 ("Except as otherwise provided . . . discovery in proceedings before the Board shall be governed by the Pa.R.C.P."). "[T]he purpose of Discovery is so both sides can gather information and evidence, plan trial strategy, better explore settlement opportunities, and discovery strengths and weaknesses of their respective positions." *Kennedy v. DEP*, 2006 EHB 193, 195. The Board is charged with overseeing discovery between the parties and has broad discretion to act to assure adequate discovery as needed. *DEP v. Neville Chemical Company*, 2005 EHB 1, 3-4; *Stern v. Vic Snyder, Inc.*, 473 A.2d 139 (Pa. Super. 1984).

The Board will typically find that a party, like Myers, that chooses not to respond to a non-dispositive motion, does not oppose the motion. *See Kennedy* 2006 at 194. We are not

[1] The Department's motion also requests that we compel Myers to disclose whether he has secured, or intends to secure, the assistance of counsel. Although both the Department and the Board have advised Myers that he may seek the assistance of counsel and that *pro bono* assistance is available to eligible parties, under our rules an individual has the right to participate in proceedings before the Board *pro se*, and we will not compel an appellant to disclose his decision on how to proceed. If Myers is represented by counsel in the future, that attorney will need to file a notice of appeal with the Board.

aware of any objections that Myers has to the Department's motion, and we are also not aware of any other reason to deny the Department's motion. We will grant the Department's motion, in part, and order Myers to respond to the Department's requests. Myers is undoubtedly in possession of information which the Department will require to present its position to the Board. Discovery proceedings are vital to a party's successful participation in matters before the Board. Where, as here, we are required to step in and order a party to respond to discovery requests, we will do so to ensure the timely and orderly disposition of the appeal.

Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

GLENN J. MYERS	:	
	:	
v.	:	**EHB Docket No. 2010-096-M**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 15th day of March, 2011, upon consideration of the Department's unopposed motion to compel, the motion is granted, in part. It is further ordered that Glenn J. Myers shall:

1. Respond to the Department's first stet of interrogatories and request for production of documents within thirty days.
2. Advise the Department of Myers's and his engineer-soil scientist's availability for depositions within seven days.

ENVIRONMENTAL HEARING BOARD

RICHARD P. MATHER, SR.
Judge

DATED: March 15, 2011

c: **DEP Bureau of Litigation:**
Connie Luckadoo - Library

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MARYANNE WESDOCK
ACTING SECRETARY TO THE BOAR

JAN HENDRYX AND CHRISTINE HENDRYX	:	
	:	
v.	:	**EHB Docket No. 2010-144-M**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and EAST RESOURCES, INC., Permittee	:	**Issued March 18, 2011**

OPINION AND ORDER
ON MOTION TO DISMISS

By Richard P. Mather, Sr., Judge

Synopsis

The Board will deny a motion to dismiss where the moving parties have not established that a third party appeal was untimely filed or that the Appellants lacked standing to bring the appeal before the Board.

OPINION

Background

The Marcellus Shale is a rock formation that underlies approximately two-thirds of Pennsylvania, and it is believed to hold trillions of cubic feet of natural gas.[1] Recent advances in drilling technology have attracted new interest in this previously untapped formation. Extracting natural gas from the Marcellus Shale formation requires both vertical and horizontal drilling combined with a process known as "hydraulic fracturing". After a well is drilled, cased and

[1] *See Marcellus Shale Fact Sheet*, Commonwealth of Pennsylvania Department of Environmental Protection, rev. 01/2010. Available at http://www.elibrary.dep.state.pa.us/dsweb/Get/Document-77964/0100-FS-DEP4217.pdf.

cemented, operators pump large amounts of water mixed with sand and other fluids into the Shale formation under high pressure to fracture the rock around the well bore which then allows the natural gas to flow freely to the well bore for collection. Large volumes of water are required to complete development of a Marcellus Shale natural gas well and large volumes of waste water are generated as part of the drilling process. The Department of Environmental Protection (the "Department"), in cooperation with the Susquehanna and Delaware River Basin Commissions, has created additional permit guidelines for drilling in the Marcellus Shale formation to create consistent state-wide rules for water withdrawal, usage, treatment and disposal.

A component of the Department's regulatory program governing the well drilling in the Marcellus Shale formation is the requirement for well operators to prepare, and to submit for Department approval, a Water Management Plan ("WMP"). The Department has announced that a WMP "must be completed" that covers water sources used for fracture stimulation of each Marcellus Shale natural gas well developed in the Commonwealth.[2]

Appellants Jan and Christine Hendryx are McKean County landowners who reside in close proximity to an East Resources, Inc ("East Resources") well site for which the Department has issued well permit no. 37-083-54594 for the development of natural gas from the Marcellus Shale formation.[3] This Marcellus Shale well permit is covered by a particular WMP that was revised to add the Allegheny River as an additional water source. The Appellants have appealed the Department's approval of the WMP revision submitted by East Resources allowing it to

[2] *See Water Management Plan for Marcellus Shale Wells*, Commonwealth of Pennsylvania Department of Environmental Protection, Document No. 5500-PM-OG0087, 4/2009. Available at http://www.elibrary.dep.state.pa.us/dsweb/Get/Document-74083/5500-PM-OG0087%20Application%20Example.doc; *See Water Management Plan for Marcellus Shale Wells Instructions*, Commonwealth of Pennsylvania Department of Environmental Protection, Document No. 5500-PM-OG0087, 4/2009. Available at http://www.elibrary.dep.state.pa.us/dsweb/Get/Document-74082/5500-PM-OG0087%20Instructions.doc.

[3] In a related appeal docketed at EHB Docket No. 2010-057-M, Jan and Christine Hendryx also appealed the Department's issuance of well permit no. 37-083-54594. That appeal is also currently before the Board.

withdraw water from a site on the Allegheny River for use at any of its Marcellus Shale permitted natural gas well sites in several listed Pennsylvania counties including, but not limited to, the site located near the Appellants' property, in McKean County. The Department and East Resources ("Movants"), in a joint motion, seek to dismiss this appeal, asserting that the Appellants have failed to file this appeal in a timely fashion. The Movants also assert that the Appellants have no standing to object to the Department's approval of East Resources' WMP revision.

A motion to dismiss will be granted by the Board where the moving party is clearly entitled to judgment as a matter of law and there is no dispute over any issue of material fact. *Spencer v. DEP,* 2008 EHB 573, 574; *Eljen Corp. v. DEP*, 2005 EHB 918. For the reasons set forth below, the Board denies the Department's and East Resources' motion to dismiss because the record before the Board does not establish that they are entitled to judgment as a matter of law and there are disputed issues of material fact.

There is a preliminary matter that the Board needs to address concerning the fact that the motion to dismiss is supported in large part on facts outside of those stated in the notice of appeal. The Board has noted that as a matter of practice, the Board has authorized motions to dismiss as a "dispositive motion" and has permitted the motion to be determined on facts outside of those stated in the appeal when the Board's jurisdiction . . . is in issue." *Felix Dam Preservation Ass'n v. DEP*, 2000 EHB 409, 421, n. 7. In their motion to dismiss, the Department and East Resources raise two issues: the appeal was filed beyond the 30 day period for filing the appeal; and Appellants lack standing. The first issue is clearly jurisdictional and the parties are entitled to rely upon facts outside of those stated in the appeal. The standing issue is clearly not jurisdictional under Pennsylvania case law, *see Beers v. Unemployment Compensation Board of*

Review, 534 Pa. 605, 611 (1993)(Whether a party has standing to maintain an action is not a jurisdictional issue.), and parties' reliance on facts outside of those stated in the appeal provide a basis to reject standing as a basis to grant the motion to dismiss. The Board's Rules allow parties to rely upon facts outside of those stated in the appeal to resolve non-jurisdictional issues in the context of motions for summary judgment. Under the Board's Rules governing motions for summary judgment there are additional procedural and substantive requirements that better enable the Board to identify and resolve factual disputes between the parties, and the Board believes that these should be used to address non-jurisdictional issues. *See* 25 Pa. Code § 1021.94a. The Board will, nevertheless, address the non-jurisdictional standing issue in this appeal for the convenience of the parties who have briefed the issue, since the Appellants did not raise an objection.

Timeliness

The Department approved the revision to East Resources' WMP on May 20, 2010. The Appellants filed their appeal on September 16, 2010. The joint motion to dismiss asserts that the appeal is not timely because the Appellants' filed the appeal more than thirty days after receiving actual notice. The Movants contend that actual notice occurred on July 27, 2010 when one of the Appellants received an e-mail from William Belitskus, the Board President of the Allegheny Defense Project ("ADP"), including an attached copy of a letter sent to John Hanger, the Secretary of the Department, raising a number of objections to the Department's permitting program for Marcellus Shale gas wells. The letter briefly referred to a WMP authorizing East Resources to withdraw water from the Allegheny River, and a footnote in the letter included a hyperlink to the Department's approval letter for the WMP. The Movants contend that because

the Appellants' did not file their appeal until September 16, 2010, fifty-one days after receiving the email from Mr. Belitskus, the appeal was untimely.

The Appellants' assert that they received actual notice of the Department's action through information acquired in discovery in the related appeal of the well drilling permit docketed at EHB Docket No. 2010-057-M, on August 24, 2010, twenty-four days prior to the filing of the present appeal. By way of answering the allegations of the joint motion, the Appellants assert that they are not members of ADP and the Movants neither claim that either Appellant read the letter in question or utilized the footnoted hyperlink to the Department's approval letter.

Appellants also assert that Belitskus's email and attached Hanger Letter are general in nature and they fail to make the connection between the approved WMP and the possible use of water under the amended WMP and the well site near their residence. Appellants assert that it was only after the WMP in question was identified in discovery of the related appeal of the well drilling permit that Appellants received actual notice of the Department's approval of the WMP at issue here.

It is well established law that the Board's jurisdiction only extends to timely filed appeals. 25 Pa. Code § 1021.52(a); *Rostokosky v. DER*, 364 A.2d 761 (Pa. Cmwlth. 1976)("[T]he untimeliness of the filing deprives the Board of jurisdiction"). In the case where the Department has directed or issued its decision to a party, that party must file its appeal within thirty days after it receives written notice of the action, unless a different time period is specified by statute. 25 Pa. Code § 1021.52(a)(1); *Spencer v. DEP*, 2008 EHB 573, 574. Where the individual aggrieved by the Department's action was not the person that the Department directed its decision to, an appeal is timely if it is filed within thirty days of the decision's publication in the PA Bulletin or a party's actual notice. 25 Pa. Code § 1021.52(a)(2).

With the exception of actions published in the PA Bulletin,[4] the question of an appellant's actual notice of a Department action is not one where we inquire when an appellant should reasonably know about the action. *Emerald Coal Resources, LPL v. DEP*, 2008 EHB 312, 318. "Our rules refer only to actual notice, which is where our focus must lie." *Id.* In *Emerald Coal*, we declined to conclude that the appellant had received actual notice of the Department's decision to issue a well permit, even where the appellant knew that the application for the permit had been submitted to, and processed by, the Department, and even where the Department's decision had been published to a Commonwealth database available to the public. *See generally Id.* Thus, the Department and East Resources are required to establish that the appellant did receive actual notice more than thirty days before the appeal was filed to prevail with their motion. The record before the Board does not support such a finding.

The Department and East Resources assert that a chain of plausible events establishes that the Appellants received actual notice more than thirty days before the appeal was filed. There are key breaks in this chain of events that prevent the Board from granting the motion to dismiss on the record before the Board at this time:[5]

1. Movants assert that William Belitskus, President of ADP, knew when the WMP was issued and since he was involved with the Appellants, the Movants assume that Belitskus told the Appellants. Nothing in the record confirms that Belitskus told the Appellants.

[4] Neither party has contended that the approval in question was published in the Pennsylvania Bulletin.

[5] The Appellants assert that the Movants failed to use discovery to bridge the missing gaps in Movants chain of plausible events. The Board agrees that it appears that the Movants neglected to use discovery to address some of the unanswered questions concerning when Appellants received actual notice of the Department's decision to approve the WMP.

2. Movants assert that Mr. Belitskus sent Appellants an email. One of the attachments to the email was a copy of a lengthy ADP letter to the Department that contained a brief discussion of an approval of an East Resources WMP that was subsequently identified as the East Resources WMP under appeal here. Neither the email nor the attached letter was intended as notice of the Department action under appeal here. The email merely circulated ADP's letter and press release to a number of persons with a description that these items were "about illegal permitting of water withdrawals for Marcellus drilling." The eight-page, single-spaced letter set forth ADP's legal objections to the Department's new WMP program and it concluded that the Department "lacks the legal authority to authorize, permit or otherwise approve water withdrawal in the Commonwealth." Nothing in record establishes that Appellants appreciated the importance of the brief discussion of an approved East Resources WMP embedded in a lengthy ADP letter to the Department that was attached to an email that Appellants received.
3. Movants also assert that the above mentioned ADP letter contained a link in a footnote to the approved WMP itself. Nothing in the record indicates that Appellants used the link to access a copy of the Department's letter approving the WMP even if they had read the letter.

The Department and East Resources apparently believe Appellants have a duty to investigate all materials that they receive from third parties to look for clues of actual notice of a Department action of interest to them. The Board does not share this view. Appellants need not reside at 221B Baker Street to be able to uncover and investigate clues of actual notice. Since neither the Department nor East Resources assert that either gave Appellants actual notice

directly, to prevail the Movants must establish when Appellants received actual notice. Because Appellants dispute material issues of fact supporting Movants' actual notice argument, the Board will not grant its motion to dismiss on this basis.

Even if Movants had established that Appellants had used the link embedded in the letter attached to the Belitskus email to read the Department's letter to East Resources approving the WMP in question, the Board has serious concerns about "the adequacy of such notice and whether it clearly identifies an action of the Department such that *an ordinary member of the public* would have sufficient information to determine that they may be affected by such an action for the purpose of filing an appeal with the Board." *Teleford Borough Authority v. DEP*, 2009 EHB 333, 338. As Judge Miller declared in *Teleford Borough*, "the standard is not whether an experienced practitioner of law should have known to file an appeal on behalf of a client." *Id.* It is unreasonable to assume that a member of the public is intimately acquainted with the minutia of the Department's manner of administering its oil and gas regulatory program for the development of Marcellus Shale gas wells. According to the Appellants, they only recognized the relationship between the approved WMP and the well permit adjacent to their residence, which is also under appeal before the Board, when East Resources provided notice to the Appellants as part of the discovery in the well permit appeal. It is not apparent to the Board, based on the record before us, that ordinary members of the public would be able to see that they would be affected by the issuance of a particular WMP without additional information from the Department or the Permittee.

Standing

The Movants also assert that the Appellants lack standing to challenge the Department's May 11, 2010 approval of the revision to the WMP that covered East Resources' Marcellus

Shale gas well development in McKean, Forest and Potter Counties. The May 11, 2010 revision added the Allegheny River as a water source and, among other things, identified the location of the point of withdrawal. In support of their motion, Movants assert that Appellants lack standing because:

1. Appellants neither lease or own property at the Allegheny River withdrawal point or downstream from the withdrawal point.
2. Appellants do not use the Allegheny River for recreation (fishing, canoeing or hiking).
3. Appellants do not consider themselves riparian property owners with respect to the Allegheny River.

These assertions focus narrowly on the actual withdrawal of water from the new source on the Allegheny River.

In their response, Appellants do not argue with the "Appellants' lack of proximity to the water withdrawal point." The Appellants take a broader perspective and assert that their standing is based on the relationship between the approved WMP revision and the East Resources' Marcellus Shale well permit for the site adjacent to their residence. Appellants argue that "but for" the water that East Resources is allowed to use under its approved WMP the well next to its residence could not be developed.

In their reply, Movants challenge the Appellants' "but for" approach to establish harm for several reasons.[6] Movants argue that this harm is too speculative, too remote in space and time from the Department's action to approve the WMP, and too broad to allow a challenge to East Resources' WMP.

[6] The Board finds that the Appellant's Notice of Appeal did include this type or genre of objection. *See* Notice of Appeal, Objection 4; *Angela Cres Trust v. DEP*, 2007 EHB 595, 600-01.

In order to establish standing in this appeal, "appellants must prove that (1) the action being appeal has had – or there is an objectively reasonable threat that it will have – adverse effects, and (2) the appellants are among those who have been – or are likely to be – adversely affected in a substantial, direct and immediate way". *Giordano v. DEP*, 2000 EHB 1184, 1185-86 *citing Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, 120 S. Ct. 693, 704-05 (2000); *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 346 A.2d 269, 280-83 (Pa. 1975); *Wurth v. DEP*, EHB Docket No. 98-179-MG, Slip Op. at 16-17 (Opinion and Order Issued February 29, 2000). As Judge Labuskes stated in *Giordano*, "[t]he first question expresses the Board's gatekeeper function; the Board will not allow a waste of resources on cases where there is no actual harm or credible threat of harm **to anybody** and, therefore no legitimate case or controversy. The Appellants are not required to prove their case on the merits but they must show that they have more than subjective apprehensions, and that the likelihood of adverse effects is not merely speculative." *Id* (emphasis in original).

There is no question that there are objectively reasonable threats of adverse effects that are associated with the Department's decision to approve a revision to East Resources' WMP to add the Allegheny River as an additional approved source of water for hydraulic fracturing of East Resources' Marcellus Shale wells permitted in McKean, Forest and Potter Counties. A cursory review of the Department's Instruction and Example Format for Water Management Plan for Marcellus Shale Gas Well Development[7] reveals that there are several types of "objectively reasonable threats" of adverse affects associated with a WMP that must be completed for every water source used for fracture stimulation of every Marcellus Shale well developed in the Commonwealth.

[7] East Resources used this example format to prepare the WMP revision under appeal here as evidenced by Exhibit B to the Joint Motion to Dismiss.

The dispute that the Board needs to resolve between the parties to answer the first *Giordano* question is the nature of the actual harm or the credible threat of harm that Appellants need to demonstrate. Movants take a narrow view and assert that harm or the credible threat of harm associated with the physical water withdrawal activity and the actual point of withdrawal from the Allegheny River are the only focus when determining whether the Department's decision presents a legitimate case or controversy. Because Movants assert that Appellants failed to assert any harm or credible threat of harm during discovery from the water withdrawal from the Allegheny River that the WMP revision authorizes, Movants believe that Appellants lack standing to file the appeal.

While conceding Movants' recitation of Appellants' lack of proximity to the new water withdrawal point, Appellants take a more expansive view of the type of harm or credible threat of harm that is needed to demonstrate standing. Appellants assert that a sufficient nexus exists between the new authorization to withdraw water from the Allegheny River and the use of such water at the East Resources' Marcellus Shale well site adjacent to their residence. Appellants believe they should be allowed to demonstrate harm or a credible threat of harm associated with the use of the water for hydraulic fracturing at the well site adjacent to their residence.[8]

The Board agrees with the Appellants that the Board needs to look beyond the mere withdrawal of water from the Allegheny River to determine whether there is harm or the credible threat of harm associated with the Department's challenged action to support Appellants' standing. The Board needs to evaluate the regulatory context of this decision to determine what types of harm or the credible threats of harm may be available to support Appellants' standing.

[8] Movants assert that Appellants failed to raise this harm in their Notice of Appeal and that they should not be allowed to amend their Notice now. The Board disagrees because the Appellants need not allege standing in their Notice of Appeal. *Cooley v. DEP*, 2004 EHB 554.

There is a clear regulatory nexus between the East Resources' Marcellus Shale well permit for the site adjacent to Appellants' residence and the revision to East Resources' WMP under appeal here. As the Department has stated "[e]xtracting natural gas from the Marcellus Shale formation requires both vertical and horizontal drilling, combined with a process known as 'hydraulic fracturing'". *See Marcellus Shale Fact Sheet*, *supra*, n. 1. Hydraulic fracturing requires large volumes of water, and large volumes of waste water are generated as part of the drilling process. To address the issues with hydraulic fracturing the Department has created new permit guidelines for drilling in the Marcellus Shale formation to establish consistent rules for water withdrawal, usage, treatment and disposal in all areas of the state. The requirement to have a WMP covering each Marcellus Shale well is a part of these additional requirements. Regardless of the location of the water source, the Department has decided that a WMP must be completed that covers any water source used for hydraulically fracturing each Marcellus Shale well project in the state.

As the motion to dismiss states, the revision to East Resources' WMP covers any of its Marcellus Shale wells located in McKean, Forest and Potter Counties. East Resources' WMP clearly lists these counties as the geographic scope of the WMP. Appellants' residence and the East Resources' Marcellus Shale Well permit site adjacent to it are in McKean County. Thus, the revision to the WMP under appeal here is the WMP that East Resources must have to hydraulically fracture the Marcellus Shale well adjacent to the Appellants' residence. The regulatory nexus could not be any clearer.

The narrow focus on harm that Movants propose is at odds with the much broader scope of the new additional permitting guidelines that the Department has developed and that are reflected in the approved WMP. The WMP is much more than just a water withdrawal plan, and

it is intended, according to the Department's statements, to cover water withdrawal, water usage, water treatment and disposal. The regulatory purpose of the additional WMP requirement is broader than just the water withdrawal from a particular source and it includes the use of water at permitted Marcellus Shale well sites. Putting East Resources' WMP revision in its regulatory context allows the Board to find that Appellants have affirmatively answered the first *Giordano* question.

The second question in *Giordano* focuses on the Appellants' interests to ensure that they have something to gain or lose as a result of the Board's decision. Having decided that the Board will take a broader view of the harm or the credible threat of harm resulting from the Department's decision to approve the revision to East Resources' WMP, it is clear from the facts of this appeal that Appellants have a direct, immediate and substantial interest in the Department's challenged action. It is undisputed that the Appellants reside in McKean County. It is undisputed that East Resources has received a well permit to develop a Marcellus Shale well on property adjacent to Appellants' residence located in McKean County. It is undisputed that the Department has created additional requirements for operators who want to develop Marcellus Shale wells in Pennsylvania, including a requirement to have an approved WMP for every well where the operator will conduct hydraulic fracture stimulation. It is undisputed that the Department approved a revision to East Resources' WMP to add the Allegheny River as a new water source for East Resources' Marcellus Shale wells in McKean, Forest and Potter Counties. The Appellants filed an appeal from this Department action, and this WMP covers the East Resources' Marcellus Shale well permit site that is located adjacent to Appellants' residence. There is no doubt that Appellants have standing to file an appeal of a well permit for a site that is adjacent to their residence. The revision to East Resources' WMP is also directly tied to this

well site adjacent to their residence and Appellants have standing to challenge the revision for the same reasons because the revision also covers all East Resources' well sites in McKean County.

The Board believes that part of the Movants' confusion concerning Appellants' standing results from their failure to fully appreciate the flexible nature of the regulatory mechanism that the Department created to allow it to regulate a Marcellus Shale well operator's withdrawal, usage, treatment and disposal of the large volumes of water needed for hydraulic fracturing of such wells. Although all water sources that are used for hydraulic fracturing must be covered by a WMP, the Department does not require that a WMP tie particular wells to particular water sources. As East Resources' approved WMP provides, the plan covers any and all of its Marcellus Shale well permits in McKean, Forest and Potter Counties. This operational flexibility obviously benefits East Resources since it decides when to use a particular source at a particular well site. Movants have mistakenly attempted to offensively use the operational flexibility, which the Department built into its regulatory program, to defeat Appellants' standing.

The Department and East Resources assert that it is too speculative to connect the East Resources' Marcellus Shale well permit with the challenged revision to its WMP to add the Allegheny River as a new water source. Because there is no certainty that water from the new water source will be used to hydraulically fracture the well adjacent to Appellants' residence, the Movants believe that the harm is too speculative to support Appellants' standing. Contrary to this assertion the connection between the revised WMP and Appellants' residence is clearly established and is not speculative. The connection between the two items is *elective* on East Resources' part and not speculative in any meaningful sense. Under the regulatory mechanism

to approve water sources to hydraulically fracture Marcellus Shale gas wells, East Resources has the flexibility to use any of the approved water sources in the geographic area covered by its approved WMP. East Resources will decide whether to use water from its new source at the well adjacent to Appellants' residence, and its ability to decide what water source to use should not defeat Appellants' standing. The operational flexibility that the Department built into its regulatory requirements does not preclude the Appellants from having standing.

There is another consideration that supports denial of the motion to dismiss on the standing issue. It is apparent to the Board that the Department created some of its additional requirements for Marcellus Shale well permits in a manner to provide some regulatory flexibility. The Board has in similar situations raised cautions in litigation concerning such types of mechanism because mechanisms that provide regulatory flexibility sometimes present due process concerns. *Army for a Clean Environment v. DEP*, 2006 EHB 698, 702 (General permits are a valuable regulatory device, but they should not be used as a tool for whittling down constitutional rights). The umbrella-like WMP, that identifies all approved water sources but does not tie particular water sources to particular well permits, may present similar due process concerns if a person who has standing to challenge a particular Marcellus Shale well permit does not also have standing to challenge the revised WMP that covers that well permit.

There is one final point to mention regarding standing. As Judge Renwand stated "[t]he purpose of the standing doctrine is not to evaluate whether a particular claim has merit but rather to determine whether an appellant is the appropriate party to file an appeal from an action of the Department." *Ziviello v. DEP*, 2000 EHB 999, 1005 *citing Valley Creek Coalition v. DEP*, 1999 EHB 935, 944. In addressing the Appellants' basis for standing the Board has not evaluated

whether any of their claims have merit, but the Board has simply decided that they have standing to raise objections and file an appeal.

Accordingly we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

JAN HENDRYX AND CHRISTINE HENDRYX	:	
	:	
v.	:	**EHB Docket No. 2010-144-M**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and EAST RESOURCES, INC., Permittee	:	

ORDER

AND NOW, this 18th day of March, 2011, upon consideration of the Department's and Permittee's motion to dismiss and the Appellants' response thereto, it is hereby ordered that the motion to dismiss is **denied**.

ENVIRONMENTAL HEARING BOARD

RICHARD P. MATHER, SR.
Judge

DATED: March 18, 2011

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MARYANNE WESDOCK
ACTING SECRETARY TO THE BOARD

ENVIRONMENTAL INTEGRITY PROJECT AND CITIZENS COAL COMPANY	:	
v.	:	**EHB Docket No. 2009-039-R (Consolidated with 2009-006-R)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and ALLEGHENY ENERGY SUPPLY COMPANY, Permittee	:	**Issued: March 21, 2011**

OPINION AND ORDER ON MOTION FOR SUMMARY JUDGMENT

By Thomas W. Renwand, Chairman and Chief Judge

Synopsis:

Where a power company constructs a flue gas desulfurization scrubber system and associated wastewater treatment plant ("scrubber facility"), the scrubber facility is a "new discharger" under the Clean Water Act. Therefore, the Department may impose effluent limits in the power company's NPDES permit to properly meet water quality standards. The hearing on the merits will focus on whether the Department imposed the proper limits.

OPINION

Presently before the Pennsylvania Environmental Hearing Board (the "Board") in this consolidated case is the Motion for Summary Judgment filed by

Allegheny Energy Supply Company ("Allegheny Energy"). Allegheny Energy argues that as a matter of law the Pennsylvania Department of Environmental Protection (the "Department") improperly categorized its newly constructed flue gas desulfurization scrubber system and associated wastewater treatment plant (collectively, the "scrubber system" or the "scrubber facility") as a "new discharger" under the applicable regulations. In its view, the scrubber system should have been classified as an "existing source." Allegheny Energy argues that the Department then incorrectly imposed effluent limits for Total Dissolved Solids and Sulfates in its NPDES Permit.

Allegheny Energy contends that there are no issues of genuine material fact which would prevent us from granting its Motion for Summary Judgment. It requests that we declare as a matter of law that it is not a "new discharger," that it is an "existing source," and that the Department had no basis to impose what Allegheny Energy calls stringent effluent limits for Total Dissolved Solids and Sulfates in its NPDES Permit. It requests that we remand the permit to the Department so it can be appropriately revised.

The Department, together with the Interveners, Environmental Integrity Project and Citizens Coal Council, vigorously oppose Allegheny Energy's Motion for Summary Judgment. The Department contends that the scrubber system makes Allegheny Energy a "new discharger" rather than an "existing source." However,

for the purposes of our deciding the Motion for Summary Judgment, the Department argues this issue is a legal red herring as its action was required based on the water quality of the Monongahela River, to impose effluent limits for Total Dissolved Solids and Sulfates in Allegheny Energy's Amended NPDES Permit (the "Permit" or "Amended Permit") regardless of whether Allegheny Energy's new scrubber facility is characterized as a "new discharger" or "existing source."

The Interveners claim Allegheny Energy's Motion is without merit. They contend that, under the Clean Water Act and its regulations, the scrubber facility at Allegheny Energy's Hatfield Ferry Power Station is a "new discharger" and the Department lawfully imposed the appropriate effluent limits in Allegheny Energy's NPDES Permit.

Following the filing of Allegheny Energy's Motion for Summary Judgment the parties filed voluminous papers setting forth their respective positions and arguments in great detail. We have carefully and fully reviewed this mountain of paper. Their briefs and filings have maintained the exceedingly high standards of excellence that counsel have set in this case since it was filed in 2009. The Board further explored the issues with counsel during an extensive and spirited oral argument held in Pittsburgh on Wednesday, March 9, 2011.

Legal Standard for Summary Judgment

The Board can only grant summary judgment when the pleadings,

depositions, answers to discovery, admissions and affidavits, if any, show that there is no genuine issue of material fact and that the moving party, in this case Allegheny Energy, is entitled to judgment as a matter of law. *Adams v. Department of Environmental Protection,* 687 A.2d 1222 (Pa. Cmwlth. 1997); *Bethenergy Mining v. Department of Environmental Protection,* 676 A.2d 711, 714n.7 (Pa. Cmwlth. 1996). The Pennsylvania Environmental Hearing Board will only grant such a motion where it determines that the right to summary judgment is clear and free from doubt. *Martin v. Sun Pipe Line Company*, 666 A.2d 637 (Pa. 1995).

In making our determination, we must "view the record in the light most favorable to the nonmoving parties, and all doubts as to the presence of a genuine issue of material fact must be resolved against the moving party." *Department of Environmental Protection v. Weiszer,* 2010 EHB 483, 485. We may only enter summary judgment when "the facts are so clear that reasonable minds cannot differ." *Atcovitz v. Gulph Mills Tennis Club, Inc.,* 812 A.2d 1218, 1221 (Pa. 2002); *Lyman v. Boonin,* 635 A.2d 1029, 1032 (Pa. 1993).

Allegheny Energy's Scrubber System is a "New Discharger"

Allegheny Energy contends that the issue regarding whether its scrubber system is a "new discharger" or an "existing source" is a question of law based on undisputed facts. The Department and Interveners argue that questions of material

fact prevent us from ruling on this issue at this stage of the proceedings. We agree with Allegheny Energy that this is a question of law upon which we can rule now.

We part company with Allegheny Energy, however, in ruling that the new scrubber system is a "new discharger." Therefore, the Pennsylvania Department of Environmental Protection correctly characterized the new scrubber facility as a "new discharger."

> A "new discharger" is "any building, structure, facility, or installation:"
> (a) From which there is or may be a "discharge of pollutants;"
> (b) That did not commence the "discharge of pollutants" at a particular "site" prior to August 13, 1979;
> (c) Which is not a "new source;" and
> (d) Which has never received a finally effective NPDES permit for discharges at the "site."

40 C.F.R. Section 122.2; 25 Pa. Code Section 92a.2.

We specifically reject Allegheny Energy's contention that its facility does not fall within the definition of a "new discharger" because it discharges at an existing outfall on the Monongahela River. We agree with the Interveners and the Department that Allegheny Energy's focus on the discharge site as opposed to the new scrubbing facility ignores the plain language of the regulatory definition, which expressly states that where, as here, a "new discharger" is any "building, structure, facility or installation… which has never received a finally effective

NPDES permit…." 40 C.F.R. Section 122.2.

We also agree with the Department and the Interveners that Allegheny Energy's position cannot be reconciled with either the plain language of the regulations or the overarching intent of the Clean Water Law. If we adopted Allegheny Energy's reasoning, a NPDES permittee could convert any number of new facilities into "existing sources" simply by diverting their discharges into an existing outfall. This would substantially gut the Congressional goal to eliminate pollutant discharges to the waters of the United States as quickly as possible. *See* 33 U.S.C. Section 1251(a) ("The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.") Furthermore, "it is the national goal that the discharge of pollutants into navigable waters be eliminated by **1985**." 33 U.S.C. Section 1251(a)(1). (emphasis added). Most importantly, the regulations require that "new dischargers" "must install and have in operating condition…pollutant control equipment to meet the conditions of its permits before beginning to discharge." 40 C.F.R. Section 122.2 (d)(4). In other words, "new dischargers" must comply immediately with all applicable effluent limits. "Existing sources," on the other hand, may take up to five years to comply with effluent limitations. *See* 40 C.F.R. Section 122.47(a); 25 Pa. Code Section 92a.51.

Based on our ruling on the first issue pertaining to "new discharger" we do

not need to discuss the second issue of permit standards at this juncture. We, therefore, will issue an Order denying Allegheny Energy's Motion for Summary Judgment. The hearing on the merits will focus on the standards the Department imposed in the NPDES permit in question.

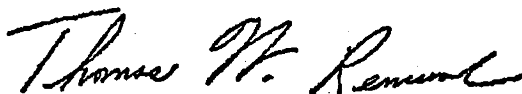
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ENVIRONMENTAL INTEGRITY PROJECT AND CITIZENS COAL COUNCIL	:	
v.	:	**EHB Docket No. 2009-039-R (Consolidated with 2009-006-R)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and ALLEGHENY ENERGY SUPPLY COMPANY, Permittee	:	

ORDER

AND NOW, this 21st day of March 2011, Allegheny Energy Supply Company's Motion for Summary Judgment is **denied**.

ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Chairman and Chief Judge

DATE: March 21, 2011

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MARYANNE WESDOCK
ACTING SECRETARY TO THE BOARD

SALVATORE PILEGGI, Appellant and SUSAN PILEGGI, Intervenor	:	
v.	:	**EHB Docket No. 2009-044-C**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and NEWTON TOWNSHIP, Permittee	:	**Issued: March 21, 2011**

ADJUDICATION

By Michelle A. Coleman, Judge

Synopsis:

The Board dismisses an appeal where the Appellant has failed to establish by a preponderance of the evidence that the Department acted contrary to the law when it denied the Appellant's planning module as incomplete pursuant to 25 Pa. Code § 71.53(d).

FINDINGS OF FACT

1. The Department is the agency of the Commonwealth with the duty and authority to administer and enforce the Pennsylvania Sewage Facilities Act, Act of January14, 1966 P.L. (1965) 1535, as amended, 35 P.S. § 750.1, *et seq.* ("Sewage Facilities Act"); the Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. § 691.1, et seq. ("Clean Streams Law"); Section 1917-A Administrative Code of 1929, Act of April 9, 1929, P.L. 177, as amended, 71 P.S. § 510-17 ("Administrative Code"); and rules and regulations promulgated thereunder.

2. Appellant, Salvatore Pileggi ("Appellant" or "Pileggi"), owns a ten-lot subdivision on sixty-five acres that is the subject of the sewage facility planning module application under appeal ("Site"). N.T. 239.[1]

3. The Intervenor is Susan Pileggi, the Appellant's spouse. N.T. 6.

4. The Permittee is Newton Township ("Township") located in Lackawana County, Pennsylvania. N.T. 6.

5. On October 31, 2008 Pileggi hand delivered to the Township a proposed planning module to revise the Township's Official Sewage Facilities Plan for the construction of a sewage treatment facility for the Site. Department Exhibit ("DEP Ex.") 5; Appellant Exhibit ("App. Ex.") 22; N.T. 31.

6. On November 12, 2008 Newton Township sent Pileggi a letter stating that he owed outstanding fees and required him to put the fees in escrow before the Township would commence review of the submission stating, "$1,450.00 to be put into escrow for the review of the plans that you recently submitted before they can be reviewed by Milnes Engineering." DEP Ex. 6.

7. On November 14, 2008 Pileggi sent a letter to the Township stating that he "dispute[d] the Township engineering fees." DEP Ex. 7.

8. The Department received a copy of the November 14, 2008 letter and Department representatives offered to meet with Pileggi and the Township. N.T. 152-53.

9. On January 16, 2009 representatives from DEP and the Township met with Pileggi to discuss the planning module. DEP Ex. 11.

10. Pileggi had his planning module at the January 16, 2009 meeting but did not

[1] The citations to the notes of testimony will be cited as "N.T.".

submit it to any Department representatives. N.T. 249-52.

11. At the January 16, 2009 meeting the Department informed Pileggi that the October 31, 2009 submission to the Township was technically deficient and that the planning module had not been deemed approved at the municipal level. N.T. 153, 161-62, 165-55, 177, 187, 260; App. Ex. 22.

12. On February 23, 2009 Pileggi met with representatives of the Department and submitted his planning module to the Department because he did not view the module as already deemed approved after the January 16, 2009 meeting. N.T. 253-54, 261; App. Ex. 24.

13. Within 10 days of receipt of the planning module the Department determined that the February 23, 2009 submission was incomplete. DEP Ex. 1.

14. On March 6, 2009 the Department sent a denial letter to Pileggi stating that there was no documentation that the planning module was submitted to the appropriate planning agencies as required by Section 71.53(d)(2) and there was no proof of public notice of the planning module as required by Section 71.53(d)(6). N.T. 160-62; DEP Ex. 1; *see also* 25 Pa. Code § 71.53(d)(2) and (d)(6).

15. There was no proof of comments having been received from local planning agencies accompanying the February 23, 2009 planning module submitted to the Department as required by 25 Pa. Code § 71.53(d)(2). App. Ex. 24; N.T. 160-62.

16. There was no proof of public notice accompanying Pileggi's February 23, 2009 planning module submission to the Department as required by 25 Pa. Code § 71.53(d)(6). App. Ex. 24; N.T. 160-62.

17. After the Department's March 6, 2009 denial letter Pileggi sent a notification to *The Abbington Journal* on April 1, 2009 stating there was deemed approval at the Township.

App. Ex. 16.

18. A one day hearing was held before the Honorable Michelle A. Coleman on Monday, June 14, 2010.

DISCUSSION

Before the Board is an appeal of the Department's denial of a planning module that proposes a revision to Newton Township's Official Sewage Facilities Plan. The Department denied the planning module on March 6, 2009 because it was incomplete.

The Appellant bears the burden of proof to establish his case by a preponderance of the evidence. 25 Pa. Code § 1021.122(c). "Preponderance of the evidence has been defined by the Board 'to mean that the evidence in favor of the proposition must be greater than that opposed to it.'" *Don Noll v. DEP*, 2005 EHB 505, 515, *citing Bethenergy Mines, Inc. v. DER*, 1994 EHB 925, 975; *Midway Sewage Auth. v. DER*, 1991 EHB 1445, 1476. Here, Pileggi must provide enough evidence to establish that the Department acted contrary to the law when it denied the planning module. The Board finds that he did not meet his burden in this case, in fact the Department's case clearly establishes that the planning module was incomplete upon submission and rightfully denied in accordance with the law.

Sewage Facilities Act

The Pennsylvania Sewage Facilities Act, Act of January 24,1966, (1965) P.L. 1535, as amended, 35 §§ P.S. 750.1-750.20a, was enacted "to ensure public health, safety and welfare of the citizens by providing for a technically competent, integrated and coordinated system of sanitary sewage disposal." 35 P.S. § 750.3. The Sewage Facilities Act, in part, requires every municipality to adopt an official plan subject to approval by the Department. 35 P.S. §750.5. The Department has the power and duty under the Sewage Facilities Act to approve or deny official

plans in accordance with the Department's regulations. 35 P.S. § 750.10(2).

When a developer requests a revision to a municipality's official plan for a new land development that developer must complete the Department's Sewage Facilities Planning Module and submit it to the municipality for action. It is then the responsibility of the municipality to act upon revisions for new land development. 25 Pa. Code § 71.53(a). After submission at the municipal level, the proposal must be submitted to the Department wherein the Department will conduct a completeness review to determine if the applicant has provided all the information required by 25 Pa. Code § 71.53(d). Section 71.53(d) provides in pertinent part:

> (d) For purposes of this section, no plan revision for new land development will be considered complete unless it includes the following:
>
> . . . .
>
> (2) Comments by appropriate official planning agencies of a municipality, including a planning agency with areawide jurisdiction if one exists, under the Pennsylvania Municipalities Planning Code (53 P. S. § § 10101—11202) and the existing county or joint county department of health. Evidence that the sewage facilities planning module has been before these agencies for 60 days without comment shall be sufficient to satisfy this paragraph.
>
> . . . .
>
> (6) Evidence documenting newspaper publication. The newspaper publication may be provided by the applicant or the applicant's agent, the municipality or the local agency by publication in a newspaper of general circulation within the municipality affected. When an applicant or an applicant's agent provides the required notice for publication, the applicant or applicant's agent shall notify the municipality or local agency and the municipality and local agency will be relieved of the obligation to publish. The newspaper notice shall notify the public where the plan is available for review and indicate that all comments regarding the proposal shall be sent to the municipality within which the new land development is proposed. . . .

25 Pa. Code § 71.53(d)(2) and (6). Accordingly, Section 71.54(b) provides that a proposed plan revision for new land development will not be approved by the Department unless it contains the information provided in the above cited section, 71.53(d).

Proposed Planning Module

On October 31, 2008 Pileggi submitted a proposed planning module to revise Newton Township's Official Plan to allow for his ten-lot subdivision. However, on November 12, 2008 Newton Township sent Pileggi a letter stating that he owed outstanding fees and required him to put the fees in escrow before the Township would commence review of his submission stating, "$1,450.00 [must] be put into escrow for the review of the plans that you recently submitted before they can be reviewed by Milnes Engineering." DEP Ex. 6. Pileggi responded with a letter to the Township on November 14, 2008 stating that he "dispute[d] the Township engineering fees." DEP Ex. 7.

The Department was copied on the correspondence between Pileggi and the Township. N.T. 152. In addition, Pileggi called the Department in reference to the problems he was having with the submission of his module. N.T. 248. The Department scheduled a meeting on January 16, 2009 to meet with Pileggi and the Township representatives. N.T. 152-53; DEP Ex. 11. Pileggi testified that he brought his planning module to the meeting on January 16, 2009.[2] The Department informed Pileggi at the meeting that his planning module submitted to the Township on October 31, 2008 was technically deficient.[3] Pileggi also was told that the required

[2] It should be pointed out that Pileggi asserts that he first attempted to submit the planning module to the Department on January 5, 2009 during a telephone conversation with a Department representative. Appellant's Post Hearing Brief, p. 10.

[3] Mr. Fritz of the Department informed Pileggi that: his Pennsylvania Natural Diversity Index was deficient because it was only for 0.2 acres instead of the entire project area (N.T. 190); it was unclear as to how many dwelling units would be accommodated (N.T. 190-91); and, his consultation with the Pennsylvania Historic Museum Commission was deficient (N.T. 192).

completeness checklist was missing, so the submission lacked the required approval at the municipal level. Then Pileggi was told that if he was going to submit the module in this form it would be denied. N.T. 153, 161-62, 165-66, 177, 187.

On February 23, 2009 Pileggi met with Department representatives and submitted his planning module for review. N.T. 253. The Department conducted its completeness check within 10 days and determined that Pileggi's module was incomplete. On March 6, 2009 the Department denied Pileggi's proposed planning module for two reasons: (1) there was no documentation that the planning module was submitted to the appropriate official planning agencies as required by 25 Pa. Code § 71.53(d)(2); and (2) there was no documentation that public notice and opportunity to comment had been provided pursuant to 25 Pa. Code § 71.53(d)(6). DEP Ex. 1. The denial letter also contained a line that the "Department does not agree that the October 31, 2008 planning module was deemed approved by Newton Township since the sewage facilities planning module is not complete for the reasons set forth above." DEP Ex. 1. Had the planning module been submitted to the appropriate agencies, either the agencies or the Township would have published notice of the plan in a local newspaper, thereby providing both the public notice and the opportunity to comment. In an attempt to cure his incomplete submission Pileggi sent a notification to *The Abbington Journal* on April 1, 2009 alleging that there was deemed approval by the Township, however the Department had already denied the planning module on March 6, 2009. App. Ex. 16.

The Board's jurisdiction is to review final actions of the Department. *See* 35 P.S. § 7514(a); 25 Pa. Code § 1021.2. Here, the Board must decide whether or not the Department erred when it denied Pileggi's February 23, 2009 planning module submission. Pileggi has made many

arguments regarding the alleged failures at the Township level.[4] We understand Pileggi's frustration with the Township's handling of his submission, but our jurisdiction under this matter is limited to whether or not the Department acted contrary to the law in denying the planning module. The Department's completeness review indicated that there were two things missing from the planning module and rightfully denied it. We do not need to even discuss whether there was approval at the Township level in this Adjudication. Even if there had been deemed approval at the Township level, the Department would still have been correct in denying the planning module submission as incomplete, since it was deficient under the requirements of Section 71.54(b).

After a hearing on the merits, the Board finds that the submission made to the Department on February 23, 2009 was incomplete and the Department could not approve the planning module as submitted. The Department informed Pileggi of the deficiencies within 10 days of his submission in accordance with the law. Therefore, we find that Pileggi has not met his burden of establishing that the Department erred when it denied the Appellant's planning module based on two portions of missing information.

CONCLUSIONS OF LAW

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

---

[4] The Township disagrees stating that it sent a letter on November 12, 2008 informing Pileggi that it would not review his module without his submission of fees in escrow. Pileggi then responded with a letter disputing the fees and arguing that the Township was still legally required to conduct a review of his module. Again, the fee dispute is not something we need to consider or decide in order to determine whether or not the Department acted contrary to the law when it denied the planning module as incomplete.

2. Pileggi has the burden of proof in this appeal and in order to sustain the burden of proof, Pileggi must show by a preponderance of the evidence that the Department abused its discretion because its action was not reasonable, supported by the facts, or in accordance with law.

3. Pileggi failed to establish by a preponderance of the evidence that the Department abused its discretion when it determined that was no proof of opportunity to comment by planning agencies accompanying the February 23, 2009 submission.

4. Pileggi failed to establish by a preponderance of the evidence that the Department abused its discretion when it determined that there was as no proof of public notice accompanying the February 23, 2009 submission.

5. The Department acted reasonably and lawfully when it denied Pileggi's February 23, 2009 planning module submission as incomplete.

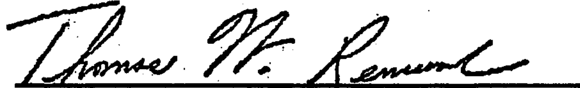
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

SALVATORE PILEGGI, Appellant and SUSAN PILEGGI, Intervenor	:	
v.	:	**EHB Docket No. 2009-044-C**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and NEWTON TOWNSHIP, Permittee	:	

ORDER

AND NOW, this 21st day of March, 2011, it is hereby ordered that this appeal is **dismissed.**

ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Chairman and Chief Judge

MICHELLE A. COLEMAN
Judge

BERNARD A. LABUSKES, JR.
Judge

RICHARD P. MATHER, SR.
Judge

DATED: March 21, 2011

c: **DEP Bureau of Litigation:**
Connie Luckadoo, Library

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MARYANNE WESDOCK
ACTING SECRETARY TO THE BOAR

BARNSIDE FARM COMPOSTING FACILITY	:	
	:	
v.	:	**EHB Docket No. 2010-187-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: March 24, 2011**

OPINION AND ORDER ON PETITION TO INTERVENE

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board grants a township's petition to intervene where the township seeks to represent its interests in an appeal of a permit suspension where the permitted facility is located within the township.

OPINION

Barnside Farm Composting Facility LLC ("Barnside") operates a composting facility in Lower Salford Township, Montgomery County. Barnside operates pursuant to a determination by the Department of Environmental Protection (the "Department") that General Permit No. WMGM017 authorizing composting operations is applicable to Barnside's operation. Barnside filed this appeal to challenge the Department's suspension of its authority to operate under the general permit and order directing it to remove all waste materials other than yard waste from the facility. Lower Salford Township (the "Township") has now filed an unopposed petition to intervene generally in support of the Department's order.[1] The Township opposes continued

[1] The Department's answer to the petition stated that it does not oppose the Township's intervention.

composting at the site.

As we have stated previously, "[i]t does not take much to be able to intervene in Board proceedings." *TJS Mining v. DEP*, 2003 EHB 507, 508. Under the Environmental Hearing Board Act, 35 P.S. § 7514(e), "[a]ny interested party may intervene in any matter pending before the board," where a petitioner's interests are "substantial, direct and immediate." *See CMV Sewage Co. v. DEP*, 2010 EHB 82, 84; *Elser v. DEP*, 2007 EHB 771, 772; *see generally* 25 Pa. Code § 1021.81 (requirements for intervention).

Where harm or risk of harm to a municipality's environment arises, "[t]he environment which forms a part of the physical existence of the municipality or county has been altered and immediate attention must be given to the changed character if the local government is to properly discharge its duties and responsibilities." *Franklin Township v. DER*, 452 A.2d 718, 722 (Pa. 1982). "Whatever affects the natural environment within the borders of a township or county affects the very township or county itself." *Id* at 720. Thus, it will be the rare case indeed where a host municipality has anything less than a substantial, direct and immediate interest in an appeal relating to a facility within its borders.

The Township clearly meets the requirements for intervention in this appeal. The Barnside facility is located within the Township and impacts that Barnside's activities are alleged to have on the surrounding environment may affect the Township and its residents. In the same way that the Pennsylvania Supreme Court found that Franklin Township had an interest in the solid waste facility within its borders, it is appropriate for the Township to represent its interests here.

Accordingly, we issue the Order that follows.

Barnside has not chosen to respond to the Township's petition within the time provided by rule. *See* 25 Pa. Code § 1021.81.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

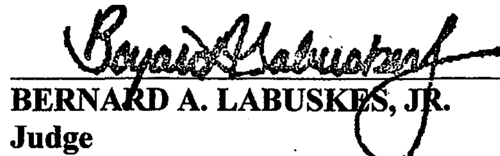
BARNSIDE FARM COMPOSTING FACILITY	:	
	:	
v.	:	**EHB Docket No. 2010-187-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 24th day of March, 2011, it is hereby ordered that Lower Salford Township's petition to intervene is **granted**. The caption in this matter shall be revised as follows and shall appear on all future filings with the Board:

BARNSIDE FARM COMPOSTING FACILITY	:	
	:	
v.	:	**EHB Docket No. 2010-187-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and LOWER SALFORD TOWNSHIP, Intervenor	:	

ENVIRONMENTAL HEARING BOARD



BERNARD A. LABUSKES, JR.
Judge

DATED: March 24, 2011

c: **DEP Bureau of Litigation:**
Connie Luckadoo - Library

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MARYANNE WESDOCK
ACTING SECRETARY TO THE BOAR

JIM LYONS AND MARY JO TAKACS	:	
	:	
v.	:	**EHB Docket No. 2009-099-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and ST. CLAIR RESORT DEVELOPMENT, LLC, Permittee	:	**Issued: March 29, 2011**

ADJUDICATION

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board upholds the Department's issuance of a permit for a boat dock. The record developed before the Board shows that the Department reached the correct conclusion that the dock will not have a significant impact on safety or protection of life, health, property, or the environment.

FINDINGS OF FACT

Stipulated Facts[1]

1. The Pennsylvania Department of Environmental Protection (the "Department") is the agency of the Commonwealth with the duty and authority to administer and enforce the Dam Safety and Encroachments Act, 32 P.S. §§ 693.1 *et seq.* (the "DSEA"), the Clean Streams Law, 35 P.S. §§ 691.1 *et seq.*, Section 1917-A of the Administrative Code of 1929, 71 P.S. § 510-17,

[1] The following findings are derived from the parties' joint stipulations of fact, which we accepted for inclusion in the record at the beginning of the hearing on the merits. (Notes of Transcript, August 18, 2010 page 11 ("T. (8/18) 11").)

and the rules and regulations promulgated under those statutes. (Joint Stipulation of the Parties Nos. ("Stip.") 1-3.)

2. James H. Lyons and Mary Jo Takacs are individuals who own properties on the lake in the Borough of Indian Lake, Somerset County. (For convenience of reference Lyons and Takacs shall be collectively referred to as "Lyons" unless otherwise noted.) (Stip. 4-7.)

