COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

ADJUDICATIONS VOLUME II

1984

MEMBERS

OF THE

ENVIRONMENTAL HEARING BOARD

DURING THE PERIOD OF THE
ADJUDICATIONS

1984

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

Member.....EDWARD GERJUOY

Cite by Volume and Page of the
Environmental Hearing Board Reporter

Thus: 1984 EHB 1

FORWARD

In this volume are contained all of the final adjudications of the Environmental Hearing Board issued during the calendar year 1984.

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

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

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

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

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

In addition, the Board hears civil penalties cases pursuant to The Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §691.1, *et seq*. and the Air Pollution Control Act, Act of January 8, 1960, P.L. 2119, *as amended*, 35 P.S. §4001 *et seq*. and reviews the Department's assessments of civil penalties under Section 605 of the Solid Waste Management Act, Act of July 7, 1980, P.L. 380, 35 P.S. 6018.605 and under Section 13 of the Surface Mining Conservation and Reclamation Act, Act of May 31, 1945, *as amended*, November 30, 1971, 52 P.S. 1396.22.

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

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1. Administrative Code, §472.71 P.S. §180-2.

2. Act of September 2, 1961 (P.L. 1177, No. 525) *as amended* November 8, 1971 (P.L. 535, No. 138).

secretary[3] is appointed by the Board with the approval of the Governor.

The department is a party before the Board in most cases.[4] Other parties include recipients of DER orders, penalties assessments, permit denials and modifications and other DER actions. Third party appeals from permit issuances are also common in which cases the permittees are also parties.

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3. The current Secretary of the Board is M. Diane Smith, who was appointed on April 1, 1976.

4. The one exception has been appeals from decisions of municipalities and county health departments under the Pennsylvania Sewage Facilities Act, Act of January 24, 1966, P.L. 1535, *as amended*, 35 P.S. §750.1, *et seq*. That exception was eliminated for the future by amendments to the Pennsylvania Sewage Facilities Act enacted July 22, 1974, (Act 208).

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1984 ADJUDICATIONS

COMMONWEALTH OF PENNSYLVANIA

BEFORE THE

ENVIRONMENTAL HEARING BOARD

BUTLER TOWNSHIP BOARD OF SUPERVISORS	:	EHB DOCKET NO. 83-037-M
Appellant	;	
v.	:	Clean Streams Law, 35 P.S. §691.1 et seq. -preemption of local zoning ordinances
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
Appellee	:	
BOROUGH OF ASHLAND	:	
Intervenor	:	
FRACKVILLE AREA MUNICIPAL AUTHORITY	:	
Intervenor	:	

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

By: Anthony J. Mazullo, Jr., Member, November 15, 1984

Appellant, Butler Township Board of Supervisors (Butler), appeals an order of the Department of Environmental Resources (DER), dated January 17, 1983, which required Butler, along with the surrounding municipalities and sewer authorities,[1] to execute an agreement

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1. The municipalities and sewer authorities subject to DER's order of January 17, 1983 are: Butler Township; Frackville Borough; West Mahanoy Township; Frackville Area Municipal Authority (FAMA); and Butler Township Municipal Authority. It should be noted that DER was mistaken in its belief that Butler Township had organized a municipal sewer authority. In fact, Butler Township does not have a municipal sewer authority and had declined an offer to join FAMA.

providing for the construction of a regional sewage treatment facility at a DER-specified site in Butler Township. Butler was the only municipality which appealed DER's order; West Mahanoy Township and Frackville Borough did not appeal.

Location of a regional sewage treatment facility at the DER-specified site (hereinafter: Site # 1) would result in the discharge of treated sewage into Little Mahanoy Creek, which flows around Ashland Reservoir in Butler Township. Because of the potential impact on Ashland Reservoir, which is the sole source of suitable water for Ashland residents, the Borough of Ashland was granted intervenor status. Similarly, because DER's order required the surrounding sewer authorities to participate in the process of executing an agreement providing for the construction of a sewage treatment facility, Frackville Area Municipal Authority (FAMA), the sewer authority for the Borough of Frackville, was granted intervenor status.

After the submission of Pre-Hearing Memorandums, hearings were conducted on October 25, 26 and 27, 1983 by Board Member Anthony J. Mazullo, Jr. Thereafter, Post-Hearing Briefs were duly filed and the record was presented for adjudication.

FINDINGS OF FACT

1. Appellant, Butler Township Board of Supervisors, represents Butler Township, a duly organized Township of the Second Class, a political subdivision of the Commonwealth of Pennsylvania.

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

3. Intervenor Ashland Borough is a duly organized borough under the provisions of the Borough Code of the Commonwealth of Pennsylvania.

4. Intervenor Frackville Area Municipal Authority (FAMA) is a regional municipal authority formed by Frackville Borough to undertake the construction and operation of sewage collection and treatment facilities for the purpose of serving Frackville Borough, sections of Butler Township (specifically Englewood and Walnick Manor) and sections of West Mahanoy Township (specifically Altamont and Crestmont).

5. Frackville Borough is located at the top of Broad Mountain. Bordering Frackville to the west are the Englewood and Walnick Manor sections of Butler Township. Bordering Frackville to the east are the Altamont and Crestmont sections of West Mahanoy Township. Bordering Frackville to the north is Gilberton Borough.

6. Ashland Borough is located to the west of Butler Township.

7. The Ashland Reservoir is located in Butler Township, west of Frackville Borough, north of Little Mahanoy Creek.

8. Little Mahanoy Creek flows in an east to west direction, beginning east of Frackville Borough.

9. Little Mahanoy Creek flows around, and not into, Ashland Reservoir.

10. Mahanoy Creek is located to the north of both the Little Mahanoy Creek and Frackville Borough. Mahanoy Creek flows through Gilberton Borough.

11. Little Mahanoy Creek flows through Frackville Borough down into a valley west of Frackville where the creek is diverted into a man-made sluiceway located to the south of Ashland Reservoir.

12. Ashland Borough owns a water distribution facility which consists of Ashland Reservoir, a watershed and certain distribution lines.

13. Little Mahanoy Creek is in the same watershed as Ashland Reservoir.

14. Frackville Borough, West Mahanoy Township and Butler Township have all adopted an official sewage facilities plan pursuant to the Sewage Facilities Act, 35 P.S. §750.1 et seq., and 25 Pa. Code §71.

15. The official sewage plans of the three municipalities were submitted to and approved by DER pursuant to the Sewage Facilities Act, 35 P.S. §750.1 et seq., and 25 Pa. Code §71.

16. The official sewage plans of the three municipalities are set forth in a wastewater study which is entitled "North Schuylkill County, Pennsylvania Wastewater Management Study," dated May 1972 and prepared by Betz Environmental Engineers, Inc.

17. Charles H. Quandel Associates, Inc., prepared a wastewater study for the Frackville area, dated February 11, 1981, which addressed existing and proposed wastewater collection and treatment facilities for the Frackville area.

18. DER's order of January 17, 1983 requires Frackville Borough, Butler Township, West Mahanoy Township and FAMA to execute satisfactory agreements which would allow for the implementation of the official sewage plans of these municipalities and assure that all facilities called for or described in the official sewage plans and the Quandel study are constructed and placed into operation.

19. DER's order of January 17, 1983 also requires that the aforementioned agreements provide for the construction, maintenance and operation of a regional sewage treatment facility by Frackville Borough, West Mahanoy Township, Butler Township and FAMA at Site # 1 as set forth in the Quandel study.

20. Quandel's Site # 1 is a 7.835 acre partially wooded parcel of land located in Butler Township on the south side of Pennsylvania Route 61, approximately one half (1/2) mile east of Ashland Reservoir.

21. Site # 1 is owned by Pennsylvania Power and Light Company (PP&L).

22. FAMA proposes to buy Site # 1 from PP&L.

23. The sewage collection system currently in use in the area surrounding Frackville Borough is quite old and in a deteriorated condition. The entire system is subject to much inflow and infiltration.

24. FAMA presently operates a sewage pump station located at Fourth and Chestnut Streets in Frackville Borough, for the conveyance

of sewage from portions of Frackville Borough, West Mahanoy Township and Butler Township.

25. Sewage that is pumped through the Frackville pump station is inadequately treated or untreated and discharged down a hillside into an abandoned mine located in Gilberton Borough.

26. The Frackville pump station occasionally suffers pump failures or overflows of storm water into the station which exceed the pump's capacity. The resultant overflow of inadequately treated or untreated sewage drains into and pollutes Little Mahanoy Creek.

27. Neither Frackville Borough nor West Mahanoy Township nor Butler Township has a complete sewage system sufficient to collect and convey all the sewage from each municipality to the Frackville pump station.

28. Neither Ashland Borough nor Butler Township disputes the need of Frackville and the surrounding municipalities for adequate sewage collection and treatment facilities.

29. The discharge of untreated or inadequately treated sewage into Little Mahanoy Creek is injurious to public health; to animal and aquatic life; and to industrial, recreational and domestic uses of these waters.

30. Adequate treatment of the sewage that drains into Little Mahanoy Creek is necessary to prevent public health hazards and to prevent pollution of Little Mahanoy Creek and other points of discharge into waters of the Commonwealth.

31. Site # 1 is in an area zoned "woodland-conservation" under Section 401 of Butler Township's zoning ordinance.

32. Permitted uses under Section 401 of Butler Township's zoning ordinance are as follows:

a. forest, scenic and wildlife preserves;

b. single-family detached dwellings;

c. public uses, structures or buildings owned or operated by the municipality or an authority organized by the municipality.

33. The Butler Township Zoning Hearing Board has refused to grant a special exception, a variance and a zoning permit to FAMA for the construction of a regional sewage treatment facility at Site # 1 in Butler Township. The decision of the Zoning Hearing Board was affirmed by the Court of Common Pleas of Schuylkill County at No. S-1004 of 1981 (January 5, 1982). The decision of the Court of Common Pleas was subsequently affirmed by Commonwealth Court at 234 CD on October 21, 1982.

34. Frackville Borough, West Mahanoy Township, Butler Township and FAMA have failed to enter into an agreement, satisfactory and acceptable to DER, for the implementation of a plan covering the collection and treatment of sewage from Frackville Borough, the Village of Englewood in Butler Township and the Village of Altamont in West Mahanoy Township, and for the construction of a regional sewage treatment facility at Site # 1.

35. DER's order of January 17, 1983 was issued after consideration of the official sewage plans of Frackville Borough, West Mahanoy Township and Butler Township.

36. The official sewage plan of Frackville Borough proposes that maximum use should be made of existing sewage collection systems. The plan also proposes that the capacity of the Frackville pump station be increased to enable the station to handle sewage from Altamont and Englewood. The plan further proposes that the combined sewers in the north drainage area be replaced so that storm water flow through Frackville's collection system can be eliminated, thereby decreasing the amount of pumping required in the system.

37. The official sewage plan of Altamont proposes the construction of a separate collection system which would discharge into Frackville's collection system.

38. The official sewage plan of Butler Township proposes a series of sewage collection lines to be placed throughout Butler Township, including the Village of Englewood.

39. West Mahanoy Township currently has sewage collection lines which drain into the Frackville collection system.

40. The official sewage plans of Frackville Borough, Butler Township and West Mahanoy Township are capable of being implemented in an internally consistent manner.

41. The Quandel study considered the need of Frackville Borough, West Mahanoy Township and Butler Township for a comprehensive sewage collection and treatment system.

42. The Quandel study set forth a cost analysis of sewering Frackville Borough, Englewood and Altamont in relation to ultimate sewage treatment and disposal.

43. The Quandel study considered two locations for a regional sewage treatment facility, identified as Site # 1 and Site # 2.

44. Site # 1 as set forth in the Quandel study is the 7.835 acre tract located in Butler Township. A sewage treatment facility operated at Site # 1 would discharge sewage into Little Mahanoy Creek.

45. Site # 2 as set forth in the Quandel study is located in Gilberton Borough. A sewage treatment facility operated at Site # 2 would discharge sewage into Mahanoy Creek.

46. The Quandel study considered the advantages and disadvantages of locating a sewage treatment facility at Site # 1 or Site # 2.

47. The Quandel study recommended Site # 2 for location of a regional sewage treatment facility.

48. The Quandel study was considered by DER in preparing and issuing its order of January 17, 1983.

49. No part of DER's order of January 17, 1983 has been complied with by the municipalities subject to that order.

50. Malfunctions at the Frackville pump station cause sewage from Butler Township to contribute to the pollution of Little Mahanoy Creek.

51. Frackville Borough and FAMA have attempted in good faith to comply with DER's order of January 17, 1983.

52. The official sewage plan of Butler Township proposes Site # 2 for the location of a regional sewage treatment facility.

53. Site # 2, as set forth in the official sewage plan of Butler Township, is located in Girardville, with a proposed discharge into Mahanoy Creek.

54. The wastewater study conducted by Betz Environmental Engineers, Inc., considered twenty one (21) sites as alternate locations for a proposed regional sewage treatment facilty.

55. In preparing and issuing its order, DER considered twenty one (21) alternate sites for a proposed regional sewage treatment facility, including Site # 1, Quandel study's Site # 2 and Betz study's Site # 2.

56. Harleth W. Davis, Jr., a DER employee and an expert in wastewater treatment and watershed management, participated in DER activities leading up to the issuance of DER's order of January 17, 1983.

57. In issuing DER's order, Mr. Davis did not consider the zoning ordinance of Butler Township.

58. In issuing DER's order, Mr. Davis was aware that Farmers' Home Administration was opposed to financing a proposed sewage treatment facility at Site # 2.

59. Richard J. Sichler is employed by DER as a regional hydrogeologist.

60. In the course of carrying out his duties for DER, Mr. Sichler examined the hydrogeology of Ashland Reservoir and its environs.

61. In the course of carrying out his duties for DER, Mr. Sichler conducted a study to determine the effect, if any, of a proposed sewage treatment facility to be located on Site # 1 on the quality of water in Ashland Reservoir and the quantity of water flowing into Ashland Reservoir.

62. In conducting his study, Mr. Sichler sought to identify ground water discharge and recharge areas to determine where such areas were located and how construction and operation

of a regional sewage treatment facility at Site # 1 would affect those areas.

63. A ground water recharge area is an area that receives precipitation which percolates through the soil and contributes to the ground water flow in that area.

64. A ground water discharge area is an area where ground water is expelled from the ground and which becomes surface water through seeps or springs.

65. Mr. Sichler also conducted field observations in the areas surrounding Little Mahanoy Creek and Ashland Reservoir for the purpose of identifying ground water recharge and discharge areas.

66. Based upon his field observations, Mr. Sichler prepared a map which identified the ground water recharge and discharge areas surrounding Little Mahahoy Creek and Ashland Reservoir.

67. In preparing the map referred to in Finding of Fact No. 66, Mr. Sichler interpreted aerial photographs supplied by the United States Geological Survey (USGS).

68. The USGS photographs represent an accurate topographical depiction of Frackville Borough, West Mahanoy Township and Butler Township and indicate possible areas of fractures or faults.

69. After studying the USGS photographs, Mr. Sichler conducted a fracture trace analysis of the areas surrounding Little Mahanoy Creek and Ashland Reservoir.

70. Mr. Sichler field-checked the results of his fracture trace analysis.

71. A "fracture" describes rock strata which is broken but where there is no discernible movement between the two blocks of rock.

72. A "fault" describes rock strata which is broken and where there is some movement between the two blocks of rock.

73. A fracture trace analysis may indicate zones of fractured bedrock, which induce a higher ground water flow along the line of the fractured bedrock.

74. The existence of fractured bedrock changes the shape of ground water basins, which alters the ground water flow to a configuration that does not appear on the surface.

75. The fracture trace analysis conducted and field-checked by Mr. Sichler did not show any significant traces of fractured bedrock in the area surrounding Site # 1.

76. The fracture traces in the area surrounding Site # 1 will not have any significant impact on the ground water that reaches Ashland Reservoir.

77. In conducting his studies and carrying out his field investigations, Mr. Sichler determined that Site # 1 is located in a ground water discharge area.

78. Ground water at Site # 1 will not flow any farther downstream into Ashland Reservoir.

79. Ground water at Site # 1 is discharged into Little Mahanoy Creek and carried around Ashland Reservoir by the sluiceway and aqueduct system into which the creek is diverted south of Ashland Reservoir.

80. Site # 1 is not located in the ground water basin which provides ground water flow for Ashland Reservoir.

81. A field investigation conducted by Mr. Sichler shows that Little Mahanoy Creek is a gaining creek, in terms of flow, as it approaches Ashland Reservoir. As a result, Little Mahanoy

Creek is not in a critical recharge area of Ashland Reservoir.

82. Construction and operation of a sewage treatment facility at Site # 1 would not alter the ground water flow in the ground water basin.

83. Construction of a treatment facility at Site # 1, should it involve blasting, would not affect the ground water or surface water flow into the Ashland Reservoir.

84. In terms of soil conditions, the phrase "artesian" describes a soil condition where there is a consistent upward pressure of ground water.

85. A "swampy area" is one form of an artesian condition.

86. Site # 1 is located in a swampy area.

87. Construction of a treatment facility at Site # 1 would involve some form of pumping to lower the water table and alleviate the artesian condition of the soil in order to provide a suitable foundation on which to construct the facility.

88. A pumping system could be designed to limit the effects of such pumping to the 7.835 acre area designated as Site # 1.

89. Pumping at Site # 1 during construction would not threaten the springs that flow into Ashland Reservoir because Site # 1 is located in a discharge area.

90. The use of pumping to alleviate an artesian condition is not an unusual construction technique for sewage treatment facilities located in swampy areas.

91. A geological fault is located within one half (1/2) mile of Ashland Reservoir and it terminates approximately one quarter (1/4) of a mile west of Site # 1.

92. The existence of a geological fault within one quarter (1/4) of a mile west of Site # 1 would not have an impact on the location and operation of a sewage treatment facility on Site # 1.

93. Paul Malinchok is vice president of FAMA.

94. In his capacity as vice president of FAMA, Mr. Malinchok is familiar with maintenance procedures concerning the present sewage collection systems in Frackville Borough.

95. On numerous occasions, Mr. Malinchok has observed raw sewage flowing in the streets of Englewood. Sewage from Englewood flows into and pollutes Little Mahanoy Creek.

96. Butler Township officials declined an offer from FAMA to join FAMA.

97. Funding in the form of grants and loans is available to FAMA from Farmers' Home Administration and Appalachian Regional Council, provided FAMA constructs a sewage treatment facility on Site # 1.

98. Without the combination of loans and grants from Farmers' Home Administration and Appalachian Regional Council, FAMA will be unable to pay for the construction of a sewage treatment facility.

99. Ground water flow in the areas surrounding Little Mahanoy Creek and Ashland Reservoir is mostly controlled by topographical features.

100. The existence of geological fractures and faults in the areas surrounding Little Mahanoy Creek and Ashland Reservoir does not alter in any significant manner the ground water flow in those areas.

101. Lawrence A. Pawlush is employed by DER as a Water Quality Regional Manager for the Wilkes-Barre region. The Wilkes-Barre region encompasses the area of the proposed sewage treatment facility.

102. Mr. Pawlush supervised Mr. Harleth W. Davis, Jr. and Mr. Richard J. Sichler in their capacities as DER employees.

103. Mr. Pawlush was directly responsible for DER's order of January 17, 1983.

104. Mr. Pawlush's decision to issue DER's order was based upon: information received by Mr. Davis, a DER geologist; field investigations conducted by Mr. Pawlush; the condition of existing sewage collection systems in the Frackville area; the dispensability of an on-site pumping station if the facility was constructed at Site # 2; the availability of taking in sections of Butler Township that would not be sewered; construction costs; operational costs, including standby electrical power costs; economic and developmental factors; including proposed expansion of the Frackville area for a motel and a prison complex; and the availability of funding for Site # 1.

105. Frank W. Sarnes, Jr. is vice president of engineering for Charles H. Quandel Associates, Inc., and the author of the Quandel study dated February 11, 1981.

106. As revealed by an analysis of the Quandel study, some of the disadvantages of locating a treatment facility at Site # 2 include: the necessity of pumping eighty (80) percent of the collected sewage up a mountainside; the necessity of building a long discharge line which would run down a steep mountain and across coal fields to Mahanoy Creek; the necessity of purchasing several parcels of land currently owned by Reading Company; and the necessity of constructing a supplementary pump station to be located

at Site # 1 to handle the sewage from Englewood and Walnick Manor.

107. Due to the delay in constructing a regional sewage treatment facility, the economic costs increase, the availability of funding is jeopardized, the development of housing projects and an industrial park is impeded, and pollution of Little Mahanoy Creek continues unabated.

108. The Pennsylvania Bureau of Corrections plans to construct a prison complex south of Frackville Borough.

109. The plans for the proposed prison complex anticipate tying into the Frackville area sewer system.

110. The prison complex cannot tie into the Frackville area sewer system unless a sewage treatment facility is constructed.

111. Because of the extent of development in, and the size of, Frackville Borough, there is no feasible location in Frackville Borough on which to construct a sewage treatment facility.

112. Construction and operation of a regional sewage treatment facility at Site # 1 would not involve any violations of generally accepted water management or resource management principles.

113. Dennis Pennington is vice president of the geotechnical group of SMC Martin, Inc., Valley Forge, Pennsylvania.

114. Mr. Pennington conducted field observations in the area surrounding Ashland Reservoir and prepared a ground water impact study for Ashland Borough officials.

115. Four major springs and a well drilled in 1980 by Mr. Pennington provide the major sources of water for the Ashland Reservoir.

116. Ashland Reservoir covers an area of approximately thirteen hundred (1,300) acres.

117. Ashland Reservoir is located in a woodland-conservation zone as designated by Butler Township's zoning ordinance.

118. Ashland Reservoir has a capacity of one hundred ten million (110,000,000) gallons.

119. Ashland Reservoir's water supply meets the potable drinking water quality requirements set by DER.

120. Ashland Reservoir supplies water to approximately five thousand two hundred (5,200) area residents.

121. Ashland Reservoir supplies the only suitable source of potable drinking water for area residents presently served by the reservoir.

122. The normal daily consumption rate for Ashland Reservoir is approximately eight hundred thousand (800,000) gallons.

123. The total capital cost of placing a treatment facility at Quandel's Site # 2 is approximately eight percent greater than the total capital cost of placing the facility at Site # 1, excluding the addition of an outfall structure at Site # 2, which would significantly increase the cost of placing the facility at Site # 2.

124. A proposed stream relocation set forth in the Quandel study would relocate Little Mahanoy Creek within the discharge area and therefore would not affect the feeder springs, seeps or other ground water sources that recharge Ashland Reservoir.

125. Ashland Reservoir has been polluted by sewage overflow from Little Mahanoy Creek on only one previous occasion. This occurred in 1951 when faulty maintenance procedures resulted in the failure to remove in a timely fashion a fallen tree that had blocked

the creek's channel, causing an overflow and the discharge of sewage into Ashland Reservoir.

126. Except for the overflow incident in 1951, there is no evidence whatsoever of sewage from Little Mahanoy Creek discharging into Ashland Reservoir.

127. Englewood and Walnick Manor must be sewered in order to eliminate the contribution of these municipalities to the pollution of Little Mahanoy Creek.

128. If a regional sewage treatment facility is located on Site # 1, all the sewage from Englewood could flow by gravity to the treatment facility.

129. The location of a sewage treatment facility at Quandel's Site # 2 would not permit the sewering of Englewood because a supplementary pump station would have to be constructed at Site # 1 to pump Englewood's sewage back to Frackville's pump station and thence up a hill against approximately two hundred thirty (230) feet of dynamic head at Site # 2. In engineering terms, two hundred thirty (230) feet is a significant amount of dynamic head.

130. The location of a sewage treatment facility at Quandel's Site # 2 would require gaining access to various parcels of land where private homes are situated.

131. If a sewage treatment facility is constructed on Site # 1, Ashland Reservoir could be polluted with sewage only under the following simultaneous occurrences: total electrical failure; total backup system failure; a rainstorm of tremendous and as yet unrecorded proportions; faulty maintenance of the Little Mahanoy Creek sluiceway such that it would remain blocked for a significant period of time; and, failure to detain the sewage in the treatment facility.

132. Ashland Reservoir continues to maintain a supply of suitable water despite decades of sewage discharge into Little Mahanoy Creek.

DISCUSSION

DER's order, dated January 17, 1983, was promulgated pursuant to the Clean Streams Law (hereinafter: the Act), 35 P.S. §691.1 et seq., DER Rules and Regulations promulgated thereunder, 25 Pa. Code §91, the Sewage Facilities Act (hereinafter: SFA), 35 P.S. §750.1 et seq., and DER Rules and Regulations promulgated thereunder, 25 Pa. Code §71. Under the Act, the legislature granted DER comprehensive powers to control pollution of Commonwealth waters. In order to fully exercise its powers under the Act, DER may "issue such orders as may be necessary to implement the provisions of [the Act]." 35 P.S. §§691.5 (b)(1); 691.5(b)(7). Specifically, the Act provides that DER may order a municipality "to acquire, construct, repair, alter, complete, extend or operate a sewer system and/or treatment facility." 35 P.S. §691.203(a). Moreover, DER may order municipalities "to negotiate with other municipalities for combined or joint sewer systems or treatment facilities." 35 P.S. §691.203(b).

The breadth of DER's powers under the Act makes it apparent that the legislature intended to create a comprehensive program of water quality management with the power to regulate-- without interference from local authorities-- centered in DER. Despite such a grant, Butler and Ashland contend that the Act does not give DER the power to preempt Butler's duly enacted zoning ordinance. Specifically, they contend that Butler's zoning ordinance does not permit the construction by FAMA of

a regional sewage treatment facility at Site # 1.[2] Thus, Ashland and Butler request that the Board overturn DER's order requiring construction of the facility at Site # 1. At the hearings, the Board ruled that DER did have the power under the Act to preempt local zoning ordinances; however, Butler and Ashland requested a written opinion on the issue of preemption.

In considering the issues raised in this appeal, it must be noted that, because DER's order requires the construction of a sewage treatment facility, the burden of proof rests with DER to establish by a preponderance of the evidence the affirmative of any issue. 25 Pa. Code §§21.101(a); 21.101(b)(5). After reviewing the record and the briefs submitted by counsel, the Board holds that DER does have the power to preempt local zoning ordinances in issuing the type of orders at issue herein pursuant to the Clean Streams Law. The reasons for the Board's holding are set forth below.

At the outset, it must be noted that there is no language in either the Act or in DER Rules and Regulations requiring DER to abide by local zoning ordinances in issuing its orders. The Act does enumerate

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2. The relevant portion of Butler's zoning ordinance is set out in Finding of Fact No. 32. It should be noted that there is some disagreement among the parties as to whether the ordinance contains a "use" or "user" restriction. Both the Court of Common Pleas of Schuylkill County and Commonwealth Court noted in their decisions (see Finding of Fact No. 33) that Butler's zoning ordinance appeared to permit the construction of a sewage treatment facility at Site # 1 under the "public use" portion of the ordinance, but only if the facility was owned or operated by Butler Township or an authority organized by Butler Township. Because the Board holds that the Clean Streams Law preempts local zoning ordinances when DER issues the type of order at issue herein, we need not reach the issue of whether the ordinance contains a "use" or "user" restriction.

five factors which DER must consider,[3] but Butler and Ashland do not contend that DER failed to consider these factors.[4] Similarly, DER Rules and Regulations enumerate specific factors that DER must consider where a comprehensive program of water quality management is involved,[5] but Butler and Ashland do not contend that DER failed to consider these factors.

Although the Act and DER Rules and Regulations do not explicitly provide for the preemption of local zoning ordinances, the Board finds that the sweeping language and comprehensive nature of the Act support DER's position with regard to preemption under the facts of this appeal. The Act's objectives are to prevent future pollution of Commonwealth waters and to reclaim and restore to a clean, unpolluted condition streams which are presently polluted. 35 P.S. §691.4(3). The achievement of these objectives therefore requires a comprehensive program of watershed management and control. 35 P.S. §691.4(5). Thus, DER is granted broad powers with which to achieve the objectives of the Act.

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3. The Clean Streams Law provides that, in issuing its orders under the Act, DER must consider: 1)water quality management and pollution control of the watershed as a whole; 2)the present and possible future uses of particular waters; 3)the feasibility of combined or joint treatment facilities; 4)the state of scientific or technical knowledge; and, 5)the immediate and long-range economic impact upon the Commonwealth and its citizens. 35 P.S. §691.5(a).

4. Butler and Ashland do contend that DER's order constituted an abuse of discretion in that the order was premised solely upon financial considerations. To the extent that this contention can be read to fairly imply that DER failed to consider the statutory factors set forth in Section 691.5(a) of the Act, the Board expressly rejects such a contention.

5. DER's Rules and Regulations provide that: in cases where a comprehensive program of water quality management and pollution control is inadequate or non-existent and a project is necessary to abate existing pollution or health hazards, the best mix of: 1)expeditious action to abate pollution or health hazards; 2)consistency with long-range development; and, 3) economy, should be considered in the evaluation of alternatives and in justifying proposals. 25 Pa. Code §91.31(c). Butler and Ashland do not contend that DER failed to consider these factors.

One of these powers permits DER to do exactly what it has done in the present case--to order various municipalities to negotiate the execution of an agreement providing for the construction of a regional sewage treatment facility. 35 P.S. §691.203(a)(b). In the absence of such all-inclusive powers, it is difficult to conceive how the legislative intent to create a comprehensive program of watershed management and control could ever be effecutated.

In addition, the Board notes that it would be an anomaly for the legislature to create a comprehensive scheme under the Act while at the same time permitting local authorities to use their zoning ordinances to frustrate DER's attempts to carry out its statutory obligations. It would be particularly anomalous when the township attempting to interpose its local zoning ordinance--here, Butler Township--is one of the municipalities contributing to the pollution of Commonwealth waters. (See Findings of Fact Nos. 27, 50 and 95). To hold that DER, when it issues the type of order at issue herein, does not have the power to preempt local zoning ordinances under the Act in such a situation would have the effect of completely thwarting DER's attempt to enforce the provisions of the Act. The Board firmly believes that the legislature did not intend such a result.

Moreover, Board precedent in an analogous context supports our holding with regard to preemption of local zoning ordinances under the Clean Streams Law. In Township of Hilltown v. DER and Haines and Kibblehouse, Inc., EHB Docket Nos. 79-025-W and 80-035-W, 1980 EHB 215 and 1980 EHB 470, and Board of Supervisors of Springfield Township v. DER and Peter S. Mozino, EHB Docket No. 80-019-W, 1982 EHB 104, the Board held that if the statute at issue preempted local zoning ordinances DER's authority to issue permits was not conditioned upon DER's consideration of local zoning ordinances. Although Hilltown and Mozino involve

permitting decisions by DER, rather than orders issued by DER, their holdings are applicable by analogy to the present appeal.

It should be noted that, in Hilltown, the board found that Section 17 of the Surface Mining Conservation and Reclamation Act (SMCRA), 52 P.S. §1396.1 et seq., explicitly preserved a role for local zoning ordinances, which were not preempted by SMCRA.

However, there is ample language in the Clean Streams Law which evinces an overriding legislative intent with regard to preemption of local zoning ordinances, for orders of the sort DER has issued to Butler Township. See, City of Pittsburgh v. Commonwealth, 468 Pa. 174, 360 A.2d 607 (1976). As noted previously, the legislature created a comprehensive program of watershed management and control with the power to regulate in the first instance granted to DER. Thus, in enumerating those factors which DER must consider in issuing orders pursuant to the Clean Streams Law, the legislature saw fit not to include local zoning ordinances as part of those enumerated factors. Indeed, the Board cannot conceive of any statewide comprehensive program which could succeed if municipalities were free to interpose their local zoning ordinances to thwart DER's attempts to carry out its statutory obligations.

Of course, in reviewing the exercise of DER's powers under a statutory mandate, the Board shall liberally construe the statute so as to achieve the legislature's objective in promulgating it. Statutory Construction Act, 1 Pa. C.S.A. §1928(c). In addition, in ascertaining the intent of the legislature, it is presumed that the legislature did not intend an absurd result. 1 Pa. C.S.A. §1922. The Board believes that it would border on the absurd for us to affirm the result that would follow from Ashland and Butler's position--namely, that a township which violates the Clean Streams Law by permitting raw

sewage from the township to discharge into and pollute the Commonwealth's waters can interpose its local zoning ordinance to frustrate DER's attempt to enforce the Act to prevent the pollution of Commonwealth waters. The Board reiterates that Board precedent, the language and scope of the Clean Streams Law, and legislatively enacted theories of statutory construction all point to the inescapable conclusion that the legislature intended to provide DER with the power to preempt local zoning ordinances when issuing orders pursuant to the Clean Streams Law which require various municipalities to negotiate an agreement providing for the construction, operation and maintenance of a regional sewage treatment facility.

Butler and Ashland have raised a number of additional arguments which the Board hereby addresses.

First, the Board rejects as wholly without merit and without the need for further elucidation the contention that DER's order represents an unconstitutional infringement on the powers of the judiciary and an unlawful collateral attack on a final order of the Commonwealth Court.

Second, the Board also rejects as wholly without merit the contention that DER's order is ambiguous and self-contradictory. On the contrary, the Board finds that the official sewage plans of the various municipalities can be implemented in an internally consistent manner upon compliance with DER's order. (See Finding of Fact No. 40). Also, far from being ambiguous, DER's order is a model of clarity; the order requires, inter alia, that the various municipalities execute satisfactory and acceptable agreement(s) which would provide for the implementation of the official sewage plans of each municipality and the construction, maintenance and operation of a regional sewage treatment

facility as Site #1. The Board fails to see how the order could be any clearer.

Third, the Board rejects the contention that DER exceeded its statutory authority when it ordered the named municipalities and municipal authorities to construct a regional sewage treatment facility at a specific location. The Clean Streams Law explicitly grants DER the power to order a municipality to negotiate with other municipalities for the purpose of constructing combined or joint sewer systems or treatment facilities. 35 P.S. §691.203(a)(b). Moreover, DER is granted the broadest possible powers under the Act--namely, the power to issue such orders as may be necessary to implement the provisions of the Act. 35 P.S. §§691.5(b)(1); 691.5(b)(7). In the case at bar, DER deemed it necessary to order the construction of a regional sewage treatment facility on Site #1 and the Board has found no evidence in the record to serve as a basis for overturning DER's order.

Fourth, the Board holds that, because the Clean Streams Law preempts local zoning ordinances for orders of the sort DER has issued to Butler Township, DER has no duty to consider such ordinances under Article I, Section 27 of the Pennsylvania Constitution.[6] However, this

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6. The duties of DER as trustee of the Commonwealth's public natural resources arise from Article I, Section 27 of the Pennsylvania Constitution, which provides:

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

As interpreted by the courts of the Commonwealth, DER's duties under Article I, Section 27 are subject to the threefold test set forth in Payne v. Kassab, 11 Pa. Cmwlth. 14, 312 A.2d 86 (1973) aff'd 468 Pa. 226, 361 A.2d 263 (1976). The Payne test is as follows:

does not mean that DER has no duty whatsoever under Section 27. Rather, as trustee of the Commonwealth's public natural resources, DER has the responsibility to conserve and maintain public natural resources for the benefit of all the people. Payne, supra. However, under the Clean Streams Law, DER is also obligated to take whatever actions DER deems necessary and appropriate in order to achieve the objectives of the Act. Thus, in carrying out its dual responsibilities under the Act and Section 27, DER must balance conflicting environmental and social concerns in arriving at decisions which are intended to be expedient as well as cognizant of the high priority which Section 27 has placed upon the conservation of the Commonwealth's public natural resources.

The standard that has been adopted to determine if DER actions are in compliance with Article I, Section 27 of the Pennsylvani Constitution is set forth in Payne, supra. (See footnote no. 6). We

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6. Continued.

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

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

Evidently, DER's duty to consider local land use ordinances under Section 27 and Payne only arises if the statute at issue does not preempt local zoning ordinances. Mozino, supra. Because the Board holds that the Clean Streams Law preempts local zoning ordinances when DER issues the type of order at issue herein, DER has no duty to consider those ordinances under Article I, Section 27 of the Pennsylvania Constitution, and the argument of Butler and Ashland to the effect is an irrelevancy.

will consider each factor of the threefold standard of Payne to determine if DER's order is in compliance with Article I, Section 27 of the Pennsylvania Constitution.

The first test set forth in Payne requires DER to comply with all applicable statutes and regulations that are relevant to the protection of the Commonwealth's public natural resources. DER's order was promulgated pursuant to the Sewage Facilities Act,[7] the Clean Streams Law and DER Rules and Regulations, 25 Pa. Code §91 et seq. As a result, DER was required to consider those factors set forth in the Clean Streams Law (see footnote no. 3) and in 25 Pa. Code §91.31(c) (see footnote no. 5). The Board has already noted that

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7. DER's order states that it is promulgated pursuant to Sections 5(a)(3), 203, 402(a) and 610 of the Clean Streams Law, 35 P.S. §§691.5(a)(3), 691.203, 691.402(a) and 691.610, as well as Section 10(3) of the Sewage Facilities Act, 35 P.S. §750.10(3). Ashland and Butler contend that DER's order violates the Sewage Facilities Act (SFA) because, under Section 5(d)(4), DER is required to take all aspects of planning and zoning into account upon approval of official sewage plans under the SFA. 35 P.S. §750.5(d)(4); Delaware County Community College, et al. v. Fox, et al., 20 Pa.Cmwlth. 335, 342 A.2d 468 (1975). However, in its order, DER is only requiring, inter alia, implementation of official sewage plans that had already been submitted by the various municipalities and approved by DER prior to the issuance of its order of January 17, 1983. (See Finding of Fact No. 15). Butler and Ashland do not contend that DER failed to consider local zoning ordinances when it approved the official sewage plans of the various municipalities, and indeed, that is not an issue in the present appeal. In addition, Butler and Ashland do not contend that the municipalities themselves failed to consider local zoning, as they are required to do, when they submitted their official sewage plans to DER. 35 P.S. §750.5(d); 25 Pa. Code §71.14(a)(5). Of course, that part of DER's order which requires the construction of a regional sewage treatment facility at Site # 1 was promulgated pursuant to the Clean Streams Law. 35 P.S. §§691.203(a), 691.203(b). Because the Board holds that the Act preempts local zoning ordinances when DER issues the type of order at issue herein, the Board rejects the contention that the SFA required DER to consider local zoning when it issued its order.

Ashland and Butler do not contend that DER failed to consider the factors enumerated in the Clean Streams Law and 25 Pa. Code. Ashland and Butler do contend that DER's order amounts to an abuse of discretion in that it was premised solely upon financial considerations. While financial considerations did play an important role in DER's decision-making process,[8] the record clearly indicates that environmental concerns played an equally important role. (See Findings of Fact Nos. 35, 48, 55 and 104). Thus, the Board rejects the contention that DER's order was premised solely upon financial considerations.

The second test set forth in Payne requires a reasonable effort on DER's part to reduce the environmental incursion to a minimum. Again, the Board finds that the record clearly indicates that DER considered all of the available alternate sites for the construction of a regional sewage treatment facility (see Finding of Fact No. 55), and DER came to the eminently reasonable conclusion that Site # 1 was the only feasible site from both an economical and environmental viewpoint. With raw sewage flowing into Little Mahanoy Creek and with raw sewage being discharged into an abandoned mine pit on a daily basis, the Board rejects with a great degree of skepticism the contention that the order which was designed to correct such an abhorrent situation does not evince a reasonable effort on DER's part to reduce the environmental incursion to a minimum.

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8. Of course, DER is required to consider the economic impact of its actions when it issues orders pursuant to the Clean Streams Law. 35 P.S. §691.5(a)(5); 25 Pa. Code §91.31(c)(iii).

The third test set forth in Payne asks: does the environmental harm which would result from the challenged decision or action so clearly outweigh the benefits to be derived therefrom that to proceed further would be an abuse of discretion? The Board finds that the record does not indicate that any environmental harm would result from compliance with DER's order. On the contrary, the record is replete with substantial credible evidence which establishes that there are numerous considerable benefits to be derived from compliance with DER's order. As described in sufficient detail by the Honorable George W. Heffner of the Court of Common PLeas of Schuylkill County, the following benefits would ensue upon completion of a regional sewage treatment facility at Site # 1 in Butler Township:

> (1)Ashland Borough's water supply would no longer be in danger from the existing sources of pollution;
> (2)the problem of raw sewage seeping into the yards of residential homes in Englewood and Walnick Manor would be eliminated;
> (3)it would foster the location of new industries and provide more job opportunities in an industrial park in the area to be served by the proposed treatment facility;
> (4)it would lessen or eliminate the pollution of Little Mahanoy Creek;
> (5)it would treat the sewage that is presently collected by FAMA and therefore would eliminate any existing pollution caused by discharges of untreated sewage;
> (6)it would provide for the availability of public funding for the construction of the treatment facility at Site # 1; and,
> (7)it would eliminate the necessity of building a supplementary pump station, which would be required if the treatment facility was constructed at another site.

Even a cursory review of the aforementioned benefits shows that the third test of Payne has been satisfied. In addition, Judge Heffner of the Court of Common Pleas of Schuylkill County stated that the

record before the court clearly proved that Site # 1 was the most feasible site for a regional sewage treatment facility and that placement of the facility at Site # 1 would not be detrimental to the health and welfare of area citizens.

Finally, the Board must determine whether or not DER's order complied with the Clean Streams Law and DER Rules and Regulations promulgated thereunder. 35 P.S. §691.1 et seq., 25 Pa. Code §91 et seq. If so, then DER's order constituted a reasonable exercise of its discretion. If not, DER's action would constitute an abuse of discretion and be arbitrary and capricious. Because DER's order requires the named municipalities to construct a regional sewage treatment facility, DER bears the burden of proving that its order constituted a reasonable exercise of its discretion. 25 Pa. Code §21.101(b)(5).

After reviewing all the evidence introduced at the hearings and the briefs of all parties, the Board holds that the record clearly establishes that DER's order was neither an abuse of discretion nor amounted to arbitrary and capricious action. Rather, DER has established, without effective rebuttal from Butler or Ashland, that Site # 1 is the only feasible location for a regional sewage treatment facility from an economical, environmental and practical viewpoint. (See Findings of Fact Nos. 97, 98 and 104). DER has also established that the individual responsible for issuing its order, Mr. Lawrence A. Pawlush, considered all of the statutorily mandated factors under the Clean Streams Law and DER Rules and Regulations promulgated thereunder.

The Board is well aware of the importance of this litigation to the respective parties and to the residents of the affected area. All the parties agree that the area is in desperate need of adequate sewage collection and treatment facilities. While the Board is not unmindful of Butler and Ashland's fears with regard to the Ashland Reservoir, we believe that the record clearly establishes that Ashland Reservoir will not be adversely affected by construction and operation of a regional sewage treatment facility at Site # 1. Accordingly, we conclude that DER acted reasonably in issuing its order of January 17, 1983.

CONCLUSIONS OF LAW

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

2. In issuing its order of January 17, 1983, DER considered all the statutorily mandated factors under the Clean Streams Law, 35 P.S. §691.5(a) and DER Rules and Regulations promulgated thereunder, 25 Pa. Code §91.31(c).

3. DER's order did not constitute an abuse of discretion or amount to arbitrary and capricious action.

4. The Clean Streams Law preempts local zoning ordinances in situations where DER orders various municipalities to negotiate an agreement for the construction, operation and maintenance of a regional sewage treatment facility at a DER-specified site.

5. The Clean Streams Law provides that, in issuing its orders under the Act, DER must consider: 1)water quality management and

pollution control of the watershed as a whole; 2)the present and possible future uses of particular waters; 3)the feasibility of combined or joint treatment facilities; 4)the state of scientific or technical knowledge; and, 5)the immediate and long-range economic impact upon the Commonwealth and its citizens. 35 P.S. §691.5(a).

6. DER Rules and Regulations provide that: in cases where a comprehensive program of water quality management and pollution control is inadequate or non-existent and a project is necessary to abate existing pollution or health hazards, the best mix of: 1)expeditious action to abate pollution or health hazards; 2)consistency with long-range development; and 3)economy, should be considered in the evaluation of alternatives and in justifying proposals. 25 Pa. Code §91.31(c).

7. DER is required to consider the economic impact of its actions when it issues orders pursuant to the Clean Streams Law. 35 P.S. §691.5(a)(5); 25 Pa. Code §91.31(c)(iii).

8. DER's duty to consider local land use ordinances, under Article I, Section 27 of the Pennsylvania Constitution and Payne, supra, only arises if the statute at issue does not preempt those ordinances.

9. DER has no duty to consider local zoning ordinances under Article I, Section 27 of the Pennsylvania Constitution and Payne, supra, when issuing orders requiring the construction, operation and maintenance of a regional sewage treatment facility at a DER-specified site.

10. The Sewage Facilities Act, 35 P.S. §750.1 et seq., is not applicable to that part of DER's order which required the construction, operation and maintenance of a regional sewage treatment facility at a DER-specified site.

11. DER fulfilled its responsibilites as trustee of the Commonwealth's public natural resources under Article I, Section 27 of the Pennsylvania Constitution and Payne, supra, when it issued its order of January 17, 1983 requiring the construction of a regional sewage treatment facility at Site # 1.

12. Butler and Ashland did not produce sufficient credible evidence to justify this Board's overturning of DER's order of January 17, 1983, and therefore, the appeal must be dismissed.

O R D E R

AND, NOW, this 15th day of NOVEMBER, 1984 in consideration of the within Findings of Fact and Conclusions of Law, the appeal of the Butler Township Board of Supervisors docketed at EHB Docket No. 83-037-M is hereby dismissed.

ENVIRONMENTAL HEARING BOARD

ANTHONY J. MAZULLO, JR.
Member

EDWARD GERJUOY
Member

DATED: Novmeber 15, 1984

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COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

221 NORTH SECOND STREET
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HARRISBURG, PENNSYLVANIA 17101
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JOHN F. CULP, III :

:

Docket No. 83-194-G

:

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and CONSOL PENNSYLVANIA COAL COMPANY, Permittee

OPINION AND ORDER
SUR MOTION TO AMEND NOTICE OF APPEAL

On August 31, 1983, Mr. Culp appealed the issuance, on August 3, 1983, of Permit No. C-468-1 to Consol, under the Bituminous Mine Subsidence and Land Conservation Act, 52 P.S. §1406.9. On November 28, 1983, Consol filed a motion to quash the appeal for lack of standing. On December 16, 1983 the Board, without filing a written opinion, issued an order rejecting the motion to quash. However, the Board, in a letter to the parties, did explain that the motion had been rejected because the Board did not believe the permittee had made its case under the standard of William Penn Parking Garage, Inc. v. City of Pittsburgh, 464 Pa. 168, 346 A.2d 269 (1975).

Thereafter, on December 30, 1983, Culp filed a motion to amend his notice of appeal. Although the amended notice of appeal modifies the original notice of appeal in a number of places, the principal modification is inclusion of the previously lacking allegation that Culp owns 400 acres of land overlying the area encompassed within the permit, on which land (Culp alleges) he owns all interests except the

Pittsburgh seam of coal which Consol intends to mine; Culp avers that omission of this allegation from the original notice of appeal "was the result of an oversight" which has not prejudiced Consol.

Consol opposes the motion to amend. Its objections focus on Culp's proposed new allegation described in the preceding paragraph. These objections of Consol's may be summarized as follows.

> 1. Only 100 of the aforementioned 400 acres are located within the permitted area.
>
> 2. Culp's ownership of the surface land "does not create a right" to the relief he requests, namely overturn of the permit grant.
>
> 3. The original omission of the disputed allegation was not an oversight.
>
> 4. Consol has been prejudiced, by having had to expend time and money on responses to the original notice.
>
> 5. Granting the petition to amend "will delay resolution of these proceedings unconscionably."
>
> 6. Under the Board's rules, 25 Pa. Code §21.51(e), the amendment has been waived.

Objections 1 and 2 supra go to the accuracy and/or merits of Culp's contentions, and as such are not relevant to the issue of whether or not Culp should be allowed to amend his appeal. It is true that the Pennsylvania courts have refused to allow amendment of a complaint under Rule 1033 of the Pennsylvania Rules of Civil Procedure where the complainant shows no sign of being able to establish a cause of action. Behrend v. Yellow Cab Co., 441 Pa. 105, 271 A.2d 241 (1970); However, Consol has made no showing that Culp's appeal, viewed in toto, is irremediably unmeritorious; the Board already has ruled that Consol has failed to show the appeal should be quashed for lack of standing (although ultimately demonstrating standing remains Culp's burden).

Objection 5 above is frivolous. It also is difficult to believe Consol is serious about its objection 4. In any event, at least one Pennsylvania court has ruled that under Pa. R.C.P. Rule 1033 the expense of preparing a pleading to respond to an amended pleading is not such prejudice as bars allowance of the making of the amendment. Universal Match Corp. v. LeKape Corp., 20 Bucks Co. L. Rep. 56 (1970). We concur with this ruling, which appears to be wholly consistent with the liberal standard for allowing amendment of a pleading under Pa. R.C.P. Rule 1033. Anderson, Pennsylvania Civil Practice §1033.33; Behrend, supra; Otto v. American Mutual Insurance Co., 482 Pa. 202, 393 A.2d 450 (1978). Moreover, "prejudice" under Rule 1033 means more than the detriment the opposing party (in this case Consol) will suffer from the possibility that allowing the amendment will strengthen Culp's case. Anderson, supra, §1033.41. Sands v. Forrest, 434 A.2d 122 (1981). For example, unfair surprise can constitute prejudice sufficient to deny the desired amendment; but Consol has not alleged, e.g., that Culp's proposed amendment unfairly introduces new averments which are a surprise to Consol, and which--for reasons that would not have existed had Culp made the averments earlier--Consol now is unable to counter.

Thus objections 3 and 6 supra are the only ones that require further examination by us. In support of these objections, taken together, Consol quotes the language of 25 Pa. Code §21.51(e):

> The appeal shall set forth in separate numbered paragraphs the specific objections to the action of the Department. Such objections may be factual or legal. Any objections not raised by the appeal shall be deemed waived, provided that, upon good cause shown, the Board may agree to hear such objection or objections. For the purpose of this subsection, good cause shall include the necessity for determining through discovery the basis of the action from which the appeal is taken.

Consol then argues that this language shows the appeal should be amended only upon good cause shown. "Oversight" is not such cause, Consol asserts; moreover, according

to Consol, omission of the disputed allegation from the original notice of appeal was an advised factual decision, not an oversight. As authority for its contention that objections 3 and 6, taken together, warrant refusal of the proposed amendment, Consol cites Matter of Harrison Square, Inc., 368 A.2d 285 (Pa. 1977). The Board has read Harrison, and finds it totally off the point; no additional discussion of Harrison would be useful here.

In essence Consol is advocating (as it recognizes) that the language of 25 Pa. Code §21.51(e) makes the standard for amending a notice of appeal to us much more stringent than the liberal standard, discussed supra, for amending pleadings under Pa. R.C.P. Rule 1033. The Board never has taken this restrictive a view of 25 Pa. Code §21.51(e), however, and sees no reason to do so now. In the first place, the courts' liberal interpretation of Rule 1033 rests upon the injunction of Pa. R.C.P. Rule 126. The language of Rule 126 is tracked by 1 Pa. Code §31.2, which reads:

> The rules in this part shall be liberally construed to secure just, speedy and inexpensive determination of the issues presented.

Although 25 Pa. Code §21.51 does specifically supersede certain provisions of 1 Pa. Code Part II, General Rules of Administrative Practice and Procedure, 1 Pa. Code §31.2 is not superseded by 25 Pa. Code §21.51. Nor is 1 Pa. Code §31.2 superseded by any of our other rules and regulations, 25 Pa. Code Chapter 21. Therefore, under the general rules of administrative practice and procedure, the Board's construction of its rule §21.51(e) is expected to be liberal, presumably much like the corresponding applications of Pa. R.C.P. 126 to Rule 1033.

Our liberal construction of 25 Pa. Code §21.51(e) is bolstered by 1 Pa. Code §35.49, which also has not been superseded by 25 Pa. Code Chapter 21. Section 35.49 states:

§35.49.Amendments to conform to the evidence.

(a) When, at a hearing, issues not raised by the pleadings are introduced by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these new issues may be made upon motion of any participant at any time during the hearing. If evidence upon such new issues is objected to on the ground that it is not within the issues raised by the pleadings, the agency head or the presiding officer may allow the pleadings to be amended and such evidence to be received, when it appears that the presentation of the merits of the proceeding will be served thereby without prejudicing the public interest or the rights of any participant. When in the discretion of the agency head or the presiding officer, a continuance is necessary in order to enable the objecting participant to meet such new issues and evidence, a continuance may be granted by the agency head or the presiding officer, as provided in §31.15 (relating to extensions of time).

As we have explained, Consol has not alleged that allowing the amendment will prejudice Consol, as the term "prejudice" normally is understood in the context of the present dispute. Anderson, supra, §1033.41. If new not previously pleaded evidence is allowable at the hearing when there is no showing of prejudice, a non-prejudicial amendment of Culp's notice of appeal surely must be allowable now, at a stage of these proceedings before a hearing date has been set and before either party has filed its pre-hearing memorandum.

For the above reasons, Consol's objections are rejected and Culp's amended notice of appeal is accepted. We add that this ruling is completely consistent with the Board's usual practice. For example, the Board has permitted appellants to amend their notices of appeal in order that the appellants' ability to allege facts sufficient to confer standing not be foreclosed merely by inartful pleading. Concerned Citizens Against Sludge v. DER, Docket Nos. 82-220-G and 82-221-G (Opinion and Order, February 9, 1983). In its desire to give an appellant every opportunity to show there was standing, the Board even has permitted amendment and re-amendment

of pre-hearing memoranda, not just notices of appeal. Township of Indiana and Concerned Citizens of Rural Ridge v. DER, Docket Nos. 82-099-G and 82-100-G, 1982 EHB 469 and 496. Elsewhere we have ruled that matters not raised in a notice of appeal need not be waived if they are raised in the appellant's pre-nearing memorandum. Melvin D. Reiner v. DER, Docket No. 81-133-G, 1982 EHB 183; Pa. Game Commission v. DER, Docket No. 82-284-G (Opinion and Order, March 29, 1983). In effect this ruling concerning waiver is embodied in the Board's Pre-Hearing Order No. 1, which regularly is sent to all parties, including the appellant of course, upon receipt of a notice of appeal. Paragraph 4 of Pre-Hearing Order No. 1 reads:

> A party may be deemed to have abandoned all contentions of law or fact not set forth in its pre-hearing memorandum.

Consol has been aware of, and has not questioned, Pre-Hearing Order No. 1 since November 3, 1983, when that Order was filed.

O R D E R

WHEREFORE, this 10th day of January, 1984, the appellant's amended notice of appeal is accepted, to be henceforth regarded as the notice of appeal in this matter.

ENVIRONMENTAL HEARING BOARD

EDWARD GERJUOY
Member

DATED: January 10,1984

cc: Bureau of Litigation
Marc A. Roda, Esquire
Anthony P. Picadio, Esquire
Daniel E. Rogers, Esquire
E. J. Strassburger, Esquire

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

TER-EX, INC. :

:

Docket No. 83-138-G

:

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER
SUR PETITION TO INTERVENE

Ter-Ex has timely appealed from a spacing and integration order concerning Ter-Ex's Ramaley No. 2 gas well, located in Derry Township, Westmoreland County. Thereafter, the Pennsylvania Natural Gas Associates ("PNGA") petitioned to intervene. This petition has been supported by Ter-Ex, which is not a member of PNGA, but has been opposed by DER; however, DER does not oppose PNGA's participation in an amicus curiae capacity. On December 16, 1983, the Board heard oral argument on the motion. The transcript of the oral argument having been received, we now rule on the petition.

The Board's rules covering intervention, 25 Pa. Code §21.62, supplement but do not supersede 1 Pa. Code §35.28, which is titled "Eligibility to Intervene." During oral argument (N.T. 8-11) counsel for PNGA conceded that PNGA's petition to intervene relied primarily on 1 Pa. Code §35.28(a)(3), which reads:

> (a) Persons. A petition to intervene may be filed by any person claiming a right to intervene or an interest of such nature that intervention is necessary or appropriate to the administration of the statute under which the proceeding is brought. Such right or interest may be any one of the following:
>
> (3) Any other interest of such nature that participation of the petitioner may be in the public interest.

According to PNGA, its intervention is needed because DER cannot represent the public interest in this particular matter. The appealed-from order alleged that the Ramaley No. 2 gas well is draining gas which lies beneath lands owned by DER's Bureau of State Parks ("Parks"); correspondingly, the spacing and integration order claimed that Parks is:

> entitled to a proportionate share of production from Ter-Ex's Ramaley No. 2 well on a limited or carried basis as provided in Section 8(c) of the Oil and Gas Conservation Law, 58 P.S. §408(c).

PNGA argues that DER's claimed financial interest in Ter-Ex's well, as evidenced by the immediately preceding quote, prejudices DER's ability to fairly represent the public interest while this appeal is being litigated. However, PNGA was unable to state--except in rather vague, quite general terms--what evidence it expected to present if permitted to intervene, why such evidence would be in the public interest, and why the Board would require such evidence to correctly decide this appeal.

Although the Board believes the criteria for intervention listed in 1 Pa. Code §35.28 should be interpreted liberally, PNGA simply has not shown that its intervention has enough likelihood of being in the public interest to fall within the language of §35.28(a)(3). Therefore, we will not allow PNGA to intervene at this time. On the other hand, the point raised by PNGA concerning DER's financial interest in this matter has merit. In fact, DER itself has argued that

to protect the public interest adequately DER should be represented by two counsel in this appeal, one from Parks and one from DER's Division of Oil and Gas Regulation ("DOGR"); indeed, DER originally filed two pre-hearing memoranda, one from Parks and the other from DOGR. But the Board--as stated at the hearing (N.T. 38)--felt that having separate counsel from Parks and from DOGR, with the DOGR counsel assumedly prepared to protect the public interest if Parks' counsel failed to do so, offered only specious protection of the public interest. Thus, the Board, before the hearing, already had ruled (on November 14, 1983) that separate representation of DER by counsel from Parks and from DOGR, as if these counsel represented separate parties, would not be allowed.

It follows that whether or not DER can and will sufficiently protect the public interest during the hearing on the merits of this appeal is a question which legitimately can be raised now. Furthermore, Ter-Ex has made it plain that Ter-Ex does not accept any responsibility for protecting the public interest in this appeal (N.T. 49-50). We can only conclude that it would be inappropriate, at this stage of these proceedings, to wholly foreclose the possibility of PNGA's intervention in this appeal to represent the public interest.

The accompanying Order is consistent with the foregoing considerations and with the Board's initial reactions at the close of oral argument on the petition to intervene (N.T. 51).

O R D E R

WHEREFORE, this 10th day of January, 1984, it is ordered that:

1. PNGA will have amicus curiae status in these proceedings; in particular:

   a. PNGA shall receive copies of all documents filed.

   b. PNGA may file a post-hearing brief.

c. PNGA may be seated at counsel's table during the presentation of Ter-Ex's and DER's cases at the hearing on the merits of this appeal, but may not present evidence, cross examine witnesses or engage in argument.

2. Unless and until otherwise ordered, paragraph 1 supra and paragraph 4 infra completely limit PNGA's participation in this appeal.

3. At the hearing on the merits, after DER and Ter-Ex have completely closed their presentations, PNGA will be permitted to orally renew its petition to intervene; if PNGA decides to take advantage of this opportunity, it will have to:

a. State precisely what evidence it intends to present, and explain why this evidence is not merely cumulative.

b. Explain why this evidence is pertinent to the instant appeal.

c. Explain why this evidence is needed to assure that the Board's adjudication adequately takes account of the public interest.

4. If the Board, after listening to opposing arguments, is persuaded by PNGA's presentation (pursuant to paragraph 3 supra) that PNGA has evidence satisfying the criteria of paragraphs 3a-3c, the Board will allow PNGA to intervene in this appeal for the purpose of presenting such evidence; in this event:

a. PNGA will have to describe this evidence and related contentions in a pre-hearing memorandum prepared in accordance with our Pre-Hearing Order no. 1.

b. The hearing will be continued to a later date, so that the other parties may receive and digest PNGA's pre-hearing memorandum.

c. The renewed hearing, when rescheduled, will be limited to presentation of the aforesaid evidence of PNGA's, to cross examination of PNGA's

witnesses by DER and Ter-Ex, and to DER and/or Ter-Ex testimony tending to rebut PNGA's evidence.

d. PNGA will have all the rights of a party at the renewed hearing, including the right to cross examine any DER or Ter-Ex rebuttal witnesses.

5. In the meantime, PNGA's petition to intervene is rejected.

ENVIRONMENTAL HEARING BOARD

Edward Gerjuoy

EDWARD GERJUOY
Member

DATED: January 10, 1984

cc: Bureau of Litigation
Justina M. Wasicek, Esquire
Melinda Holland, Esquire
William A. Jones, Esquire
Lawrence A. Demase, Esquire
Barry K. Cosey and J. Kent Culley, Esquire

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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WESTERN PENNSYLVANIA CITIZENS FOR SAFE COMMUNITIES :

:

Docket No. 83-147-G

:

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and CABOT OIL AND GAS CORPORATION, Permittee

OPINION AND ORDER

On July 22, 1983 the Western Pennsylvania Citizens for Safe Communities ("Citizens") wrote the Board that the Citizens intended to appeal "permit PA 0101508" to the Cabot Oil and Gas Corporation ("Cabot"), whose issuance (the Citizens asserted) was recorded in the Pennsylvania Bulletin, June 25, 1983, p. 2016. In accordance with the Board's usual practice, this letter was docketed as a skeleton appeal, and the Citizens were notified of the additional information needed to perfect the appeal under the requirements of the Board's rules, 25 Pa. Code §§ 21.51 and 21.52.

A more formal Notice of Appeal was filed by the Citizens on September 13, 1983, but their appeal was not properly perfected until October 31, 1983, when--after numerous requests--the Citizens finally filed a copy of the Pa. Bulletin page which gave the notice on which their appeal relies. Their Notice of Appeal re-iterated that they were appealing "permit 6182201, including NPDES #0101508."

However, the Pa. Bulletin June 25, 1983 p. 2016 filed by the Citizens on October 31, 1983 made no mention of permit 6182201 or of NPDES permit 0101508. The only reference to Cabot on p. 2016 was:

> Permit No. 61-49. Encroachment...
> To construct and maintain an outfall from
> a brine-water treatment facility...

In the meantime Cabot, on October 12, 1983, filed a Motion to Dismiss the appeal as untimely. Cabot's Motion alleged that on November 24, 1982, DER had issued NPDES Permit PA-0101508 to Cabot, authorizing Cabot to treat and discharge industrial waste from a facility located in Cranberry Township, Venango County; attached as Exhibit A to the Motion was a Pa. Bulletin notice of this permit, December 18, 1982, p. 4308. Cabot's Motion also alleged that DER issued Water Quality Management Permit 6182201 to Cabot on May 20, 1983; attached as Exhibit B to the Motion was notice of this permit in Pa. Bulletin June 11, 1983, p. 1920.

July 22, 1983 is more than thirty (30) days after each of December 18, 1982 and June 11, 1983. To date, the Board has received no brief or other arguments from the Citizens in opposition to Cabot's Motion to Dismiss, although on October 17, 1983 the Citizens were warned that their response to the Motion was due November 6, 1983. There is no doubt that the 30 day time limit of 25 Pa. Code §21.52(a) for filing an appeal is jurisdictional; we cannot take jurisdiction of an appeal which is untimely filed. Joseph Rostosky Coal Company v. DER, 20 Pa. Cmwlth. 478, 364 A.2d 761 (1976); East Lampeter Township Sewer Authority v. Butz, 455 A.2d 220 (Pa. Cmwlth. 1983).

Therefore, we have decided to grant Cabot's Motion. This appeal is dismissed. Nonetheless, we add that this conclusion of this matter is not entirely obvious. The Citizens' appeal was filed less than thirty days after June 25, 1983. However, the Citizens' contentions in their September 18, 1983 Notice of Appeal

were directed solely at DER's alleged failure to set proper effluent limits for the discharge, or to provide for adequate monitoring of the discharge. The Citizens' Notice of Appeal exhibited absolutely no concern about problems which might be associated with the proposed outfall to be constructed under the encroachment permit 61-49, such as bank erosion or water runoff. Consequently it seems improper to keep this appeal alive by allowing the Citizens to amend their Notice of Appeal at this late date, so that it now would refer specifically to the encroachment permit 61-49 noticed in the Pa. Bulletin on June 25, 1983. The point to be stressed, and which we hope the Citizens will recognize, is that even if we did allow them to appeal the grant of the encroachment permit, the scope of that appeal necessarily would exclude any attacks on NPDES Permit PA-0101508 or on Water Quality Management Permit 6182201; those permits, not having been timely appealed, cannot be attacked under the guise of an appeal of permit 61-49.

O R D E R

WHEREFORE, this 13th day of JANUARY, 1984 the above-captioned appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

ANTHONY J. MAZULLO, JR.
Member

EDWARD GERJUOY
Member

DATED: January 13, 1984

cc: Bureau of Litigation
Thomas N. Thomas
Richard S. Ehmann, Esquire
Larry A. Silverman, Esquire

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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EUGENE PETRICCA :

:

Docket No. 83-239-G

:

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER

On September 12, 1983, Thomas R. Vayansky, District Mining Manager, DER's Bureau of Mining and Reclamation at Greensburg, Pennsylvania, sent the appellant an administrative order which, inter alia, required the appellant to apply for surface mining permits at two sites, including bonds in the appropriate amounts. The last paragraph of the order read, in pertinent part:

> This action of the Department may be appealable to the Environmental Hearing Board, 221 N. Second Street, Harrisburg, PA 17120 (717-787-3483) by any aggrieved person pursuant to Section 1921-A of the Administrative Code of 1929, 71 P.S. Section 510-21; and the Administrative Agency Law, 2 Pa. C.S., Chapter 5A. Appeals must be filed with the Environmental Hearing Board within 30 days of receipt of written notice of this action unless the appropriate statute provides a different time period.

The appellant admits receiving this administrative order on or about September 14, 1983. The appellant alleges that on or about September 27, 1983 he mailed a notice of appeal of the order to the Environmental Hearing Board by first class mail. Copies of the notice of appeal were sent to the DER Bureau of

Litigation and to Mr. Vayansky, by certified mail, return receipt requested. Mr. Vayansky and the DER Bureau of Litigation received these copies, but the original notice of appeal never reached the Board. On or about October 19, 1983 the appellant called the Board and learned that the Board had not received the notice of appeal. The appellant then mailed the Board a copy of his original notice of appeal, which was docketed by the Board on October 24, 1983. According to the appellant, the notice of appeal had been mailed originally--by first class mail but not certified return receipt requested--to the Board's former address in the Blackstone Building, Harrisburg; this address was given on a now superseded notice of appeal form the appellant had in his possession (the Board's new forms give the Board's correct current address, namely the address stated in the above quote).

Thereafter, on November 28, 1983, DER filed a motion to quash the appeal on the grounds that it was untimely under 25 Pa. Code 21.52(a), which requires that appeals be filed within thirty days (as stated in the last paragraph of the order quoted supra). The appellant has replied that the motion to quash is itself untimely under our rule 25 Pa. Code §21.64, which states that "except as provided otherwise in these rules" the Pennsylvania Rules of Civil Procedure apply to proceedings before this Board. The appellant argues that the motion to quash is in the nature of a preliminary objection, which under Pa. R.C.P. Rule 1026 must be filed within 20 days of receipt of a complaint. In the alternative, should the Board refuse to deny DER's motion to quash the appeal, the appellant petitions for leave to file his appeal nunc pro tunc, under 25 Pa. Code §21.53.

Although a motion to quash an appeal to this Board does have features in common with preliminary objections to a civil complaint, the Board has ruled

in the past that a notice of appeal is not a complaint governed by Pa. R.C.P. Rules such as Rule 1017 or Rule 1026. Township of Indiana and Concerned Citizens of Rural Ridge v. DER, Docket Nos. 82-099-G and 82-100-G, 1982 EHB 469. As explained in Indiana, the notion that a notice of appeal is governed by Rules 1017 and 1026 conflicts with the language of 25 Pa. Code §21.64(c), which specifically states:

> Due to the nature of appeal proceedings, unless otherwise ordered by the Board, neither the Department nor a permittee shall be required to file an answer to an appeal from an action of the Department.

Therefore we do not believe DER's motion to quash must be deemed untimely because it has not been filed within the 20 day period prescribed by Pa. R.C.P. Rule 1026. Moreover, even if Pa. R.C.P. Rule 1026 does apply generally to motions to quash appeals, the 20 day time limit of Rule 1026 would not apply to motions to quash for reasons of this Board's lack of jurisdiction, as DER correctly points out. Pa. R.C.P. Rule 1032(2). The claim that the appellant's appeal was untimely filed does raise a jurisdictional question. Rostosky v. DER, 26 Pa. Cmwlth. 478, 364 A.2d 761 (1976).

Consequently DER's motion to quash was not untimely and is before us. Having reached this decision, we now have no choice but to decide--again on the authority of Rostosky--that the appeal was untimely filed and must be dismissed; October 24, 1983, when the appeal was docketed by the Board, is more than 30 days after September 14, 1983, when the appellant admits he received the administrative order. Our rules, 25 Pa. Code §21.11(a), and Rostosky, make it clear that the date of receipt by the Board is determinative, not the claimed date of mailing nor the date of receipt by DER.

There remains appellant's petition to file nunc pro tunc. However, here we again are bound by Rostosky and other Pennsylvania court precedents [see, e.g.,

Pa. Dept. of Transportation v. Rick, 462 A.2d 902 (Pa. Cmwlth 1983)]. As the appellant recognizes, filing an appeal nunc pro tunc must involve a breakdown in the court's (in this case the Board's) operations; negligence by the appellant cannot justify a nunc pro tunc filing. East Side Landfill Authority v. DER, Docket No. 81-209-M, 1982 EHB 299, Soberdash Coal Company v. DER, Docket No. 83-030-G (Opinion and Order, March 1, 1983).

Where the administrative order correctly gave the Board's current address, it was negligent for the appellant to mail the notice of appeal to a different address without calling the Board (at the Board's telephone number given on the administrative order) to ascertain whether mail sent to the Board's former address would reach the Board. The appellant compounded his negligence by not mailing his notice of appeal to the Board certified return receipt requested, as was done with the copies sent to Mr. Vayansky and DER's Bureau of Litigation. Had he asked for a return receipt, he would have realized well before the 30 day deadline that the Board had not received his notice of appeal.

Furthermore, the Board moved its new address in May 1982; mail sent to the former Blackstone Building address was forwarded to the Board's present address for a year thereafter, until May 1983. It is not a breakdown in the Board's operations, justifying allowance of an appeal nunc pro tunc, for the Board to have permitted discontinuance of mail forwarding from its former address after the Board had been in its new quarters for a full year.

The appellant also has alleged--apparently in an effort to show that mailing the notice of appeal to the Board's former address was not negligent--that "the precise address of the Environmental Hearing Board appears to be in some state of confusion." As evidence for this allegation, the appellant cites the facts that both the Pennsylvania Bar Association Lawyers Directory (1983 Edition) and the June 1983 Commonwealth Telephone Directory (issued by the Commonwealth Department

of General Services) list the Board's former Blackstone Building address rather than its present address. However, there was no allegation by the appellant that he relied on either of these Directories when he mailed his notice of appeal. In any event, the Board cannot be responsible for failures of the Lawyers Directory or the Commonwealth Telephone Directory to maintain current addresses. The Board has seen to it that the recipients of administrative orders, such as this appellant, are given the Board's correct address in the event they wish to appeal. The Board scarcely could do more.

Thus, for the reasons stated supra, the appellant's petition to file his appeal nunc pro tunc is rejected, and his appeal is conclusively dismissed. We recognize that this ruling will seem harsh to the appellant, but emphasize that under the facts and binding precedent we cannot rule otherwise. We would welcome a ruling by the Commonwealth Court that would allow us to deem an appeal timely filed if the notice of appeal has reached DER, though not the Board, within the allowed 30 day period.

We add that we have dismissed this appeal without a hearing because there is no indication that any of the controlling facts are in dispute. Therefore this dismissal does not conflict with the recent holding in St. Christopher's Hospital v. Department of Public Welfare, 466 A. 2d 1134 (Pa. Cmwlth 1983).

O R D E R

WHEREFORE, this 13th day of JANUARY , 1984, the above-captioned appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

ANTHONY J. MAZULLO, JR., Member

EDWARD GERJUOY, Member

DATED: January 13, 1984
cc: Bureau of Litigation
Stanley R. Geary, Esquire
J. Philip Bromberg, Esquire

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

221 NORTH SECOND STREET
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(717) 787-3483

MATHIES COAL COMPANY :

:

: Docket No. 82-212-G

:

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER
SUR MOTION FOR SUMMARY JUDGMENT

On or about August 4, 1982, DER issued an amendment of Mathies' NPDES Permit PA 0023337. This amendment, at Mathies' request, authorized Mathies to increase its discharge into Peters Creek, Washington County, from the Thomas Portal of the Mathies coal mine. The amendment permits a discharge of 4,000 gallons per minute (gpm), whereas previously the discharge could be at most 420 gpm. However, the amendment imposed, inter alia, the following water quality limitations on the discharge:

	Allowed Concentrations (mg/l)	
Discharge Parameter	Monthly Average	Daily Average
Iron	1.5	3.0
Manganese	1.0	2.0
Aluminum	0.5	1.0

where mg/l denotes milligrams per liter. Mathies has appealed these effluent limitations. DER has moved for summary judgment that as a matter of law the iron

("Fe") and manganese ("Mn") limitations are not an abuse of DER's discretion. This motion is the subject of the instant Opinion. DER has not asked for summary judgment as to the aluminum limitations, which therefore are not further addressed in what follows.

A. May We Render Summary Judgment

Before we may proceed to the substantive merits of DER's motion, there is a threshold procedural question we must address, namely are we empowered to render summary judgment. Mathies' views on this question are not altogether clear. In its "Statement in Opposition" to DER's motion, Mathies contends that DER's motion seeks to deprive Mathies of the hearing which the Administrative Code requires (Mathies' emphasis); Mathies points to 71 P.S. §510-21(c) and 2 P.S. §504 in support of this contention. In its "Supplemental Statement in Opposition," on the other hand, Mathies concedes that summary judgment for DER could be appropriate "if the law requires the Department to impose the stringent effluent limits it has imposed" (Mathies' emphasis again).

Nevertheless, we shall address the aforementioned procedural question, because it so obviously is crucial to our ruling. Mathies has cited no precedent for its contention supra; DER has ignored the contention and the underlying question of our power to render summary judgment before a hearing on the merits. Therefore the Board has been forced to rely on its own research concerning this issue. Based on this research we reject Mathies' contention, for reasons which follow. The language of 71 P.S. §510-21(c) guarantees a right of appeal to this Board; Section 510 nowhere says that the right of appeal necessarily includes a hearing, and assuredly does not bear on whether a hearing is required when summary judgment would lie in a civil action governed by the Pennsylvania Rules of Civil Procedure. The language of 2 P.S. §504 reads:

> No adjudication of a Commonwealth agency shall be valid as to any party unless he shall have been afforded reasonable notice of a hearing and an opportunity to be heard.