3. The Permittee, St. Clair Resort Development, LLC ("St. Clair"), is a Pennsylvania limited liability company that obtained a permit to build a boat dock on Indian Lake. (Stip. 8.)

4. Indian Lake is a "U" or "horseshoe" shaped lake consisting of approximately 512 acres that has approximately 124,080 feet or 23.5 miles of shoreline. The normal elevation pool of Indian Lake is approximately 2,280 feet above sea level. (Stip. 11.)

5. Indian Lake was constructed in 1962-63 and is a private, man-made lake that is primarily open to recreational activities exclusive to Borough property owners and their friends, family, and guests. (Stip. 12.)

6. On or about December 12, 1974, Indian Lake Development Company, Inc. conveyed Indian Lake to the Borough of Indian Lake by a deed recorded with the Somerset County Recorder of Deeds at Deed Book Volume 775, Page 303. (Stip. 13.)

7. On or about August 16, 2007, the Borough issued a Boat Dock Easement to St. Clair authorizing St. Clair's use of a certain portion of Indian Lake for constructing, erecting, and maintaining boat docks. (Stip. 14.)

8. Currently, there are approximately 400 boat docks on Indian Lake. (Stip. 15.)

9. On or about January 27, 2009, St. Clair submitted an "Application for Small Projects Permit" to the Department. The Department received the application and designated it Application Number E56-349. (Stip. 18.)

10. St. Clair proposed to operate and maintain an existing commercial docking facility and to expand, operate, and maintain that facility by installing a total of 40 docking slips including 16 personal watercraft mooring spaces. (Stip. 19.)

11. On June 12, 2009, the Department issued Permit No. E56-349, a Water Obstruction & Encroachment Permit, Small Project to St. Clair. (Stip. 20.)

12. The Department issued the permit authorizing St. Clair to:

> Operate and maintain an existing commercial docking facility, authorized by GP 115608206 and to expand, operate and maintain that facility by installing additional docking slips. The extension is approximately 220 feet long and extends approximately 75 feet from the shore line. The project is located along the eastern edge of Indian Lake in Indian Lake Borough, Somerset County, Pennsylvania (Central City, Pennsylvania Quadrangle, 7.15"N, 15.2"W, Latitude 40° 2'21", Longitude 78° 51'31").

(Stip. 21.)

13. The dock extends 65 feet from the shoreline and 300 feet along the width of the St. Clair property. (Stip. 22.)

14. Jamie Detweiler was the Department's reviewing biologist and Charles Colbert was the Department's reviewing engineer for the permit. Their recommendations and comments on the issuance of the permit were reviewed by Chris Kriley, Section Chief, Permitting and Technical Services, who in turn made a recommendation for permit issuance to Rita Coleman, Watershed Management Program Manager, who executed the permit on behalf of the Department. (Stip. 28.)

15. The most current Department Water Obstruction & Encroachment application packet (3920-BK-DEP2175) (Rev. 10/2009) provides instructions for small project applications on page 4. (Stip. 31.)

16. Page 4 directs applicants to apply for one of either two types of permits, a "Small Project" or a "Standard" Permit, assuming the applicant does not qualify for a waiver of a permit or a general permit. (Stip. 32.)

17. As part of its small projects application submission, St. Clair submitted notifications of the application to the municipalities of Indian Lake Borough and the Somerset County Commissioners including a site plan, location map, project narrative and General Information Form. (Stip. 36.)

18. By letter of February 9, 2009, the Indian Lake Zoning Officer, Dean Snyder, corresponded with the Department's reviewing engineer, Charles Colbert. The letter confirmed that Borough Ordinance #144 was currently in effect and allowed commercial docks to be constructed in the location St. Clair had requested. Also, the officer advised that the ordinance was in legal proceedings and awaiting a court ruling. (Stip. 37.)

19. On March 21, 2009, the Pennsylvania Fish and Boat Commission ("PFBC") commented on the permit application. (Stip. 38.)

20. By letter of April 7, 2009, the Chief, Regulatory Branch, United States Army Corps of Engineers advised St. Clair that a Department of Army Permit would not be required for the project. (Stip. 39.)

21. Special Condition Paragraph 2 on page 5 of the permit states:

> This permit does not relieve the permittee of the responsibility to comply with all local code and ordinances, nor does it confer any property rights not otherwise provided by state or federal law.

(Stip. 45.)

22. As a fisheries biologist for the Pennsylvania Fish and Boat Commission, Thomas Shervinskie reviews over 400 Chapter 105 water obstruction and encroachment permits

applications per year. Shervinskie asserts that it is the PFBC's practice to ask for mitigation on nearly all dock applications because of potential impacts to aquatic resources. Boat docks can impact physical habitats that are used for spawning, foraging, and/or refugia. The PFBC reviews permit applications on a statewide basis. (Factual Stipulations regarding testimony of Shervinskie ¶ 1.)

23. With respect to the permit at issue, Shervinskie recommended, consistent with the PFBC's practice, that the applicant mitigate for the loss of shallow water habitat impacted by the construction and use of the proposed commercial docking facility. He further recommended that the applicant consider implementation of fish improvement structures in appropriate lake habitat. (Shervinskie Stip. ¶ 2.)

24. In connection with his review, Shervinskie did not visit the site. He was not and is not aware of anything special about the area in question. For example, the habitat in that area does not support threatened or endangered species under the PFBC's jurisdiction. (Shervinskie Stip. ¶ 3.)

25. The PFBC's recommendation for approval of the permit was not contingent on mitigation. (Shervinskie Stip. ¶ 4.)

Additional Findings of Fact

26. St. Clair's permit application included a site plan, cross-sectional view, location map, project description, color photographs, and other information about the dock's construction and the operation of personal watercraft. (T. (8/18) 31, 150-152; Department Exhibits ("DEP Ex.") 1, 2, 3, 4, 5, 7, 8, 9, 20; St. Clair Exhibits ("St. C. Ex.") D, G.)

27. St. Clair's application complied with the pertinent regulations defining the required contents of a small project permit application. (T. (8/18) 150-52.)

28. The St. Clair dock has already been built. (T. (8/18) 158.)

29. St. Clair's permit application as supplemented in response to Departmental inquiries contained sufficient information for the Department to conclude that the dock should be evaluated as a small project. (T. (8/18) 28-37, 43-48, 49-54, 74-78.)

30. The Department conducted a thorough review appropriately commensurate with the fact that the dock is a small project with respect to all aspects of the permit application except with respect to the impact of the project on public safety. (T. (8/18) 28-37, 43-48, 49-54, 65-67, 74-78, 146-47, 175.)

31. The Department's review of the impact the project would have on public safety was limited to a determination of whether the dock will cause flooding and whether it will extend out so far that it will impede safe navigation on the lake. (T. (8/18) 36-37, 159-60, 176.)

32. Beyond considering the length of the dock, the Department did not evaluate whether the dock by virtue of its construction, design, or location would cause a safety hazard. (T. (8/18) 36-37, 159-60, 176.)

33. The Pennsylvania Fish and Boat Commission's Waterways Conservation Officer, Daniel McGuire, credibly testified that the dock does not stick out so far that it causes a safety hazard, but he did not evaluate whether the dock otherwise has a significant impact on public safety. (T. (8/19) 118-20, 125, 128.)

34. It has not been shown that the dock as designed, constructed, and located will have a significant adverse impact on public safety. The dock is not too long, the water is not too shallow, and personal watercraft can enter and exit the dock safely. (T. (8/18) 21-22, 34, 49-51, 58, 157, 161-62, 169, 171-72, 175; (8/19) 118.)

35. Although Lyon's boating-safety expert, Virgil Chambers, raised concerns regarding the safety of the dock, he was hesitant to suggest any specific changes and he strongly denied that he thought the Department should have denied the permit. (Lyons Exhibit ("L. Ex.") 80 p. 58, 60.)

36. Indian Lake can be congested with boaters, especially on warm-weather weekends and holidays, and that congestion, coupled with the lake's unusual shape, results in regular boater safety infractions and safety concerns (T. (8/19) 127-131, 141, 311-13, 317-19; (8/20) 25-32, 39, 66-67; L. Ex. 80), but there is no credible evidence that the St. Clair dock contributes in any material way to those congestion-related safety concerns.

37. Jamie Detweiler, the Department's expert biologist, credibly testified that neither the dock itself nor the use thereof will have a significant impact on the environment. (T. (8/18) 37, 42-43, 53, 57-59, 86.)

38. Detweiler's opinion is based upon, *inter alia*, the minimally invasive nature of the dock construction, the somewhat rocky substrate in the vicinity of the dock, and the relatively miniscule contribution that the dock has in relation to the heavy use of the lake. (T. (8/18) 37, 42, 53, 57- 59, 65.)

39. St. Clair's expert biologist, Thomas Johnston, credibly testified that the dock will not have a significant impact on the environment. (T. (8/19) 190-201.)

40. Johnston persuasively explained that the dock would have an insignificant impact because there will be minimal benthic macroinvertebrate disturbance, there is an absence of significant spawning habitat in the dock area, and there is an unlikelihood of harm to fish, turtles, or waterfowl. (T. (8/19) 200-04.)

41. Lyon's expert witness on biology, Mark McCleary, testified that personal watercraft using the dock will disturb fish and churn up sediment, which would cause suffocation of benthic invertebrates and fish egg development. (T. (8/20) 141-42.)

42. McCleary did not testify that there would be any long-term adverse impact or that the dock itself would cause any harm, and he did not consider the 400 other docks on the lake or the overall impact from heavy boat traffic on the lake. (T. (8/20) 134-147.)

43. McCleary's primary opinion was that the Department should have conducted a more thorough investigation. (T. (8/20) 144.) When asked whether he thought the Department had enough information to conclude that the docks would in fact have a significant adverse impact, McCleary said "no." (T. (8/20) 145.)

44. There was no appreciable loss of shallow water habitat as a result of the dock's construction. (T. (8/18) 43, 50, 52.)

45. The St. Clair dock has less of an impact on shallow habitat than most docks on the lake because the shoreline was left in a natural state, i.e., without dredging and a constructed seawall. (T. (8/18) 57, 63, 67, 82.) The St. Clair dock helps protect the shoreline from the wave action of passing boats. (T. (8/18) 84-85.)

46. The Department conducted an adequate investigation to ensure that the dock was not inconsistent with the Borough's zoning ordinance. (T. (8/18) 46-47; DEP Ex. 6; St. C. Ex. R; *see also Takacs & Lyons v. Indian Lake Borough ZHB*, 46 C.D. 2010 (December 16, 2010) (upholding zoning ordinance).)

47. The Department included a special condition in the permit, which reads as follows:

> This permit does not relieve the permittee of the responsibility to comply with all local codes and ordinances, nor does it confer any property rights not otherwise provided by state or federal law.

(DEP Ex. 2.)

48. The dock is built on riparian property owned by Indian Lake Borough with the permission of the Borough. (Stip. 13, 14; T. (8/18) 35-36, 82, 92, 160; DEP Ex. 1, 5, 19; St. C. Ex. A, B.)

49. The record does not support a finding that the dock extends into or in front of Takacs's riparian property or has any significant impact on her riparian rights. (T. (8/20) 108-09, 115-17.)

50. The Department conducted an adequate investigation to ensure that St. Clair did not have any ongoing violations and was not unwilling or unable to comply with the law at the time of permit issuance. (T. (8/18) 67-68, 86-88, 155, 168-69, 177, 191-92; DEP Ex. 26.)

51. The St. Clair dock will have an insignificant impact on safety and protection of life, health, property, and the environment. The Department did not err in issuing a permit for the dock. (FOF 1-50.)

DISCUSSION

No person may construct a water obstruction or encroachment such as a boat dock without first obtaining a permit from the Department under the Dam Safety and Encroachments Act ("DSEA"), 32 P.S. § 693.1 *et seq*. *See* 32 P.S. § 693.6. A permit application must be accompanied by complete maps, plans, specifications, test reports, and such other information as the Department may require to determine compliance with the DSEA. 32 P.S. § 693.8. The Department may issue a permit if it determines that the proposed project complies with the provisions of the DSEA and all other applicable laws and will adequately protect public health,

safety, and the environment. 32 P.S. § 693.9; 25 Pa. Code § 105.21. Any person aggrieved by the Department's permitting decision may appeal to this Board. 32 P.S. § 693.24(a). In an appeal by a permit applicant from a Department action concerning a DSEA permitting decision, the applicant has the burden of proving that there is "no reasonable basis" for the Department's action. 25 Pa. Code § 105.21(e). The burden is certainly no less stringent for a third party such as Lyons who appeals another person's permit.

There are two basic paths to obtaining a permit under the DSEA, depending upon whether a proposed project is a small project or a standard project. A small project is one that will have "an insignificant impact on safety and protection of life, health, property or the environment." 25 Pa. Code § 105.13(e). A permit application for a standard project can include such components as a stormwater management analysis, floodplain management analysis, risk assessment, alternatives analysis, mitigation plan, and impacts analysis. 25 Pa. Code § 105.13(d). In contrast, a permit application for a small project need only be accompanied by the following more limited information:

> (e) A permit application for small projects located in streams or floodplains shall be accompanied by the following information. This permit application may not be used for projects located in wetlands. If upon review the Department determines that more information is required to determine whether a small project will have an insignificant impact on safety and protection of life, health, property or the environment, the Department may require the applicant to submit additional information and processing fees required by this chapter.
>
> (1) *A site plan.* A site plan shall include:
>
> (i) The floodplains and regulated waters of this Commonwealth on the site, including wetlands, existing roads, utility lines, lots, other manmade structures, natural features such as slopes and drainage patterns, proposed structures or activities included in the project.
>
> (ii) The names of the persons who prepared the plan.
>
> (iii) The date and the name of applicants.
>
> (iv) A north arrow.

(2) *A cross sectional view.* A cross sectional view of the affected waters of this Commonwealth before and after the structure or activity is constructed.
(3) *A location map.* A map showing the geographic location of the project. U.S.G.S. topographic maps, FEMA maps or municipal maps are acceptable. ...
(4) *Project description.* A narrative of the project shall be provided which includes, but is not limited to:
    (i) A description of the proposed structure or activity.
    (ii) The project purpose.
    (iii) The effect the project will have on public health, safety or the environment.
    (iv) The project's need to be in or in close proximity to water.
(5) *Color photographs.* Color photographs of the proposed site shall be submitted. The photos shall accurately depict the project area and provide a relative scale of the project to the surrounding area and a map showing the location and orientation of each photograph.

25 Pa. Code § 105.13(e).

The Department has pointed out that 25 Pa. Code Subchapter H establishes a few additional requirements related to the construction of docks. 25 Pa. Code §§ 105.321-.351. The subchapter requires a permit applicant who proposes to build a dock to describe the exact location of the structure, a plan showing the dimensions of the structure and, if applicable, the dimensions of the mooring area, a plan indicating the relation of the structure and mooring area to the banks and channel and other water features, cross sections, the purpose of the structure and other information the Department may require. 25 Pa. Code § 105.331. If the dock is on or in front of riparian property not owned by the applicant, the applicant must furnish to the Department notarized and signed releases from the owners of the affected riparian property. 25 Pa. Code § 105.332.

Lyons is challenging the DSEA permit that the Department issued to St. Clair to build its new dock on Indian Lake. There was already a dilapidated dock in place but St. Clair wanted to

modernize the dock and expand it to 40 slips, 16 of which are for personal watercraft, i.e., jet skis. The dock has now been built and installed. It joins 400 other docks that were already in place on Indian Lake. Lyons has never argued that the dock cannot eventually be permitted. Rather, he argues that the Department should not have permitted the dock as a small project. Lyons argues that the Department did not have enough information to conduct a proper review, that the Department did not in fact conduct an adequate review, and that the Department, based upon that inadequate information and study, ultimately made an incorrect decision; namely, that the St. Clair dock could be permitted as a small project. The first two criticisms somewhat blend together and have limited relevance if we conclude in the final analysis that the Department ultimately arrived at the correct result. *See O'Reilly v. DEP*, 2001 EHB 19, 39-40, and 51. Nevertheless, we will address Lyons's arguments in turn.

The Permit Application

Lyons's first objection is that, as peculiar as it sounds, the Department should have required St. Clair to submit a standard permit application for its small project because, without a full-blown application, the Department could not make a rational determination of whether the project qualified as a small project. Thus, in Lyons's view, St. Clair should have been required to submit such components as an alternatives analysis, mitigation plan, and an impacts analysis for its small project.

Lyons's approach would read the distinction between standard and small projects completely out of the regulations. Although not framed as such, Lyons's position amounts to nothing less than an attack on the small-projects program as a whole. We reject this view. We see the bifurcated approach to permitting as a reasonable way to apportion limited resources based on risk. The purpose for creating reduced requirements for small projects is to save permit

applicants and permit reviewers the considerable time and expense associated with a full-blown application where such detailed information is simply not necessary. Lyons's approach would defeat that purpose. There would be no point to creating reduced application requirements for small projects if applicants for small projects were required to submit standard applications anyway.

There is no bright line distinguishing small projects from large projects. Deciding whether a particular project qualifies as a small project requires the exercise of some judgment and skill based upon experience. There is nothing that is necessarily improper in Department personnel basing their determination of whether a project qualifies as a small project on the application itself. Indeed, the regulations assume that that is how it will be done.

Lyons complains that permit applicants get to decide whether their projects are small projects, but that is not the case. An applicant may propose that its project is a small project, but the final determination of whether a project qualifies as a small project is not in the hands of the applicant; it is in the hands of the Department. If the Department's review of an application shows that additional information is necessary, either because the project does not qualify as a small project or because more information is needed to make that determination, the Department has the express authority to require that such additional information be submitted. 25 Pa. Code § 105.13(e). In fact, the Department did exactly that in this case.

The record shows that the Department had adequate information to conclude that the St. Clair dock not only qualified as a small project, but that it could be permitted as such as well. St. Clair's permit application contained location information, and an application completion checklist. It contained the General Information Form, which provided checklists for facility information, land use information, and coordination information. It contained a number of

notifications to municipalities and other parties as required by the regulations. It contained a site plan describing the project, a topographic location map, and a project narrative accompanied by photographs. It contained an environmental assessment form, a resource identification, a boat dock easement between Indian Lake Borough and St. Clair Resort Development, a letter to the mayor of Indian Lake regarding safety, and a commercial boat dock installation profile or cross-section. (DEP Ex. 20.)

Following a technical deficiency letter from the Department, St. Clair submitted a letter from Dean Snyder, the Borough Zoning Officer, and a description that in the area of the docks the water was three feet deep. The Department solicited comments from the Pennsylvania Fish and Boat Commission. (DEP Ex. 7.) Two Fish and Boat Commission employees commented on the project. Waterways Conservation Officer Daniel McGuire provided a three-sentence comment indicating that the project was controversial, and he would not recommend extending the dock any further than 65 feet from the shore. He also recommended that no ski course be set up in the area. McGuire neither approved nor disapproved the permit. Thomas Shrevinskie of the PFBC's Division of Environmental Services also provided comments. (FOF 21-25.) He did not object to the issuance of the permit.

St. Clair's application clearly satisfied the regulatory requirements for a small project permit. 25 Pa. Code § 105.13(e). The Department reasonably concluded that the information contained in the application as supplemented, coupled with the results of its own investigation, provided a sufficient basis for concluding that the project qualified as a small project.

The Department's Review of the Permit Application

Lyons makes the related but somewhat different argument that the Department conducted an inadequate review of the information that it did have. Lyons relies upon 25 Pa. Code §

105.14, which describes the Department's obligations when reviewing an application. For example, Section 105.14 requires the Department to consider potential threats to life and property, potential threats to safe navigation, the effect the project will have on the property and riparian rights of nearby landowners, the effect of the project on the ecology of the watercourse, and the effect the project might have on historical and natural landmarks.

As an initial matter, it is important to point out that Section 105.14 was not intended to expand, supplant, or replace the application requirements set forth in Section 105.13 and Subchapter H. Sections 105.13, 105.21, 105.14, and 105.321-.351 must be read *in pari materia. See* 1 Pa.C.S.A. § 1932 (provisions to be read *in pari materia* wherever possible). Although Section 105.14 does not specify separate procedures or review criteria for small projects, the Department's review of a small project under Section 105.14 may be based upon the contents of a small-project application as described in 105.13(e) and Subchapter H. Similarly, the Department's decision whether to issue or deny under Section 105.21 may be based on the application contents described in Section 105.13 and Subchapter H. As previously noted, if the Department finds that there is not enough information in the application to do what it needs to do under Section 105.14, it may insist upon more information.

The issue in this appeal is not so much whether the Department considered all of the potential threats listed in Section 105.14. The record shows that the Department gave at least some consideration to all of those threats. The real question is whether it gave the project the amount of consideration that it deserved. We find that the Department gave all of the issues listed in Section 105.14 the attention they deserved except for the impact the dock would have on public safety and safe navigation.[2] The Department gave due consideration to the impacts of the

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[2] "Safety" is defined as "[s]ecurity from the risk or threat of significant loss or injury or injury to life, health, property and the environment." 32 P.S. § 693.3; 25 Pa. Code § 105.1.

project on the environment, riparian rights, the permittee's compliance history, and local land use requirements. With respect to safety, however, the Department's effort fell short.

The Department's evaluation of whether the dock would pose a safety hazard focused exclusively on whether the dock protruded too far out into the lake and whether the dock would cause or exacerbate flooding.[3] However, other features of a dock may pose a threat to safety. Singling out dock length and flooding issues for exclusive consideration is arbitrary. The Department should have considered whether there was anything else about the construction, design, or location of the dock that might result in a significant adverse impact to public safety or safe navigation.

The Department argues that its limited review is justified because it should not be required to consider the impacts to safety that the *users* of the dock will have. It is true that there are limits to the Department's authority to consider all activity associated with an encroachment when reviewing some DSEA permits. *See Abod v. DEP*, 1997 EHB 872, 884; *Bernie Enterprises v. DEP*, 1996 EHB 239, 243; *Welteroth v. DER*, 1989 EHB 1017, 1024. *See also Angela Cres Trust v. DEP,* 2009 EHB 342, 363 (Our review of a DSEA permit "is limited to an examination of the permit and the work authorized by it.") However, if there is something about the construction, design, or location of the dock that will cause the users of the dock to in turn cause a significant safety hazard, the dock should not be evaluated as a small project. For example, Lyons has alleged the St. Clair dock by virtue of its design and location does not allow for safe exit and re-entry by the dock's users. This is a legitimate area of inquiry. The ability to

[3] There is no dispute that the dock will not cause or exacerbate flooding. The weight of the evidence supports the Department's conclusion that the stipulated length of the dock (65 feet) does not pose a hazard. (T. (8/18) 34, 49, 51, 157, 169; DEP Ex. 7). Lyons also claimed that water depth at the dock could be too shallow for the operation of personal watercraft. To the extent this claim goes to safety rather than effect on the environment, we find that the record does not support that the water is too shallow. (T. (8/18) 21-22, 58; (8/19) 118.)

leave a dock safely is no less significant than whether a dock extends out too far to allow for safe navigation.

We hasten to add that the Department is obviously not responsible for regulating all behavior of the people using the waterbody in which the encroachment is built. A dock permit cannot be denied simply because boaters using the dock may engage in inappropriate or illegal behavior unrelated to the construction of the dock. As Lyons's boating expert so elegantly put it, "You can't regulate stupidity." While the Department must consider the effect of the dock on users of the waterbody, including dock users, the Department's focus remains on the dock itself. If there is some aspect or feature of the dock that either directly or indirectly as a result of that aspect or feature poses a significant potential impact, it should not be evaluated as a small project.

The Department relies on *Welteroth v. DER*, 1989 EHB 1017, where we held that the Department's authority to review a permit application for a culvert does not extend to passing on the suitability of the design of the adjacent road. 1989 EHB at 1024. Under this reasoning, the Department should not (and did not) review the merits of the St. Clair resort, golf course, or townhouses. However, just as the Department was required to evaluate the design of the culvert itself in *Welteroth*, it was required to evaluate the design of the dock here. There is no reason why the Department should arbitrarily limit itself to two aspects of the encroachment's design (e.g. dock length and flooding hazard) if other design features pose a threat. That would be like saying the Department should have considered the size of a culvert in *Welteroth* but not whether it was placed at an appropriate location and angle to prevent flooding.

The Department's Decision to Issue a Permit

Safety

Lyons next turns to what we believe should be the central inquiry on the case; namely, whether the Department erred in concluding that the St. Clair dock will not in fact have a significant impact on safety and protection of life, health, property, and the environment. Lyons bears the burden of proof, 25 Pa. Code § 1021.122, and its burden is to show that there was "no reasonable basis" for issuing the permit, 25 Pa. Code § 105.21(e).

Lyons's argument raises the threshold question of whether we can decide the safety issue given our finding that the Department did not adequately consider the matter. In many and perhaps even most cases where the Department errs by conducting an insufficient or incorrect analysis, we remand the matter for further consideration. *See, e.g., Crum Creek Neighbors v. DEP*, 2009 EHB 548. We are not required to do so. Where, as here, the Department errs by conducting an inappropriate analysis or otherwise, we may substitute our discretion and decide the matter as we see fit if the record produced by our *de novo* review allows it:

> When an appeal is taken from DEP to the EHB, the EHB is required to conduct a hearing *de novo*. *Warren Sand & Gravel Co., Inc. v. Dep't of Envtl. Res.*, 20 Pa. Cmwlth. 186, 341 A.2d 556 (1975). The EHB is not an appellate body with a limited scope of review attempting to determine if DEP's action can be supported by the evidence received at DEP's fact finding hearing. *Id.* Rather, the EHB's duty is to determine if DEP's action can be sustained or supported by the evidence taken by the EHB.
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> Further, the EHB determines from the evidence it receives whether DEP's action can be sustained. Where the EHB finds DEP abused its discretion, it may substitute its discretion for that of DEP and order the relief requested. *Pequea Township v. Herr*, 716 A.2d 678 (Pa. Cmwlth. 1998) (holding the EHB may substitute its discretion for that of DEP, and modify DEP's action based on the evidence before the EHB); *Warren Sand & Gravel* (affirming the

> EHB's modification of permit conditions imposed by DER based on evidence submitted to the EHB).

Leatherwood v. DEP, 819 A.2d 604, 611 (Pa. Cmwlth. 2003).

The safety issue has been fully aired in this case. Frankly, the issue is not exceedingly complex. After three days of hearings, a lengthy deposition taken for use at trial, videotapes, and dozens of exhibits, we have no hesitation in resolving the safety issue without a remand. Further study would be superfluous and would require devoting further scant resources to a project that has already consumed resources of the Board and the parties that are arguably well out of proportion to the size and scope of the project.

Lyons raises two safety concerns that we deem to be worthy of discussion. First, he is concerned that the dock will add to congestion problems at the lake. Second, he is concerned that the dock, given its size, location, and design, will result in a safety hazard, particularly to nearby swimmers. With regard to the first concern, Lyons devoted a considerable amount of time at the hearing to showing that the lake can get very crowded. There are about 400 docks on the lake. Some dock owners, such as Lyons and Takacs, own multiple boats. In addition, there are other boaters who use the lake who may not have a dock of their own. Joint Exhibit 1, a site plan for the Borough, shows hundreds of lots on and near the lake. The congestion that can occur with this many users coupled with the irregular and sometimes narrow shape of the lake combine to create a situation where there are a fair number of boating infractions including near-misses. None of this is disputed.

Having set this scene, however, the shortcoming in Lyons's case is that there is no record support for the counterintuitive idea that the St. Clair dock will have any noticeable incremental effect on the situation at the lake. Lyons has failed to show that having 401 docks on the lake

instead of 400 has made or will make any significant difference when it comes to congestion-related concerns.

Lyons's better argument is that there is something specific to this particular dock that justifies reconsideration. Lyons first points to the fact that Takacs and her guests swim off the shoreline of her adjacent property. Takacs is concerned because watercraft exiting from and returning to the docks could come close to these swimmers. Although the concern is not unfounded, Lyons had not convinced us that this concern should have precluded the Department from issuing the permit. The Takacs swimmers have no greater right to use the lake than the St. Clair boaters. Both owe a duty of reasonable care and accommodation to each other. Lyons's case seems to be built upon the premise that Takacs's use and enjoyment of the lake takes precedence over all newcomers, but we do not endorse that presumption. The use of the dock by watercraft and the use of Takacs's shoreline for swimming and for launching her own fleet of boats are not incompatible uses. In fact, Takacs has continued to use her shoreline for swimming notwithstanding the construction of the dock. (T. (8/20) 216, 219-20.)

Lyons relies upon the deposition testimony of a boating-safety expert, Virgil Chambers, but interestingly, Chambers strongly denied that he believed the Department should have denied a permit for the dock. (L. Ex. 80 at 60.) Rather, he opined that he might have designed some things differently, but even on that point he was rather equivocal. (L. Ex. 80 at 58-61.) When asked whether he disagreed with the conclusion of Robert Kaufman, a boating-safety authority who said in his report (which was included in St. Clair's permit application) that "I see no safety or navigational hazards associated with the proposed docks," Chambers testified: "No. I may have said things a little differently, but I can't--I can't argue what he said in his short report." (L. Ex. 80 at 126.) Many of Chamber's concerns were generic concerns that would apply to *any*

dock (e.g. "the common practice for both boaters and property occupants on this lake to swim within the vicinity of their boat and dock"). (L. Ex. 80, Ex. 2.) Some of the concerns were quite speculative (e.g. "the dock configuration may encourage boaters to cut across traffic"). (L. Ex. 80, Ex. 2.) Some concerns were heavily qualified (the dock "could have" a significant impact) or set an unrealistically high standard (the entrance is not "ideal"). (L. Ex. 80 at 32, 17.) And again, many of the concerns simply related to the unavoidable fear that the Department cannot control all aspects of boater or swimmer behavior. Taken together, the concerns do not rise to a level that we are able to conclude that the Department acted unreasonably by permitting an unsafe dock. To the limited extent that Chambers opined that the dock will have a significant impact, we do not credit it.

Although the Department's engineering expert, Charles Colbert, limited his safety review during his permit review to the length of the dock and flooding concerns, at the hearing he testified more generally that the dock will not have a significant impact on safety. (T. (8/18) 161-62.) When pressed on cross-examination, he stated that watercraft are likely to exit the dock one at a time, and that the users of the dock pose no more of a safety hazard to nearby swimmers than any other dock on the lake. (T. (8/18) 171-72.) The size of the dock causes Colbert no concerns whatsoever. (T. (8/18) 172.) He testified that he considered the location of the dock on the lake and determined that it was no worse than any other docks. (T. (8/18) 175.) This testimony from the Department's reviewer further supports our finding that Lyons has failed to satisfy his burden of proving that the dock as designed and built will have a significant adverse impact on public safety or safe navigation.

Environment

Lyons has also failed to show that construction and operation of the dock will have a significant impact on the environment at Indian Lake. Lyons actually made no serious effort to show that the dock itself will harm the environment. Rather, he argues that personal watercraft using the dock will cause significant harm. Although we reject the Department's suggestion that it was not required to consider the impact that the use of the dock would have on the environment, we nevertheless conclude that the Department again reached the correct result.

Lyons relies largely on the testimony of Eric McCleary, who we qualified as an expert on fish and benthic macroinvertebrate biology. McCleary adopted a very narrow view of the issue. He did not consider the fact that there are 400 other docks on the lake. (T. (8/20) 146.) He conceded that his primary criticism was that the Department performed an inadequate investigation, not that the dock would actually cause significant harm. (T. (8/20) 137, 144.) His brief testimony regarding harm is limited to somewhat conclusory statements to the effect that personal watercraft would churn up sediment and thereby "disturb" fish and suffocate benthic invertebrates and fish eggs. (T. (8/20) 141-142.) Of course, a swimmer in the lake also temporarily churns up sediment. Walking across a stream temporarily churns up sediment. Boats motoring by on the lake send out waves that reach shallow areas that temporarily churn up sediment. McCleary has simply not convinced us that the use of the dock will cause any significant harm. He did not testify that there would be any long-lasting adverse impacts. To the limited extent that he opined that the dock would cause a significant impact in the immediate vicinity of the dock, we do not find the opinion to be credible. Lyons's photographic evidence did not independently suggest or reveal any significant harm; quite the contrary. (*See, e.g.*, Lyons Ex. 54, 55, 56, 67, 74-79.)

In fact, St. Clair's dock is a floating dock that has done far less damage to the shoreline than many of the more traditional docks on the lake that involved dredging and the construction of seawalls. St. Clair's dock left the shoreline in a relatively natural state. The dock did not eliminate habitat. The Department's expert biologist, Jamie Detweiler, testified credibly that the lake's habitat would suffer no appreciable increased deleterious impact from the dock or the watercraft using the dock. (T. (8/18) 37, 42, 57-59, 65.) This testimony was corroborated and reinforced by St. Clair's expert biologist, Thomas Johnston, who credibly opined that the dock and its users would have an insignificant impact on the aquatic regime and wildlife. (T. (8/19) 196-204.)

Lyons directs our attention to the suggestion of the Pennsylvania Fish and Boat Commission's environmental services representative, Thomas Shervinskie, to the effect that St. Clair should mitigate for any loss of habitat caused by the dock. (FOF 22-25.) However, Shervinskie's review comments were highly generic in nature, and the fact that the St. Clair dock has not in fact resulted in any loss of shallow habitat renders Shervinskie's suggestion moot. In any event, the PFBC approved the application and did not make mitigation a condition of that approval. (FOF 25.)

Other Issues

Lyons asserts that the Department failed to conduct an adequate investigation regarding property rights. Initially, it is worth pointing out that an encroachment permit actually confers no property rights, *Abod v. DEP*, 1997 EHB 872, 884; *Bernie Enterprises v. DEP*, 1996 EHB 239, 243, so the Department's role in this regard is rather limited. Nevertheless, when an applicant proposes to install a dock "on or in front of riparian property not owned by the applicant," it must furnish to the Department notarized and signed releases from the owners of

the affected property. 25 Pa. Code § 105.332. Here, the St. Clair dock is "on" the property of the Borough and the Borough has granted the requisite permission. (FOF 48.) Takacs owns the land adjacent to the St. Clair property, but there is no record that the dock extends "in front of" Takacs's land. (T. (8/20) 107-17.)

Under 25 Pa. Code § 105.14(b)(3), the Department must consider the effect of the dock on the "property or riparian rights of owners above, below or adjacent to the project." Lyons called an expert witness on zoning matters, Victor Schwartz, but he expressly avoided giving any opinion on whether the dock affected Takacs's riparian property rights, which he declined to define. (T. (8/20) 108.) He was careful to limit his discussion to zoning issues, which we determine to be largely beyond the scope of this Board's review function as discussed below. He also limited his discussion to the riparian "area" relating to Takacs's property, but the regulations say nothing about a riparian "area" and we do not know what that is. The regulatory requirement to consider riparian *rights* relates to property issues and is not an additional basis for delving into safety issues. In sum, the Department conducted an adequate investigation regarding property rights, and the St. Clair dock has not been shown to have any negative impact on Takacs's (or any other person's) riparian property rights.

Lyons next raises what is essentially a zoning challenge, arguing that the dock violates local zoning. Lyons refers us to the Act 67 and 68 amendments to the Municipalities Planning Code, 53 P.S. §§ 11105(a)(2) and 10619.2, which to some extent require the Department to consider local zoning and land use requirements when reviewing permit applications. *See New Hanover Township v. DEP and Gibralter Rock, Inc.*, 2010 EHB 795, 801 n. 3; *Tri-County Landfill, Inc. v. DEP*, 2010 EHB 602, 604; *Epstein v. DEP*, 2010 EHB 352, 361 n. 5; *County of Berks v. DEP*, 2005 EHB 233, 245, 268-69. Act 67 provides that the legal effect of a

municipality's adoption of a local plan and ordinances includes the ability of state agencies to consider and rely upon "comprehensive plans and zoning ordinances when reviewing applications for the funding or permitting of infrastructure of facilities." 53 P.S. § 11105. Act 68 provides that "Commonwealth agencies shall consider and may rely upon comprehensive plans and zoning ordinances when reviewing applications for the funding or permitting of infrastructure or facilities." 53 P.S. § 10619.2.

The Department contends that, by policy, it considers information on land use plans and zoning ordinances *submitted in writing by the municipality and county officials*. We agree that Acts 67 and 68 usually require no more. The Department contends that local governments are entitled to a level of deference regarding land use decisions. Again, we agree. Acts 67 and 68 were not intended to transmogrify EHB appeals into statewide zoning hearing board proceedings. Therefore, there is no need to further consider the opinion of Lyons's zoning expert, Schwartz, on whether the dock complied with Indian Lake zoning requirements.

Here, the record shows that the Department did in fact consult with the Borough's zoning officer. It was advised about pending litigation between Lyons and the Borough regarding the issue. (FOF 18.) As a result, the Department issued the permit with a special condition putting St. Clair on notice that "the permit does not relieve the permittee of the responsibility to comply with all local codes and ordinances." (DEP Ex. 2 at 5 ¶ 2.) This approach represented a reasonable accommodation to the dictates of Acts 67 and 68 under the circumstances. Even without this language, however, the permit would not have excused compliance with zoning requirements. *See Abod*, 1997 EHB at 884; *Bernie Enterprises*, 1996 EHB at 243. Acts 67 and 68 are designed to ensure that the Department gives due respect to local land use decisions in the course of its permit reviews, and the Department has clearly done so here. By way of adding a

belt to the suspenders already holding up tight trousers, the record more than supports the conclusion that the dock conforms to local zoning. (T. (8/18) 160; (8/19) 110, 151-52; DEP. Ex. 6.)[4]

Although "it is a minor part of Appellants' case," Lyons argues that the Department erred by not applying the permit bar authorized by Section 609 of the Clean Streams Law, 35 P.S. § 691.609. The Department counters that it performed a compliance check sufficient to ensure that there were no ongoing violations of the law at the time of the permit issuance.

Section 609 provides that "[t]he Department shall not issue any permit required by the Clean Streams Law if it finds, after investigation and an opportunity for informal hearing that (1) the applicant has failed and continues to fail to comply with any provisions of law or (2) the applicant has shown a lack of ability or intention to comply with the law as indicated by past or continuing violations. 35 P.S. §§ 691.609. *See also* 25 Pa. Code § 105.21(a)(5) (a DSEA permit application will not be approved unless the applicant has shown that it has not been found to be in continuing violation of the law).

Although it is not well-developed in his post-hearing brief, Lyons's argument seems to be that the permit bar set forth in Section 609 should have been applied to the dock permit because St. Clair was in violation of the law at the time the permit was issued. Although he does not cite any specific provisions, the law that he seems to be referring to is the regulatory requirement that a person must implement an approved erosion and sediment control ("E&S") plan. 25 Pa. Code § 102.4. Lyons presents two bases for his assertion that St. Clair was violating Section 102.4 in June 2009 when the dock permit was issued. First, he refers to two inspections conducted by Keith Largent, a technician with the Somerset County Conservation District, on September 3 and

[4] We are informed that Lyons's efforts to challenge the project's zoning have been unsuccessful to date. *See Takacs and Lyons v. Indian Lake Borough ZHB*, No. 46 C.D. 2010 (Pa. Cmwlth. December 16, 2010).

24, 2008, nine months before the dock permit was issued. (T. (8/18) 184-95; DEP Ex. 26.) Second, Lyons proffered the expert testimony of Andrew Banfield, who would have opined that St. Clair's site did not conform to its E&S plan at the time of the hearing in August 2010.

In truth, we doubt that Section 609 was intended to be used the way that Lyons is trying to use it in this case. Section 609 by its own terms does not apply unless *the Department* finds that an applicant is in violation or is recalcitrant. *Accord* 25 Pa. Code § 105.21(a)(5). That finding can be made only after a Departmental investigation and an informal hearing. Section 609 does not appear to create a mechanism for a third party challenging another person's permit to present evidence to this Board in the first instance that a permittee is in violation or recalcitrant. This Board does not make findings of violations in the first instance, we do not conduct "investigations," and we do not hold "informal hearings." Although we can review the Department's implementation or failure to implement Section 609, an appeal to this Board should not act as the substitute for the procedure set forth in Section 609, and this Board normally should not act as the initial enforcer of that section.

We raise this concern because this aspect of Lyons's appeal required us and the other parties to devote time and resources to what amounts to a sort of mini-trial on alleged E&S problems on the St. Clair property that were completely unrelated to the central inquiry into whether the dock permit should have been issued. Lyons's effort in this case exemplifies why we said in *O'Reilly v. DEP*, 2001 EHB 19 at 45 that "a remand for further review of a compliance history will almost never be appropriate, particularly where the Department has conducted some investigation but that investigation is alleged to have been inadequate." *See also Belitskus v. DEP*, 1998 EHB 846, 864.

In this case, there were no Departmental findings of violations on the part of St. Clair which were made after investigation and an informal hearing. In fact, we have no record of violations as established by unappealed orders, assessments, consent agreements, or other formal actions. We do not even have any notices of violation. The only evidence in the record regarding alleged violations consists of notations in an inspection report. (DEP Ex. 26.) An inspection report is not normally an appealable action. Further, although the report references violations of E&S requirements that were observed on September 3, *2008*, the author of the report, Stephen Largent, testified that he was satisfied with the condition of the site as of September 24, *2008* upon a reinspection, and indeed remained satisfied up to the time of the hearing in this matter. (T. (8/18) 186-95.) The Department's engineer, Charles Colbert, verified that the site had been properly stabilized. (T. (8/18) 153-55.)

Lyons's other attempt to show violations was the proffered testimony of Andrew Banfield, which was offered to show that the site is currently not in conformance with its E&S Plan. We disallowed the testimony and Lyons asserts that we erred by doing so. We find no error for several reasons. First and foremost, as discussed above, absent unusual circumstances not present here, an appeal to the EHB does not provide an occasion for trying to implicate Section 609 by independently establishing violations *ab initio* through expert testimony. Second, Lyons inexcusably and in clear violation of our rules and pre-hearing orders identified Banfield for the first time one day before the hearing. Such a trial by ambush and dereliction of our procedures and orders cannot be tolerated. Lyons's attempt to characterize Banfield as a "rebuttal" witness has no merit. The burdens of production and proof in this appeal fell squarely upon Lyons. Banfield should have been identified and his opinions described long before the hearing. Banfield's testimony can in no way be characterized as simply rebutting new evidence

unexpectantly presented for the first time at the hearing by the Department or St. Clair. His testimony should have been and in fact was offered as part of Lyon's case in chief.

Third, based upon Lyons's offer of proof, Banfield was not retained until August 2010, long after the permit was issued, which means he had no direct knowledge of whether the site was in conformance with its E&S Plan at the time of permit issuance, and there were no other witnesses testifying on behalf of Lyons who would have supplied the necessary factual basis upon which to base an expert opinion. Fourth, even if Banfield could have testified that the site failed to conform to the E&S Plan at the relevant point in time, he was not qualified to make the legal finding that any such deviations from the plan constituted legal violations, let alone violations that would give rise to a permit bar. Fifth, any minimal probative value that could have been added by Banfield would have been far outweighed by considerations of time and expense. Pa.R.Ev. 403. Finally, if we forget everything we have just said and assume that Banfield could have convinced us that St. Clair was in violation of E&S requirements at the time of dock issuance, St. Clair's alleged violations as described in Lyons's proffer, if we can call them that, do not convince us that St. Clair's compliance is enough of a concern to justify vacating the dock permit. They do not amount to a compliance history that clearly shows that St. Clair "cannot be trusted" with a permit. *O'Reilly*, 2001 EHB at 45; *Belitskus v. DEP*, 1998 EHB 846, 867. Far from it. The alleged violations are unrelated to the dock itself. They are not the sort of serious violations that ordinarily result in a permit hold. The alleged violations did not give rise to civil penalties or any other enforcement activity. There is no evidence of environmental harm. They in no way suggest to us that St. Clair is unable or unwilling to comply with the law in constructing and maintaining the docks.

CONCLUSIONS OF LAW

1. Lyons bears the burden of proof. 25 Pa. Code § 1021.122(c)(2).

2. Lyons must prove that there was no reasonable basis for the Department's action. 25 Pa. Code § 105.21(e).

3. The St. Clair dock constitutes an encroachment that requires a DSEA permit. 32 P.S. §§ 693.3, 693.4, 693.6, and 693.9.

4. The Department has reduced permitting procedures for "small projects." A "small project" is one which will have an insignificant impact on safety and protection of life, health, property and the environment. 25 Pa. Code §§ 105.1, 105.13.

5. A permit application must be accompanied by complete maps, plans, specifications, test reports, and such other information as the Department may require to determine compliance with the DSEA. 32 P.S. § 693.8.

6. The Department may issue a permit if it determines that the proposed project complies with the provisions of the DSEA and all other applicable laws and will adequately protect public health, safety, and the environment. 32 P.S. § 693.9; 25 Pa. Code § 105.21.

7. If a dock is on or in front of riparian property not owned by the applicant, the applicant must furnish to the Department notarized and signed releases from the owners of the affected riparian property. 25 Pa. Code § 105.332.

8. Objections regarding the Department's review and processing of a permit application tend to have limited relevance if we conclude in the final analysis that the Department arrived at the correct result. *See O'Reilly v. DEP*, 2001 EHB 19, 39-40, and 51.

9. An applicant for a small-project permit is not required to submit an application that meets all of the requirements of an application for a standard permit.

10. The Department may base its determination of whether a project qualifies as a small project on the permit application itself.

11. If the Department's review of an application shows that additional information is necessary, either because the project does not qualify as a small project or because more information is needed to make that determination, the Department has the express authority to require that such additional information be submitted. 25 Pa. Code § 105.13(e).

12. St. Clair's application satisfied the regulatory requirements for a small project permit. 25 Pa. Code § 105.13(e).

13. The Department's review of a small project under Section 105.14 may be based upon the contents of a small-project application as described in 105.13(e).

14. The Department must consider whether there is anything about the construction, design, or location of a dock that might result in a significant adverse impact to public safety or safe navigation when reviewing a small-project application.

15. If there is something about the construction, design, or location of a dock that will cause the users of the dock to in turn cause a significant safety hazard, the dock should not be evaluated as a small project.

16. Where the Department errs by conducting an inappropriate analysis or otherwise, we may substitute our discretion and decide the matter as we see fit if the record produced by our *de novo* review allows it.

17. Lyons failed to show that the St. Clair dock will have a significant impact on safety or the protection of life, health, property, or the environment.

18. An encroachment permit confers no property rights, *Abod v. DEP*, 1997 EHB 872, 884; *Bernie Enterprises v. DEP*, 1996 EHB 239, 243.

19. Under 25 Pa. Code § 105.14(b)(3), the Department must consider the effect of the dock on the "property or riparian rights of owners above, below or adjacent to the project."

20. An encroachment permit does not excuse compliance with zoning requirements. *See Abod*, 1997 EHB at 884; *Bernie Enterprises*, 1996 EHB at 243.

21. Acts 67 and 68 are designed to ensure that the Department gives due respect to local land use decisions in the course of its permit reviews, and the Department has done so here.

22. A remand for further review of a compliance history will almost never be appropriate, particularly where the Department has conducted some investigation but that investigation is alleged to have been inadequate. *O'Reilly v. DEP*, 2001 EHB 19, 45; *Belitskus v. DEP*, 1998 EHB 846, 864.

23. In the final analysis, the Department did not err in issuing a permit for the St. Clair dock.

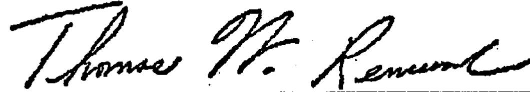
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

JIM LYONS AND MARY JO TAKACS	:	
	:	
v.	:	**EHB Docket No. 2009-099-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and ST. CLAIR RESORT DEVELOPMENT, LLC, Permittee	:	

ORDER

AND NOW, this 29th day of March, 2011, it is hereby ordered that this appeal is **dismissed.**

ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Chairman and Chief Judge

MICHELLE A. COLEMAN
Judge

BERNARD A. LABUSKES, JR.
Judge

RICHARD P. MATHER, SR.
Judge

DATED: March 29, 2011

c: **DEP Bureau of Litigation:**
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MARYANNE WESDOCK
ACTING SECRETARY TO THE BOAF

GSP MANAGEMENT COMPANY

v.

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION

EHB Docket No. 2009-142-M

Issued: April 1, 2011

OPINION AND ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

By Richard P. Mather, Sr., Judge

Synopsis

The Board enters an Order denying the parties' Cross-Motions for Summary Judgment. There are disputed issues of material fact that preclude the Board from granting either of the parties' motions for summary judgment.

OPINION

GSP Management Company ("GSP") is the owner and operator of the Alex Acres Sewage Treatment Plant ("Alex Acres STP"). GSP is a registered fictitious name for Frank T. Perano ("Perano"). The Alex Acres STP is located on the Alex Acres Mobile Home Park in Halifax Township, Dauphin County. On October 9, 2009, the Department of Environmental Protection (the "Department") issued the renewal NPDES Permit No. PA0034754 for the Alex Acres STP ("2009 NPDES Permit"). The 2009 NPDES Permit includes the following permit condition in Part C, Para. I. E which states as follows:

> This permit authorizes the discharge of treated sewage until such time as facilities for conveyance and treatment at a more suitable location are installed and are capable of receiving and treating the permittee's sewage. Such facilities must be in accordance with the applicable municipal official plan adopted pursuant to Section 5 of the Pennsylvania Sewage Facilities Act, the Act of January 24, 1956, P.L. 1535, as amended. When such municipal facilities become available, the permittee shall provide for the conveyance of the sewage to these sewerage facilities, abandon the use of the sewage treatment plant thereby terminating the discharge authorized by this permit, and notify the Department accordingly. This permit shall then, upon notice from the Department, terminate and become null and void, and shall be relinquished to the Department.

On November 6, 2009, GSP filed an appeal of the Department's issuance of the 2009 NPDES Permit for the Alex Acres STP. The appeal is based solely on the Department's decision to include the above referenced permit condition in the 2009 NPDES Permit.

The appeal was timely filed. Pursuant to Board orders, the parties conducted discovery prior to the May 7, 2010 discovery deadline. Both parties filed motion for summary judgment before the end of the deadline for filing dispositive motions.[1] For the reasons set forth below, the Board denies both parties' motions because there are disputed issues of material fact that the Board will have to resolve subsequently.

As a general rule, the Board may grant a motion for summary judgment where the pleadings, depositions, answers to interrogatories and admissions, together with any supporting affidavits, show that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as matter of law. 25 Pa. Code § 1021.94a(l); *Angela Cres Trust of June 25, 1998 v. DEP*, 2007 EHB 111, 114; *Snyder Bros., Inc. v. DEP*, 2006 EHB 978, 980. "The record is to be viewed in the light most favorable to the nonmoving party, and all doubts as to the

[1] After the parties filed briefs in support or in response to the motions, the parties jointly requested that the Board stay consideration of their motions. Upon request of the parties, the Board lifted the stay on November 1, 2010, and the motions are ripe for disposition.

presence of a genuine issue of material fact must be resolved against the moving party." *Albright v. Abington Mem'l Hosp.*, 696 A.2d 1159, 1165 (Pa. 1997). "[S]ummary judgment is granted only in the clearest of cases, where the right is clear and free from doubt... ." *Lyman v. Boonin*, 635 A.2d 1029, 1032 (Pa. 1993). The granting of summary judgment is appropriate when a limited set of material facts are truly undisputed and the appeal presents a clear question of law. *Bertothy v. DEP*, 2007 EHB at 254, 255; *CAUSE v. DEP*, 2007 EHB 101, 106. For the reasons set forth below, the Board will deny both motions for summary judgment that are before it.

GSP's Motion for Summary Judgment

GSP has challenged the Department's decision to include a certain permit condition in its 2009 NPDES permit renewal. GSP asserts that the permit condition at Part C, Paragraph I. E ("Standard Condition E") is automatically included in every non-municipal sewage permit and is impermissibly applied as a "binding norm." GSP asserts that the Department does not exercise any discretion when it decides to insert the permit condition, and therefore the permit condition establishes a "binding norm" rule that was not promulgated under the Commonwealth Document Law. 45 P.S. § 1102, 1201-1208; 45 Pa. C.S.A. Chapters 5, 7 and 9. GSP asks the Board to strike Standard Condition E because it impermissibly establishes a "binding norm" requirement that was not promulgated as a regulation as required by law.