In our opinion, the instant appeal has given Mathies its "opportunity to be heard." We do not agree (and can find no citation to 2 P.S. §504 implying) that Section 504 would be violated by refusing Mathies an evidentiary hearing[1] in this appeal--if the relevant facts indeed are not in dispute, so that our decision is merely a matter of law.

On the basis of the above considerations, we see no bar to our rendering summary judgment in this matter. However, the clarity of our reasoning thus far has been clouded by a moderately recent ruling of the Commonwealth Court. Carol Lines v. Pa. PUC, 439 A.2d 838 (Pa. Cmwlth 1981). In Carol Lines the court ruled that under Pa. Code §35.180(a) an administrative law judge for the PUC "had no authority to render summary judgment without a hearing," in an appeal to the PUC of a cease and desist order issued by the PUC. In so ruling, the Commonwealth Court quoted 1 Pa. Code §35.180(a), which in pertinent part reads:

> The presiding officer designated to preside at a hearing is authorized to rule upon any motion not formally acted upon by the agency head prior to the commencement of the hearing where immediate ruling is essential in order to proceed with the hearing, and upon any motion filed or made after the commencement of the hearing and prior to the submission of his proposed report in the proceedings, except that no motion made before or during a hearing, a ruling upon which would involve or constitute a final determination of the proceeding, shall be ruled upon by a presiding officer except as part of his proposed report submitted after the conclusion of the hearing.
> (Emphasis added by Commonwealth Court)

---

1. We stress that Mathies objects to summary judgment because it wishes to present "factual matters thus far ignored by the Department," mainly economic impacts on Mathies. Mathies has not argued that it is entitled to oral argument on DER's summary judgment motion, and we do not rule on whether Mathies is thus entitled.

The proceedings of our Board do not involve preparation of a "proposed report" to the "agency head" by an administrative law judge in his capacity as "presiding officer." 1 Pa. Code §35.202. This matter has not been conducted by a hearing officer who is not a Board member, as the Board can authorize. 71 P.S. §510-21(f); 25 Pa. Code §21.86(a). Rather, from the outset, pursuant to our Pre-Hearing Order No. 1 (issued September 8, 1982 after filing of the appeal on September 7, 1982) and to our almost invariable custom, this appeal has been assigned to a Board member, who is given the responsibility for overseeing the appeal's progress. Moreover, any final decision on this appeal, such as a decision to render summary judgment, must be made by a majority of the Board, not by a single Board member.

Consequently we believe Carol Lines, supra, with its reliance on 1 Pa. Code §35.180(a), does not bar this Board from rendering summary judgment in the instant appeal. This conclusion is reinforced by the holdings of Summerhill Borough v. DER, 383 A.2d 1320 (Pa. Cmwlth 1978), and Lebanon County Sewage Council v. DER, 382 A.2d 1311 (Pa. Cmwlth 1978). In Summerhill, the Court affirmed a summary judgment which the Board had rendered in favor of DER against the Borough. In Lebanon, the Court affirmed an order of the Board dismissing Lebanon County's appeal to the Board for lack of Board jurisdiction. In so ruling, the Commonwealth Court wrote:

> Because no final action was taken by the Board's presiding officer alone, we find no merit in petitioner's claim that the Board was required to conduct a hearing under 1 Pa. Code §35.180.

Carol Lines does not cite, and certainly does not reverse, either Summerhill or Lebanon.

In sum, we rule that we are empowered to render summary judgment in this matter, and now go on to the substantive merits of DER's motion.

B. Economic Impact

Mathies contends that under the Clean Streams Law, 35 P.S. §691.5(a), DER was required to consider "the immediate and long-range economic impact" on Mathies of DER's action--namely its imposition of the appealed-from effluent limitations. Mathies argues that this contention is consistent with the holdings of three 1975 Commonwealth Court decisions: Rochez Bros., Inc. v. DER, 334 A.2d 790; East Pennsboro Township Authority v. DER, 334 A.2d 798; Warren Sand and Gravel v. DER, 341 A.2d 556. DER does not speak directly to this economic impact contention of Mathies'. Rather, DER maintains that the effluent limitations it has imposed on Mathies are required by current mandatory regulations; in this circumstance, DER argues, it is impermissible for DER to consider factors extraneous to the regulations (such as economic impact) which in the absence of mandatory regulations might justify less restrictive effluent limits. In support of its contention, DER cites, inter alia, the same Rochez, Pennsboro and Warren cases cited by Mathies.

Our reading of these cases disagrees with Mathies' contention and agrees with DER's. For example, although Pennsboro held DER should have taken economic impact into account in enforcing a sewer connection prohibition, the holding rests on the Court's belief that DER had the discretion to take actions other than the complete sewer connection ban DER actually imposed. As the Court stated (at 803):

> In the instant case DER admits it gave no consideration to the economic impact of its sewer ban. We hold this to be error. Under the facts of this case, DER had discretionary power to issue a complete sewer ban, to permit limited connections or to issue an order to enforce or even coerce compliance.

In fact, elsewhere in Pennsboro the Court asserts:

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

The EQB has established 25 Pa. Code Chapter 93 under the authority of the Clean Streams Law, 35 P.S. §691.5 [see the notes to 25 Pa. Code Chapter 93]. DER has relied on 25 Pa. Code §93.5(b) in setting the Fe and Mn effluent limits quoted at the outset of this Opinion. The language of Section 93.5(b), and of the also relevant 25 Pa. Code §95.1, is mandatory. Mathies is not challenging the validity or constitutionality of the regulations in 25 Pa. Code Chapter 93; as pointed out earlier, Mathies--in its "Supplemental Statement in Opposition"--concedes summary judgment for DER could be appropriate if the regulations require the imposed effluent limits. Mathies has offered no defenses to application of the regulations. Magnum Minerals v. DER, Docket No. 82-230-G (Opinion and Order, November 22, 1983).

We conclude that it was not an abuse of discretion for DER to have established the aforesaid effluent limits without considering the economic impact on Mathies. Indeed, under the circumstances just described, wherein Mathies has offered no possibly meritorious legal defenses to application of the regulations, it probably would have been an abuse of discretion for DER not to apply them. In the past, this Board has permitted DER to ignore regulations which "were purely procedural, easily correctable, and quite irrelevant to the real merits of the appeal, namely the allegedly harmful environmental consequences." Coolspring Township v. DER, Docket No. 81-134-G (Adjudication, August 8, 1983). However,

we have not been--and are not--willing to allow DER to overlook clearly substantive (rather than merely procedural) mandatory (rather than discretionary) regulations such as 25 Pa. Code §93.5(b).

We add that--for reasons similar to those just discussed--the effects, or lack of effects, of Mathies' discharge on the biota in Peters Creek, is not relevant to this appeal. DER has no choice but to apply the unchallenged regulations the EQB has established.

C. The Magnitude of the Flow

Except for the immediately following, the only contentions of Mathies which warrant serious examination already have been discussed supra. DER's application of 25 Pa. Code §93.5(b) includes computation of the effluent limitations from a formula. Mathies has not challenged use of this formula which involves, inter alia, the "actual or estimated lowest seven-consecutive-day average flow that occurs once in ten years" [language of 25 Pa. Code §93.5(b)]. This average flow, denoted by the symbol (Q 7-10), was taken to be 0.056 cfs (cubic feet per second) by DER. Mathies contends--in its "Statement in Opposition" --that (Q 7-10) is zero. Mathies offers no basis for this assertion that (Q 7-10) = 0. However, Mathies' answer to Interrogatory 5 of DER's First Set of Interrogatories gives Mathies' estimate of (Q 7-10) as 3.9 gpm (gallons per minute). Walter O'Shinski's affidavit, submitted as an attachment to DER's motion for summary judgment, states that the proposed discharge flow from the Thomas Portal is estimated at 8.87 cfs. The amended permit puts the proposed flow from the Thomas Portal as 4,000 gpm. Using this information about the Thomas Portal flow, accepting as an admission by Mathies that (Q 7-10) = 3.9 gpm, and indulging this Board's penchant for taking judicial notice of elementary arithmetic manipulations (see Lower Paxton Township Authority v. DER, Docket

No. 80-205-W, 1982 EHB 111 at 143), we find that (Q 7-10) = 0.0086 cfs, about six times smaller than DER's estimated (Q 7-10).

It can be seen that use of Mathies' (Q 7-10) = 0.0086 cfs (instead of DER's (Q 7-10) = 0.056 cfs) in the aforesaid formula would not have modified the computed effluent limits stated at the outset of this Opinion. However, it is possible that, as Mathies contends, use of (Q 7-10) = 0.0086 cfs would trigger a clause in 25 Pa. Code §93.5(b) which DER apparently has ignored. This clause reads:

> Where the lowest seven-consecutive-day average flow that occurs once in ten years is zero, the Department shall specify the design flow based on the identified or estimated flow at that point where a use identified in §93.4 of this title (related to statewide water uses) becomes possible.

At this stage of these proceedings the Board has no idea whether Mathies' admitted (Q 7-10) of 0.0086 cfs is small enough to be reasonably equated to the "zero" flow mentioned in the above-quoted portion of 25 Pa. Code §93.5(b). If the effluent limits should be based on the flow at a point other than immediately above the Thomas Portal (which was the point at which (Q 7-10) was measured by both DER and Mathies), then the formula DER employed might lead to modified effluent limits.

We conclude that the value of (Q 7-10) to be used in computing the effluent limits is a genuine issue of material fact at this stage of these proceedings. Accordingly summary judgment in DER's favor cannot be granted. However, this Opinion makes it apparent that many of the factual issues in this matter have been foreclosed, and that the hearing on the merits of this appeal can be correspondingly limited.

The accompanying Order is consistent with the foregoing considerations.

O R D E R

WHEREFORE, this 13th day of January, 1984, it is ordered that:

1. DER's Motion For Summary Judgment is denied.

2. The economic impact on Mathies of DER's effluent limitations is outside the scope of this appeal.

3. The possible effects, or lack of effects, of the discharge on plant and animal life in Peters Creek is outside the scope of this appeal, except as such facts bear on the point at which the flow is to be estimated in accordance with 25 Pa. Code §93.5(b).

ENVIRONMENTAL HEARING BOARD

EDWARD GERJUOY
Member

DATED: January 13, 1984

cc: Bureau of Litigation
Zelda Curtiss, Esquire
Daniel E. Rogers, Esquire

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

221 NORTH SECOND STREET
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(717) 787-3483

AMITY COAL, INC. and
ANTHONY P. DICENZO :

:

Docket No. 82-273-G

:

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER

On November 1, 1982 Amity Coal, Inc. ("Amity") and Anthony P. DiCenzo ("DiCenzo") appealed a DER order dated September 30, 1982, addressed to Amity. DiCenzo is the president of Amity. The order found that Amity had conducted surface mining operations in violation of various statutes and regulations, and required Amity to take specified remedial measures to correct these violations. The order also found that Amity's Mine Drainage Permit 6379301 (for the area which was the subject of the order) had lapsed for failure to start operations within two years of receipt of the permit. Amity's appeal raised various contentions, but appeared to object mainly that carrying out DER's order would prevent access to a proposed deep mine.

On November 4, 1982 the Board, in accordance with its usual practice, sent its Pre-Hearing Order No. 1 to the attorney for the appellants (Amity and DiCenzo, who were represented by the same attorney). Pre-Hearing Order No. 1 required the appellants to file their pre-hearing memorandum in this matter no

later than January 18, 1983. On February 24, 1983, no pre-hearing memorandum having been received from the appellants, the Board notified appellants' attorney by certified mail that failure to file appellants' pre-hearing memorandum by March 6, 1983 risked sanctions under our rules, 25 Pa. Code §21.124, including the possibility the appeal would be dismissed.

The appellants did file their pre-hearing memorandum on March 7, 1983, and the filing was accepted by the Board. Then, on May 31, 1983, after receiving DER's responsive pre-hearing memorandum, the Board held a pre-hearing conference, attended by counsel for the appellants and by counsel for DER. At the pre-hearing conference the parties agreed that this appeal would be adjudicated on briefs, if possible, without any evidentiary hearing. A briefing schedule was set up at the pre-hearing conference: DER's brief was due July 29, 1983; the appellants' responsive brief was to be filed 15 days later; and DER was given 10 days to file a reply brief. This schedule was confirmed during several telephone conferences with the parties subsequent to May 31, 1983.

DER's brief was not received until August 29, 1983. On October 6, 1983 the Board wrote appellants' attorney, reminding him that appellants' brief had been due September 13, 1983. The Board then warned:

> Unless you file your brief on or before October 17, 1983, the Board will adjudicate this appeal on the basis of DER's brief only, unless it appears to the Board that a hearing is required.

The above October 6, 1983 warning to appellants' attorney did not elicit appellants' brief, nor did appellants make any other response to our October 6, 1983 letter. Nevertheless, the Board, learning that appellants' attorney had changed his address recently, and fearing he may not have received the October 6, 1983 letter, decided to give appellants' attorney still another warning. On November 29, 1983 we wrote appellants' counsel as follows.

> This is our irrevocably final notice that unless you file your brief on or before December 9, 1983, the Board will adjudicate this appeal on the basis of DER's brief only, unless it appears to the Board that a hearing is required...
>
> Several telephone messages from the Board asking you to call, made to your present law office, have not been returned. Nor has the Board received a request from you to withdraw your appearance in this matter. Under the circumstances, the Board reserves the right to communicate directly with Mr. DiCenzo and Amity Coal at a later date, to be sure their rights have been protected.

Our November 29, 1983 letter was sent certified to appellants' attorney, and the Board has received the return receipt signed by him. Nevertheless, the Board has had no further communication of any kind from either the appellants or their attorney, not even a phone call.

Under the circumstances, the Board sees no alternative to adjudicating this appeal on the basis of DER's brief only; it does not appear to the Board that a hearing is required. DER's brief argues this appeal should be dismissed on the grounds that the appellants have presented no valid defense to DER's September 30, 1982 order. In particular, DER asserts:

> The only grounds that Amity has set forth as a defense to the Department's action is that it anticipates opening an underground mine on the area that it affected by its surface mining activities. Amity contends that it would be a waste of resources for it to reclaim the area now because it will have to undo its work in the future when it commences operation of the anticipated underground mine...
>
> Assuming that such facts existed as would enable Amity to advance the argument that it intends to continue its mining operations, Amity would not have presented a valid defense to the Department's action. The Board has held that the Department does not abuse its discretion in ordering an operator to reclaim an area of land where it intends to conduct future mining activities if the unreclaimed condition of the land

would cause significant environmental harm. Old Home Manor, Inc. v. Commonwealth of Pennsylvania Department of Environmental Resources, EHB Docket No. 82-006-G, Opinion and Order Sur Petition for Supersedeas, issued April 11, 1983.

In the absence of opposing arguments from the appellants, the Board finds DER's arguments for dismissal--as quoted above and as further elaborated in its brief--persuasive. Therefore, the appeal is dismissed.

A copy of this Opinion and Order is being sent directly to the appellants as well as to appellants' attorney.

O R D E R

AND NOW, this 13th day of JANUARY, 1984 , for reasons given in the accompanying Opinion, this appeal is dismissed with prejudice.

ENVIRONMENTAL HEARING BOARD

ANTHONY J. MAZULLO, JR.
Member

EDWARD GERJUOY
Member

DATED: January 13, 1984

cc: Bureau of Litigation
Diana J. Stares, Esquire
Allan E. MacLeod, Esquire
Amity Coal, Inc.
Anthony P. DiCenzo

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

LEWIS M. ALDERFER :

:

Docket No. 82-038-M

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER

This matter comes before the Board for decision upon the motion to dismiss filed by the Commonwealth of Pennsylvania, Department of Environmental Resources (DER). Appellant, Lewis M. Alderfer, filed an answer to the motion, but did not file a brief in support thereof.

Appellant, through his counsel, by letter dated October 2, 1981 requested an exception to DER's ban on connections to the Souderton Borough sewage treatment plant. By notice dated January 13, 1982, DER denied appellant's request for the said exception, and an appeal was thereafter timely filed on February 10, 1982.

In his appeal, appellant stated the following reasons for his appeal:

> "Applicant's (appellant herein) proposal is to construct two (2) additional apartments and remove an existing common bathroom. The additional apartments will not significantly increase sewage flows...."

Thereafter, in his pre-hearing memorandum, under the heading, "Statement of Facts", appellant avers that the "proposed alteration will not increase sewage flow from the structure to any significant degree".

DER moved to dismiss the appeal, asserting that appellant's basis for his appeal admitted, at least implicitly, some increase in sewage flow and on those facts the appeal must be dismissed.

It is well settled that this Board has the authority to dismiss an appeal where the appeal challenges the validity of an action by DER, and DER shows that there is no genuine issue as to any material fact and that on the law and admitted facts DER is entitled to judgment as a matter of law. *United States Steel Corporati v. Commonwealth of Pa., Department of Environmental Resources* EHB Docket No. 78-165- (Decided January 4, 1980), citing *Summerhill Borough v. Commonwealth of Pa., DER,* 34 Pa. Commonwealth Ct. 574, 383 A.2d 1320 (1978) and *Associates Commercial Corporation v. DER,* EHB Docket No. 79-140-B (issued July 2, 1979).

As to the law to be applied in the matter of appeals seeking an exception to a ban on sewer connections for replacement of a discharge, it is settled that an exception may not be granted if the exception would result in any increase in sewage flow into the system. *Edgewoof Manor v. DER,* 2 EHB 60 (1973). Docket No. 77-251; *Alan Mitchell Corp. v. DER,* 1 EHB 68 (1972). Docket No. 71-108-W. Therefore, DER prevails unless there remains factual issue over the increase of sewage flow.

While appellant argues in his Answer to Motion to Dismiss that a factual issue has been raised regarding increased sewage from proposed connection, this argument is contradictory to the reasons for appeal contained in the notice of appeal filed February 10, 1982, and in appellant's Statement of Facts contained in his pre-hearing memorandum. With the exception of appellant's argument in the Answer to DER's motion to dismiss the appeal, appellant has been consistent, in his basis for this appeal, that the proposed alteration to the existing structure will not significantly (Emphasis supplied) increase the flow of sewage into the system. We are of the opinion that appellant is bound by the facts presented by him is his appeal and that any argument that there will be no increase of sewage flow is totally inconsistent with such facts. Since appellant's argument is not based upon facts consistent therewith, the argument is without merit and must be denied.

We therefore find that there is no genuine issue of any material fact, and DER is entitled to judgment as a matter of law.

Accordingly, DER's motion to dismiss the appeal is granted.

O R D E R

AND NOW, this 20th day of JANUARY, 1984 the motion of DER to dismiss the appeal is granted, and the appeal of Lewis M. Alderfer, at EHB Docket No. 82-038-M is dismissed.

ENVIRONMENTAL HEARING BOARD

ANTHONY J. MAZULLO, JR.
Member

EDWARD GERJUOY
Member

DATED: January 20, 1984

cc: Bureau of Litigation
Robert G. Bricker, Esquire
Louise S. Thompson, Esquire

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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ENVIROSAFE :

:

Docket No. 83-101-M

:

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
CAERNARVON TOWNSHIP, EAST EARL TOWNSHIP, and
RED ROSE ALLIANCE, Intervenors

OPINION AND ORDER SUR
APPELLANT'S MOTION FOR SANCTIONS

On July 25, 1983, subsequent to the taking of the deposition of Gary Galida, a DER employe, by appellant, the appellant filed a Motion for Sanctions.

Appellant seeks, in its motion, for sanctions to be imposed upon DER by reason of the refusal of Galida, upon instructions from counsel for DER, to answer questions propounded by appellant's counsel pertaining to the development and background of the regulation which formed the basis for the denial by DER of appellant's application for a permit to operate a hazardous waste treatment, storage and disposal facility. The regulation in question is 25 Pa. Code §75.264 (v) (3) (XU).

On August 15, 1983, Appellant filed with the Board a Motion for Sanctions by reason of the refusal of DER to answer three interrogatories (nos. 1,2,3) propounded to DER by appellant. DER refused to answer the interrogatories on the basis that the questions which were solely related to the development of the aforecited regulation wer burdensome, intolerable, and irrelevant to the instant appeal.

Both parties filed memoranda of law in support of their position.

The basis of appellant's motion is that the information sought in the interrogatories is relevant and not burdensome upon DER. In opposition, DER asserts that information pertaining to the background and development of the regulation in question is beyond the orbit of "relevant information" since the Board does not have jurisdiction to pass upon the constitutionality of regulations, which issue appellant raised in its notice of appeal. DER also asserts that the information sought by appellant both at the deposition of Galida, and in the interrogatories, is not calculated to challenge the application of the regulation, and is therefore not relevant.

The Board has thoroughly reviewed the memoranda filed by the parties in support of their respective positions, and concur in the basic precedent discussed in them.

However, the appellant, in its memoranda, assumes what it intends to prove, i.e., relevancy of the information sought is assumed as a basis for the imposition of sanctions against DER.

Instead of arguing the relevancy of the information sought at depositions and in the interrogatories, appellant assumed its relevancy. Despite the appellant's argument that the "test of relevancy" should be applied, *Rota v. Luzerne Township*, 70 Pa. D&C 2d 51 (1975), the appellant does not connect the cited "test" to the information it seeks.

In a recent Commonwealth Court case, the Court, in discussing the relevancy of evidence in general stated that evidence is relevant if it tends to make the fact at issue more or less probable. *Brenckle v. Arblaster*, 466 A.2d 1975 (Cmwlth. Ct. 1983).

We cannot agree with appellant in its contention that information pertaining to the background and development of the questioned regulation is relevant to this appeal.

The Board has no jurisdiction to decide constitutionality of regulations, and therefore questions designed to elicit information pertaining to the background and development of the regulation are only relevant in the context of the constitutionality

of the regulation, which issue is beyond our authority.

DER rightly argues that the information sought is not relevant and therefore such questions need not be answered, either at depositions or in interrogatories.

We see no reason to discuss further the implications of the various cases and rules of procedure cited in the memoranda. The cases cited are appropriate and controlling, but not where the discovery is not relevant to the issue before the Board.

Accordingly, it is hereby ORDERED that appellant's Motion for Sanctions (two (2) is number) be and hereby are dismissed.

ENVIRONMENTAL HEARING BOARD

Anthony J. Mazullo, Jr.

ANTHONY J. MAZULLO, JR.
Member

DATED: January 23, 1984

cc: Bureau of Litigation
Mark Gold, Esquire
Pamela S. Goodwin, Esquire
Christopher S. Underhill, Esquire
Louis J. Farnia, Esquire
Kenneth C. Notturno, Esquire
Lynn Wright, Esquire
Thomas L. Goodman, Esquire

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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HARMAR COAL COMPANY :

:

Docket No. 83-174-G

:

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER

On November 9, 1983, Harmar filed its pre-hearing memorandum in this matter. There being no discernible prejudice to DER, the pre-hearing memorandum, though actually due November 7, 1983, was accepted as timely, consistent with the Board's understanding of the implications of 1 Pa. Code §31.2 and recent decisions of the Pennsylvania courts. De Angelis v. Newman, 460 A.2d 730 (Pa. 1983); Byard v. Brogan, 460 A.2d 1093 (Pa. 1983); Dunn v. Maislin Transport Limited, 456 A.2d 632 (Pa. Super. 1983).

According to our Pre-Hearing Order No. 1, DER's pre-hearing memorandum was due fifteen (15) days after receipt of Harmar's pre-hearing memorandum. On December 22, 1983, when DER's pre-hearing memorandum was long overdue, the Board sent DER's counsel notice by certified mail that DER must file its pre-hearing memorandum by January 3, 1984 or risk sanctions. The return receipt for this notice was returned to the Board, signed as of December 27, 1983. DER's pre-hearing memorandum has not been filed, however, nor has DER requested any extension of the aforesaid January 3, 1984 filing deadline.

We would have accepted DER's pre-hearing memorandum a few days after January 3, 1984, just as we were willing to accept Harmar's somewhat tardy pre-hearing memorandum. However, we cannot ignore DER's repeated failure to comply with our orders. Furthermore, in other appeals we have sanctioned appellants who have failed to file their pre-hearing memoranda despite Board reminders. Armond Wazelle v. DER, Docket No. 83-063-G (Opinion and Order, September 13, 1983); Township of South Park v. DER, Docket No. 83-068-G (Opinion and Order, December 2, 1983); W. A. Cotterman v. DER, Docket No. 83-155-G (Opinion and Order, December 22, 1983). It would be unseemly for the Board to sanction deficient appellants without ever sanctioning DER for similar deficiencies.

Therefore, at the hearing on the merits of this appeal, if held, we will limit DER's participation to cross examination of Harmar's witnesses and to presentation of such evidence as normally would be offered in rebuttal (rather than in DER's case-in-chief). This ruling is along the lines of our rulings in Wazelle, South Park and Cotterman, supra.

This appeal is from portions of a DER abatement order addressed to Harmar, dated July 1, 1983. Thus DER bears the burden of proof. 25 Pa. Code §21.101(b)(3). Nevertheless, we will not permit our ruling supra to become the basis for a compulsory non-suit against DER, i.e., for an adjudication sustaining the appeal without the necessity for evidence by Harmar. DER's July 1, 1983 abatement order makes various findings of facts allegedly establishing the existence of environmental damage caused by Harmar's activities. Until rebutted, these findings are entitled to a presumption of validity. Abbotts Dairies Division of Fairmont Foods v. Butz, 389 F. Supp 1 (D.C.Pa. 1975); Mignatti Construction Co. v. EHB, 49 Pa. Cmwlth. 497, 411 A.2d 860 (1980). Consequently we judge that sustaining Harmar's appeal at this stage, without requiring Harmar to come forward with its

evidence, would be inconsistent with 25 Pa. Code §21.101(d)(1).

Before closing, there is another complication to be mentioned. According to our docket, Harmar's appeal was not filed until August 15, 1983, much more than thirty days after the July 1, 1983 date on DER's abatement order. We conclude that this appeal well may have been untimely filed, and hence may have to be dismissed as outside our jurisdiction before we ever get to a hearing on the merits. 25 Pa. Code §21.52(a); Rostosky v. DER, 26 Pa. Cmwlth. 478, 364 A.2d 761 (1976).

O R D E R

WHEREFORE, this 23rd day of January, 1984, it is ordered that:

1. If DER believes this appeal has been untimely filed, it shall file an appropriate Motion to Dismiss on or before February 17, 1984, accompanied by a memorandum of law in support of the motion.

2. If DER files the Motion called for in Paragraph 1, Harmar shall respond within twenty (20) days of receipt (see Paragraph 3 of our Pre-Hearing Order No. 1).

3. The Board will rule on the aforesaid Motion, if filed, as soon as possible after Harmar's response is received; if necessary, the Board will schedule an evidentiary hearing on this timeliness issue.

4. Once the timeliness issue is resolved, a hearing on the merits of this appeal will be scheduled if necessary.

5. If this matter comes to a hearing on the merits, DER's participation will be limited to cross examination of Harmar's witnesses and to presentation

of such evidence as normally would be offered in rebuttal (rather than in DER's case-in-chief); DER also will be permitted to file a post-hearing brief.

ENVIRONMENTAL HEARING BOARD

Edward Gerjuoy

EDWARD GERJUOY
Member

DATED: January 23, 1984

cc: Bureau of Litigation
Michael E. Arch, Esquire
Daniel E. Rogers, Esquire

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

221 NORTH SECOND STREET
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DANIEL A. MARINO, JR. :

:

Docket No. 83-198-G

:

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER

On September 6, 1983, Marino filed an appeal headed "Department of Environmental Resources vs. City of Greensburg vs. Daniel A. Marino, Jr." This appeal objected to DER's decision to prohibit new connections to a portion of the Greater Greensburg Sewage Authority ("GGSA"). This decision, announced in a letter of July 27, 1983 to the City of Greensburg ("City") already had been appealed by the City in an appeal docketed by us at 83-192-G. Marino's appeal was accompanied by a Petition to Intervene in the appeal at 83-192-G.

Marino has not responded to DER's Interrogatories and Request for Production of Documents, filed September 29, 1983. On November 4, 1983, the City withdrew its appeal at 83-192-G. Marino's pre-hearing memorandum in the instant appeal, due December 5, 1983, has not been filed. On December 9, 1983 the Board wrote Marino's counsel stating:

> Your pre-hearing memorandum in the Marino appeal was due December 5, 1983, but has not been filed. If you do not intend to pursue this appeal, the Board will appreciate being so informed, so

that we may clear our docket. If your pre-hearing memorandum is not filed by December 22, 1983, the Board will feel free to apply sanctions, including dismissal of the Marino appeal.

Marino has not filed his pre-hearing memorandum, nor has he responded at all to the Board's December 9, 1983 letter. Under the circumstances, we see no alternative to dismissal of this appeal for failure to obey the Board's orders, under the authority of 25 Pa. Code §21.124.

O R D E R

AND NOW, this 25th day of January , 1984, for reasons given in the accompanying Opinion, this appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

ANTHONY J. MAZULLO, JR.
Member

EDWARD GERJUOY
Member

DATED: January 25, 1984

cc: Bureau of Litigation
Zelda A. Curtiss, Esquire
William C. Stillwagon, Esq.

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

221 NORTH SECOND STREET
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EAST FALLOWFIELD TOWNSHIP :

:

Docket No. 81-008-M

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and SCATALOGIC ASSOCIATES, INC., Permittee

OPINION AND ORDER

On January 21, 1981, the Environmental Hearing Board (Board) received a skeleton appeal, in the form of a telegram, filed by East Fallowfield Township, Chester County, Pennsylvania, and in due course the appeal was perfected.

The appeal was filed in protest against the issuance by the Department of Environmental Resources (DER), through its Regional Solid Waste Manager, Wayne L. Lynn, of solid waste permit No. 601887 to Scatalogic Associates, Inc., (Scatalogic) 60 Davidson Road, West Chester, PA.

The permit authorized Scatalogic to operate a sludge processing or disposal facility at Buck and Doe Run Valley Farms, Inc. in East Fallowfield Township.

Various reasons were given in the notice of appeal as the bases for the appeal, which specified reasons are not set forth herein by reason of the Order of the Board issued contemporaneously with this Opinion.

On February 4, 1981, the Board issued Pre-Hearing Order No. 1, requiring appellant to, inter alia, file a pre-hearing memorandum "on or before March 4, 1981", with the permittee, Scatalogic, being thereafter granted leave to file its responsive

pre-hearing memorandum "within ten (10) days after the date on which the appellant's pre-hearing memorandum is filed.

The appellant did not file its pre-hearing memorandum on or before March 9, 1981, and the record indicates no action by appellant as of January 5, 1982, when the Board requested that a status report on the appeal be filed with the Board "on or before January 15, 1982".

Since the appellant did not respond to the Board's request for a status report, the Board, by notice dated January 26, 1982, requested that a status report be filed "by February 5, 1982". The said notice advised appellant that failure to comply with the notice could result in sanctions being imposed by the Board, including "dismissal of appeal".

By letter dated February 4, 1982, and received by the Board on February 5, 1982, counsel for appellant advised that his client desired "to be heard" concerning the question of dumping by appellant in the Township.

The Board thereafter, of February 19, 1982 issued another Pre-Hearing Order No. 1 (which specifically noted that it superseded Pre-Hearing Order No. 1 issued February 4, 1981) which required appellant to file a pre-hearing memorandum on or before April 19, 1982.

Having received no response to its Order dated February 19, 1982, the Board, on June 4, 1982, sent a notice to counsel for appellant requiring the filing of a pre-hearing memorandum by June 15, 1982. The latter notice was sent by certified mail, return receipt requested, and the return receipt indicate delivery on June 7, 1982, and advised counsel for appellant of sanctions if not complied with.

By letter dated June 25, 1982, counsel for appellant advised the Board that he would contact the Board of the intentions of his client by July 9, 1982.

Not having received any contact or communication from appellant or its counsel by October 27, 1983, approximately sixteen (16) months later, the Board, on said date, requested a status report to be filed on or before November 7, 1983. As of December 14, 1983 the Board, not having received any response from appellant's counsel, requested that appellant file its status report by December 23, 1983, or suffer sanctions

for non-compliance, including dismissal of the appeal. The notice was received by counsel for appellant on December 16, 1983, as indicated by the return receipt received by the Board after delivery of the notice. As of the date of the writing of this Opinion and Order, the Board has not received any response to its request for a status report.

In addition to the aforecited instances of failure or refusal to proceed on the part of appellant, we note that in his letter of June 25, 1982 to the Board counsel for appellant stated that he "personally" felt "that this particular matter is moot".

While the matter may indeed by moot, insofar as counsel or appellant is concerned, this Board has no facts upon which to decide that issue.

However, it has more than sufficient facts to determine that its orders and procedural requirements have been grossly ignored by appellant. Putting aside the matter of professional responsibility, common courtesy alone dictates what action should have been taken pursuant to the repeated requests made by the Board in this appeal.

The Rules and Regulations of the Board, at 25 Pa. Code 21.124 provides:

> "The Board may impose sanctions upon a party for failure to abide by a Board order or Board rule of practice and procedure. Such sanctions may include the dismissal of any appeal..."

Appellant, and its counsel were advised of the provisions of the above Board rule, and chose to ignore the possibility of the imposition of sanctions.

While we do not lightly consider the drastic nature and implications of dismissal of an appeal without hearing, we must weigh such drastic action on the part of the Board against the conduct of the appellant in flatly refusing to proceed in this matter. Perhaps the refusal is the true measure of the legal basis of appellants appeal. Certainly the record would substantiate such a finding by the Board.

In view of all of the above facts, we therefore issue the following:

ORDER

AND NOW, this 26th day of January, 1984, upon consideration of the record of this appeal, the appeal of East Fallowfield Township, at EHB Docket No. 81-008-M is hereby dismissed with prejudice.

ENVIRONMENTAL HEARING BOARD

ANTHONY J. MAZULLO, JR.
Member

EDWARD GERJUOY
Member

DATED: January 26, 1984

cc: Bureau of Litigation
William R. Keen, Jr., Esquire
Denis J. Byrne, Esquire
Louise S. Thompson, Esquire

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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BLAKE BECKER, JR. :

:

Docket No. 79-188-B

: .

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER

On December 10, 1979, Blake Becker, Jr., appellant filed a Notice of Appeal with the Board seeking review of the action of the Department of Environmental Resources Bureau of Surface Mine Reclamation, (DER) in declaring forfeited bonds posted by appellant in conjunction with various surface mining permits.

By order of the Board, dated February 8, 1980, the appeal was continued "pending settlement".

By notice dated October 15, 1980, the Board requested appellant to report on the status of the appeal on or before October 27, 1980.

By notice dated November 11, 1980, counsel requested an indefinite extension of time in which to proceed pending settlement negotiations.

By notice dated November 19, 1980, the Board granted an extension to February 18, 1981 for compliance pending settlement negotiations.

On February 27, 1981, the Board advised counsel that the date for filing of pre-hearing memoranda (February 18, 1981) had passed without compliance therewith, and that unless there was compliance by March 9, 1981 sanctions might be imposed, including

dismissal of the appeal. Counsel for appellant received said notice on March 2, 1981.

By notice dated November 18, 1981, the Board requested that a status report be filed on or before November 29, 1982. Not having received a reply to the November 18, 1981 notice, the Board by notice dated December 8, 1982, advised counsel of the default and outlined that unless compliance was affected by December 20, 1982, sanctions might be imposed, including dismissal of the appeal. Counsel for appellant received said notice December 10, 1982, and failed to respond thereto.

On November 2, 1983, the Commonwealth filed a Motion to Dismiss this appeal by reason of appellant's failure to prosecute the appeal. On Novmeber 22, 1983, the Board, sua sparte, granted a Rule upon the appellant to show cause why the Commonwealth's Motion to Dismiss should not be granted, and the rule was returnable December 20, 1983.

The Board has not received a response to the said Rule as of the date of the writing of this Opinion and Order.

Under the provisions of the Board's Rules and Regulations section 21.11, entitled "Timely filing required", parties are required to make filings with the Board, where required or permitted, "within the time limits, if any, for such filing".

Appellant has been consistent in his failure to comply with the provisions of this section of the Board's Rules and Regulations.

Under the provisions of section 21.124 of the Board's Rules and Regulations, entitled "Sanctions", sanctions may be imposed by the Board upon a party for failure "to abide by a Board order or Board rule of practice and procedure. Such sanctions may include dismissal of an appeal...."

A review of the record in this appeal reveals a persistent refusal on the part of the appellant to abide by the Board's rules and regulations.

Short of the notice of appeal, appellant has steadfastly refused to file the documents required to be filed by Board order.

In matters involving bond forefeitures, where DER has the burden of proof and should be required to establish its case before the Board acquiesces in the forfeiture, the Board has been very reluctant to dismiss an appeal, even when an appellant has not

filed his pre-hearing memorandum and has ignored discovery requests. *W.A. Cotterman v. DER*, EHB Docket No. 83-155-G (Opinion and Order, December 22, 1983). Under the facts of the present appeal however, it appears pointless to call a hearing on the merits of this matter. The appellant has failed to prosecute his appeal for over four years. The Board has sought to apprise the appellant of the necessity for proceeding in this matter so as to avoid the imposition of sanctions and, in issuing its Rule to Show Cause, the Board, on its own motion, sought to arouse the appellant into action on his own behalf.

The Board can do no more to protect the appellant, especially is this so in situations such as the instant appeal wherein appellant has failed and refused to respond to the many notices calculated to elicit a responsive reply from appellant.

The Commonwealth should not be required to expend additional time, labor and expense in appeals apparently brought in other than good faith.

Accordingly, we enter the following:

O R D E R

AND, NOW, this 27th day of January, 1984, upon motion of counsel for the Commonwealth (DER), and upon failure of appellant to respond thereto, and upon failure of appellant, Blake Becker, Jr., to respond to the Rule to Show Cause entered by the Board on November 22, 1983, and returnable December 20, 1983, the appeal of Blake Becker, Jr., at EHB Docket No. 79-188-B, is hereby dismissed with prejudice.

ENVIRONMENTAL HEARING BOARD

ANTHONY J. MAZULLO, JR.
Member

DATED: January 27, 1984

cc: Bureau of Litigation
Diana J. Stares, Esquire
David J. Humphreys, Esquire

EDWARD GERJUOY
Member

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

SPEC COALS, INC. :

:

Docket No. 83-256-G

:

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER

On November 4, 1983, Spec Coals ("Spec"), acting through its officer Robert E. Ankney, filed an appeal of a DER abatement order addressed to Spec, dated September 29, 1983. Thereafter the Board sent Mr. Ankney, who is not an attorney, its standard Pre-Hearing Orders Nos. 1 and 2.

On December 14, 1983, DER filed a Motion to Dismiss, alleging that the aforementioned abatement order had been mailed to Spec by certified mail and had been received and signed for by Spec on October 4, 1983. Therefore, DER contends, the appeal must be dismissed, as having been filed one day past the thirty-day time limit for filing an appeal specified in 25 Pa. Code §21.52(a).

As of this date Spec has not responded to DER's Motion, although paragraph 6 of Pre-Hearing Order No. 1 (mailed November 16, 1983) and paragraph 3 of Pre-Hearing Order No. 2 (mailed December 5, 1983) notify the appellant that parties must respond to petitions or motions within twenty days. Indeed paragraph 3 of

Pre-Hearing Order No. 2 adds the admonition: "THE BOARD WILL NOT NOTIFY THE PARTIES THAT A RESPONSE MAY BE DUE" (capitals in the original).

In view of the facts recounted above, and recognizing that the Pennsylvania courts have established that the Board has no jurisdiction to hear an appeal which is filed after the thirty-day period, we have no choice but to dismiss the appeal. Rostosky v. DER, 26 Pa. Cmwlth. 478, 364 A.2d 761 (1976); Multichem Corp. v. DER, EHB Docket No. 83-047-M (Opinion and Order, May 5, 1983).

We add, however, for the benefit of this pro se appellant, that if he disagrees with the facts recounted above, he may petition the Board to reconsider this dismissal, under 25 Pa. Code §21.122 of our Rules and Regulations.

O R D E R

AND NOW, this 31st day of January, 1984, for reasons given in the above Opinion, this appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

ANTHONY J. MAZULLO, JR.
Member

EDWARD GERJUOY
Member

DATED: January 31, 1984

cc: Bureau of Litigation
Alan S. Miller, Esquire
Robert C. Ankney

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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COMMONWEALTH OF PENNSYLVANIA :
PENNSYLVANIA GAME COMMISSION :

: Docket No. 82-284-G

v. :

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

OPINION AND ORDER

On November 1, 1982, DER issued Solid Waste Permit No. 300795 for construction of a 40-acre residual waste landfill to the permittee, Ganzer Sand & Gravel ("Ganzer"). On November 22, 1982 the Commonwealth of Pennsylvania Game Commission ("Commission") timely appealed issuance of this permit, alleging inter alia that operation of the permit would allow acid and other contaminating material "to leach into the important wetlands immediately adjacent to the permitted site."

We need not review here the history of this appeal since November 22, 1982; some of this history is recounted in Opinions and Orders issued by the Board on March 15, 1983, March 29, 1983 and April 15, 1983, concerning various disputes between the parties. This matter now is ready for a hearing on the merits, however, which has been scheduled. In the instant Opinion and Order we will rule on a

number of still open issues bearing on the scope and content of that forthcoming hearing.

A. Can the Commission Appeal to this Board?

On December 13, 1983 the Board issued an Order permitting the parties to file memoranda of law on the following issue:

> Under the circumstances of the instant appealed-from permit grant to Ganzer, is the Commission an entity authorized to appeal DER's action to the Environmental Hearing Board?

On December 13, 1983 the Board also wrote to the Office of General Counsel to the Governor, asking whether that Office knew of previous circumstances wherein this issue, or issues substantially similar, had been encountered.

Memoranda were received from the Commission and from Ganzer. After supplementing these memoranda with the Board's own research, we have concluded that the Commission is an entity authorized to file the above-captioned appeal. This conclusion is based on the reasoning in the two immediately following paragraphs. No information concerning the above issue was received from the Governor's General Counsel's Office, so that our December 13, 1983 letter to that Office has had no consequences relevant to the above-captioned matter.

Examination of a Table of Pennsylvania Case Names indicates that the appellate courts of Pennsylvania have been willing to hear appeals filed by one Commonwealth agency against a sister agency, or even against the Commonwealth itself. See, e.g., Pa. Dept. Highways v. Pa. Public Utility Commission, 198 Pa. Super. 87, 182 A.2d 267 (1962); Pa. Labor Relations Bd. v. State Liquor Control Bd., 28 Pa. Cmwlth. 145, 367 A.2d 805 (1977); Pa. Labor Relations Bd. v. Commonwealth, 478 Pa. 582, 387 A.2d 475 (1978). Indeed, such appeals, while not common, cannot be termed rare. The subject matter of such appeals, and the agencies involved

therein, are varied, but we have discerned one apparent common thread, namely that in each such appeal one or both of the agencies involved can be considered "independent" of the Governor, because, e.g., the agency head or heads, once appointed, do not serve at the Governor's pleasure and therefore do not have to bend to his will. Refusal by the courts to adjudicate disputes which the Governor could decide on his own authority is consistent with principles of judicial restraint and with Pennsylvania court precedents. Comm. v. Gaitano, 277 Pa. Super. 404, 419 A.2d 1208 (1980), affirming Governor's exclusive power to commute prison sentences; Wilt v. Comm. Dept. of Revenue, 62 Pa. Cmwlth. 316, 436 A.2d 713 (1981), aff'd 447 A.2d 943 (1982); In re Investigation By Dauphin County Grand Jury, June 1938, 332 Pa. 289, 2 A.2d 783 (1938). Willingness by the courts to adjudicate disputes which the Governor does not have the authority to decide is equally consistent with those principles and precedents.

The Pennsylvania Game Commission is an "independent" commission under the terms of 71 P.S. §§11, 61 and 101. Under 34 P.S. §1311.201, Commission members, once appointed by the Governor and confirmed by the Senate, hold office for a fixed term of eight years. The executive director of the Commission is selected by the Commission and serves at the pleasure of the Commission. 34 P.S. §1311.205. Thus we do not see how the Governor assuredly can decide this dispute on his own authority; e.g., we do not see how the Governor can order the Commission to accept DER's evaluation that Ganzer's permit will not adversely affect wetlands immediately adjacent to the permitted site. Therefore, in light of the preceding paragraph, we see no basis for holding that the Commission is not authorized to appeal to this Board. Although our December 13, 1983 Order suggested that we might ask for oral argument on the issue of the Commission's authority to appeal to this Board, we now do not feel such oral argument is necessary.

B. The Commission's Standing

As explained in our December 13, 1983 Order, our conclusion that the Commission is authorized to appeal to this Board does not automatically imply that the Commission has standing to prosecute this appeal; to have standing, the Commission must allege facts which satisfy the test of William Penn Parking Garage v. City of Pittsburgh, 464 Pa. 168, 346 A.2d 269 (1975). The issue of the Game Commission's standing, on which we next rule, has been discussed in various documents filed by the parties pursuant to our Order of October 4, 1983 in this matter.

William Penn, supra, requires us to examine the nature of the injuries the Commission allegedly may suffer if the Ganzer landfill is constructed. Such injuries must lie within the Commission's zone of interests delineated by the legislation defining the Commission's powers and responsibilities; the Commission has no legal basis for claiming injuries to interests outside that zone. William Penn, supra, note 23. Alternatively one can say that the Commission cannot be adversely affected by--and therefore cannot have standing to challenge--actions irrelevant to its statutorily prescribed duties and responsibilities. Lisa H. v. State Board of Education, 447 A.2d 669 (Pa. Cmwlth. 1982).

The Commission's powers and responsibilities are articulated in 34 P.S. §§1311.101 et seq., especially §§.210 and .214, and in 71 P.S. §§671-675. It appears that the powers and responsibilities germane to the instant appeal are:

> 34 P.S. §1311.210 Duties of commission.
> It is the duty of said commission to protect, propagate, manage and preserve the game, fur-bearing animals, and protected birds of the State, and to enforce, by proper action and proceedings, the laws of this Commonwealth relating thereto.

> 71 P.S. §674. State game land refuges and farms.
> The Pennsylvania Game Commission shall have the power to acquire lands, with or without mineral reservations, by purchase, lease, or gift, and to establish and maintain State Game Refuges and Game Farms, State Game Propagation Areas, and Special Preserves, for the protection and propagation of game, as may now or hereafter be authorized by law.

71 P.S. §672, which tracks the language of 34 P.S. §1311.210, need not be additionally repeated here.

Although Ganzer and Hammermill argue to the contrary, we believe the Commission has alleged facts sufficient to confer standing in the light of William Penn and the immediately preceding quotations. In particular, the Commission's Second Amended Pre-Hearing Memorandum asserts the Commission

> is prepared to show that contaminated surface runoff can infiltrate into the Siegel Marsh ecosystem and leachate breakout can run into the pit and into the ground water or breakout through the side directly into the surrounding wetlands.

Elsewhere the Commission claims that various elements in the leachate will be toxic or otherwise damaging to the wildlife in the wetlands adjacent to the permitted site. Such allegations fall within the zone of interests specified by 34 P.S. §1311.210 (to protect...and preserve the game...) and 71 P.S. §674 (to... maintain State Game Refuges...for the protection and propagation of game). The threatened injuries alleged are "substantial, immediate and direct." William Penn, supra; Concerned Citizens Against Sludge, Docket No. 82-221-G (Opinions and Orders dated September 14, 1983, August 19, 1983, May 4, 1983 and February 9, 1983).

On the other hand we agree with Ganzer that the Commission cannot be allowed to "act as a private or Commonwealth attorney general, looking over DER's shoulders" as DER administers the Solid Waste Management Act ("SWMA"), 35 P.S.

§§6018.101 et seq., or the Dam Safety and Encroachments Act ("DSEA"), 32 P.S. §§693.1 et seq. Every allowable Commission claim of procedural or substantive error by DER in granting Ganzer its permit must be related to the Commission's alleged injuries under the William Penn standard. Furthermore, if the Commission intends to argue that the existing regulatory scheme relied on by DER is insufficient to protect the wildlife and wildlife habitats for which the Commission is responsible, the Commission will have to overcome the presumption that the existing regulatory scheme meets the objectives of the Legislature. Coolspring Township v. DER, Docket No. 81-134-G (Adjudication, August 8, 1983), at section IIA.

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

We add that considerations similar to those presented supra make it evident that much of the evidence the parties describe in their pre-hearing memoranda is irrelevant to this appeal. For example, if the wetlands immediately adjacent to the proposed site indeed are lands the Commission is supposed to maintain (71 P.S. §674), containing wildlife the Commission is supposed to protect (34 P.S. §1311.210), there is no need to burden the hearing on the merits with testimony about the wetlands' use by educational groups. Similarly, we shall not admit testimony about the Lowville site, e.g., testimony regarding the daily

operation at Lowville, without a showing that such testimony--concerning a different landfill at a different location--has probative value for the instant appeal.

O R D E R

WHEREFORE, this 3rd day of February, it is ordered that:

1. The Commission is an entity authorized to appeal to this Board.

2. The Commission has alleged facts sufficient to confer standing to appeal, but must prove those facts of course.

3. The Commission does not have standing to allege procedural or substantive errors by DER, unless those claimed errors bear on admissible allegations of injury to the Commission.

4. Admissible allegations of injury to the Commission must be "substantial, immediate and direct" (the William Penn standard), and must fall within the zone of interests specified by 34 P.S. §1311.210 and 71 P.S. §674.

5. At the forthcoming hearing on the merits of this appeal, rulings on the admissibility of proffered evidence, e.g., testimony concerning alleged failure to comply with regulations promulgated under the Dam Safety and Encroachments Act, will be based on the considerations of the Opinion accompanying this Order.

ENVIRONMENTAL HEARING BOARD

EDWARD GERJUOY
Member

DATED: February 3, 1984

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

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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(717) 787-3483

ADAM EIDEMILLER :

:

Docket No. 83-264-M

:

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER

On October 12, 1983, the Department of Environmental Resources (DER) issued a compliance order upon Adam Eidemiller, Inc., appellant, concerning a surface mine operation conducted by appellant in Springfield Township, Fayette County, Pennsylvania.

On November 18, 1983, appellant appealed the order of DER of October 12, 1983 to this Board, alleging as the sole basis for the appeal the fact that "all of the matters complained of "in DER's order" have been corrected.

On January 9, 1984, DER filed with the Board a Motion to Dismiss, wherein DER agreed that appellant had "complied with the requirements of the Compliance Order", and that, therefore, no issues of fact or law had been raised by appellant in this appeal.

The Board agrees with DER's position.

Where there exists no controversy in law or fact, and where the Board can grant no relief, the appeal is moot. *Highway Auto Service v. Commonwealth of Pa., DER*, 1980 EHB 10.

In the instant appeal, appellant contends that it has complied with the Compliance Order, and DER agrees. The Board is therefore left with no controversy to

decide and cannot grant relief to either party to this appeal. The appeal is therefore moot and must be dismissed.

O R D E R

AND, NOW, this 7th day of FEBRUARY, 1984, there being no issue of fact or law at issue in this appeal, and the Board being unable to grant relief, the appeal of Adam Eidemiller, Inc., appellant, at EHB Docket No. 83-264-M is dismissed as moot.

ENVIRONMENTAL HEARING BOARD

ANTHONY J. MAZULLO, JR.
Member

EDWARD GERJUOY
Member

DATED: February 7, 1984

cc: Bureau of Litigation
Patti J. Saunders, Esquire
B. Patrick Costello, Esquire

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

221 NORTH SECOND STREET
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HARRISBURG, PENNSYLVANIA 17101
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LANSDALE BOROUGH :

:

Docket No. 83-088-M

:

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER
SUR MOTION FOR SANCTIONS
AND MOTION TO STRIKE
COMMONWEALTH'S PRE-HEARING MEMORANDUM

Lansdale Borough, appellant herein, filed four separate appeals from final actions of DER, all of which final actions were denials of change orders pertaining to construction of a waste water treatment plant and submitted to DER for approval by appellant.

The chronology of the filing of the appeals is as follows:

1. Appeal docketed at 83-088-M filed May 5, 1983.

2. Appeal docketed at 83-089-M filed May 5, 1983 and consolidated with 83-088-M by Board order dated May 16, 1983.

3. Appeal docketed at 83-090-M filed May 5, 1983, and consolidated with 83-088-M by Board order dated May 16, 1983.

4. Appeal docketed at 83-107-M filed May 31, 1983, and consolidated with 83-088-M by Board order dated June 22, 1983.

The Board issued its pre-hearing order No. 1 on May 16, 1983 requiring appellant to file pre-hearing memorandum as to 83-088, 089 and 090-M on or before July 29, 1983. As to 83-107-M the Board ordered that a pre-hearing memorandum be filed on

August 17, 1983. In all cases DER was required to file an answering pre-hearing memorandum within fifteen (15) days of receipt of appellant's pre-hearing memorandum.

Appellant filed its initial pre-hearing memorandum on August 16, 1983, and a supplemental pre-hearing memorandum was filed by appellant on September 29, 1983. Although DER presumably had a right to object to these late filings by appellant, no objection thereto was filed by DER.

DER requested an extension of time within which to file its pre-hearing memorandum and was granted an extension to September 30, 1983 to so file. On October 28, 1983, withour prior demand that a pre-hearing memorandum be filed by DER, appellant filed a Motion for Sanctions by reason of the failure of DER to file a pre-hearing memorandum by September 30, 1983. On November 4, 1983 DER requested leave to file its pre-hearing memorandum by November 11, 1983, to which appellant objected, and on November 14, 1983, DER again requested an extension of time within which to file its pre-hearing memorandum to November 18, 1983, and again appellant objected.

DER filed its pre-hearing memorandum on November 21, 1983, and on November 30, 1983, appellant filed a motion to strike DER's pre-hearing memorandum.

The several motions are now ready for decision by the Board, and will be considered separately hereinafter.

1. Appellant's Motion For Sanctions and Motion to Strike

The appellant seeks to have this Board impose various sanctions upon DER for failure to file in a timely fashion its pre-hearing memorandum.

In its motion appellant alleges DER has "utterly failed to comply with the requirements of "the Board", and is deliberately attempting to delay this litigation. Appellant also alleges that the proceedings are delayed and discovery "stymied" by failure of DER to file its pre-hearing memorandum.

In furtherance of its motion, appellant, in paragraph 13 of its motion, states that "...sanctions must (emphasis supplied) be granted pursuant to 25 Pa. Code §21.124...".

There is no doubt that DER failed to file its pre-hearing memorandum in the

time frame ordered by the Board on September 2, 1983. However, it is clear, and undoubted, that appellant's characterization of the conduct of DER's counsel is without foundation.

The file reveals that counsel for DER was aware of the deadlines imposed by Board order, and communicated his concerns to the Board in requesting extensions for filing of the pre-hearing memorandum. Counsel for appellant was made aware of the problems being experienced by counsel for DER, and in fact attended a conference with said counsel wherein the filing of the subject pre-hearing memorandum was discussed.

Counsel for DER contends that, by mutual agreement, both parties agreed to withhold filing of any documents until a settlement conference was held. This decision was reached prior to September 30, 1983, the due date for the filing of DER's pre-hearing memorandum, and the settlement conference was held on October 26, 1983. Counsel for appellant contests DER's version of their agreement.

Irrespective of the conflicting versions given by counsel, it is of no small moment that no motion was filed by counsel for appellant until October 28, 1983, and that October 28, 1983 is just two (2) days after the settlement conference was held wherein no settlement could be reached. If there were no agreement as to the filing of the pre-hearing memorandum by DER, why did counsel for appellant wait until October 27, 1983 to forward his motion for sanctions.

We can find no justification for the allegation of appellant's counsel that counsel for DER "utterly failed" to abide by Board rules and that he was "deliberately attempting to delay" the litigation. It is common practice for counsel to delay filings with this Board pending the outcome of settlement negotiations and we can find no reason, in light of a review of the entire file, to conclude that the usual practice was not followed in this case.

While, under the provisions of 25 Pa. Code §21.124 the Board may impose sanctions, we do not feel that sanctions such as those requested by appellant are appropriate in this instance. The Board, under other circumstances, has imposed sanctions for failure to abide by Board orders, but in those instances, the imposition of sanctions

occurred after failure of a party to file "despite Board reminders". *Harmar Coal Company v. Comm., DER*, EHB Docket 83-174-G (Opinion and Order January 23, 1984). The instant case, however, does not present the factual basis present in *Harmar*, as the cases cited therein.

Board rules, and the rules of civil procedure governing practice before the several courts of common pleas of the Commonwealth, may, by consent of the parties, be waived. The admitted facts regarding the filing of DER's pre-hearing memorandum support a finding that a waiver of filing date for DER's pre-hearing memorandum was in effect in this appeal, and we do so find.

Accordingly, appellant's motion for sanctions and to strike DER's pre-hearing memorandum are denied.

O R D E R

AND, NOW, this 7th day of FEBRUARY, 1984, upon consideration of appellant's Motion for Sanctions and its Motion to Strike, and upon review of the record in this appeal, it is hereby ORDERED that the appellant's Motion for Sanctions and Motion to Strike be and hereby are denied.

ENVIRONMENTAL HEARING BOARD

Anthony J. Mazullo, Jr.

ANTHONY J. MAZULLO, JR.
Member

DATED: February 7, 1984

cc: John Wilmer
Bureau of Litigation
Jeffrey T. Sultanik, Esquire

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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GUY AND MARY SETLIFF :

:

Docket No. 83-289-G

:

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and CLARKSBURG COAL COMPANY

OPINION AND ORDER

On December 22, 1983 the Setliffs appealed DER's grant of a mine drainage permit to Clarksburg Coal. Their stated grounds for appeal, quoted here in full, were as follows:

1. Devaluation of property.
2. Length of proposed mining--8 years!!
3. Possible loss of water. Inconvenience and abrupt change in lifestyle.
4. Noise Pollution.
5. Gross environmental disruption for many years.
6. Unsafe environment for children.
7. Wildlife preservation.
8. Possible property damage.
9. Disruption of community--starting of a new site before completion of other sites.

On January 6, 1984 the permittee filed a motion asking that the appellants be ordered "to more specifically plead the reasons and basis for their appeal."

The Board granted this motion, but--because the Setliffs are appearing pro se--also wrote them a letter, explaining that their notice of appeal was deficient from the standpoint of 25 Pa. Code §21.51(e), and advising the Setliffs to get an attorney.

The Setliffs have responded by stating:

> We do not have any more definite statements to add to our original appeal.
>
> We do not choose to seek an attorney in our appeal.

The Setliffs then proceeded to reiterate, essentially word for word, their previously stated grounds for appeal, stated supra.

The Board customarily grants pro se appellants a great deal of latitude in pursuing their appeals; we realize that our procedures are unfamiliar to non-lawyers. However, we also have an obligation to the permittee in this appeal, who is entitled to know what specific complaints the appellants have, so that a defense to those complaints can be prepared. The grounds for appeal stated above are grossly deficient in this regard. Moreover, in this appeal, unlike others where we have tolerated very considerable disregard of our orders by pro se appellants, the appellants have the burden of proof. 25 Pa. Code §21.101(c)(3). W. A. Cotterman v. DER, Docket No. 83-155-G (Opinion and Order, December 22, 1983).

Nevertheless, we will not wholly dismiss the appeal at this stage of these proceedings, because we believe the appellants' grounds 3 and 4 could be germane to the issue of whether DER abused its discretion in granting the appeal, and are sufficiently specific to enable the permittee to initiate meaningful discovery on the issues of water loss and noise pollution. We also will not now dismiss ground 8, because it is possible, we suppose, that DER has not required the permittee to comply fully with blasting regulations. Of course, the appellants

still will be expected to file a more detailed statement of the facts and legal contentions they intend to establish concerning these grounds 3, 4 and 8, as required by our Pre-Hearing Order No. 1. Otherwise, as the appellants were warned when the Board wrote them, they may be precluded from fully presenting their case at the hearing on the merits. W. A. Cotterman, supra.

The other grounds for appeal listed by the appellants are dismissed, however. Without the necessary elaboration the appellants refused to offer, we see no basis for these other grounds. In particular, excluding grounds 3, 4 and 8, the grounds stated by the Setliffs appear to be either: (a) outside the scope of this Board's jurisdiction; or (b) of a sort which the appellants do not have standing to raise; or (c) wholly irrelevant to the issue of whether DER abused its discretion in granting the permit appealed-from.

O R D E R

WHEREFORE, this 16th day of February, 1984, grounds 1, 2, 5, 6, 7 and 9 in the appellants' notice of appeal are dismissed, and no longer are part of the above-captioned matter; correspondingly, evidence on the aforementioned grounds will not be admissible in a hearing on the merits of this appeal, when and if held.

ENVIRONMENTAL HEARING BOARD

EDWARD GERJUOY
Member

DATED: February 16, 1984

cc: Bureau of Litigation
Guy and Mary Setliff
Dennis W. Strain, Esquire
Robert D. Douglass, Esquire

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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AL HAMILTON CONTRACTING COMPANY :

:

Docket No. 83-248-G

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER
SUR MOTION TO DISMISS

On September 29, 1983, DER ordered Hamilton to abate certain alleged violations at Hamilton's surface mining site in Bradford County. Hamilton timely appealed DER's abatement order, but then did correct the alleged violations, to DER's satisfaction. DER therefore moved to dismiss the appeal as moot. Hamilton objects to this Motion, on which we now rule.

In general a case becomes moot if the court hearing the case becomes unable to grant relief. Highway Auto Service v. DER, Docket No. 79-114-W, 1980 EHB 10, aff'd 64 Pa. Cmwlth. 160, 439 A.2d 238 (1982). There are exceptions to this doctrine. For example, a case that is technically moot may be decided on its merits if it involves a question that is capable of repetition but is likely to evade review if the normal rules on mootness are applied. Comm. v. Joint Bargaining Comm., etc., 484 Pa. 175, 398 A.2d 1001 (1979); Wiest v. Mt. Lebanon School District, 457 Pa. 166, 320 A.2d 362 (1974). Thus, in Wiest, the court ruled on

the merits of a complaint by graduating students that the program for their graduation exercises violated First Amendment requirements even though by the time the court ruled the students already had graduated; the court recognized that otherwise the slow pace of legal proceedings never would permit students to mount a possibly meritorious challenge to violations of their First Amendment rights.

In the instant appeal, however, Hamilton has offered no valid basis for excepting the aforesaid general mootness rule. Hamilton argues, in effect, that the severity of the penalties for not complying with the abatement order coerced Hamilton into correcting the alleged violations even though Hamilton felt the order was unjust. But Hamilton offers no authority that the argument just given, even if borne out by facts not yet on the record, justifies this Board's taking the time to hear its appeal. Our adjudication of this appeal would be no more than an advisory opinion on a particular DER action whose specific facts--since they rest on specific allegations about Hamilton's and only Hamilton's conduct at this particular site at this particular time--are not likely to be repeated, even for Hamilton as a recipient of a DER Order.

In sum, we believe our ruling in this matter should follow our previous holding in Highway Auto, supra, where the issues were very similar, and where the Commonwealth Court agreed the appeal was moot. Our dismissal of this appeal without a hearing is permissible. Eugene Petricca v. DER, Docket No. 83-239-G (Opinion and Order, January 13, 1984).

O R D E R

WHEREFORE, this 23rd day of February , 1984, this appeal is dismissed as moot.

ENVIRONMENTAL HEARING BOARD

Anthony J. Mazullo, Jr.

ANTHONY J. MAZULLO, JR.
Member

Edward Gerjuoy

EDWARD GERJUOY
Member

DATED: February 23, 1984

cc: Bureau of Litigation
Timothy J. Bergere, Esquire
William C. Kriner, Esquire

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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W. A. COTTERMAN :

:

Docket No. 83-155-G

:

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER

On December 22, 1983 we issued an Opinion and Order in this matter. Over DER's objection, we refused to dismiss this appeal although Cotterman had not filed his pre-hearing memorandum and had not responded to DER's discovery requests. However, Cotterman was ordered to file a statement, on or before January 6, 1984, affirming his intention to pursue this appeal. Our December 22, 1983 Order stated that we would dismiss the appeal if Cotterman did not file the aforementioned statement. A certified letter, reiterating the Board's order and warning that Cotterman must file a statement by January 6, 1984 or face dismissal, was sent separately to Cotterman on December 21, 1983; the receipt for this letter, signed by Cotterman, has been returned to the Board.

On December 29, 1983, DER asked for reconsideration of our December 22, 1983 Opinion and Order. On January 10, 1984 we denied DER's request for reconsideration, in a letter copied to Cotterman. This denial was mailed after the Board received a telephone call from Cotterman on January 6, 1984, asking that his time

for filing the aforementioned statement be extended. Although this communication was ex parte, the Board--noting that Cotterman is not represented by an attorney--told Cotterman he would be given an additional week. Afterwards the Board informed DER's counsel of this conversation.

As of this date, Cotterman has not filed the required statement, nor has he had any further communication with the Board since his telephone call of January 6, 1984. DER now has filed its pre-hearing memorandum, and has renewed its request that the appeal be dismissed. The facts DER alleges, if proved, would thoroughly justify the bond forfeitures which Cotterman has appealed. Indeed, according to DER, the uncorrected violations which led to the bond forfeitures were brought to Cotterman's attention as long ago as 1980.

Under the circumstances, taking into account the considerations discussed by us on December 22, 1983, we do not believe our continued refusal to dismiss this appeal would be warranted. DER's action does not appear to have been lightly taken; there is an excellent likelihood that DER would meet its burden of proof if this matter were brought to a hearing. There is a limit to the Board's obligation to warn an appellant, even a pro se appellant like Cotterman, of the possible consequences of failure to obey the Board's orders. There is a similar limit to the Board's patience with failure to obey those orders.

O R D E R

WHEREFORE, this 23rd day of February, 1984, the above-captioned appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

ANTHONY J. MAZULLO, JR.
Member

EDWARD GERJUOY
Member

DATED: February 23, 1984

cc: Bureau of Litigation
Richard S. Ehmann, Esquire
W. A. Cotterman

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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MINE RECLAMATION AND LAND DEVELOPMENT CORPORATION :

:

Docket No. 83-189-G

:

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER

The above-captioned appeal of a bond forfeiture order was filed on August 29, 1983. On August 30, 1983, pursuant to its usual practice, the Board sent appellant's counsel Pre-Hearing Order No. 1, ordering the appellant to file its pre-hearing memorandum on or before November 14, 1983.

By December 20, 1983, appellant's pre-hearing memorandum had not been received. In the meantime, on December 16, 1983, the Board received a Motion for Sanctions filed by DER, for appellant's alleged failure to respond to DER's discovery requests. DER asked that the sanctions include dismissal of the appeal.

On December 20, 1983, therefore, the Board wrote appellant's counsel a letter which, in pertinent part, read as follows:

> The Board...notes that...the appeal appears to be untimely under 25 Pa. Code §21.52(a).
>
> For these reasons, the Board...now informs you that sanctions under 25 Pa. Code §21.124, possibly including dismissal, may be imposed against your client unless by January 9, 1984 the Board receives:
>
> 1. Your Pre-Hearing Memorandum
> 2. A response to DER's Motion for Sanctions, giving good reason why sanctions should not be imposed.

> Whether or not the above items 1 and 2 are filed, the Board will have no choice but to dismiss the appeal as untimely unless by January 9, 1983 you also allege facts sufficient to show that the filing was timely under our rules, or that you deserve permission to file the appeal nunc pro tunc.

The December 20, 1983 letter was sent certified, return receipt requested, to appellant's counsel's address as given on the notice of appeal. On January 6, 1984 the letter was returned unclaimed. The Board then called appellant's counsel at the telephone number given on the notice of appeal, and reached him. Counsel said he had been "moving around between two offices," and asked that we remail our December 20, 1983 letter to him at the same address the Board previously had employed.

On January 9, 1984, the Board member handling this appeal did remail the December 20, 1983 letter to appellant's counsel, along with a covering letter reading as follows:

> The enclosed was sent certified mail on December 20, 1983, but apparently not received by you. I was tempted to dismiss the appeal, but decided to have my secretary make one more effort to reach you at the location you previously had given my secretary as your office address, which was the address to which the letter was sent.
>
> My secretary did reach you today, at that address, and you again told her you would be receiving mail there. I am giving you precisely ten additional days, till January 20, 1984, to respond as prescribed in the letter. It is up to you to ensure that correctly addressed mail from the Board reaches you. It certainly is not up to the Board, as it seems to have been, to track you down.

The January 9, 1984 letter also was sent certified; the return receipt, signed by appellant's counsel and dated January 23, 1984, was returned to the Board. Although the Board could conceive of no possibly acceptable reason why the January 9, 1984 letter should have been picked up by appellant's counsel two weeks after it was mailed, and therefore already past the deadline date of January 20, 1984 quoted

above, the Board decided to give appellant's counsel some additional time, to file the items originally requested on December 20, 1983 or to explain why he had been unable to do so.

As of February 13, 1984, the appellant had not filed the items called for on December 20, 1983, nor had appellant's counsel made any attempt to explain this failure or to ask for a continuance. In fact, as of February 13, 1984, except for the aforementioned telephone conversation with appellant's counsel initiated by the Board, neither appellant nor his counsel had communicated with the Board in any way since the appeal originally was filed. The Board therefore drafted an Order dismissing this appeal, along with an Opinion explaining the reasons for the Board's action.

On February 15, 1984, however, after the aforesaid Opinion and Order had been typed, but before it had been signed, appellant's counsel finally did telephone the Board, saying that he had picked up his mail late, and asking that the time for complying with the Board's December 20, 1983 letter be extended to February 21, 1984.

Nevertheless, despite the Board's reluctance to default appeals wherein DER bears the burden of proof [Armond Wazelle v. DER, Docket No. 83-063-G (Opinion and Order, September 13, 1983; W. A. Cotterman v. DER, Docket No. 83-155-G (Opinion and Order, December 22, 1983], the Board sees no reason to refrain from dismissing this appeal. The facts which have been recounted amount to unusually flagrant disregard of appellant's responsibility to obey the Board's orders. [Compare, e.g., Daniel A. Marino, Jr. v. DER, Docket No. 83-198-G (Opinion and Order, January 25, 1984)]. We can envisage no justifiable explanation for appellant's counsel having picked up his mail "late"; even if the mail pickup at the late date of January 23,

1984 was justified, why did appellant's counsel wait until February 15, 1984 to ask for an extension? The Board is far too busy to justifiably condone the wastage of the Board's time appellant's counsel has caused.

O R D E R

WHEREFORE, this 23rd day of February , 1984, for reasons given in the accompanying Opinion, this appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

ANTHONY J. MAZULLO, JR.
Member

EDWARD GERJUOY
Member

DATED: February 23, 1984

cc: Bureau of Litigation
Richard S. Ehmann, Esquire
Allan E. MacLeod, Esquire
Calvin C. Smith

COMMONWEALTH OF PENNSYLVANIA

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BEN FRANKLIN COAL COMPANY, INC. :

:

Docket No. 83-224-G

:

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER

On October 3, 1983 the appellant filed an appeal of abatement and cessation orders dated August 30, 1983, directed to the appellant by DER; the possibility that this appeal is untimely under 25 Pa. Code §21.52 has not been raised by DER; correspondingly this possibility plays no role in our dismissal of this appeal. Our reasons for ordering dismissal are as follows.

On October 5, 1983, the Board, in accordance with its customary practice, mailed the appellant our Pre-Hearing Order No. 1, ordering the appellant to file a pre-hearing memorandum on or before December 20, 1983.

By January 20, 1984 the pre-hearing memorandum had not been filed. The Board therefore wrote the appellant, by certified mail sent to the address stated on appellant's notice of appeal, warning the appellant that the appeal might be defaulted if the appellant did not file the pre-hearing memorandum by January 30, 1984.

On February 6, 1984 this certified letter was returned to the Board marked "Unclaimed." The Board has received no communication of any kind from the

appellant since the initial filing of the notice of appeal. The Board then tried to call the appellant at the phone number listed on the notice of appeal, but was answered by a recorded message saying the number had been disconnected.

Although the Board is very reluctant to default an appeal when DER bears the burden of proof under 25 Pa. Code §21.101(b) [see Armond Wazelle v. DER, Docket No. 83-063-G (Opinion and Order, September 13, 1983) and W. A. Cotterman v. DER, Docket No. 83-155-G (Opinion and Order, December 22, 1983)], it remains the appellant's responsibility to obey Board orders and prosecute the appeal. This responsibility certainly must include ensuring that the Board's orders can reach the appellant. The Board cannot, and should not, take the time to track down the appellant.

Therefore, as in the appeal of Daniel A. Marino, Jr. v. DER, Docket No. 83-198-G (Opinion and Order, January 25, 1984), under the circumstances recounted we see no alternative to dismissal of this appeal.

O R D E R

WHEREFORE, this 23rd day of February , 1984, for reasons given in the accompanying Opinion, the above-captioned appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

Anthony J. Mazullo, Jr.

ANTHONY J. MAZULLO, JR.
Member

Edward Gerjuoy

EDWARD GERJUOY
Member

DATED: February 23, 1984

cc: Bureau of Litigation
William F. Larkin, Esquire
Nancy A. Biedenbach

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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JOHN F. CULP, III :

:

Docket No. 83-194-G

:

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and CONSOL PENNSYLVANIA COAL COMPANY, Permittee

OPINION AND ORDER

On August 31, 1983 Mr. Culp appealed the issuance, on August 3, 1983, of Permit No. C-468-1 to Consol, under the Bituminous Mine Subsidence and Land Conservation Act, 52 P.S. §§1406 et seq. (the "Act"). On December 16, 1983 the Board, without opinion, rejected a motion to quash the appeal for lack of standing. On January 10, 1984, the Board issued an Opinion and Order which permitted Culp to amend his notice of appeal. Thereafter, Consol filed a Motion for Partial Dismissal (the "Motion") of the Appeal, based on the allegations in Culp's amended notice of appeal. Memoranda of Law having been received from the parties, we now proceed to rule on the Motion.

In part, the Motion reargues the issue of Culp's standing to appeal. The amended notice of appeal alleges:

> 2. Appellant is the owner of rights in and to certain coal seams and other strata which overlie in excess of 3,500 acres of the Pittsburgh seam of coal which Consol Pennsylfania Coal Company intends to mine.

> 3. Appellant is also the owner of approximately 400 acres of land on which he holds all interests except the Pittsburgh seam of coal, which land overlies the area encompassed within the Permit...
>
> 7. The Application for the Permit failed to describe the measures which Permittee will adopt to prevent subsidence causing material damage to the extent technologically and economically feasible, to maximize mine stability and to maintain the value and reasonable foreseeable use of Appellant's land...
>
> 9. The Department in issuing the Permit in question abused its discretion by failing to consider Appellant's interest in preserving the economic value and reasonable foreseeable use of Appellant's land and by failing to require Permittee to include in its application a description of the methods it will adopt to maintain the value and reasonable foreseeable use of Appellant's land.