The Department filed a response in opposition to GSP's motion and raised two objections. First, the Department asserted that GSP waived this objection by not raising it in its Notice of Appeal. Second, the Department argued that its policy preference for "regionalization," which Standard Condition E reflects and supports, does not constitute a "binding norm", and therefore it does not need to be promulgated as a regulation under the

Commonwealths Document Law. In support of this second argument, the Department attached an affidavit of Lee McDonnell, the Department's Southcentral Region Water Management Program Manager. The affidavit contained Mr. McDonnell's verified statements that support the Department's assertion that it did not apply its regionalization policy as a "binding norm" in violation of the Commonwealth Documents Law.

GSP filed a reply brief in support of its motion for summary judgment in which it responded to the two objections that the Department raised in its earlier response. First, GSP asserted that the Department was attempting to rely upon materials or information which the Department had not produced in discovery.[2] Second, in a related argument, GSP asserted that Mr. McDonnell affidavit contradicts the Department's answers to interrogatories, which the Department had given to GPS during discovery. Finally, although acknowledging that its Notice of Appeal did not specifically state its "binding norm" objection, GSP asserted that its general allegations concerning the Standard Condition E encompass the challenge to it as an unpromulgated regulation.

GSP's Notice of Appeal

The Board will first address the issue whether GSP raised the "binding norm" objection in its Notice of Appeal. As previously mentioned, the Department asserts that GSP waived its objection that the contested permit condition violated the Commonwealth Documents Law under the "binding norm" standard because this specific objection was not raised in GSP's Notice of Appeal. For the reasons set forth below, the Board rejects the Department's position. GSP's Notice of Appeal includes several broadly worded objections that can be construed to include such an objection, and GSP's Notice of Appeal can be construed to include the "genre of this

[2] GSP asked the Board to strike these materials which it asserted were not produced in discovery, or in the alternative to reopen discovery to allow GSP to inquire about these materials.

issue" in question to avoid finding that GSP's "binding norm" objection has been waived.[3]

As Judge Labuskes stated in *Rhodes et al. v. DEP*, 2009 EHB 325, 327:

> It is a longstanding rule that allegations not raised in the notice of appeal are waived. *See Fuller v. DER*, 599 A.2d 248 (Pa. Cmwlth. 1991); *Halvard Alexander v. DEP*, 2006 EHB 306; *Chippewa Hazardous Waste, Inc. v. DEP*, 2004 EHB 287, *aff'd*, 971 C.D. 2004 (Pa. Cmwlth., October 28, 2004); *Moosic Lakes Club v. DEP*, 2002 EHB 396. However, given the strict requirement to file a notice of appeal within 30 days of receiving notice of the Department's action and our general distaste for trap-door litigation, we have been relatively indulgent when it comes to interpreting less than precise notices of appeal. So long as an issue falls within the scope of a broadly worded objection found in the notice of appeal, or the "genre of the issue" in question was contained in the notice of appeal, we will not readily conclude that there has been a waiver. *Angela Cres Trust v. DEP*, 2007 EHB 595, 600-01; *Ainjar Trust v. DEP*, 2001 EHB 59, 66, *aff'd*, 806 A.2d 402 (Pa. Cmwlth. 2002); *Jefferson County Board of Commissioners v. DEP*, 1996 EHB 997, 1005. *See also Croner, Inc. v. DER*, 598 A.2d 1183, 1187 (Pa. Cmwlth. 1991).

In this appeal, GSP has challenged the Department's decision to reissue an NPDES permit to GSP and the parties agree that the appeal is based solely on the Department decision to again include a particular permit condition in the renewed and reissued 2009 NPDES permit. GSP's Notice of Appeal specifically identifies the challenged permit condition, and it list five general objections to this particular condition. While GSP acknowledges that its Notice of Appeal does not contain a recitation of the issue in exactly the same words as in its motion for summary judgment, there is no doubt that GSP always objected to the Department decision to include this condition in the permit for various and numerous reasons from the beginning of this appeal. The Board has no difficulty in construing these five broad and general objections in a manner to include the "binding norm" objection because the sole over-arching objection is and

[3] If the Department continues to believe that its defense could be prejudiced, and additional discovery is necessary to cure the prejudice, then the Board has reopened discovery for 30 days for this limited purpose in addition to the purpose discussed later in this in Opinion.

remains the addition of this one specifically identified permit condition. It would be a different story if GSP wanted to include objections to a different permit condition that had not be specifically identified in the Notice of Appeal.

In addition, GSP's Notice of Appeal specifically identifies another permit that contains a similar condition. This other permit, with the similar permit condition, forms the basis for most of GSP's objections. The Department was therefore on notice that GSP also had broader objections that involved other permits containing similar permit conditions. The "binding norm" objection is a more specific objection of this "genre" that the Board can infer from GSP's interest in other permits that contain similar permit conditions. Thus, the Board rejects the Department's argument that GSP waived this argument by not expressly including it in its Notice of Appeal.

Binding Norm Analysis

As previously mentioned, GSP seeks to strike Standard Condition E as an improperly promulgated "binding norm" or regulation. The "binding norm" test or analysis is well-established as a matter of Pennsylvania caselaw. *See, e.g., PA Human Relations Comm'n v. Norristown Area Schl. Dist.*, 473 Pa. 334, 374 A.2d 671 (1977); *Lopata v. Commonwealth, Unemployment Comp. Bd. of Review*, 493 A.2d 657 (Pa. 1985); *Home Builders Ass'n of Chester and Delaware Counties v. Dep't of Envtl. Prot.*, 828 A.2d 446, (Pa. Cmwlth. 2003) *aff'd* 844 A.2d 1227 (Pa. 2004); *Ins. Fed'n of PA v. PA Ins. Dep't*, 970 A.2d 1108 (Pa. 2009). To ascertain whether an agency pronouncement improperly establishes a "binding norm" a court must consider: 1) the plain language of the pronouncement; 2) the manner in which it has been implemented by the agency; and 3) whether the pronouncement restricts the agency's discretion *R.M. v. PA Hous. Fin. Agency*, 740 A.2d 302 (Pa. Cmwlth. 1999).

Although the "binding norm" test is most often used to decide whether an agency's statement of policy has been applied improperly as a "binding norm," the Board has applied the "binding norm" test in a challenge to the Department's decision to include standardized permit conditions in permits that the Department issues. *Dep't of Envtl. Res. v. Rushton Mining Co.*, 1990 EHB 50, *aff'd* 591 A.2d 1168. (Pa. Cmwlth. 1991) *appeal denied* (600 A.2d 541 (Pa. 1991).

In *Rushton*, the consolidated proceeding before the Board involved forty-six appeals of underground coal mining activity permits that were consolidated for resolution of certain common issues including challenges to certain standard permit conditions. The appellants in the forty-six appeals were the underground coal mine operators which asserted that these standard permit conditions in the underground coal mining activity permits should be stricken as improperly promulgated regulations because the standard permit conditions established "binding norms" of general applicability and future effect.

The Department asserted broadly that permit conditions can never constitute regulations even if the conditions are inserted in several permits in reliance upon *Warren Sand and Gravel v. Dep't of Envtl. Res.*, 341 A.2d 556 (Pa. Cmwlth. 1975). The Department argued that its authority to insert terms and conditions in mining permit allowed it to include standard permit conditions. The Board rejected the Department's argument and decided that the standard permit conditions were regulations due to their binding nature, general applicability and future effect. The Board ultimately decided that the standard permit conditions were invalid because they were never promulgated properly as regulations under state law. The Board decided that the Department's authority to add conditions to permits did not include the authority to add standard permit conditions that are in the nature of regulations.

The Department appealed the Board's decision to Commonwealth Court. Commonwealth Court affirmed the Board and concluded:

> Applying the binding norm test to these conditions, the DER is attempting to implement a uniform state-wide policy for certain aspects of mine operations. Inherent in a statewide policy is that the regulations will necessarily be binding on the agency, and one of the agency's personnel will have any discretion to vary those terms and conditions. In the instant case, because the DER ministerially applied the conditions to all forty-six permits and the regulations were generic in nature and not at all related to facts, the DER intended the conditions to be binding on the agency and none of its employees to have any discretion in applying the conditions to any individual case. Consequently, we find that the standard conditions meet the binding norm test and are regulations, and the DER failed to promulgate the standard conditions in accordance with the Commonwealth Documents Law.

Rushton, 591 A.2d at 1174. In addition, Commonwealth Court addressed the Department's argument that it has the authority to use standard permit conditions under *Warren Sand and Gravel*:

> While the statutes cited by the DER do provide the DER with the authority to attach terms and conditions to mining permits, and the Pennsylvania Code sections cited outline the types of conditions to be included in the permits, those sources do not give the DER the authority to mask regulations as standard conditions, nor relieve it from the obligation to promulgate those conditions when they are in the nature of regulations which are binding and have the force of law. Even though the DER believes that the conditions are generic in nature, and, therefore, will be permissible and apply to all of the operators, the DER overlooks the fact that even generic conditions may be found to be regulations if they, too, are binding and have the force of law. Because we have determined that the general conditions in question in the permits were regulations which should have been promulgated and were not, we find that the DER did not have the authority to apply the conditions to all of the permittees as a matter of policy.

Rushton, 591 A.2d at 1175-76. Thus, under Commonwealth Court and Board caselaw, permit conditions are subject to the same "binding norm" analysis as statements of policy, and they may be invalidated if they are found to be an improperly promulgated regulation.[4]

In support of its motion, GSP asserts that the standard permit condition in question is an improperly promulgated regulation establishing a "binding norm" because it is automatically inserted in every NPDES permit for a non-municipal wastewater treatment plant. GSP also asserts that it is inserted in every NPDES permit for a non-municipal wastewater treatment plant without any consideration of the particular circumstances of a particular plant and that DEP does not exercise any discretion in deciding whether to include this permit condition in a particular permit. GSP primarily relies upon the deposition transcript of Maria D. Bebenek, P.E., to support its argument.[5] She is an Environmental Engineer Manager in the Permit Section of the Water Management Program in the Department's Southcentral Regional Office.

The Department responds that the disputed permit condition does not create a "binding norm" because the Department's representatives exercise discretion as to when to insert the standard condition in a particular permit. The Department alleges that it evaluates its use in each permit on a case-by-case basis. The Department further alleges that Mr. McDonnell, as Southcentral Regional Office Program Manager, has the discretion to exclude the disputed

[4] GSP and to a greater extent the Department add a layer of unnecessary confusion to the "binding norm" discussion by including a discussion of the Department's unwritten and general policy preference for "regionalization." The parties acknowledge the existence of this policy preference for "regionalization" of sewage treatment facilities which is intended to discourage the proliferation of small private sewage treatment plants. The Department suggests that this unwritten policy preference is the "policy" under scrutiny as an alleged "binding norm." Under *Rushton*, a standard permit condition used improperly as a binding norm is subject to scrutiny without regard to any underlying policy it promotes. Under *Rushton*, the standard permit condition itself is subject to "binding norm" scrutiny and analysis without the need to consider whether the Department's overall general and unwritten policy preference for regionalization also runs afoul of the "binding norm" analysis. For purposes of resolving the parties' cross-motions, this Board will evaluate the Department's use of the standard permit condition at issue under *Rushton*.

[5] GSP also cites to DEP's answers to Interrogatories Nos. 1, 5. (Exhibit D to GSP's motion for Summary Judgment).

permit condition from NPDES permits for non-municipal treatment plants. In support of its position, the Department identified two permits, an earlier permit for the Alex Acres STP and a recent permit issued by the Department's Southcentral Region for a non-municipal sewage treatment facility that did not include a similar standard permit condition. The Department also relied upon an affidavit from Lee McDonnell, Manager, Water Management Program and supplemental responses to GSP's interrogatories to support the Department's argument.

In its reply brief, GSP asserts that the Department's position on this issue is flawed for two reasons. First, GSP asserts that the Department is attempting to rely upon materials (the two identified permits) that were not produced in discovery. According to GSP, the Department never identified these permits while discovery was open, and the Department only recently identified them in its supplemental discovery responses. Because these materials were not produced earlier, GSP asked that the Board strike them from the motions record. While the Board has some concerns with the timing of the Department's supplemental responses identifying the two permits in question, the Board does not agree that these materials should be stricken because they implicate an important aspect of the "binding norm" analysis that the Board needs to consider and apply here. Rather, the Board will allow GSP's alternative request and allow discovery to be reopened for 30 days for the limited purpose to allow GSP to inquire further about these two permits, including possible depositions of Mr. McDonnell and Ms. Bebenek.

GSP's second objection to the Department's response to GSP's motion is that Mr. McDonnell's affidavit contradicts the Department's answers to interrogatories and should therefore also be stricken. GSP asserts that the affidavit contradicts the Department's answer to interrogatory No. 1.

GSP correctly points out that this is a jurisdiction that follows the rule that a party cannot avoid summary judgment by submitting an affidavit that contradicts prior sworn testimony. *Pennsylvania Trout v. DEP*, 2003 EHB 622, 631. The Board will, however, not strike the affidavit as requested for several reasons. First, it is not apparent that the rule regarding an affidavit that contradicts prior sworn testimony extends to the situation here where there is an allegation that an affidavit contradicts an answer to an interrogatory. More importantly, and assuming that the rule does apply here, the McDonnell affidavit does not appear to directly contradict the answer to interrogatory No. 1. As Chief Judge Renwand recognized in applying the rule:

> However, not every discrepancy between an affidavit and earlier deposition testimony authorizes us to disregard the affidavit. "[A]n affidavit should only be disregarded where it contradicts, without explanation, previously given clear testimony..." (citations omitted)

Pennsylvania Trout v. DEP, 2003 EHB at 631.

Looking at the affidavit in the light most favorable to the Department, the affidavit provides a more complete explanation of the Department's "intention" to include the standard permit condition in question in permits. In this light there is no contradiction and no basis to strike the affidavit. Moreover, the Board's decision to reopen discovery regarding the two recently identified NPDES permits also allows GSP to inquire about the statements in Mr. McDonnell's affidavit to determine whether the affidavit supplements the answer to interrogatory No. 1 or contradicts it.

Turning now to the question of whether to grant GSP's motion for summary judgment, the Board will not grant GSP's motion because material issues of fact exist regarding whether the Department applied the standard permit condition as a "binding norm." The existence of the

two permits and Mr. McDonnell's affidavit raise material issues of fact that prevent the Board from completing the three part analysis to decide whether to invalidate the standard permit condition in question as a "binding norm." While the plain language of the standard permit condition is not in dispute, there are disputed issues of material fact regarding the manner in which it has been implemented and whether it restricts the Department's discretion. The record before the Board contains conflicting allegations regarding whether this standard permit condition in question is automatically included in every non-municipal NPDES water treatment permit, whether the Department has the discretion to not include the standard permit condition in question in particular situation, whether the Department made an individualized permit decision to include the standard permit condition in question in the Alex Acres NPDES permit under appeal, and whether the Department exercised its discretion and independent consideration when it included the standard permit condition in the Alex Acres NPDES permit. Because there are outstanding issues of material fact, GSP is not entitled to summary judgment and the Board will deny GSP's motion.

Department's Motion for Summary Judgment

The parties agree that GSP's appeal in this matter only challenges the Department's decision to include the permit condition found in Part C, Paragraph I: E in the 2009 NPDES Permit which the Department renewed and reissued on October 9, 2009. In its motion for summary judgment, the Department asserts that this permit condition, or a permit condition substantially similar to it, has been "included in all previous NPDES permits issued for this" Alex Acres STP.[6] In its motion for summary judgment, the Department argues that GSP's

[6] In its response to GSP's motion for summary judgment, the Department makes a different statement that the Department did not include a similar permit condition in the 1988 renewal to the Alex Acres NPDES permit. Notwithstanding the Department's apparently inconsistent statements, the parties agree that such a condition was included in the 1997 NPDES permit that was reissued and renewed immediately before

appeal is, therefore, barred by the Doctrine of Administrative Finality because this permit condition was previously included in all prior NPDES permits for the Alex Acres STP and there has been no change in law or facts concerning the permit condition that would preclude the application of the Doctrine of Administrative Finality. In addition, the Department asserts that GSP never requested that the Department remove or modify the permit condition in question during the entire time that the Department was reviewing GSP's permit renewal application for the 2009 NPDES permit for the Alex Acres STP. Finally, the Department asserts that there is no basis for the appeal even if the Doctrine of Administrative Finality is not applicable.

GSP filed a response to the Department's motion for summary judgment in which GSP opposed the motion. In support of its response, GSP asserts that the "applicable legal content related to Standard Condition E has changed since the Department issued the prior NPDES permit for Alex Acres [STP] in 1997", and that this change in legal circumstances bars application of the Doctrine of Administrative Finality. In addition, GSP asserts that there are material issues of fact which preclude granting the Department's motion for summary judgment. Finally, GSP asserts that its "binding norm" challenge provides a basis for this appeal.

Application of Doctrine of Administrative Finality

The Doctrine of Administrative Finality is well established in Pennsylvania caselaw. *See, e.g., Dep't of Envtl. Res. v. Wheeling-Pittsburgh Steel Co.*, 348 A.2d 765 (Pa. Cmwlth. 2001); *Potratz v. Dep't of Envtl. Prot.*, 897 A.2d 16 (Pa. Cmwlth. 2006), *appeal denied* 592 Pa. 769 (2007). The purpose of the Doctrine of Administrative Finality is to preclude a collateral attack

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the renewal of the 2009 NPDES permit that GSP challenged in this appeal. While the Department's inconsistent statements may undercut the full force of its administrative finality argument, the fact that a similar permit condition was in the permit immediately before the one that is under appeal means the Board will have to address the Department's administrative finality argument.

where a party could have appealed an administrative action, but chose not to do so. *Moosic Lakes Club v. DEP*, 2002 EHB 396, 406. Judge Labuskes recently stated:

> It is well-settled that a party may not use an appeal from a later DEP action as a vehicle for reviewing or collaterally attacking the appropriateness of a prior Department action. *See Grimaud v. DEP*, 638 A.2d 299, 303 (Pa. Cmwlth. 1994) (*citing Fuller v. DEP*, 599 A.2d 248 (Pa. Cmwlth. 1991)); *Wheatland Tube v. DEP*, 2004 EHB 131, 134. Allowing a Department action to be challenged at some undefined time in the future would "postpone indefinitely the vitality of administrative orders and frustrate the orderly operation of administrative law." *DER v. Wheeling Pittsburgh Steel Co.*, 348 A.2d 765, 767 (Pa. Cmwlth. 1975), *aff'd*, 375 A.2d 320 (Pa. 1977); *see also PUSH v. DEP*, 1996 EHB 1428, 1432. "[O]ne who fails to exhaust his statutory remedies may not thereafter raise an issue which could have and should have been raised in the proceeding afforded by the statutory remedy." *Wheeling Pittsburgh Steel Co.*, 348 A.2d at 767.

Delores Love v. DEP, 2010 EHB 523, 525.

Although the Board is often asked to apply the Doctrine of Administrative Finality to bar an appeal, the Board recognizes several situations in which the Board has declined to apply it or limited its applicability. Judge Labuskes identified several of these situations in his *Delores Love* opinion:

> Administrative finality has limited effect where the Department is charged with periodic re-evaluation of, *e.g.*, a permit. *See, e.g., Wheatland Tube v. DEP*, 2004 EHB 131, 133, *Solebury Twp. v. DEP*, 2004 EHB 95, 113-14; *Tinicum Township v. DEP*, 2002 EHB 822, 835-36. We also very recently held that administrative finality does not necessarily act as a complete bar where a statute creates a special process for re-examining a prior decision upon request if a party utilizes appropriate procedures. *Perano v. DEP*, EHB Docket No. 2009-119-L (Opinion and Order, May 26, 2010).

Delores Love v. DEP, 2010 EHB at 528-29.

In addition, several of the Board's earlier decisions have limited the applicability of the Doctrine to situations involving the periodic renewal of permits, including NPDES permits

which is the type of permit as issue. *See Specialty Waste Services, Inc. v. DEP*, 1992 EHB 382; *Tinicum Township v. DEP*, 1996 EHB 816.

These decisions establish several rules that govern the applicability of the Doctrine of Administrative Finality in an appeal of a permit renewal and reissuance:

1. In the case of permit renewals or reissuances an appellant may only challenge those issues which have arisen between the time the permit was first issued and the time it was renewed and reissued. *Yourshaw v. DEP*, 1998 EHB 37.
2. The purpose of the Doctrine of Administrative Finality "is to preclude a collateral attack where a party could have appealed an administrative action, but chose not to do so." *Moosic Lakes Club v. DEP*, 2002 EHB 396, 406.
3. In the case of a permit renewal or reissuance, the Department is always required to ensure that the continuation of the permit, issued years earlier, is still appropriate based on facts known at the time of the permit renewal, *Tinicum Township v. DEP*, 2002 EHB 822, or on changes in law or the "applicable legal context." *Dethridge House v. Dep't of Envtl. Res.*, 541 A.2d 827, 830-831 (Pa. Cmwlth. 1988)
4. If a permittee is entitled to request that the Department modify a permit under existing law and the permittee requests changes, an appeal from the Department's action on the request is not barred by the Doctrine of Administrative Finality even if the permit is not changed. *Wheatland Tube v. DEP*, 2004 EHB 131.

Applying these rules to this appeal, the Department is not entitled to summary judgment under the Doctrine of Administrative Finality for the reasons set forth below.

Applicability of the Doctrine of Administrative Finality to GSP's Challenge

The Department asserts that the Doctrine of Administrative Finality is applicable here to bar the appeal because a similar permit condition was included in the prior 1997 NPDES permit issued for Alex Acres and that GSP did not challenge it at that time. The Board disagrees and declines to apply the doctrine here because GSP is not challenging an issue in this appeal that it could have raised in a challenge to the 1997 NPDES permit. *Moosic Lakes Club v. DEP*, *supra*. The issue in this appeal is whether the Department's decision to include the permit condition at issue in the 2009 permit violated the "binding norm" rule. In 1997, GSP could not have predicted how the Department would act to include the permit condition in future permit renewals such as the 2009 NPDES permit.

In 1997, GSP could have challenged the Department's decision to include the permit condition in question in the 1997 NPDES permit, but a "binding norm" challenge necessarily requires an assessment of particular circumstances surrounding the Department's decision that is under review, and the circumstances surrounding earlier decisions are not at all useful when resolving a "binding norm" challenge to the current decision under review.

The Department's current defense to GSP's motion for summary judgment and its "binding norm" challenge to the 2009 permit condition illustrates why the Doctrine of Administrative Finality is not applicable here. The Department's defense to GSP's "binding norm" challenge is largely based on the affidavit of Lee McDonnell. In this affidavit, Mr. McDonnell described the circumstances surrounding his decision to include the permit condition in question in 2009:

1. Mr. McDonnell had the discretion not to include the challenged permit condition in particular NPDES permits for non-municipal facilities when he made the decision in 2009.
2. Mr. McDonnell decided to include the permit condition in question in the 2009 NPDES permit based on his review of the particular facts related to Alex Acres STP.
3. Mr. McDonnell gave some independent consideration to the appropriateness of including the permit condition in Alex Acres's 2009 NPDES permit.

These are allegations of fact that occurred in the context of the Department's 2009 decision to renew the 2009 NPDES permit. GSP had no opportunity in 1997 to challenge these allegations that Mr. McDonnell performed an independent assessment in 2009 regarding the appropriateness of including the permit condition in the 2009 NPDES permit condition. Under the motion record before the Board, GSP's "binding norm" challenge to the permit condition in question in the 2009 NPDES permit could not have been raised earlier, and it is not barred by the Doctrine of Administrative Finality.

Continuation of the Renewed and Reissued NPDES Permit

The Department contends that it is entitled to summary judgment even if the Doctrine of Administrative Finality is not applicable because GSP has not alleged any facts that would support a conclusion that the continuation of the permit, including the standard permit condition at issue, was unreasonable, arbitrary or capricious or contrary to law. The Board disagrees and finds that there are new facts that the Board needs to consider to decide whether to allow continuation of the permit. GSP has alleged that the Department included Standard Condition E in the 2009 NPDES permit as a "binding norm" and that this objection, if proven, would

establish that the Department's decision under appeal is contrary to law. If this objection were established, it would provide the basis for the Board to conclude that continuation of the permit is now not appropriate.

As previously discussed, there are disputed issues of material fact regarding the "binding norm" issue that prevents the Board from granting GSP's motion for summary judgment. These disputed issues of fact also prevent the Board from granting the Department's motion. These factual disputes prevent the Board from deciding that the continuation of the challenged 2009 NPDES permit is appropriate as a matter of law.

Circumstances Surrounding Pleasant Hills NPDES Permit

GSP's defense to the Department's administrative finality argument mainly rests on GSP's claim that the "applicable legal context" has changed as a result of circumstances surrounding a Pleasant Hills NPDES permit which is also under appeal at 2010-104-L. Although the Board has rejected the Department's argument for other reasons, the Board believes it is useful to evaluate GSP's claim.

The Board rejects GSP's argument that the circumstances surrounding a Pleasant Hills NPDES permit constitute a change in law or the applicable legal context of the renewed NPDES permit for Alex Acres that is under appeal here. These circumstances, and GSP's claims of abuse of that standard permit condition, as a matter of law, do not rise to the level of change in the "applicable legal context" because at this time the Board has not addressed GSP's claims in the Pleasant Hills NPDES permit appeal. Until the Board decides the Pleasant Hills NPDES permit appeal, GSP's allegations of abuse of the standard permit condition do not constitute a change in the "applicable legal context" under *Dethridge House Ass'n v. Dep't of Envtl. Prot.*, 541 A.2d 827 (Pa. Cmwlth. 1988).

In addition, the Board also rejects GSP's argument that there are material issues of fact about the Department's conduct at Pleasant Hills that prevent the Board from granting Department's motion for summary judgment in this appeal. While there may be disputed issues of material fact in the Pleasant Hills appeal, these disputes are not relevant to this appeal and will not be litigated in both appeals at the same time. The Board will address the circumstances regarding the Alex Acres permit renewal in this appeal and the circumstances regarding the Pleasant Hills permit in that other appeal docketed at 2010-104-L.

Parties' Dispute Whether GSP Requested Deletion or Modification of Standard Permit Condition at Issue

There is one final Department argument that deserves the Board's attention. In its motion, the Department repeatedly asserts that GSP never requested that the Department delete or modify the standard permit condition at issue in this appeal, and that GSP's failure to raise the issue during the Department's lengthy permit review process bars GSP from raising the issue on appeal. Although the Department's argument has some merit under *Wheatland Tube* and would normally deserve some consideration,[7] GSP raises a valid consideration that the Department failed to follow the Board's Rules governing motions for summary judgment and include citations to the motion record to support this assertion.[8] The Department's failure to follow the Board Rules effectively prevented GSP from responding appropriately under the Board's Rules

---

[7] *Wheatland Tube* addresses one aspect of the rules that govern the applicability of the Doctrine of Administrative Finality in an appeal of a permit renewal. Under *Wheatland Tube*, an appeal is not barred if a permittee requests changes to a permit even if the Department decides not to change the permit. There are also other considerations in addition to *Wheatland Tube*, as this opinion illustrates, that may govern whether the Doctrine is applicable in a particular appeal.

[8] GSP also raises an issue that deserves little consideration regarding the close of the public comment period on the permit renewal and GSP's misguided assertion that this event somehow prevented GSP from raising issues with the Department regarding the renewal after this date. GSP knows, from the facts of this appeal, that permit applicants meet with the Department and otherwise communicate with the Department up until this Department makes a permit decision. GSP had ample time to raise its concerns after the close of the comment period.

to dispute the Department's supported factual assertions. The Board is therefore not in a position to address or resolve the issue that the Department raised in its motion. Because the Board has decided to deny the Department's motion for other reasons, the Board does not have to resolve this dispute now to deny the Department's motion.

Accordingly, we issue the following Order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

GSP MANAGEMENT COMPANY	:	
	:	
v.	:	**EHB Docket No. 2009-142-M**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 1st day of April, 2011, it is hereby ordered as follows:

1. The Department's motion for summary judgment is **denied.**
2. GSP Management Company's motion for summary judgment is **denied.**
3. Discovery is reopened for 30 days for the limited purposes set forth in this opinion.

ENVIRONMENTAL HEARING BOARD

RICHARD P. MATHER, SR.
Judge

DATED: April 1, 2011

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MARYANNE WESDOCK
ACTING SECRETARY TO THE BOARD

SAYREVILLE SEAPORT ASSOCIATES ACQUISITION COMPANY, LLC T/A SAYREVILLE SEAPORT ASSOCIATES, L.P.

v.

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION

EHB Docket No. 2010-127-L (Consolidated with 2011-015-L)

Issued: April 5, 2011

OPINION AND ORDER ON SECOND MOTION TO DISMISS

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board denies the Department's motion to dismiss for mootness where the letter which is the subject of the appeal is purported to have been superseded and replaced, but the Department's underlying decision has been reaffirmed in a subsequently appealed Department letter.

OPINION

There are three letters of immediate pertinence in this case. The first letter is dated July 14, 2010 and is addressed to Sayreville Seaport Associates Acquisition Company, LLC t/a Sayreville Seaport Associates, L.P. ("Sayreville") from the Department of Environmental Protection (the "Department"). The letter reads as follows:

> This letter is in response to your June 30, 2010, e-mail to Todd Wallace in follow up to our June 16, 2010, meeting. The e-mail concerned the status of the Form U

> proposal to send contaminated soil from the Sayreville, NJ site to the Cumberland County Landfill and the potential of sending the contaminated soil to the Hazleton Creek Property (HCP) site for use as regulated fill.
>
> The Department's Southcentral Regional Office considered the Form U proposal submitted by the Cumberland County Landfill and disapproved the proposal. I have attached a copy of the disapproval notice that was sent to the Cumberland County Landfill for your information.
>
> Regarding your other request, the Department believes that this contaminated soil cannot be accepted by HCP or any other facility approved to beneficially use waste materials as regulated fill under the Department's residual waste general permit WMGR096 or as clean fill pursuant to the Department's Management of Fill Policy. Environmental due diligence performed on this waste identified concerns related to naturally occurring radioactive material (NORM) and technologically enhanced naturally occurring radioactive material (TENORM). The beneficial use of waste with radioactive concerns as regulated fill or clean fill may adversely effect human health or the environment, and therefore the Department's Fill Management policy does not apply.

The letter is signed by Stephen Socash, Chief, Division of Municipal and Residual Waste. The appeal docketed at EHB Docket No. 2010-127-L is filed from the July 14, 2010 letter. The Department previously moved to dismiss that appeal, arguing that the letter does not constitute a final, appealable action. We denied that motion.

The second letter from the Department to Sayreville is dated December 23, 2010 and reads as follows:

> We have recently learned that Sayreville's contaminated soil is licensed in New Jersey under Radioactive Materials License Number RAD100001-518402. Such NRC or Agreement State licensed radioactive material is low-level radioactive waste ("LLRW"), as defined in Section 103 of the Low-Level Radioactive Waste Disposal Act ("LLRWDA")(35 P.S. § 7130.103), as well as 25 Pa. Code § 236.2. Pennsylvania statutes and regulations prohibit the disposal of such licensed radioactive material at facilities that are not licensed to accept low-level radioactive waste pursuant to the LLRWDA at 35 P.S. § 7130.102(13) and 25 Pa. Code Chapter 236. This includes municipal waste landfills and other "shallow land burial" scenarios.
>
> Prohibitions for the placement of LLRW are also contained in the Department's municipal and residual waste regulations. Specifically, § 273.201(i) of the municipal waste regulations prohibits LLRW that is controlled under a

specific or general license authorized by any Federal, State or other government agency from being disposed in a municipal waste landfill, unless specifically exempted from disposal restrictions by an applicable Pennsylvania or Federal statute or regulation. 25 Pa. Code § 273.201. Additionally, § 287.2(h) of the residual waste regulations provides that the management and disposal of LLRW shall be regulated under Chapter 236 (relating to low-level radioactive waste management and disposal) instead of this article. 25 Pa. Code § 287.2.

> Therefore, the contaminated soil, which is LLRW, is barred from disposal or beneficial use in the Commonwealth of Pennsylvania. If you have any further questions or comments concerning this subject please contact me.

The letter is signed by David J. Allard, Director, Bureau of Radiation Protection. The appeal docketed at 2011-015-L is from the December 23, 2010 letter. We believe it is noteworthy that the December 23 letter does not by its terms supersede the July 14 letter.

The third letter from the Department to Sayreville is dated January 31, 2011 and reads as follows:

> I am writing to withdraw my July 14, 2010 letter to you and as addressed to Brian O'Neill, Jr. ("July 14th Letter") regarding the beneficial use of the contaminated soil from Sayreville, NJ as regulated fill. The operative letter in this matter is now the December 23, 2010, letter from David J. Allard to you and as addressed to Brian O'Neill, Jr. ("December 23rd Letter"). The December 23rd Letter supersedes and replaces the July 14th Letter.

The January 31 letter is signed by Stephen Socash, who also signed the July 14, 2010 letter. Based on this January 31 letter the Department has now filed a second motion to dismiss the first appeal (from the July 14 letter), this time arguing that the appeal is moot.

The Department asserts that the appeal of the July 14, 2010 letter is now moot because its January 31, 2011 letter completely and unequivocally supersedes that earlier letter. It says that it is as if the earlier letter had never existed. The Board in the Department's view can no longer grant any effective relief. In response, Sayreville argues that the Department's January 31 letter does not withdraw of the decision embodied in the July 14 letter. The underlying decision remains the same; the December 23 letter merely adds another basis for prohibiting Sayreville

from bringing the material into Pennsylvania.

We find ourselves in agreement with Sayreville. The July 14 letter bars Sayreville's soil from disposal or use in Pennsylvania because it is contaminated to the point that it may adversely affect human health or the environment. The December 23 letter bars Sayreville's soil from disposal or use in Pennsylvania because it is licensed low-level radioactive waste ("LLRW"). Although the Department has added another reason in support of its decision, the decision itself has not changed.

Although ours is not to reason why, we cannot help wondering what the Department hopes to gain by having the appeal from the July 14 letter dismissed as moot. Sayreville cites the Department's effort as "merely another attempt to delay Appellant by forcing it to litigate the Department's reasons for denial in a piecemeal and sequential fashion." It notes that "the Department has offered no other explanation why it issued the January 31 letter." It adds that there is nothing to prevent the Department from effectively reinstating the July 14 letter by issuing a new letter saying the same thing, particularly if the Department is unsuccessful in its effort to defend the appeal from the December 23 letter. "The Department should not be permitted to manipulate the Board's review of its actions by 'withdrawing' a letter while preserving the ability to assert the reasons set forth in that letter for a later day."

Sayreville's characterization rings true. The Department's arguments in support of its motion to dismiss presume that it has correctly determined that the contaminated soil is licensed LLRW, and it therefore follows beyond any doubt that there is no need to consider whether the soil is otherwise inappropriate for disposal or use in Pennsylvania. We have no idea at this point whether the Department is correct. The Department's determination that the soil is LLRW is the subject of the second appeal. If the Department loses that appeal, we doubt very much that it

will take the view that the soil can be used in Pennsylvania. We doubt that the Department by virtue of its December 23 letter now believes that the soil can be beneficially used. Rather, we suspect that the Department believes that the material cannot be disposed of or used in Pennsylvania even if it is not LLRW. The Department has not changed its mind on this point. As this consolidated case now stands, we will be able to address what now appears to be the Department's secondary reason for barring the material from the state if we reject its arguments regarding LLRW. If the Department was to have its way, and our suspicions are correct that the July 14 findings would then be resurrected one way or the other, we would need to start from scratch with a new appeal. Sayreville's prediction of piecemeal, sequential litigation will have come to pass. This approach is neither efficient nor fair. It is better to address all of the issues now.

The record also supports Sayreville's characterization. Socash testified at his deposition that the Department's legal staff drafted the January 31 letter and he merely signed it. He testified that the January 31 letter was not intended to in any way suggest that the Department has changed its mind regarding the substance of the July 14 letter. To the contrary, his testimony is rather illuminating and worth quoting at length:

> Q. Did you draft this [January 31, 2011] letter at all?
>
> A. No.
>
> Q. Was this given to you to sign?
>
> A. Yes.
>
> Q. Do you know who prepared it?
>
> A. I believe it was our – our legal counsel who prepared it and let me see it to see if I had any comments on it.
>
> Q. Did you have any comments?

A. No.

* * *

Q. . . . Is it now your view that the Sayreville soil is regulated fill?

A. No.

Q. Does it continue to be your position and your determination that the Sayreville soil is not regulated fill?

A. Yes.

Q. As far as you know, does that continue to be the Department's determination and position?

A. I'm – I don't know that. It – it's mine. And I, in fact, still continue to get questions concerning this and other similar things. I just don't believe it's – it doesn't qualify as regulated. It doesn't fall within the fill management policy.

Q. So if proposed – and it has been proposed – for the Hazleton Creek site, you would continue to maintain that it can't be beneficially used there because it doesn't qualify as regulated fill, correct?

A. Well, I mean, we haven't received a formal proposal to – to make a decision on that at this time.

Q. But you made a decision about it, correct?

A. Not about Hazleton. Just that it doesn't qualify as regulated fill or clean fill.

Q. Period?

A. Yes.

Q. Whether at Hazleton or anywhere else in the state?

A. Correct.

Q. And that continues to be your decision, correct?

A. Yes.

Q. You didn't mean, by your January 31 letter, to change that decision, did

you?

A. No.

Q. You didn't mean, by your January 31 letter, to retract that decision did you?

A. I do that. It's just retracting the letter that I had sent; that's correct.

Q. You meant to retract the letter? Well, why were you seeking to retract the letter?

A. Because it had come to my attention that it was, perhaps, a licensed material. So there was other information that it couldn't even be considered to go into a landfill or even be considered to be a regulated fill or a clean fill. So it was like a different animal at that point.

Q. So you understand that the Department learned after your July 14 letter that there was an additional reason why it couldn't go into Hazleton Creek or any regulated fill project, correct?

A. Yes.

Q. So as you sit here today, you understand that there are two reasons why this soil cannot be used as regulated fill at Hazleton Creek or any other beneficial use project, one is the license and one is your determination that by its nature, it doesn't qualify per the fill policy, correct?

A. Yes.

Q. Do you have any understanding of what the Department is trying to accomplish with your [January] 31 letter?
Let me withdraw that and ask it this way: Is the Department, by your [January] 31 letter, trying to force Sayreville to litigate before the Board the license issue first. And then even if it prevails on the license issue, it can then spring your July 14 letter back to life and force Sayreville to litigate that second, so that the Department's reasons would be litigated sequentially rather than all at one time?

MR. ZEYHER: Objection

A. I've heard discussions like that, but I really don't get involved. You know, it was just like, retract your letter. And I let the legal . . . I don't get involved in all those discussions.

The Department claims to be interested in promoting judicial economy. As we see it, the

motion has now required us to address a *second* motion to dismiss, the resolution of which will make virtually no obvious difference in the time and resources needed to resolve the question – which is not going away – of whether the soil can be brought into Pennsylvania. The Department's approach would only make sense if it were conceding that the question turns exclusively on whether the soil is LLRW. To repeat, that does not appear to be the Department's position.

The January 31 letter actually has no independent significance. It relies upon a rather self-serving characterization that the December 23 letter supersedes the July 14 letter, but we do not see the December 23 letter as having that purpose, effect, or intent. The December 23 letter expressly reincorporates its decision from the July 14, 2010 letter that the soil is "barred from *disposal or beneficial use* in the Commonwealth of Pennsylvania." *See Perano v. DEP*, 2010 EHB 449, 452 (motion to dismiss for mootness denied where the Department's rescinded terms were subsequently incorporated in a later appealed consent order and agreement). Once again, it is clear that the Department has not changed its decision in this case that the soil cannot be disposed of in a landfill or beneficially used because of potential adverse effects on public health or the environment. At most, it has put that determination to the side for the moment because it has found what it believes to be an even better reason for keeping the soil out of the state.

The Board has a duty to adjudicate appeals from "orders, permits, licenses, or *decisions* of the Department." Section 4(a) of the Environmental Hearing Board Act, 35 P.S. § 7514(a)(emphasis added). The Department's decision regarding Sayreville's soil has not changed. The decision remains subject to this Board's review.

Thus, we do not believe that Sayreville's appeal from the July letter can be fairly characterized as moot. Assuming for purposes of argument that it might be viewed as moot, we

have previously sought "to disabuse the Department from the notion that mootness is a jurisdictional matter. It is not. Mootness is a *prudential* limitation related to justiciability, not jurisdiction. If this Board lacks jurisdiction, it *must* dismiss an appeal. In contrast, where an appeal is moot, the Board has the authority based upon its own measure of prudence to proceed." *Ehmann v. DEP*, 2008 EHB 386, 388. (internal citations omitted). We see no value whatsoever to be gained by dismissing the appeal from the July letter. Finally, we will not dismiss a case that is otherwise moot if the appellant would suffer a detriment without a decision from the Board. *Ehmann*, 2008 EHB at 391. Here, Sayreville would suffer such a detriment.

Accordingly, we issue the Order that follows.

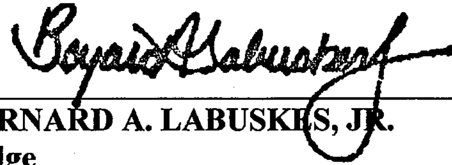
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

SAYREVILLE SEAPORT ASSOCIATES ACQUISITION COMPANY, LLC T/A SAYREVILLE SEAPORT ASSOCIATES, L.P.	:	
v.	:	**EHB Docket No. 2010-127-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 5th day of April, 2011, it is hereby ordered that the Department's second motion to dismiss is **denied**.

ENVIRONMENTAL HEARING BOARD



BERNARD A. LABUSKES, JR.
Judge

DATED: April 5, 2011

c: **DEP Bureau of Litigation:**
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MARYANNE WESDOCK
ACTING SECRETARY TO THE BOA

ENVIRONMENTAL INTEGRITY PROJECT AND CITIZENS COAL COMPANY	:	
	:	
v.	:	**EHB Docket No. 2009-039-R**
	:	**(Consolidated with 2009-006-R)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and ALLEGHENY ENERGY SUPPLY COMPANY, Permittee	:	**Issued: April 6, 2011**

OPINION AND ORDER ON MOTION TO EXTEND HEARING DATE AND CERTAIN PREHEARING DEADLINES

By Thomas W. Renwand, Chairman and Chief Judge

Synopsis:

The Pennsylvania Environmental Hearing Board denies the third request to postpone a hearing. This hearing date was set months ago at the request of all parties and is still five months away.

OPINION

Presently before the Pennsylvania Environmental Hearing Board is Allegheny Energy Supply Company's (Allegheny Energy) Motion seeking to postpone a hearing for the third time in this case. The Pennsylvania Department of Environmental Protection filed a two page letter response summarizing the Motion, advising the Board that settlement discussions have been both "very general" and unsuccessful, and then taking

no position on the Motion. Environmental Integrity Project and Citizens Coal Council (Environmental Integrity Project or Interveners) oppose the Motion.

Before deciding the Motion a brief overview of the procedural history of this consolidated appeal is in order. In January 2009 Allegheny Energy filed a Notice of Appeal and an Amended Notice of Appeal to the Department's action. In February 2009 Allegheny Energy filed a Petition for Supersedeas. Soon thereafter, the Department and Allegheny Energy reached a quick agreement regarding the relief requested in the Supersedeas Petition. Environmental Integrity Project filed a Petition to Intervene which was opposed by Allegheny Energy. As Environmental Integrity Project clearly met the requirements for intervention, the Board granted the Petition to Intervene. In March 2009 Environmental Integrity Project filed a Notice of Appeal to the Department's action. These two appeals were then consolidated.

Following the consolidation, the parties sought to bifurcate the appeal and have the Board decide the appeal of Allegheny Energy first. After first denying this request on the basis that we thought it would delay the resolution of these matters and result in piecemeal litigation, we granted the parties request to reconsider our decision. The case has been scheduled for hearing twice. On March 23, 2011, two days after we denied Allegheny Energy's Motion for Summary Judgment, the power company moved to postpone the three week hearing scheduled to begin in mid-September. It requests that we move the hearing back until sometime in January 2012.

Allegheny Energy seeks a further delay of the hearing because of the time and energy it expended in pursuing its unsuccessful Motion for Summary Judgment and

because it now is under new management which is not yet up to speed on the complexities of this case. Allegheny Energy explains that it wants to explore settlement possibilities which would be complicated if it also has to prepare for hearing.

In opposing this Motion, Environmental Integrity Project points out that the hearing is still five months away and nothing whatsoever prevented the parties from moving forward with discovery while they were working on the summary judgment issues. Counsel also points out that parties can certainly conduct discovery while at the same time discussing settlement. Moreover, and most importantly, Environmental Integrity Project reminds the Board that the National Pollutant Discharge Elimination System (NPDES) permit at issue "was finalized over two years ago in December 2008, and its water-quality based effluent limits have yet to take effect." (Response of Environmental Integrity Project to the Motion, page 1).

As we have said before, it is very important to the integrity of the litigation process that the deadlines we set are viewed as meaningful and important. *McGinnis v. Department of Environmental Protection and Eighty-Four Mining, Inc.,* 2010 EHB 489, 493. As Judge Krancer stated so directly in *Department of Environmental Protection v. Simmons,* 2010 EHB 188 "[t]here comes a time where one has to say 'enough is enough' and the time for that here is probably well overdue." Likewise, that time has arrived in this case. The Motion is denied.

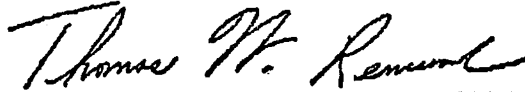
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ENVIRONMENTAL INTEGRITY PROJECT AND CITIZENS COAL COUNCIL	:	
	:	
v.	:	**EHB Docket No. 2009-039-R**
	:	**(Consolidated with 2009-006-R)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and ALLEGHENY ENERGY SUPPLY COMPANY, Permittee	:	

ORDER

AND NOW, this 6th day of April, 2011, Allegheny Energy's Motion to Extend Hearing Date and Certain Pre-Hearing Deadlines is **Denied.**

ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Chairman and Chief Judge

DATE: April 6, 2011

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MARYANNE WESDOCK
ACTING SECRETARY TO THE BOARD

TRI COUNTY WASTEWATER MANAGEMENT, INC., ALLAN'S WASTE WATER SERVICE, INC., and R. ALLAN SHIPMAN :

v. : **EHB Docket Nos. 2011-042-R, 2011-043-R and 2011-044-R**

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION : **Issued: April 6, 2011**

OPINION AND ORDER ON APPLICATIONS FOR TEMPORARY SUPERSEDEAS

By Thomas W. Renwand, Chairman and Chief Judge

Synopsis:

Applications for temporary supersedeas filed by a wastewater facility, a wastewater transportation company, and an owner of the companies are denied where the Board determines it needs to hear testimony to determine if there is a threat of pollution or injury to the public. Moreover, the scheduling of the hearing less than one week from the date of this Opinion and Order obviates the need for a temporary supersedeas. The threat of pollution and harm to the public safety outweighs the economic harm that the applicants will suffer during the suspension of their business operations.

OPINION

This matter involves three appeals: one filed by Allan's Wastewater Service, Inc. (Allan's Wastewater) (Dockets No. 2011-043-R and 2011-044-R), one filed by owner R. Allan Shipman (Allan Shipman) and one filed by Tri County Wastewater Management, Inc. (Tri County) (Docket No. 2011-042-R). The appeals challenge orders issued by the Department of Environmental Protection (Department) on March 21, 2011 suspending the appellants' operations. The appellants have filed petitions for supersedeas and temporary supersedeas. This opinion addresses the petitions for temporary supersedeas.

Allan's Wastewater operates a waste transportation service pursuant to an Authorization issued under the Waste Transportation Safety Act, 27 Pa. C.S.A. § 6201 *et seq*. Allan's Wastewater conducts the following business operations: (1) pumping, collection, transportation and disposal of septage from septic tanks to storage treatment plants; (2) rental, pumping, collection, transportation and disposal of portable toilets (known as port-a-johns); (3) pumping, collection, transportation and disposal of sewage from holding tanks to a sewage treatment plant; (4) collection, transportation and disposal of construction and demolition waste as well as other municipal waste; (5) pumping, collection, transportation and disposal of production water from oil and gas wells; (6) pumping, collection, transportation and disposal of hydraulic fracking water from oil and gas wells; (7) pumping, collection, transportation and disposal of industrial wastewater; (8) pumping, cleaning, transportation and disposal of material from grease traps from various restaurants; and (9) hauling potable water from public water supplies to oil and gas well sites. (Allan's Wastewater Petition, Stephenson Affidavit) As of March 21,

2011, Allan's Wastewater had 26 employees, 250 active customers and over 600 total customers (including seasonal customers). (*Id.* at para. 17, 18) The CEO and president of Allan's Wastewater is Allan Shipman. Mr. Shipman owns 50% of the shares of Allan's Wastewater, while his wife, Carolyn, owns the other 50%. (Allan's Wastewater Petition, Savarno Affidavit, para. 9)

On March 21, 2011 Allan's Wastewater was served with two orders of the Department alleging that between 2003 and 2009, Allan's Wastewater and Allan Shipman, in his individual capacity, deposited gas well production water, sewage sludge, grease trap water and other wastewater and industrial waste onto the surface of the ground, underground or into waters of the Commonwealth in various locations throughout southwestern Pennsylvania. The orders suspend the company's Authorization under the Waste Transportation and Safety Act and require the company to immediately cease the storage, collection, transportation, processing, treatment, beneficial use or disposal of solid waste.

Tri County's business includes the treatment, disposal and reuse of oil and gas production fluids. (Tri County Petition, Kohler Affidavit, para. 8) Tri County operates under a permit-by-rule under 25 Pa. Code § 287.102(c). Allan Shipman owns 20% of the outstanding shares of Tri County. The remaining 80% are owned by his wife, Carolyn Shipman. (Tri County Petition, Savarno Affidavit, para. 7) As of March 21, 2011, Tri County had five employees. On March 21, 2011, the Department issued an order to Tri County suspending its permit-by-rule and directing it to cease the storage, collection, transportation, processing, treatment, beneficial use or disposal of solid waste. The order

states that Allan Shipman is directly involved in the day-to-day operations of both Allan's Wastewater and Tri County and that Mr. Shipman has failed to comply with the provisions of the Solid Waste Management Act, 35 P.S. § 6018.101 *et seq.*, and the Clean Streams Law, 35 P.S. § 691.1 *et seq.*, and has demonstrated a lack of ability to comply with the same.

The appellants point out that the Department's March 21 orders came four days after the filing of criminal charges against Mr. Shipman and Allan's Wastewater by the Environmental Crimes Unit of the Pennsylvania Office of the Attorney General. Prior to the March 21 orders, neither Allan's Wastewater nor Tri County had received any orders or notices of violation from the Department. (Allan's Wastewater Petition, Stephenson Affidavit, para. 30; Tri County Petition, Kohler Affidavit, para. 17) A preliminary hearing in the criminal proceeding against Mr. Shipman and Allan's Wastewater is scheduled to take place in June 2011.

The Environmental Hearing Board (Board) has scheduled a hearing on the appellants' supersedeas petitions on April 12, 2011. In the interim, both appellants seek temporary supersedeas on the basis that they will suffer irreparable harm if their ability to operate remains suspended until that date. Both appellants argue that they are currently suffering irreparable harm during the suspension of their businesses, and by continuing to turn away customers they will effectively lose their ability to operate in the future.

The Board's rules provide that "[a]n application for temporary supersedeas may be filed when a party may suffer immediate and irreparable injury before the Board can conduct a hearing on a petition for supersedeas." 25 Pa. Code § 1021.64(a). The factors

the Board will consider in determining whether an application for temporary supersedeas will be granted are as follows:

(1) The immediate and irreparable injury the applicant will suffer before a supersedeas hearing can be held.

(2) The likelihood that injury to the public, including the possibility of pollution, will occur while the temporary supersedeas is in effect.

(3) The length of time required before the Board can hold a hearing on the petition for supersedeas.

25 Pa. Code § 1021.64(e).

Allan's Wastewater and Allan Shipman's Application for Temporary Supersedeas

We first consider the applications of Allan's Wastewater and its owner Allan Shipman for temporary supersedeas. Allan's Wastewater argues that since the March 21 suspension of its Authorization, it has been unable to perform virtually all of its business functions and is earning virtually no income. Without income, it argues it will be soon be forced to close its business. The applicant also argues that it has been forced to turn away its customers during the suspension, and once the customers go elsewhere any subsequent reversal of the suspension will be for naught. This, it argues, constitutes irreparable harm.

We agree that the suspension of its business activities and potential permanent loss of its customers may constitute irreparable harm. *Wagner v. DEP*, 1998 EHB 1056; *Consolidated Penn Labs v. DEP*, 1997 EHB 908. However, irreparable harm is not the only factor that the Board must consider in determining whether to grant a temporary

supersedeas. One of the other factors the Board must consider is the likelihood that injury to the public, including the possibility of pollution, will occur while the temporary supersedeas is in effect. The Department claims its investigation of this matter indicates a total disregard for the environmental laws of this Commonwealth by Mr. Shipman and Allan's Wastewater, a company owned and controlled by him. The Department interviewed a number of former employees who claim to have witnessed the illegal disposal of waste water at the direction of Mr. Shipman. These alleged disposal activities include, but are not limited to, the following: (1) kicking open valves on aboveground storage tanks and allowing waste water to run into a stream; (2) emptying waste water trucks at the Allan's Wastewater garage by discharging the waste water through floor drains; (3) "cocktailing" waste water, the practice of mixing grease trap waste with sewage water to pass it off as sewage at a sewage treatment plant (the disposal of sewage costing less than the disposal of grease trap waste. (Ex C, C-1, C-2, D to Department Response) One former employee described how he was instructed by Mr. Shipman to empty the contents of his tanker truck into the main sewer system when he was servicing restaurants. (*Id.*) Another was told by Mr. Shipman to allow waste water to run onto the ground when there was more waste water to haul than could be handled in a day. It was estimated that this resulted in the dumping of 30,000 to 40, 000 gallons of waste water a day into a nearby creek. (*Id.*) If true, the conduct described in the exhibits to the Department's response is egregious and demonstrates an inability or lack of intent to comply with the Solid Waste Management Act or the Clean Streams Law. We need to hear testimony before we will take the extraordinary step of superseding the

Department's orders under these circumstances. We cannot say that pollution or injury to the public health or welfare will not occur if the temporary supersedeas against Allan's Wastewater is lifted.

The applicant makes the argument that its Constitutional right to due process will be violated if it is forced to defend against the Department's action while criminal charges are pending against the applicant and Mr. Shipman. It asks that the suspension be superseded at least until the criminal matter has been resolved. The Board sympathizes with the applicant's argument. However, the applicant has cited no authority directly supporting the argument. We direct the parties to research and brief this issue further.

Tri County Application for Temporary Supersedeas

Tri County argues that it has been unfairly tied to the activities alleged against Allan's Wastewater and that there is no evidence or allegation that it has committed any wrongdoing. Tri County has not been criminally charged. It argues that the suspension of its permit-by-rule has caused an entire shutdown of its operation and threatens permanent shutdown due to the loss of customers. The Department asserts that the close relationship between the two companies compels the Board to reach the same conclusions with respect to Tri County as it does with respect to Allan's Wastewater. As noted earlier, Tri County is co-owned by Mr. Shipman and his wife. According to the Department, the Tri County waste disposal facility was built by Mr. Shipman as an extension of the Allan's Wastewater business, and the original permit application for the Tri County facility was submitted on Allan's Wastewater letterhead. The Department

further avers that Allan's Wastewater is responsible for 88% of Tri County's business. According to the Department's interview of a former employee, Mr. Shipman is in the Tri County office on a daily basis and he monitors the number of loads of waste received by the company. (Ex. D to Department Response) The Department argues that "[a]llowing one wing of Shipman's waste disposal scheme, Tri-County, to continue to operate invites mischief, threatens pollution and threatens the health, safety and welfare of the citizens of Pennsylvania." (Department Response, p. 8)

We sympathize with Tri County's argument that it suffers harm each day it remains out of operation. Nonetheless, we are persuaded by the Department's argument that the nature of the allegations is one of deliberate refusal to abide by environmental statutes. Although we certainly are not drawing any conclusion at this juncture as to the veracity of the allegations, we also cannot rule out a threat to public health or welfare or a threat of pollution. At a minimum, we will need to hear testimony on this matter.

As noted earlier, one of the factors that the Board must consider in determining whether to grant a temporary supersedeas is the length of time before the Board can hold a hearing on the petition for supersedeas. We have scheduled the hearing to be held in a relatively short period of time – less than a week from today.[1] Even if we were to grant a temporary supersedeas the practical result would be to provide Tri County with only a few additional days of operation. Moreover, as counsel for the Department noted during our conference on April 4, at least some of Tri County's customers have expressed a

[1] The Board originally intended to schedule the supersedeas hearing on April 11 but moved it to the 12th at the convenience of the appellants.

desire to return to doing business with Tri County if the order is lifted. (Ex. D to Tri County Petition) Therefore, given the relatively short amount of time before the supersedeas hearing will be held and our concern over the nature of the allegations, we choose to err on the side of caution and allow the Department's order to remain in place at least until this matter can be more fully fleshed out at the supersedeas hearing.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

TRI COUNTY WASTEWATER MANAGEMENT, INC., ALLAN'S WASTE WATER SERVICE, INC., and R. ALLAN SHIPMAN	:	
v.	:	**EHB Docket Nos. 2011-042-R, 2011-043-R and 2011-044-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 6th day of April 2011, the Applications for Temporary Supersedeas filed by Allan's Waste Water Service, Inc., R. Allan Shipman and Tri County Wastewater Management, Inc. are **denied.**

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Chairman and Chief Judge

DATE: April 6, 2011

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MARYANNE WESDOCK
ACTING SECRETARY TO THE BOAF

CONSOL PENNSYLVANIA COAL COMPANY, LLC and CONSOL ENERGY INC.	:	
v.	:	**EHB Docket No. 2010-030-R (Consolidated with 2010-184-R and 2011-017-R)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, and DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES, Intervenor	:	**Issued: April 14, 2011**

OPINION AND ORDER ON PETITION TO INTERVENE

By Thomas W. Renwand, Chairman and Chief Judge

Synopsis:

A Petition to Intervene filed by a citizens group in an appeal concerning alleged mine subsidence damage to a state park is granted. Any interested party may intervene in a manner pending before the Pennsylvania Environmental Hearing Board if it has a substantial, direct and immediate interest in the subject matter of the appeal.

OPINION

Discussion

Presently before the Pennsylvania Environmental Hearing Board is the Petition to Intervene filed by the Center for Coalfield Justice. The Petition to Intervene is vigorously

opposed by Consol Pennsylvania Coal Company, LLC (Consol Coal). The consolidated appeal arises from the Pennsylvania Department of Environmental Protection actions determining that Consol Coal's longwall mining operations which undermined parts of Ryerson State Park caused subsidence damage to the state park including its dam. The Pennsylvania Department of Conservation and Natural Resources somewhat surprisingly oppose the Petition to Intervene. The Pennsylvania Department of Environmental Protection takes a more neutral approach and does not affirmatively oppose intervention by the Center for Coalfield Justice.

The standard for intervention is set forth in Section 4(e) of the Environmental Hearing Board Act, which states that "any interested party may intervene in any matter pending before the Board." 35 P.S. Section 7414 (e); *Tri-State River Products v. Department of Environmental Protection*, 2001 EHB 556, 557. The Pennsylvania Commonwealth Court has explained that, in the context of intervention, "any interested party" actually means any person or entity who will either gain or lose by direct operation of the Board's decision. *Browning-Ferris, Inc. v. Department of Environmental Resources,* 598 A.2d 1057, 1060 (Pa. Cmwlth. 1991); *Conners v. Department of Environmental Protection,* 1999 EHB 669. As Judge Coleman recently stated in *Monroe County Municipal Waste Management Authority v. Department of Environmental Protection,* 2010 EHB 819 "a person or entity seeking to intervene must have an interest that is substantial, direct and immediate and that interest must be sufficiently related in some way to the subject-matter of the Department actions being appealed." 2010 EHB at 820.

Despite Consol Coal's protestations, the intervener meets all of the requirements to intervene in this consolidated appeal. Its interest is substantial, direct and immediate. *McCord v. Pennsylvania Gaming Control Board,* 9 A.3d 1216, 1219 (Pa. Cmwlth. 2010). Moreover, it also benefits derivatively from the interests of Ms. Attilia Shumaker who is very much involved in the interests of coal field justice in addition to being an avid user of Ryerson State Park. As Judge Krancer has pointed out, "under repeated Board precedent, an aesthetic appreciation for or recreational enjoyment of an environmental resource can confer standing." *Drummond v. Department of Environmental Protection,* 2002 EHB 413, 424. *See also LTV Steel Company v. Department of Environmental Protection,* 2002 EHB 605, 606-607. Since the Center for Coalfield Justice without question meets the standards applicable to intervention, we will issue an appropriate Order granting its Petition to Intervene.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CONSOL PENNSYLVANIA COAL COMPANY, LLC and CONSOL ENERGY INC.	:	
v.	:	**EHB Docket No. 2010-030-R (Consolidated with 2010-184-R and 2011-017-R)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES and CENTER FOR COALFIELD JUSTICE, Intervenors	:	

ORDER

AND NOW, this **14th** day of **April, 2011,** following review of the Petition to Intervene and opposing papers, it is ordered as follows:

1) The Petition to Intervene filed by the Center for Coalfield Justice is **granted.**

2) The caption is amended to reflect that the Center for Coalfield Justice is granted intervenor status in this case.

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Chairman and Chief Judge

DATED: April 14, 2011

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MARYANNE WESDOCK
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TRI COUNTY WASTE WATER MANAGEMENT, INC.	:	
v.	:	**EHB Docket No. 2011-042-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: April 15, 2011**

OPINION AND ORDER ON
PETITIONS FOR SUPERSEDEAS

By Thomas W. Renwand, Chairman and Chief Judge

Synopsis:

We are issuing a supersedeas with several conditions. Tri County has met its heavy burden of showing a likelihood of success on the merits, irreparable harm, and no threat of pollution or injury to the public, where the evidence demonstrates no violations of the environmental laws by Tri County. Where the words of a statute are clear and unambiguous, the Board cannot add words to the statute under the pretext of pursuing its spirit.

OPINION

This matter involves three related appeals: an appeal filed by Tri County Waste Water Management, Inc. (Tri County) (Docket No. 2011-042-R), which is the subject of this opinion; one filed by Allan's Waste Water Service, Inc. (Allan's Waste Water) (Docket No. 2011-043-R), and one filed by Mr. R. Allan Shipman (Docket No. 2011-044-R), an owner of Allan's Waste Water. The appeals challenge two Pennsylvania Department of Environmental Protection

(Department) orders which were issued on March 21, 2011. The Department's orders suspended the waste treatment permit held by Tri County and the waste transportation authorization held by Allan's Waste Water.[1]

Allan's Waste Water operates a wastewater transportation business that hauls various types of waste water, including but not limited to the following: production water and hydraulic fracking water from oil and gas wells; sewage; septage from septic tanks; industrial waste water; and material from grease traps from various fast food restaurants. The shares of Allan's Waste Water are divided equally between Allan Shipman and his wife, Carolyn. (Comm. Ex. 7, Supersedeas Hearing)

Tri County operates a wastewater treatment facility under a Permit-by-Rule issued pursuant to 25 Pa. Code § 287.102(c). The shares of the corporation are divided between Mr. Shipman, who holds 20%, and his wife, Carolyn, who holds 80%. (Comm. Ex. 6, Supersedeas Hearing; Tri County Supersedeas Petition, Svarno Affidavit, para. 7) Mr. Shipman also holds the title of corporate secretary in the business. According to testimony at the supersedeas hearing in this matter, Allan's Waste Water accounts for between 80-88% of the wastewater received by Tri County.

On March 21, 2011, the Department issued orders suspending the companies' operations based on alleged violations of the Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended,* 35 P.S. §§ 691.1 – 691.1001, and the Solid Waste Management Act, Act of July 7,

---

[1] Additional information is provided in our Opinion and Order issued in these cases on April 6, 2011. *Tri County Wastewater Management, Inc. et al. v. DEP*, EHB Docket Nos. 2011-042, 043 and 044-R (Opinion and Order on Applications for Temporary Supersedeas issued April 6, 2011.) The spelling of the parties' names differs between the two opinions due to various spellings contained in the documents filed by the parties pertaining to the Applications for Temporary Supersedeas, the Petitions for Supersedeas, and the briefs in support of the applications and petitions.

1980, P.L. 380, as amended, 35 P.S. §§ 6018.101 – 6018.1003. Several days prior to the Department's orders, criminal charges were brought against Allan's Waste Water and Mr. Shipman individually by the Pennsylvania Office of Attorney General. No criminal charges have been filed against Tri County.

On March 30, 2011, Petitions for Supersedeas and Applications for Temporary Supersedeas were filed on behalf of all three appellants with the Pennsylvania Environmental Hearing Board (the Board.) On April 4, 2011, the Board held a conference with the parties to address the Applications for Temporary Supersedeas. Following the conference and review of the parties' arguments, the Board issued an opinion on April 6, 2011 denying the Applications for Temporary Supersedeas. *Tri County Waste Water Management, Inc. et al. v. DEP*, EHB Docket No. 2011-042, 043, and 044-R (Opinion and Order on Applications for Temporary Supersedeas issued April 6, 2011.) In its opinion, the Board concluded that testimony was needed on the issues of threat to public health and safety and threat of pollution.

Subsequent to the Board's opinion, Allan's Waste Water and Mr. R. Allan Shipman withdrew their petitions for supersedeas. Therefore, and importantly, Mr. Shipman and Allan's Waste Water are effectively shut down pursuant to the Department's March 21, 2011 order. On April 12, 2011, the Board held a hearing on the remaining petition for supersedeas, i.e., the petition filed by Tri County. The supersedeas hearing was presided over by Environmental Hearing Board Chief Judge and Chairman Thomas W. Renwand. At the conclusion of the hearing, the Board ordered the filing of supplemental briefs by 5:00 p.m. Wednesday, April 13. The parties filed detailed briefs. This opinion addresses Tri County's petition for supersedeas.

The Board may issue a supersedeas only after a hearing. 25 Pa. Code § 1021.61(b). Among the factors to consider in determining whether to grant or deny a supersedeas are the

following:

(1) Irreparable harm to the petitioner.

(2) The likelihood of the petitioner prevailing on the merits.

(3) The likelihood of injury to the public or other parties, such as the permittee in third party appeals.

Id. at § 1021.63(a); *Pennsy Supply v. DEP and McDermitt Concrete*, 2008 EHB 411; *Kennedy v. DEP*, 2008 EHB 423; *Robinson v. DEP and Consol Pennsylvania Coal Co.*, 2004 EHB 270.

A supersedeas may not be issued where pollution or injury to the public health, safety or welfare exists or is threatened during the period when the supersedeas would be in effect. *Id.* at § 1021.64(c); *Kennedy, supra.; Robinson, supra.* As set forth in *UMCO Energy, Inc. v. DEP*, 2004 EHB 797, 802, "in the final analysis, the issuance of a supersedeas is committed to the Board's discretion based upon a balancing of all the statutory criteria."

Tri County had the burden of proof at the supersedeas hearing, even though the Department will have the burden of proof at the hearing on the merits. 25 Pa. Code §§ 1021.122(a) and 1021.122 (b)(3) and (4).

At the supersedeas hearing, the Department presented the testimony of former employees of Allan's Waste Water who stated that Allan Shipman directed them, in their capacity as employees of Allan's Waste Water, to take part in various waste disposal activities that, if true, were in violation of the Clean Streams Law and the Solid Waste Management Act. These included, but are not necessarily limited to, the following:

(1) a practice known as "drinking," whereby a driver would pull up to a fast food establishment and, instead of pumping the greasy water *out* of the waste trap to be hauled to a wastewater treatment facility, the driver would pump wastewater from his full truck *into* the grease trap. This was done when the truck was full in order to allow Allan's Waste Water to

charge for more wastewater pickups than the truck could actually hold.

(2) a practice known as "cocktailing," whereby grease trap waste was mixed with sewage water or sour milk to pass it off as either sewage or milk at a sewage treatment plant. This was done because a lower price was charged for the disposal of sewage than for the disposal of grease trap waste.

(3) the emptying of trucks full of wastewater into drains located on the floor of the Allan's Waste Water garage. The drains emptied to Tom's Run and an unnamed tributary to Tom's Run, as evidenced by the testimony of Department employees who conducted a dye test of the drains.

(4) the late night disposal of wastewater into a bore hole permitted by EPA only for the disposal of coal bed methane wastewater by CNX. The bore hole was known by Allan's Waste Water employees as the "magic hole" because they were directed by Mr. Shipman to dispose of thousands of gallons of wastewater at the site.

(5) disposal of wastewater at a tank farm operated by CNX. A former employee testified that it was his job to go to the tank farm and pump out the aboveground storage tanks holding coal bed methane wastewater. He testified that he was directed by Mr. Shipman to kick open the valves on the aboveground storage tanks and let the water run into the creek.

According to the testimony of former employees, these activities were done at the direction of Mr. Shipman and with his knowledge, and in many instances with his active participation. They were done regularly over the course of several years. The activities were directed by Mr. Shipman in his management and operation of Allan's Waste Water. None of the activities were performed by Tri County or its employees.

The Department based its decision to suspend Tri County's permit on Section 503(c) of

the Solid Waste Management Act. That section authorizes the Department to suspend or revoke a permit where the applicant, permittee or licensee has failed to comply with certain environmental laws, orders or conditions of a permit, or where the Department finds that the applicant, permittee or licensee has shown a lack of ability or intention to comply with the law. The Department asserts that Mr. Shipman has shown a lack of ability or intention to comply with the Solid Waste Management Act and the Clean Streams Law, and that Mr. Shipman exercises influence and control over Tri County, both due to his part ownership of the company and in connection with his operation of Allan's Waste Water.

Tri County argues that Section 503(c) of the Solid Waste Management Act does not support the suspension of its Permit-by-Rule based on the conduct of Mr. Shipman. Tri County asserts that Section 503(c) permits the Department to *suspend* a permit only where the *permittee* itself has failed to comply with the laws or has shown a lack of ability or intention to comply. Tri County points out that the Department's March 21, 2011 Order suspending Tri County's Permit-by-Rule contains no findings of wrongdoing by Tri County; rather the findings focus on the actions of Mr. Shipman and Allan's Waste Water.

Section 503(c) reads in relevant part as follows: "[T]he department may deny, *suspend,* modify, or revoke any permit or license if it finds that the applicant, *permittee* or licensee has failed or continues to fail to comply with any provision of" the Solid Waste Management Act, the Clean Streams Law, or other state or federal statutes relating to environmental protection or public health, safety and welfare, "or if the department finds that the applicant, *permittee* or licensee has shown a lack of ability or intention to comply with any provision of" the Solid Waste Management Act or Clean Streams Law or other statute "as indicated by past or continuing violations." 35 P.S. § 6018.503(c) (emphasis added).

Section 503(c) goes on to state: "In the case of a *corporate* applicant, permittee or licensee, the department may *deny the issuance of a license or permit* if it finds that a principal of the corporation was a principal of another corporation which committed past violations of [the Solid Waste Management Act]." *Id.* (emphasis added). Notably, Section 503(c) allows the suspension of a permit where the permittee itself has failed to comply with the law or shown a lack of ability or intention to comply. In this case, the March 21, 2011 Order contains no finding, and the hearing held on April 12, 2011 revealed no evidence that the permittee, Tri County, committed any unlawful conduct or that Tri County did not comply with the provisions of the Solid Waste Management Act, the Clean Streams Law or any other state or federal statute relating to environmental protection or public health. The Department's March 21, 2011 Order contains no finding, and the April 12, 2011 hearing revealed no evidence that the permittee, Tri County, has shown a lack of ability or intention to comply with any of the above acts.

The unambiguous language of the statute is crystal clear and applies only to the denial of an issuance of a license or permit, not a suspension.

Where the words of a statute are clear and unambiguous, we may not look beyond its plain meaning in attempting to glean the intent of the Legislature. *Hunt v. Pennsylvania State Police*, 983 A.2d 627, 631 (Pa. 2009); *Koken v. Reliance Insurance Co.*, 893 A.2d 70, 81 (Pa. 2006); *Joseph J. Brunner, Inc. v. DEP and Beaver Valley Alloy Foundry Co.*, 2004 EHB 684, 693, *rev'd on other grounds*, 896 A.2d 1172 (Pa. Cmwlth. 2005). Likewise, as stated by former Chief Judge Krancer in a dissenting opinion in *Brunner*, in which I joined, we may not add words to a statute which the Legislature did not put there. 2004 EHB at 703. Here, as in *Brunner*, the problem with the Department's interpretation is that it adds words to the statute that simply are not there. *Id.* at 696, 703.

The Department's March 21, 2011 Order contains no findings of any violations of the Solid Waste Management Act, the Clean Streams Law or any other environmental statute by Tri County. All of the findings in the order pertain to Mr. Shipman and Allan's Waste Water. The only connection to Tri County is that Mr. Shipman is the corporate secretary and a shareholder in the company.

At the supersedeas hearing, testimony was presented by Raymond Kohler, the Plant Manager of Tri County. Mr. Kohler has operated the plant since it was built in approximately 2007. He provided detailed testimony about its operation and the day-to-day activities of the business. What became quite clear from his testimony was that Mr. Shipman is not actively involved with the daily operations of Tri County.

We conclude from the testimony presented before us at the supersedeas hearing that Tri County's environmental record is unblemished. Moreover, the Department has concluded the same thing, having issued no notices of violations to the company. The findings contained in the March 21, 2011 Order refer only to activities conducted by Mr. Shipman and Allan's Waste Water. The Department conducted a detailed inspection of Tri County on April 6, 2011 in preparation for this hearing. No violations or alleged wrongdoing were found that would justify the suspension of Tri County's permit. Indeed, the Department's entire case against Tri County is based on the conduct of Allan Shipman, a minority shareholder of Tri County, and that conduct pertained to activities conducted by another company with no connection to any activities or conduct of Tri County other than the fact that they were a customer and Mr. Shipman is a part owner. There is nothing in the record to suggest that Mr. Kohler or any of the employees at Tri County had any knowledge of the alleged environmental wrongs being committed by Mr. Shipman or Allan's Waste Water. Nor is there any indication that Mr. Kohler took any direction

from Mr. Shipman in the operation of the plant. Neither the witnesses nor the detailed and thorough investigation by the Department showed that any of these violations involved Tri County or any of its employees. The only link between the egregious conduct of Allan's Waste Water and Mr. Shipman and Tri County is the fact that Mr. Shipman is a minority owner of Tri County. Indeed, even looking at the testimony in the light most favorable to the Department only leads to the strong inference that Mr. Shipman was an absentee owner vis-à-vis Tri County.

Our duty in this case, as well as in every case before us, is to reach our decision guided solely by the law. The Department, through the testimony of its inspectors and two former employees of Allan's Waste Water, presented very compelling evidence of deliberate and egregious violations of the Clean Streams Law and the Solid Waste Management Act. If true, these are blatant and serious violations that evidence an intention to violate the law. These activities could have harmed not only the environment but some of the 750,000 people who get their drinking water from this watershed.

Tri County, which has the burden of proof with regard to its supersedeas petition, provided strong evidence that it has committed no violations of the environmental laws of this Commonwealth, much less any violations that would necessitate the suspension of its permit. Moreover, the Department became aware of the alleged egregious conduct of Mr. Shipman at the very latest in 2008. Although the Department argues strenuously that Tri County must now be immediately shut down, they have allowed not only Tri County but also Allan Shipman and Allan's Waste Water to operate for years even after they became aware of egregious violations in 2008. However, *none* of those violations – not a single one – involve Tri County.

We believe that Mr. Kohler has managed Tri County in conformance with the stringent environmental laws applicable to waste water treatment plants. Mr. Kohler testified in detail to

the many steps he takes to ensure that Tri County is in compliance with all environmental regulations. He also testified as to how the wastewater proceeds through the Tri County treatment plant. Most of the treated water is then piped 1500 feet to the Franklin Township Sewer Authority Wastewater Treatment Plant.. The testimony gives us great comfort that this plant has not only operated according to the law but that it would be very difficult for Tri County to engage in any of the nefarious conduct detailed at the hearing.

If we were to deny this petition for supersedeas, we have no doubt that Tri County would suffer irreparable harm. They presented testimony they would lose current customers and any potential business available to them. As a result of the Department's order they are, in effect, out of business. Two of their employees have been laid off, and the remaining employees will be laid off by the end of this week. We cannot read words into a statute where the Legislature's language is unambiguous. Therefore, we are convinced that Tri County has met its heavy burden of proof and we are convinced that they have an excellent chance of succeeding on the merits. The Department's case is against Mr. Shipman and Allan's Waste Water. None of the egregious violations involve Tri County.

25 Pa. Code § 1021.63(k) authorizes us to "impose conditions that are warranted by the circumstances" in the granting of a supersedeas. As a condition to the granting of a supersedeas and as set forth in more detail in our accompanying order, Mr. Shipman shall have no involvement, either directly or indirectly in the business or operation of Tri County. He shall not communicate in any manner with the plant manager or any of the employees of Tri County. The Department's complaint is with Mr. Shipman, and our order removes him from any potential involvement whatsoever in the day to day operation and management of Tri County. As part of this order, Mr. Kohler shall certify by affidavit on a monthly basis that he has not had any

contact with Mr. Shipman and that Mr. Shipman has no involvement in the operation or business of Tri County. At this time, we will enter an order that grants the supersedeas of the Department's March 21, 2011 Order, but only until July 15, 2011. If we do not issue another order extending the supersedeas then the March 21, 2011 Order will be automatically reinstated by operation of law. In addition, the Department is requested to conduct regular inspections of the Tri County Waste Water treatment plant and immediately advise the Pennsylvania Environmental Hearing Board of any violations that the Department would consider as requiring the suspension of Tri County's Permit-by-Rule. We shall order the Department through its counsel to file a status report with the Board on or before July 8, 2011 advising us of the results of its inspections. Following a review of the Department's status report, the Board will determine whether it needs to consult with counsel, conduct further supersedeas hearings, or extend the supersedeas and further suspension of the Department's March 21 Order.

Nothing we have said in this opinion should be construed as criticism of the actions of the Department of Environmental Protection. The testimony of the inspectors, supervisors and program manager evidences employees who are dedicated to protecting the environment and serving the public. We also should not lose sight of the fact that after we denied the applications for temporary supersedes of not only Tri County, but also Mr. Shipman and Allan's Waste Water, both Mr. Shipman and Allan's Waste Water withdrew their petitions for supersedeas. We can only assume that after reading our opinion, their experienced and learned counsel determined that this Board would never grant the petition for supersedes filed by Mr. Shipman and Allan's Waste Water based on the facts that would be presented at the hearing.

Our decision today fully protects the environment. At the same time, and just as importantly, it upholds the rule of law.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

TRI COUNTY WASTE WATER MANAGEMENT, INC.	:	
v.	:	**EHB Docket Nos. 2011-042-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 15th day of April 2011, upon consideration of Tri County Waste Water Management, Inc.'s Petition for Supersedeas and following a hearing conducted on April 12, 2011 and the review of the briefs and memoranda filed in this matter, it is ordered as follows:

1) The March 21, 2011 Order of the Pennsylvania Department of Environmental Protection (the March 21, 2011 Order or the Order) is **superseded** but only until **July 15, 2011**. If the Pennsylvania Environmental Hearing Board does not issue another Order extending the supersedeas then the March 21, 2011 Order will be automatically reinstated by operation of law.

2) The Pennsylvania Department of Environmental Protection is requested to conduct regular inspections of the Tri County Waste Water treatment plant and immediately advise the Pennsylvania Environmental Hearing Board of any violation(s) that the Department would consider as requiring the suspension of Tri County's Permit-by-Rule.

3) The Pennsylvania Department of Environmental Protection, through its counsel, shall file a ***status report*** with the Pennsylvania Environmental Hearing Board on or before **July 8, 2011** advising of the results of its inspections.

4) Following a review of the Department's status report, the Board will determine whether it needs to consult with counsel, conduct further supersedeas hearings or extend the supersedeas and further suspension of the Department's March 21, 2011 Order.

5) Tri County, through its counsel, shall file a status report with the Pennsylvania Environmental Hearing Board on or before July 8, 2011, advising the Board of the status of the criminal prosecution of Mr. R. Allan Shipman and Allan's Waste Water Service, Inc.

6) Pending a hearing on the merits of the appeal; the dismissal, acquittal or otherwise successful resolution of the criminal charges against Mr. R. Allan Shipman and Allan's Waste Water Service; or further Order of the Pennsylvania Environmental Hearing Board; as a condition of the supersedeas entered by the Board, Mr. R. Allan Shipman shall have absolutely no involvement, either directly or indirectly, in the business or operation of Tri County Wastewater. Mr. Shipman shall not communicate in any manner with the Plant Manager or any of the employees of Tri County Waste Water Management.

7) As part of this Order, Mr. Raymond Kohler, the Plant Manager of Tri County Waste Water Management, shall certify by affidavit on a monthly basis, with the first certification to be provided to Tri County's legal counsel on **May 2, 2011**, that he has not had any contact with Mr. R. Allan Shipman and that Mr. Shipman has had no involvement in the business or operation of Tri County Waste Water Management.

8) On or before **May 17, 2011**, Tri County must satisfy the secondary containment requirement set forth in the Department's April 6, 2011 inspection report, and counsel shall so advise the Pennsylvania Environmental

Hearing Board when this has been accomplished.

9) All Notices of Deposition shall be filed with the Pennsylvania Environmental Hearing Board.

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Chairman and Chief Judge

DATE: April 15, 2011

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MARYANNE WESDOCK
ACTING SECRETARY TO THE BOARD

FRANK T. PERANO	:	
	:	
v.	:	**EHB Docket No. 2009-067-L**
	:	**(Consolidated with 2010-033-L**
COMMONWEALTH OF PENNSYLVANIA,	:	**and 2010-104-L)**
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION and TILDEN TOWNSHIP,	:	**Issued: April 26, 2011**
Permittee	:	

OPINION AND ORDER
ON PETITION TO REOPEN THE RECORD

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board denies the Department's petition to reopen the record to allow for the admission of a document after a hearing but prior to adjudication because the document presents cumulative evidence.

OPINION

In this consolidated matter, Frank T. Perano ("Perano"), the owner of the Pleasant Hills Mobile Home Park, has appealed the Department of Environmental Protection's (the "Department's") decision not to renew the NPDES permit that allows Perano to discharge from a sewage treatment plant at Pleasant Hills. Perano has also appealed the Department's order requiring Tilden Township to revise its Act 537 plan to address the future need for future sewage disposal at Pleasant Hills, as well as the consent order and agreement between the Department and Tilden Township resolving that order.

On February 14-16, 2011, we held a hearing on the merits of the consolidated appeal

during which Perano, the Department, and Tilden Township were each afforded the opportunity to present fact and expert evidence to support their case. This three-day hearing was in addition to three previous days of hearings that we held to address Perano's petition for supersedeas. The parties have agreed that the transcripts from those three days of hearings are to be incorporated into the record for purposes of resolving the merits. Among other things, the parties during the six days of hearings sought to establish, in considerable detail, both the compliance history of the Pleasant Hills treatment plant as well as the remedial steps taken to improve future compliance. The Department essentially seeks to demonstrate that Perano is unable or unwilling to operate the plant within the operational requirements and limits of his NPDES permit, and therefore, the residents of Pleasant Hills will require different sewage disposal services in the future. During the hearing the Board admitted more than fifty exhibits into evidence in addition to those already in the record, including inspection and compliance reports, discharge monitoring reports, plant and site photographs, and lab samples and analyses. We closed the record at the conclusion of the hearing.

The Department now petitions the Board to reopen the record to allow the admission of a March 25, 2011 letter written by James Perano to the Department disclosing that a recent 24-hour composite sample taken after the conclusion of the hearing had been returned from the laboratory indicating that the Pleasant Hills treatment plant had exceeded its permitted effluent limits and was having an operational problem on March 15-16, 2011. The Department's petition asks the Board to reopen the record to allow the admission of this letter because, in its view, the letter demonstrates that "Perano continues to be unable and/or unwilling to operate [the plant] in compliance with the requirements of his NPDES permit." Unlike the evidence presented at the hearing, which largely focused on past noncompliance, the Department asserts that this letter

shows that Perano, despite his protestations to the contrary, is still unable to operate in compliance.

Perano responds that the letter merely offers the Board additional evidence of the compliance history of the treatment plant and fails to establish anything that is new or that was not covered during the hearing. Perano asserts that by the Department's logic ongoing examples of compliance with the permit should be entered into the record as well. Perano adds that the letter, if anything, demonstrates Perano's efforts to comply with the NPDES permit's requirement that Perano inform the Department when the plant exceeds effluent limits.

There are only a few situations where the Board will reopen the record to allow for the presentation of additional evidence after the conclusion of a hearing on the merits but before adjudication. Our rules provide three requirements which must all be met before the Board will allow the introduction of recently discovered evidence:

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

25 Pa. Code § 1021.133(b).[1]

Reopening the record is at the discretion of the Board, even where all of the criteria set forth in our rule are met. *M&M Stone Co. v. DEP*, 2010 EHB 227, 235. "Our rule allows the record to be reopened to remedy mistakes, not simply to add more evidence." *Id.* (quoting *Lang v. DEP*, 2006 EHB 7, 25-26). We are generally reluctant to give parties "two bites at the proverbial apple," *Noll v. DEP*, 2005 EHB 24, 32 (quoting *Exeter Citizens' Action Comm. v.*

[1] The record may also be reopened to consider evidence that has become material as a result of a change in legal authority, but that rule is not implicated here. 25 Pa. Code § 1021.133(c).

DEP, 2004 EHB 179, 181), because hearings, like many other things in life, must eventually come to an end, even if the ending is less than perfectly satisfying to all concerned.

This case illustrates that reopening the record to add one more piece of evidence will rarely end the matter. If we were to admit the documents related to Perano's noncompliance on March 15-16, 2011, presumably in order to be fair we would need to also leave the record open to allow Perano to explain those events, and Perano makes a good point that, perhaps, all instances of compliance should be admitted as well.

Furthermore, we already have what we think is a rather full understanding of the situation at Pleasant Hills. The letter documenting an additional event where the plant exceeded its effluent limitations is a relatively small cumulative detail compared to the much larger record regarding compliance. In rejecting a petition to reopen in *Lang v. DEP*, *supra*, we noted that "the condition that was the subject of the appeal continues to exist after the trial closes, and additional data can continue to be collected. ... By its very nature, such data is likely to vary." 2006 EHB 7, 25-26. Similarly, by virtue of the fact that the Pleasant Hills plant is currently in operation due to an administrative extension granted by the Department, the plant will continue to generate data until we issue our Adjudication, and possibly beyond. Such data is likely to vary, but that does not mean we can or should keep reopening the record.

Finally, in the context of all of the evidence already in record, it is hard to imagine how the proffered letter might "conclusively establish . . . [or] contradict" a material fact necessary for the Board to adjudicate this matter. 25 Pa. Code § 1021.133(b)(1). The parties have had a full and fair opportunity to conduct discovery and present evidence. It is now time to move forward toward the resolution of this appeal without further ado.

Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

FRANK T. PERANO	:	
	:	
v.	:	**EHB Docket No. 2009-067-L**
	:	**(Consolidated with 2010-033-L)**
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION and TILDEN TOWNSHIP,	:	
Permittee	:	

ORDER

AND NOW, this 26th day of April, 2011, the Department's petition to reopen the record is **denied**.

ENVIRONMENTAL HEARING BOARD

BERNARD A. LABUSKES, JR.
Judge

DATED: April 26, 2011

c: **DEP Bureau of Litigation:**
Connie Luckadoo - Library

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MARYANNE WESDOCK
ACTING SECRETARY TO THE BOAR

FRANK T. PERANO	:	
	:	
v.	:	**EHB Docket No. 2010-025-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: April 27, 2011**

OPINION AND ORDER ON
 PETITION TO REOPEN THE RECORD

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board denies a petition to reopen the record to accept new evidence because the evidence would not conclusively establish or contradict a material fact and because it should have been discovered earlier with the exercise of due diligence.

OPINION

Frank T. Perano ("Perano") has several appeals from actions of the Department of Environmental Protection (the "Department") pending before this Board. The instant appeal is taken from a Department order directing Perano to provide the Department with records related to his sewage treatment plant at the Cedar Manor mobile home park. We held a hearing on the merits on March 10, 2011. At the hearing, the Department presented the testimony of its inspector regarding a March 7, 2011 inspection of the Cedar Manor plant. The inspector testified that during his inspection he witnessed grease balls and sewage-related plastics in the receiving stream for the treatment plant's discharge. We closed the record at the conclusion of the

hearing.[1]

Perano has now filed a petition to reopen the record. Perano asserts that he has discovered that the grease balls and other litter observed in the receiving stream could have come from trash cans being knocked over in the vicinity of the stream. If the grease balls came from this "possible alternative source," it would in Perano's view contradict the Department's testimony that there was no source other than the plant for the grease balls in the stream.

The Department responds that evidence regarding the trash cans could have and should have been known to Perano prior to the close of the record. It says that Perano is merely proposing an alternate theory, not evidence that would conclusively establish a material fact. It adds that allowing Perano to present his new theory would mean that the Department in the interests of fairness should be permitted to present evidence rebutting the theory.

As we explained yesterday in another Perano appeal,

> [t]here are only a few situations where the Board will reopen the record to allow for the presentation of additional evidence after the conclusion of a hearing on the merits but before adjudication. Our rules provide three requirements which must all be met before the Board will allow the introduction of recently discovered evidence:
>
> (1) Evidence has been discovered which would conclusively establish a material fact of the case or would contradict a material fact which had been assumed or stipulated by the parties to be true.
>
> (2) The evidence is discovered after the close of the record and could not have been discovered earlier with the exercise of due diligence.
>
> (3) The evidence is not cumulative.
>
> 25 Pa. Code § 1021.133(b).

[1] We conducted a site view after the record had been closed at the end of the day. The purpose of a site view is to help the Board understand the record evidence. Neither the site view nor anything that occurred at the site view constitutes record evidence. *UMCO v. DEP*, 2004 EHB 797, 801h; *Giordano v. DEP*, 2000 EHB 1163, 1166.

> Reopening the record is at the discretion of the Board, even where all of the criteria set forth in our rule are met. *M&M Stone Co. v. DEP*, 2010 EHB 227, 235. "Our rule allows the record to be reopened to remedy mistakes, not simply to add more evidence." *Id.* (quoting *Lang v. DEP*, 2006 EHB 7, 25-26). We are generally reluctant to give parties "two bites at the proverbial apple," *Noll v. DEP*, 2005 EHB 24, 32 (quoting *Exeter Citizens' Action Comm. v. DEP*, 2004 EHB 179, 181), because hearings, like many other things in life, must eventually come to an end, even if the ending is less than perfectly satisfying to all concerned.

Perano v. DEP, EHB Docket No. 2009-167-L, slip op at 3-4 (footnote omitted) (Opinion and Order, April 26, 2011).

Here, Perano has failed to satisfy two of the three prerequisites for reopening a closed record prior to adjudication. First, this appeal is from an order of the Department directing Perano to produce documents regarding the operation of the Cedar Manor treatment plant. The presence or absence of grease balls in the receiving stream has very little apparent relevance to the central issue in the case; namely, Perano's duty to provide information regarding operation of the plant upon the Department's request. Perano filed a petition for supersedeas in this appeal in which he did not seriously dispute that he was required to provide information. His complaint and the basis for his petition was that he should not have been required to pay to have the requested documents copied. While Perano has added additional objections in his pre-hearing memorandum, the fundamental issue in the case--a permittee's obligation to produce information regarding operation of a permitted facility--has not changed. The source of grease balls in the receiving stream, whether it be from Perano's plant directly or indirectly by way of trash cans, is not a "material fact" that justifies reopening the record. Further, evidence concerning the trash-can theory does not "conclusively establish" a material fact or "contradict a material fact which had been assumed or stipulated by the parties to be true." Perano has failed to satisfy the first

criteria for reopening a record.

Assuming for purposes of argument that the treatment plant's performance history is relevant in deciding whether the plant's operator had an obligation under his permit and the law to produce information upon request, there is already extensive evidence in the record regarding the plant's performance history. Among other things, Perano has not disputed that the plant discharges raw sewage to the stream on a regular basis. Quibbling about the source of grease balls is not a productive use of the Board's or the parties' resources.

Secondly, we agree with the Department that the trash-can evidence could have been discovered earlier with the exercise of due diligence. Perano claims that he did not actually know that trash cans were being knocked over in the vicinity of the stream until after the hearing, but the pertinent inquiry is not what Perano actually knew but what he should have known with the exercise of due diligence. Perano reasonably should have been aware of the handling of his own trash cans. Perano has failed to satisfy the second criteria for reopening the record as well.

Finally, reopening the record to allow Perano to present his new theory would in fairness require us to accept evidence regarding the Department's response to that theory. At that point, other theories regarding the origin of the grease balls might emerge. We see no value to stepping onto this slippery slope.

Accordingly, we issue the Order that follows.

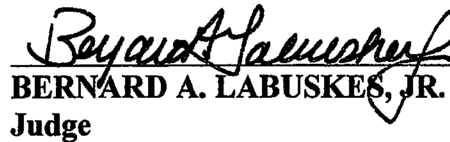
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

FRANK T. PERANO	:	
	:	
v.	:	**EHB Docket No. 2010-025-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	: : :	

ORDER

AND NOW, this 27th day of April, 2011, it is hereby ordered that Perano's petition to reopen the record is **denied**.

ENVIRONMENTAL HEARING BOARD



BERNARD A. LABUSKES, JR.
Judge

DATED: April 27, 2011

c: **DEP Bureau of Litigation:**
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MARYANNE WESDOCK
ACTING SECRETARY TO THE BOARD

JIM LYONS AND MARY JO TAKACS	:	
	:	
v.	:	**EHB Docket No. 2009-099-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and ST. CLAIR RESORT DEVELOPMENT, LLC, Permittee	:	**Issued: April 28, 2011**

OPINION AND ORDER ON MOTION TO COMPEL

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board has jurisdiction to entertain a motion to compel a party to comply with the reimbursement aspect of its discovery order even after dismissal of the appeal. The Board directs a party who took the deposition of an expert witness pursuant to a Board order requiring reimbursement of the expert's fees and expenses to pay the reasonable portion of those fees and expenses.

OPINION

On July 22, 2010, Jim Lyons and Mary Jo Takacs (hereinafter collectively "Lyons") filed a motion for leave to conduct additional discovery or to preclude testimony of previously undisclosed witnesses. The motion sought permission to, among other things, conduct depositions of witnesses identified in the permittee, St. Clair Resort Development, LLC's ("St. Clair's"), pre-hearing memorandum. Although both St. Clair and the Department opposed the motion, we partially granted it. By Order dated July 29, 2010, we permitted all parties to

conduct additional discovery on an expedited basis, as well as depose proposed expert witnesses, provided that the party noticing any such deposition was required to "pay the deponent for his reasonable fees and expenses incurred in preparing for and attending the deposition." Pursuant to the Board's Order, Lyons noticed the deposition of Ian Thompson, a potential expert witness of St. Clair. The deposition was held on August 10, 2010 in Somerset, Pennsylvania. The deposition lasted approximately three hours.

Thompson thereafter forwarded an invoice to St. Clair's counsel, which he said reflected the time he spent in preparing for and attending his deposition. Thompson's bill totals $3,420.11, which includes twenty hours time at $165 an hour, 202 miles at 50 cents per mile, and expenses for one meal of $19.11. Rather than pay Thompson's bill and seek reimbursement as is customary, St. Clair's counsel forwarded Thompson's bill directly to Lyons's counsel for payment. Lyons's counsel responded with a letter in which he questioned the accuracy of the invoice and suggested that the invoice seemed to include time spent by Thompson in performing other services for St. Clair. St. Clair's counsel wrote back stating that all time on Thompson's bill was related to the deposition, and directing Lyons's counsel to remit the invoiced amount directly to Thompson. Lyons has not paid the bill. As a result, Thompson's employer has apparently filed a civil complaint with Magisterial District Court in Huntingdon County against St. Clair's counsel seeking payment of the unpaid invoice and other unrelated unpaid charges.

St. Clair has now filed a motion to compel, sanction, and/or find Lyons and Lyons's counsel in contempt. St. Clair asks us to order Lyons to pay the entire $3,420.11 bill, as well as all legal fees and expenses incurred by St. Clair and its attorneys in filing their motion to compel and defending Thompson's civil complaint. Lyon's response questions our jurisdiction to address the motion. He does not dispute his liability for paying $1,338.50, which represents

Thompson's time for four hours of travel and three and one-half hours of attendance at his deposition (7.5 x $165 = $1,237.50), and $101 for his mileage expense. He objects that anything more is not reasonable.

Before turning to the substance of St. Clair's motion we must address Lyons's contention that we lack jurisdiction to address the motion because we have already entered our Adjudication in this matter and dismissed the appeal. *Lyons v. DEP*, EHB Docket No. 2009-099-L, slip op. at 33 (Adjudication, March 29, 2011). Although Lyons cites no authority in support of the contention, we must take any suggestion that we lack jurisdiction seriously.

We are satisfied that we do in fact have jurisdiction to address St. Clair's motion. The dismissal of an appeal does not act as an absolute bar to the Board's authority. For example, the Board obviously retains jurisdiction to consider such things as petitions for reconsideration, 25 Pa. Code § 1021.152, and applications for attorney fees, 25 Pa. Code §§ 1021.181-184. We also may consider an application for a stay pending appeal. Pa.R.A.P. 1781. Generally speaking, once the Department has taken an action and a timely appeal has been filed, the Board's jurisdiction extends to all matters directly associated with the appeal. *Dauphin Meadows v. DEP*, 2001 EHB 116, 121-22; *Columbia Gas of Pennsylvania v. DEP*, 1996 EHB 1067, 1069.

Although not directly applicable, by way of analogous authority on this issue we look to Pa.R.A.P. 1701, which provides that an agency usually may not proceed further in an action once an appeal from its final action is taken. An agency, however, may continue to handle some "ancillary" matters. Pa.R.A.P. 1701(b)(1); *Crum Creek Neighbors v. DEP*, 2010 EHB 67, 71. We review St. Clair's motion to compel compliance with our discovery order as just such an ancillary matter. Under Rule 1701, the agency also retains jurisdiction to "enforce any order entered in the matter, unless the effect of the order has been superseded as provided in this

chapter." Pa.R.A.P. 1701(b)(2). Although we do not have enforcement powers *per se*, we can grant motions to compel and impose sanctions. 25 Pa. Code § 1021.161. We believe that that authority outlasts dismissal of an appeal under certain circumstances, such as those present here. *See Travitzky v. Travitzky*, 534 A.2d 1081, 1084 (Pa. Super. 1987) (trial courts possess inherent powers to enforce their orders by imposing sanctions for failure to comply with those orders even after an appeal is filed).

Turning now to the substance of St. Clair's motion, as previously noted, Lyons has not denied that he is liable to pay for *some* of the expert witness's fees and expenses. With respect to the amount of fees billed, Lyons correctly points out that he is not required by our Order to compensate the expert for meeting with the permittee's counsel "subsequent to the deposition" as requested in the petition. He correctly argues that Thompson's bill provides little detail and that St. Clair's counsel has not responded to his request for greater detail. In addition to these concerns, we must agree that 12.5 hours to prepare for the deposition strikes us as somewhat unreasonable, at least without further explanation.

Our Order was not intended to create a contractual relationship between St. Clair's expert and Lyons, so we will not hold Lyons responsible for St. Clair's legal expenses in defending Thompson's civil complaint. We also do not see this as an appropriate case for awarding fees for the cost of filing the motion to compel. With these considerations in mind, pursuant to 25 Pa. Code §§ 1021.102 (discovery) and 1021.161 (sanctions) and further to our Order of July 29, 2010, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

JIM LYONS AND MARY JO TAKACS	:	
	:	
v.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and ST. CLAIR RESORT DEVELOPMENT, LLC, Permittee	:	**EHB Docket No. 2009-099-L**

ORDER

AND NOW, this 28th day of April, 2011, it is hereby ordered that Lyons shall reimburse St. Clair's expert for the following reasonable fees and expenses incurred in preparing for and attending his deposition:

3.5 hrs. @ $165/hr. to attend deposition	$577.50
4.0 hrs. @ $165/hr. travel to/from depo	$660.00
4.0 hrs. @ $165/hr. depo. preparation	$660.00
Mileage and meal expense	$120.11
	$2,017.61

ENVIRONMENTAL HEARING BOARD

BERNARD A. LABUSKES, JR.
Judge

DATED: April 28, 2011

c: **DEP Bureau of Litigation:**
Connie Luckadoo - Library

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MARYANNE WESDOCK, ESQUIRE
ACTING SECRETARY TO THE BOARD

DELORES LOVE	:	
	:	
v.	:	**EHB Docket No. 2010-031-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and CONSOLIDATION COAL COMPANY, Intervenor	:	**Issued: May 10, 2011**

OPINION AND ORDER ON MOTION FOR SUMMARY JUDGMENT

By Bernard A. Labuskes, Jr., Judge

Synopsis

An appellant whose mine subsidence claim was not processed by the Department because of a pre-mining agreement is not barred by the doctrine of administrative finality from pursuing her appeal as a result of the Department's previous refusal to process her claim because the Department reconsidered the claim on its merits. The Department erred by refusing to process the claim because the release set forth in the agreement is invalid.

OPINION

Delores Love ("Love") occupies a home that is located above Consolidation Coal Company's ("Consol's") closed Dillsworth mine in Jefferson Township, Greene County. Prior to mining, Consol and Love entered into a pre-mining agreement dated May 25, 2000. It is this agreement that is at the center of the current controversy. Consol paid Love $10,200 as consideration for her agreeing to employ alternate remedies for seeking reimbursement from Consol for subsidence damages and for any and all inconvenience suffered as a result of

Consol's mining operations. The agreement specified a means and manner for resolving claims of mine subsidence damage in lieu of compensation and repair remedies provided under the Bituminous Mine Subsidence and Land Conservation Act, 52 P.S. § 1406.1 *et seq.* (the "Subsidence Act"). Mining under Love's home was completed in December 2000.

Notwithstanding the agreement, on September 2, 2003, Love filed a mine subsidence damage claim with the Department of Environmental Protection (the "Department") alleging that Consol's mining damaged her home. Her claim referred to damages such as cracks in her floors and ceilings, trim pulled loose, doors out of alignment, damaged siding, and the like. She indicated in her claim that the problems began in 2000. By letter dated October 28, 2003, the Department informed Love that it would not process her claim because of the pre-mining agreement. The letter read as follows:

> As I had mentioned during our discussion on October 10, 2003, the Department cannot process your claim due to the pre-mining agreement between yourself and Consolidation Coal Company. The Bituminous Mine Subsidence and Land Conservation Act (Section 5.6) does not prohibit landowners and mine operators from entering into voluntary agreements.

Love did not file an appeal from the Department's refusal to process her claim.

Approximately six years later, on November 15, 2009, Love filed another subsidence damage claim with the Department. The 2009 claim was identical in substance to the claim that she filed in September 2003. The claim referred to the exact same damages that were described in her 2003 claim. The Department responded in a letter to Love's attorney dated December 4, 2009 that the claim "cannot be processed due to a pre-mining agreement entered into on May 25, 2000 between Mrs. Love and Consolidation Coal Company." The letter said:

> A previous claim was also filed by your client on October 10, 2003, Claim #SA1494, but was not processed due to the same pre-mining agreement. The Bituminous Mine Subsidence and Land

> Conservation Act (Section 5.6) does not prohibit landowners and mine operators from entering into voluntary agreements.

Love did not appeal the 2009 letter.

The Department thereafter received additional letters from Love's attorney and Consol's attorney. Love's attorney argued that Love's claim was not barred because the pre-mining agreement had expired and because the agreement is inconsistent with current law. The Department reconsidered the claim in response to this correspondence. After reconsideration, the Department in a letter dated February 22, 2010 once again reiterated to Love that the Department would not process her claim because of the pre-mining agreement. The letter is addressed to Love's attorney and reads as follows:

> Please consider this letter to be a response to the Subsidence Damage Claim that you submitted to this office on behalf of Delores Love on or about November 19, 2009. The Department has reviewed the claim form, the Subsidence Agreement between Ms. Love and Consolidation Coal Company ("Consol"), and the additional correspondence from you and counsel for Consol, Mr. Puz. The Department has concluded that it cannot process Ms. Love's claim as the parties entered into a valid pre-mining Subsidence Agreement, dated May 25, 2000 ("Agreement"). This Agreement appears to still be in effect, and Ms. Love should obtain relief from Consol under the terms of this Agreement. The Department does not agree with Consol's position that the Agreement expired and Ms. Love cannot obtain relief under it. Accordingly, because of the existence of the existing Subsidence Agreement, the Department is unable to process Ms. Love's claim.