These allegations unquestionably meet the requirement that the appealed-from DER action must threaten an interest of Culp's which is "substantial, immediate and direct." William Penn Parking Garage v. City of Pittsburgh, 464 Pa. 168, 364 A.2d 269 (1975). However, Consol also argues (in effect) that even if the threatened interest is "substantial, immediate and direct," it is pointless to grant standing if there is no legal basis for the relief requested. In support of this reasoning, Consol quotes the following footnote from William Penn (note 23):

> The test applied in these [cited] cases accords standing where the plaintiff has suffered (or will suffer) 'injury in fact' and the interest he seeks to protect is arguably within the zone of interest sought to be protected or regulated by, the statute or constitutional guarantee in question [citations omitted]. (Emphasis added).

We agree that this quotation is pertinent, but call Consol's attention to the emphasized adverb arguably. The major and much-argued issue in this appeal is whether the coal seams Culp owns are protected against subsidence under the Act (see infra). To deny Culp the standing even to argue the merits of his appeal would be far too restrictive an interpretation of William Penn's language. We

affirm our earlier refusal to dismiss this appeal, in whole or in part, for lack of standing.

We now turn to the major issue Consol raises, which we will rephrase as follows: Was issuance of the permit an abuse of DER's discretion in that DER failed to impose permit conditions which, under the Act, are required to protect Culp's coal seams from subsidence or other damage as a result of Consol's mining activities?

Evidently the answer to this question involves construction of the Act. Culp argues that the Act has a broad land conservation purpose, within which is contained the intent to preserve those coal seams lying above Consol's. According to Culp, the words "land" and "surface" are used broadly in the Act, so that "land" includes Culp's estate in his coal seams, and "surface" includes all strata lying above Consol's coal seam. In support of his thesis, Culp cites a number of Pennsylvania cases, notably Wilkes-Barre Township School District v. Corgan, 403 Pa. 383, 170 A.2d 97 (1961).

Consol argues of course that the Act is not intended to protect Culp's coal seams, and is joined in these arguments by DER. For instance, Culp urges that Section 2 of the Act, 52 P.S. §1406.2, which states the Act's purpose, uses the phrase "conservation of surface land areas" in a fashion which demands the inference that the Act does not protect Culp's coal seams. DER argues that Sections 4, 6(a) and 15 of the Act, taken together, also demand the aforesaid inference. DER and Consol also maintain that Wilkes-Barre, supra, supports this interpretation, not Culp's, of the construction to be given the term "surface" under the Act.

We begin our own analysis by remarking that Wilkes-Barre and its antecedents, cited by Culp, really are not to the point. In particular, Wilkes-Barre

involved construction of a deed conveying ownership of the surface to the Township, but reserving to the grantor the ownership of an underlying coal seam. The decision in Wilkes-Barre explicitly rested on the court's view of the parties' intentions when they entered into their contract. Thus Wilkes-Barre is irrelevant to our present problem, namely to discern the intent of the Legislature when it passed the Act.

Our resolution of the aforementioned problem has not been helped by Culp's quotation from the legislative debate prior to passage of the Act. Consequently we must construe the Act solely on its face, in accordance with the precepts of the Statutory Construction Act, 1 Pa. C.S.A. §§1921 et seq. So doing, we conclude that the Act was not intended to protect Culp's coal seam. We note particularly that where the Act lists the items the Act is intended to protect, in 52 P.S. §1406.4, the only items listed are "surface structures", such as public buildings, residential dwellings or cemeteries. Nowhere in this section is there even a hint that the Act seeks to protect a subsurface coal seam like Culp's. Section 1406.6(a) of the Act also refers specifically to "structures", as does Section 1406.15. Section 15, which pertains to structures not covered under Section 4 of the Act, explicitly speaks of structures "upon the land overlying the coal" whose mining is objected-to. A coal seam could not conceivably be termed upon the land. Nowhere does the Act speak of structures or other features within the land overlying the coal whose mining is intended.

We do not believe those explicit and specific provisions of the Act cited in the preceding paragraph conflict with other more general provisions of the Act, e.g., Section 1406.2 establishing the Act's purpose; even if there is a conflict, however, the explicit provisions must prevail, according to Section 1933 of the Statutory Construction Act.

In short, we cannot see how failure to require Consol to provide for preservation of Culp's coal seam conceivably can be an abuse of DER's discretion. Therefore we grant Consol's Motion for Partial Dismissal. Unless Culp can allege facts--e.g., threatened damage to surface structures on the 400 acres he owns allegedly overlying the area encompassed within the permit--from which his entitlement to protection under the Act can be inferred, full dismissal of this appeal, or its withdrawal, would seem to be in order.

We add that, in view of our just-described ruling, we see no reason for allowing the discovery requested by Culp in his Motion to Compel Discovery filed November 21, 1983. Action on that Motion, and on Consol's Motion for Protective Order filed November 28, 1983, was deferred by us in an Order dated December 16, 1983, pending our ruling on Consol's Motion for Partial Dismissal. Accordingly, we now grant Consol's Motion for Protective Order. However, if Culp can allege facts arguably entitling him to protection under the Act (see the preceding paragraph), discovery relevant to such claims will be permitted, upon suitable petition under our rules for permission to conduct discovery. 25 Pa. Code §21.111(a).

O R D E R

WHEREFORE, this 1st day of March, 1984, it is ordered that:

1. Culp's standing to pursue this appeal is affirmed.

2. Consol's Motion for Partial Dismissal is granted.

3. The subject matter of this appeal is limited to claims--e.g., threatened damage to surface structures on the 400 acres Culp owns allegedly overlying the area encompassed within the permit--from which, consistent with the foregoing Opinion, Culp's entitlement to protection under the Act can be inferred.

4. Culp's November 21, 1983 Motion to Compel Discovery is denied.

5. Consol's November 28, 1983 Motion for Protective Order is granted.

6. Culp may petition for leave to conduct discovery relevant to claims described in paragraph 3 supra.

ENVIRONMENTAL HEARING BOARD

EDWARD GERJUOY, Member

DATED: March 1, 1984

cc: Bureau of Litigation
Anthony P. Picadio, Esquire
Marc A. Roda, Esquire
Daniel E. Rogers, Esquire
E. J. Strassburger, Esquire

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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REITZ COAL COMPANY :

:

Docket No. 83-213-M

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER
SUR
MOTION TO DISMISS

By notice dated August 22, 1983, the Commonwealth of Pennsylvania, Department of Environmental Resources (DER) issued to Reitz Coal Company (Reitz) an abatement order, and Reitz received said order on August 24, 1983. Reitz filed notice of appeal with the Board on September 26, 1983.

Under the provisions of 25 Pa. Code §21.52 (a), jurisdiction of the Board attached to appeals filed with the Board within 30 days after appellant's receipt of DER's final action.

In this appeal, the 30 days within which the appeal could have been filed and perfected before the Board ended on September 23, 1983.

Since the appeal was not timely filed, DER's motion to dismiss the appeal must be granted. The fact that a response to the motion to dismiss was not filed with the Board has not entered into our consideration of this matter.

Accordingly, the appeal of Reitz Coal Company, at EHB Docket No. 83-213-M is hereby dismissed.

ENVIRONMENTAL HEARING BOARD

ANTHONY J. MAZULLO, JR.
Member

EDWARD GERJUOY
Member

DATED: March 6, 1984

cc: Bureau of Litigation
John J. Dirienzo, Jr., Esquire
Louis A. Naugle, Esquire

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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DALLAS AREA MUNICIPAL AUTHORITY :

:

Docket No. 75-270-M

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER
SUR
MOTION TO DISMISS

On October 22, 1985, Dallas Area Municipal Authority (Dallas) filed a notice of appeal with this Board, contesting the effluent limitations required under the Commonwealth of Pennsylvania, Department of Environmental Resources certification for issuance of NPDES Permit No. PA 002622 for Dallas' Kingston Township sewage treatment plant by the U.S. Environmental Protection Agency.

The permit which is the subject of this appeal was made effective on February 24, 1974, and expired on February 28, 1979.

On or about September 12, 1977, DER issued its Sewage Permit No. PA 0026221 to Dallas, which permit covered the period September 12, 1979 to September 12, 1984.

Dallas has not appealed the provisions of the permit issued on or about Septembe 12, 1979, by DER.

DER has filed a motion to dismiss this appeal on the grounds that the issue of effluent limitations of the EPA issued and DER certified permit is moot since that permit experied February 28, 1979.

This Board cannot offer any relief to Dallas for limitations upon an expired permit.

This appeal is therefore moot, see *Silver Spring Township v. DER*, 28 Pa. Cmwlth 302, 268 A.2d 866 (1977), and must be dismissed. *Highway Auto Service v. DER*, EHB Docket No. 79-114-W (Opinion dated 1/30/80).

O R D E R

AND, NOW, this 6th day of March, 1984 the appeal of Dallas Area Municipal Authority, at EHB Docket No. 75-270-M is hereby dismissed as moot.

ENVIRONMENTAL HEARING BOARD

ANTHONY J. MAZULLO, JR.
Member

EDWARD GERJUOY
Member

DATED: March 6, 1984

cc: Lynn Wright, Esquire
Merton E. Jones, Esquire
Bureau of Litigation

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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WHITE OAK BOROUGH AUTHORITY :

:

Docket No. 84-013-M

:

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER
SUR
PETITION TO QUASH APPEAL

By notice dated December 2, 1983, the Commonwealth of Pennsylvania, Department of Environmental Resources (DER) advised White Oak Borough that the sewage facilities plan supplement submitted to DER for a development identified as Rainbow Gardens was inadequate for reasons stated therein.

The said notice also contained a notice that an appeal of DER's action "must be filed with the Environmental Hearing Board within 30 days of receipt of written notice" of DER's action.

On January 11, 1984, this Board received a letter from counsel from DER which stated, inter alia,

> "On the off chance that the appellants have failed to file this appeal with the Board, I enclose a copy of the materials sent to DER for your information."

Since the documents forwarded to the Board by counsel for DER included a notice of appeal, the Secretary of the Board docketed the appeal as of the date the notice of appeal was received by the Board.

The Board has not ever received a notice of appeal from appellant herein, or from anyone acting on their behalf.

On January 20, 1984, the Commonwealth filed a Petition to Quash appeal, and a response thereto was filed by counsel for appellant on January 30, 1984.

Under the provisions of 25 Pa. Code §21.52(a), appeals must be in writing and "filed with the Board within 30 days" after a party has received written notice of the final action of DER. Failure of a party to file its appeal within the prescribed time period deprives the Board of jurisdiction to hear the appeal. *Joseph Rostosky Coal Company v. Commonwealth of Pa., DER,* 364 A.2d 761, 26 Pa. Comwlth. 478 (1976).

Since appellant herein did not file its appeal with the Board within 30 days of its receipt of DER's final action letter of December 2, 1983 and received by appellant on December 5, 1983, the appeal has not been timely filed.

O R D E R

AND, NOW, this 6th day of March, 1984, it appearing that the appeal of White Oak Borough Authority was not timely filed, the appeal of White Oak Borough Authority, at EHB Docket No. 84-013-M is hereby quashed and dismissed.

ENVIRONMENTAL HEARING BOARD

ANTHONY J. MAZULLO, JR.
Member

EDWARD GERJUOY
Member

DATED: March 6, 1984

cc: Bureau of Litigation
Edward E. Osterman, Esquire
Richard S. Ehmann, Esquire

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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ERIC K. HUBER :

:

Docket No. 83-154-G

:

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER

On July 28, 1983, Huber cabled the Board that he was appealing a DER letter of July 1, 1983. The Board, pursuant to 25 Pa. Code §21.52(c) and in accordance with its usual practice, docketed this cable as a skeleton appeal under Docket No. 83-154-G, but asked Huber to file specified additional information.

Thereafter Huber filed the additional information requested, in the form of a properly completed Notice of Appeal pursuant to Pa. Code §21.51. Initially the Board also mistakenly docketed this Notice of Appeal as a new appeal under Docket No. 83-168-G. The error soon was recognized, however, and on September 1, 1983 the appeal at 83-168-G was consolidated with the original appeal at 83-154-G, under the above-captioned docket number.

Thus what is before the Board is a single appeal filed July 28, 1983, of a letter to Huber from the Secretary of DER dated July 1, 1983. The substantive contents of this letter, in totality, were as follows:

> Thank you for your recent letter requesting the Department's position on the acceptability of Akdolit as a neutralizing filter medium.
>
> It is the Department's position that Akdolit can be used in appropriate applications as a chemical conditioning agent so long as water quality is maintained and the filtration process is not impeded. However, it cannot be approved for use as an alternative to filter media since it does not meet the criteria and specifications established for filter media by the National Sanitation Foundation and the Department's Public Bathing Place Manual. This is the same position on the use of Akdolit expressed in recent correspondence to Senator D. Michael Fisher and Representative Thomas A. Michlovic.
>
> I trust that you will find this information is responsive to your request.

Now DER has filed a petition to quash the appeal as untimely. Huber has admitted that before June 25, 1983 he received a copy of a letter sent by the Secretary of DER to the Honorable Thomas A. Michlovic of the Pennsylvania Legislature. This letter, which apparently was referred to in the July 1, 1983 letter to Huber quoted supra, also dealt with the use of Akdolit. In pertinent part this May 20, 1983 letter stated:

> In summary then, the Department has not objected to the use of this product as a classical conditioning agent so long as water quality is maintained and the filtration process is not impeded. However, we cannot approve its use as an alternative to filter media since it does not meet the criteria and specifications expected of a filter media. This is the position the Department has taken in all prior discussions with Mr. Huber in this issue.

The Secretary of DER did not copy the May 20, 1983 letter to Huber, but Representative Michlovic sent Huber a copy. Huber also admits that he did not appeal the May 20, 1983 letter. According to DER, Huber's receipt of the May 20, 1983 letter constituted "written notice of the Department's position not

to give blanket approval to the use of Akdolit as a filtering medium." Therefore, according to DER, Huber's appeal is untimely under 25 Pa. Code §21.52(a).

The Board has sent Huber our Pre-Hearing Orders Nos. 1 and 2, again according to our usual practice. Both these documents instruct the parties that answers to motions or petitions must be filed within twenty (20) days of receipt. DER's Petition to Quash was filed February 3, 1984, but Huber has not yet responded. We therefore proceed to rule on DER's Petition without benefit of Huber's arguments in opposition.

We remark first that the logic of DER's Petition is not as limpid as might be. DER does not contest the fact that Huber received the aforementioned July 1, 1983 letter no earlier than July 1, 1983. Thus his appeal of that letter, filed July 28, 1983, unquestionably was timely, i.e., within the 30-day jurisdictional period prescribed by 25 Pa. Code §21.52(a). What DER means to urge (we believe) is that the appeal of the July 1, 1983 letter is foreclosed by res judicata principles, in that Huber did not appeal the May 20, 1983 letter embodying (DER seems to be contending) precisely the same refusal to approve an Akdolit alternative to filter media as was embodied in the July 1, 1983 letter.

If the May 20, 1983 letter was not appealable, then the instant appeal is not barred by res judicata, and DER's Petition must fail. On the other hand, if the May 20, 1983 letter was not appealable, it may be that the July 1, 1983 letter also was not appealable, a position DER also urges in its petition. If the July 1, 1983 letter was not an appealable action of DER's, then the instant appeal indeed should be quashed, though not for the untimeliness reason DER advances.

O R D E R

WHEREFORE, this 15th day of March, 1984, it is ordered that:

1. DER's Petition to Quash the above-captioned appeal is rejected, without prejudice to DER's rights (under paragraph 2 infra) to renew the motion at a later time.

2. If DER renews its Petition to Quash, said Petition must be accompanied by a Memorandum of Law arguing:

a. The May 20, 1983 letter was an appealable action by DER, which action became final when Huber failed to timely appeal that letter; and/or

b. The July 1, 1983 letter was not an appealable action of DER's.

3. Huber is reminded that any response to a renewed DER Petition to Quash, or to any other DER petition or motion, is due within twenty (20) days of receipt.

ENVIRONMENTAL HEARING BOARD

EDWARD GERJUOY
Member

DATED: March 15, 1984

cc: Bureau of Litigation
Ward Kelsey, Esquire
Thomas W. Scott, Esquire

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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M. L. KINNEBREW :

:

: Docket No. 83-065-M

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER

By notice dated March 3, 1983, the Commonwealth of Pennsylvania, Department of Environmental Resources (DER) issued an order upon M. L. Kinnebrew (appellant) requiring appellant to cease and refrain from certain activities and to take certain actions specified by DER with regard to appellant's operation of a water flood project on an oil lease located along Sandy Creek on State Game lands #130 in Sandy Lake Township, Mercer County.

Appellant received the said order of DER on March 4, 1983, and timely filed this appeal on April 1, 1983.

On April 5, 1983, the Board, according to its usual practice, issued its Pre-Hearing Order No. 1, wherein, inter alia, appellant was required to file his pre-hearing memorandum on or before June 20, 1983.

On June 17, 1983 appellant filed a Request for Extension of Time within which to file his pre-hearing memorandum, and the Board on June 22, 1983 extended the filing date for appellant's pre-hearing memorandum to August 22, 1983.

As of September 27, 1983 the appellant's pre-hearing memorandum had not been filed, nor had any further extension been requested or granted, and the Board ordered that the pre-hearing memorandum be filed by October 7, 1983, or sanctions might be applied against appellant, including dismissal of the appeal.

On October 4, 1983, appellant filed a second Request for Extension of Time within which to file his pre-hearing memorandum for the reasons that settlement discussions were ongoing and appellant was changing counsel, although the identity of new counsel was not furnished to the Board.

On October 12, 1983 the Board granted an extension to November 10, 1983 for appellant to comply with Pre-Hearing Order No. 1.

On October 13, 1983 the Board requested that a status report from appellant be provided to the Board on or before December 28, 1983, but the appellant has failed, to the present time, to reply to the Board's request.

On December 21, 1983, DER filed a Motion for Sanctions by reason of appellant's failure to comply with the Board's Pre-Hearing Order No. 1, and subsequent orders of the Board.

On December 23, 1983, the Board issued an Order and Rule to Show Cause, returnable January 17, 1984, ordering appellant to show cause why his appeal should not be dismissed for failure to comply with the order of the Board.

Appellant has not responded to the Board's Order and Rule to Show Cause, although the U.S. Postal Service return receipt indicates receipt of the notice by appellant on December 28, 1983.

The Board's Rules and Regulations, Section 21.124, entitled "Sanctions", 25 Pa. Code §21.124, provides:

> "The Board may impose sanctions upon a party for failure to abide by a Board order or Board rule of practice and procedure. Such sanctions may include the dismissal of any appeal or an adjudication against the offending party, orders precluding introduction of evidence or documents not disclosed in compliance with any order, barring the use of witnesses not disclosed in compliance with any order, barring an attorney from practice before the Board

> for repeated or flagrant violation of orders, or such other sanctions as are premitted in similar situations by the Pennsylvania Rules of Civil Procedure for practice before the Courts of Common Pleas.

Appellant has been advised on at least two occasions by this Board that his failure to comply with Board orders could lead to the imposition of sanctions against him.

DER also furnished appellant a copy of its Motion for Sanctions, by certified mail, return receipt requested.

We therefore find that appellant is fully aware of the consequences for his failure to comply with Board orders. We also hold appellant liable to the imposition of sanctions by reason of his failure to respond to DER's Motion for Sanctions.

Appellant has failed to comply with the Board's Pre-Hearing Order No. 1 (failure to file its pre-hearing memorandum); with the Board's request for a status report; and with the Board's Order and Rule to Show Cause.

In further defiance of the Board's rules and regulations, appellant has failed to answer DER's Motion for Sanctions. 25 Pa. Code §21.64 (d).

This Board may impose sanctions, including dismissal of an appeal, for failure of a party to comply with Board orders. 25 Pa. Code §21.124.

The matter of dismissal of an action for failure to comply with procedural rules has been discussed at length in two recent decisions by the Pennsylvania Supreme Court. *DeAngelis v. Newman*, ____Pa. ____, 460 A.2d 730 (1983) and *Brogan v. Holmes*, ___Pa. ___, 460 A.2d 1093 (1983).

In both cases at issue was the requirement of a local rule of court which "arbitrarily and automatically" terminated a cause of action for failure to comply with

a procedural rule of court, i.e., failure to meet a filing requirement.

While the instant action by the Board might appear to be the same action which is prohibited by the holdings in the above cited Supreme Court decisions, a closer examination of the circumstances in this appeal reveal no such similarity.

In this appeal, the action of dismissal of an appeal for failure to file a pre-hearing memorandum upon order of the Board is not required by the Board's rules. The Board may impose other sanctions, as well as dismissal, for failure to comply with Board orders.

Also, in this appeal, the Board, after granting two extensions of time within which to file the required pre-hearing memorandum, requested a status report from appellant, which request has been ignored. Thereafter, the Board issued its Order and Rule to Show Cause, and appellant has failed to respond thereto. Also, the appellant has failed to respond to the Commonwealth's Motion for Sanctions.

It is therefore clearly evident that the Board is not "arbitrarily and automatically" requiring dismissal of appellant's action before the Board. Rather, the Board has, in its discretion and in conformity with its own rules of practice made several

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1. Quoting from *Brogan*, supra, the entire text of which paragraph is at p. 1096, and is as follows:

> "The trial of a lawsuit is not a sporting event where the substantative legal issues which precipitated the action are subordinate to the "rules of the game". A lawsuit is a judicial process calculated to resolve legal disputes in an orderly and fair fashion. It is imperative that the fairness of the method by which the resolution is reached not be open to question. A rule which arbitrarily and automatically requires the termination of an action in favor of one party and against the other based upon a non-prejudicial procedural mis-step, without regard to the substantive merits and without regard to the reason for the slip, is inconsistent with the requirement of fairness demanded by the Rules of Civil Procedure. Rule 126 is not a judicial recommendation which a court may opt to recognize or ignore. Rather the rule is a statement of the requirement of fairness and establishes an affirmative duty courts are bound to follow in applying all procedural rules whether they be statewide or local in origin."

reasonable attempts to advise the appellant of the consequences of his failure to proceed with his appeal in compliance with Board orders and its rules of practice. It is the repeated failure of the appellant to respond, in any fashion, to Board orders and its rules of practice, which form the bases for the Board's decision at this stage of the appeal.

In consideration of the above facts and circumstances, and in conformity with the Board's rules of practice, it is hereby ORDERED that the appeal of M. L. Kinnebre at EHB Docket No. 83-065-M be dismissed with prejudice.

ENVIRONMENTAL HEARING BOARD

ANTHONY J. MAZULLO, JR.
Member

EDWARD GERJUOY
Member

DATED: March 15, 1984

cc: Bureau of Litigation
M. L. Kinnebrew
Zelda Curtiss, Esquire

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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ETNA EQUIPMENT AND SUPPLY COMPANY :

:

Docket No. 83-142-G

:

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER

This appeal was filed July 20, 1983. In accordance with the Board's usual practice, the parties then were sent our Pre-Hearing Order No. 1 which, inter alia, required the appellant to file its pre-hearing memorandum on or before October 12, 1983.

On October 24, 1983, the Board granted the parties' joint motion for a continuance, extending to January 1, 1984 the due date for appellant's pre-hearing memorandum.

On January 23, 1984, nothing having been heard from either party since the aforesaid extension was granted, the Board wrote appellant's counsel, warning him that unless appellant's pre-hearing memorandum was filed on or before February 15, 1984, the Board might apply sanctions, including dismissal, under the Board's rule 25 Pa. Code §21.124. This warning was sent certified, and was received January 24, 1984, according to the receipt returned to the Board.

Despite the aforesaid warning, nothing more has been heard from the appellant; our last communication from him remains the joint motion filed a few days before our October 24, 1983 Order.

Under the circumstances, the Board sees no reason to refrain from dismissing this appeal, for failure to obey the Board's orders. It is the appellant's responsibility to prosecute his appeal, which involves, inter alia, filing his pre-hearing memorandum on time or at the very least asking for an extension of time. The Board is too busy, and should not be expected, to repeatedly remind an appellant his pre-hearing memorandum is due.

O R D E R

WHEREFORE, this 23rd day of March , 1984, the above-captioned matter is dismissed.

ENVIRONMENTAL HEARING BOARD

ANTHONY J. MAZULLO, JR., Member

EDWARD GERJUOY, Member

DATED: March 23, 1984

cc: Bureau of Litigation
Alan S. Miller, Esquire
Harry F. Klodowski, Jr., Esquire

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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ENVIROSAFE SERVICES OF PENNSYLVANIA, INC. :

:

Docket No. 83-101-M

:

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER
SUR
PETITION FOR RECONSIDERATION EN BANC

On February 9, 1984, appellant, Envirosafe Services of Pennsylvania, Inc., filed with the Board a Petition for Reconsideration En Banc, seeking therein to have the Board reverse its decision dated January 23, 1984 holding that "questions designed to elicit information pertaining to the background and development of the regulation are only relevant in the context of the constitutionality of the regulation, which issue is beyond our authority."

Appellant asserts that under the provisions of 25 Pa. Code §21.122 the Board may "grant reargument before the Board, en banc,""for compelling and persuasive reasons."

The Board has, on prior occasions, discussed the application of Section 21.122 of its Rules and Regulations, and has consistently held that "reconsideration" applies "following final (emphasis in original) decisions of the Board. *Chemical Waste Management, Inc., et al. v. Comm., DER*, EHB Docket No. 81-154-H (Dated September 17, 1982).

The decision of January 23, 1984 which is contested by appellant is not a final dicision, and, therefore, reconsideration under the cited Board rule, i.e., 25 Pa. Code

§21.122 is inappropriate in this instance.

We therefore, deny appellant's Petition for Reconsideration En Banc for the reasons cited hereinbefore. We also do not reach the merits of appellants petition.

ENVIRONMENTAL HEARING BOARD

ANTHONY J. MAZULLO, JR.
Member

EDWARD GERJUOY
Member

DATED: March 28, 1984

cc: Bureau of Litigation
Lynn Wright, Esquire
Marc Gold, Esquire
Pamela S. Goodwin, Esquire
Christopher S. Underhill, Esquire
Louis J. Farina, Esquire
Kenneth C. Notturno, Esquire
Thomas L. Goodman, Esquire

COMMONWEALTH OF PENNSYLVANIA

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JOHN F. CULP, III :

:

: Docket No. 83-194-G

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and CONSOL PENNSYLVANIA COAL COMPANY, Permittee

OPINION AND ORDER
SUR MOTION FOR RECONSIDERATION

On March 1, 1984 the Board issued an Opinion and Order in the above-captioned matter, wherein we granted Consol's Motion for Partial Dismissal of this appeal. In particular, we limited the subject matter of this appeal to claims of threatened damage to surface structures on the 400 acres Culp owns allegedly overlying the area encompassed within the permit whose grant to Consol has been appealed. We will not further recapitulate here the contents of our March 1, 1984 Opinion and Order, to which reference should be made for a summary of the essential facts in this controversy.

On March 26, 1984 the Board received a Motion for Reconsideration of our March 1, 1984 Order. This Motion was almost instantaneously responded to by Consol, which urges us to reject the Motion on the grounds that it is untimely under our rules, 25 Pa. Code §21.122. Culp now has responded in turn, arguing:

1. The time limits of Section 21.122 do not apply because the Motion asked for reconsideration only by the Board member who had issued the March 1, 1984 Order, not by the Board en banc.

2. In any event, the Motion is timely under Section 21.122, because our March 1 Order was received by Culp's counsel on March 3, and their Motion was mailed to the Board on March 23.

Our Order of March 1, 1984 was not a final order; Culp's appeal was not dismissed, although Consol's Motion for Partial Dismissal, really a motion to limit the issues, was granted. We have explained on numerous occasions that our rules do not provide for reconsideration of interlocutory rulings. Envirosafe Services of Pennsylvania v. DER, Docket No. 83-101-M (Opinion and Order, March 28, 1984); Magnum Minerals v. DER, Docket No. 82-230-G (Opinion and Order, November 22, 1983). On this reasoning, Culp's Motion for Reconsideration could be denied without further ado.

However, as Magnum explains;

> [T]he Board does have inherent authority to reconsider its rulings at any time prior to final adjudication. On the other hand, the Board's limited resources do not permit reconsideration of interlocutory rulings in other than exceptional circumstances.

In Magnum we decided the circumstances were sufficiently exceptional to warrant examination of the request for reconsideration, with the result that we did modify a previously issued Opinion and Order. In the present appeal, there also is an exceptional circumstance, namely that our March 1, 1984 Order just about dismissed the appeal. The small remaining opening for keeping the appeal active as of March 1, 1984 now has been closed by Culp himself, in paragraph 5 of his Motion for Reconsideration; this paragraph concedes that "there are no structures on that portion of the land of which Culp owns all of the interests except the Pittsburgh seam of coal."

Therefore we will treat Culp's Motion for Reconsideration as if it does pertain to a final order. In other words, we will evaluate Culp's Motion under the standard of 25 Pa. Code §21.122. But the Motion is unmerited and untimely under those standards. Although Culp argues to the contrary, the Board believes that Culp had the opportunity to fully brief the central issue of our March 1, 1984 Opinion, namely whether the Bituminous Mine Subsidence and Land Conservation Act, 52 P.S. §1406 et seq., protects Culp's coal seams against Consol's mining activities. Furthermore, the due date for Culp's Motion is determined by 25 Pa. Code §21.11, not 25 Pa. Code §21.33 which pertains to date of service. As 25 Pa. Code §21.32 makes clear, documents are "served" on parties but are "filed" with the Board. Section 21.11, on timely filing requirements, unmistakably states, "The date of receipt by the Board and not the date of deposit in the mails is determinative." March 26, when the Motion for Reconsideration was received by the Board, is more than 20 days after March 3, the date when--by Culp's admission--his counsel received the Board's March 1, 1984 Opinion and Order.

We add, finally, that in applying the standards of 25 Pa. Code §21.122 to Culp's Motion for Reconsideration we are not imposing overly strict standards. Because reconsideration of interlocutory orders must be truly "exceptional", we correspondingly must require as a minimum that to warrant reconsideration of an interlocutory order the standards of Section 21.122 should be met, insofar as those standards are relevant. They are relevant in the present circumstances.

O R D E R

WHEREFORE, this 3rd day of April , 1984, it is ordered that:

1. Culp's Motion for Reconsideration is denied, as untimely and unmerited under the standards of 25 Pa. Code §21.122, which is deemed to apply.

2. In view of paragraph 5 of Culp's Motion, which stipulates that "there are no structures on that portion of the land of which Culp owns all of the interests except the Pittsburgh seam of coal," this appeal now is dismissed; in other words, our March 1, 1984 Order, which granted Consol's Motion for Partial Dismissal, now is modified to a full dismissal of the instant appeal.

ENVIRONMENTAL HEARING BOARD

ANTHONY J. MAZULLO, JR.
Member

EDWARD GERJUOY
Member

DATED: April 3, 1984

cc: Bureau of Litigation
Marc A. Roda, Esquire
Anthony P. Picadio, Esquire
Daniel E. Rogers, Esquire
E. J. Strassburger, Esquire

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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AUGUSTA A. ZITO :

:

: Docket No. 83-184-M

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER

By order dated July 19, 1983, the Department of Environmental Resources (DER), acting through its authorized representative, G. E. Kyle, Director Bureau of Dams and Waterway Management, directed the appellant, Augusta A. Zito, "to remove fill material placed on his property on the bank of the Driftwood Branch of the Sinnemakoning Creek".

The appellant filed a notice of appeal with this Board on August 22, 1983, alleging error on the part of DER in the reason given by DER in said order as the bases for the order.

Pursuant to its rules, the Board issued its Pre-Hearing Order No. 1 on August 25, 1983, requiring appellant, inter alia, to file a pre-hearing memorandum on or before November 7, 1983.

On December 8, 1983, upon appellant's unexplained failure to file his pre-hearing memorandum on the required date, DER filed a Motion for Sanctions.

Pursuant to said motion the Board issued, on December 9, 1983, an Order requiring appellant to file his pre-hearing memorandum in proper form on or before

December 19, 1983, "and upon failure of appellant to file" the required pre-hearing memorandum as ordered, the Board "shall" dismiss the appeal "without further action of the Board."

As of the date of the writing of this Opinion and Order, i.e., April 04, 1984, the appellant has failed to respond to either of the two (2) orders issued by the Board and directed to the appellant.

The rules and regulations pertaining to practice before the Board particularly section 21.11 (25 Pa. Code §21.11) provides, in pertinent part:

> "(a) Appeals, briefs, notices and other documents required or permitted to be filed under these rules shall be received by the Board within the time limits, if any, for such filing....".

Also, the provisions of section 21.64(d) of the Board rules provides:

> "Any party failing to respond to a...motion shall be deemed to be in default and at the Board's discretion sanctions may be imposed in accordance with §21.124 of this title (relating to sanctions); such sanctions may include treating all relevant facts stated in such...motion as admitted."

Further, the provisions of section 21.31 (a) of the Board's rules provide:

> "(a) Orders, notices, and other documents originating with the Board shall be served upon the person or persons designated in the notice of appearance by mail or in person."

In addition, section 21.124 of the Board's rules provides, in pertinent part, as follows:

> "The Board may impose sanctions upon a party for failure to abide by a Board order or Board rule of practice and procedure. Such sanctions may include the dismissal of any appeal...."

In the instant appeal, the orders of the Board were sent to appellant's counsel of record at the address supplied by said counsel. No response has been received by the Board to the Board's orders. Also, the notices sent to appellant's counsel have not been returned to the Board.

By reason of the nature of this appeal, the burden of proof is upon the appellant. 25 Pa. Code §21.101. Under the provisions of Section 21.101 (a) of the Board's Rules and Regulations, the appellant herein bears the burden of proof and the burden of proceeding since DER in its Order of July 19, 1983, alleged pollution was occurring or likely to take place and appellant is in possession of the facts relating to the alleged environmental damage.

Since appellant bore the burden of proof herein, it was his responsibility to proceed to prosecution of his appeal, and the first step in so doing was to comply with the Board's Pre-Hearing Order No. 1. By failing to comply therewith, appellant precluded DER from defending its position, and deprived DER of an opportunity to apprise itself of the true nature of appellant's position in this appeal. Without the information required to be included by appellant in the pre-hearing memorandum, DER cannot properly prepare its defense of the appeal.

The action of the appellant in failing to file its pre-hearing memorandum to date effectively stops the appeal from proceeding in an orderly fashion, in addition to the more obvious disregard of the order of the Board.

In an obvious effort to ascertain the factual and legal posture of this appeal, DER filed a motion for sanctions, to which motion appellant has failed to respond.

The Board, in an attempt to secure the filing of the pre-hearing memorandum required to be filed by appellant, and in response to DER's motion for sanctions, issued another order to appellant, requiring filing of the pre-hearing memorandum. The said order, of December 13, 1983, also advised appellant of the threat of dismissal of his appeal "without further action of the Board" if appellant failed to comply with its order.

The appellant failed to respond to the Board's second order, and the Board can, and does, infer, from appellant's refusal to abide by Board orders, that the appellant has no intention of proceeding and prosecuting his appeal.

Having been advised, on two separate occasions, in clear terms, on the con-

sequences should he fail to comply with orders of the Board, the appellant leaves the Board with no alternative but to impose those sanctions made known to appellant by the Board.

This result is not in conflict with, and is taken after consideration of the results of the Board's decisions on *Harmar Coal Company v. DER*, Docket No. 83-174-G, (Opinion and Order, January 23, 1984) and *Armand Wazelle v. DER*, Docket No. 83-063-G (Opinion and Order, September 13, 1983). If the burden of proof were on DER, the result might not be as herein reached. However, the burden of proof and of proceeding rests upon the appellant so there is no undue benefit gained as might be the case if the appeal were dismissed in favor of the party upon who the burden of proof and of proceeding rested.

Accordingly, the Board, being mindful of the appellants' right to be heard upon his appeal, finds that the appellant has exhibited such careless and callous disregard of his rights and of the rules of practice and procedure before this Board as to warrant a dismissal of his appeal.

Accordingly, the Board issues the following:

O R D E R

AND, NOW, this 12th day of April, 1984, for the reasons stated in the foregoing Opinion of the Board, the appeal of Augustus A. Zito, at EHB Docket No. 83-184-M i dismissed with prejudice.

ENVIRONMENTAL HEARING BOARD

ANTHONY J. MAZULLO, JR.
Member

EDWARD GERJUOY
Member

DATED: April 12, 1984

cc: Bureau of Litigation
William Sierks, Esquire
Patrick Kronenwetter, Esquire

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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ALBENA B. KASMOCH :

:

: Docket No. 83-196-G

:

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER

Kasmoch, a 74-year-old woman, has appealed from a DER Order addressed to her, under the authority of Section 316 of the Clean Streams Law ("CSL"), 35 P.S. §691,316, ordering Kasmoch to permit the Consolidation Coal Company ("Consol") access to her land for the purpose of abating an acid water discharge arising on Kasmoch's property. DER has determined that Consol is responsible for the discharge, and should abate it at Consol's expense; Consol has agreed to these determinations in a signed Consent Order and Agreement between Consol and DER. DER also has determined that the abatement requires Consol's entry on Kasmoch's land, and indeed may require Consol to install seep collectors, lateral drains, access ways and boreholes on the Kasmoch property.

The DER Order was dated August 9, 1983. Nevertheless, as of this date, Kasmoch has refused to permit Consol's entry upon her land, even for the preliminary purpose of surveying her property to decide precisely what the abatement plan should be. Because of Kasmoch's advanced age this Board (and DER in our

opinion) has been extremely lenient with Kasmoch up to now. Her initial appeal, filed pro se, did not satisfy the requirements of 25 Pa. Code §21.51. The Board gave her several opportunities to correct the deficiencies in her notice of appeal; indeed as late as January 24, 1984, more than four months after her appeal originally was filed, the Board wrote Kasmoch explaining in detail that she faced dismissal of her appeal if she did not properly perfect it. 25 Pa. Code §§21.52 (b) and (c).