The February 2010 letter is the only letter that Love appealed. It is the subject of this appeal.

Consol moved to dismiss this appeal, arguing that the Department's refusal to process Love's claim was not an appealable action or, if it was, this appeal is barred as a result of the administrative finality of the Department's 2003 and 2009 actions. The Department in its response to Consol's motion to dismiss agreed that the doctrine of administrative finality should be applied.

We denied the motion to dismiss. *Love v. DEP*, 2010 EHB 523. We held that the 2003 determination constituted a final appealable action,[1] and that Love could have appealed the Department's rejection of her claim in 2003. We declined to find, however, that the appeal from the 2010 letter was necessarily barred by the doctrine of administrative finality:

> [A]dministrative finality is far from an absolute bar of appeals from serial Department actions involving a particular person, site or subject. Indeed, just the other day we held that finality may not apply where the facts that are relevant to assessing the proprietary of the Department's later action are dramatically new and different from the facts that were relevant to assessing the propriety of the Department's earlier action. *Rural Area Concerned Citizens v. DEP*, EHB Docket No. 2008-327-R, (Opinion issued June 10, 2010) (doctrine does not apply in an appeal of small noncoal permit as a result of the Department's denial 30 years earlier of another company's mine drainage permit application for the same site). Administrative finality has limited effect where the Department is charged with periodic re-evaluation of, *e.g.*, a permit. *See e.g., Wheatland Tube v. DEP*, 2004 EHB 131, 133, *Solebury Twp. v. DEP*, 2004 EHB 95, 113-14; *Tinicum Township v. DEP*, 2002 EHB 822, 835-36. We also very recently held that administrative finality does not necessarily act as a complete bar where a statute creates a special process for re-examining a prior decision upon request if a party utilizes appropriate procedures. *Perano v. DEP*, EHB Docket No. 2009-119-L (Opinion and Order, May 26, 2010).

2010 EHB at 528.

Consol has now moved for summary judgment. Consol contends that Love's claims are barred as a matter of law by the clear terms of her pre-mining agreement with Consol. The agreement in Consol's view provided the exclusive mechanism for the determination of liability for damages, and Love's failure to pursue the procedures for seeking reimbursement for subsidence damages from Consol in a timely manner now prevents her from pursuing a claim in any forum. She cannot in Consol's view make an "end around" the agreement by pursuing a claim with the Department.

---

[1] We held that the December 4, 2009 letter did not constitute such a final action.

The Department in its "response" to the motion agrees that summary judgment against Love is appropriate, but for very different reasons. The Department disagrees that the pre-mining agreement bars Love's claim. In its view, Love may still seek damages utilizing the procedures set forth in the agreement.[2] In any event, the Department continues to believe that Love's 2009 claim is barred by the doctrine of administrative finality. It says that the 2003 claim denial was final and cannot now be collaterally attacked, and that no key circumstances have changed since 2003. Love, of course, disputes all of these points and argues, among other things, that if either Consol or the Department's interpretation of the agreement is correct, the agreement is invalid.

Whether the Department could have stood on the doctrine of administrative finality and refused to process Love's 2009 claim on that basis alone, the fact of the matter is that it chose not to do so. The Department did not reject Love's claim out of hand, citing no more than the fact of the earlier rejection and the failure to pursue an appeal to this Board. Rather, the Department considered the issue anew, and based on its new review, decided the claim on its merits. It determined that the pre-mining agreement was a valid agreement. It determined that the agreement will still in effect. It expressly rejected Consol's position that the agreement had expired. On the basis of these findings, it refused to process Love's claim, not because it was barred by the earlier determination, but because of the existence of what it believed was a valid agreement.

The doctrine of administrative finality does not create a double standard. It does not allow the Department to reconsider a matter while simultaneously insulating the action taken as a result of the Department's reconsideration from Board review. When the Department

[2] The Department does not explain how Love could follow those procedures, which require Consol's participation, when Consol has refused to cooperate in the process. Presumably, the Department believes that Love could file a civil action in the court of common pleas, but this is not clear.

reconsiders a matter, its decision becomes subject to Board review. The fact that the Department arrives at the same conclusion upon reconsideration is largely irrelevant. Appealability turns on whether a properly requested application or request was considered on its merits and acted upon by the Department. *Wheatland Tube v. DEP*, 2004 EHB 131, 137. If the Department performs a new, substantive review, the doctrine of administrative finality does not bar this Board from conducting its own new, substantive review of the Department's action. *GSP Management Company v. DEP*, EHB Docket No. 2009-142-M, slip op. at 17 (Opinion & Order, April 1, 2011); *Perano v. DEP*, 2010 EHB 439, 446. We do not review the old action; we review the new action. To hold otherwise would deprive the person who is the object of the Department's new action of the due process that is afforded by this Board's review.

We turn, then, to the merits of the Department's decision. We conclude that the Department erred by refusing to process Love's claim. First, as we said in our earlier Opinion and Order, which denied Consol's motion to dismiss, the Department has a duty to look beyond the mere existence of a pre-mining agreement when reviewing a subsidence claim:

> To the extent the Department argues that the mere existence of *any* pre-mining agreement automatically precludes it from acting further on a subsidence claim, it is also incorrect. In order to trump the Department-managed claims procedure, an agreement, among other things, must be "voluntary." 52 P.S. § 1046.5f. It must clearly state what rights are created by the statute. *Id.* The landowner must expressly acknowledge the release from liability as consideration for the alternate remedies provided in the agreement. *Id.* The remedies provided in the agreement "shall be no less than those necessary to compensate the owner of a building for the reasonable cost of its repair or the reasonable cost of its replacement where the damages are irreparable." *Id.*

2010 EHB at 528. Here, although the Department referred to its action as a "refusal to process," it is clear that it actually reviewed the agreement and concluded that it is valid and that it bars Love's claim. Thus, the Department did, in fact, process the claim.

The Department incorrectly concluded that the release set forth in the pre-mining agreement is valid. Section 5.6 of the Subsidence Act provides that a landowner and mine operator may enter into an agreement "establishing the manner and means by which repair or compensation for subsidence damage is to be provided." 52 P.S. § 1406.5f(a). However, any release contained in such an agreement is only valid if the alternate remedies provided under the agreement are no less than those necessary to compensate the landowner for the reasonable cost of repair or replacement. *Id.*

Consol interprets its agreement with Love to bar Love from pursuing the alternate remedies for recovering subsidence damages described in the agreement after the term of the agreement has expired. The language of the contract supports this interpretation. Section VI of the agreement states:

> Consolidation Coal Company and Surface Owner are aware of the possibility of damage occurring to the Structures of Surface Owner *during the term of this Agreement* resulting from mining by Consolidation Coal Company and Consolidation Coal Company agrees to reimburse Surface Owner in accordance with the procedures hereinafter set forth with regard to any damage to said Structures.

(Emphasis added.) The Agreement goes on to describe the procedures that Love was required to follow if she wished to claim damages. Among other things, Love was required under Section VI to give Consol notice as follows:

> (c) In the event of any damage to a Structure as a result of Consolidation Coal Company's mining operations *and during the term hereof*, Surface Owner agrees to notify Consolidation Coal Company promptly in writing as to the occurrence of the damage. ...

(Emphasis added.) The Section goes on to provide:

> (f) Should Structures incur damages which Consolidation Coal Company determines are the result of its mining operations, then the parties' sole and exclusive remedies shall be the damage provisions of this Agreement. Surface Owner understands and acknowledges that they have specific

> rights established by Act 54 of 1994, including but not limited to those mentioned in Sections 5.4, 5.5 and 5.6 of Act 54 of 1994 relating to repair or compensation for subsidence damage. Surface Owner expressly acknowledges the release contained and/or referenced in Paragraph IX is consideration for the alternate remedies provided under this Agreement. However, should Consolidation Coal Company determine that said damages are not the result of its mining operations, then nothing contained herein shall constitute a waiver of any right held by Surface Owner to institute a civil action to determine only the issue of the liability of Consolidation Coal Company for such damages. If, as a result of said action, liability is attributed to Consolidation Coal Company, then and in that event, Surface Owner and Consolidation Coal Company agree that the amount of such damages will be determined by the damage provisions of this Agreement. If as a result of said action, liability is attributed to Consol then Consol shall reimburse Surface Owner for all reasonable cost of said action.

The release provision in the argument reads in the pertinent part as follows:

> Upon payment of the cost of repairs under Paragraph VI and/or completion by Consolidation Coal Company of its obligations under Paragraphs VIII [relating to water loss], the Surface Owner shall and hereby does release and forever discharge Consolidation Coal Company...from any and all actions, causes of actions, claims and demands for, upon, or by reason of any damage or loss *which heretofore has been or which hereafter may be sustained by Surface Owner arising in any manner from Consolidation Coal Company's said mining operations* as aforesaid or which may be contemplated in any way under the terms of this Agreement.

(Emphasis added.) The "term" of the Agreement is defined as three years from the date of full extraction mining. (Section III.) Consol argues that these contract provisions taken together make it clear that Love had three years to file an action in court. That was the entire extent of her rights to pursue reimbursement for subsidence damage. After that, she is forever precluded from pursuing *any* claim for *any* subsidence damages regardless of when they occurred in *any* forum at *any* time.

We believe that Consol's interpretation of the agreement is correct,[3] and therefore, we find that the release in the agreement is invalid. Love's remedies under the agreement are clearly less than those necessary to compensate her for her subsidence damages. Furthermore, the agreement goes well beyond establishing the "manner and means" for recovery and attempts to bar recovery altogether. The pre-mining agreement between Love and Consol is exactly the sort of agreement that Section 5.6 appears to have been designed to prevent. The agreement does not comport with the requirements of Section 5.6 of the Subsidence Act and the Department erred by refusing to process Love's claim by virtue of that agreement.[4]

The parties argue about whether Love's claim is also barred by a statute of limitations set forth in Section 5.5 of the Subsidence Act. That section establishes a procedure to be followed if a landowner wishes to file a claim with the Department. That procedure begins by a building owner who believes that it is the victim of mine subsidence damage notifying the mine operator of the damage. If owner and the mine operator are unable to agree within six months of the date of that notice, the owner may file a claim with the Department. Section 5.5(b) states that such claims "shall be filed within two years of the date damage to the building occurred." It is unclear whether the process established by Section 5.5 applies in a case such as this where the Department has refused to process a claim due to the existence of a pre-mining agreement. We

[3] The Department says that the term of the agreement merely described the period when damages could be expected to occur and was not intended to limit the time during which Love could pursue her contract remedies. This interpretation not only differs from that of both of the contracting parties, it finds no support in the language of the contract.

[4] Consol recognized that the agreement might go too far:

> To the extent, if any, that the compensation and repair remedies provided for under Act 54 of 1994 are determined to be non-waivable, Consolidation Coal Company shall be entitled to apply any and all monetary compensation paid under this Agreement as credit to the additional monetary compensation, if any, to which the Surface Owner may be entitled. (Section V.)

have no record that the parties followed the procedure set forth in Section 5.5, and the Department certainly did not deny Love's claim pursuant to that section. In any event, in this context Subsection 5.5(b) has been superseded and has not been effective in Pennsylvania since 2004. *See* 30 C.F.R. § 938.13(a)(6). The Love claim that is currently under review was made in 2009. Therefore, Love is not barred from pursuing her claim.[5]

Accordingly, we issue the Order that follows.

---

[5] We hasten to add that we are not deciding or suggesting in any way that Love's claim should be approved following a proper Departmental investigation.

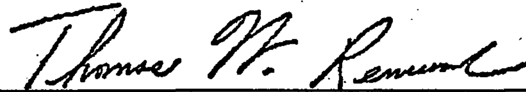
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DELORES LOVE	:	
	:	
v.	:	**EHB Docket No. 2010-031-L**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION and CONSOLIDATION COAL	:	
COMPANY, Intervenor	:	

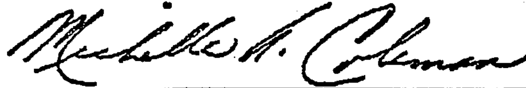
ORDER

AND NOW, this 10th day of May, 2011, Consol's motion for summary judgment is **denied**.

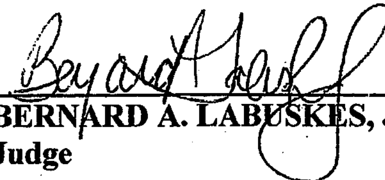
ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Chairman and Chief Judge



MICHELLE A. COLEMAN
Judge



BERNARD A. LABUSKES, JR.
Judge

RICHARD P. MATHER, SR.
Judge

DATED: May 10, 2011

c: **DEP, Bureau of Litigation:**
Attention: Connie Luckadoo

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MARYANNE WESDOCK, ESQUIRE
ACTING SECRETARY TO THE BOARD

FRANK T. PERANO	:	
	:	
v.	:	**EHB Docket No. 2009-118-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: May 10, 2011**

ADJUDICATION

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board finds that the Department's issuance of an order pursuant to the Clean Streams Law requiring a permittee to turn over information regarding the permittee's operation of its sewage treatment plant was a lawful and reasonable exercise of the Department's discretion that was supported by the facts.

FINDINGS OF FACT

1. Frank T. Perano ("Perano") owns and operates the Pleasant Hills Mobile Home Park in Tilden Township, Berks County. (Joint Exhibit ("J.Ex.") 1.)

2. Sewage generated within Pleasant Hills is conveyed to an on-site sewage treatment plant, also owned and operated by Perano. (J.Ex. 1.)

3. Perano is authorized by NPDES Permit No. PA 0053104 to discharge treated effluent from the sewage treatment plant into an unnamed tributary of the Schuylkill River. (J.Ex. 1.)

4. The permit was set to expire on August 31, 2010, but the Department of Environmental Protection (the "Department") has administratively extended it indefinitely. (J.Ex. 1; Notes of Transcript page ("T.") 10-11.)

5. Part B.I.C of Perano's Pleasant Hills NPDES permit provides as follows:

> C. Duty to provide Information
>
> 1. The permittee shall furnish to DEP, within a reasonable time, any information which DEP may request to determine whether cause exists for modifying, revoking and reissuing, or terminating this permit, or to determine compliance with this permit.
> 2. The permittee shall furnish to DEP, upon request, copies of records required to be kept by this permit.
> 3. Other information – Where the permittee becomes aware that it failed to submit any relevant facts in a permit application, or submitted incorrect information in a permit application or in any report to DEP, it shall promptly submit the correct and complete facts or information.

(J.Ex. 1.)

6. Part A.I.A.2 of the permit reads as follows:

> Records Retention
>
> Except for records of monitoring information required by this permit related to the permittee's sludge use and disposal activities which shall be retained for a period of at least five years, all records of monitoring activities and results (including all original strip chart recordings for continuous monitoring instrumentation and calibration and maintenance records), copies of all reports required by this permit, and records of all data used to complete the application for this permit shall be retained by the permittee for three years from the date of the sample measurement, report, or application. The three-year period shall be extended as requested by DEP or the EPA Regional Administrator.

7. Part B.III.C of the permit reads as follows:

> Property Rights
>
> The issuance of this permit does not convey any property rights of any sort, or any exclusive privilege.

8. The Department has made it clear since February 2008 that it did not intend to renew the permit for the Pleasant Hills plant. (T. 73, 82; Perano Exhibit ("P.Ex.") 1.)

9. By letter dated April 29, 2008 from Martin Siegel, an attorney representing the Department, to Daniel F. Schranghamer, an attorney representing Perano, which was sent in response to letters from Attorney Schranghamer directly to Departmental program personnel, Siegel said:

> Be advised that because of pending and threatened litigation regarding this and related matters, all future communications from you regarding the matter should be directed to me.

(P.Ex. 2.)

10. On May 1, 2008, the Department sent Perano a letter that read as follows:

> The Department requests copies of the following information from May 2, 2005, through May 2, 2008, for the Pleasant Hills Mobile Home Park:
>
> - Flow chart recordings and flow measurement calibration records
> - Daily log books and daily log sheets
> - Sludge and Wastewater removal records
> - Maintenance records
>
> In addition, we request all correspondence from the certified operator to the system owner describing the status of the wastewater treatment plant and any known conditions that may be causing violations of any Department permit or regulation. ...
>
> We request all of these documents for the past three years to be submitted to the Department within fifteen (15) days of the date of this letter. Please be advised that NPDES Permit No. PA 0053104 requires furnishing copies of records required to be kept by the permit to the Department upon request.

(J.Ex. 3.)

11. On May 21, 2008, the Department sent another letter to Perano, which read as follows:

> Upon reviewing our files, we note that you have not responded to our information request dated May 1, 2008, a copy of which is enclosed. Please be advised that Part B.I.C.2 of your NPDES Permit No. PA 0053104 requires furnishing copies of records required to be kept by the permit to the Department upon request.
>
> Please furnish us with the required information within 5 days of the date of this letter.

(J.Ex. 4.)

12. Perano did not supply the information requested in the Department's May 1 and May 21, 2008 letters. (T. 25; J.Ex. 2, 7.)

13. Instead, Perano, in a letter dated May 16, 2008 that was authored by his brother, James Perano, who is the chief operating officer of Perano's company, GSP Management Company, wrote a letter on behalf of Perano to the Department, which read as follows:

> This is in response to your May 1, 2008 letter regarding information from May 2, 2005 to May 2, 2008, for the village at Pleasant Hills. Be advised that because of pending and threatened litigation regarding this and related matters, all communications from you regarding this matter should be directed to my attorney, Dan Schranghamer, of Allen E. Ertel and Associates. All employees of GSP Management Co., and Pleasant Hills are represented by counsel in this matter. Kindly refer your counsel to Mr. Schranghamer, who can be reached at [telephone number omitted].

(J.Ex. 5.)

14. Perano purposely used the same language that Siegel used in his letter to Schranghamer of April 29, 2008 requesting that all communications from counsel be directed to counsel. (T. 79.)

15. On May 23, 2008, James Perano sent another letter, which read as follows:

> My response to your May 1, 2008 letter crossed in the mail with your May 21st letter. Kindly direct all inquiries regarding this matter to my attorney Dan Schranghamer, of Allen E. Ertel and Associates. Mr. Schranghamer, can be reached at [telephone number omitted].

(J.Ex. 6.)

16. The Department sent Perano a Notice of Violation ("NOV") on June 8, 2009 notifying him that he was in violation of his permit as a result of his refusal to furnish the information requested in the Department's May 1 and May 21, 2008 letters. (J.Ex. 7.)

17. On June 25, 2009, Jonathan Hugg of Obermayer, Rebmann, Maxwell & Hippel, another attorney representing Perano, responded to the NOV by writing a letter to Susan Shinkman, Chief Counsel of the Department, and Martin Sokolow, Regional Counsel for the Department, which read in part as follows:

> I am writing to bring to your attention yet another provocation by Mr. Arbaugh. On June 8, 2009, Mr. Arbaugh issued a Notice of Violation because my client failed to provide information that my client had more than a year before directed Mr. Arbaugh to obtain from my client's counsel. Mr. Arbaugh never contacted my client's attorney. Mr. Arbaugh's decision to ignore my client's invocation of his right to counsel and to issue the June 8, 2009 Notice is illegal and very obviously intended to bully my client. You and the Department should not countenance this misconduct.
>
> * * *
>
> I request that you immediately order Mr. Arbaugh to rescind his June 8, 2009 Notice of Violation; any request for information concerning Pleasant Hills can be directed to me. I also request that you investigate why Mr. Arbaugh disregarded my client's right to counsel. Mr. Arbaugh knows better, and you should advise Mr. Arbaugh that his lack of respect for my client's right to counsel is unacceptable. As I have explained, Mr. Arbaugh purposefully confrontational approach has poisoned relations between the Department and my client. This is just the latest example.
>
> In my June 12, 2009 letter, I outlined Mr. Arbaugh's overly aggressive behavior toward my client in some detail. Mr. Arbaugh: disseminated false information about Pleasant Hills for the purpose of supporting his enforcement agenda and depriving my client of the use of his facility; skewed the public record by reporting only violations and omitting reports that show compliance; aggressively and disproportionately targeted my client's facilities; and interrogated my client's certified operators and omitted positive verbal reports from his reports. Furthermore, Mr. Arbaugh is the only member of the Department who has admitted to regular contact with Sansoni, who, as you recall, left overt threats on my client's voice mail.

> You and the Department have insisted that you take seriously allegations of unfairness by Department personnel. To date, however, over the past year, no one at the Department (including Ann Johnston, Martin Siegel, Cathleen Myers, Randy King, and several program staff) has responded to a single allegation or complaint raised by my client. Meanwhile, Mr. Arbaugh continues to act provocatively and to escalate tensions between my client and the Department. Mr. Arbaugh has gone beyond merely noting the presence of violations (the existence of which seems for the Department to be sufficient rational for Mr. Arbaugh to do whatever he pleases). Rather, Mr. Arbaugh seems intent upon singling out my client, "putting" my client "in his place," and "teaching" my client "a lesson." Considering your insistence that you and the department take such allegations seriously, your continued silence, and the apparent unconcern of the Department, is most puzzling; an answer to my client's allegations is in order.

(P.Ex. 8.)

18. Another one of Perano's attorneys, Bryan Salzmann of Salzmann Hughes, P.C., also responded to the NOV by separate letter dated June 26, 2009. The letter contends that the NOV should not have been issued and should be retracted. (P.Ex. 9.)

19. In a letter dated July 2, 2009, Sokolow responded to several letters of Perano's attorneys, in which he among other things stated that it is standard Departmental practice to send NOVs directly to permittees. He reiterated that the Department still required the information requested in the NOV. (P.Ex. 10.)

20. Perano did not supply the information requested in the NOV. (T. 57-58, 103.)

21. The Department issued the Order that is the subject of this appeal to Perano on or about July 30, 2009. The Order cited Perano for violating his legal obligation to supply the information requested in the Department's May 1 and May 21 letters and directed Perano as follows:

> 1. Perano shall, within 30 days of the date of this Order, submit copies of the following documents and information to the Department for Pleasant Hills sewage treatment plant for the period of September 1, 2005 through the date of this Order:

a. Any and all records, receipts, and correspondence from the certified and non-certified operators at the sewage treatment plant.
b. Any and all flow measurement recordings including flow chart recordings and flow measurement calibration records at the sewage treatment plant.
c. Any and all daily log books and log sheets at the sewage treatment plant.
d. Any and all maintenance records and receipts at the sewage treatment plant.
e. Any and all sampling records including dates, person sampling, times, analyses, analyses results, and sampling locations at the sewage treatment plant.
f. Any and all sludge and wastewater removal records including sludge removed from a stream or treatment unit, wastewater removed from a stream or treatment unit, and disposal locations for sludge and wastewater removed. This information shall include the name of the hauler and a copy of all receipts.

2. Mr. Perano shall, within 30 days of the date of this Order, submit a notarized statement to the Department containing an individual accounting of the number of lots connected to the sewage treatment plant.

3. Mr. Perano shall, within 30 days of the date of this Order, submit a notarized statement to the Department containing an individual accounting of the number of occupied lots connected to the sewage treatment plant.

22. The information requested by the Department in its May 1 and May 21, 2008 letters, June 8, 2009 NOV, and July 30, 2009 Order was necessary to implement the provisions of the Clean Streams Law, 35 P.S. § 691.1 *et seq*., aid in its enforcement, and help the Department determine whether cause existed to modify, revoke, or terminate Perano's permit during its remaining term, reconsider its decision to not renew the permit, and otherwise assess Perano's compliance with the permit. (T. 15, 17-21, 36-37, 55, 58-59.)

23. Among other things, the Department needed the requested information to help it assess the following:

- The ability of the treatment plant to handle the amount of flow being directed to the facility, including but not limited to inflow and infiltration during storm events (T. 19, 29-32);
- The accuracy and reliability of the Discharge Monitoring Reports (DMRs) that had been submitted by Perano (T. 20, 29);
- The reason for and extent of ongoing compliance problems at the facility (T. 15, 20);
- Sludge removal activity at the facility (T. 20);
- Sludge removal from the receiving stream (T. 20);
- Reports that there were trucks coming into the facility at night removing wastewater, which would be highly unusual (T. 21);
- The amount and timeliness of maintenance being performed at the facility (T. 21);
- Reports from the plant's certified operator referencing numerous deficiencies at the plant and recommending that sewage from Pleasant Hills be rerouted to a public sewer plant (T. 21); and
- Compliance reports from the plant's noncertified operators (T. 21).

24. Perano did not submit the information demanded in the Order until after the Department filed a petition to enforce the order in Commonwealth Court. (T. 58, 103-04.)

25. Neither the Department's information requests nor the Department's activities associated therewith restricted or limited Perano's ability to work with his counsel in responding to the requests, and in fact he did so. (T. 80, 97, 104-05; P.Ex. 8, 9.)

DISCUSSION

This Board reviews the Department's issuance of an order to determine whether it is a lawful and reasonable exercise of the Department's discretion that is supported by the facts. *GSP Management Company v. DEP*, 2010 EHB 456, 475; *Rockwood Borough v. DEP*, 2005 EHB 376, 384. Perano's first objection in support of his appeal from the Department's information-request order is that the order is unlawful because the Department did not have the legal authority to issue the order. The objection is curious because, after claiming that the Department lacks authority, Perano concedes, correctly, that the Department had the authority to issue the order under Section 5(b)(7) of the Clean Streams Law. That section authorizes the Department to "[i]ssue such orders as may be necessary to implement the provision of this act and the rules and regulations of the Department." 35 P.S. § 691.5(b)(7).

One statutory provision creating legal authority is enough to support the issuance of an order, *ADK Development Corp. v. DEP*, 2009 EHB 251, 253; *Milco Industries v. DEP*, 2002 EHB 723, 724, but here there are several. Section 610 of the Clean Streams Law states that the Department "may issue such orders as are necessary to aid in the enforcement of the provisions of this act." 35 P.S. § 691.610. Section 1917-A of the Administrative Code authorizes the Department to issue orders to abate nuisances, 71 P.S. § 510-17, and the combined operation of Sections 402, 601, 610, and 611 of the Clean Streams Law, 35 P.S. §§ 691.402, 691.601, 691.610, and 691.611, authorizes orders to address unlawful conduct. Perano violated the terms of his permit because Section B.I.C of his permit required him to furnish to the Department upon request the information set forth in the Department's letters of May 1 and 21, 2008 and NOV of June 8, 2009 and he failed to do so.[1] Perano's violation of his permit constituted unlawful

[1] In another appeal currently pending before the Board, Perano conceded that he had a duty to furnish information pursuant to the same permit condition at issue here, but he petitioned this Board for a

conduct and a statutory nuisance. 35 P.S. §§ 691.402(b) and 691.611. Thus, the Department had statutory authority under 71 P.S. § 510-17 and 35 P.S. §§ 691.402, 691.601, 691.610, and 691.611 to issue the order as well.

Perano argues that the Department exceeded its statutory authority by requiring Perano to provide information regarding the operation of his permitted plant that goes beyond what Perano was required to furnish pursuant to the terms of the permit. Perano is incorrect. First, under Sections 5 and 610 of the Clean Streams Law, the Department is authorized to ask a permittee for whatever information is necessary to implement the provisions of the act or aid in the enforcement of the act. 35 P.S. §§ 691.5, 691.610. These provisions do not depend upon the terms of the permit. The Department may not be able to ask a permittee to provide his bowling score, but it may certainly ask him to provide log books, maintenance records, sludge data, information regarding the number of connections to a permitted facility, and all of the other data requested in the Department's order, regardless of what the permit says. Whatever limit there is on the Department's authority to request information, the Department has not exceeded it here.[2]

As it happens, Perano's permit in fact covers all of the information listed in the Department's order, which makes Perano's argument that the Department's authority is limited by the terms of the permit rather academic. Perano's permit specifically provides that the permittee *shall* furnish *any* information which the Department may request to, among other things, assess the permittee's compliance with his permit. (J.Ex. 1.) This language is designed

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supersedeas from the order requiring the information because he contended that he should not be required to cover the copying costs for the documents. *Perano v. DEP*, EHB Docket No. 2010-025-L (Opinion and Order, March 17, 2010).

[2] Analyzing how far the Department may go in an information request illustrates that the question of the Department's authority blends into the question whether the Department has acted reasonably. Even where an order is authorized, we still must decide whether it embodies a reasonable exercise of discretion. *Sabot v. DEP*, 2009 EHB 1, 5. In this case, the Department's request is both lawful *and* reasonable, as discussed more fully below.

to provide the Department with the broad investigative authority that it needs to monitor hundreds of permitted facilities throughout the Commonwealth with limited staff and resources. Indeed, the entire NPDES program is heavily dependent on self-reporting. *DEP v. Kennedy*, 2007 EHB 15, 27; *Whitemarsh Disposal Corporation v. DEP*, 2000 EHB 300, 353; *DER v. East Penn Manufacturing*, 1995 EHB 259, 271; *DER v. Wawa*, 1992 EHB 1095, 1202. The permit condition at issue here is simply one aspect of that system. All of the information in the Department's order was without any doubt necessary to aid the Department in determining to what extent Perano was complying with his permit. The order did nothing more than require Perano to do exactly what he was already required to do by his permit.

Perano complains that not all of the information demanded in the order was necessary to determine whether cause existed for modifying, revoking and reissuing, or terminating his permit because the Department had already decided not to renew his permit at the time of the order. Assuming this to be true, the point is nevertheless completely academic because the Department also needed the information to assess ongoing compliance with the permit. Perano's permit was set to expire on August 31, 2010 but the Department has decided to administratively extend it indefinitely. It would seem to go without saying that the Department can and indeed should monitor the plant's compliance until the day it is shut down. In any event, the Department has credibly testified that the information requested would indeed help it decide whether cause exists to modify or terminate the permit. (T. 55.) In fact, the Department has modified the permit as a condition of its administrative extension. The Department's decision to allow the permit to continue in place indefinitely is subject to continuing evaluation and consideration, and it is subject to change at any time.

The Department's authority to require a permittee to furnish information does not depend upon whether the Department happens to have some independent information regarding ongoing compliance problems. The Department would have had authority to require Perano to provide the information listed in the order even if Perano's compliance record had been stellar. In fact, the plant's record has been anything but. (T. 15, 53.) This history made the Department's evaluation of the cause of these problems by among other things demanding production of operational information in Perano's hands all the more appropriate. The Department did not just need the information to determine *whether* the plant was consistently in compliance; it knew that it was not. It also reasonably needed the information to determine *why* the plant was out of compliance. It needed the information to investigate claims by the plant's certified and noncertified operators that the plant was experiencing significant operational problems. It needed to understand where sludge regularly seen in the receiving stream was coming from. It needed to see if there was anything to the reports that trucks were servicing the facility at night.

Perano questions the Department's statutory authority to demand production of documents that he is not required to keep pursuant to his permit. For example, monitoring results are to be retained for three years from the date of measurement (J.Ex. 1), but the order asks for documents going back longer than that. To repeat, the Department's statutory authority is not defined by the permit, but there are other problems with Perano's argument as well. Perano repeatedly cites to the provision in his permit that requires him to provide "copies of records *required to be kept* by the permit." (J.Ex. 1, Part B.I.C.2 (emphasis added).) That section, however, is in addition to the more general requirement contained in Section B.I.C.1 that the permittee must provide *any* information needed to assess compliance with the permit.

Frankly, Part B.I.C.2 is rather redundant. Part B.I.C.2 does not limit the Department's options under B.I.C.1.

In addition, the order does not require Perano to produce anything that he did not have. The order does not cite Perano for failing to maintain any records. If he destroyed documents, he had no obligation to provide them under the order. If he never had an obligation to create and/or save any documents, the order did not create an independent obligation to do so. It is also worth pointing out at this juncture that we are not in this appeal concerned with analyzing what was required to fully comply with the order. That question would be at issue in an action to enforce the order, or in an appeal from a second order citing Perano for failing to comply with the first order, or, perhaps, in a civil penalty case. Here, our sole focus is limited to the validity and content of the order. *See Ramey Borough v. DEP*, 351 A.2d 613, 615 (Pa. 1976); *M&M Stone Co. v. DEP*, 2008 EHB 24, 67.[3]

Perano argues that the Department could not demand any information in the order that it had not previously asked for by other means. For example, he objects that the order asked for more information than that which was requested in the Department's letters and NOV. He complains that the Department's demand for a notarized accounting of the number of lots in the development that were connected to the treatment plant was improper because Perano had previously provided the Department with sufficient information to prove that connection from all of the lots had been approved by the Department. He says that prior to the order the Department never said that it was unclear about the number of lots, and the Department never raised the issue during any of its inspections.

[3] Another example of an argument that has little relevance here is whether the order as drafted only required Perano to provide documents physically located at the plant. Whether it did or not does not affect the validity of the order.

Perano cites no legal support for his novel theory that the Department must ask for information by some means other than an order. The argument is ironic given Perano's protracted disregard of the Department's letters and NOV, but putting that aside, the argument is simply incorrect. The Department, while certainly encouraged to seek voluntary compliance as it did here, is not required by any law that we are aware of to do so. Nor does the Department need to "indicate" that it is unclear about a fact or raise a question in its inspections as a prerequisite to an information-request order.

By the same token, the Department had the authority and acted reasonably by asking for more information in the order than it asked for in previous correspondence. The situation at the plant was hardly static. The information obtainable is not frozen in time by attempts to achieve voluntary compliance. The additional information requested in the order (e.g. disposal locations for sludge and wastewater removal, sampling records) was pertinent to the Department's ongoing investigation. Sending more letters and NOVs as a precursor to requesting the additional items in the order would have been a waste of time and resources and the Department reasonably declined to do so.

Perano goes on to argue that the order, even if lawfully issued, represents an unreasonable exercise of the Department's discretion and is not supported by the facts.[4] These arguments essentially boil down to a claim that the Department should not have issued an order in this case, but instead, should have proceeded by less draconian means. We reject this claim. It was perfectly reasonable for the Department to proceed by issuing the order that it did when it

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[4] There is substantial overlap between Perano's arguments in support of his claim that the order was not authorized by law and his argument in support of his claims that issuance of the order was unreasonable and unsupported by the facts. We reject all of Perano's arguments in all contexts. To the extent we reject the argument in our discussion relative to authority, we reject it as well as to reasonableness and factual support, and vice versa.

did. The Department sent two letters and an NOV over the course of several months with no adequate response. That is more than an adequate attempt to attain voluntary compliance.

Perano's primary argument on this front is that the Department acted unreasonably by not re-sending its letters and the NOV to his attorneys after he asked the Department to do so before resorting to an order. Initially, we disagree that Perano may avoid his duty to provide information or otherwise comply with his permit by the simple expedient of sending a letter to the Department insisting that the Department re-send its information-request letter directly to his attorneys. Writing a letter does not act as a stay. Throughout this proceeding Perano has repeatedly said that he was entitled to "invoke his right to counsel." Had the Department issued him an order directing him to stop discharging in excess of his permit limits, Perano's "invocation of his right to counsel" would not mean that he could have simply continued discharging illegally. He would not have been excused from his duty to comply with his permit by the act of writing a letter to the Department insisting that the Department direct its request that he stop his illegal discharges through counsel. Complying with the information gathering provisions of the permit is no different. Perano's right to counsel did not give him the right to refuse to answer. It in no way excused him from complying with his permit.

The Department's information requests did not in fact interfere in any way with Perano's right to counsel. Nothing prevented Perano from forwarding the requests to his attorneys and even funneling his response to the information requests through his attorneys. In fact, he did exactly that. (E.g., P.Ex. 8, 9.) Unfortunately, the responses simply confirmed Perano's de facto refusal to turn over the requested information.

The record supports the Department's view that anything less than an order would have resulted in further delay and, in the end, almost certainly would have been ineffective. James

Perano testified that he would have provided the information if the Department had simply re-sent its letters to his attorneys. He testified that the Department has dealt with him as opposed to his brother (the actual permittee) in the past, which shows that the Department was merely being stubborn here, which further shows that proceeding by issuance of an order was unreasonable.

Initially, we find that James Perano's testimony is not credible. It is not believable on its face, but it is also inconsistent with Perano's course of conduct both before and after the letters. Most obviously, it contradicts Perano's refusal to turn over any documents as memorialized in his attorneys' letters to the Department in response to the NOV. It contradicts his later statement that he did not turn over the documents because of the pendency of an appeal. (T. 103.) He did not turn over the documents even after the Department issued the order, which shows that even the order was ineffective. His testimony that he did not know that a supersedeas could be filed is equally incredible, if for no other reason than he did not file a petition even after he purportedly learned it was available. (T. 103-04.) In fact, Perano did not turn over the documents until the Department filed a petition to enforce in Commonwealth Court.

We are not suggesting that Perano was necessarily trying to hide anything. Rather, Perano's reaction was a rather clumsy, tit-for-tat response to Martin Siegel's letter to Daniel Schranghamer asking that all communications from counsel be directed to counsel, as is required by the Rules of Professional Conduct. See Rule 4.2 (communication with person represented by counsel). Perano admitted that he purposely phrased his letters to match exactly the language in Siegel's letter. (T. 79.) Of course, while attorneys must speak to attorneys, clients may communicate directly.

If Perano had truly been interested in performing his duty to supply information as a permittee, he would have forwarded the information requests to his attorneys and worked with

them to prepare a legitimate response rather than respond with lengthy personal attacks against Departmental personnel. In response to this logical gap in Perano's explanation, he says that, had he asked his attorneys to respond to the Department's letters and NOV, it might not have been "acknowledged." This contention is impossible to follow. Perano did in fact have his attorneys respond, albeit with vitriol rather than substance, and the Department not only acknowledged, but responded to those letters in turn. (P.Ex. 8, 9, 10.) In addition, the fact that his response might not have been "acknowledged" is not an excuse for violating his permit. Had the Department directed Perano to stop exceeding his effluent limits, Perano would not have been authorized to continue the illegal discharges by protesting that his compliance efforts might not have been "acknowledged."

Along the same lines, Perano says that Siegel's letter about counsel communicating with counsel meant that his attorneys could not have responded to the author of the letters, Shawn Arbaugh, directly, if he had turned over the information requests to his attorneys for a response. Although, again, we are not directly concerned with compliance with the order here, if Perano chose to respond through his attorneys, we do not see why the response could not have been routed through Siegel on the Department end.

We are not entirely sure that it would have constituted adequate notice of the administrative action if the Department had communicated directly with the permittee's attorney rather than the permittee himself, especially for the NOV. Interestingly, Perano has not argued that the Department should have sent the order itself to his attorneys. Although we need not resolve the question here because the Department did in fact send its correspondence to the permittee, we simply observe that, not only was it reasonable for the Department to send its information request to Perano, any other course might have raised questions regarding proper

notice and service. The fact that the Department in the past has sent correspondence to James Perano as his brother's representative does not suggest to us that that is an appropriate course of conduct.

As we have previously explained, the pendency of litigation between a permittee and the Department does not stay a permittee's duty to provide information. *Perano v. DEP*, 2010 EHB 891, 893. Similarly, pending litigation does not require that every communication from Department employees to Perano be directed through his litigation counsel. Pending litigation, of course, also does not justify Perano's disregard of his duty as a permittee to furnish requested information, absent a supersedeas.

Perano makes oblique reference in his brief to his constitutional right against self-incrimination. However, he never claimed that privilege in response to the Department or before this Board as a basis for refusing to comply with the information requests, and the right not to incriminate oneself is distinct from the right to legal representation. There is nothing in the record here to support a finding that the Department has in any way interfered with either right.

Perano argues that he needed to be careful in responding to the Department's requests because "responding to formal requests for information can be full of pitfalls." It is undoubtedly true that Perano needed to exercise appropriate care in responding to the Department's requests for information. As a component of exercising appropriate care, he was entitled to work with his attorneys in preparing his response, it was wise of him to do so, and he in fact did so. However, none of that translates into a right to refuse to respond. Respond carefully--yes; refuse to respond at all--no.

Perano suggests that the Department issued the order, not because the information was really necessary to aid in its enforcement of the law, but because it wanted to "turn up the heat on

Mr. Perano with respect to Pleasant Hills." The Department's motivation for issuing an order has little or no relevance in a review of the validity of the order, *Milco*, 2002 EHB at 727, but putting that aside, even if the Department wanted to "turn up the heat," a speculative allegation that has no record support, it does not follow that the Department had no sincere interest in also investigating the plant's compliance. To the contrary, as previously discussed, the Department had multiple reasons to investigate what was going on at the plant.

Perano says that the thirteen-month delay between the NOV and the order also shows that the order was issued purely for spite. The Department has credibly explained that the time lag was primarily due to the ongoing negotiation of outstanding issues between Perano and the Department. (T. 56.) Although the Department hoped the need for the information would go away during the thirteen-month period, the negotiations were ultimately unsuccessful. In sum, we see nothing in the record to suggest that the Department's issuance of the order was unreasonable or unsupported by the facts.

CONCLUSIONS OF LAW

1. The Department bears the burden of proving by a preponderance of the evidence that the Department's order constitutes a lawful and reasonable exercise of the Department's discretion that is supported by the facts.

2. The Department satisfied its burden of proof.

3. The Department had the statutory authority to issue the order.

4. Perano engaged in unlawful conduct by refusing to respond in substance to the Department's requests for information.

5. A permittee is not entitled to violate his permit or disregard Department requests for information by invoking the right to counsel. The permittee may work with his attorneys in preparing a response, but the permittee must nevertheless respond.

6. Perano did not present a legitimate excuse for his unlawful conduct.

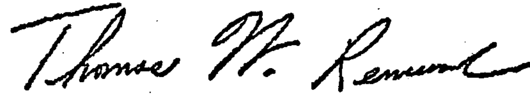
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

FRANK T. PERANO	:	
	:	
v.	:	**EHB Docket No. 2009-118-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

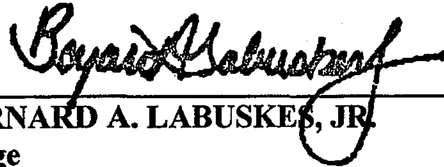
AND NOW, this 10th day of May, 2011, it is hereby ordered that this appeal is **dismissed.**

ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Chairman and Chief Judge

MICHELLE A. COLEMAN
Judge



BERNARD A. LABUSKES, JR.
Judge

RICHARD P. MATHER, SR.
Judge

DATED: May 10, 2011

c: **DEP Bureau of Litigation:**
Attention: Connie Luckadoo, Library

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MARYANNE WESDOCK
ACTING SECRETARY TO THE BOARD

SUSAN FOX and JEFF VAN VOORHIS, et al.	:	**Docket No. 2007-280-C**
	:	**(Cons. w/ 2007-283-C,**
	:	**2007-284-C, 2007-289-C,**
v.	:	**2008-003-C, 2008-013-C,**
	:	**2008-015-C, 2008-023-C,**
	:	**2008-031-C, and 2008-032-C)**
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION and SYNAGRO	:	**Issued: May 12, 2011**
MID-ATLANTIC, INC., Permittee	:	

OPINION AND ORDER
ON PERMITTEE'S MOTION FOR NON-SUIT

By Michelle A. Coleman, Judge

Synopsis:

The Board grants the Permittee's motion for nonsuit because the Appellants, at the close of their case-in-chief, failed to prove by preponderance of the evidence that a neighboring farm was unsuitable to receive biosolids from two permitted sources. Thus, the Appellants have not proven their cause of action and we dismiss the appeal.

OPINION

Before the Board is a motion for nonsuit filed by Synagro Mid-Atlantic, Inc ("Synagro" or "Permittee") arguing that the Appellants have failed to prove their cause of action at the hearing on the merits. Appellants are landowners with property adjacent to agricultural land owned by George Phillips ("Phillips Farm") located in Shrewsbury Township, York County. Synagro is a biosolids and residual waste management company located in Whiteford, Maryland.

Synagro sent a letter dated November 6, 2007 notifying the Department and adjacent landowners that it intended to apply biosolids to the Phillips Farm. The biosolids originated in two permitted wastewater treatment facilities, New Oxford Municipal Authority WWTP and New Freedom Borough Authority WWTP.[1] Beginning December 2007 through February 2008, the Board received letters from individual Appellants objecting to the use of the biosolids at the Phillips Farm. On March 12, 2008 the Board consolidated the individual appeals.

There have been two previous opinions and orders in this case. In the opinion and order on Synagro's motion to dismiss, the Board determined that there was a genuine issue of fact as to whether Appellants were provided notice prior to the spreading of sewage sludge on the Phillips Farm. Therefore, the Board denied the motion to dismiss. *See Susan Fox, et al v. DEP & Synagro Mid-Atlantic, Inc.*, 2008 EHB 515. The Department and Synagro filed a joint motion in limine. In an opinion & order issued on April 23, 2010 the Board held that it had jurisdiction to hear the consolidated appeal, but the appeal was limited to the challenge of the two new sources in the general permit and their suitability to application on the Phillips Farm. The opinion provided:

> If we do not allow them to be heard now, then their right to be heard on these two sources will be lost. Therefore, we conclude that we will limit the appeal to allow the challenge of the two additional sources as it relates to the general permit and suitability of the Phillips Farm, but will not allow challenges to the approval of the PAG-08, the coverage determination of the twenty nine prior sources, or the site suitability determination as it relates to the twenty nine sources approved throughout 2005. Those challenges should have been brought within thirty days after the publication in the *Pennsylvania Bulletin*.

---

[1] As way of background, on November 23, 2005 the Department issued Synagro general permits for the use of twenty nine sources of non exceptional and exceptional quality biosolids from permitted wastewater treatment facilities to be used at the Phillips Farm. The biosolids under appeal here are two new sources to be applied to the Phillips Farm.

Susan Fox, et al v. DEP & Synagro Mid-Atlantic, Inc., 2010 EHB 331, 334.

The Board held a one day hearing on October 6, 2010 wherein the Appellants called four fact witnesses to testify, all of whom are Appellants in this matter. At the close of the Appellants' case-in-chief, the Permittee made an oral motion for nonsuit on the basis that,

> Appellants have not presented any evidence, any testimony as to the suitability of the Phillips Farm for the land application of biosolids from the two new sources. They presented no expert testimony, no expert reports to support that contention.
>
> . . .
>
> Given the lack of any scientific or expert testimony presented to show that the Phillips Farm is not suitable for the application of biosolids from the two new sources, appellants have clearly failed to meet their burden of proof on that issue.

N.T. 86.[2] The Department concurred in the motion. Judge Coleman explained that the full Board would be needed to decide the motion so either the hearing would be postponed to allow the full Board to deliberate on the motion, or the hearing could proceed and the motion remain open. The parties chose to suspend the hearing and brief the motion for non-suit. The Board provided the parties with an opportunity to brief the pending motion. Synagro submitted its brief in support of the motion on November 17, 2010. The Department concurred with Synagro by letter dated November 18, 2010. The Appellants' response was received on December 15, 2010.

The Appellants' have the burden of proof in this proceeding. *See* 25 Pa. Code § 1021.122(c). They must prove by a preponderance of the evidence that the Department acted unreasonably or contrary to the law when it allowed Synagro to apply biosolids from New Oxford Municipal Authority and New Freedom Borough Authority to the Phillips Farm. In essence, the Appellants must prove that the Phillips Farm is unsuitable to receive the two sources noted above.

---

[2] Notes of the testimony will be cited as "N.T."

Our rules provided that "the party with the burden of proof is required to make a prima facie case by the close of its case-in-chief." 25 Pa. Code § 1021.117(b). If a party with the burden of proof fails to make a prima facie case the Board may grant a motion for nonsuit. *Decker v. DEP*, 2002 EHB 610 (*citing Leone v. Pennsylvania Department of Transportation*, 782 A.2d 754, 756 (Pa. Cmwlth. 2001); *see also, Delaware Environmental Action Coalition, et al. v. DEP*, 1994 EHB 1427, 1430; *City of Harrisburg v. DEP*, 1993 EHB 90, 91; *County of Schuylkill v. DEP*, 1991 EHB 1, 6. The initial party's case must be clearly insufficient and the Board must consider the evidence, and all reasonable inferences arising from that evidence, in a light most favorable to the nonmoving party. *See Clabbatz v. DEP*, 2006 EHB 263, 265, *citing Leone v. Department of Transportation*, 780 A.2d 754, 756 (Pa. Cmwlth. 2001).

At the hearing the Appellants had four witnesses (Jeffrey Van Voorhis, Susan Lee Fox, Michele Torgersen and Jeff Fodel) discuss whether or not Synagro provided the landowners notice of the land application of the two biosolids under appeal. The first witness, Jeffrey Van Voorhis, identified his notice of appeal, Synagro's November 6, 2007 letter sent to Van Voorhis providing notice of land application of the two biosolids, and the envelope postmarked December 7, 2007 that housed the Synagro letter. Appellants' Exhibits ("App. Exs.") 3, 4, 5. The next witness was Susan Fox. She testified that she lives with Van Voorhis, but never received her own letter from Synagro. N.T. 24. Even though her testimony was that she did not receive a letter specifically addressed to her, she did testify that a letter was sent to her residence addressed to Van Voorhis on December 10, 2007 prompting her to file her own individual notice of appeal. App. Ex. 6. The third witness was Michele Torgersen who identified her notice of appeal signed by both her and her husband. She testified that she and her husband received Synagro's November 6, 2007 letter on December 20, 2007. App. Ex. 7. She also identified the

envelope postmarked December 7, 2007 that contained the Synagro November 6, 2007 letter. App. Ex. 23. The last witness to testify was Jeff Fodel who identified his notice of appeal signed by him and his wife. App. Ex. 12.

The Board recognizes that the letters sent to the adjacent landowners were postmarked significantly later than November 6, 2007, however there has been no argument made that the notice was insufficient. In fact, the Appellants' own testimony indicates that they received notice via the letter dated November 6, 2007 prompting them to pursue their respective appeals before the Board. There is nothing for us to decide with respect to that issue, due process has been afforded to each Appellant.

The notices of appeal challenge the site suitability of the Phillips Farm and in order to sustain the consolidated appeal, the Appellants must prove by a preponderance of the evidence that the Phillips Farm is unsuitable to receive the two biosolids from New Oxford Municipal Authority and New Freedom Township. At the hearing there was no evidence presented regarding the suitability of the Phillips Farm. The only evidence the Board can find that would remotely address the Phillips Farm suitability was Jeff Fodel's testimony. He presented photographs that were taken by him in February, 2008. *See* Apps Exs. 13-18. He testified that on the day he took these photographs it was raining. N.T. 73. Fodel explained that each photographic exhibit was taken to show "runoff" from and around the Phillips Farm. N.T. 42, 45, 61, 62-64, 65-68, 69-71 However, there is no testimony or any other evidence to indicate that the photographs depict the runoff of biosolids and if they do, whether they depict biosolids from the two new biosolid sources being challenged in this appeal. All the Board can extrapolate from Fodel's testimony is that there is standing water and runoff after a rain event.

We have no other evidence being offered by the Appellants to support their argument.

There was no expert called and qualified in this matter to provide an opinion on whether or not the Phillips Farm is unsuitable to receive the two biosolid sources under appeal here. There is no evidence, anywhere in the record, to indicate that the Phillips Farm is unsuitable to receive the two biosolids. The only other evidence admitted was a chemical analysis document, but there was no testimony in support of the document or to explain the analysis. No testimony was proffered on how it is even relevant to this proceeding. App. Ex. 22.

When technical and scientific issues are raised, such as the suitability of a farm for the application of biosolids, the party with the burden must present the testimony of witnesses who have personal knowledge or can provide expert opinions regarding the reasonableness of the Department's actions. *See Clabbatz v. DEP*, 2006 EHB 263 (The Board found that Clabbatz, who only had his unsworn statement as evidence, failed to meet his burden of proof and the Board granted the motion for nonsuit). In *Ernest Lee Van Tassel v. DEP and Genesis, Inc.*, 2002 EHB 625, the Board granted a nonsuit where the Appellants failed to make a prima facie case in their appeal of a mining permit. Similar to the case at hand, the Appellants in *Van Tassel* presented lay testimony but no scientific evidence to support their contentions, nor did the Appellants provide testimony on the relevance on certain technical data introduced into evidence. *Van Tassel*, 2002 EHB at 630-31.