In the meantime Kasmoch has secured the services of an experienced environmental attorney, who immediately has peppered the Board with motions and petitions. These filings by Kasmoch are the subject of this Opinion and Order.

On March 28, 1984 Kasmoch filed a petition for supersedeas. In this petition, however, the Board could discern no credible allegation of irreparable harm to Kasmoch. On April 3, 1984, during a telephone conference call with the parties, Kasmoch's attorney still could not offer more than highly speculative allegations of irreparable harm to Kasmoch, other than the allegation that Consol's activities on her land might damage Kasmoch's property without compensation and subject her to personal liability. Although the Board was not convinced such allegations fall within the "irreparable harm to the petitioner" which must be weighed before granting a supersedeas under our rules, 25 Pa. Code §21.78(a)(1), on April 4, 1984 we granted a supersedeas for a week over DER's objection, to provide time for clarification of what specific harm might ensue to Kasmoch. We granted this supersedeas primarily out of deference to Kasmoch's age, without any implication that Kasmoch had made a showing she deserved a supersedeas under our rules.

On April 12, 1984, at a conference between the Board and the parties with Consol present, the Board remained dubious about Kasmoch's allegations of

irreparable harm. Moreover, in view of undertakings accepted by Consol and by DER at the April 12 meeting, we now are able to fashion an Order (see infra) which we believe will protect Kasmoch from the property damage and personal liability harms she alleges. Because of the continuing acid discharges which Kasmoch does not dispute, there is a "likelihood of injury to the public." 25 Pa. Code §21.78(a)(3). Furthermore, our rules say that a supersedeas shall not issue in cases where significant pollution exists during the period when the supersedeas would be in effect. 25 Pa. Code §21.78(b). The acid discharge is such pollution. Therefore the Board now has no hesitation about terminating the previously granted supersedeas without a hearing, under the authority of 25 Pa. Code §21.77, and without coming to any conclusion about "the likelihood of the petitioner prevailing on the merits." 25 Pa. Code §21.78(a)(2).

Kasmoch also has filed a motion for summary judgment, alleging inter alia: (1) that Section 316 of the CSL has been inappropriately applied to Kasmoch; and (2) that DER has effected a de facto taking of Kasmoch's property, which (Kasmoch claims) must be authorized under Section 314 of the CSL, not Section 316. This motion was unaccompanied by any affidavits. The Board believes that Kasmoch's legal theory is not wholly obvious, and that the allegation of a "de facto taking" requires considerable factual proof, which presently is lacking. Some other allegations in this motion, concerning Kasmoch's claim that Consol has been given untrammeled rights to affect her property, are taken care of in the Order accompanying this Opinion. The Board therefore denies the motion for summary judgment.

Kasmoch has filed a motion to stay these proceedings; she particularly asks for a stay of our Order of April 4, 1984 which granted her a week's supersedeas. We do not follow Kasmoch's logic in requesting a stay of our April 4, 1984 Order,

unless Kasmoch wanted us to retain the supersedeas we granted on April 4, 1984, but to refrain from terminating it. In any event, we have decided to terminate the supersedeas for reasons explained above. To grant the motion for a stay at this point would be to grant an unjustified supersedeas. The motion for a stay is denied.

Finally, Kasmoch has petitioned us (on April 11, 1984) for a certification of interlocutory appeal to the Commonwealth Court. This petition alleges inter alia that we have refused Kasmoch's motion for a declaratory judgment; we have been unable to find a motion for declaratory judgment in our files on this matter. Kasmoch further alleges that she has previously raised allegations (presumably in her petition for supersedeas and motion for summary judgment) which have been resolved against her and which "are controlling issues of law which if resolved, would terminate the litigation." While Kasmoch may be correct that controlling issues of law tentatively have been resolved against her in these proceedings (we have not yet ruled definitively on the merits of her cause), she has made no showing that "there is substantial ground for difference of opinion" on the Board's tentative rulings thus far [quoting from the language of 42 Pa. C.S. §702(b)]. Without such a showing, we refuse the requested certification.

The above takes care of all pending motions. To make plain the basis for the Order which follows we add the following. Consol's attorney, in a letter to the Board dated April 11, 1984, has written as follows:

> The surveying we need to do will take about three weeks to complete, weather permitting. About three Consol employees will do the surveying using standard land surveying equipment. Some clearing of brush and small trees will be required to establish lines-of-sight. When the surveying is finished we will take a small backhoe onto the property to dig about ten test trenches to determine the depth beneath the surface that the percolating water flows.

> The test trenches will be about three feet wide and about ten or fifteen feet long. Their depth should be, we estimate, no more than eight feet. These trenches will be located up near the 1240 contour line just below the elevation of the Pittsburgh coal seam outcrop. We will fill the trenches after we have gained the information from them that we require.
>
> The preliminary work we plan to do will cause no significant harm whatsoever to Mrs. Kasmoch's property. We will fill and reclaim all excavations or other surface disturbances we create. We will protect, indemnify and defend Mrs. Kasmoch, and hold her harmless, from and against any damage to her property caused by the preliminary work, and any claims which anyone may make against her for property damage or personal injury arising from that preliminary work.

DER informs us that the surveying work described in the above quotation requires no permit from DER, but that any work beyond this "surveying" will require a permit, after submission of a work plan to DER for DER's review. The Board agrees that Kasmoch, as bystander to the Consent Agreement between DER and Consol, should suffer no financial losses attributable to Consol's entry onto her land. For her to be left unprotected in this regard is likely to be an abuse of discretion by DER and by the Board.

O R D E R

WHEREFORE, this 18th day of April, 1984, it is ordered that:

1. The supersedeas granted in our Order of April 4, 1984 in this matter is terminated; once DER has filed the information required in paragraph 2b below, Kasmoch shall permit Consol's entry upon her land.

2. However, Consol may not enter upon Kasmoch's land, nor affect that land in any way, until:

a. Consol sends Kasmoch a legally binding document, with copies to DER and the Board:

(1) promising to limit its entry and activities upon Kasmoch's land to those described in the letter from Consol's attorney quoted in the body of the Opinion accompanying this Order; and

(2) promising to protect Mrs. Kasmoch and her property from damages and personal injury claims as described in Consol's aforesaid letter; and

(3) promising to employ a licensed real estate appraiser --acceptable to Kasmoch though to be paid by Consol--who, before Consol actually affects Kasmoch's land in any way, will appraise the value of Kasmoch's property with the intent of reappraising it after Consol has concluded its activities [all activities, not merely those described in paragraphs 2a(1) and 2a(2)]; and

(4) promising to employ and pay the same appraiser, or another licensed real estate appraiser acceptable to Kasmoch, to appraise Kasmoch's property after Consol has completed its land-affecting activities for the sole purpose of determining the diminution, if any, in the value of Kasmoch's property attributable to Consol's activities; and

(5) agreeing to compensate Kasmoch automatically, without any need for her to file a claim, for any diminution in the value of her property attributable to Consol's activities, as estimated from the aforesaid appraisals.

b. DER has reviewed the document filed in compliance with paragraph 2a supra, and has informed this Board that in DER's opinion the document:

(1) is sufficiently detailed, in its responses to the requirements of paragraphs 2a(1) and 2a(2), to give Kasmoch the protection she

deserves and this Board intends; and

(2) in other respects comports with the requirements and intent of paragraphs 2a(1) through 2a(5).

3. Before Consol undertakes any activities on Kasmoch's land beyond those described in paragraph 2a(1), Consol shall have received an appropriate permit from DER, based on a work plan filed with DER and copied to Kasmoch; the plan shall include guarantees, of the sort in paragraph 2a(2), which will protect Kasmoch and her property from damages and personal injury claims resulting from the newly planned work.

4. As soon as possible after receipt of Consol's filing described in paragraph 3, Kasmoch shall file with DER its objections thereto, if any.

5. If possible, DER shall review the document filed by Consol in compliance with paragraph 3 supra taking into account Kasmoch's objections, but DER shall not permit non-receipt of Kasmoch's objections to delay its review, which should begin within seven days after Consol's filing; however, DER shall not issue a permit allowing Consol to go forward with its proposed work plan in less than seven days after receipt of the proposed plan.

6. DER shall not grant Consol the required permit unless it is convinced that the document Consol submitted:

a. proposes to affect Kasmoch's land no more than reasonably necessary to abate the existing discharge; and

b. gives Kasmoch the protection she deserves and the Board intends, as would be inferred from the accompanying Opinion and paragraph 2b(1) supra.

7. Should the permit be granted, DER is to give Kasmoch, through her attorney, immediate notice of the permit's issuance.

8. Should DER grant the requested permit, Consol is not to actually begin the work permitted on Kasmoch's land for seven days after receipt, to give Kasmoch time to request and receive (if deserved) a supersedeas of that permit.

9. Any objections by Kasmoch to issuance of the aforesaid work permit will be merged with the instant appeal, via routine amendment of Kasmoch's pre-hearing memorandum; Kasmoch need not file a new appeal to retain her rights to object to the work permitted by DER.

10. Kasmoch's Motion for Summary Judgment, Motion to Stay these proceedings and Petition for a Certification of Interlocutory Appeal are denied.

11. Consol will receive a copy of this Opinion and Order; Consol is urged to petition for intervention in this appeal, to protect its rights.

12. Kasmoch's attorney shall impress upon his client that failure to obey orders of the Board can result in sanctions, including dismissal of this appeal, and that Kasmoch no longer can count on the Board's leniency. 25 Pa. Code §21.124.

ENVIRONMENTAL HEARING BOARD

EDWARD GERJUOY
Member

DATED: April 18, 1984

cc: Bureau of Litigation
Diana J. Stares, Esquire
Robert P. Ging, Jr., Esquire
Daniel E. Rogers, Esquire

COMMONWEALTH OF PENNSYLVANIA

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MAGNUM MINERALS :

:

: Docket No. 82-230-G

:

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER
SUR RENEWED MOTION FOR SANCTIONS

On February 28, 1983, this Board issued an Opinion and Order in the above-captioned matter. Therein we refused to order sanctions against Magnum requested by DER, but ordered Magnum to furnish more complete answers to various Interrogatories which--DER had complained--had not been satisfactorily answered by Magnum. Our February 28, 1983 Order was affirmed orally on March 22, 1983, after oral argument by the parties.

On or about April 20, 1983, Magnum did furnish supplemental answers to the previously complained-of Interrogatories; apparently these are the only supplemental answers which Magnum has furnished. DER was not satisfied with these supplemental answers, and on September 16, 1983 filed a "Renewed and Second" motion for sanctions. Magnum has responded to this motion. However the Board, for reasons about to be described, has not yet acted on this renewed motion for sanctions.

On July 28, 1983, before filing its renewed motion for sanctions, DER filed a motion to dismiss the appeal. This motion was denied by the Board in an Opinion and Order dated August 22, 1983. Thereafter, DER filed a petition for reconsideration of our August 22, 1983 Opinion and Order. In an Opinion and Order issued November 22, 1983, the Board affirmed its refusal to dismiss the appeal, but did vacate some of the language in our August 22, 1983 Opinion and Order.

In the meantime, on October 7, 1983, the Board had issued an Order which might have resulted in the complete resolution of this appeal. Magnum was ordered to file amendments to its previously filed permit application, whose denial (on September 3, 1982) is the subject of the instant appeal. DER was ordered to give Magnum the opporunity to file additional amendments, if needed. When the application was complete, DER was to review it. Pending this review of an amended permit application from Magnum, the Board on October 7, 1983 deferred action on DER's renewed motion for sanctions.

DER now has informed the Board that review of the amended application by Magnum has been completed, and that DER still refuses to grant the permit. Therefore DER once again asks the Board to act on its second motion for sanctions. The Board now accedes to this request, to which Magnum has not responded.

In substance, DER complains that Magnum's answers to Interrogatories 4 and 46 remain deficient. These Interrogatories were thoroughly discussed in our February 28, 1983 Opinion and Order; we need not repeat that discussion. We will state, briefly, that Interrogatory 4 asks Magnum to describe the specific acts and regulations that--according to Magnum--were not adhered to by DER; Interrogatory 46 asks Magnum to state the substance of the facts and opinions to which each of Magnum's expert witnesses is expected to testify, along with a summary of the grounds for each opinion. Magnum's response to DER's renewed motion for sanctions

does not reply substantively to DER's complaints about Magnum's answers. Magnum argues merely: (1) DER is estopped from asking for sanctions because DER waited so long (from April 20, 1983 to September 16, 1983) before asking for sanctions; and (2) DER is not entitled to sanctions because DER has not been prejudiced by any deficiencies in Magnum's answers to DER's Interrogatories.

DER complains particularly about the answers to Interrogatories 4(b) and 4(c), and to Interrogatory 46(c). Magnum's complete answers to Interrogatories 4(b) and 4(c) read as follows:

> 4(b) The acts which were not adhered to by the Department were the Bituminous Coal Open Pit Mining Conservation Act (52 P.S. 1396.5), and the Clean Streams Act (35 P.S. 691.7, 691.305), the Commonwealth Documents Law (45 P.S. 1208) and the Administrative Law Act (2 Pa. C.S.A. 102).
>
> 4(c) The rules and regulations not adhered to by the Department were under the Administrative Law Act (2 Pa. C.S.A. 102) and the Commonwealth Documents Law (45 P.S. 1208). In addition thereto, the Department failed to comply with its own rule regarding overburden analysis (See Department's Answer to Appellant's Interrogatory No. 20).

DER's renewed motion for sanctions makes the following objections to these answers:

> In answering Interrogatory 4(b), Appellant has provided a general list of statutes and citations which barely make sense. The first act Appellant lists, the "Bituminous Coal Open Pit Mining Conservation Act (52 P.S. §3196.5)" was repealed in 1971 by Section 9 of P.L. 554. See Purdon's Statutes: 52 P.S. §1396.5. Appellant's citations to Sections of the Clean Streams Law, Section 7 providing for judicial review of Department actions, and Section 305 giving the Department authority to investigate water pollution caused by industrial wastes, are completely irrelevant to any of Appellant's contentions of Department impropriety. Appellant's reference to the "Administrative Law Act (2 P.C.S.A. §102)", which confers upon agencies of the Commonwealth general rulemaking power, is equally puzzling as Appellant has not contended that the Department lacks rulemaking authority. Appellant's citation to 45 P.S. §1208 is the only citation which relates to Appellant's broadly stated contentions of law.

> Appellant's answer to Interrogatory 4(c) is completely deficient. Appellant has failed to state any specific regulation it contends the Department has violated, and merely lists two Acts under which unknown regulations were allegedly promulgated.

Magnum has not even tried to rebut the above objections to its answers to Interrogatories 4(b) and 4(c). We find those objections convincing. Therefore we rule that Magnum's answers to Interrogatories 4(b) and 4(c) are deficient. As for Interrogatory 46(c), it is sufficient to note--without going into further details--that Magnum's answer thereto does not include the opinions of any of Magnum's five named expert witnesses. Failure to include those opinions makes Magnum's answer to Interrogatory 46(c)--which tracks the language of Rule 4003.5 (a)(1)(b) of the Pa. Rules of Civil Procedure--obviously deficient. Moreover, in so holding, we are not ruling out the possibility that Magnum's answer to Interrogatory 46(c) is deficient for reasons beyond and above failure to include the opinions of Magnum's expert witnesses.

Consequently the only remaining issue before us is whether we should order sanctions against Magnum. Magnum argues there should be no sanctions because DER has not been prejudiced; this argument of Magnum's relies on Royster v. McGowen Ford, 439 A.2d 799 (Pa. Super. 1982). However, Royster is concerned only with "sanctions as a result of another party's failure seasonably to disclose the identity of an expert witness and the substance of the expert's report." Thus we may ignore Royster in our considerations of the proper sanctions, if any, for Magnum's failure to furnish proper answers to Interrogatories 4(b) and 4(c).

Under Pa. R.C.P. Rules 4019(a)(1)(i) and 4019(c)(2), a party who fails to serve sufficient answers to written interrogatories may be sanctioned by:

> an order refusing to allow the disobedient party to support or oppose designated claims or defenses,...

Pa. R.C.P. Rule 4019(g)(1) implies that sanctions for failure to satisfactorily answer interrogatories should not be imposed without "opportunity for a hearing." However, Magnum has had this opportunity, on March 22, 1983, after Magnum had seen our explanation of the legitimacy of DER's Interrogatories 4(b) and 4(c).

Moreover, our Pre-Hearing Order No. 1 required the appellant's pre-hearing memorandum to state the "contentions of law and detailed citations to authorities, including specific sections of statutes, regulations, etc., relied upon." Interrogatories 4(b) and 4(c) closely parallel this requirement of our Pre-Hearing Order No. 1. Paragraph 4 of our Pre-Hearing Order No. 1 warns:

> A party may be deemed to have abandoned all contentions of law or fact not set forth in its pre-hearing memorandum.

In the past, under the authority of 25 Pa. Code §21.124, this Board has sanctioned appellants who failed to file pre-hearing memoranda, by, e.g., limiting the evidence they would be permitted to present at a hearing on the merits. Armond Wazelle v. DER, Docket No. 83-063-G (Opinion and Order, September 13, 1983).

For all these reasons, we impose the following sanction on Magnum. Magnum will not be permitted to support its appeal by contending violation of any statute or regulation which has not been listed--either in Magnum's answers to Interrogatories 4(b) and 4(c), or in Magnum's pre-hearing memorandum--in a fashion sufficiently specific to meet objections like those (quoted earlier) which DER has raised to Magnum's present answers to Interrogatories 4(b) and 4(c).

Magnum may attempt to remove this sanction, in whole or in part, by petitioning the Board to accept supplemental answers to Interrogatories 4(b) and 4(c), and/or amendments to Magnum's pre-hearing memorandum, prepared in a fashion

which will cure the aforementioned deficiencies of Magnum's present answers to Interrogatories 4(b) and 4(c). Any such petition will have to be accompanied by a satisfactory explanation of Magnum's previous failure to come up with acceptable answers to those Interrogatories, which would have avoided requiring this Board (and DER) to spend all this time dealing with what should have been a routine task for any attorney who is experienced in practice before this Board (as Magnum's counsel is). Furthermore, any proffered cure of the aforementioned deficiencies must be filed early enough that any reasonably credible claim of prejudice to DER could be convincingly rebutted by Magnum. The pertinent rules permitting imposition of sanctions, namely Pa. R.C.P. Rule 4019 and 25 Pa. Code §21.124, have been providently promulgated and have a presumption of regularity. Under the circumstances, we will not put on DER the burden of showing that it has been prejudiced; it is Magnum who must bear the burden of dispelling the possibility of prejudice created by its unwillingness to comply with the discovery rules, even after this Board's order that the rules be complied with and after the Board's accompanying explanation of the legitimacy of DER's Interrogatories.

We will not grant DER's request that Magnum be precluded from presenting the testimony of any of its listed expert witnesses. It is true that Magnum's answers to Interrogatory 46(c) are deficient. However, those deficiencies well may be caused by present uncertainties in the minds of those experts. Under Pa. R.C.P. 4007.4, Magnum is expected to supplement its answer to Interrogatory 46(c), as its expert witnesses come to more definite conclusions about the substance of the facts and opinions about which they expect to testify. Magnum is warned that under Pa. R.C.P. Rule 4003.5(c), as well as under appropriate subsections of Pa. R.C.P. Rule 4019, the testimony of any Magnum expert witnesses at any hearing on the merits may be limited so as not to "go beyond the fair scope" of said

witness's answer to Interrogatory 46(c). This warning is not inconsistent with Royster, supra on which Magnum relies; the operative phrase in the preceding sentence is "may be limited". We will not limit Magnum's testimony if DER has not been prejudiced by Magnum's failure to comply with the discovery rules, but as explained earlier we will expect Magnum to bear the burden of dispelling the possibility of prejudice.

DER will be permitted to depose Magnum's expert witnesses. These depositions were postponed on October 7, 1983, by agreement between the parties, pending DER's review of Magnum's amended application. For this purpose, but only for this purpose, the Board--pursuant to 25 Pa. Code §21.111(a)--is extending the time for discovery. However, all these depositions must be completed within sixty (60) days from the date of this Opinion and Order. This matter has been mired in procedural wrangles long enough; it is time to reach the merits, in a hearing if necessary. DER is warned that although it cannot be expected to ask deposition questions about subjects Magnum has not brought up during DER's discovery, nevertheless the availability of Magnum's experts for deposition must be relevant to the issue of DER's prejudice from Magnum's answers to Interrogatory 46(c).

Finally, as we believe this Opinion makes plain, Magnum is under no obligation to supplement its present Interrogatory answers; but Magnum is put on notice if it does file supplementary answers which again will prove to be unacceptable, the Board will give serious consideration to ordering Magnum to pay DER's costs, including attorney fees, as authorized by Pa. R.C.P. Rule 4019(g)(1). We add that we see nothing in the Rules of Civil Procedure or in Royster which conditions such payments on a showing of prejudice.

O R D E R

WHEREFORE, this 19th day of April, 1984, it is ordered that:

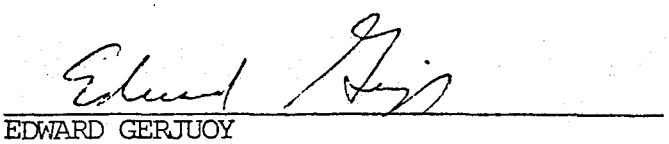
1. Magnum will not be permitted to support its appeal by contending violation of any statute or regulation which has not been listed--either in Magnum's answers to Interrogatories 4(b) and 4(c), or in Magnum's pre-hearing memorandum--in a fashion sufficiently specific to meet objections like those which DER has raised to Magnum's present answers to Interrogatories 4(b) and 4(c).

2. The sanction ordered in paragraph 1 supra may be removed after petition by Magnum, provided Magnum meets the conditions for such removal described in the body of the accompanying Opinion.

3. DER may depose Magnum's expert witnesses, provided the depositions are completed within sixty (60) days from the date of this Order.

4. Within fifteen (15) days from the date of this Order, Magnum is to petition the Board for permission to undertake any discovery it still desires; at the same time Magnum is to renew any earlier unacted-upon motions for sanctions it believes are merited by DER's responses as of now to Magnum's earlier discovery requests.

ENVIRONMENTAL HEARING BOARD



EDWARD GERJUOY
Member

DATED: April 19, 1984

cc: Bureau of Litigation
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SANITARY AUTHORITY OF THE CITY OF DUQUESNE :

:

Docket No. 83-055-G

:

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER
SUR CROSS MOTIONS FOR SUMMARY JUDGMENT

The Sanitary Authority, City of Duquesne ("Authority") has timely appealed a letter dated February 22, 1983, written by DER to the Authority, denying the Authority's 1982 application for funds under Act 339, 35 P.S. §701 et seq. ("the Act"). The parties have stipulated to the relevant facts (joint stipulation filed February 6, 1984) and have filed cross motions for summary judgment based on those facts. These motions have been fully briefed by both parties and were the subject of oral argument on February 6, 1984. We now rule on these motions.

According to their joint stipulation, the parties have agreed to the following facts:

> 1. The Department mailed an application form to the Sanitary Authority for the Authority to use in completing its Act 339 grant application for the year 1982, in early November, 1982

2. On January 10, 1983, the Department mailed a letter to the Sanitary Authority, reminding the Authority of the January 31, 1983 deadline for the filing of grant applications for the year 1982.

3. The Sanitary Authority's application for a grant for the year 1982 under the Act 339 program was not postmarked until Feburary 15, 1983.

4. The Sanitary Authority's application for a grant for the year 1982 was not received by the Department until February 18, 1983.

5. The Sanitary Authority's application for a grant for the year 1982 requested the same dollar amount sought by the applications which the Authority had filed with the Department for the years 1965-1981.

DER has moved for summary judgment on the basis of the above facts and the following language of the Act (35 P.S. §703):

> The amounts to be expended for any of the foregoing purposes shall be recommended by the Secretary of Health and approved by the Governor, in accordance with rules and regulations which the Department of Health is hereby authorized to promulgate, and shall be based upon reports filed with the Secretary of Health prior to the thirty-first day of January, one thousand nine hundred fifty-four, and annually thereafter, by the municipalities, municipality authorities or school districts entitled to receive such payments, setting forth the amounts expended for the acquisition and construction of sewage treatment plants from the effective date of the act, approved the twenty-second day of June, one thousand nine hundred thirty-seven (Pamphlet Laws 1987), up to and including the thirty-first day of December of the preceding year.

DER argues that the language just quoted required DER to deny the Authority's 1982 application in view of the admitted fact (stipulated fact No. 3 supra) that the 1982 application was postmarked February 15, 1983, fifteen days after the date January 31, 1983 specified in the Act. DER bolsters this argument by referring to 25 Pa. Code §103.23, which--in reference to applications for Act 339 funds--states:

> (a) The required application and supporting

> documentation shall be filed with the Department prior to January 31, 1954 and prior to February 1 annually thereafter. No application received by the Department or postmarked later than January 31 will be accepted for processing by the Department.

The Authority has moved for summary judgment under the precedent of Borough of Norristown v. Commonwealth, 39 D&C 2d. 245, 85 Dauph. 65 (1966), on the basis that the parties have stipulated, under the heading "Issues Upon Which This Appeal Turns":

> 1. Whether an application for a grant under the Act of August 20, 1953, 35 P.S. §701 et seq. ("Act 339") which is not filed within the deadline established by Section 3 of Act 339, 35 P.S. §703, and by Section 103.23(a) of the Rules and Regulations of the Environmental Quality Board ("EQB"), 25 Pa. Code §103.23(a), may be accepted by the Department.

Norristown, supra, also dealt with an application for funds under Act 339, by the Borough of Norristown. Because of the unexpected illness of the Borough Treasurer responsible for preparing the application for the year 1962, it was not mailed until February 4, 1963. The Department of Health (the forerunner of DER) therefore denied the application as untimely under the Act. According to the Norristown opinion, the Department of Health also cited a regulation in support of its action; however, the regulation in question does little more than track the language of the Act's Section 703. Consequently the Norristown opinion rests solely and squarely on application to the Norristown facts of the court's interpretation of Section 703.

The Norristown court, citing East Lake Road and Payne Avenue, 309 Pa. 327, 163 At. 683 (1932), held the language of the Act did not necessarily imply that an application filed a few days later could not be accepted. The court ruled that under the facts--where the late application resulted from an unexpected illness,

and therefore was not the Borough's "fault"--mailing the 1962 application on February 4, 1963 "substantially complied with the filing conditions of the Act." In support of this ruling, the court quoted from East Lake Road, supra:

> We have held as a general rule that where an act of assembly commands an act to be performed within a certain time the words employed are mandatory. It is not within the power of courts to waive or dispense with such legislation. There are exceptions to the rule: it does not embrace literal compliance with an act, the performance of which has been made impossible through no fault of the one whose duty it was to act, where the thing to be done may be done at some future time [Commonwealth v. Hill, 185 Pa. 385, 39 A. 1055 (1898)]; nor does it include the performance of a public duty, the neglect of which works general inconvenience, serious injury, or injustice to those having no control over the person who is to perform the duty. [Commonwealth v. Griest, 196 Pa. 396, 46 A. 505 (1900)]. (Other citations omitted)

Norristown, which appears to be the only reported opinion that construes the Act, clearly supports the Authority's motion. DER's cited cases, in support of DER's contention that the January 31 time limit in the Act should be strictly construed, all involve other statutes or related general principles, e.g., that a time limit for filing an appeal should be strictly construed. In other words, Norristown is much more closely on point than any authority DER can cite.

Nevertheless, we grant DER's motion and reject the Authority's motion. In explanation of this ruling we note first that we are not bound by the Norristown decision under principles of stare decisis, as DER's brief in support of its motion points out and as the Authority conceded during oral argument (N.T. 49); the Board is not inferior to the Dauphin County Court of Common Pleas. In our opinion, Norristown was wrongly decided. Although the Norristown court found language in East Lake Road, quoted supra, justifying the Norristown view that the January 31 time limit is not stringent but can be "substantially complied with" by a

(presumably not too) tardy filing, in actuality the East Lake Road court upheld a strict reading of a statutory time limit--namely, in the East Lake Road case, for establishing a property lien; the Norristown court was quoting mere dicta. Furthermore, the facts in the Hill and Griest cases, from which the East Lake Road court drew these dicta, are utterly different from the facts in the appeal before us. The issue in Hill was whether an appeal of a death sentence, entered on the day set for the execution, would serve as a supersedeas of execution. Griest involved a mandamus action to compel the Secretary of the Commonwealth to publish a proposed constitutional amendment. We see no reason to follow this off-the-point flimsy chain of reasoning--from Hill and Griest through East Lake Road--favored by the Norristown court.

Moreover, our standard of review is different from the Norristown court's. The Norristown court made its own de novo decision on the facts, after an appeal by the Department of Health from rulings by two Commonwealth quasi-judicial tribunals (the Board of Claims and the Board of Finance and Review) upholding the Borough's 1962 application despite its February 4, 1963 filing. We are reviewing DER's decision denying the Authority's 1982 application. Our task is to determine whether this denial was an abuse of DER's discretion. Warren Sand and Gravel Company, Inc. v. DER, 20 Pa. Cmwlth. 186, 341 A.2d 556 (1975); Township of Indiana et al. v. DER, Docket Nos. 82-099-G and 82-100-G (January 3, 1984) [see note 3 therein]. Although under Warren, supra, we may substitute our discretion for DER's when DER has abused its discretion (and perhaps sometimes even when DER has not abused its discretion), we can find no basis for second-guessing DER under the facts of this appeal.

In our view, despite the Authority's rather strained attempts to argue to the contrary, the Act requires new applications to be filed each year an

Act 339 grant is desired, and further requires that the application for any year (e.g., 1982) be filed by January 31 of the next year (e.g., January 31, 1983). In this view we agree with Norristown, which did not challenge the January 31 of next year deadline, but merely held that the deadline need not always be strictly enforced. The language of 25 Pa. Code §103.23 is explicitly consistent with the view of the Act's construction which we have just expressed. The issue before us is whether DER abused its discretion by insisting the January 31, 1983 deadline must be strictly enforced against the Authority.

Once put this way, the resolution of the aforesaid issue is obvious. It cannot be an abuse of discretion for DER to enforce the literal terms of a statute or regulation. Indeed the Commonwealth Court has instructed DER to enforce regulations literally. East Pennsboro Township Authority v. DER, 334 A.2d 798 (Pa. Cmwlth 1975). In other words, whether or not acceptance of the Authority's application mailed February 15, 1983 would have been within DER's discretion, it was not an abuse of discretion for DER to refuse the application. This ruling of ours is consistent with sound principles of administrative law. DER is expected to obey the statutes promulgated by the Legislature and the regulations promulgated by the Environmental Quality Board. In addition, while DER's failure to follow the literal terms of statutes or regulations might be justified under suitable exceptional circumstances, for us to overrule DER when it is adhering to the statutory and regulatory letter would have to be considered an abuse of our discretion. Our function is adjudicative, not legislative. If DER is to be instructed that it must not interpret strictly the language of the Act and of Pa. Code §103.23, that instruction will have to come from a higher court, not from us. In the alternative, if DER's adherence to the letter of the statute and regulation really will result in an unfair tax burden for the citizens of the

City of Duquesne, against the intent of the Legislature, then the citizens should look to the Legislature, not to this Board, for special relief.

There remains a point which is implicit in the Authority's argument. Under the authority of United States Steel Corp. v. Comm. of Pa. Environmental Hearing Board, 442 A.2d 7 (Pa. Cmwlth. 1982), we may review the validity of a regulation in the context of a given appeal, e.g., the appeal presently before us. Coolspring Township v. DER, Docket No. 81-134-G (Adjudication, August 8, 1983), at 23. If, as the Norristown court apparently believed, the language of the Act is sufficiently imprecise to encompass a loose non-literal reading of the January 31 deadline, then the EQB may have gone beyond the authority of the Act in promulgating the quite unequivocal 25 Pa. Code §103.23; this regulation simply does not permit any deviation from the January 31 deadline. However, the EQB's duly promulgated regulation has a presumption of validity, Comm. DER v. Locust Point Quarries, 486 Pa. 350, 396 A.2d 1205 (1979). Except for its reliance on Norristown, the Authority has not rebutted this presumption. We do not agree with the Norristown ruling, for reasons explained earlier. We see no reason to believe the language of Section 105.23 was so far outside the intent of the language of the Act that DER's insistence on strict adherence to the regulation could be said to constitute an abuse of DER's discretion under the facts of this appeal.

The foregoing explains our ruling. It will be observed that our analysis makes it unnecessary for us to examine the facts of this appeal--in particular the causes of the application's having been mailed February 15, 1983 rather than before January 31, 1983--to ascertain whether it could have been within DER's discretion to accept the application.

ORDER

WHEREFORE, this 25th day of April, 1984, the Authority's Motion for Summary Judgment is rejected, DER's Motion for Summary Judgment is granted, and the above-captioned appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

ANTHONY J. MAZULLO, JR.
Member

EDWARD GERJUOY
Member

DATED: April 25, 1984

cc: Bureau of Litigation
Michael E. Arch, Esquire
J. Philip Bromberg, Esquire

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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HARRISBURG, PENNSYLVANIA 17101
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WILLIAM FIORE, d/b/a
MUNICIPAL AND INDUSTRIAL DISPOSAL COMPANY

Docket No. 83-160-G

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER
SUR MOTIONS FOR SUMMARY JUDGMENT

Fiore has appealed DER's suspension, in a letter dated August 4, 1983, of the Phase I - Industrial Waste Pit portion of Fiore's Solid Waste Disposal Permit No. 300679. This appeal was accompanied by a petition for supersedeas, which the Board denied in an Opinion and Order at the above docket number, dated August 24, 1983. Many of the Facts germane to the instant Opinion and Order, e.g., the language of DER's August 4, 1983 letter, already have been reviewed in our August 24, 1983 Opinion and Order. To help make the instant Opinion and Order self-contained, however, some of the text of that Opinion and Order is repeated here.

The petition for supersedeas was denied after a hearing, held August 12, 1983. A major issue discussed at that hearing, and in our August 24, 1983 Opinion, was the legal effect of a Consent Order and Agreement ("CO&A") between DER and Fiore, dated January 25, 1983. On August 31 and September 1, 1983, hearings were

held in the Commonwealth Court on a DER petition to enforce the CO&A. On October 28, 1983 the Commonwealth Court granted the petition; in particular, Fiore was adjudged guilty of contempt for having violated the CO&A and was ordered to comply with the CO&A henceforth.

Thereafter an expedited hearing on the merits of the above-captioned appeal was held, starting November 15, 1983. At the opening of this expedited hearing, the Board--after allowing oral argument--granted in large part a motion by DER to limit the issues in the appeal; the Board agreed with DER (who, along with Fiore, had filed briefs on the motion) that issues such as the validity and legal effect of the CO&A had been precluded by the Commonwealth Court's October 28, 1983 Opinion which granted DER's request to enforce the CO&A (N.T. 64-67). The Board also ruled the Commonwealth Court had found, with res judicata effect for the instant appeal, that Fiore had violated paragraphs 4, 5, 7 and 9 of the CO&A (N.T. 67). In so ruling, the Board rejected Fiore's argument that the Commonwealth Court's October 18, 1983 Opinion could not preclude later (after October 18, 1983) judgments of issues in the instant appeal; according to Fiore such issue preclusion was improper because this appeal was filed before DER initiated the Commonwealth Court action which led to the October 28, 1983 Opinion.

DER's August 4, 1983 letter justified the appealed-from suspension on the primary grounds (now established, see supra) that Fiore had not complied with the CO&A. On the other hand, at the opening of the expedited hearing on November 15 Fiore moved for summary judgment, on the claim that DER's Commonwealth Court petition to enforce the CO&A precluded DER from proceeding with the permit suspension. The Board deferred ruling on this motion. By December 5, 1983, however, after three days of hearings, during which time DER had completed its case-in-chief but Fiore

had not yet begun his case-in-chief, it had become apparent that the Board might be able to dispose of this appeal on the basis of the evidence already heard. Therefore, on December 5, 1983, the Board--with the agreement of the parties--suspended the hearings and ordered the parties to file briefs on the issues raised by Fiore's motion for summary judgment. The parties also were informed the Board would treat DER's brief as a motion for summary judgment that, as a matter of law, the aforesaid established violations of the CO&A, standing alone, justified DER's suspension order.

These briefs having been filed, we now rule, for reasons explained below:

1. DER is not precluded from proceeding with the permit suspension, or from relying on violations of the CO&A to justify the suspension order.
2. The established violations of paragraphs 4, 5, 7 and 9 of the CO&A justified the suspension order.

1. Preclusion of CO&A Violations

Fiore argues that the Doctrine of Election of Remedies, as embodied in DER v. Leechburg Mining Co., 9 Pa. Cmwlth. 297, 305 A.2d 764 (1973) ("Doctrine") precludes DER from pursuing the permit suspension before this Board, once DER had commenced the Commonwealth Court action to enforce the CO&A. DER argues to the contrary. DER further argues that the Board should not even consider Fiore's invocation of the Doctrine, because the applicability of the Doctrine had not been raised in Fiore's Notice of Appeal or pre-hearing memorandum, but only was raised in Fiore's motion for summary judgment the day the hearings opened.

We will deal first with this threshold possibility that Fiore had waived the Doctrine issue. It is true that the Board's rules, 25 Pa. Code §21.51(e) state:

> (e) The appeal shall set forth in separate numbered paragraphs the specific objections to the action of the Department. Such objections may be actual or legal. Any objection not raised by the appeal shall be deemed waived, provided that, upon good cause shown, the Board may agree to hear such objection or objections. For the purpose of this subsection, good cause shall include the necessity for determining through discovery the basis of the action from which the appeal is taken.