Based on the evidence presented by the Appellants, the Board determines that the Appellants have not met their burden of proof to establish that the Phillips Farm was unsuitable to receive the two biosolids under appeal. The Appellants failed to prove their cause of action and the Board grants the motion for nonsuit.

Accordingly, we enter the following Order.

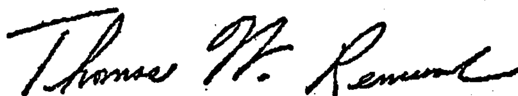
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

SUSAN FOX and JEFF VAN VOORHIS, et al.	:	
	:	**Docket No. 2007-280-C**
	:	**(Cons. w/ 2007-283-C,**
	:	**2007-284-C, 2007-289-C,**
v.	:	**2008-003-C, 2008-013-C,**
	:	**2008-015-C, 2008-023-C,**
	:	**2008-031-C, and 2008-032-C)**
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION and SYNAGRO	:	
MID-ATLANTIC, INC., Permittee	:	

ORDER

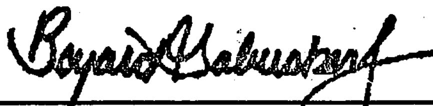
AND NOW, this 12th day of May, 2011, the Permittee's Motion for Nonsuit is hereby granted. The consolidated appeals in the above captioned matter are dismissed.

ENVIRONMENTAL HEARING BOARD

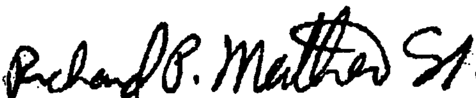


THOMAS W. RENWAND
Chairman and Chief Judge

MICHELLE A. COLEMAN
Judge



BERNARD A. LABUSKES, JR.
Judge



RICHARD P. MATHER, SR.
Judge

DATED: May 12, 2011

c: **DEP Bureau of Litigation:**
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MARYANNE WESDOCK
ACTING SECRETARY TO THE BOARD

SCOTTIE WALKER	:	
	:	
v.	:	**EHB Docket No. 2011-032-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: May 12, 2011**

OPINION AND ORDER ON DISMISSING APPEAL AS A SANCTION

By Michelle A. Coleman, Judge

Synopsis:

The Board dismisses a *pro se* appeal wherein Appellant has failed to provide both a copy of the Department action being appealed and proof of service of the Notice of Appeal on the Department's Office of Chief Counsel and Officer of the Department who took the action being appealed. Appellant also did not follow Board Orders to provide the missing information.

OPINION

The Appellant in this matter is Scottie Walker ("Walker") who is appearing *pro se*. On or about March 15, 2011 Walker sent a Notice of Appeal ("NOA") to the Board referencing Blasting Activity Permit No. 43114001. The NOA lists 6 objections in separate numbered paragraphs. However, there was no information in the NOA to specify to whom the permit was issued, where the activity in question is located, and what the activity is.

In addition, there was no indication that the NOA had been served upon the Office of

Chief Counsel or the officer of the Department who took the action in question. A copy of the action was not attached to the NOA. To rectify these insufficiencies, the Board sent an Order dated March 16, 2011 to Walker requesting that a copy of the action and proof of service be filed on or before April 5, 2011.

On April 6, 2011, the Board, having not received the requested information, issued a Rule to Show Cause returnable April 29, 2011. No response was made to the Rule.

The Board has the authority to dismiss an appeal as a sanction for failing to comply with Board orders. 25 Pa. Code § 1021.161; *Martin, et al. v. DEP*, 1997 EHB 158. A sanction resulting in dismissal is justified when a party to the case fails to comply with Board orders and shows a lack of intent to pursue its appeal. *Pearson v. DEP*, 2009 EHB 628, 629, *citing Bishop v. DEP*, 2009 EHB 259; *Miles v. DEP*, 2009 EHB 179, 181; *RJ Rhodes Transit, Inc.*, 2007 EHB 260; *Swistock v. DEP*, 2006 EHB 398; *Sri Venkateswara Temple v. DEP*, 2005 EHB 54.

Walker failed to comply with the Board's Orders and the Rule requiring that the appellant provide certain information. Section 1021.51 provides,

> (d) If the appellant has received written notification of the action from the Department, a copy of the action shall be attached to the appeal.
>
> . . .
>
> (g) Concurrent with or prior to the filing of a notice of appeal, the appellant shall serve a copy thereof on each of the following:
>
> > (1) The office of the Department issuing the notice of the Department action.
> >
> > (2) The Office of Chief Counsel of the Department or agency taking the appeal.

25 Pa. Code § 1021.51.

Since it appears that this matter involves a blasting permit, we can deduce that there is a

permittee, however, we have no knowledge of the name or address of said permittee. Therefore, no action was taken with respect to Section 1021.51(g)(3) relating to recipient of the action.

There has been a failure to perfect this appeal. Also, Appellant has not complied with the Board Orders issued on March 16, 2011 and April 6, 2011. In light of these omissions, Walker has failed to prosecute this appeal.

Accordingly, we issue the Order that follows.

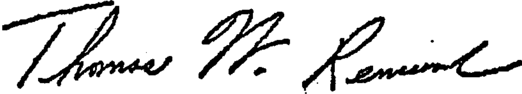
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

SCOTTIE WALKER	:	
	:	
v.	:	**EHB Docket No. 2011-032-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

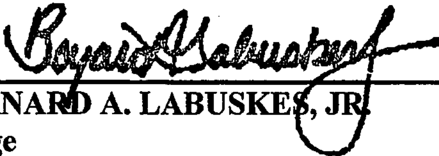
AND NOW, this 12th day of May, 2011, upon consideration that the Appellant failed to comply with the Board's Orders of March 16, 2011 and April 6, 2011, which required the Appellant to perfect the above appeal by providing a copy of the Department action being appealed and proof of service of the notice of appeal upon the Department, it is hereby ordered that the appeal is dismissed pursuant to 25 Pa. Code § 1021.161 as a sanction for failure to comply with 25 Pa. Code § 1021.51 and the Board's Orders.

ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Chairman and Chief Judge

MICHELLE A. COLEMAN
Judge



BERNARD A. LABUSKES, JR.
Judge

RICHARD P. MATHER, SR.
Judge

DATED: May 12, 2011

c: **DEP, Bureau of Litigation:**
Attention: Connie Luckadoo

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MARYANNE WESDOCK, ESQUIR
ACTING SECRETARY TO THE BOA

LOWER SALFORD TOWNSHIP AUTHORITY	:	
v.	:	**EHB Docket No. 2008-238-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: May 18, 2011**
TELFORD BOROUGH AUTHORITY AUTHORITY	:	
v.	:	**EHB Docket No. 2008-265-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: May 18, 2011**
BOROUGH OF WEST CHESTER AND GOSHEN SEWER AUTHORITY	:	
v.	:	**EHB Docket No. 2008-272-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: May 18, 2011**
LOWER PAXTON TOWNSHIP, HOMEBUILDERS ASSOCIATION OF METROPOLITAN HARRISBURG, Appellants and THE HARRISBURG AUTHORITY, Intervenor	:	**EHB Docket No. 2008-273-L**
v.	:	**Issued: May 18, 2011**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

OPINION AND ORDER ON JURISDICTION OF THE BOARD

By Bernard A. Labuskes, Jr., Judge

Synopsis:

The Board dismisses four appeals from three Total Maximum Daily Loads because the Environmental Protection Agency established the TMDLs, not the Department. The Board also dismisses appeals from component decisions allegedly made by the Department as part of the TMDL process because they are not separately appealable final actions.

OPINION

This matter involves four appeals challenging the Environmental Protection Agency's ("EPA's") establishment on June 30, 2008 of three Total Maximum Daily Loads ("TMDLs") for the Indian, Goose, and Paxton Creek watersheds, as well as certain underlying decisions that the Department of Environmental Protection (the "Department") is said to have made as part of the TMDL process.[1] The only question currently before the Board is whether we have jurisdiction to hear the merits of these appeals. After considering the evidence regarding jurisdiction at a hearing limited solely to that issue before Judge Miller on August 17-19, 2009 and before Judge Krancer on December 7, 2010, we conclude that we have no jurisdiction to decide these appeals.

A TMDL is a calculation of the amount of a pollutant or group of pollutants that a water body can tolerate and still meet its designated use. (Notes of Transcript page ("T.") 30.) There can be no doubt whatsoever based upon our review of the factual record that EPA, not the Department, established the TMDLs. (T. 33-35, 235, 239-41, 303-05, 492, 660, 682-93, 707-08;

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[1] The Appellants are the Lower Salford Township Authority, Lower Salford Township, Franconia Township, Franconia Sewer Authority, Telford Borough Authority, Borough of West Chester, West Goshen Sewer Authority, Lower Paxton Township, and the Home Builders Association of Metropolitan Harrisburg. The Harrisburg Authority has intervened.

Board Exhibits ("B.Ex.") 5, 6, 7, 8-13, 17.) The Appellants concede as much. (*See, e.g.*, Lower Salford *et al.* Post-Hearing Brief 15; Telford *et al.* Post-Hearing Brief 31.) This Board only has jurisdiction to review actions *of the Department*. 35 P.S. § 7514(a); 25 Pa. Code § 1021.2(a); *Angela Cress Trust v. DEP*, 2009 EHB 342, 363-64. We do not review the actions of the federal government. *Borough of West Chester v. DEP*, 2009 EHB 308, 311-12; *Franklin Township Municipal Sanitary Authority v. DER*, 1990 EHB 916, 944; *Del-Aware Unlimited, Inc. v. DER*, 1984 EHB 178, 257-58; *Allegheny County Sanitary Authority v. DER*, 1983 EHB 496, 503. Therefore, we do not have jurisdiction to review the TMDLs.

The Appellants argue that the Department *should* have established the TMDLs. The argument is that, since the Department should have established the TMDLs instead of EPA, we should pretend that the Department established the TMDLs and proceed to review them on their merits. Our jurisdiction, however, turns on what did happen, not what should have happened. *Lower Salford Twp. Authority v. DEP*, 2006 EHB 657, 668. Whether the Department could have or should have established the TMDLs, the fact of the matter is that it did not. There simply is no final Departmental action for us to review. How that came to be is nothing more than inconsequential background. The Board has no jurisdiction over Department inaction. *Associated Wholesalers, Inc. v. DEP*, 1997 EHB 1174, 1182-83; *Westvaco Corp. v. DEP*, 1997 EHB 275, 277; *Westinghouse Electric Corp. v. DER*, 1990 EHB 515, 518. Similarly, whether EPA was authorized to establish the TMDLs or not, the fact of the matter is that it did. This Board has no more jurisdiction over an unauthorized federal action than an authorized federal action.[2]

---

[2] We cannot resist noting that there is very little doubt that EPA had the authority to issue the TMDLs in lieu of the Commonwealth. *See Upper Gwynedd-Towamencin Municipal Authority v. DEP*, 9 A.3d 255, 259 and 267.

The Appellants suggest that we have already decided in this and other TMDL litigation that, regardless of the facts, the TMDLs must always be attributed to the Department. This is simply not true. We held a hearing on the issue in this case because the issue is factual. Deciding who did what is a question of fact, not law. Where, as here, the factual record shows beyond any doubt that there was no Departmental action, there is no occasion for pretending otherwise "as a matter of law." The Board's prior statements in this and other TMDL cases in the context of resolving motions to dismiss and motions for summary judgment should not be taken out of context and need to be understood as a rejection of the Department's contention that the issue could be decided *either way* as a matter of law. *See, e.g., Lower Salford Township Authority v. DEP*, 2006 EHB 657, 668 (we review what happened, not what should have happened; this is a disputed issue of fact); *Lower Salford Township Authority v. DEP*, 2009 EHB 633, 642 (whether DEP promulgated the TMDL is a question of fact that has not been resolved).

Even if we assume for purposes of argument that EPA was not authorized to establish the TMDLs as the Appellants claim, it simply does not logically follow that the Department may be said to have taken an action. It is a *non sequitor*. If EPA acted improperly, a federal court can presumably direct it to act properly, but that in no way results in a conclusion that EPA's improper action remains in place and should be attributed to the Department. If the TMDL is defective, the solution to is require corrective action, not keep the defective TMDL in place and attribute it to the Department. That simply makes no sense.

Appellants suggest that the TMDLs should be attributed to the Department because EPA was merely acting as the Commonwealth's "agent," and that EPA was nothing but a "glorified contractor." The Appellants cite no authority for the rather novel theory that the federal government can act as the Commonwealth's "agent." Nor do we view it as having any merit.

Not surprisingly, the Department and EPA work in a cooperative fashion, as two sovereigns who share the ultimate goal of ensuing the protection of the nation's and the Commonwealth's water resources. *Hatfield Township Municipal Authority v. DEP*, 2010 EHB 571, 590. *See also New York v. United States*, 505 U.S. 144, 167 (Clean Water Act envisions "a program of cooperative federalism"); *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992) (CWA creates a partnership between the states and the federal government, animated by a shared objective). It is true that the Department provided stream data, monitoring information, permitting information, and other factual information that contributed to EPA's development of the TMDL (T. 234-35, 303-306, 489, 492),[3] but cooperative governance and federalism between agencies with overlapping responsibilities does not make one sovereign the agent or contractor of the other.

The Appellants complain that the presiding judge excluded a *Pennsylvania Bulletin* notice that said that EPA was establishing certain TMDLs "for the Commonwealth" and that those TMDLs satisfy "the Department's obligations" to do TMDLs. (35 *Pa. Bull.* 2691.) They say this shows that EPA can act as the Department's agent. The argument is highly semantical and the notice was not related to the TMDLs at issue here, but putting that aside, the fact that EPA did the TMDLs "for" the Commonwealth does not change the simple, dispositive fact that it was EPA that established the TMDLs. For whom EPA acted, whatever that means, matters little. Admission of the evidence would have made no difference.

As part of its contribution to EPA's efforts, the Department submitted comments to the agency in a letter dated June 27, 2008.[4] The Appellants in the appeals docketed at 2008-265-L,

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[3] The Department worked in part with EPA's contractors, TetraTech and the Louis Berger Group. (T. 234-35, 239-41, 684-86.)

[4] The letter reads as follows:

> The Department of Environmental Protection (DEP) appreciates the opportunity to clarify comments submitted to the Environmental Protection Agency (EPA) on April 18, 2008, regarding EPA's TMDLs for Chester, Indian and Southampton Creeks. With respect to

2008-272-L, and 2008-273-L (hereinafter "Telford") contend that this letter memorialized certain component decisions made by the Department as part of the TMDL process, and in addition to the TMDLs themselves they have also appealed from this letter and these component decisions.[5] These component decisions are that the Department (1) authorized a revision of its narrative water quality standard with respect to nutrients, (2) determined that Goose Creek was nutrient impaired, and (3) asked EPA to propose a nutrient TMDL for a waterbody never formally identified as nutrient impaired. Telford has devoted the vast majority of its brief to arguing that these component decisions are appealable to this Board, perhaps in partial recognition of the near absurdity of this Board attempting to review the EPA TMDLs themselves. In any event, the effort has been futile because we do not view these component decisions as separately appealable actions.

We only review *final* actions. The component decisions in this case are analogous to the many subsidiary decisions the Department makes along the way in the course of reviewing a permit application. These subsidiary decisions can have a profound and immediate practical effect on a permit applicant, but we nevertheless require the applicant to wait until the Department makes a final decision on the permit before filing an appeal. The Board will not review provisional and interlocutory decisions of the Department. *See Tri-County Landfill, Inc. v. DEP*, 2010 EHB 747, 750 ("when the Department takes a final . . . action, there may be other issues lurking of which we are not aware. It is imperative that the Board exercise appropriate

---

> the comment stating DEP's concurrence with the approach used in developing phosphorus endpoints, it is DEP's view that the chosen approach and endpoint adequately protect all beneficial water uses in those watersheds.

(B.Ex. 7.)

[5] The Lower Salford Appellants only appealed the TMDL. As to Telford, we are giving them the benefit of the doubt that the component decisions to which they object were made and were incorporated into the June 27 letter, which was the only action aside from the TMDL that was attached to their notices of appeal. In truth, the Appellants' interpretation of the letter is hardly supported by the record. (*See, e.g.*,

judicial restraint and wait to review all of those issues at once, or not at all."); *United Refining Co. v. DEP*, 2000 EHB 132, 133 ("Any number of decisions during a permit review could have costly, real world consequences, but this Board will not review them in piecemeal fashion."); *Central Blair County Sanitary Authority v. DEP*, 1998 EHB 643, 646, *quoting Phoenix Resources, Inc. v. DER*, 1991 EHB 1681, 1684 (decisions that are "transitory in nature, often undefined, frequently unwritten . . . Board review of these matters would open the door to a proliferation of appeals challenging every step of [the Department's review] . . . process before the final action has been taken. Such appeals would bring inevitable delay to the system and involve the Board in piecemeal adjudication of complex, integrated issues."). *See also County of Dauphin v. DEP*, 1997 EHB 29 (dismissing an appeal for lack of jurisdiction when it sought Board review of a Department decision to suspend review of a landfill permit application pending substantive changes required by Act 101.)

The same reasons that cause us to reject appeals from the Department's interim decisions in the permitting context inform our analysis here. The Department's component decisions made within the TMDL process are not fairly viewed as separate actions. They are, at most, constituent determinations that are an integral part of the final action, but they are not themselves final actions.[6]

This Board only has jurisdiction to review final actions that affect personal or property rights, privileges, immunities, duties, liabilities, or obligations. 35 P.S. § 7514(c); 25 Pa. Code §

T. 42, 538, 573-77, 635, 715; Bd. Ex. 7.)

[6] We are assuming for purposes of discussion that the TMDLs are final actions. Obviously, we have no need to decide in this case whether the TMDLs would themselves have been reviewable at the time they were established (as opposed to some other time, such as when NPDES permits based on the TMDLs are issued) if they had been established by the Department. Similarly, the instant dispute does not require us to describe the scope or substance of our review if and when the Department issues an NPDES permit based in part on a federally promulgated TMDL.

1021.2(a). The Department's component decisions had no such impact on Telford. This point can be illustrated by imagining that EPA never established a TMDL. Without the TMDL, the component decisions are simply too far removed from any discernable impact on Telford to be considered appealable acts. *Telford Borough Authority v. DEP*, 2010 EHB 713, 719. *See also Pickford v. DEP*, 967 A.2d 414, 420 (Pa. Cmwlth. 2008). State decisions that are subject to further federal review and/or approval, such as the Department's component decisions here, are generally not considered final actions: *Telford*, 2010 EHB at 719. *See also Miller & Son Paving, Inc. v. Pennsylvania Historical and Museum Commission*, 628 A.2d 498 (Pa. Cmwlth. 1993), *appeal denied* 641 A.2d 590 (Pa. 1994) (actions of the state in approving and certifying nomination did not constitute a final appealable order subject to state court jurisdiction, but merely were recommendations which required subsequent final action by the federal agency); *Sarah A. Todd Memorial Home v. Commonwealth, Department of Health*, 410 A.2d 404, 405 and 500 (Pa. Cmwlth. 1980) (no jurisdiction to review state action where final determination is made by federal agency). Indeed, the Commonwealth Court has recognized that in certain cases implicating a federal system of regulation, "there will never be an adjudication appealable to this Court." *LPG Construction Co. v. Commonwealth, Department of Transportation*, 501 A.2d 360, 362 (Pa. Cmwlth. 1985) (no jurisdiction to review state agency's denial of certification that was not conclusive because federal agency review was available).

Recommendations and comment letters by definition are generally not reviewable. *Telford, supra*. By their very nature they neither create rights or obligations nor require anybody to alter their conduct. Similarly, a letter that directs no action from anyone and is merely an interpretation of the law is generally not appealable. *Perkasie Borough Authority v. DEP*, 2008 EHB 483, 484, *citing HJH, LLC v. Department of Environmental Protection*, 949 A.2d 350 (Pa.

Cmwlth. 2008); *Polites v. DEP*, 2007 EHB 604, 607, *aff'd*, 2148 C.D. 2007 (Pa. Cmwlth. 2008). This principle extends to a purported change in legal interpretation disembodied from any Department action directly affecting a particular party, such as the Department's June 27 letter. *Gordon-Watson v. DEP*, 2005 EHB 812, 815-16.

Telford complains that the component decisions had an immediate adverse impact because Telford could not comment on them. In the Department's words, this puts the cart before the horse. The argument goes to the merits, not jurisdiction. In any event, public comments are rarely if ever accepted for interim decisions. The TMDL was open to public comment. (T. 303-05; Bd. Ex. 11.)

Telford's tendency to confuse issues that relate to the merits with issues that relate to jurisdiction permeates its brief. For example, it cites *Dauphin Meadows v. DEP*, 2000 EHB 521, for the proposition that this Board can determine whether a Department action is based upon improper rulemaking. *Dauphin Meadows*, however, involved an appeal from a permit denial. A permit denial is unquestionably a final Departmental action that has an immediate adverse impact on the permit applicant. The illegal rulemaking itself would not have been reviewable outside of the context of such a final action. Such a final action by the Department is what is missing here.

Telford argues that the June 27 letter is analogous to the Commonwealth's certification under Section 401(a) of the Clean Water Act, 33 U.S.C. § 1341(a). That section requires states to certify that a discharge to be authorized by a federal license or permit will not violate the state's water quality standards. The state may impose effluent limits or conditions, if necessary, in the federal permit or license. 33 U.S.C. § 1341(d). *See generally S.D. Warren Co. v. Me. Bd. of Environmental Protection*, 547 U.S. 370, 374 (2006); *PUD No. 1 v. Washington Department*

of Ecology, 511 U.S. 700, 713 (1994). Administrative review of the certification at the state level is expected, 40 C.F.R. § 124.55(e), and we, in fact, have entertained appeals from certifications or denials thereof. *Solebury v. DEP*, 2003 EHB 208; *City of Harrisburg v. DER*, 1996 EHB 709.

There are critical differences, however, between a 401 certification and the Department's June 27 comment letter. The 401 certification is a separate action governed by a formal process that can result directly in legally enforceable limitations being imposed upon a particular dischargers. In contrast, the Department's comment letter in this case was not part of a mandatory, formal process leading up to a distinct state action, and the Department's comments could not directly result in legally enforceable permit limitations being imposed upon a particular discharger. Any connection between the Department's comment letter and NPDES permit limits down the road is theoretical, distant, and remote. Limitations imposed as a result of a 401 certification remain separate and distinct. In contrast, EPA incorporated the Department's comments into its analysis. They were subsumed by the TMDL.

Before concluding, we pause for a moment to reflect upon the practical difficulties that would be associated with any attempt on our part to assume jurisdiction in this case. First, if we held that we had jurisdiction, it would not necessarily follow that our jurisdiction is exclusive of federal court review. In fact, Telford concedes that a federal court would still need to review the TMDL if we allowed an appeal from some or all of the component decisions to go forward. This raises the wholly unsatisfactory possibility that there would be concurrent review of essentially the same matter by two different forums. We are under no illusion that any ruling on the merits by us would be likely to have much precedential value in a federal court proceeding. The Appellants might try to leverage a favorable ruling from us in federal litigation, but that would

make us little more than a tool. The Board does not issue advisory opinions. *CAUSE v. DEP*, 2006 EHB 717, 719.

Assuming jurisdiction over some of the constituent determinations of the TMDLs but not the TMDLs themselves would result in the worst sort of piecemeal litigation. Reviewing only the component decisions brings to mind the proverbial blind man carefully examining an elephant's trunk: disjunctive review can lead to poorly thought out, inaccurate conclusions. Public policy favors one review of one action in one forum. Anything else results in regulatory uncertainty, protracted litigation, a wasteful use of resources, the threat of inconsistent results, and unproductive delay that defeats, or at least postpones, attainment of the goals envisioned in the water pollution laws. A cynic might be forgiven for suspecting that is exactly what this case is all about.

Telford thinks that, if we were to invalidate one or more of the Department's constituent determinations, the TMDL "might" be withdrawn. Of course, this is very speculative, but aside from that, the record does not support a finding that any ruling by us on the merits is likely to have much of an effect on EPA. (T. 692-93.) *See also Upper Gwynedd-Towamencin Municipal Authority*, 9 A.3d 255, 267 (EPA's ultimate authority raises the question whether the Department can withdraw TMDLs once EPA has approved them).

Finally, EPA barely allowed its employee to testify in our jurisdictional hearing. It took a "Determination of Regional Counsel" just for that to happen. Future cooperation cannot be anticipated, particularly given EPA's view that the TMDLs are clearly federal actions. *See Groce v. DEP*, 2006 EHB 856, 950-63 (discussing National Park Service's refusal to allow its employees to testify in Board proceeding even though they were key players in permit review process); *Lower Salford Township Authority v. DEP*, 2009 EHB 384, 387 (federal employees not

typically permitted to testify in Board proceedings). Thus, if we were to assume jurisdiction we would likely be faced with the quixotic task of reviewing an action (or worse, its component parts) without the benefit of access to the individuals who actually took or acted upon the actions. Without that testimony, we would not be able to perform a meaningful review. *Cf. Zerr v. DER*, 570 A.2d 132, 133-34 (Pa. Cmwlth. 1990) (state Board lacks jurisdiction where United States is an indispensable party).

Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

LOWER SALFORD TOWNSHIP AUTHORITY	:	
v.	:	**EHB Docket No. 2008-238-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

TELFORD BOROUGH AUTHORITY AUTHORITY	:	
v.	:	**EHB Docket No. 2008-265-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

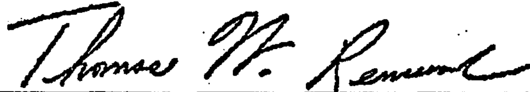
BOROUGH OF WEST CHESTER AND GOSHEN SEWER AUTHORITY	:	
v.	:	**EHB Docket No. 2008-272-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

LOWER PAXTON TOWNSHIP, HOMEBUILDERS ASSOCIATION OF METROPOLITAN HARRISBURG, Appellants and THE HARRISBURG AUTHORITY, Intervenor	:	**EHB Docket No. 2008-273-L**
v.	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

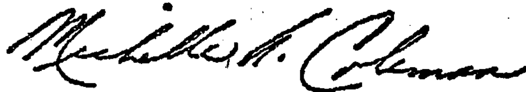
ORDER

AND NOW, this 18th day of May, 2011, the appeals in the above matters are hereby dismissed for lack of jurisdiction.

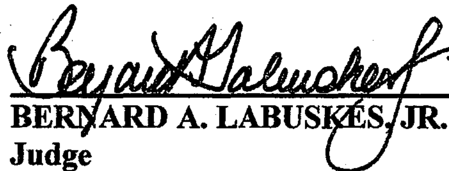
ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Chairman and Chief Judge



MICHELLE A. COLEMAN
Judge



BERNARD A. LABUSKES, JR.
Judge

Judge Richard P. Mather, Sr. did not participate in these appeals.

DATED: May 18, 2011

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MARYANNE WESDOCK, ESQUIRE
ACTING SECRETARY TO THE BOARD

JAN HENDRYX AND CHRISTINE HENDRYX	:	
	:	
v.	:	**EHB Docket No. 2010-144-M**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and EAST RESOURCES, INC., Permittee	:	**Issued May 23, 2011**

OPINION AND ORDER
ON MOTION FOR SUMMARY JUDGMENT

By Richard P. Mather, Sr., Judge

Synopsis

The Board grants a motion for summary judgment where the Appellant has informed the Board that it does not intend to oppose the motion.

OPINION

This appeal involves a Water Management Plan ("WMP") revision approved by the Department of Environmental Protection (the "Department") which was submitted by East Resources, Inc. ("East Resources") to designate approved sources of water to conduct hydrofracturing activities at its permitted Marcellus Shale wells in McKean, Potter and Forest Counties. Appellants Jan and Christine Hendryx have appealed the Department's approval of the WMP revision as landowners who live in close proximity to one East Resources well site in

McKean County.[1] Previously, we denied the Department and East Resources' motion to dismiss challenging both the timeliness of the Appellants' appeal as well as the Appellants' standing to challenge the WMP.

In February 2011, the permit to drill for natural gas at the site near the Appellants' home was transferred to Swepi, L.P, a business entity not involved in this appeal. That transfer was followed by a letter dated March 30, 2011, in which East Resources asked the Department to cancel its WMPs because it was no longer operating in Pennsylvania. Thereafter, the Department and East Resources have now filed this motion for summary judgment on the basis that the WMP revision appealed by the Appellants has been has been rescinded by the Department and the appeal is now moot. Appellants have responded by letter only informing the Board that they do not intend to oppose the motion.

Under our rules, a party seeking summary judgment must file a motion, a statement of undisputed material facts and a brief in support of the motion for summary judgment. 25 Pa. Code § 1021.94a(b). A party opposing summary judgment must, within thirty days, file a response to the motion, a response to the statement of undisputed facts and brief in opposition to summary judgment. 25 Pa. Code § 1021.94a(f). "If the adverse party does not so respond, summary judgment may be entered against the adverse party." 25 Pa. Code § 1021.94a(k). The Board construes the Appellant's letter, which informs the Board that Appellants do not intend to oppose the motion for summary judgment, as Appellants' statement that they will not be filing the more detailed response required by our Rule. Under the Rule if such a response is not filed, then the Board has the authority to grant the motion based solely on the failure to file the required response. We have frequently exercised our authority to grant summary judgment

[1] The Appellants have also appealed the well permit and the permit's transfer to other business entities. *See Hendryx v. DEP and Swepi, LP*, EHB Docket No. 2010-057-M; *Hendryx v. DEP and SWEPI, LP*, EHB Docket No. 2011-030-M; *Hendryx v. DEP and Swepi, LP*, EHB Docket No. 2011-031-M.

based solely upon a parties failure to appropriately respond to a motion for summary judgment. *See e.g. Koch v. DEP*, 2010 EHB 42, 43.

Accordingly we issue the Order that follows.

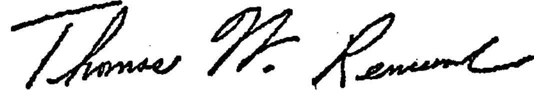
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

JAN HENDRYX AND CHRISTINE HENDRYX	:	
	:	
v.	:	**EHB Docket No. 2010-144-M**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and EAST RESOURCES, INC., Permittee	:	

ORDER

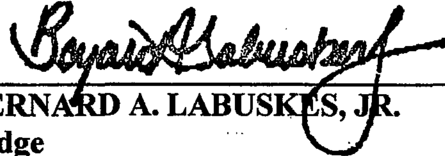
AND NOW, this 23rd day of May, 2011, it is hereby ordered that the Department's and East Resource's joint motion for summary judgment is **granted** and this appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

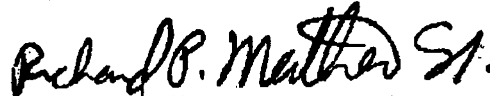


THOMAS W. RENWAND
Chairman and Chief Judge

MICHELLE A. COLEMAN
Judge



BERNARD A. LABUSKES, JR.
Judge



RICHARD P. MATHER, SR.
Judge

DATED: May 23, 2011

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MARYANNE WESDOCK
ACTING SECRETARY TO THE BO

EDWARD J. FORTUNA	:	
	:	
v.	:	**EHB Docket No. 2011-046-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and ENVIRONMENTAL RECYCLING SERVICES LANDFILL (ERSI), Permittee	:	**Issued: June 3, 2011**

OPINION AND ORDER
ON DISMISSING APPEAL AS A SANCTION

By Michelle A. Coleman, Judge

Synopsis:

The Board dismisses a *pro se* appeal as a sanction wherein Appellant has failed to provide his telephone number, a copy of the Department action being appealed, the date he received notice of the Department action, objections to the Department's action and proof of service of his appeal upon the Department and Permittee pursuant to 25 Pa. Code § 1021.51. Appellant also did not follow Board Orders to provide the missing information.

OPINION

The Appellant in this matter is Edward J. Fortuna ("Fortuna") who is appearing *pro se.* On or about April 1, 2011 Fortuna sent a Notice of Appeal ("NOA") to the Board appealing the Department's March 3, 2011 issuance of a permit to the Permittee, Environmental Recycling Services, Inc. ("ERSI"). The NOA does not provide Fortuna's telephone number, a copy of the

Department action being appealed, the date he received notice of the Department action, objections to the Department's action and proof of service of his appeal upon the Department and Permittee.

To rectify these insufficiencies, the Board sent an Order dated April 1, 2011 to Fortuna requesting that missing information be provided to the parties and the Board on or before April 21, 2011. On April 22, 2011, the Board, having not received the requested information, issued a Rule to Show Cause returnable May 18, 2011. No response was made to the Rule.

The Board has the authority to dismiss an appeal as a sanction for failing to comply with Board orders. 25 Pa. Code § 1021.161; *Martin, et al. v. DEP*, 1997 EHB 158. A sanction resulting in dismissal is justified when a party to the case fails to comply with Board orders and shows a lack of intent to pursue its appeal. *Scottie Walker v. DEP*, EHB Docket No. 2011-032-C (Opinion and Order issued May 12, 2011); *Pearson v. DEP*, 2009 EHB 628, 629, *citing Bishop v. DEP*, 2009 EHB 259; *Miles v. DEP*, 2009 EHB 179, 181; *RJ Rhodes Transit, Inc.*, 2007 EHB 260; *Swistock v. DEP*, 2006 EHB 398; *Sri Venkateswara Temple v. DEP*, 2005 EHB 54.

Fortuna failed to comply with the Board's Orders and the Rule requiring that the appellant provide certain information. Section 1021.51 provides,

> (c) The appeal shall set forth the name, address and telephone number of the appellant.
>
> (d) If the appellant has received written notification of the action from the Department, a copy of the action shall be attached to the appeal.
>
> (e) The appeal shall set forth in separate numbered paragraphs the specific objections to the action of the Department. The objections may be factual or legal.
>
> . . .
>
> (g) Concurrent with or prior to the filing of a notice of appeal, the appellant shall serve a copy thereof on each of the following:

> (1) The office of the Department issuing the notice of the Department action.
>
> (2) The Office of Chief Counsel of the Department or agency taking the appeal.
>
> (3) In a third party appeal, the recipient of the action. The service shall be made at the address set forth in the document evidencing the action by the Department or at the chief place of business in this Commonwealth of the recipient.[1]

25 Pa. Code § 1021.51.

Due to Fortuna's failure to comply with 25 Pa. Code § 1021.51 and failure to comply with the Board's Orders issued on April 1, 2011 and April 22, 2011, we dismiss this appeal as a sanction pursuant to 25 Pa. Code § 1021.161.

Accordingly, we issue the Order that follows.

[1] The rules provide that a "recipient of the action" includes, "The recipient of a permit, license, approval or certification." 25 Pa. Code § 1021.51(h)(1).

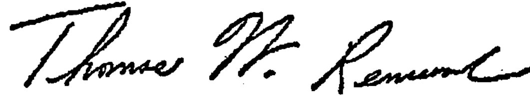
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

EDWARD J. FORTUNA	:	
	:	
v.	:	**EHB Docket No. 2011-046-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and ENVIRONMENTAL RECYCLING SERVICES LANDFILL (ERSI), Permittee	:	

ORDER

AND NOW, this 3rd day of June, 2011, upon consideration that the Appellant failed to comply with the Board's Orders which required the Appellant to perfect the above appeal by providing his telephone number, a copy of the Department action being appealed, the date he received notice of the Department action, objections to the Department's action and proof of service of his appeal upon the Department and Permittee, it is hereby ordered that the appeal is dismissed pursuant to 25 Pa. Code § 1021.161 as a sanction for failure to comply with 25 Pa. Code § 1021.51 and the Board's Orders.

ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Chairman and Chief Judge

MICHELLE A. COLEMAN
Judge

RICHARD P. MATHER, SR.
Judge

Judge Bernard A. Labuskes, Jr. did not participate in this Opinion.

DATED: June 3, 2011

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MARYANNE WESDOCK
ACTING SECRETARY TO THE BOARD

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION

v.

DAVID WEISZER

EHB Docket No. 2009-014-CP-M

Issued: June 7, 2011

ADJUDICATION

By Richard P. Mather, Sr., Judge

Synopsis

The Board assesses a civil penalty of $83,284 for violations of the Clean Streams Law and the Department's regulations. The Defendant was the operator of a poultry processing facility and he operated the facility in a manner which caused numerous unpermitted discharges of industrial waste into the waters of the Commonwealth. The civil penalty is based upon the Defendant's conduct that caused or allowed the discharges, the Defendant's conduct that resulted in severe pollutional impacts to the waters of the Commonwealth and the Defendant's failure to notify the Department of the events causing or threatening to cause pollution as required by Department regulations.

INTRODUCTION

The Department of Environmental Protection (the "Department") filed a Complaint for Civil Penalties for violations of the Clean Streams Law, 35 P.S. § 691.1 *et seq.*, and the Department's regulations against David Weiszer ("Weiszer" or "Defendant"), the operator of the G&G Poultry Incorporated ("G&G Poultry") plant located in Berks County. Through its

operations, the plant generated industrial waste composed mostly of poultry processing wastewater and blood for which the plant did not hold a required National Pollutant Discharge Elimination System ("NPDES") permit to discharge the wastewater generated at the plant into the waters of the Commonwealth. The Department's complaint has three counts and is based upon twelve separate discharge events. The Department discovered these unauthorized discharges of industrial waste through its routine and follow-up inspections of the G&G Poultry plant. The unauthorized discharge of industrial waste violated several sections of the Clean Streams Law and the Department's regulations.

After answering the Complaint for Civil Penalties, Weiszer subsequently failed to respond to the Department's requests for admission and the Department's motion for summary judgment. As a result of Weiszer's failures to respond, and the deemed admissions in the motion, the Board granted the Department's motion for summary judgment on the issue of Weiszer's liability. Accordingly, Weiszer's liability for the violations has already been established, and we subsequently held a hearing on January 6, 2011 to hear evidence on the sole issue regarding the amount of the civil penalties to be assessed. The Department and Weiszer have submitted post-hearing briefs, and the Department has submitted a reply brief, and this matter is ripe for adjudication.

FINDINGS OF FACT[1]

General issues

[1] Prior to the Hearing on January 6, 2011, certain facts in this appeal were conclusively established as a result of Defendant's Answer to the Department's Complaint and the Department's Request for Admissions directed to the Defendant. The Department filed the Request for Admission along with its motion for summary judgment which the Board granted. In the Board's Finding of Facts, the Board will refer to the paragraph in the Complaint or the particular Request for Admission to identify Findings of Fact that are based on these earlier developments.

1. The Department is the agency with the duty and authority to administer and enforce the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §§ 691.1 *et seq*. ("Clean Streams Law") and the regulations promulgated thereunder. Request for Admissions "Req. for Ad." 1.

2. Defendant is an individual, who at all times relevant to the Department's Complaint, was the operator of the G&G Poultry Incorporated ("G&G Poultry") chicken and turkey processing plant ("Plant" or "G&G plant") located at 1101 Lincoln Road, Birdsboro, Exeter Township, Berks County, Pennsylvania. Req. for Ad. 2, 3.

3. The Plant site drains both to an unnamed tributary of the Schuylkill River, a water of the Commonwealth, and to a stormwater swale, itself a water of the Commonwealth, tributary to the unnamed tributary of the Schuylkill River. Req. for Ad. 7, 9, 11, 13, 14, 16, 17, 19, 20, 24, 26, 28.

4. The Plant, at all relevant times hereto, had no NPDES permit. Instead, the Plant conveyed industrial waste, after pretreatment, to the Exeter Township sewage treatment plant. Req. for Ad. 20, 22, 26.

5. Waste from the Plant, which was comprised mainly of chicken processing wastewater and blood (*see* Notes of Testimony ("N.T.") 11:17-21), constitutes "industrial waste" as that term is defined in 35 P.S. § 691.1. Req. for Ad. 30.

6. Defendant is a "person" as that term is defined in the Clean Streams Law, 35 P.S. § 691.1. Complaint, ¶ 9 admitted.

7. During inspections of the Plant, the Department documented that the Defendant had allowed unpermitted discharges of industrial waste to waters of the Commonwealth to occur. The inspections took place on the following dates: January 3, 2007, February 2, 2007, February

5, 2007, February 6, 2007, February 20, 2007, February 28, 2007, April 18-23, 2007, September 20, 2007, December 11, 2007, and January 3, 2008. Req. for Ad. 7, 9, 11, 13, 14, 16, 17, 19, 24, 26, 28.

8. The unpermitted discharges of industrial waste to waters of the Commonwealth associated with the following inspection dates were not reported by the Defendant to the Department: January 3, 2007, February 2, 2007, February 5, 2007, February 20, 2007, February 28, 2007, September 20, 2007, December 11, 2007, and January 3, 2008. Req. for Ad. 8, 10, 12, 15, 18, 25, 27, 29.

9. During a follow-up inspection of the Plant on April 23, 2007, the Department documented that Defendant had allowed a new unpermitted discharge of industrial waste to waters of the Commonwealth to occur, distinct from the unpermitted discharge documented on April 18-23, 2007. Req. for Ad. 20.

10. A biological assessment performed by the Department on April 23, 2007 documented a deleterious impact on the waters of the Commonwealth from the unpermitted discharges of industrial waste to that point in time. Req. for Ad. 21.

11. During an inspection of the Plant on May 30, 2007, the Department documented that the Defendant had allowed an unpermitted discharge of industrial waste to the ground surface to occur. This unpermitted discharge of industrial waste was not reported by the Defendant to the Department. Req. for Ad. 22-23.

Liability

12. Defendant caused and allowed the unpermitted discharge of industrial waste into waters of the Commonwealth on at least twelve separate occasions, as documented by the Department's inspections dated January 3, 2007, February 2, 2007, February 5, 2007, February

6, 2007, February 20, 2007, February 28, 2007, April 18-23, 2007, April 23, 2007, May 30, 2007, September 20, 2007, December 11, 2007, and January 3, 2008. Req. for Ad. 31.

13. Defendant caused and allowed pollution to the waters of the Commonwealth, as documented by the Department's April 23, 2007 biological assessment, from the unpermitted discharges of industrial waste to that point. Req. for Ad. 35. Notes of Testimony ("N.T.") 59:25-61:2; Department Exhibit ("D.Ex.") 2.

14. Defendant did not report to the Department the unpermitted discharges of industrial waste associated with the following nine inspection dates: January 3, 2007, February 2, 2007, February 5, 2007, February 20, 2007, February 28, 2007, May 30, 2007, September 20, 2007, December 11, 2007, and January 3, 2008. Req. for Ad. 8, 10, 12, 15, 18, 23, 25, 27, 29.

Department's Recommended Penalty – General Considerations

15. Jesse Goldberg, who testified for the Department at the hearing, was an Environmental Protection Compliance Specialist with the Department's Water Management Program for approximately seventeen years, from 1993 to 2010. He is now employed in the private sector. N.T. 5:17-6:15.

16. Prior to assuming the duties of Environmental Protection Compliance specialist with the Department, Mr. Goldberg was a permit engineer in the Department's Water Management Program for five years, from 1988 to 1993. N.T. 6:16-19.

17. Mr. Goldberg received an undergraduate degree in Environmental Engineering from Penn State University in 1988 and a Masters Degree in Environmental Engineering Science from Penn State University in 1998. N.T. 6:21-25.

18. Mr. Goldberg's duties as an Environmental Protection Compliance Specialist with the Department involved enforcement activities under the Pennsylvania Clean Streams Law,

including the assessment of civil penalties and site inspections of permitted and non-permitted facilities. N.T. 6:6-13.

19. Mr. Goldberg is the Department official who was assigned primary responsibility for enforcement activities with respect to the Plant in this matter. N.T. 7:5-14.

20. Mr. Goldberg has knowledge of the Plant and of Defendant's noncompliance through review of inspection reports, personal conduct of inspections and meetings with the Defendant as part of his duties as the Department official with primary responsibility for enforcement activities with respect to the Plant in this matter. N.T. 7:15-8:4.

21. Mr. Goldberg calculated the Department's recommended civil penalty outlined in this case. N.T. 8:1-4.

22. Mr. Goldberg used the Department's published guidance document, "Civil Penalty Assessment Procedure for Pollution Incidents," ("Penalty Policy") derived from the Clean Streams Law and the Department's regulations, to determine the Department's recommended civil penalty. N.T. 8:1-11:5; D.Ex. 3.

23. The Penalty Policy provides a standardized approach to calculating penalties for pollution incidents through the application of various factors to arrive at a proposed penalty at or below the maximum allowable penalty under Clean Stream Streams Law Section 605, which is ten thousand dollars per day per violation. The penalties calculated pursuant to the Penalty Policy are intended to be sufficiently large as to act as a deterrent against future noncompliance. N.T. 8:7-24; D.Ex. 3.

24. The Penalty Policy was admitted into evidence as Department Exhibit 3. N.T. 25:18-26:6.

25. Mr. Goldberg considered the following factors when calculating the Department's recommended assessment of civil penalty: (1) the severity of the particular violation (N.T. 8:25-9:25; D.Ex. 3); (2) damage to waters of the Commonwealth resulting from that violation (N.T. 10:4-19; D.Ex. 3); (3) willfulness (T 10:4-11:1; D.Ex. 3); and (4) violation history (N.T. 10:4-19; D.Ex. 3). The severity classification determines the maximum potential penalty for a violation. Application of the damage, willfulness and violation history subclassifications then determines what percentage of that maximum potential penalty actually is generated with respect to the particular violation. (N.T. 8:21-11:1; D.Ex. 3). Damage constitutes up to fifty percent of the maximum potential penalty (N.T. 14:11-14; D.Ex. 3); willfulness constitutes up to forty percent of the maximum potential penalty (N.T. 14:23-15:1; D.Ex. 3) and violation history, where such history exists, constitutes ten percent of the maximum potential penalty (N.T. 15:9-14; D.Ex. 3).

26. Mr. Goldberg's application of these factors to each violation varied depending on the particular incident in question but the overall procedure was the same throughout. N.T. 11:23-12:1; 16:23-17:6; 29:7-14; D.Ex. 1.

27. In applying these factors to each incident, Mr. Goldberg made the requisite exercises of judgment and discretion called for by the Penalty Policy based upon his past experience and training and upon his discussions with other Department staff, including inspectors Paul Jardel and Sean Arbaugh, Steve O'Neil, who was Mr. Goldberg's supervisor, and Jenifer Fields, the manager of the Regional Water Management Program. N.T. 30:7-31:10.

28. Michael Boyer, who testified for the Department at the hearing, was a Water Pollution Biologist Supervisor with the Department's Water Management Program for twenty years. He is now retired. N.T. 53:7-25.

29. Prior to assuming the duties of Water Pollution Biologist Supervisor, Mr. Boyer was a fisheries technician with the Pennsylvania Fish and Boat Commission for approximately fourteen years. N.T. 54:1-12.

30. Mr. Boyer's duties as Water Pollution Biologist Supervisor included assessing the quality of surface waters, including both lakes and streams, in the five-county area comprising the Department's Southeast Region. N.T. 53:15-23.

31. Mr. Boyer was qualified as an expert in the field of aquatic biology. N.T. 54:13-55:2.

32. On April 23, 2007, Mr. Boyer performed an aquatic biology investigation of the unnamed tributary of the Schuylkill River upstream and downstream of the Plant's discharge to assess the impacts of that discharge on the aquatic ecosystem of the creek. N.T. 55:4-25; D.Ex. 2.

33. Mr. Boyer drafted a report summarizing the findings of his aquatic biology investigation. N.T. 55:13-20; D.Ex. 2.

34. The written report of the aquatic biology investigation was admitted into evidence at Department Exhibit 2. N.T. 65:1-13.

35. Mr. Boyer concluded in the aquatic biology investigation that there was considerable stream damage resulting from the Plant's discharge based upon field chemistry measurements and examinations of the invertebrate community. N.T. 55:21- 56:9; D.Ex. 2.

36. The invertebrate community downstream of the Plant's discharge was composed of different organisms than was the upstream community. Two sensitive taxa existed upstream of the discharge that were not present downstream. Thirteen facultative taxa existed upstream of the discharge. Eleven of those thirteen facultative taxa were eliminated downstream. By contrast, six

pollution-tolerant taxa existed both upstream and downstream of the discharge. From these results, Mr. Boyer concluded that the Plant's discharge had a major impact to the aquatic community in the unnamed tributary of the Schuylkill River. N.T. 63:12-64:1; D.Ex. 2.

37. In addition, Mr. Boyer concluded that the bacteria levels downstream of the Plant's discharge were "many, many times higher than what was found upstream." Thus, the chemical analysis caused Mr. Boyer to conclude that the stream damage in the unnamed tributary of the Schuylkill River from the Plant's discharge was severe. N.T. 64:2-10; D.Ex. 2.

38. Mr. Boyer was asked by Mr. Goldberg to judge the impact of the Plant's discharge to the unnamed tributary of the Schuylkill River on a scale from one to ten, with ten being the most severe. Mr. Boyer concluded that the stream was "about an eight." N.T. 57:16-24. This rating represented Mr. Boyer's judgment that the stream damage was severe "but not the worst I've ever seen." N.T. 64:8-11.

39. Mr. Boyer noted the presence of *Sphaerotilus*, a fungus, on the substrate downstream of the Plant's discharge. *Sphaerotilus* develops over time when there is pollution in the stream. No *Sphaerotilus* was observed upstream of the Plant's discharge. Mr. Boyer concluded that this was evidence of chronic pollution in the unnamed tributary of the Schuylkill River from the Plant, the result of repeated discharges on dates prior to and including April 23, 2007. N.T. 59:25-61:2; D.Ex. 2.

40. Mr. Goldberg calculated penalties for violations of Clean Streams Law Sections 301 and 307 (unpermitted discharges of industrial waste to waters of the Commonwealth) for each of the twelve incidents detailed in the Complaint. N.T. 20:21-25.

41. Mr. Goldberg used the Penalty Policy to calculate recommended penalties for violations of Clean Streams Law Sections 301 and 307 and for violations of Clean Streams law

Section 401 (pollution to waters of the Commonwealth). With respect to those dates for which the Department recommended penalties for Clean Streams Law Sections 301 and 307 violations and for Clean Streams Law Section 401 violations, these calculated penalties were the same (T. 17:7-15; D.Ex. 1), except as specifically noted (*see* Department's Post-Hearing Brief, ¶¶ 56(c) and 61(c), *infra*).

42. Mr. Goldberg employed an escalating scale, pursuant to a standard Regional approach, in recommending penalties for those incidents in which failure to notify the Department, in violation of 25 Pa. Code § 91.33(a), was at issue. (N.T. 39:6- 11). For the first such incident, a $1,000 penalty was recommended. This base penalty was doubled for each successive violation, until the statutory maximum of $10,000 was reached, reflecting repeated failures to provide notification after the Defendant was aware of this requirement. N.T. 21:16-22:9; D.Ex.1.

43. The Complaint recommended a total penalty of $176,000. *See* Complaint at 12. The Department subsequently revised that calculation, as reflected in the Department's Pre-Hearing Memorandum.

44. The Department's penalty calculation was revised downward in the following manner:

a. The Penalty Policy allows the Department to recover its costs. The Department accumulated significant costs that were included in the original penalty amount recommended in the Complaint. However, the Complaint did not provide notice to the Defendant that the Department would pursue its costs. Therefore, the Department's costs are not included in the revised recommended penalty. N.T. 22:10-19; D.Ex. 1, 3.

b. The original penalty amount recommended in the Complaint included calculations for violations of Clean Streams Law Section 401 for dates subsequent to April 23, 2007. However, the Complaint did not provide notice to the Defendant that the Department would be assessing penalties for Clean Streams Law Section 401 violations for dates subsequent to April 23, 2007. Therefore, these violations are not included in the revised recommended penalty. N.T. 22:10-19; D.Ex. 1, 3.

45. The Complaint reserved the right for the Department to seek an additional penalty to be determined after discovery to recover the economic benefit of the Defendant's noncompliance. *See* Complaint at 12. However, the requisite information to calculate this additional penalty was not received from the Defendant during discovery. The Department accordingly has been unable to present this calculation to the Board. N.T. 22:20-23:6.

46. The Department calculated a recommended penalty based only upon the discrete violations that the Department actually observed. (T. 24:3-8). Thus, the Department's proposed penalty does not address the possibility of continuing violations of the Clean Streams Law. N.T. 25:9-11, *but see, e.g.,* .T. 59:25-61:2.