Nevertheless, it remains true that an appellant, forced to file his notice of appeal under the strict thirty-day time limit of 25 Pa. Code §21.52(a), really may not have had the opportunity to sort out his thoughts and determine all his issues until well after the thirty-day appeal period has passed. For this reason, inter alia, the Board recently has been very reluctant to waive issues not raised by the notice of appeal. Township of Indiana et al. v. DER, Docket Nos. 82-099-G and 82-100-G, 1982 EHB 469; Concerned Citizens Against Sludge v. DER, Docket Nos. 82-220-G and 82-221-G (Opinion and Order, February 9, 1983). DER points to Pa. Game Commission v. DER, Docket No. 82-284-G (Opinion and Order, March 29, 1983) as a Board precedent for refusing to consider Fiore's Leechburg Doctrine contention. However, the Board's refusal to allow an amendment to the notice of appeal in Game Commission was primarily based on the belief that the appellant did not have standing to raise his would-be amendment; the fact that the amendment appeared to be untimely was supportive of the Board's refusal to allow the amendment rather than determinative, as the Opinion and Order (which uses the language "the amendment... does appear to be untimely" (emphasis added) clearly indicates. Similar remarks pertain to Western Hickory Coal Company v. DER, Docket No. 82-141-G (Adjudication, June 22, 1983), to which DER also points as precedent.

The Board's rules do not specifically prescribe the form and contents of the parties' pre-hearing memoranda. However, under the authority of Pa. Code §21.82(c), the Board customarily issues Pre-Hearing Order No. 1 to the parties

shortly after the notice of appeal is filed. Pre-Hearing Order No. 1 warns:

> A party may be deemed to have abandoned all contentions of law or fact not set forth in its pre-hearing memorandum.

But the Board also has been reluctant to enforce this warning without a showing that refusal to waive a contention of law or fact not set forth in a party's pre-hearing memorandum would be prejudicial to another party. Melvin D. Reiner v. DER, Docket No. 81-133-G, 1982 EHB 183 at 200. The Doctrine is purely a matter of law, and its raising by Fiore the morning the hearings began did not prejudice DER's presentation of its case in any way. Since the hearing, DER has been given full opportunity to brief the Doctrine issue.

Consequently we hold that the merits of Fiore's would-be invocation of the Doctrine are before us. In Leechburg, The Commonwealth Court was ruling on a complaint in equity charging violations of the Clean Streams Law and other statutes, filed by DER against a mining company. Previously, DER had issued an administrative order requiring the company to abate these same violations. This order had been appealed to the Environmental Hearing Board, but the appeal was settled by a Consent Adjudication filed with the Board. The Commonwealth Court held that although under the Clean Streams Law and other statutes DER is given a choice of remedies, including the issuance of administrative orders and the filing of complaints in equity, nevertheless DER could not proceed with the complaint in equity against the violations once it had issued the administrative order to abate those violations. The Court did allow DER to proceed with that portion of its complaint in equity which alleged violations of the Consent Adjudication.

Under the foregoing Leechburg facts, the applicability of Leechburg to the appeal at hand is immediately dubious. The appealed-from administrative order to Fiore suspending his permit was DER's original action; the petition asking the

Commonwealth Court to enforce the CO&A came later. Thus, even assuming arguendo that the Doctrine is applicable to this dispute between DER and Fiore, the Doctrine should have been raised during the August 31-September 1, 1983 Commonwealth Court hearings, as a reason for the Commonwealth Court to dismiss DER's petition. The record in the instant appeal does not indicate whether the Doctrine and/or its possible implications ever were raised during the Commonwealth Court hearings. However, there certainly is nothing in the October 28, 1983 Commonwealth Court Opinion to indicate that the Court felt its Opinion would preclude DER from claiming violations of the CO&A as a justification for suspending Fiore's permit. We can find nothing in Leechburg to suggest that the Commonwealth Court's October 28, 1983 Opinion automatically "related back" to rescind DER's August 4, 1983 suspension of Fiore's permit, or to preclude use of CO&A violations as a justification for the suspension.

The reasoning of the immediately preceeding paragraph suffices to rebut Fiore's argument that in the instant appeal DER's continued defense of Fiore's permit suspension has been precluded by DER's Commonwealth Court petition, under the Doctrine. But even if this reasoning were to fail, the applicability of the Doctrine to the instant appeal is dubious. The Pennsylvania courts clearly have stated that even if the Doctrine can apply when the Legislature specifically has provided for multiple remedies [DER v. Bethlehem Steel, 469 Pa. 578, 367 A.2d 222 (1976)], its application must be limited to "inconsistent" remedies; there is no bar to multiple remedies which are "supportive" or "cumulative" rather than "inconsistent". DER v. Coward, 489 Pa. 377, 414 A.2d 91 (1980); DER v. Penn Power, 34 Pa. Cmwlth. 546, 384 A.2d 273 (1978); Nuside Metal Products v. Eazor Express, 189 Pa. Super. 593, 152 A.2d 275 (1959); Harper v. Quinlan, 159 Pa. Super. 367, 48 A.2d 113 (1946). The courts' definitions of "inconsistent" remedies have not

been as transparent as might be hoped; however, the definition in Nuside, supra, does seem helpful:

> Two modes of redress are inconsistent if the assertion of one involves the negation or repudiation of the other, as where one of them admits a state of facts and the other denies the same facts, or where one is founded upon the affirmance, and the other upon the disaffirmance, of a voidable transaction.

Paragraphs 4, 5, 7 and 9 of the CO&A, which--the Commonwealth Court found--had been violated by Fiore, call for Fiore to:

> a. Remove all solid waste material stored on an area identified as the temporary storage pit.
>
> b. Submit a closure plan for the temporary storage pit.
>
> c. Refrain from expanding his hazardous waste facility identified as the Phase I Industrial Waste Pit, and from utilizing or constructing any other hazardous waste facility.
>
> d. To pay a civil penalty of $500 per month until he receives an industrial waste discharge permit.

The permit suspension implies that Fiore must cease accepting any waste at the Phase I Industrial Waste Pit, and must file a closure plan for that Pit as well as for the temporary storage pit.

We see no basis for concluding that these consequences--of enforcing the CO&A and of the permit suspension--are inconsistent under the Nuside definition. Fiore contends [pp. 6-7 of his brief] that the permit suspension is inconsistent with enforcing the CO&A because suspending Fiore's permit in effect is a repudiation of the CO&A. We reject this contention, whose logic we cannot follow.

2. Justification for the Suspension Order

The foregoing has explained our ruling 1, stated supra, that DER is not precluded from proceeding with the permit suspension or from relying on violations

of the CO&A to justify the suspension order. But having so ruled, we believe we cannot avoid the consequent ruling 2, supra, that the aforementioned violations of the CO&A--namely paragraphs 4, 5, 7 and 9 thereof--suffice to justify the suspension order, without further supporting evidence, such as evidence of other violations by Fiore at his site.

Section 503(c) of the Solid Waste Management Act ("SWMA") 35 P.S. §6018.503(c) states:

> In carrying out the provisions of this act, the 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 order of the department; 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 this act...or any rule or regulation of the department or order of the department...as indicated by past or continuing violations.

Paragraph 12 of the CO&A, which was not appealed by Fiore, asserts that paragraphs 1 through 11 of the CO&A constitute a DER order. Therefore Fiore's violations of paragraphs 4, 5, 7 and 9 of the CO&A are violations of final DER orders; according to the just-quoted Section 503(c), DER may suspend a permit on the basis of such violations.

Our task in this matter is to review DER's action to determine whether DER committed an abuse of discretion or an arbitrary exercise of its duties or functions.[1] Warren Sand and Gravel Company v. DER, 20 Pa. Cmwlth. 186, 341 A.2d (1975). Township of Indiana et al. v. DER, EHB Docket Nos. 82-099-G and 82-100-G, (Adjudication, January 3, 1984). In view of the facts summarized in the preceding

---

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

paragraph, there certainly is no apparent abuse of DER's discretion at first sight; under the statute, suspension of the permit was an act within DER's discretion given the fact there had been a failure to comply with a DER order.

Nevertheless, we might be willing to entertain the thesis that DER should have imposed a less stringent sanction than permit suspension, had Fiore's violations been purely technical or otherwise comparatively unimportant. But Fiore's failure to comply with the requirements listed as a - d supra hardly can be termed "purely technical or otherwise comparatively unimportant." On January 25, 1983 Fiore had agreed to remove all solid waste material from the temporary storage pit by June 15, 1983; by August 4, 1983, the date of the appealed-from permit suspension, Fiore had not complied with this requirement. Similarly, by August 4, 1983, Fiore had not submitted a closure plan for the temporary storage pit, as required by paragraph 5 of the CO&A; had failed to refrain from expansion of his Phase I hazardous waste facility, or had failed to refrain from utilizing or constructing any other unpermitted hazardous waste facility; and had not paid a monthly civil penalty he had agreed to pay. These are serious violations, for which one would expect strong sanctions. Moreover, from the foregoing recitation of violations alone, DER well could have concluded not only that Fiore had violated a DER order, but also that Fiore had shown a lack of ability or intention to comply with orders of the department. According to 35 P.S. §6018.503(c) quoted supra, such a lack of ability is an independent basis (aside from violation of a DER order) for suspension of a permit.

Conclusion

The discussion we have presented demands the conclusion that--at the time DER suspended the permit--DER did not abuse its discretion. It is true that

our hearings are de novo, which in effect means that our task is to decide whether DER's action was an abuse of discretion under all the facts presented to the Board, not merely under those facts available to DER at the time of its complained-of action. It also is true that the hearings on the merits of this appeal were suspended before Fiore had the opportunity to present its case-in-chief. However, in coming to the conclusion that DER did not abuse its discretion when it suspended the permit on August 4, 1983, we have relied only on facts which were established as res judicata for the instant appeal; those facts, concerning violations of the CO&A, could not be challenged during Fiore's presentation of its case-in-chief. Thus our conclusion that DER did not abuse its discretion on August 4, 1983 implies that as a matter of law, under the undisputed facts, our de novo review of DER's permit suspension also must conclude there was no abuse of DER's discretion. Hence summary judgment to this effect is warranted although the hearings were suspended before Fiore presented its case-in-chief.

Finally we remark that we definitely have not relied on DER's attempts during the hearings to introduce evidence of other alleged violations by Fiore, attempts which Fiore objected to and would have been entitled to rebut. Thus there is no cause for us to rule on the admissibility of those alleged facts of Fiore's "compliance history," as Fiore has asked us to rule.

O R D E R

WHEREFORE, this 25th day of April , 1984, it is ordered that:

1. Fiore's Motion for Summary Judgment is rejected.
2. Summary Motion in favor of DER is granted.

3. The above-captioned appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

ANTHONY J. MAZZILLO, JR.
Member

EDWARD GERJUOY
Member

DATED: April 25, 1984

cc: Bureau of Litigation
Howard J. Wein, Esquire
Robert P. Ging, Jr., Esquire

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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NORTH FAYETTE TOWNSHIP :

:

: Docket No. 83-146-G

:

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and DEEP VALLEY DISPOSAL, INC., Permittee

OPINION AND ORDER
SUR MOTION TO DISMISS

The Township has appealed DER's grant of a permit to Deep Valley Disposal ("DVD") for operation of a demolition waste disposal site, under the Solid Waste Management Act, 35 P.S. §6018.101 et seq. Paragraph 3 of the notice of appeal requires the appellant to state its reasons for appealing. The Township's complete statement in response to this requirement read as follows:

> Technical Zoning Questions/violations presented sufficient to bar said granting of permit and/or action referred to in attachment. Also clear and present danger created to communities surrounding. environmental and demographic effects. Also unreasonable and arbitrary.

The "attachment" referred to in the above quotation was the appealed-from permit.

Thereafter the Township filed its pre-hearing memorandum, pursuant to the Board's Pre-Hearing Order No. 1, which is sent to all appellants. According to Pre-Hearing Order No. 1, the pre-hearing memorandum must contain the following (inter alia):

A. Statement of facts the appellant intends to prove.

B. Contentions of law and detailed citations to authorities, including specific sections of statutes, regulations, etc. relied upon...

D. Order of witnesses.

E. Documents sought to be introduced into evidence.

The Township's pre-hearing memorandum's entire response to these requirements was:

A. Statement of Facts

Deep Valley Disposal, Inc. was granted a permit for a solid waste disposal and/or processing facility within North Fayette Township, Allegheny County, Pennsylvania on the Twentieth (20th) day of June, 1983, by the Department of Environmental Resources.

The permit is applicable to the facility named as Deep Valley Disposal and briefly described as follows:

Construction and Demolition
Waste and Disposal Site

Class I, Class II, and Class III
Latitude: 40° 26' 12"
Longitude: 80° 10' 48"

As provided in the original permit, said right granted by the Department is subject to revocation (or) suspension for various reasons, one of which the appellant maintains is always fraud.

The appellant alleges that the permittee acquired the above-referenced permit by fraudulently making assertions and statements and representation to the Department and various other officials. In addition, under the circumstances of this case, the granting of said permit was unreasonable. (See filed appeal form). Fraud resulting in the unjust granting of a permit such as that in the instant case is within the purview of this department's jurisdiction.

B. Contentions of Law

Fraud on the part of the permittee is sufficient grounds for revocation, or suspension of the permit in this case.

Alternatively, the commission of Fraud on the part of the permittee takes the case back to pre-granting of said permit. In essence, the permit was never legally granted.

See Attached.

D. Appellant reserves the right to call any witnesses regarding North Fayette Township and their position regarding fraud committed by the permittee, and rationale of Township as to why granting of permit was unreasonable. This list includes, but is not limited to members of the Township Board, the solicitor, and all related commissions and their members.

E. Documents

We will rely on the department's entire file.

Attachment

Rescission of transaction that the deception induced and restitution of the parties to their pre-contract position; authority includes, but is not limited to E. g., Jennings v. Lee. 105 Ariz. 167, 461 P.2d 161 (1969); Mock v. Duke, 20 Mich.App. 453, 174 N.W. 2d 161 (1969); Farnsworth v. Feller, 256 Or. 56, 471 P.2d 792 (1970); Halpert v. Rosenthal, 267 A, 2d 730 (R.I. 1970); Restatement of Contract S 476 (1932). 33 ALR 1081, 1109. 5 Am Jur POF2d, pp 727-781. False Claims Act (31 USCS S 231) pertaining to "false" or fictitous" claims or statements, 26 ALR Fed 307. All applicable Pennsylvania law will be asserted.

After reviewing the Township's pre-hearing memorandum, DER filed a motion for sanctions. This motion alleged that the Township's pre-hearing memorandum failed to comply with the requirements of our Pre-Hearing Order No. 1 in the following particulars:

a. Instead of a statement of facts to be proved, the pre-hearing memorandum contained "vague allusions and legal conclusions".

b. The averments of fraud were not pleaded with particularity.

c. The pre-hearing memorandum made no reference to specific sections of statutes or regulations which allegedly had been violated by DER's grant of the permit.

d. No witnesses were named, thereby severely hampering DER's ability to conduct discovery.

e. The documents on which the Township intended to rely had not been explicitly listed.

DER therefore requested that the Township be ordered to file a more specific pre-hearing memorandum, in full compliance with our Pre-Hearing Order No. 1.

The Township's response to DER's motion for sanctions was confined to a request for oral argument on the motion. The Board then granted DER's motion, after denying the request for oral argument on the grounds that no need for oral argument had been shown. The Board agreed that DER had correctly identified deficiencies in the Township's pre-hearing memorandum, and ordered the Township to file an amended pre-hearing memorandum correcting those deficiencies. No additional sanctions were imposed, but the warning stated in paragraph 4 of our Pre-Hearing Order No. 1 was repeated, namely that failure to comply fully with the requirements of Pre-Hearing Order No. 1 may result in the imposition of sanctions under 25 Pa. Code §21.124, including possible dismissal of the appeal.

The Township did file an amended pre-hearing memorandum in response to the Board's order. The amended pre-hearing memorandum was identical to the original pre-hearing memorandum, except that:

(i) Under Statement of Facts, the allegation of fraud was supplemented by the parenthetical insert: "(said representations and misrepresentations including but not limited to misrepresentations as to

zoning classifications)."

(ii) Under Contentions of Law, there was added: "Also - 18 Pa.. C.S.A. 1401 et seq."

(iii) The previous reservation of the right to call "any witnesses" was supplemented by the sentence: "Specifically, the list includes, but is not limited to James Quinn; Louis Chauvet; Floyd Lutz; Larry P. Gaitens, Esq."

(iv) The section Documents was amplified to: "We will rely on the department's entire file, (and all correspondence between Deep Valley Disposal and DER) also, all inconsistent statements made by Deep Valley Disposal."

(v) The following Appendix was added:

> North Fayette Township understands that the above-revised memorandum adequately addresses all issues brought out in the motion for sanctions. Additionally, North Fayette Township again asks the department to grant its request for oral argument under its own laws and guidelines, the same being fair and reasonable.
>
> If any discrepancies should exist between what the department wants included in memorandum and memorandum as it exists, the reason is that North Fayette Township is unable to ascertain the department's position.

After receipt of the Township's amended pre-hearing memorandum, the Board member to whom this appeal has been assigned on January 20, 1984 wrote DER's counsel a letter. The complete text of this letter, which was copied to the Township's counsel, was as follows:

> I am in receipt of North Fayette Township's Amended Pre-Hearing Memorandum dated January 13, 1984, but not received by the Board until January 17, 1984.

Mr. Nicholas feels that his submission meets the objectives of your Motion for Sanctions and my Order of December 21, 1983. Do you agree?

If you do agree, then I expect to receive your pre-hearing memorandum (and also the Permittee's pre-hearing memorandum) within 15 days of January 17, 1984, as per paragraph 5 of the aforementioned Order.

If you do not agree, then within the same time period you should refile your Motion For Sanctions, in whole or in part, suitably amended if need be to take into account the Township's newly filed Amended Pre-Hearing Memorandum.

Should you renew your Motion, in its original or in amended form, I will give Mr. Nicholas 10 days after that to respond once again. He still may amend his pre-hearing memorandum, but this is the last chance I will give him to do so. Or he may refuse to amend it, along with explanations of his reasons for refusal.

In addition, if Mr. Nicholas should continue to insist on oral argument, I remind him of paragraph 3 of my letter of December 21, 1983, to him. I will not order oral argument without a better reason than "the same being fair and reasonable," this being the language of the Township's Amended Pre-Hearing Memorandum. Mr. Nicholas should explain how oral argument will help the Board reach a decision on Ms. Saunders' Motion. What are the legal issues the Board should hear Mr. Nicholas discuss? If Mr. Nicholas cannot explain how oral argument will help the Board reach a decision, then he must show that failure to grant oral argument will violate regulations, statutes or due process.

I am not accompanying this letter with a separate Order, but the above paragraphs are to be regarded as more or less explicit Orders of this Board.

DER's response to the above letter was a motion to dismiss the appeal, filed February 6, 1984. DER argued that the amended pre-hearing memorandum differed minimally from the original pre-hearing memorandum, and cited Melana v. DER, Docket No. 82-039-G (1982 EHB 418 and 505) as authority for the proposition

that failure to file an adequate pre-hearing memorandum is grounds for dismissal. DER also argued that the appeal merited dismissal because the Township had not stated a cognizable ground for appeal; in particular, DER claimed the Township has not pointed to any specific statute or regulation which had been violated by issuance of the permit.

Despite the language of the Board's letter to DER's counsel, quoted supra, and despite the fact that both our Pre-Hearing Orders Nos. 1 and 2 set 20 days as the time for responding to petitions or motions, the Township has not responded to DER's motion to dismiss; in fact, the Board has had no communication from the Township since the Township filed its amended pre-hearing memorandum. Our Pre-Hearing Order No. 2 warns the recipients, who included the Township, that insofar as petitions or motions are concerned "THE BOARD WILL NOT NOTIFY THE PARTIES THAT A RESPONSE MAY BE DUE" (upper case in original). Therefore we proceed to rule on DER's motion, without the benefit of the Township's response.

On the record before us, there is no reason to refrain from dismissing this appeal. The Township's notice of appeal was almost a joke; its pre-hearing memorandum was obviously inadequate under the requirements (quoted supra) of our Pre-Hearing Order No. 1. Moreover, as DER correctly pointed out, the Township's pre-hearing memorandum had not stated any acceptable ground for appeal. These deficiencies, though carefully spelled out by DER in its motion for sanctions, were not corrected in the Township's amended pre-hearing memorandum. Indeed, the Township persisted in its refusal of DER's quite reasonable request that the Township specify the documents on which the Township intended to rely. The Township did not respond to DER's motion to dismiss despite the emphasized upper-case warning of our Pre-Hearing Order No. 2, and despite the explicit language of

the Board's January 20, 1984 letter to DER's counsel, quoted earlier.

Thus dismissal, in effect judgment on the pleadings, is warranted on the substantive basis that no ground for appeal has been stated. Dismissal is equally warranted on the procedural basis of continued refusal to obey the Board's rules of practice and procedure, under the authority of 25 Pa. Code §21.124. Because the Township bears the burden of proof in this appeal, under 25 Pa. Code §21.101(c)(3), dismissal of its appeal is not inconsistent with recent Board rulings which--when the appellant did not have the burden of proof--have refused to order dismissal under 25 Pa. Code §21.124. Armond Wazelle v. DER, Docket No. 83-063-G (Opinion and Order, September 13, 1983): W. A. Cotterman v. DER, Docket No. 83-155-G (Opinion and Order, December 22, 1983). Furthermore, we are not dealing here with an impecunious pro se appellant, who cannot be expected to know the rules and for whom the Board customarily bends over backwards to avoid imposing sanctions for procedural violations. Cotterman, supra.

The only remaining question is whether we should dismiss the appeal without giving the Township the opportunity for oral argument it has requested in its amended pre-hearing memorandum. On reflection, we have decided the Township has made no showing that oral argument would be useful, and therefore are rejecting this request of the Township's. Our January 20, 1984 letter made it quite plain that we would not grant oral argument without some such showing by the Township; the Township has not even attempted to make such a showing. This Board customarily quashes appeals and grants summary judgment on the basis of pleadings and/or briefs, without oral argument. Certainly our rules do not require us to grant oral argument; the only possibly pertinent rule, namely 25 Pa. Code §21.92, makes the grant of oral argument a matter within our discretion, not mandatory. Rule 211 of the Pa.

Rules of Civil Procedure does say that "any party or his attorney shall have the right to argue any motion." Our rules are not the same as the Pa. Rules of Civil Procedure, however; we have no explicit rule paralleling Rule 211. Moreover, Rule 211 has been construed in City of Philadelphia v. Kenny, 28 Pa. Cmwlth. 531, 369 A.2d 1343 (1977). In Kenny the Court said:

> We are of the opinion that Rule 211 was not intended to compel a Motion Judge to allow pointless oral argument.

O R D E R

WHEREFORE, this 25th day of April, 1984, the above-captioned appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

ANTHONY J. MAZULLO, JR.
Member

EDWARD GERJUOY
Member

DATED: April 25, 1984

cc: Bureau of Litigation
Patti J. Saunders, Esquire
Romel L. Nicholas, Esquire
Samuel S. McKenney, Esquire

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

HILLCREST CONSTRUCTION, INC. :

:

Docket No. 84-033-G

:

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER

On February 2, 1984 the Board received a copy of the Notice of Appeal in this matter, sent by counsel for DER to whom this appeal had been assigned. DER informed the Board that the Notice of Appeal had been mailed to DER. However, the appellant apparently never had mailed the Notice of Appeal directly to this Board.

On February 24, 1984 DER filed a petition to quash the appeal for untimeliness under 25 Pa. Code §21.52(a). DER points out that the Notice of Appeal states the DER action appealed-from is a compliance order to the appellant received December 29, 1983. This date is more than 30 days earlier than the February 2, 1984 date when the Board received and docketed this appeal.

The appellant has not responded to this petition to quash, although during February 1984 the Board sent the appellant our Pre-Hearing Orders Nos. 1 and 2; each of these Pre-Hearing Orders instructs the parties that petitions or motions

must be responded to within 20 days. Indeed, the Board never has received any communication directly from the appellant; as explained supra, our only knowledge of this appeal comes from documents furnished us by DER.

Under the circumstances, and in view of the applicable law, we can see no reason for rejecting the petition to quash. Joseph Rostosky Coal Company v. DER 26 Pa. Cmwlth. 478, 364 A.2d 761 (1976).

ORDER

WHEREFORE, this 29th day of April, 1984, the above-captioned appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

ANTHONY J. MAZULLO, JR.
Member

EDWARD GERJUOY
Member

DATED: April 29, 1984

cc: Bureau of Litigation
Richard S. Ehmann, Esquire
Karl R. Dawson, Jr., Esquire

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

FELTON ENTERPRISES, INC. :

:

Docket No. 84-077-G

:

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER

On February 23, 1984 the Board received a letter from Felton Enterprises ("Felton") dated February 17, 1984, concerning two DER compliance orders previously served on Felton. In pertinent part, the letter stated:

> This letter is to serve as notice of our intent to appeal the above referenced Commonwealth of Pennsylvania, Department of Environmental Resources, compliance orders.

On February 29, 1984, the Board notified Felton that his February 17, 1984 letter did not conform to the requirements of 25 Pa. Code §21.51. Felton was given ten days to submit the following information: (1) specification of the manner in which he had been aggrieved by DER's action; and (2) assurance that notice of the appeal had been served as required on the Board's standard Notice of Appeal form, a copy of which was enclosed with the Board's February 29, 1984 letter. In the meantime, the Board, pursuant to its usual custom, docketed this matter as a skeleton appeal. 25 Pa. Code §21.52(c). Felton was warned that failure to comply with the Board's February 29, 1984 requests could lead to dismissal of his appeal.

Receipt of the Board's February 29, 1984 letter was acknowledged by Mr. R. Kevin Coleman of Felton Enterprises in a letter to the Board dated March 15, 1984. In this letter Mr. Coleman asked the Board for a two weeks extension of time to comply with the requirements of the February 29, 1984 letter. Mr. Coleman added that an attorney, named, would handle the matter for Felton Enterprises. The letter was copied to Felton's president (who had written the original February 17, 1984 letter quoted supra) and to the named attorney.

Since March 15, 1984 the Board has heard nothing from Felton, Mr. Coleman or any attorney representing Felton. No attorney has filed an appearance in this matter. The Notice of Appeal form sent Felton has not been completed and returned. Under the circumstances, therefore, the Board sees no reason to refrain from dismissing this appeal, on the authority of 25 Pa. Code §§21.52(c) and 21.124, for: (1) failure to comport with the requirements of 25 Pa. Code §§21.51(e) and (f) concerning Appellant's objections to DER's action and serving notice of the appeal; and (2) for failure to obey the Board's order to rectify previous deficiencies in meeting the requirements of §§21.51(e) and (f).

O R D E R

WHEREFORE, this 15th day of May, 1984, the above-captioned appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

Anthony J. Mazzullo, Jr.

ANTHONY J. MAZZULLO, JR., Member

Edward Gerjuoy

EDWARD GERJUOY, Member

DATED: May 15, 1984

cc: Bureau of Litigation
Western Bureau of Litigation
Robert O. Lampl, Esquire
Clifford Felton

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

GARY HUEY :

:

Docket No. 84-042-G

:

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER

Sometime before January 12, 1984, Mr. Huey complained to DER that mining and blasting activities by Benjamin Coal Company had degraded Huey's water supply. On January 12, 1984, DER wrote Huey that it had concluded Benjamin Coal was not responsible for the water degradation Huey was experiencing. Huey timely appealed this January 12, 1984 letter from DER. 25 Pa. Code §21.52(a).

On March 30, 1984, DER filed a Petition to Quash this appeal for lack of jurisdiction. DER argued that this matter is governed by George Eremic v. DER, 249, EHB 1976. In Eremic this Board ruled that the Board did not have jurisdiction over an appeal by George Emeric of a DER refusal to close a solid waste disposal facility adjacent to Emeric's land. The EHB affirmation on reconsideration relied on In Re Frawley v. Downing, 26 Pa. Cmwlth. 517, 364 A.2d 748 (1976), which DER also relies on in its Petition to Quash.

Huey has not responded to DER's Petition to Quash, although the Board's Pre-Hearing Orders Nos. 1 and 2, which were mailed to the parties on February 22,

1984 and March 6, 1984 respectively, clearly state that: (1) any party desiring to respond to a petition or motion filed by another party must do so within twenty (20) days of receipt; (2) that the Board will not notify the parties a response may be due; and (3) a party may be deemed to have waived the right to contest any motion or petition to which a timely response has not been filed.

At first sight, it does appear that George Eremic, supra, is squarely on point and requires dismissal of the instant appeal. On further consideration, we believe Frawley v. Downing, supra, might have been misapplied to George Eremic, supra, and might not be applicable to the instant facts; correspondingly, we are not wholly convinced that George Eremic was correctly decided.

However, we do not feel we properly can depart from George Eremic, supra, in an appeal that appears to be controlled thereby, when the Appellant has not even bothered to respond to a petition to quash his appeal.

O R D E R

WHEREFORE, this 15th day of May , 1984, the above-captioned appeal is dismissed for lack of jurisdiction, according to apparently controlling precedent.

ENVIRONMENTAL HEARING BOARD

ANTHONY J. MAZULLO, JR., Member

EDWARD GERJUOY, Member

DATED: May 15, 1984

cc: Bureau of Litigation
Richard S. Ehmann, Esquire
George D. Kulakowski, Esquire
Carl A. Belin, Jr., Esquire

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

ANCHOR HOCKING CORPORATION :

:

Docket No. 81-196-G

:

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER

On December 17, 1981 Anchor Hocking ("Anchor") appealed a DER letter, dated November 17, 1981, refusing Anchor's proposed compliance plan. On December 22, 1981 the Board--pursuant to its usual custom at the time--ordered DER to file its pre-hearing memorandum in this matter on or before January 22, 1982; Anchor's brief was to be filed 15 days after receipt of DER's pre-hearing memorandum.

DER did not file its pre-hearing memorandum. Instead DER filed a series of requests for extensions of time pending settlement negotiations; these requests were granted. On June 25, 1982 the Board--pursuant to revised and present policy--vacated its December 22, 1981 Order and replaced it with a new Pre-Hearing Order No. 1. The new Order gave Anchor (not DER) a deadline, namely September 16, 1982, for filing its pre-hearing memorandum. Now it was DER's pre-hearing memorandum which became due 15 days after receipt of the opposing party's pre-hearing memorandum.

Anchor has not filed its pre-hearing memorandum. It did file its own series of requests for extension of its pre-hearing memorandum due date, pending settlement negotiations. The Board also granted these requests. The last such extension, to August 1, 1983, was granted on April 8, 1983. By August 29, 1983 the Board had not received Anchor's pre-hearing memorandum, nor had Anchor filed a request for a further extension.

On August 29, 1983, therefore, the Board on its own motion, extended the due date for Anchor's pre-hearing memorandum to April 8, 1984. However, the Board's Order of August 29, 1983 stated:

> 3. An extension of this April 8, 1984 due date will be granted only for very good cause shown.
>
> 4. If nothing further has been heard from the appellant by April 8, 1984, the appeal will be dismissed for failure to abide by the Board's orders. 25 Pa. Code §21.124.

The August 29, 1983 Order was accompanied by a letter to the parties from the Board, elaborating on the Order's paragraphs which have just been quoted.

As of this date, the board still has not received Anchor's pre-hearing memorandum, nor has Anchor petitioned for extension of the April 8, 1984 due date. In fact, Anchor has not made any communication to the Board since its last request for extension, dated March 28, 1983.

The letter Anchor has appealed reads as follows:

> On October 15, 1981, the Department of Environmental Resources, Bureau of Air Quality Control, received from your firm a plan to comply with 25 Pa. Code, Section 129.52, which covers the coding of miscellaneous metal parts and products at Plant 15, Connellsville, Pennsylvania. The Department cannot accept the plan requested by your letter.
>
> Pursuant to Section 4 of the Pennsylvania Air Pollution Control Act, the Act of January 8, 1960,

P.L. 2119, as amended, 35 P.S. §4004, the Department hereby orders compliance with dates in accordance with 25 Pa. Code, Section 129.66(a), based on the April 21, 1981 adoption date of this regulation. Final compliance must be achieved by April 21, 1984.

In our view, Anchor's appeal of this letter falls under the provisions of 25 Pa. Code §21.101(c)(2), which would assign Anchor the burden of proof.

We conclude that under all the circumstances, and consistent with our recent practice, the sanction threatened in paragraph 4 of our August 29, 1983 Order should be imposed. Augusta A. Zito v. DER, Docket No. 83-184-M (Opinion and Order, April 12, 1984); W. A. Cotterman v. DER, Docket No. 83-155-G (Opinions and Orders, December 22, 1983 and February 23, 1984); Armond Wazelle v. DER, Docket No. 83-063-G (Opinion and Order, September 13, 1983).

ORDER

WHEREFORE, this 1st day of June, 1984, the above-captioned appeal is dismissed for failure to obey the Board's orders. 25 Pa. Code §21.124.

ENVIRONMENTAL HEARING BOARD

ANTHONY J. MAZULLO, JR.
Member

EDWARD GERJUOY
Member

DATED: June 1, 1984

cc: Bureau of Litigation
Ward T. Kelsey, Esquire
Louise W. Yoder, Esquire

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

CONEMAUGH VALLEY SCHOOL DISTRICT :

:

: Docket No. 84-047-G

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER

Some time ago, DER issued a permit to the Conemaugh Valley School District (District) authorizing the construction of a sewage treatment plant; the permitted treatment facilities included the use of a comminutor. Thereafter, the District requested permission to eliminate the comminutor. DER refused this request in a letter dated January 13, 1984. This letter, which has been appealed by the District under the above caption, reads as follows (in pertinent part):

> Your letter proposes to eliminate the comminutor at the sewage treatment plant and replace it with a basket with one-inch square openings.
>
> Raw sewage is not uniform in quality. It contains rags, sticks and other large particles which tend to clog pipes. Large sized particles are also slower to degrade biologically. Comminution is therefore a required operation for the extended aeration sewage treatment process.
>
> Your request is therefore denied.

After docketing the appeal, the Board sent the District our usual Pre-Hearing Order No. 1, which inter alia set a due date of May 7, 1984 for filing of the District's pre-hearing memorandum. The District has timely filed this pre-hearing memorandum, wherein it argues that the basket will adequately replace the comminutor, that the comminutor is a maintenance problem and safety hazard, etc. In the meantime, however, DER--on March 15, 1984--filed a Motion to Quash the appeal. DER argues--appealing to Annville Township Sewer Authority v. DER, 1980 EHB 425--that the above letter is not an appealable action of DER's as defined in Section 101 of the Administrative Agency Law, 2 Pa. C.S. §101 et seq.

Paragraph 6 of our Pre-Hearing Order No. 1 states:

> 6. Parties shall file answers to motions or petitions within twenty (20) days after receipt thereof: A party shall be deemed to have waived the right to contest any motion or petition to which an answer has not been timely filed as required herein.

The Board also has sent the District our Pre-Hearing Order No. 2, whose third paragraph reads:

> 3. Any party desiring to respond to a petition or motion filed by another party must do so within 20 days of receipt of the petition or motion being responded to. 1 Pa. Code §35.179. THE BOARD WILL NOT NOTIFY THE PARTIES THAT A RESPONSE MAY BE DUE.

Nevertheless, the District has not responded to DER's Motion to Quash, nor does the District's pre-hearing memorandum address DER's argument that its January 13, 1984 letter was not appealable.

DER correctly states that Annville, supra, wherein the Board held that DER's letter (refusing to change waste water treatment requirements) was not an appealable action, is squarely on point with the instant appeal. We are not entirely certain that Annville, which relied on holdings such as DER v. New Enterprise Stone and Lime, 359 A.2d 845 (Pa. Cmwlth. 1946) and Eremic v. DER, 1976 EHB 249, was correctly decided; these earlier rulings may have been distinguishable

from Annville (and the instant appeal). For instance, DER presently argues that the above-quoted letter was not appealable because it did not alter the District's obligations and duties in any way. However, the same argument would imply that a permit denial to a would-be permittee is not appealable, since the permit refusal does not alter the status quo. Yet this Board routinely hears appeals from DER refusals to grant permits, under the presumed authority of 25 Pa. Code §21.2(a) and 25 Pa. Code §21.101(c)(1).

On the other hand, the Board can see good policy reasons for following its Annville rule. If we are to overturn Annville, we should not do so without convincing arguments for so doing. It was up to the District to furnish such arguments. The District has not done so; rather, the District has given us no reasons not to accept DER's urgings that we follow our previous Annville holding. Therefore, DER's is the course we shall take.

ORDER

WHEREFORE, this 1st day of June, 1984, DER's Motion to Quash is granted, and the above-captioned appeal is dismissed for lack of jurisdiction.

ENVIRONMENTAL HEARING BOARD

ANTHONY J. MAZULLO, JR.
Member

EDWARD GERJUOY
Member

DATED: June 1, 1984

cc: Bureau of Litigation
Zelda Curtiss, Esquire
Michael Katawczik, Business Manager
Conemaugh Valley School District

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

FERRI CONTRACTING COMPANY, INC. :

:

Docket No. 84-134-G

:

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER
SUR MOTION TO QUASH APPEAL

By a letter dated March 15, 1984 the Department of Environmental Resources, Bureau of Water Quality Management notified the Deer Creek Drainage Basin Authority ("Authority") of eligibility determinations made by the Department with regard to Grants Project No. C-421012-01. A copy of this letter was sent by the Department to Ferri Contracting company ("Ferri") and was received by it March 19, 1984. Thereafter Ferri filed a notice of appeal with this Board which was received April 16, 1984. This filing was within the thirty-day period prescribed by 25 Pa. Code §21.52(a) for the taking of an appeal to the Board.