47. Penalties are proposed for the time period January 3, 2007 to January 3, 2008. N.T. 50:21-25; D.Ex. 1.

48. The Department issued Notices of Violation to the Defendant between January 3, 2007 and January 3, 2008. N.T. 40:2-15; 52:6-8.

49. There were Clean Streams Law violations at the Plant prior to January 3, 2007 that are not part of the proposed penalty. N.T. 37:3-9.

Department's Recommended Penalty – Specific Calculations

50. At hearing, Mr. Goldberg provided testimony detailing the Department's recommended penalty, as detailed below. N.T. 12:5-25:17; D.Ex. 1.

51. January 3, 2007:

a. During a routine inspection, the Department documented that an unpermitted discharge of industrial wastewater from the Plant into an unnamed tributary of the Schuylkill River occurred during the installation of holding tanks. This overflow was not reported to the Department. Req. for Ad. 7.

b. The April 23, 2007 biological assessment of the unnamed tributary of the Schuylkill River revealed a deleterious impact to waters of the Commonwealth from this incident. Req. for Ad. 21; N.T. 59:25-61:2.

c. To address the violations of Clean Streams Law Sections 301 and 307, a maximum potential penalty of $6,000 was assigned, based upon a classification of this incident as moderately severe. (N.T. 12:10-13; D.Ex.1). From this, a damage value of $2,010 was assigned, reflecting damage between moderate and high (N.T. 14:19-22; D.Ex.1); a willfulness value of $800 was assigned, reflecting a classification of negligent (N.T. 14:23-15:8; D.Ex. 1); and a violation history value of $600 was assigned (N.T. 15:9-17), for a subtotal of $3,410. This calculation was repeated to address the violation of Clean Streams Law Section 401. N.T. 15:17-16:1; D.Ex. 1.

d. A $1,000 penalty was assessed for violation of 25 Pa. Code § 91.33(a). N.T. 21:16-22:9; D.Ex.1.

e. The total proposed penalty for the January 3, 2007 violations is $7,820. N.T. 14:5-16:7; D.Ex. 1.

52. February 2, 2007:

a. During a routine inspection, the Department documented that an overflow from the pretreatment system due to a pump malfunction at the Plant resulted in an unpermitted discharge of industrial wastewater from the Plant into an unnamed tributary of the Schuylkill River. This overflow was not reported to the Department. Req. for Ad. 9.

b. The April 23, 2007 biological assessment of the unnamed tributary of the Schuylkill River revealed a deleterious impact to waters of the Commonwealth from this incident. Req. for Ad. 21; N.T. 59:25-61:2.

c. To address the violations of Clean Streams Law Sections 301 and 307, a maximum potential penalty of $7,000 was assigned, based upon classification of the incident as moderate. N.T. 8:25-9:25; D.Ex. 3 at 1. From this, a damage value of $2,450 was assigned, reflecting damage between moderate and high; a willfulness value of $1,848 was assigned, reflecting a classification of recklessness; and a violation history value of $700 was assigned, for a subtotal of $4,998. This calculation was repeated to address the violation of Clean Streams Law Section 401. D.Ex. 1; N.T. 14:5-16:7.

d. A $2,000 penalty was applied to the 25 Pa. Code § 91.33(a) violation. N.T. 21:16-22:9; D.Ex.1.

e. The total recommended penalty for the violations that occurred on February 2, 2007 is $11,996. D.Ex.1.

53. February 5, 2007:

a. During a routine inspection, the Department documented that an overflow of the rotary bar screen and holding tank resulted in an unpermitted discharge of industrial wastewater from the Plant into an unnamed tributary of the Schuylkill River. This overflow was not reported to the Department. Req. for Ad. 11.

b. The April 23, 2007 biological assessment of the unnamed tributary of the Schuylkill River revealed a deleterious impact to waters of the Commonwealth from this incident. Req. for Ad. 21; N.T. 59:25-61:2.

c. A field order was issued by the Department in connection with the February 5, 2007 incident in order to abate the extensive pollution to waters of the Commonwealth on that date. Accordingly, for that date, Mr. Goldberg assessed the maximum $10,000 penalty for violation of Clean Streams Law Section 401. N.T. 17:16-18:4; D.Ex. 1.

d. To address the violations of Clean Streams Law Sections 301 and 307, a maximum potential penalty of $8,000 was assigned, based upon classification of the incident as severe. See N.T. 8:25-9:25; D.Ex. 3 at 1. From this, a damage value of $3,000 was assigned, reflecting high damage; a willfulness value of $3,200 was assigned, reflecting a classification of intentional; and a violation history value of $800 was assigned, for a subtotal of $7,000. D.Ex. 1; N.T. 14:5-16:7.

e. A $4,000 penalty was applied to the 25 Pa. Code § 91.33(a) violation. N.T. 21:16-22:9; D.Ex.1.

f. The total recommended penalty for the violations that occurred on February 5, 2007 is $21,000. D.Ex.1.

54. February 6, 2007:

a. During a routine inspection, Department personnel observed a truck containing blood and chicken processing wastewater leaking onto the ground at the Plant, which subsequently created an unpermitted discharge of industrial wastewater from the Plant into an unnamed tributary of the Schuylkill River. Req. for Ad. 13.

b. The April 23, 2007 biological assessment of the unnamed tributary of the Schuylkill River revealed a deleterious impact to waters of the Commonwealth from this incident. Req. for Ad. 21; N.T. 59:25-61:2.

c. To address the violations of Clean Streams Law Sections 301 and 307, a maximum potential penalty of $2,000 was assigned, based upon classification of the incident as minor (caused pollution). N.T. 8:25-9:25; D.Ex. 3. From this, a damage value of $250 was assigned, reflecting low damage; a willfulness value of $264 was assigned, reflecting a classification of negligent; and a violation history value of $200 was assigned, for a subtotal of $714. This calculation was repeated to address the violation of Clean Streams Law Section 401. D.Ex. 1; N.T. 14:5-16:7.

d. The total recommended penalty for the violations that occurred on February 6, 2007 is $1,428. D.Ex.1.

55. February 20, 2007:

a. During a routine inspection, the Department documented that an overflow from the pretreatment system due to a pump malfunction at the Plant resulted in an unpermitted discharge of industrial wastewater from the Plant into an unnamed

tributary of the Schuylkill River. This overflow was not reported to the Department. Req. for Ad. 14.

b. On February 22, 2007, the Department conducted a follow-up inspection and documented that the February 20, 2007 incident had not been addressed. Req. for Ad. 16.

c. The April 23, 2007 biological assessment of the unnamed tributary of the Schuylkill River revealed a deleterious impact to waters of the Commonwealth from this incident. Req. for Ad. 21; N.T. 59:25-61:2.

d. To address the violations of Clean Streams Law Sections 301 and 307, a maximum potential penalty of $4,000 was assigned, based upon classification of the incident as moderate. N.T. 8:25-9:25; D.Ex. 3 at 1. From this, a damage value of $500 was assigned, reflecting low damage; a willfulness value of $528 was assigned, reflecting a classification of negligent; and a violation history value of $400 was assigned, for a subtotal of $1,428. This calculation was repeated to address the violation of Clean Streams Law Section 401. D.Ex. 1; N.T. 14:5-16:7.

e. An $8,000 penalty was applied to the 25 Pa. Code § 91.33(a) violation. N.T. 21:16-22:9; D.Ex.1.

f. The total recommended penalty for the violations that occurred on February 20, 2007 is $10,856. D.Ex.1.

56. February 28, 2007:

a. During a routine inspection, the Department documented that an overflow from the pretreatment system due to a pump malfunction at the Plant resulted in an

unpermitted discharge of industrial wastewater from the Plant into an unnamed tributary of the Schuylkill River. This overflow was not reported to the Department. Req. for Ad. 17.

b. The April 23, 2007 biological assessment of the unnamed tributary of the Schuylkill River revealed a deleterious impact to waters of the Commonwealth from this incident. Req. for Ad. 21; N.T. 59:25-61:2.

c. To address the violations of Clean Streams Law Sections 301 and 307, a maximum potential penalty of $9,000 was assigned, based upon classification of the incident as severe. N.T. 8:25-9:25; D.Ex. 3 at 1. From this, a damage value of $3,375 was assigned, reflecting high damage; a willfulness value of $2,412 was assigned, reflecting a classification of reckless; and a violation history value of $900 was assigned, for a subtotal of $6,687. This calculation was repeated to address the violation of Clean Streams Law Section 401. D.Ex. 1; N.T. 14:5-16:7.

d. A $10,000 penalty was applied to the 25 Pa. Code § 91.33(a) violation. N.T. 21:16-22:9; D.Ex.1.

e. The total recommended penalty for the violations that occurred on February 28, 2007 is $23,374. D.Ex.1.

57. April 18-23, 2007:

a. During a routine inspection, Department personnel observed the contents of a truck containing blood and chicken processing waste being dumped onto the ground at the Plant, which subsequently created an unpermitted discharge of

industrial wastewater from the Plant into an unnamed tributary of the Schuylkill River. Req. for Ad. 19.

b. The April 23, 2007 biological assessment of the unnamed tributary of the Schuylkill River revealed a deleterious impact to waters of the Commonwealth from this incident. Req. for Ad. 21; N.T. 59:25-61:2.

c. To address the violations of Clean Streams Law Sections 301 and 307, a maximum potential penalty of $2,000 was assigned, based upon classification of the incident as minor (caused pollution). N.T. 8:25-9:25; D.Ex. 3 at 1. From this, a damage value of $250 was assigned, reflecting low damage; a willfulness value of $264 was assigned, reflecting a classification of negligent; and a violation history value of $200 was assigned, for a subtotal of $714. This calculation was repeated to address the violation of Clean Streams Law Section 401. D.Ex.1; N.T. 14:5-16:7.

d. The total recommended penalty for the violations that occurred on April 18-23, 2007 is $1,428. D.Ex.1.

58. April 23, 2007:

a. During a follow-up inspection, the Department observed an unpermitted discharge of industrial wastewater from a broken pipe, which conveys flow from the Plant to the Exeter Township sewage treatment plant. This unpermitted discharge entered a stormwater swale and eventually entered an unnamed tributary of the Schuylkill River. Req. for Ad. 20.

b. The April 23, 2007 biological assessment of the unnamed tributary of the Schuylkill River revealed a deleterious impact to waters of the Commonwealth from this incident. Req. for Ad. 21; N.T. 59:25-61:2.

c. Based upon his discussion with Mr. Boyer, during which Mr. Boyer opined that the stream damage rated an eight on a scale from one to ten in terms of severity (N.T. 57:16-24), Mr. Goldberg correlated that rating with a penalty of $8,000 within a range of $1,000 to $10,000 and assessed that $8,000 to address the Clean Streams Law Section 401 violation. N.T. 19:19-20:5; D.Ex.1.

d. To address the violations of Clean Streams Law Sections 301 and 307, a maximum potential penalty of $2,000 was assigned, based upon classification of the incident as minor (caused pollution). N.T. 8:25-9:25; D.Ex. 3 at 1. From this, a damage value of $250 was assigned, reflecting low damage; a willfulness value of $264 was assigned, reflecting a classification of negligent; and a violation history value of $200 was assigned, for a subtotal of $714. D.Ex.1; N.T. 14:5-16:7.

e. The total recommended penalty for the violations that occurred on April 23, 2007 is $8,714. D.Ex.1.

59. May 30, 2007:

a. During a routine inspection, the Department documented an unpermitted discharge of industrial wastewater from a broken pipe, which conveys flow from the Plant to the Exeter Township sewage treatment plant. The unpermitted discharge of industrial wastewater from the broken pipe was released onto the

ground surface. This overflow was not reported to the Department. Req. for Ad. 22.

b. A penalty was assessed for violations of Clean Streams Law Sections 301 and 307 in connection with this incident, which involved an unpermitted discharge of industrial waste to the ground surface, since groundwater is included in the definition of "waters of the Commonwealth" in the Clean Streams Law. See 35 P.S. § 691.1. Mr. Goldberg calculated the penalty for a discharge to groundwater in the same way as for the direct stream discharges on other dates. N.T. 21:1-15; D.Ex. 1.

c. To address the violations of Clean Streams Law Sections 301 and 307, a maximum potential penalty of $2,000 was assigned, based upon classification of the incident as minor (caused pollution). N.T. 8:25-9:25; D.Ex. 3 at 1. From this, a damage value of $250 was assigned, reflecting low damage; a willfulness value of $264 was assigned, reflecting a classification of negligent; and a violation history value of $200 was assigned, for a subtotal of $714. D.Ex. 1; N.T. 14:5-16:7.

d. A $10,000 penalty was applied to the 25 Pa. Code § 91.33(a) violation. N.T. 21:16-22:9; D.Ex.1.

e. The total recommended penalty for the violations that occurred on May 30, 2007 is $10,714. D.Ex.1.

60. September 20, 2007:

a. During a routine inspection, the Department documented an unpermitted discharge of industrial wastewater at the Plant into the stormwater swale, a water

of the Commonwealth. This overflow was not reported to the Department. Req. for Ad. 24.

b. To address the violations of Clean Streams Law Sections 301 and 307, a maximum potential penalty of $5,000 was assigned, based upon classification of the incident as moderate. N.T. 8:25-9:25; D.Ex. 3 at 1. From this, a damage value of $1,875 was assigned, reflecting high damage; a willfulness value of $1,320 was assigned, reflecting a classification of reckless; and a violation history value of $500 was assigned, for a subtotal of $3,695. D.Ex. 1; N.T. 14:5-16:7.

c. A $10,000 penalty was applied to the 25 Pa. Code § 91.33(a) violation. N.T. 21:16-22:9; D.Ex.1.

d. The total recommended penalty for the violations that occurred on September 20, 2007 is $13,695. D.Ex.1.

61. December 11, 2007:

a. During a routine inspection, the Department documented that a hose conveying wastewater from the pretreatment plant at the Plant to the Exeter Township sewage treatment plant had numerous leaks and was discharging industrial wastewater on the ground and into the stormwater swale, a water of the Commonwealth. This overflow was not reported to the Department. Req. for Ad. 26.

b. To address the violations of Clean Streams Law Sections 301 and 307, a maximum potential penalty of $3,500 was assigned, based upon classification of the incident as between minor and moderate. N.T. 8:25-9:25; D.Ex. 3 at 1. From this, a damage value of $875 was assigned, reflecting moderate damage; a

willfulness value of $924 was assigned, reflecting a classification of reckless; and a violation history value of $350 was assigned, for a subtotal of $2,149. D.Ex. 1; N.T. 14:5-16:7.

c. A $10,000 penalty was applied to the 25 Pa. Code § 91.33(a) violation. N.T. 21:16-22:9; D.Ex.1.

d. The total recommended penalty for the violations that occurred on December 11, 2007 is $12,149. D.Ex.1.

62. January 3, 2008:

a. During a routine inspection, the Department documented an overflow from the pretreatment system at the Plant due to a pump malfunction, which resulted in an unpermitted discharge of industrial wastewater from the Plant into an unnamed tributary of the Schuylkill River. This overflow was not reported to the Department. Req. for Ad. 28.

b. To address the violations of Clean Streams Law Sections 301 and 307, a maximum potential penalty of $9,000 was assigned, based upon classification of the incident as severe. N.T. 8:25-9:25; D.Ex. 3 at 1. From this, a damage value of $3,375 was assigned, reflecting high damage; a willfulness value of $2,376 was assigned, reflecting a classification of reckless; and a violation history value of $900 was assigned, for a subtotal of $6,651. D.Ex. 1; N.T. 14:5-16:7.

c. A $10,000 penalty was applied to the 25 Pa. Code § 91.33(a) violation. N.T. 21:16-22:9; D.Ex.1.

d. The total recommended penalty for the violations that occurred on January 3, 2008 is $16,651. D.Ex.1.

63. Mr. Goldberg's penalty calculation was admitted into evidence as Department Exhibit 1. N.T. 25:18-26:6.

64. The Department's total recommended penalty is $139,825. N.T. 25:12-17; D.Ex. 1.

DISCUSSION

The typical procedure for resolving a complaint for civil penalties, which the Department files under the Clean Streams Law, is a two step procedure. *DEP v. Simmons*, 2010 EHB 262, 276. The first step involves establishing liability for the violations, and the Department bears the burden of proof to establish the violations under the Clean Streams Law and the Department regulations promulgated thereunder. *Id* at 276-81; 25 Pa. Code § 1021.122(b)(1). After the Department satisfies its burden and establishes liability for the violations, then the second step of the assessment procedure involves determining the amount of the civil penalty for the violations that have been established. *Id* at 281-83.

In this Adjudication, after briefly summarizing the prior liability determinations, the Board will move directly to the second step because the Board previously granted the Department's motion for summary judgment that established liability for all of the violations set forth in the Department's Complaint, which are summarized below.

Liability

The Department's Complaint contained three counts. Count I alleged that the Defendant, as the operator of the G&G plant, caused or allowed the unpermitted discharges of industrial waste into the waters of the Commonwealth in violation of Sections 301 and 307(a) of the Clean Streams Law. 35 P.S. §§ 691.301 and 691.307(a). These discharges occurred on twelve different days. Count II alleged that the Defendant, as the operator of the G&G plant, caused or

allowed pollution to the water of the Commonwealth. 35 P.S. § 691.401. The pollution occurred on at least eight different days. Count III alleged that the Defendant, as the operator of the facility, violated 25 Pa. Code § 91.33(a) when he failed to report to the Department the unpermitted discharges of industrial waste that constitute "incidents causing or threatening pollution". The Defendant failed to report incidents that occurred on nine different days. The Board conclusively established the Defendant's liability for all of the violations listed above when it granted the Department's motion for summary judgment. *DEP v. Weiszer*, 2010 EHB 483. The Department has already established that the Defendant violated various sections of the Clean Streams Law on numerous days over an extended period of time and that these violations caused severe impacts to an unnamed tributary to the Schuylkill River. Defendant has also violated its regulatory duty to report these discharges to the Department. Thus, the only issue before the Board is determining the appropriate amount of the civil penalty for the violations that were previously established.

Penalty Assessment

Unlike our role in an *appeal* of a civil penalty assessed by the Department under other statutes, in assessing a civil penalty under the Clean Streams Law the Board independently determines the appropriate penalty amount. *DEP v. Leeward Constr., Inc.*, 2001 EHB 870, 885; *Westinghouse v. DEP*, 705 A.2d 1349, 1353 (Pa. Cmwlth. 1998). In doing so, "our responsibility is to assess a penalty based upon applicable statutory maxima and criteria, regulatory criteria (if any), and precedent." *DEP v. Kennedy*, 2007 EHB 15, 26; *DEP v. Hostetler*, 2006 EHB 359; *Leeward, supra* at 908, 913. Section 605 of the Clean Streams Law provides, in part:

> . . . for a violation of a provision of this act, rule, regulation, order of the department, or a condition of any permit issued pursuant to this act, the

> department, after hearing, may assess a civil penalty upon a person or municipality for such violation. Such a penalty may be assessed whether or not the violation was wilful. The civil penalty so assessed shall not exceed ten thousand dollars ($ 10,000) per day for each violation. In determining the amount of the civil penalty the department shall consider the wilfullness of the violation, damage or injury to the waters of the Commonwealth or their uses, cost of restoration, and other relevant factors.

35 P.S. § 691.605. Under Section 605 the Board has the authority to assess a civil penalty up to $10,000 per day for each violation. In addition to the willfulness of the violation, the extent of the damage the violation has on the waters of the Commonwealth, and the cost of restoration, additional relevant factors include the cost savings to the violator, the size of the violating facility, the volume of the discharge, and the deterrent effect. *DEP v. Angino*, 2007 EHB 175, 201; *Kennedy*, *supra* at 26; *DEP v. Breslin*, 2006 EHB 130, 143.

In its Complaint, the Department proposed a civil penalty assessment of $176,000, which it later reduced to $139,825 by the time this matter went to hearing. Its proposal is calculated according to the Department's penalty matrix for the violations of Sections 301, 307, 401 and 611 of the Clean Streams Law, and the Department seeks additional civil penalties for violations of its regulations promulgated under the Clean Streams Law for Weiszer's failure to notify the Department of the discharges which occurred at the G&G plant. 35 P.S. §§ 301, 307, 401, 611; 25 Pa. Code § 91.33. The Department's current proposal demonstrates its view of the appropriate application of the Clean Streams criteria to the evidence it presented to the Board. The Department's recommended civil penalty is purely advisory and is not binding on the Board. *Angino*, *supra* at 202; *DEP v. Tessa*, 2000 EHB 772, 787; *DER v. Landis*, 1994 EHB 1781, 1787. In making its recommendation, the Department used its guidance to calculate a suggested civil penalty, and this Department guidance is also not binding on the Board. *DEP v. United Refining Co.*, 2006 EHB 846, 849-50.

Turning to our penalty assessment, the Department's Complaint centers around twelve distinct discharge events between January, 2007 and January, 2008. These events all involve the unpermitted discharge of blood and poultry processing wastewater, which has been established as violations under Sections 301 and 307 of the Clean Streams Law. 35 P.S. §§ 691.301 and 691.307. At minimum the eight documented unpermitted discharge events which occurred prior to the Department's biological assessment on April 23, 2007 caused significant pollution to the unnamed tributary adjacent to the G&G plant, such that the Department's aquatic biologist and expert witness testifying in this matter considered the harm to the stream "severe".[2] *See* 35 P.S. § 691.401. Lastly, the Department asks us to assess a civil penalty for failing to notify the Department of incidents threatening or causing pollution. *See* 25 Pa. Code § 91.33.

In considering the willfulness of the violations as a component of the civil penalty calculation, the Board has defined the levels of culpability as:

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

DEP v. Angino, et al., 2007 EHB 175, 188 (citing *DEP v. Whitemarsh Disposal Corp.*, 2000 EHB 300, 349). The Department's proposed civil penalty finds that Weiszer's culpability for the twelve discharge events varied considerably, ranging from negligent conduct to intentional conduct. We agree in part. The events at G&G may have begun as a result of the challenges posed by equipment malfunctions, however, the events documented are easily foreseeable consequences of poor maintenance and operation and would not have occurred absent Weiszer's

[2] There is no reason to believe that the discharge events subsequent to April 23, 2007 had no deleterious impact to the unnamed tributary to the Schuylkill River, but we do not have any additional information on harm after that date.

lack of reasonable care. Moreover, the Department documented several discharges which occurred due to the same or similar situations. Such failure to correct the issues leading to initial violations after having notice that the discharges had occurred constitutes a conscious disregard that future unchanged conduct may result in further violations of the law. Therefore, we find that where the Department has established multiple instances of the same violations, Weiszer's culpability for those violations is at least reckless and warrant a higher penalty. However, the Department has not established to the Board's satisfaction that any discharge was an intentional violation of the law.

Turning to the next statutory criteria in the Clean Streams Law, the damage or injury to the waters of the Commonwealth, the Board considers:

> such factors as the actual and potential harm to the stream and its inhabitants, the size of the disturbed area, the magnitude and duration of the discharge, the classification and condition of the stream, and the degree to which the discharge exceeded permit limits.

DEP v. Pecora, 2007 EHB 545, 645. The Department's aquatic biologist provided extensive credible expert testimony on the deleterious impacts that the discharge events have had on the unnamed tributary to the Schuylkill River. His conclusions isolated the plant as the cause of the pollution to the stream, citing the presence upstream of the plant of a variety of pollution sensitive and pollution facultative taxa of macroinvertebrates that were not present downstream of the plant where he also found a marked increase in the bacteria levels in the stream as well as the presence of a fungus which indicates the presence of pollution. Based on his findings and conclusions that the harm to the stream was severe, we concur that, at minimum, the discharge events prior to the April 23, 2007 biological assessment led to a severe impact on the stream. The evidence in this matter indicates that very significant pollution events occurred at the G&G

plant that harmed the environment. We have little doubt that very significant civil penalties are warranted.

The Board's assessment is based on Department's recommended civil penalty and the evidence presented at the hearing including the testimony, exhibits and admissions of the parties. For our penalty calculation, we begin with the discharge events, eight of which occurred prior to the Department's biological assessment of the unnamed tributary to the Schuylkill River, and four occurred after the assessment. For the first eight discharge events, we start from a base penalty of four thousand dollars per violation, which we believe is justified by Weiszer's negligence and the magnitude of the discharges as demonstrated by the severe pollutional impact. Half of the base penalty for these events is based upon the unpermitted discharge of industrial waste under Sections 301 and 307 and the remaining half is based upon the events causing or allowing pollution to the unnamed tributary to the Schuylkill River under Section 401. 35 P.S. §§ 691.301, 307 and 401. For the four later events, we acknowledge the limited information presented to the Board on the damage and magnitude of these events and assess a base penalty of one thousand dollars, the minimum penalty we believe is warranted under these circumstances for the discharge of industrial waste under Sections 301 and 307. *Id.* Next, where the Department has proposed a lesser penalty on a particular day based on their assessment of the magnitude and damage, we lower our assessment to the Department's request. For the pollution event on February 5, 2007, where the Department issued a field order, we assess an additional penalty of two thousand dollars for extensive pollution to the water on that date which prompted the Department to issue the field order. Finally, as we determined earlier, where we have seen multiple discharge events due to the same type of problem, Weiszer's conduct was at least reckless as to those events, and we will increase those penalties by one thousand dollars.

The Department has asked us to assess a penalty for failure to notify the Department of incidents threatening or causing pollution under Section 91.33 of its regulations. 25 Pa. Code § 91.33. In its proposal the Department calculated this portion of the penalty by beginning with a penalty of one thousand dollars, and doubling each penalty assessment until it had reached the statutory maximum of ten-thousand dollars per day, per violation. *See* 35 P.S. § 691.605. Although we agree with the Department in principal, that Weiszer's repeated noncompliance with the notification requirement requires an increasing penalty to deter future violations of this provision of law, we believe that the Department's calculation is too severe under the circumstances. Instead, we will begin with a base penalty of one thousand dollars and increase the penalty by one thousand dollars for each subsequent violation.

Weiszer's Defenses to the Imposition of Civil Penalties

Since liability for the identified violations of the Clean Streams Law had already been conclusively established by the time of the hearing, the only issue now before the Board is the amount of the civil penalty. The Defendant elected not to testify at the hearing, even though he was present, to provide the Board with a factual basis or justification to reduce the amount of the civil penalty proposed by the Department. The Defendant's limited defense consisted primarily of asserting that Mr. Goldberg's testimony was inadmissible because he was not qualified as an expert witness. Since this argument has no basis in law as set forth below, the Defendant failed to provide the Board with any legal or factual basis to further reduce the proposed civil penalty beyond those adjustments which the Board made, which are set forth above.

The Defendant, throughout his post-hearing brief, raises a few arguments concerning the testimony of the Department's compliance specialist, Jesse Goldberg. The Defendant believes that these objections are such that the Board is unable to carry out our duty to adequately assess a

civil penalty based on the evidence presented by the Department. First, Weiszer takes issue with the contents of Goldberg's testimony because he testified regarding the Department's recommended penalty, without having been offered as an expert witness. Second, Weiszer also objects to the lack of detail provided by Goldberg regarding how he calculated the Department's recommended civil penalty using the Department's civil penalty matrix.

Weiszer's argument that Goldberg should have been properly qualified as an expert witness is deeply flawed. The Defendant's post-hearing brief sets out a round-about argument that ". . . a reviewing court must put aside its discretion [in favor of the] **expertise** of the administrative agency." Defendant's Post-Hearing Brief, p. 2 citing *Sunoco, Inc. v. DEP*, 865 A.2d 960, 970 (Pa. Cmwlth. 2005)(additional citations omitted)(emphasis in Brief). Based on the expertise of the Department, Weiszer argues that all determinations made by the Department staff are expert in nature and such testimony must be given by a qualified expert witness providing expert testimony. Examining this quotation in the proper context reveals that, in making this argument, Weiszer has taken a well established principal of administrative law, that an agency is afforded considerable deference when interpreting statutes or regulations that the agency administers, and has improperly twisted it into a proposed requirement that all Department personnel are expert witnesses and must be qualified as an expert witness in order to testify about how they perform their duties for the Department.

This argument has no basis in law and the Board rejects it. The deference that is afforded an agency's interpretation of statutes or regulations it administers, based on the agency's expertise, does not in any way affect whether a particular Department witness is a fact witness or an expert witness. The nature of the testimony governs whether the witness is an expert witness

or a fact witness, and the Department is allowed to have its staff testify as fact witnesses if the nature of their testimony is factual.

As the Department rightly points out in its post-hearing brief, during the Board's hearing in *Sunoco*, a Department compliance specialist testified before the Board to provide factual testimony only of the Department's penalty calculation without being qualified as an expert witness. *Sunoco, Inc. v. DEP*, 2004 EHB 191; *see also DEP v. Tessa Ltd.*, 2000 EHB 776, 782 (Similarly, Jesse Goldberg presented the Department's penalty recommendation as a Department Compliance specialist on a civil penalties complaint matter under the Clean Streams Law as a fact witness). Unlike the testimony of Mr. Boyer, who was qualified as an expert and used his scientific expertise to explain how scientific tests, macroinvertebrate and fungal observations led him to his expert opinion that the stream was polluted, Goldberg's testimony covered only his personal knowledge about the G&G site as well as what he did to prepare the Department's proposed penalty. His testimony was factual in nature, it was appropriate and it will not be struck from the record as unqualified expert testimony.

Weiszer's post-hearing brief also complains about the limited testimony provided by Goldberg about the specific details of the events at the G&G plant that led Goldberg to calculate the civil penalty recommendation in the manner that he did. He protests, for example, that Goldberg testifies that certain events on certain days were qualified by the Department as "severe" or "moderately severe" and when pressed on cross-examination, Goldberg was unable to cite what the specific factors were that led him to make such determinations. In part, Weiszer presents this argument under the Pennsylvania Rules of Evidence requiring the disclosure of facts or data underlying expert opinion. Pa.R.Ev. 705. Since we have already rejected the assertion that Goldberg's testimony was expert testimony, Rule 705 does not apply.

Nevertheless, Weiszer's larger contention that Goldberg's testimony was insufficient to defend the Department's characterization of the nature and severity of the incidents warrants some consideration.

There are two reasons why we will not reject Goldberg's testimony for this basis. Our caselaw allows the testimony of a compliance specialist testifying about the Department's calculation of a civil penalty without being able to provide a flawless recitation of every factual detail underlying the decisions made in the calculation. *Stine Farms and Recycling v. DEP*, 2001 EHB 796, 819-20. In *Stine Farms*, the appellants argued that the Department did not adequately carry its burden in order to prove all of the violations assessed. We concluded:

> [t]he record, however, amply supports the proposed penalty for the other eight days. The Stines' effort to have the Department's compliance specialist testify from memory on the stand about all of the details concerning the days in question was of not consequence. Although we are not overly concerned with the Department's exact methodology in arriving at a penalty amount given our *de novo* review, we are quite satisfied that the Department, primarily through the efforts of its compliance specialist, gave due consideration to the statutory criteria in arriving at the amounts assessed.

Id. Here, we are no more inclined to require that Goldberg testify to the exacting details from memory concerning each underlying pollution event that he considered when producing the recommended penalty for the Department. In this case where we have already established Weiszer's extensive liability for all counts listed in the Department's complaint before the hearing, Goldberg's testimony about the underlying violations is even less important.

Our second point is that the Department's recommended penalty calculation here is of considerably less value than the Department's actual civil penalty assessment in *Stine*. As we discussed in more detail above, the Department's proposed calculation under the Clean Streams Law is advisory only. The Board is charged with making an independent determination of the penalty amount, and we have done so. Goldberg's testimony is merely advisory and it explains

the Department's proposal as it appears in the complaint, and as entered into evidence at the hearing on January 6, 2011 and as depicted in Department Exhibit 1.

Finally, the Defendant also asserted that the Board "still does not know the nature of the discharge . . . does not know the chemical composition of the discharge or the effects on plants and wildlife." Defendant's Post-Hearing Brief at p. 4. The Defendant is mistaken because the record clearly establishes the nature of the unauthorized discharges of industrial waste and the severe impacts on the water quality and the aquatic life in the unnamed tributary to the Schuylkill River. There is no need for a chemical analysis to find that the blood and poultry processing wastewater that was illegally discharged is industrial waste. In addition, the biological assessment conducted by Mr. Boyer established that the unauthorized discharges of blood and wastewater have had severe impacts to the water quality and aquatic life in the unnamed tributary to the Schuylkill River.

Calculation of the Civil Penalty Amount

Therefore, our civil penalty assessment is as follows:

1. January 3, 2007
    a. Unpermitted discharge — $2,000
    b. Pollutional impact — $2,000
    c. Failure to notify — $1,000
2. February 2, 2007
    a. Unpermitted discharge — $2,000
    b. Pollutional impact — $2,000
    c. Failure to notify — $2,000
3. February 5, 2007
    a. Unpermitted discharge — $2,000
    b. Pollutional impact (field order issued) — $4,000
    c. Failure to notify — $3,000
4. February 6, 2007
    a. Unpermitted discharge — $714
    b. Pollutional impact — $714
5. February 20, 2007
    a. Unpermitted discharge — $1,428

b. Pollutional impact	$1,428
c. Failure to notify	$4,000
6. February 28, 2007	
a. Unpermitted discharge	$2,500
b. Pollutional impact	$2,500
c. Failure to notify	$5,000
7. April 18-23, 2007	
a. Unpermitted discharge	$2,000
b. Pollutional impact	$2,000
8. April 23, 2007	
a. Unpermitted discharge	$2,000
b. Pollutional impact	$2,000
9. May 30, 2007	
a. Unpermitted discharge	$2,000
b. Failure to notify	$6,000
10. September 20, 2007	
a. Unpermitted discharge	$1,000
b. Failure to notify	$7,000
11. December 11, 2007	
a. Unpermitted discharge	$2,000
b. Failure to notify	$8,000
12. January 3, 2008	
a. Unpermitted discharge	$2,000
b. Failure to notify	$9,000
Total	**$83,284**

The numerous violations of the Clean Streams Law that occurred at the G&G plant from January, 2007 until January, 2008 were not isolated violations of the law. The violations reflect chronic operating conditions at the plant that resulted in severe impacts to the unnamed tributary to the Schuylkill River. A review of the facts of these discharge events reveal a poorly operated and maintained plant where unpermitted discharges of industrial waste were a common occurrence. The nature and duration of the numerous unpermitted discharges as well as the documented severe impact to the waters of the Commonwealth provides the basis for the Board to assess a substantial civil penalty.

Deterrence is an important reason for assessing civil penalties. *See, e.g., DEP v. Leeward Constr., Inc.*, 2001 EHB 870, 890, *aff'd*, 821 A.2d 145 (Pa. Cmwlth. 2003). The Board believes

that this penalty assessment is fully appropriate under the circumstances because of the nature, extent and duration of the violations established and also to deter Weiszer, as well as others, from causing or allowing or not reporting unpermitted discharges of industrial waste to the waters of the Commonwealth causing severe damage to such waters over an extended period of time. The substantial amount of the civil penalty will serve to deter the Defendant as well as others from operating facilities in the future as the Defendant did in this case. The general deterrence to others to avoid similar violations in the future is as important as the specific deterrence to the Defendant in light of the nature, extent and duration of the numerous violations which we previously established.

While the Board has assessed a substantial penalty for the numerous violations of the Clean Streams Law it is useful to note that these numerous violations could have supported a substantially larger assessment. The Department has not presented evidence on the potential cost of restoration of the unnamed tributary to the Schuylkill River. It has not presented evidence on the cost savings to the violator. It has also not sought to recover its costs of investigation. It has provided the Board with only limited evidence upon which we can base an assessment of the magnitude of the individual discharge events. It presented no evidence regarding the pollutional impact after the April 23, 2007 biological assessment. Consequently we assess a civil penalty conservatively based upon the information before us.

Accordingly, we find the following:

CONCLUSIONS OF LAW

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

2. Waste from the Plant, which was comprised mainly of chicken processing wastewater and blood constitutes "industrial waste" as that term is defined in 35 P.S. § 691.1.

3. Defendant is a "person" as that term is defined in the Clean Streams Law, 35 P.S. § 691.1.

4. Defendant's actions in causing and allowing the unpermitted discharge of industrial waste into waters of the Commonwealth, as described above, constituted violations of Sections 301 and 307(a) of the Clean Streams Law, 35 P.S. § 691.301 and 35 P.S. § 691.307(a), and unlawful conduct under Section 611 of the Clean Streams Law, 35 P.S. § 691.611.

5. Defendant's actions in causing and allowing pollution to the waters of the Commonwealth, as described above, constituted violations of Section 401 of the Clean Streams Law, 35 P.S. § 691.401 and unlawful conduct under Section 611 of the Clean Streams Law, 35 P.S. § 691.611.

6. Defendant's failures to report incidents causing or threatening pollution to waters of the Commonwealth to the Department, as described above, constituted violations of 25 Pa. Code § 91.33(a) and unlawful conduct under Section 611 of the Clean Streams Law, 35 P.S. § 691.611.

7. Under Section 605 of the Clean Streams Law, 35 P.S. § 691.605, Weiszer's violations subject him to the assessment of civil penalties of up to $10,000 per day for each violation.

8. When assessing civil penalties, the Clean Streams Law requires the Board to consider the willfulness of the violation, the extent of the damage the violation has on the waters of the Commonwealth, the cost of restoration, and additional relevant factors which include the cost savings to the violator, the size of the violating facility, the volume of the discharge, and

deterrence of future violations. 35 P.S. § 691.605; *DEP v. Kennedy*, 2007 EHB 15, 26; *DEP v. Breslin*, 2006 EHB 130, 143.

9. The Board assesses a civil penalty of $83,284 against Weiszer for violations of the Clean Streams Law and the Department's regulations promulgated under the Clean Streams Law.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
v.	:	**EHB Docket No. 2009-014-CP-M**
DAVID WEISZER	:	

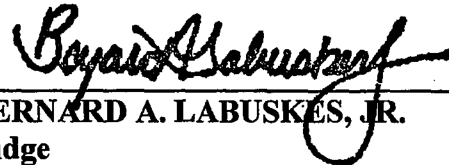
ORDER

AND NOW, this 7th day of June, 2011, it is hereby ordered that civil penalties are assessed against David Weiszer in the total amount of $83,284 for violations of the Clean Streams Law and the Department's regulations.

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Chairman and Chief Judge

MICHELLE A. COLEMAN
Judge



BERNARD A. LABUSKES, JR.
Judge

RICHARD P. MATHER, SR.
Judge

DATED: June 7, 2011

c: **DEP Bureau of Litigation:**
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MARYANNE WESDOCK
ACTING SECRETARY TO THE BOAR

WENDELL E. SCHWAB	:	
	:	
v.	:	**EHB Docket No. 2011-026-M**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	**Issued: June 7, 2011**
PROTECTION	:	

OPINION AND ORDER
ON DEPARTMENT'S MOTION TO DISMISS

By Richard P. Mather, Sr., Judge

Synopsis

The Board grants the Department's motion to dismiss and dismisses an appeal that was filed one day late beyond the thirty day appeal period because the Board does not have jurisdiction over an untimely appeal.

OPINION

On January 20, 2011, the Department of Environmental Protection (the "Department") issued an Assessment of Civil Penalty to Mr. Wendell E. Schwab and Mrs. Dorothy L. Schwab and McKissick Trucking, Inc.[1] for violations of the Solid Waste Management Act which occurred at the Schwabs's property located in Pine Grove Township, Venango County. On February 23, 2011, Mr. Schwab filed a Notice of Appeal with the Board appealing the Assessment. The Department filed a motion to dismiss the appeal on the basis that the appeal is

[1] McKissick Trucking, Inc. has also appealed this assessment in a related appeal docketed at 2011-027-M.

not timely filed within the thirty day appeal period, accompanied by an exhibit demonstrating that Schwab received notice on January 21, 2011.

Under our rules, a response to a dispositive motion may be filed within thirty days after the dispositive motion has been served. 25 Pa. Code § 1021.52(a)(1). Schwab did not file a response to the Department's motion, and the under the Board's Rules Schwab's failure to file a response constitutes an admission of all properly pled facts contained in the Department's motion. 25 Pa. Code § 1021.91(f).[2]

A motion to dismiss will be granted by the Board where the moving party is clearly entitled to judgment as a matter of law and there is no dispute over any issue of material fact. *Spencer v. DEP*, 2008 EHB 573, 574. Where the Department has directed or issued its decision to a party, that party must file its appeal within thirty days after it receives written notice of the action, unless a different time period is specified by statute. 25 Pa. Code § 1021.52(a)(1); *Spencer v. DEP*, 2008 EHB 573, 574. Therefore, the Board lacks jurisdiction over untimely appeals and will grant a motion to dismiss where an appeal in question has in fact been filed after the deadline set by our rules. *See* 25 Pa. Code § 1021.53(a).[3]

It is clear that Schwab has filed his appeal more than thirty days after receiving the Department's notice of action by certified mail. Although Schwab states in his notice of appeal that he did not receive notice of the action until McKissick Trucking received the appeal on January 25, 2011, the Department has established that Schwab received the Department's

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[2] The fact that Schwab received notice on January 21, 2011 is uncontested because he failed to controvert the Department's assertion by responding to the motion.

[3] In very rare circumstances, the Board may allow an appeal *nunc pro tunc* under Rule 1021.53. 25 Pa. Code § 1021.53(j). *Simons v. DEP,* 1998 EHB 1131, 1133. Since Schwab has not filed a response, and therefore, has not attempted to invoke the Board's authority to allow an untimely appeal under Rule 1021.53, the Board will not address the applicability of this Rule to this appeal further.

assessment directly on January 21, 2010. Department's Motion to Dismiss ¶ 2. Therefore, there is no material issue of fact in dispute in this matter. Schwab received the Assessment via certified mail on January 21, 2010. There is also no dispute that Schwab filed his appeal of the Assessment on February 23, 2011, which is thirty one days after he received the Assessment. Because the Solid Waste Management Act does not provide appellants with any additional time to file an appeal of a Department issued according to that act, *See* 35 P.S. §§ 6018.101 *et. seq.* Schwab was required to file his appeal within thirty days of his receipt of written notice of the action. He received written notice on January 21, 2011 and he had to file his appeal no later than February 22, 2011. Because Mr. Schwab filed his appeal on February 23, 2011, Mr. Schwab's appeal is untimely by one day, and the Board lacks jurisdiction to hear the appeal.

Accordingly, we issue the order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

WENDELL E. SCHWAB	:	
	:	
v.	:	**EHB Docket No. 2011-026-M**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

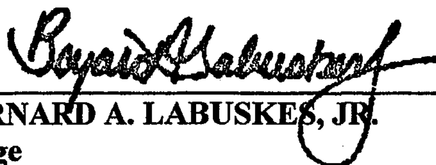
ORDER

AND NOW, this 7th day of June, 2011, it is hereby ordered that the Department's motion to dismiss is granted and the appeal is hereby **dismissed**.

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Chairman and Chief Judge

MICHELLE A. COLEMAN
Judge



BERNARD A. LABUSKES, JR.
Judge

RICHARD P. MATHER, SR.
Judge

DATED: June 7, 2011

c: **DEP Bureau of Litigation:**
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MARYANNE WESDOCK
ACTING SECRETARY TO THE BOARD

MATTHEWS INTERNATIONAL CORPORATION	:	
	:	
v.	:	
	:	**EHB Docket No. 2008-235-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, and GRANITE RESOURCES CORP., Permittee	:	**Issued: June 16, 2011**

OPINION AND ORDER
ON DEPARTMENT'S MOTION TO DISMISS

By Thomas W. Renwand, Chairman & Chief Judge

Synopsis:

The Pennsylvania Department of Environmental Protection has established that under the circumstances of this appeal the Appellant, a potential market competitor of the Permittee, lacks standing to pursue this appeal under the Air Pollution Control Act. Protection from competition is not within the zone of interests provided for under the Act. Nor does the Air Pollution Control Act provide for public notice or comment where the Department has determined that a plan approval or permit is not required. Expanding the notice and comment requirement of the Act to a determination of exemption violates the principles of statutory construction. Therefore, we dismiss the appeal for lack of standing.

OPINION

Presently before the Pennsylvania Environmental Hearing Board is the Department of

Environmental Protection's ("Department") Motion to Dismiss for lack of standing. The Department asserts that the Appellant, Matthews International Corporation ("Matthews" or "Appellant"), lacks standing to bring this appeal under the Air Pollution Control Act because there is no "direct," "immediate" and "substantial" interest for Matthews to challenge the Department action. The Permittee, Granite Resources Corporation ("Granite" or "Permittee"), supports the Department's motion.

Matthews is a publicly traded company that produces cremation and burial equipment. A division of Matthews, referred to as the Bronze Division, produces bronze memorial products in Pittsburgh, Pennsylvania. Granite is a small privately held company that is a subsidiary of its parent corporation, Bronze Stone Group. Granite sought to build a facility in Aliquippa, Pennsylvania to produce bronze plaques to be used as memorial markers in cemeteries. The facility would undertake the forming and surface coating of the bronze memorial markers. Granite filed with the Department a Request for Determination of Requirement for a Plan Approval/Operating Permit on March 4, 2008 seeking a determination by the Department that the facility would be a minor source of air contamination and could be exempt from plan approval and operating permit requirements.

Under the air quality regulations, small sources of air contamination may be exempt from plan approval and operating permit requirements pursuant to 25 Pa. Code § 127.14. Following review of Granite's request, the Department advised Granite by letter dated June 19, 2008 that the facility was exempt from the plan approval requirements because the facility constituted a

source of minor significance under 25 Pa. Code § 127.14(a)(8), and the facility was exempt from operating permit requirements because its emissions would not exceed the operating permit thresholds. Matthews filed this appeal of the June 19, 2008 letter asserting that the Department's action is arbitrary, capricious, an abuse of discretion, and contrary to the law.

During a pre-hearing conference with the Board both the Department and Granite raised the question of whether Matthews has standing to bring this appeal. The Board issued an Order allowing the Department and Granite to file motions and supporting memoranda on the issue of standing and allowing Matthews to file a response.[2]

Standing

An essential element of an appellant's case is that it must have standing to bring the appeal. Persons who are "adversely affected" by a Department action have a statutory right to file an appeal before the Board. 35 P.S. § 7514(c). The purpose of the standing doctrine in the context of proceedings before the Board is to determine whether the appellant is the appropriate party to seek relief from a Department action. *Valley Creek Coalition v. DEP,* 1999 EHB 935. The burden of proof is different depending on when a challenge to standing is brought. When standing is challenged in a dispositive motion, we must view it in the light most favorable to the non-moving party. *Greenfield Good Neighbors Group, Inc. v. DEP*, 2003 EHB 555, 563. In other words, in this matter it is the Department who has the burden to establish that there are no material facts in dispute regarding standing and that it is entitled to judgment as a matter of law on that issue.

[2] Matthews challenges the timing of the Department's Motion to Dismiss because the dispositive motion period before the Board has been closed. We find that the Department's motion is timely since we issued an Order allowing motions to be filed on the issue of standing. Moreover, the issue of standing may be raised at any time. *Highridge Water Authority v. DEP*, 1999 EHB 1, 7; *Del-Aware Unlimited, Inc. v. DER*, 1990 EHB 759. *See also, Greenfield Good Neighbors Group, Inc. v. DEP*, 2003 EHB 555. (Board entertained challenges to standing in dispositive motions, during the hearing and in post-hearing briefs.)

The material facts in this matter are not in dispute with respect to standing. The parties agree that "Granite's new bronze foundry will compete with Matthews' Bronze Division for at least some of the market Matthews' Bronze Division enjoys." Department Memorandum in Support of Motion to Dismiss, p.7; Appellant's Response to Department's Motion to Dismiss, p. 6. Matthews claims it has standing based on that economic competitive interest. The company asserts that it will sustain financial harm and a competitive disadvantage if Granite is exempt from plan approval and operating permit requirements and Matthews is not. The Department and Granite counter that Matthews' asserted competitive interest does not grant standing to challenge the Department's action under this appeal.

We must determine whether, as a matter of law, the Department is entitled to judgment on the standing issue. In order to have standing to challenge a Department action an appellant must be "aggrieved." *Wurth v. DEP*, 2000 EHB 155; *Township of Florence v. DEP*, 1997 EHB 763. The test for determining standing was explained as follows:

> In order to establish standing, the appellants must prove that (1) the action being appealed has had – or there is an objectively reasonable threat that it will have – adverse effects, and (2) the appellants are among those who have been – or are likely to be – adversely affected in a substantial, direct and immediate way [citations omitted] . . . . The second question cannot be answered affirmatively unless the harm suffered by the appellants is greater than the population at large (i.e. "substantial") and there is a direct and immediate connection between the action under appeal and the appellant's harm (i.e. causation in fact and proximate cause) . . .

Pennsylvania Trout Unlimited v. DEP, 2003 EHB 622, 625, *citing Giordano v. DEP*, 2000 EHB 1184, 1185.

Accordingly, an appellant must show that it has a "substantial" interest which "simply means that the individual's interest must have substance – 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." *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 346 A.2d 26, 282 (Pa. 1975). A "direct" interest means that the person claiming to be aggrieved must show causation of harm to the interest by which the person complains. *Id.* at 282. An "immediate" interest is one with a sufficiently close causal connection between the challenged action and the asserted harm. *Id.* at 286.

An "immediate" interest is also one where the "protection [is] of the type of interest [that] is among the policies underlying the legal rule relied upon by the person claiming to be 'aggrieved'." *William Penn Parking Garage*, 346 A.2d at 284.[3] In 1993 the Commonwealth Court applied the same rule in *Nernberg v. City of Pittsburgh*, 620 A.2d 692 (Pa. Cmwlth. 1993). In *Nernberg* a zoning conditional use was granted to a developer to build student apartments and the appellant was a competing landlord. The trial court dismissed the appeal for lack of standing because the policies underlying the zoning code did not appear to be designed to protect someone in the landlord's position. *Id.* at 696. The Commonwealth Court affirmed. *Id; see also Upper Bucks County Vocational-Technical School Education Ass'n v. Upper Bucks County Vocational Technical School Joint Comm.*, 474 A.2d 1120 (Pa. 1984) (competitive interests would establish standing only if the goals of the legislative scheme included protection of competitive interests).

The Board applied the abovementioned rule in *McCutcheon v. DER,* 1995 EHB 6. There we held that a company which had developed an alternative daily landfill cover had no standing to appeal a permit modification for a landfill to use a competing form of landfill cover. The Board held that this interest was not protected by the Solid Waste Management Act. The enumerated purposes of the Solid Waste Act do "not contain any statement regarding the

[3] The United States Supreme Court has referred to this guideline as whether the interest the plaintiff seeks to protect is within the "zone of interests" sought to be protected by the statute. *Assoc. of Data Processing Service*

protection of one's private enterprise interest over that of another." *Id.* at 9.

Turning to the Act under this appeal, the Air Pollution Control Act (Act), the policy section provides:

> It is hereby declared to be the policy of the Commonwealth of Pennsylvania to protect the air resources of the Commonwealth to the degree necessary for the (i) protection of public health, safety and well-being of its citizens; (ii) prevention of injury to plant and animal life and to property; (iii) protection of comfort and convenience of the public and the protection of the recreational resources of the Commonwealth; <u>(iv) development, attraction and expansion of industry, commerce and agriculture</u>; and (v) implementation of the provisions of the Clean Air Act in the Commonwealth.

35 P.S. § 4002(a) (emphasis added). Matthews argues that subsection (iv) above is evidence that one of the policies of the Air Pollution Control Act is the protection of *individual* competitive interests. Therefore, it asserts that its interest in this appeal falls within the zone of interests protected by the Act. We read subsection (iv) as *encouraging* competition and the *expansion* of industry, whereas Matthews is seeking to use it to protect against alleged competitive injury. The policy does not indicate that it provides for the protection of one manufacturer over another. Instead, it encourages development, attraction and expansion of industry. We do not find that a policy of the Act is to protect the individual interest of one market participant over another market participant.

Matthews points to the Board's decisions in *Highridge Water Authority v. DEP*, 1999 EHB 27; *Perkasie Borough Authority v. DEP*, 2002 EHB 75; and *Mill Service, Inc. v. DER*, 1980 EHB 406, as further support for its argument that harm to a competitive interest will confer the requisite standing.

Mill Service was decided prior to the Commonwealth Court's decisions in *Nernberg* and

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Organizations, Inc. v. Camp, 397 U.S. 150 (1970).

Upper Bucks County and, therefore, did not apply the analysis utilized in those cases. *Highridge Water Authority* and *Perkasie Borough* may be distinguished from the circumstances of this case. *Highridge Water Authority* dealt with applications by two municipal authorities for modifications to their water allocation permits. Because the appellant water authority had a contract with one of the permittees for the sale of water and was required to reserve a certain amount of water for that permittee, the Board allowed the matter to proceed and held that the parties could present evidence on the question of standing at the hearing on the merits. In *Perkasie Borough* the appellant and permittee were members of a regional sewer authority. The appellant appealed the issuance of an NPDES permit to the permittee on the basis that its rates would increase. The Board found that due to the interrelationship of the parties, there was at least some inference at that stage of the proceedings that the appellant had a substantial, direct and immediate interest. The Board held that it could not conclude that the appellant lacked standing, based on the pleadings and the record before it.

In the present case, the only interest asserted is that Matthews is an economic competitor of Granite, and the only harm alleged is that Matthews may be placed at a competitive disadvantage. As we stated earlier, that is not one of the interests protected by the Air Pollution Control Act.

Notice

The Appellant raises the issue that it was not provided notice and opportunity to comment on the Department's determination that Granite is exempt from plan approval and operating permit requirements. The applicable regulation, however, does not require that notice be provided prior to a determination of exemption under 25 Pa. Code § 127.14. Whereas the Department is required to publish notice of receipt and intent to issue a plan approval pursuant to

Section 127.44 of the regulations, no such notice requirement is set forth for a determination of exemption under Section 127.14.

The notice requirement is found in Section 6.1 of the Air Pollution Control Act entitled "Plan approvals and permits." Paragraph (b)(1) of that section states as follows:

> No person shall operate any stationary air contamination source unless the department shall have issued to such person a permit to operate such source under the provisions of this section in response to a written application for a permit submitted on forms and containing such information as the department may prescribe or where construction, assembly, installation modification is specifically authorized by the rules or regulations of the department to be conducted without written approval. *The department shall provide public notice and the right to comment on all* ***permits*** *prior to* ***issuance*** *or* ***denial*** *and may hold public hearings concerning any permit.*

35 P.S. § 4006.1(b)(1) (emphasis added).

Matthews argues that public notice and comment should also be required for a determination of *exemption* from the permitting requirements. However, to accept Matthews' argument requires us to read words into the statute that simply are not there. The Commonwealth Court has held repeatedly and emphatically that courts may not add words to a statute. *Joseph J. Brunner, Inc. v. Dept. of Environmental Protection,* 869 A.2d 1172, 1174 (Pa. Cmwlth. 2005), *appeal denied,* 885 A.2d 44 (Pa. 2005); *Vlasic Farms, Inc. v. Pa. Labor Relations Bd.*, 734 A.2d 487, 490 (Pa. Cmwlth.1999); *Latella v. Unemployment Compensation Bd. of Review*, 459 A.2d 464 (Pa. Cmwlth. 1983). Even where courts are encouraged to liberally construe statutes to effect their purpose and to promote justice, words may not be added under the guise of interpreting the meaning of the statute. *Presock v. Dept. of Military and Veterans Affairs,* 855 A.2d 928, 931 (Pa. Cmwlth. 2004). These same rules apply when construing the language of a regulation. *Id.*

The dissent would find standing based on Matthews' allegation that it *would* have taken part in the comment process had the Department provided an opportunity to do so. The dissent bases its analysis on Section 10.2 of the Air Pollution Control Act which states that any person aggrieved by a Department action "or any person who participated in the public comment process for a plan approval or permit" under the Act shall have the right to appeal the action to the Environmental Hearing Board. 35 P.S. § 4010.2. The dissenting opinion reads Section 10.2 as creating a broad statutory right to standing, not only to those who participate in the public comment process in accordance with Section 6.1(b)(1), but also to anyone who complains they should have been given an opportunity to comment. The dissent broadens the already liberal standing provision of the Air Pollution Control Act to such an extent that anyone simply interested in the process, whether they commented or not, could claim standing. Moreover, the position taken by the dissent leads to a paradoxical result: If the Department grants or denies a plan approval or permit, anyone who has filed a comment has standing to appeal, in accordance with Section 10.2. However, if the Department determines that no plan approval or permit is required, anyone who filed a comment or who *would have* filed a comment is granted standing to appeal. This results in broader standing to appeal a *waiver* from the permitting requirements than that of an actual grant or denial of a permit. This cannot be the result intended by the Legislature.

In conclusion, we find that Matthews does not have standing to challenge the Department's determination on Granite's request for an exemption under 25 Pa. Code § 127.14, nor was the Department required by statute or regulation to provide public notice and opportunity to comment.

Accordingly, we enter the following order.

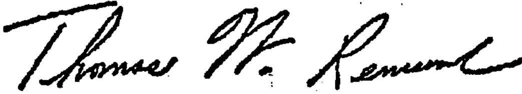
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MATTHEWS INTERNATIONAL CORPORATION	:	
v.	:	**EHB Docket No. 2008-235-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, and GRANITE RESOURCES CORP., Permittee	:	

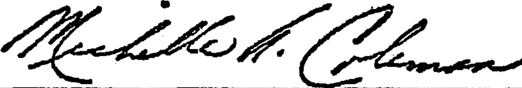
ORDER

AND NOW, this 16th day of June, 2011 it is hereby ordered that the Department's Motion to Dismiss is granted. This appeal will be marked closed and discontinued.

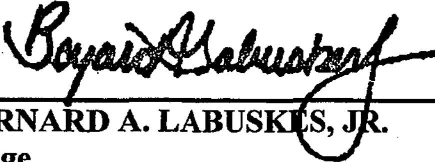
ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Chairman and Chief Judge



MICHELLE A. COLEMAN
Judge



BERNARD A. LABUSKES, JR.
Judge

Judge Mather filed a concurring and dissenting opinion which is attached.

DATED: June 16, 2011

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MATTHEWS INTERNATIONAL CORPORATION	:	
v.	:	**EHB Docket No. 2008-235-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and GRANITE RESOURCES CORP., Permittee	:	

CONCURRING IN PART AND DISSENTING IN PART OPINION OF RICHARD P. MATHER, SR.

I concur in part and dissent in part from the Opinion of the Majority. I concur in the Board's analysis that decides that Appellant's competitive economic interest is not sufficient to establish standing under general rules governing standing before the Board. I dissent from the result reached by the majority because the state Air Pollution Control Act, ("APCA") 35 P.S. §§ 4000.1 *et. seq*., contains several provisions including a specific and unique statutory requirement regarding standing that enable the Appellant to establish standing in this appeal for the reasons set forth below. *See* 35 P.S. § 4006.1 and 4010.2. I would therefore deny the Department's motion to dismiss.

Under the APCA, a person has the right to participate in the public comment process for plan approvals and operating permits. 35 P.S. § 4006.1(b) (Department shall provide public notice and the right to comment on all permits prior to issuance...). If a person exercises *the right* to comment on a plan approval or permit application, then Section 10.2 automatically bestows the right to file an appeal. 35 P.S. § 4010.2. A person establishes standing through the act of participating in the public comment process required for plan approvals and operating

permits.

Section 10.2 of the APCA provides, in part: "any person aggrieved by an order or other administrative action of the Department issued pursuant to this act *or any person who participated in the public comment process, for a plan approval or permit shall have the right...to appeal the action to the Hearing Board...*" 35 P.S. § 4010.2. (emphasis added). Thus, the General Assembly established broader standing requirements beyond the traditional aggrieved person requirements that generally govern standing before the Board. These broader requirements automatically bestow standing on any person who simply participates in the public comment process for a plan approval or permit.[4] The Appellant has objected to the loss of its right to public comments which then provides the automatic right to appeal.

Based on the discussion in Appellant's brief, it is likely that the Appellant would have participated in the public comment process generally required for plan approvals and operating permits, but the Department avoided this process by waiving the plan approval and operating permit requirements by designating the air source in question as a source of minor significance. The Department has this authority by regulation. 25 Pa. Code § 127.14(a)(8). Section 4(a)(9) of the APCA provides the Environmental Quality Board ("EQB") with the authority to adopt regulations to exempt sources or categories of sources of minor significance from the permitting requirement in Section 6.1. 35 P.S. §§ 4004(a)(9) and 4006.1. The EQB has adopted such regulations, and these regulations identify specific categories of sources of minor significance. 25 Pa. Code § 127.14(a)(1)-(7). In addition, these regulations provide the Department with the authority to designate additional sources of minor significance on a case-by-case basis. 25 Pa.

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[4] The federal Clean Air Act (CAA) contains a similar requirement at 42 U.S.C. § 7661a(b)(6), which was added in the 1990 amendments to the CAA, Nov. 15, 1990, Pub.L. 101-549 Title V, § 501, 104 Stat. 2635. Section 10.2 was added to the APCA in 1992 which were enacted to update the APCA to conform to the 1990 amendment to the CAA. Act of July 9, 1992 (P.L. 460, No. 95).

Code § 127.14(a)(8). The Department used its regulatory authority in Section 127.14(a)(8) to designate the source in this appeal as a source of minor significance. This designation effectively waived the plan approval and operating permit requirement for this source, and deprived the Appellant with an opportunity to exercise its rights to participate in the public comment process under Section 6.1 and to file an appeal under Section 10.2.

While it is clear that the requirements in Section 10.2 are not directly applicable in this appeal, they are relevant to the Board's analysis. The Appellant was not able to participate in the public comment process for a plan approval and operating permit for the source. The requirements governing the public comment process in Section 6.1 were waived by the Department when it decided that the source was a source of minor significance. This is one of the Appellant's major objections that the Appellant lost its right to public comment on the permitting requirements that were waived.

Since they are not directly applicable, the issue is whether the public's right to provide comments on applications for plan approval and operating permits and the right to file appeals, if they do participate, are protected interests that nevertheless provide the Appellant with standing to challenge a Department decision to waive these permit requirement by declaring the source as a source of minor significance.

The Appellant has, in my opinion, asserted an interest under the APCA that is sufficient to allow the Board to find that the Appellant has standing.[5] In addition to its competitive economic interest, the Appellant asserts that the lack of notice and an opportunity to comment on the Department's decision is a harm that is sufficient to confer standing on the Appellant. I agree with this position. The Appellant correctly recognizes that the Department's minor significance

[5] The competitive economic interest is not the interest that provides the Appellant with standing for the reasons set forth in this Majority Opinion.

determination cut off Appellant's right to notice and an opportunity to comment on the otherwise required plan approval and operating permit applications.

The General Assembly gave the public the right to participate in the public comment process for plan approvals and operating permits. The General Assembly also established the right for any person who participated in this process to file an appeal. These interests are, in my opinion, sufficient to establish standing to challenge a Department decision to waive the plan approval and operating permit requirements and to deprive the public with an opportunity to exercise these rights. I am not advocating that the Board expand these statutory rights. Rather, I am advocating that these rights are within the "zone of interest" sought to be protected by the APCA and that the Appellant has standing to challenge the Department's waiver of the public notice and comment requirements that deprive the Appellant of these rights established and protected by the APCA.

The most troubling aspect of the Majority Opinion is the incidental authority ceded to the Department to limit the standing of interested persons such as the Appellant which want to participate in the public participation process for plan approval and operating permits. If the Department waives the permit requirement by designating a source to be of minor significance, the Department can defeat the broad statutory right to establish standing that Section 10.2 allows by merely participating in the public comment procedures. There is absolutely no indication that the Department abused this authority to intentionally deprive the Appellants of the rights to public participation or to appeal in this case. However, if the Appellant does not have standing, as the Majority Opinion so decides, the Department will be in a position to unilaterally deprive appellants of their broad right to standing under Section 10.2 by waiving the permitting requirements and that decision will not be reviewable in the same broad manner as Section 10.2

authorizes for decisions regarding plan approvals and operating permits.

There is one final point to mention regarding standing. As Judge Renwand stated "[t]he purpose of the standing doctrine is not to evaluate whether a particular claim has merit but rather to determine whether an appellant is the appropriate party to file an appeal from an action of the Department." *Ziviello v. DEP*, 2000 EHB 999, 1005 *citing Valley Creek Coalition v. DEP*, 1999 EHB 935, 944. In addressing the Appellant's basis for standing, I have not evaluated whether any of the Appellant's claims have merit, but I have simply decided that I believe the Appellant has standing to raise objections and file an appeal.

There is one additional procedural issue that I should mention. I also have concerns with the Department's use of a Motion to Dismiss to decide a standing question when the Department's Motion relies upon facts outside of those stated in the appeal. Under the Board's caselaw, "The Board has noted that, as a matter of practice the Board has authorized motions to dismiss as a dispositive motion and has permitted the motion to be determined on facts outside those stated in the appeal when the Board's jurisdiction...is in issue." *Felix Dan Preservation Ass'n v. DEP*, 2000 EHB 409, 421, n.7; cited in *Hendryx v. DEP*, EHB Docket No. 2010-144-M (Opinion and Order issued on March 18, 2011). The Department has challenged Appellant's standing in its motion, and standing is clearly not jurisdictional under Pennsylvania caselaw. *See Beers v. Unemployment Compensation Board of Review*, 534 Pa. 605, 611 (1993) (whether a party has standing is not a jurisdictional issue). The Board recently addressed this issue in the *Hendryx* opinion and stated:

> ...and parties' reliance on facts outside of those stated in the appeal provide a basis to reject standing as a basis to grant the motion to dismiss. The Board's Rules allow parties to rely upon facts outside of those stated in the appeal to resolve non-jurisdictional issues in the context of motions for summary judgment. Under the Board's Rules governing motions for summary judgment there are additional procedural and substantive requirements that better enable the

> Board to identify and resolve factual disputes between the parties, and the Board believes that these should be used to address non-jurisdictional issues. *See* 25 Pa. Code § 1021.94a.

Hendryx, EHB Docket No. 2010-144-M, slip op. at pages 3-4. Unlike the Hendryxs in their appeal, the Appellant has raised this issue and has objected to the Department's use of a motion to dismiss that relies upon facts outside those stated in the appeal. I believe this is a second reason to deny the Department's motion to dismiss.

ENVIRONMENTAL HEARING BOARD

RICHARD P. MATHER, SR.
Judge

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MARYANNE WESDOCK
ACTING SECRETARY TO THE BOA

MOUNTAIN WATERSHED ASSOCIATION, INC.

v.

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and AMERIKOHL MINING, INC.

EHB Docket No. 2011-073-R

Issued: June 16, 2011

OPINION AND ORDER ON MOTION TO DISQUALIFY COUNSEL

By Thomas W. Renwand, Chairman and Chief Judge

Synopsis:

The Board denies a Motion to Disqualify Counsel where it finds that the previous representation was not a "substantially similar matter." Moreover, the Board finds that the Appellant would not be prejudiced by denying the Motion.

OPINION

Presently before the Pennsylvania Environmental Hearing Board is Appellant Mountain Watershed Association's (Mountain Watershed) Motion to Disqualify Counsel for the Permittee (Motion to Disqualify Counsel). Counsel for the Permittee Amerikohl Mining, Inc. (Amerikohl Mining) previously represented Mountain Watershed together with Indian Creek Land & Cattle Company in three Environmental Hearing Board matters which did not go to hearing. The

Indian Lake and Cattle Company cases were appeals of the issuance of limestone permits to New Enterprise. The current appeal involves a surface coal mining permit issued to Amerikohl Mining.

Mountain Watershed moves to disqualify counsel based on Pennsylvania Rule of Professional Conduct 1.9 which provides in part:

> A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent.

As set forth by Mountain Watershed in its well crafted Motion, the courts have developed a three part test to determine whether disqualification is warranted. The key issue in this matter is whether the earlier representation is a "substantially related matter." After carefully reviewing the papers we find that it is not. We see nothing alleged in Mountain Watershed's Motion which would prejudice them in this case. The issues in the *Indian Creek Cattle Company* cases and this case, although very important to the respective parties, are not unique. Moreover, although they involve the same watershed they are in different counties, and the *Indian Creek Cattle Company* cases involved limestone mining while this case involves coal mining.

We are loathe to interfere with a party's choice of counsel absent a clear violation of the Rules of Professional Conduct. *Department of Environmental Protection v. Whitemarsh Disposal Corp.*, 1999 EHB 588. After closely and exhaustively reviewing the parties' filings we find absolutely no reason to disqualify counsel in this case. We will issue an Order accordingly.

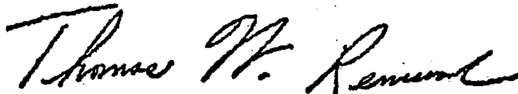
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MOUNTAIN WATERSHED ASSOCIATION, INC.	:	
v.	:	**EHB Docket No. 2011-073-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and AMERIKOHL MINING, INC.	:	

ORDER

AND NOW, this 16th day of June, 2011, after review of the Motion to Disqualify Counsel, it is ordered that the Motion is **denied.**

ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Chairman and Chief Judge

DATE: June 16, 2011

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MARYANNE WESDOCK, ESQUIRE
ACTING SECRETARY TO THE BOAR

EARL'S CLEANERS	:
	:
v.	: **EHB Docket No. 2011-038-C**
	:
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	: **Issued: July 12, 2011**

OPINION AND ORDER
ON DISMISSING APPEAL AS A SANCTION

By Michelle A. Coleman, Judge

Synopsis:

The Board dismisses a *pro se* appeal as a sanction wherein Appellant has failed to provide objections to the Department's action pursuant to 25 Pa. Code § 1021.51. Appellant also did not follow Board Orders to provide the missing information.

OPINION

The Appellant in this matter is Earl Mangin ("Mangin") who is appearing *pro se*. On March 23, 2011 Mangin sent a Notice of Appeal ("NOA") to the Board appealing the Department's February 14, 2011 Administrative Order issued to Earl's Cleaners, Inc. for violations of the Solid Waste Management Act, and the Clean Streams Law at the Earl's Cleaners site located in Richboro Township, Bucks County. The Department alleges that Mangin did not obtain a permit from the Department to operate a hazardous waste storage facility at the site or to dispose of waste at the site. The NOA does not provide objections to the Department's action.

To rectify these insufficiencies, the Board sent an Order dated March 23, 2011 to Mangin requesting that missing information be provided to the parties and the Board on or before April 12, 2011. On April 14, 2011, the Board, having not received the requested information, issued a Rule to Show Cause returnable on or before May 16, 2011. The Appellant requested an extension of 30 days to retain counsel. He was then given an extension to respond to the Board's April 14, 2011 Order on or before June 20, 2011. No response was made to the Rule. There has been no further communication from the Appellant.

The Board has the authority to dismiss an appeal as a sanction for failing to comply with Board orders. 25 Pa. Code § 1021.161; *Martin, et al. v. DEP*, 1997 EHB 158. A sanction resulting in dismissal is justified when a party to the case fails to comply with Board orders and shows a lack of intent to pursue its appeal. *Scottie Walker v. DEP*, EHB Docket No. 2011-032-C (Opinion and Order issued May 12, 2011); *Pearson v. DEP*, 2009 EHB 628, 629, citing *Bishop v. DEP*, 2009 EHB 259; *Miles v. DEP*, 2009 EHB 179, 181; *RJ Rhodes Transit, Inc.*, 2007 EHB 260; *Swistock v. DEP*, 2006 EHB 398; *Sri Venkateswara Temple v. DEP*, 2005 EHB 54.

Mangin failed comply with the Board's Orders and the Rule requiring that the appellant provide certain information. Section 1021.51 provides,

> (e) The appeal shall set forth in separate numbered paragraphs the specific objections to the action of the Department. The objections may be factual or legal.

25. Pa. Code § 1021.51.

Due to Mangin's failure to comply with 25 Pa. Code § 1021.51 and failure to comply with the Board's Orders issued on March 23, 2011 and the May 9, 2011[1], we dismiss this appeal as a sanction pursuant to 25 Pa. Code § 1021.161.

Accordingly, we issue the Order that follows.

[1] The May 9, 2011 Order extended the April 14, 2011 Order to June 20, 2011.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

EARL'S CLEANERS	:	
	:	
v.	:	**EHB Docket No. 2011-038-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

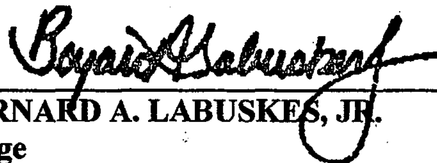
ORDER

AND NOW, this 12th day of July, 2011, it is hereby ordered that the appeal is dismissed pursuant to 25 Pa. Code § 1021.161 as a sanction for failure to comply with 25 Pa. Code § 1021.51 and the Board's Orders.

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Chairman and Chief Judge

MICHELLE A. COLEMAN
Judge



BERNARD A. LABUSKES, JR.
Judge

RICHARD P. MATHER, SR.
Judge

DATED: July 12, 2011

c: **DEP Bureau of Litigation:**
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COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION

v.

MR. KIRK E. DANFELT and MRS. EVA JOY GIORDANO

EHB Docket No. 2008-051-CP-C

Issued: July 14, 2011

OPINION AND ORDER ON MOTION FOR SUMMARY JUDGMENT

By Michelle A. Coleman, Judge

Synopsis:

The Board denies a motion for summary judgment where the facts are in dispute. The record before the Board does not provide enough facts for the Board to determine whether or not one of the Defendants was involved in the alleged violations.

OPINION

Before the Board is a Motion for Summary Judgment ("Motion") filed by the Defendant, Eva Joy Giordano ("Giordano"), on May 18, 2011. Giordano claims that she is not liable for the violations alleged in the Department's complaint filed against her and her ex-husband, Kirk E. Danfelt ("Danfelt"). The Motion requests the Board to dismiss the complaint as it relates to Giordano.

The Department filed a complaint for civil penalties in the amount of $41,250 on February 27, 2008 alleging violations of the Clean Streams Law, 35 P.S. §§ 691.401 and

691.611, (the "Clean Streams Law"). The complaint was not served until July 30, 2008. Neither Defendant filed an answer within the prescribed 30 days. *See* 25 Pa. Code § 1021.74 ("answers to complaints shall be filed with the Board within 30 days of the date of service of the complaint"). On January 8, 2009 the Department sent a notice to the Defendants that it intended to file a motion for default judgment against the Defendants if a responsive pleading was not provided within 10 days. Neither party filed an answer. The Department subsequently filed its motion for default judgment on April 15, 2009. Counsel for Giordano filed an appearance on May 7, 2009 and filed a response to the Department's motion for default judgment on May 15, 2009 requesting leave to file an answer to the complaint.

On August 20, 2009 the Board issued an opinion and order granting in part and denying in part the Department's motion for default judgment. The Board granted default judgment with respect to Danfelt finding him liable for the violations alleged in the complaint. We denied the motion as it related to Giordano and allowed her to file an answer to the complaint within 15 days to dispute her liability. Giordano filed her answer on September 8, 2009.

The complaint states that "Kirk E. Danfelt and Eva Joy Giordano ('Danfelt') are husband and wife and maintain two addresses." Complaint, ¶ 4. The Department includes both Defendants collectively in each allegation throughout the complaint referring to them as "Danfelt". The complaint alleges that violations of the Clean Streams Law occurred at three sites: East Dutch Corner in Todd Township, Fulton County ("Site 1"), Old Route 30 and the Route 30 Bypass East of McConnellsburg in Ayr Township, Fulton County ("Site 2") and East Wood Street in Todd Township, Fulton County ("Site 3"). Complaint, ¶ 5. Inspections by the Fulton County Conservation District occurred at Site 1 on January 25, 2007, March 15, 2007 and April 25, 2007; at Site 2 on June 13 and 19, 2007; and, at Site 3 on June 25 and 27, 2007. Complaint, ¶¶ 27-50.

The complaint discusses the violations at the three sites stating that "Danfelt" violated the Clean Streams Law, never making a distinction between Danfelt or Giordano individually.

Giordano's answer to the complaint stated that the "averments relate to the conduct of 'Danfelt' which the Department uses to collectively refer to both defendants; Defendant Giordano denies she engaged in any of the activity listed . . . ." Answer to Complaint. The language of her entire answer reflects her argument that she was unaware of the violations and that she did not engage in them.

During a conference call with the parties and the Board on May 26, 2010, the Department argued, for the first time, that spouses can be held responsible if they benefit from the actions of the other spouse. The Department again made this contention in a motion to compel filed with the Board on May 28, 2010 stating "the courts have discussed and assigned responsibility to spouses routinely, particularly when that spouse has benefited from the actions of the other spouse, as in the case at hand." Motion to Compel filed May 28, 2010, ¶ 22. The Department then cited tax evasion and bankruptcy cases to support its contention, *Fluehr v. Paolino*, 75 B.R. 641, 647-48 (E.D.Pa. 1987); *U.S. v. Antoine Cawog and Aurora Cawog,* 87 A.F.T.R.2d 3069 (2006). In the Department's response to the motion for summary judgment this idea is argued again, but in more detail. However, the Department's new argument states that "it is clear that the money was used to support the family . . . it should be inferred that any money made by co-defendant Danfelt went towards the expenses associated with . . . shelter, food and clothing." This is a leap the Board is not prepared to make absent clear evidence to the support the allegations. No such evidence has been offered thus far. In fact most of the arguments on both sides portray Danfelt as a scofflaw who did not meet any obligations.

In the past, the Board has dismissed assessments of civil penalties against a spouse. *See*

Barkman v. DER, 1993 EHB 738 (Board did not find the secretary of a recycling facility liable for violations that occurred at the facility, even though she is joint owner of the land on which the facility is located and the spouse of the facility owner, since she was not involved in management operations); *Blosenski v. DER*, 1992 EHB 1716 (the Board dismisses the assessment against the owner's spouse, co-owner of the real estate and secretary of the business because there was little evidence of her knowledge and participation of the violations). We find it a stretch to accept the Department's contention that Giordano is responsible merely for being married to Danfelt and possibly benefiting from his wrongdoing. In fact, if the Department is seeking liability under such a theory, it is worth noting (1) that this was not raised in its complaint, and (2) that the Defendants were not married to each other during the time of the alleged violations at Site 1. *See* Complaint, ¶¶ 28, 34, 37, 40, 43, 46, 49 (alleged violations occurred on January 25, 2007, March 15, 2007 and April 25, 2007); Motion, ¶ 8 (Defendants were married on April 27, 2007); Giordano's affidavit of May 18, 2011.

As a general rule, the Board may grant a motion for summary judgment where the pleadings, depositions, answers to interrogatories and admissions, together with any supporting affidavits, show that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as matter of law. *See* 25 Pa. Code § 1021.94a; *Angela Cres Trust of June 25,1998 v. DEP*, 2007 EHB 111, 114; *Snyder Bros., Inc. v. DEP*, 2006 EHB 978, 980. When deciding summary judgment motions, the Board must view the record in the light most favorable to the nonmoving party and all doubts as to the existence of a genuine issue of fact are to be resolved against the moving party. *Bethenergy Mines, Inc. v. Dept. of Environmental Protection*, 676 A.2d 711, 714 n.7 (Pa. Cmwlth.), *appeal denied*, 546 Pa. 668 (1996); *see also, e.g.*, *Allegro Oil & Gas, Inc. v. DEP*, 1998 EHB 1162. The granting of summary judgment is appropriate

when a limited set of material facts are truly undisputed and the appeal presents a clear question of law. *Bertothy v. DEP*, 2007 EHB at 254, 255; *CAUSE v. DEP*, 2007 EHB 101, 106.

The Board has already found liability against Danfelt for the violations set forth in the complaint. However, with respect to Giordano the Board is unable to conclude, at this point, whether or not she is liable. The Department does not allege how Giordano is liable; did she actively participate (as alleged in the complaint by referring to both her and Danfelt collectively) or is she liable solely as Danfelt's spouse (which was not raised by the Department until a motion to compel)? If the Department is trying to establish her liability as an active participant in the violations, then it was not clear in the complaint and we need more facts at this point in time to determine whether or not Giordano participated in the violations. If it is the spousal relationship the Department is using to find liability, that claim is not alleged in the complaint and the Department will have a hard time alleging that at a hearing. It is most appropriate to grant motions for summary judgment when a limited set of material facts are truly undisputed and the appeal presents clear questions of law. *Bertothy*, 2007 EHB at 255; *CAUSE v. DEP*, 2007 EHB 101, 106. That is not the case here. We have more than a question of the law, we have a question of the underlying facts of this case. Under these circumstances, we are precluded from granting summary judgment. We will need a more developed record to determine Giordano's involvement and ultimately any liability.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
v.	:	**EHB Docket No. 2008-051-CP-C**
MR. KIRK E. DANFELT and MRS. EVA JOY GIORDANO	:	

ORDER

AND NOW, this 14th day of July, 2011, it is hereby ordered that the Defendant's, Eva Joy Giordano's, motion for summary judgment is denied without prejudice.

ENVIRONMENTAL HEARING BOARD

MICHELLE A. COLEMAN
Judge

DATED: July 14, 2011

c: **DEP Bureau of Litigation:**
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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BLYTHE TOWNSHIP and FKV, LLC, Intervenor	:	
v.	:	**EHB Docket No. 2009-166-L (Consolidated with 2009-115-L and 2008-165-L)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and BOROUGH OF ST. CLAIR, Intervenor	:	**Issued: July 26, 2011**

OPINION AND ORDER ON
MOTION IN LIMINE TO EXCLUDE EXPERT TESTIMONY

By Bernard A. Labuskes, Jr., Judge

Synopsis

In an appeal involving the Department's application of the harms/benefits test in the process of denying an application for a new landfill, the Board denies a motion in limine that sought to exclude the Department's financial expert's opinions regarding financial matters associated with the operation of the proposed landfill.

OPINION

This appeal is from the Department of Environmental Protection's (the "Department's") denial of Blythe Township's application for a waste management permit for the operation of the proposed Blythe Recycling and Demolition Site ("BRADS"), a new construction and demolition waste landfill in Blythe Township, Schuylkill County. The Department denied the waste management permit application for BRADS after completing the Phase I or Environmental Assessment Process review and concluding that Blythe Township did not demonstrate that the benefits to the public from the project clearly outweigh the known and potential harms posed by it.

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The Department has identified James C. Bixby as one of its experts who is expected to testify at the upcoming hearing on the merits. The Department states that Bixby is expected to provide expert testimony relating to "financing, Blythe Township's ability to construct, operate, maintain and assume costs as permittee, the financial implications of the FKV, LLC/Blythe Township relationship, the FKV, LLC/Blythe Township agreements, the allocation of revenue to the parties and social and economic harms and benefits of the project." (FKV is a private entity that will apparently be involved in the operation of the facility.) Bixby prepared an expert report, which offers opinions under five headings: (1) creation of liability to Blythe Township; (2) creation of debt to Blythe Township; (3) payments to FKV are "off the top" of assumed revenues; (4) conflicts of decision making authority; and (5) sales volumes.

The Township has filed a motion in limine asking us to exclude all of Bixby's expert testimony on a number of grounds. The Township's first contention is that Bixby is not qualified to testify as an expert on the aforementioned subject matters. The Township says that Bixby has no experience, training, or education in finance, project financing, business planning for waste management facilities, the construction, operation, and maintenance of waste management facilities, or recycling and waste markets.

The standard for admission of expert testimony is, of course, a liberal one. An expert need only have a "reasonable pretension to specialized knowledge." *Miller v. Brass Rail Tavern*, 664 A.2d 525, 528 (Pa. 1995); *Ziviello v. State Conservation Commission*, 2001 EHB 1177, 1202. Bixby is a certified public accountant with nearly twenty years' of experience as a financial investigator. He has been qualified as an expert on financial matters by this Board on prior occasions. He clearly meets the standard for qualification as an expert to testify about the financial matters listed in his report.

The Township next argues that some of Bixby's statements amount to expert opinion on legal issues, which is not allowed. *Rhodes v. DEP*, 2009 EHB 237. We do not see it that way. Bixby's alleged legal opinions appear to relate to the meaning and consequence of the contract between the Township and FKV. Resolving the meaning of a contract is ordinarily a factual decision. *Kripp v. Kripp*, 849 A.2d 1159 (Pa. 2004); *Community College v. Society of the Faculty*, 375 A.2d 1267 (Pa. 1977); *Kirk v. Brentwood Manor*, 159 A.2d 48, 51 (Pa. Super. 1960). Although this appeal is obviously not a contract dispute, Bixby's opinions regarding the financial implications of the agreement will be meaningless to us unless we first understand what Bixby thinks the agreement means. The Board will make the ultimate determination on what the agreement means, but we are certainly interested in Bixby's views on the matter. The expression of those views, at least as currently articulated, will not necessarily encroach into the forbidden territory of legal opinion. We will be in the best position to prevent any inadvertent excursions into that territory at the hearing itself.

The Township argues that some aspects of Bixby's opinions should be excluded because they have not been expressed with a reasonable degree of professional certainty. Specifically, Bixby states: "It appears *almost* certain that Blythe Township will incur debt as a result of the [Blythe Township/FKV] Agreement" (emphasis added). Bixby also writes; "Clearly, without some evidence of new, dedicated waste streams committed to the Facility, the sales figures *look* difficult, if not impossible to attain" (emphasis added). This is not a reason to exclude Bixby's testimony. First, there is actually no absolute requirement that the phrase "reasonable degree of scientific certainty" be used at the hearing, let alone in an expert report, so long as the testimony, when taken in context and as a whole, reflects the requisite level of confidence. *Mitzelfelt v. Kamrin*, 584 A.2d 888 (Pa. 1990). Bixby's projections do that. Secondly, this case is about

predicting the future. No one operating in this earthly sphere can predict the future with absolute certainty. Expert opinion regarding increased risk and the likelihood of something occurring are routinely admitted, so long as the opinion does more than describe mere possibilities. *Merchant v. WCAB*, 758 A.2d 762 (Pa. Cmwlth. 2000). Bixby's wording expressed the *reasonable degree* of certainty that is required.

Similarly, we see no merit in the Township's complaint that Bixby's opinions constitute speculation and conjecture. Conjecture is a conclusion deduced by surmise or guesswork. WEBSTER'S NEW COLLEGIATE DICTIONARY (1980). The term connotes an inference that is based upon defective or incomplete information and derives from the practice of divining meaning from omens. Our sense from the expert report is that Bixby's opinions rest on a firmer foundation than that.

The Township complains that Bixby's opinions are based upon an inadequate investigation and an incomplete understanding of the facts. These complaints, to the extent they have any validity, go to weight and credibility, not admissibility. The Township's related compliant that Bixby's opinions are not warranted by the record is premature because we have no record against which to compare his opinions. Since we are not reviewing a motion for summary judgment, the pertinent "record" for our immediate purpose is that record which is generated at the hearing, not affidavits and snippets from discovery materials.

The Township says Bixby's opinions are irrelevant. As we said in *Dauphin Meadows v. DEP*, 2002 EHB 235, "motions in limine should not be used as motions for summary judgment in everything but name." *Id.* at 237. The Township's challenge illustrates that an objection to the relevancy of certain evidence can straddle the line between a proper motion in limine and a summary judgment motion in disguise. The Township objects that Bixby's proferred opinion

regarding the future commercial success of the project is irrelevant because -- and here is where we get into a substantive issue in the case -- the prospect for commercial success of a proposed landfill is irrelevant in performing the harms/benefits test, even where the permittee happens to be a municipality. This underlying issue is an interesting and important one whose final resolution will need to await our Adjudication. Suffice it to say at this juncture that the evidence relating to the issue is not so apparently irrelevant as to warrant exclusion by one Board Member in the context of a motion in limine. We will accept Bixby's testimony on this subject and look forward to briefing on the underlying issue.[1]

The Township uses its motion as a vehicle for arguing that Bixby's opinions are simply wrong. This, of course, goes well beyond the limited scope of a motion in limine. "Where there is a dispute between opposing experts, we have repeatedly refused to resolve such questions in the context of summary judgment motions." *CMV Sewage Company, Inc. v. DEP*, 2010 EHB 540, 543; *Pileggi v. DEP*, 2010 EHB 244, 250; *ADK Development v. DEP*, 2009 EHB 251, 253-54. The same approach applies to motions in limine. *Pine Creek Valley Watershed Association v. DEP*, 2011 Pa. Envirn. Lexis 12.

Finally, the primary purpose of expert testimony is to assist the trier of fact in understanding complicated maters. *Rhodes v. DEP*, 2009 EHB 237, 239 (quoting *Bergman v. United Services Auto Ass'n*, 742 A.2d 1101, 1105 (Pa. Super. 1999)). The harms/benefits test requires this Board, which is a quasi-judicial agency focused on *environmental* concerns, to review whether the Department, which is the Commonwealth agency focused on *environmental* protection, acted lawfully and reasonably in assessing the *social* and *economic* harms and

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[1] This same analysis applies to the Township's concern that the harms/benefits test only applies to the landfill *as proposed*, to the extent that means something different than how events will *actually* transpire. For example, the Department in the Township's view must accept the Township's sales projections as a given.

benefits of a proposed landfill project. In performing this complicated task, we can certainly use all the help we can get.

According, we issue the Order that follows.

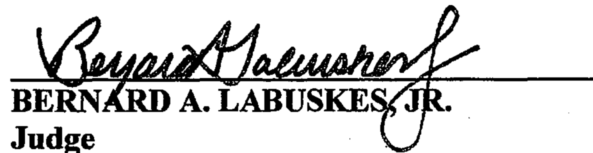
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BLYTHE TOWNSHIP and FKV, LLC, Intervenor	:	
v.	:	**EHB Docket No. 2009-166-L (Consolidated with 2009-115-L and 2008-165-L)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and BOROUGH OF ST. CLAIR, Intervenor	:	

ORDER

AND NOW, this 26th day of July, 2011, it is hereby ordered that the Appellant's motion in limine to exclude the expert testimony of James C. Bixby is **denied**.

ENVIRONMENTAL HEARING BOARD



BERNARD A. LABUSKES, JR.
Judge

DATED: July 26, 2011

c: **DEP, Bureau of Litigation:**
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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**EHB Docket No. 2011-020-CP-L**
v.	:	**Issued: July 29, 2011**
FRANK T. PERANO, BLACK HAWK VILLAGE MOBILE HOME PARK	:	

OPINION AND ORDER ON MOTION TO STRIKE AFFIRMATIVE DEFENSES

By Bernard A. Labuskes, Jr., Judge

Synopsis:

The Board denies the Department's motion to strike. Although not captioned as such, the Department's motion is in the form of preliminary objections to the Defendant's affirmative defenses and the Board's rules do not allow preliminary objections.

OPINION

The Department of Environmental Protection (the "Department") filed a complaint on March 15, 2011 against Frank T. Perano ("Perano") who is the owner of Black Hawk Mobile Home Park for failing to maintain a pump station in proper working order. Perano is the permit holder of a water quality management permit (Permit No. 1498413), which authorizes the operation of a pump station that conveys domestic wastewater from Black Hawk to Centre Hall-Potter Sewer Authority for treatment. The Department's complaint consists of eleven counts, one for each day of the alleged violations from August 22 through September 1, 2009 for failing to

maintain the pump station resulting in raw sewage discharges in violation of the permit and Section 611 of the Clean Streams Law, 35 P.S. § 691.611. The Department is seeking $45,398 in civil penalties.

Perano's answer to the complaint raised 14 affirmative defenses. These defenses include, among other things, that the pump station was cleaned and repaired within three hours of Perano being notified of the problem; the clean-up and repair resulted in a $5,000 expense and a civil penalty compounds the financial expense; there was no damage to the waters of the Commonwealth because the spill was maintained on the property; the standard conditions in the permit are unlawful; the Board determines the amount of the civil penalty; and a third party interfered with Perano's attempts to comply with the permit. These affirmative defenses prompted the Department to file a motion to strike the defenses. Perano responds that the Department's motion to strike is essentially a preliminary objection in the nature of a demurrer to his affirmative defenses. He continues that, based on the Board's rules, such a motion is procedurally improper.

Our rules allow affirmative defenses to be raised in an answer, 25 Pa. Code § 1021.74(c), but they specifically provide that "[n]o new matter or preliminary objects shall be filed," 25 Pa. Code § 1021.74(e). As stated in the past by the Board, "[p]reliminary objections challenge a pleading because the pleading, e.g., fails to conform to law or rule, contains scandalous matter, is insufficiently specific, or is legally insufficient." *Perano v. DEP*, 2010 EHB 327, 328, *citing* Pa.R.Civ.P. 1028. We agree with Perano that the Department's motion to strike is for all intents and purposes a collection of preliminary objections to his pleading. For example, the Department objects on grounds that Perano's affirmative defenses do not constitute valid defenses, are insufficiently pled, raise issues beyond the complaint, and so on. These attacks on the affirmative

defenses fall squarely into what a preliminary objection is and our rules disallow such a filing. Although we are willing to strike new matter from an answer because it is specifically prohibited by our rules, 25 Pa. Code § 1021.74(e); *DEP v. Neville Chemical Company, Inc.*, 2005 EHB 225; *DEP v. Barefoot*, 2003 EHB 667, the motion here simply comes too close to prohibited preliminary objections. Board proceedings are already complicated enough. Preliminary skirmishes over the format or content of pleadings should be the exception, not the rule.

Even if our rules allowed such a motion, we would further deny the motion based on the arguments presented by the Department. The Department's motion argues that Perano's affirmative defenses lack specificity. Our rules provide that "[a]nswers shall be in writing and so drawn as to fully and completely advise the parties and the Board as to the nature of the defense, including affirmative defenses." 25 Pa. Code § 1021.74(c). Not all details necessarily need to be pled. Chief Judge Renwand discussed Rule 1021.74 in *Neville Chemical*:

> The Board's rule is thus a combination of aspects of state pleading as set forth in the Pennsylvania Rules of Civil Procedure in that it requires fact pleading. However, it follows the federal practice of setting forth affirmative defenses in the Answer itself as opposed to a special designation of affirmative defenses under the heading of 'new matter' as required by Pennsylvania Rules of Civil Procedure 1030.

Neville Chemical, 2005 EHB at 227. The Board's rule tends to track the federal practice of notice pleading. *See Bell Atlantic Corp v. William Twombly,* 550 U.S. 544 (2007); *Conley v. Gibson,* 355 U.S. 41, 47 (1957) (Federal Rule of Civil Procedure 8(a)(2) requires only a short and plain statement of the claim in order to give fair notice of what the claim is and the ground upon which it rests.); *Howard Hess Dental Laboratories, Inc., et al. v. Denstply International, Inc., et al.*, 602 F.3d 237 (3rd Cir. 2010); *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 317 (3d Cir. 2007) (claims must allege facts sufficient to raise a right to relief above the speculative level).

The Department's argument that the affirmative defenses lack specificity and documentation does not hold up under this standard. We certainly do not expect to have documentation to support affirmative defenses during the pleadings stage. Perano's affirmative defenses are pled in such a manner that they provide the Department with notice of the nature of his defenses. Further detail will come later during the period for discovery. Our rules provide for a lengthy period of discovery, at which time the parties will have the opportunity to gain information and documentary evidence relating to the claims of each party. *See* 25 Pa. Code § 1021.101(a)(1) ("all discovery shall be completed no later than 180 days . . . .").

The Department argues that these "affirmative defenses" are not really affirmative defenses. Perano responds that he was unable to adequately defend against the Department's complaint by merely denying the factual allegations in the complaint; thus, he provided affirmative defenses under a separate heading in his answer. We agree. An affirmative defense is a defense raising a factual or legal issue other than those put in play by the plaintiff's cause of action. *Sterten v. Option One Mortgage Corp.*, 546 F.3d 278 (3d Cir. 2008). Furthermore, we are left to wonder what difference it makes. Our rules provide that "the Board at every stage of an appeal or proceeding may disregard any error or defect of procedure which does not affect the substantial rights of the parties." 25 Pa. Code § 1021.4. We will not strike the affirmative defenses because they are said to be misplaced within the answer. Doing so would elevate form over substance. *DEP v. Neville Chemical Company, Inc.*, 2005 EHB 225, 227.

The Department fails again when it argues that some of Perano's affirmative defenses do not challenge liability, but go to the issue of how severe or lenient the civil penalty should be for the violations. This argument is confusing at best. When the Department files a complaint for civil penalties it is the Board's role to review the record to determine whether the Department has

established that the Defendant has violated the law. If so, the Board will then make an independent determination of the appropriate penalty amount. *DEP v. Simmons*, 2010 EHB 262, 276; *DEP v. Pecora*, 2008 EHB 14; *DEP v. Kennedy*, 2007 EHB 15. A civil penalty complaint before the Board involves both liability and penalty amount, and any defense raised in the answer addressing each of those is appropriate.

Perano raises constitutional claims in his affirmative defenses that the civil penalty violates his constitutional rights. The Department contends in its motion that Perano's rights have not been violated. Similarly, the Department's motion attacks the merits of Perano's Affirmative Defense 8, which provides, "[t]o the extent the Standard Conditions in the Water Quality Management Permit are not set forth in the Department's regulations, they constitute unlawful regulations and are, therefore, invalid." The Department suggests that this defense cannot be raised because of administrative finality. These types of challenges to the merits run far beyond the scope of a motion on the pleadings. We will not decide the viability of these defenses in the context of a motion to strike in the nature of a demurrer.

According, we enter the following Order.

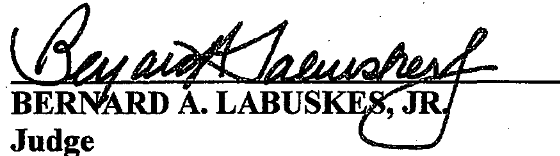
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
v.	:	**EHB Docket No. 2011-020-CP-L**
FRANK T. PERANO, BLACK HAWK VILLAGE MOBILE HOME PARK	:	

ORDER

AND NOW, this 29th day of July, 2011, it is hereby ordered that the Department's motion to strike is **denied.**

ENVIRONMENTAL HEARING BOARD



BERNARD A. LABUSKES, JR.
Judge

DATED: July 29, 2011

c: **DEP, Bureau of Litigation:**
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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

JIM LYONS AND MARY JO TAKACS	:	
	:	
	:	
v.	:	**EHB Docket No. 2009-099-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and ST. CLAIR RESORT DEVELOPMENT, LLC, Permittee	:	**Issued: August 2, 2011**

OPINION AND ORDER ON
<u>PETITION FOR ATTORNEYS' FEES AND COSTS</u>

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board denies a permittee's petition for attorneys' fees and costs under Section 307(b) of the Clean Streams Law. The Board finds that fees are not warranted under the Clean Streams Law because the permittee failed to show instances of bad faith or vexatious conduct or a lack of colorable arguments by the third-party appellants.

OPINION

St. Clair Resort Development, LLC ("St. Clair") has filed an application seeking to recover $52,669.64 in fees and costs pursuant to Section 307(b) of the Clean Streams Law, 35 P.S. § 691.307(b), as a result of its successful defense of a third-party appeal filed by James H. Lyons and Mary Jo Takacs (hereinafter collectively "Lyons") from the Department of Environmental Protection's (the "Department's") issuance of a water obstruction and encroachment permit to St. Clair to expand and maintain its existing dock facility on Indian Lake

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http://ehb.courtapps.com

in the Borough of Indian Lake, Somerset County. After a hearing, we issued an Adjudication and Order dismissing the appeal because the Department did not err in issuing a permit for the St. Clair dock. *Lyons v. DEP*, (Adjudication, March 29, 2011). Both the Department and St. Clair took an active role in defending the Department's action.

A preliminary issue that we must address is whether St. Clair's petition can be entertained under the Clean Streams Law, which permits recovery of attorneys' fees and costs in an action arising under that statute, or if this action is more appropriately defined as having arisen under the Dam Safety and Enforcement Act ("DSEA"), 32 P.S. § 693.1 *et seq.*, which does not permit recovery of such fees and costs. We need not tarry long on this question. The test is whether the litigation constitutes proceedings "pursuant to" the Clean Streams Law. 35 P.S. § 691.307(b); *PCVWA v. DEP*, 2008 EHB 705, 708, *aff'd*, No. 12 C.D. 2009 (Pa. Cmwlth., March 25, 2010). Lyons's appeal clearly constituted, at least in part, proceedings pursuant to the Clean Streams Law. Among other things, he presented argument and testimony that the project violated the Clean Streams Law and regulations promulgated thereunder because of the adverse effect the dock would allegedly have on the water quality of the lake and the creatures that live therein. Had an award of fees been appropriate, we might have found it necessary to apportion the fees according to the percentage of the case that dealt with Clean Streams Law issues, but for the reasons that follow we never reach that point in this case.

Section 307(b) of the Clean Streams Law grants this Board broad discretion to order the payment of attorneys' fees and costs that we determine to have been reasonably incurred by a party. *Solebury Township v. DEP*, 928 A.2d 990, 1005 (Pa. 2007). The Board's broad discretion authorizes the Board to award such fees and costs to "any party" and this is a situation in which a permittee has asked the Board to order a third-party appellant to pay the permittee's attorneys'

fees and costs. Under certain limited circumstances, we believe that it might be appropriate to require an unsuccessful third-party appellant to reimburse a permittee for fees incurred in the defense of its permit. *Alice Water Protection Ass'n v. DEP*, 1997 EHB 840, 843. The only circumstance that we can currently imagine where such an award might be appropriate is a case where the appellant's appeal was frivolous or brought in bad faith. *Alice Water Protection Ass'n*, 1997 EHB at 851. *Cf. Solebury*, 928 A.2d at 1005 (discussing award of fees against the Commonwealth under Section 307(b) based upon finding of bad faith or vexatious conduct). Also *cf. Lucchino v. DEP*, 809 A.2d 264, 269 (Pa. 2002) (upholding award of fees to a permittee in a third-party appeal brought under the Surface Mining Conservation and Reclamation Act (SMCRA), 52 P.S. § 1396.1 *et seq.*, as it existed at that time); 27 Pa. C.S. § 7708(c) (fees may be awarded to permittee if a party participated in a proceeding concerning coal mining activities in bad faith or for purposes of harassing or embarrassing the permittee). In other words, fees might be appropriate if it is clear that there was no colorable basis for an appeal, or the appellant's goal was to do nothing more than harass, embarrass, or annoy, or the appellant was animated by fraudulent, dishonest, or corrupt behavior. *Cf. Lucchino,* 809 A.2d at 269-70 (party's conduct was dilatory, obdurate, vexatious, or in bad faith); *Thunberg v. Strause*, 682 A.2d 295, 299-300 (Pa. 1996) (defining bad faith or corrupt behavior). As eloquently explained in *Alice Water Protection Ass'n*, requiring anything less would have an undue chilling effect on the right of access to the judicial process and the right to petition the government for redress of grievances. *Id.*, 1997 EHB at 843-52.[1]

Here, our review of the record does not support St. Clair's assertion that Lyons acted in bad faith or engaged in vexatious conduct. Although Lyons was not ultimately successful in his

[1] The test and reasoning set forth in *Alice Water Protection Ass'n* was left intact by the Supreme Court in *Solebury*. *Solebury*, 928 A.2d at 995 n.6.

appeal, we are satisfied that he was motivated by legitimate concerns. He sincerely wished to protect the lake and believed, albeit incorrectly, that St. Clair's dock would have an adverse impact on the lake's environment. He also had a genuine concern for his safety and the safety of the other users of Indian Lake. Furthermore, he supported his appeal with extensive expert testimony. One of his experts addressed a concern that there would be environmental harm due to the docking of watercraft because of the shallowness of the area where they would be docked. There was also expert testimony that the dock could cause safety problems, a point the Board acknowledged. Lyons through counsel vigorously examined the Department and St. Clair's witnesses and raised many points that gave us considerable food for thought. The fact that Lyons ultimately did not prevail does not mean that this case lacked colorable grounds. Finding neither bad faith nor frivolity, we conclude that no award of fees is warranted in this case.

Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

JIM LYONS AND MARY JO TAKACS	:	
	:	
	:	
v.	:	**EHB Docket No. 2009-099-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and ST. CLAIR RESORT DEVELOPMENT, LLC, Permittee	:	

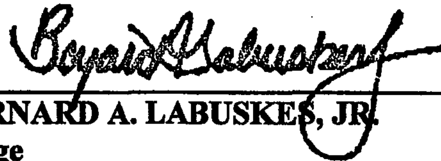
ORDER

AND NOW, this 2nd day of August, 2011, it is hereby ordered that the Permittee's petition for attorneys' fees and costs is **denied**.

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Chairman and Chief Judge

MICHELLE A. COLEMAN
Judge



BERNARD A. LABUSKES, JR.
Judge

RICHARD P. MATHER, SR.
Judge

DATED: August 2, 2011

c: **DEP Bureau of Litigation:**
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