On or about June 5, 1984, the Department moved to quash the appeal on the ground that Ferri had failed to comply with the rules regarding service of notice of the appeal in that neither the Department's Bureau of Litigation nor the office of the Department issuing the notice of departmental action, the Bureau of Water Quality Management, had received a notice of the appeal as required by 25 Pa. Code §21.51(f). The Department contends that this failure justifies a

dismissal of the appeal. For reasons set forth below, this contention is rejected.

Rule 21.52(a) provides:

> (a) Except as specifically provided in §21.53 of this title (relating to appeal nunc pro tunc), jurisdiction of the Board shall not attach to an appeal from an action of the Department unless the appeal is in writing and is filed with the Board within 30 days after the party appellant has received written notice of such action or within 30 days after notice of such action has been published in the Pennsylvania Bulletin unless a different time is provided by statute, and is perfected in accordance with subsection (b) of this section.

This rule has been held to state jurisdictional requirements. Czambel v. Commonwealth DER, 80-152-B (Opinion and Order, 1980 EHB 508); Lebanon County Sewage Council v. DER, 34 Pa. Comm. 244, 382 A.2d 1310 (1978); Rostosky v. DER, 26 Pa. Comm. 478, 364 A.2d 761 (1976). As stated above, the requirements of this section were met in the instant case.

For jurisdiction to attach, the sole additional prerequisite beyond timely filing of the appeal is perfection in accordance with Rule 21.52(b). Under the instant circumstances, Rule 21.52(b) merely requires that the Authority, the original addressee on the Department's appealed-from March 15, 1984 letter, be served with a notice of appeal. As there is no indication in the record before the Board that the Authority failed to receive notice of the appeal, §21.52(b) is inapplicable here. In other words, we have no basis for dismissing the appeal on jurisdictional grounds.

The notice requirement contained in Rule 21.52(b) apparently is designed to prevent the prejudice to the direct recipient of a DER action which might result from prosecution of a third-party appeal without notice to that direct recipient. Czambel v. Commonwealth, supra. It is significant that there is no corresponding

section [to Rule 21.52(b)] preventing perfection of an appeal for failure to provide the Department with notice of the appeal. Presumably this is reflective of the fact that, while lack of notice has the potential for causing prejudice to the Department's case, the prejudice is of a different nature than that which may result from a mistaken belief on the part of the party benefitting from the Department's action that the period for appeal had passed without a challenge being raised. In the latter case detrimental reliance upon such a belief could result in serious economic loss.

Because there has been no showing of serious prejudice to DER, and because appellant's disobedience of our rules cannot be characterized as egregious or flagrant, we also reject DER's request that the appeal be dismissed--under 25 Pa. Code §21.124--for failure to comply with 25 Pa. Code §21.51(f). However, because the Department's preparation of its case may have been delayed by its failure to promptly become aware that the instant appeal had been filed, an extension of time for DER's initiation of discovery and filing of its pre-hearing memorandum may be appropriate. DER is invited to so request.

The rulings in the immediately preceding paragraph carry no implications about the correctness of DER's allegation, denied by Ferri, that Ferri has not complied with 25 Pa. Code §21.51(f); we have heard no evidence on this score. Whether or not Ferri previously mailed copies of its notice of appeal to the other parties in this matter, including the Authority, it is ordered to make sure that all the parties now have such copies.

O R D E R

AND NOW, this 18th day of June, 1984, it is hereby ordered that:

1. DER's motion to quash the appeal of Ferri Contracting Company, Inc. is hereby denied.

2. Ferri shall make sure that all persons listed in 25 Pa. Code §21.51(f) have received copies of the notice of appeal.

ENVIRONMENTAL HEARING BOARD

EDWARD GERJUOY
Member

DATED: June 18, 1984

cc: Bureau of Litigation
Zelda Curtiss, Esquire
Timothy P. O'Reilly, Esquire
Joseph Bigler, Authority

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

FRED ERICKSON :

:

Docket No. 84-079-G

:

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER
SUR DER'S MOTION TO DISMISS

The Commonwealth of Pennsylvania, Department of Environmental Resources, appellee in the above-captioned matter, by its attorney, has moved this board to dismiss the above-captioned appeal for the reason that the board lacks jurisdiction over the appeal. In support of this motion, the Department averred and this board finds as follows:

1. On or about January 30, 1984 the department sent a letter constituting a violation notice to Erickson of Johnstown, Inc., from which Erickson took the instant appeal.

2. The letter which is the subject of this appeal informed Erickson that fill which had been placed along the left bank of Sams Run, on property belonging to Erickson of Johnstown, Inc., constituted a violation of the Dam Safety and Encroachments Act, 32 P.S. §693.1 et seq., and of regulations adopted thereunder. The letter informed Erickson that it was required to remedy the violations and specified actions to be taken in order to do so.

3. The letter of the Department provided that failure to comply with the directives set forth within it might result in the initiation of legal action against Erickson. This statement was apparently intended to notify Erickson that failure to comply could lead to sanctions. It did not, however, constitute the imposition of such a sanction. In addition, the letter stated that it was not to be construed as a final action of the Department.

4. On the basis of the aforesaid facts and the applicable law, we find that the board lacks jurisdiction to hear this appeal. The letter of January 30, 1984 does not constitute an appealable action of the Department. The letter is not an "order, decree, decision, determination or ruling by the Department affecting personal or property rights, privileges, immunities, duties, liabilities or obligations of [Erickson]." 25 Pa. Code §21.2(a)(1). See: Perry Brothers Coal Company v. Commonwealth, DER, EHB Docket No. 82-122-H (Opinion and Order issued October 13, 1982); Sunbeam Coal Corporation v. Commonwealth, DER, 304 A.2d 169 (Pa. Cmwlth. 1973); Standard Lime and Refractories Company v. Commonwealth, DER, 279 A.2d 383 (Pa. Cmwlth. 1971). No sanctions have been imposed and therefore no rights have been affected as of the present time.

O R D E R

AND NOW, this 20th day of June, 1984, upon consideration of DER's motion to dismiss and Appellant's answer thereto and for the reasons set forth above, DER's motion to dismiss is granted and Appellant's appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

ANTHONY J. MAZULLO, JR., Member

DATED: June 20, 1984

cc: Bureau of Litigation
Patti J. Saunders, Esq.
Gary L. Costlow, Esq.

EDWARD GERJUOY, Member

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

DAVID P. AND NANCY L. SWANSON :

:

Docket No. 84-037-G

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and PENNSYLVANIA DEPARTMENT OF TRANSPORTATION,
Permittee

OPINION AND ORDER
SUR MOTION TO DISMISS

The Swansons have timely appealed DER's grant of Encroachment Permit No. 25-170 to PennDOT. This Permit allows PennDOT to construct and maintain stream enclosures in Eightmile Creek, Greenfield Township, Erie County. PennDOT agrees, as the Swansons allege, that the proposed encroachments are located on lands owned by the Swansons.

The Swansons have appealed on the ground that granting PennDOT the permit, although the Swansons are the owners and have not granted any release to PennDOT, violates various provisions of the Dam Safety and Encroachments Act, 32 P.S. §691.1 et seq. (the "Act"), the governing statute. PennDOT counters that--on March 27, 1984, in the Court of Common Pleas, Erie County--PennDOT filed a Declaration of Taking for the Swanson property which (according to PennDOT) the proposed encroachments involve. Therefore, PennDOT argues, the Swansons have no standing to appeal and the appeal has become moot. DER has

taken no position on this property issue, nor has it filed any documents in support of its decision to grant the permit. The Swansons do not allege that PennDOT has condemned less land than PennDOT will affect, but they do allege that the taking is illegal, and therefore that the Swansons retain legal title to the disputed land.

In our view, neither the Swansons nor PennDOT have conclusively established their case. Under 26 P.S. §1-402 of the Eminent Domain Code, on which PennDOT relies, title in the disputed land passed from the Swansons to PennDOT when PennDOT filed its Declaration of Taking. Moreover, this Board does not have the jurisdiction to decide title disputes. Donald T. Cooper and Kathleen Cooper, Docket No. 81-032-G, 1982 EHB 250 at 278. That jurisdiction, in the instant dispute, lies with the Erie County Court of Common Pleas. Under the circumstances, we must accept PennDOT's assertion that it now has title to the (formerly Swanson) land identified in the aforesaid Declaration of Taking.

This ruling does not close this appeal, however. Under the definition of "Person" in 32 P.S. §693.3, the Act applies to Commonwealth departments such as PennDOT. The regulations for stream enclosures promulgated under the Act, notably 25 Pa. Code §105.191, state:

> [A]ll applications for permits pursuant to this subchapter for the construction and modification of stream enclosures shall contain the following information:
> ... (7) Proof of title or adequate flowage and other easements for all lands included in the site of the proposed structure, including all lands which may be subject to flooding by backwater from such structure during a 100-year flood.

The information required by 25 Pa. Code §105.191(7) had not been furnished to DER by PennDOT when DER granted the permit. There is nothing in the record to indicate that DER ever has received PennDOT's "proof of title...for

...all lands which may be subject to flooding by backwater...during a 100-year flood." There is nothing in the record to show that the land condemned by PennDOT is sufficiently extensive to satisfy §105.191(7). Without such a showing, we cannot grant PennDOT's Motion; the Motion to Dismiss, at this stage of these proceedings, is akin to a Motion for Judgment on the Pleadings, requiring us to give the Swansons the benefit of every doubtful fact. According to the Act, 32 P.S. §693.12(a):

> The department shall have the power to grant a permit if it determines that the proposed project complies with the provisions of this act and the regulations adopted hereunder...

Under the facts which have been described, DER could not have made such a determination legitimately. Similarly this Board, here making a de novo review of DER's action in the light of all facts [Warren Sand and Gravel Company, Inc. v. DER, 20 Pa. Cmwlth. 186, 341 A.2d (1975)], including PennDOT's Declaration of Taking, may not now determine that the provisions of §105.191(7) have been complied with.

In brief, the situation is as follows. If the land PennDOT has condemned will guarantee satisfaction of 25 Pa. Code §105.191, then the Swansons no longer have standing and the appeal should be dismissed as PennDOT alleges. On the other hand, if the land PennDOT has condemned does not guarantee satisfaction of Pa. Code §105.191, the Swansons retain standing under the standard of William Penn Parking Garage v. City of Pittsburgh, 464 Pa. 168, 346 A. 2d 269 (1975); furthermore, in this event the appeal is not moot because the Board can grant the Swansons their desired relief of ruling the permit unlawful. Although we are not granting PennDOT's Motion to Dismiss, the Swansons retain the burden of proof in this appeal. 25 Pa. Code §21.101(c)(3).

The Order which follows is consistent with the foregoing considerations.

O R D E R

AND NOW, this 20th day of June, 1984, it is ordered that:

1. PennDOT's Motion to Dismiss this appeal is rejected.

2. Within thirty (30) days of the date of this Order, the Swansons shall amend their pre-hearing memorandum with factual and legal allegations pertinent to any claims that PennDOT, even with title to the land identified in its March 27, 1984 Declaration of Taking, has not satisfied the requirements of 25 Pa. Code §105.191 or other applicable statutes and regulations.

3. DER's and PennDOT's pre-hearing memoranda will be due fifteen (15) days after receipt of the Swansons' amended pre-hearing memorandum called for in paragraph 2, unless PennDOT legitimately can renew its Motion to Dismiss in the light of the Swansons' amended pre-hearing memorandum.

4. The Board will issue further orders, as appropriate, after receipt of the filings called for in paragraphs 2 and 3.

ENVIRONMENTAL HEARING BOARD

Edward Gerjuoy

EDWARD GERJUOY
Member

DATED: June 20, 1984

cc: Bureau of Litigation
Paul F. Burroughs, Esquire
David P. and Nancy L. Swanson
John M. Hrubovcak, Esquire

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

221 NORTH SECOND STREET
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(717) 787-3483

RALPH BLOOM, JR. :

:

Docket No. 84-145-G

:

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER
SUR PETITION FOR SUPERSEDEAS

SYNOPSIS

Section 315(ℓ) of the Clean Streams Law, 35 P.S. §691.315(ℓ), does not operate to grant an exemption from the general permit requirements of that Act and is limited in application to the topic of lands designated as unsuitable for mining, despite the absence of specific reference in §315(ℓ) to that topic. It is apparent that the provisions of the Clean Streams Law dealing with the designation of unsuitable lands were taken verbatim from the federal Surface Mining Control and Reclamation Act, 30 U.S.C. §1201 et seq. A similar verbatim incorporation of the federal provisions into the Pennsylvania Surface Mining Conservation and Reclamation Act, 52 P.S. §1396.4(a), is unambiguously limited to the subject of unsuitable areas. The Clean Streams Law and the Surface Mining Conservation and Reclamation Act, being statutes in pari materia, must be construed together in a manner consistent with one another pursuant to the Statutory Construction Act, 1 Pa. C.S.A. §1932. Consequently, the Department was justified in

issuing the cease order which forms the basis of this petition because Bloom was operating a mine without a permit as required by the Clean Streams Law, 32 P.S. §691.315(a), and the Surface Mining Conservation and Reclamation Act, 52 P.S. §1396.4(a). Therefore, because there appears to be no likelihood the petitioner can succeed on the merits, the requested grant of a supersedeas is denied. 25 Pa. Code §21.78(a).

OPINION

By order dated April 5, 1984 the Department of Environmental Resources ("Department") directed Ralph Bloom, Jr. to cease operation of his underground coal mine because it was no longer covered by a valid permit as required by the Clean Streams Law ("CSL"), 35 P.S. §691.1 et seq., and the applicable rules and regulations of the Environmental Quality Board, 25 Pa. Code §§86.11, 86.12 and 86.13. Bloom had conducted this mining operation since 1966 under the authority of Mine Drainage Permit 467M034. In accordance with the provisions of 25 Pa. Code §86.11(c), this permit lapsed by operation of law on March 31, 1983, eight months following the date upon which Pennsylvania was granted primary jurisdiction for the regulation of mining activities in the Commonwealth. Although Bloom had not applied for a new permit, the Department extended Bloom's authorization to mine until March 2, 1984, to enable Bloom to apply for a new permit. However, Bloom failed to do so prior to the expiration of this deadline. Consequently, the Department issued the cease order. An appeal of this order was taken on May 4, 1984. A petition for supersedeas was filed simultaneously. The supersedeas hearing was held May 21, 1984.[1]

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1. Although DER's Memorandum of Law opposing the supersedeas indicates that Bloom has failed to apply for permits under other statutes which (according to DER) require permits before Bloom lawfully could operate his underground mine, the cease order only cited Bloom's violation of the CSL. Accordingly, the parties confined their presentation at the supersedeas hearing to the applicability of the permit requirement in the CSL; this Opinion is correspondingly circumscribed.

At the close of the hearing the Board denied the petition for a supersedeas. This Opinion sets forth the reasons for that decision.

25 Pa. Code §21.78 reads in pertinent part as follows:

> (a) The circumstances under which a supersedeas shall be granted, as well as the criteria for the grant or denial of a supersedeas, are matters of substantive common law. As a general matter, the Board will interpret said substantive common law as requiring consideration of the following factors:
>
> (1) irreparable harm to the petitioner;
> (2) the likelihood of the petitioner's prevailing on the merits; and
> (3) the likelihood of injury to the public.

At the hearing the parties' arguments were directed almost exclusively toward the second of the three listed factors--the likelihood of petitioner's success on the merits. It is obvious that the petitioner will be harmed by having to cease operations. The Department has not challenged petitioner's assertion (petitioner's brief, p. 1) that Bloom never has been found to be in violation of his permit conditions, from which the Board infers that the Department does not challenge Bloom's implicit claim that continued operation of his mine will not cause injury to the public. Therefore, in accord with the thrust of the oral argument, the decision reached herein is based entirely upon an assessment of the likelihood of petitioner's prevailing on the merits. For reasons detailed below, we feel this likelihood is negligible.

The issue presented for resolution in this petition is the proper construction to be given to the following portion of the CSL:

> The requirements of this section shall not apply to lands on which mining operations are being conducted on August 3, 1977, or under a permit issued pursuant to this act, or where substantial legal and financial commitments as they are defined under section 522 of the Surface Mining Control and Reclamation Act of 1977 (30 U.S.C. §1201 et seq.), in such operation were in existence prior to January 4, 1977. 35 P.S. §691.315(ℓ).

In the first place, Bloom's argument rests on the premise that the Legislature always uses the word "section" to mean the entire section of an Act, and not a subsection. Had the Legislature used the word "subsection" instead of "section", Bloom would have no ground whatsoever for his argument. However, it is easy enough to demonstrate that the Legislature often does write "section" when it means "subsection". For example, subsection (b) of this very same section 315 of the CSL, 35 P.S. §691.315(b), reads:

> (b) The department may require an applicant for a permit to operate a mine, or a permittee holding a permit to operate a mine under the provisions of this section, to post a bond or bonds on forms prescribed and furnished by the department in favor of the Commonwealth of Pennsylvania and with good and sufficient collateral, irrevocable bank letters of credit or corporate surety guarantees acceptable to the department to insure that there will be compliance with the law, the rules and regulations of the department, and the provisions and conditions of such permit including but not limited to conditions pertaining to restoration measures or other provisions insuring that there will be no polluting discharge after mining operations have ceased. The department shall establish the amount of the bond required for each operation based on the cost to the Commonwealth of taking corrective measures in cases of the operator's failure to comply, or in such other amount and form as may be established by the department pursuant to regulations for an alternate coal bonding program which shall achieve the objectives and purposes of the bonding program. The department may, from time to time, increase or decrease such amount: Provided, however, That no bond shall be filed for less than ten thousand dollars ($10,000) for the entire permit area. The department shall also establish the duration of the bond required for each operation and at the minimum liability under each bond shall continue until such time as the department determines that there is no further significant risk of a pollutional discharge. The bond shall be conditioned upon the operator's faithful performance of the requirements of this act,...
> Provided, however, That an operator posting a bond sufficient to comply with this section of the act shall not be required to post a separate bond for the permitted area under each of the acts hereinabove enumerated. (Emphasis added)

It is quite clear from the just-quoted text of subsection (b), and is readily confirmed from perusal of the entire text of CSL section 315, that the word

"section" emphasized in the above quotation must mean "subsection"; no subsection of section 315, other than this very subsection (b), requires the posting of a bond.

For this reason we conclude that the word "section" in 35 P.S. §691.315(ℓ) is not free from ambiguity, and therewith infer that an attempt to ascertain the Legislature's intent when it used "section" in subsection (ℓ) of section 315 is consistent with the precepts of the Statutory Construction Act, notably 1 Pa. C.S.A. §1921(b). So proceeding, we are led inexorably to the conclusion that the Legislature intended "section" to mean "subsection" when it enacted the language of 35 P.S. §691.315(ℓ). Indeed, two quite independent lines of argument lead to this same conclusion:

1. Legislative History

Section 315 of the CSL, which is headed "Operation of mines", was enacted into law on October 10, 1980, the same day that the Legislature enacted section 4.5 of the Surface Mining Conservation and Reclamation Act ("SMCRA"), 52 P.S. §1396.4e. Section 1396.4e is headed, "Designating areas unsuitable for surface mining." Examination of section 1396.4e of the SMCRA shows that its subsections (a)-(h) are essentially word-for-word identical with subsections (h)-(o) of Section 315 of the CSL. In particular, 52 P.S. §1396.4e(e), the fifth subsection of the aforementioned sequence of SMCRA §1396.4e subsections, reads:

> (e) The requirements of this section shall not apply to lands on which surface mining operations were being conducted on August 3, 1977 or are being conducted under a permit issued pursuant to this act, or where substantial legal and financial commitments as they are defined under §522 of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §1201 et seq. if such operations were in existence prior to January 4, 1977.

Evidently 52 P.S. §1396.4e(e) is essentially identical to 35 P.S. §691.315(ℓ) quoted earlier, the fifth subsection in the aforementioned sequence of CSL §691.315 subsections.

On the above facts, it seems indubitable that the Legislature intended corresponding subsections of the sequences 52 P.S. §§1396.4e(a)-(h) and 35 P.S. §§691.315(h)-(o)--in particular the corresponding subsections 52 P.S. §1396.4e(e) and 35 P.S. §691.315(ℓ)--to be construed essentially identically. But, as the heading to section 1396.4e clearly states, the (a)-(h) sequence of SMCRA §1396.4e subsections is concerned with the subject of "areas unsuitable for surface mining"; in fact, this sequence plainly is concerned with no other subject. Correspondingly, the Legislature must have intended that the sequence (h)-(o) of CSL §691.315 subsections--and in particular subsection 691.315(ℓ)-- be concerned with the subject of "areas unsuitable for mining," and only with "areas unsuitable for mining."[2] In fact, except for subsection (ℓ), every subsection in the sequence (h)-(o) of CSL §691.315 is explicitly concerned with the subject of areas unsuitable for mining. To argue, as Bloom does, that the absence of explicit reference to "areas unsuitable for mining" in the lone subsection (ℓ) of the CSL §691.315 sequence means the Legislature intended the scope of subsection 691.315(ℓ) to be beyond "areas unsuitable for mining," in fact so far beyond that scope as to severely limit the general permitting requirements specified in subsection 691.315(a), flies in the face of reason.

The foregoing analysis is strengthened (if strengthening is needed) by comparisons of the two sequences--(h)-(o) of CSL §1691.315 and (a)-(h) of SMCRA §1396.4e--with section 522 of the federal Surface Mining Control and Reclamation Act, 30 U.S.C. §1272, passed August 3, 1977. It is evident that the aforementioned sequences closely track the language of 30 U.S.C. §1272, whose heading is "Designating areas unsuitable for surface coal mining." In particular, CSL §691.315(ℓ), and

---

2. One of the minor differences between the CSL §691.315 and the SMCRA §1396.4e sequences is that the CSL sequence always refers to "mining" whereas the SMCRA sequence is restricted to "surface mining," consistent with the overall purpose of the SMCRA.

its corresponding subsection (e) of the SMCRA § 1396.4e, are taken almost verbatim from subsection (a)(6) of 30 U.S.C. §1272, which reads:

> (6) The requirements of this section shall not apply to lands on which surface coal mining operations are being conducted on the date of enactment of this Act or under a permit issued pursuant to this Act, or where substantial legal and financial commitments in such operation were in existence prior to January 4, 1977.

The word "section" is quite appropriate in this quoted language from subsection (a)(6), which is embedded in section 1272 dealing solely with "designating areas unsuitable for surface coal mining." The word "section" remained appropriate when the Legislature almost verbatim copied 30 U.S.C. §1272(a)(6) in its enactment of SMCRA § 1396.4e(e), which remains embedded in a section, namely §1396.4e, having the explicit heading "Designating areas unsuitable for surface mining" (also taken almost verbatim from the heading of 30 U.S.C. §1272). But the word "section" was not appropriate, and the Legislature could not have intended that "section" refer to the entire contents of CSL §691.315, when the Legislature included CSL §691.315 subsection (ℓ)--once again an almost verbatim copy of 30 U.S.C. §1272(a)(6)--in CSL §691.315, whose heading is "Operation of mines" and which obviously is concerned with many subjects beyond "areas unsuitable for mining."

2. Statutory Construction

The conclusion we have reached about the meaning of "section" in 35 P.S. §691.315(ℓ), based on the legislative history of that subsection, is confirmed by application of the rules of statutory construction embodied in the Statutory Construction Act. This result is not surprising. The Statutory Construction Act merely codifies "common sense" principles for resolving ambiguity; the foregoing discussion has relied on the "common sense" implications of the comparisons of CSL §315, SMCRA §1396.4e and 30 U.S.C. §1272.

We begin our application of the Statutory Construction Act with 1 Pa. C.S.A. §1932, which provides:

Statutes in Pari Materia

> (a) Statutes or parts of statutes are in pari materia when they relate to the same persons or things or to the same classes of persons or things.
>
> (b) Statutes in pari materia shall be construed together, if possible, as one statute.

The CSL and the SMCRA are statutes in pari materia within the meaning given that term in subsection (a) quoted above. Both Acts regulate the operation of mines. Both require the issuance of a permit prior to commencing the operation of a mine. 35 P.S. §691.315(a); 52 P.S. §1396.4(a). The provisions of both Acts which govern the designation of areas unsuitable for mining--namely the sequence (h)-(o) of the CSL §691.315 and the sequence (a)-(h) of the SMCRA §1396.4e--are almost word for word identical, as we already have explained. Subsection (e) of SMCRA §1396.4e employs the word "section" unambiguously to refer only to §1396.4e, which is concerned only with areas designated as unsuitable for mining. Therefore, following the legislative mandate that statutes in pari materia be construed in a manner consistent with one another, the Board must similarly construe the word "section" in CSL §691.315(ℓ), whose language is almost word for word the same as the language of SMCRA §1396.4e(e).

Another provision of the Statutory Construction Act adds further support to our conclusion that the Legislature, in employing the term "section" in 35 P.S. §691.315(ℓ) did not mean to create an exception to anything other than the provisions regarding the designation of lands as unsuitable for mining. 1 Pa. C.S.A. §1922 provides in part:

> In ascertaining the intention of the General Assembly in the enactment of a statute (it is to be presumed):
>
> 1) that the General Assembly does not intend a result that is absurd, impossible of execution, or unreasonable.

The incorporation of the terms of the federal Act into the CSL nearly word for word produced a similarly confusing reference to a portion of that Act. CSL §691.315(h) provides:

> Pursuant to the procedures set forth in subsection (b), the department shall designate an area as unsuitable for all or certain types of surface mining operations...

A reference to CSL §691.315(b) reveals that no such procedures are set forth therein. However, subsection (b) of section 522 of the federal Act, 30 U.S.C. §1272(b), the provisions of which were incorporated nearly verbatim into the state Act as noted above, does set forth procedures for designating areas unsuitable for mining.

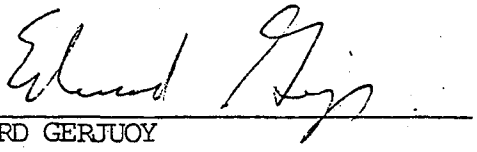
Taking the language of CSL §691.315(h) literally would produce a result incapable of execution as well as absurd or unreasonable. 1 Pa. C.S.A. §1922(1) proscribes any such construction.

In light of the foregoing, the Board finds that §315(ℓ) of the Clean Streams Law is to be construed as an exception to the provisions of the Act addressing lands unsuitable for mining and not as a general exception to the permit requirements of the Act. Consequently, the Department was justified in issuing the order which is the subject of this petition. The likelihood of petitioner's success on the merits is too remote to justify the granting of a supersedeas in the instant case.

O R D E R

WHEREFORE, this 3rd day of July, 1984, the hearing examiner's decision to deny Bloom's petition for supersedeas is affirmed.

ENVIRONMENTAL HEARING BOARD



EDWARD GERJUOY
Member

DATED: July 3, 1984

cc: Bureau of Litigation
Diana J. Stares, Esquire
Eugene E. Dice, Esquire

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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(717) 787-3483

W. P. STAHLMAN COAL COMPANY, INC. :

:

Docket No. 83-301-G

:

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER
SUR MOTION TO QUASH

SYNOPSIS

Appellant is entitled to file an appeal nunc pro tunc pursuant to 25 Pa. Code §21.53, where appellant exercised due diligence and justifiably relied upon the address provided in 25 Pa. Code §21.32(e) for the filing of documents with the Board, which address was obsolete at the time of appellant's filing of its original notice of appeal due to the Board's failure to have the address change published in the Pa. Code. The inclusion of the correct address of the Board in the final paragraph of the Department order from which this appeal is taken does not preclude the filing of the appeal nunc pro tunc because: 1) counsel is entitled to rely upon the current version of the Pennsylvania Code; and 2) the final paragraph of the Department order does not set forth the address where pleadings are to be filed.

OPINION

DER has filed a motion to quash this appeal as untimely filed under our rules, 25 Pa. Code §21.52(a). Stahlman asks the Board to deny the motion or, in the alternative, to grant leave for filing this appeal nunc pro tunc, under 25 Pa. Code §21.53(a).

The following facts are not in dispute. On November 28, 1983, DER issued an order to Stahlman, a surface mine operator. The order required Stahlman to replace the water supply of Harold Wilshire, who owns and resides on property adjacent to the Stahlman mine; according to DER, Stahlman's mining operations caused a diminution of the quantity of water produced by Wilshire's spring. Stahlman recevied the order on November 29, 1983. An appeal from the order was received and docketed by the Board on December 30, 1983, thirty-one days after November 29.

On these facts, the appeal unquestionably is untimely under the 30-day requirement of 25 Pa. Code §21.52(a). The language of Section 21.52(a) is quite unequivocal. The Commonwealth Court and our own precedents do not permit us to waive the 30-day requirement, which is jurisdictional. Rostosky v. DER, 26 Pa. Cmwlth. 478, 364 A.2d 761 (1976); Eugene Petricca v. DER, Docket No. 83-239-G (Opinion and Order, January 13, 1984).

However, we still are free to allow filing of the appeal nunc pro tunc. Our standards for such filing are strict, and not easily met. Petricca, supra. Nevertheless, under the instant facts, as elaborated infra, we conclude filing of the appeal nunc pro tunc should be allowed.

The Board's rules and regulations are published in Title 25 Chapter 21 of the Pennsylvania Code. As presently published, 25 Pa. Code §21.32(e) reads:

> (e) All documents filed with the Board shall be filed at its headquarters, Blackstone Building Annex, 112 Market Street, Harrisburg, Pennsylvania 17101.

Stahlman's counsel affirms under oath that on December 22, 1983, relying on Section 21.32(e), he mailed Stahlman's notice of appeal to the Board at the Blackstone Building address given in Section 21.32(e). Unfortunately, as we previously have explained [Petricca, supra], in May 1982 the Board moved from the Blackstone Building to its present address, Third Floor, 221 North Second Street, Harrisburg. For a year thereafter, mail sent to the former Blackstone Building address was forwarded to the present North Second Street address; in May 1983, a year having gone by, the Board permitted forwarding to be discontinued.

Therefore, the Board did not receive the notice of appeal Stahlman's counsel affirms he mailed on December 22, 1983. Stahlman's counsel further affirms that he became aware of this mischance on December 29, 1983, when the envelope containing the notice of appeal was returned by the Post Office with the stamped notation, "Forwarding Order Expired." Stahlman's counsel then immediately called the Board, obtained the Board's new address, and remailed the notice of appeal, to the Board's correct address this time. Stahlman's counsel has submitted copies of his forwarding letter of December 22, 1983 and of the envelope with the aforementioned stamped Post Office notation.

DER points out that the last paragraph of its order to Stahlman read as follows:

> This action of the Department may be appealable to the Environmental Hearing Board, Third Floor, 221 N. Second Street, Harrisburg, PA 17101 (717-787-3483), by any aggrieved person pursuant to Section 1921-A of the Administrative Code of 1929, 71 P.S. Section 510-21; and the Administrative Agency Law, 2 Pa. C.S., Chapter 5A. Appeals must be filed with the Environmental Hearing Board within 30 days of receipt of written notice of this action unless the appropriate statute provides a different time period. Copies of the appeal form and the regulations governing practice and procedure before

> the Board may be obtained from the Board. This paragraph does not, in and of itself, create any right of appeal beyond that permitted by applicable statutes and decisional law.

In Petricca, supra, the existence of this same language in the order Petricca had received led the Board to refuse the allowance of appeal nunc pro tunc.

In Petricca, however, the appellant did not allege that he had relied on the erroneous address published in the Pennsylvania Bulletin; Petricca merely mailed his appeal to the address given on an outdated notice of appeal form Petricca had in his possession, without any attempt--by checking directly with the Board--to resolve the discrepancy between the Board's addresses given on the old notice of appeal from and in the last paragraph of DER's order. Stahlman's counsel also made no attempt to check the discrepancy. But he argues that the last paragraph of DER's order, though stating the Board's address, does not set forth the address where pleadings are to be filed; consequently, Stahlman's counsel implies, there was no actual discrepancy between DER's order and the published regulation 25 Pa. Code §21.32(e), on which he avers he had every right to rely in any event.

To allow an appeal nunc pro tunc, the untimely filing under the 30-day requirement of 25 Pa. Code §21.52(a) must be ascribable to a breakdown in the Board's operations; negligence by an appellant cannot justify a nunc pro tunc filing. Petricca, supra. We reluctantly must admit that under the facts described we cannot find the appellant was negligent; he is entitled to rely on the regulations published in the Pa. Code. The Board was negligent in not making sure that the new regulations had been published before the Board allowed mail forwarding to lapse. (Much earlier, the Board had corrected the address on its own stationery and on the copies of its rules which it mails to appellants after receiving their notices of appeal.) Throughout, Stahlman's counsel acted with due diligence, as

is evidenced by the fact that the notice of appeal actually was received by the Board only one day late, despite the delay caused by the Post Office's return to counsel of the originally mailed notice of appeal.

O R D E R

WHEREFORE, this 10th day of July, 1984, it is ordered as follows:

1. Stahlman's petition for allowance of appeal nunc pro tunc is granted.

2. DER's motion to quash the appeal is refused.

3. Stahlman need not file a new notice of appeal; his already filed notice of appeal is deemed to have been filed nunc pro tunc.

4. A hearing on the merits of this matter, previously deferred pending disposition of DER's motion to quash, will be scheduled in the very near future.

ENVIRONMENTAL HEARING BOARD

Edward Gerjuoy

EDWARD GERJUOY
Member

DATED: July 10, 1984

cc: Bureau of Litigation
Diana J. Stares, Esquire
Henry Ray Pope III, Esquire

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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(717) 787-3483

TER-EX, INC. :

:

Docket No. 83-138-G

:

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER
SUR MOTION FOR SUMMARY JUDGMENT

Synopsis

On application of DER's Bureau of State Parks, DER's Division of Oil and Gas issued a spacing order covering appellant's well, under the claimed authority of the Oil and Gas Conservation Law, 58 P.S. §407. The Board rejected appellant's motion for summary judgment, holding: (1) Section 407 is applicable to land upon which a well has been completed prior to the filing of an application for a spacing order; (2) there is no per se irregularity in the fact that the Division of Oil and Gas issued the spacing order at the request of another subdivision of DER, namely the Bureau of State Parks; and (3) the Board does not have the authority to rule that the Oil and Gas Conservation Law is unconstitutional.

OPINION

Ter-Ex has timely appealed from a spacing order concerning Ter-Ex's Ramaley No. 2 gas well, located in Derry Township, Westmoreland County. Application for the spacing order was filed with DER's Division (apparently now Bureau) of Oil

and Gas Regulation ("Oil and Gas") on December 2, 1981, by DER's Bureau of State Parks ("Parks") in conjunction with DER's Bureau of Forestry; the application was amended on January 8, 1982. Oil and Gas issued the requested spacing order on June 16, 1983, under the claimed authority of the Oil and Gas Conservation Law, 58 P.S. §§401 et seq. ("Act"). Subsequently the Board granted amicus curiae status in this matter to the Pennsylvania Natural Gas Associates ("PNGA"), but rejected PNGA's petition to intervene (Opinion and Order, January 10, 1984). Ter-Ex now has filed a motion for summary judgment, which all the parties, including PNGA, have extensively briefed. This motion is the subject of the instant Opinion.

Ter-Ex asks for summary judgment on the following grounds (quoting from its motion):

> (a) The spacing provisions of Section 7 of the Oil and Gas Conservation Law, Act of July 25, 1961, P.L. 825, 58 PS, Section 407, are not applicable to land upon which a well has been completed prior to the filing of an application for a spacing order.
>
> (b) No reasonable interpretation of the language of Section 7 (5) of the Oil and Gas Conservation Law, 58 PA Section 407 (5), can be made that will both support its applicability to the wells drilled prior to Ramaley No. 2 and deny its applicability to Ramaley No. 2.
>
> (c) The law should not be interpreted to allow the DER, acting through the Division of Oil and Gas Regulation, to issue a permit, then, to take a share of the permitted well by establishing spacing upon an application filed by the Bureau of Parks after completion of the well.
>
> (d) Spacing Order No. 14 was issued 516 days after the expiration of the statutorily provided 45 days between the filing of an application and the issuance of an order on that application, Section 7 (4), 58 PS 407 (4).

DER's response to Ter-Ex's motion includes the request that Ter-Ex's motion be

dismissed because Ter-Ex has not established the absence of genuine issues of material fact. It is true that Ter-Ex's motion has not been accompanied by any affidavits, and that Ter-Ex has not specifically referred the Board to any of the pleadings or interrogatories on file in this matter. It also is true that, as DER urges, Ter-Ex has the burden of showing there is no genuine issue as to any material fact. However, the parties have filed a joint stipulation to sixty (60) factual assertions, which include the facts implicitly asserted in Ter-Ex's ground (d) quoted supra; the grounds (a)-(c) are primarily legal. Consequently, as amplified below, we have been able to rule on many substantive facets of Ter-Ex's motion, although on some relevant issues we also have been forced to hold that the facts on record at this stage of these proceedings cannot sustain summary judgment in Ter-Ex's favor. Our overall conclusion is that Ter-Ex's motion must be rejected. The bases for this conclusion are described infra.

First of all, neither Ter-Ex nor PNGA offer any convincing arguments in support of the thesis that 58 P.S. §407 is "not applicable to land upon which a well has been completed prior to the filing of an application for a spacing order." Section 407(l) reads:

> (l) After one well has been drilled establishing a pool in a horizon covered by this act, an application may be filed by the operator of the discovery well or the operator of any lands directly and immediately affected by the drilling of the discovery well, or subsequent wells in said pool, and the commission shall promptly schedule a hearing on said application.

Ter-Ex and PNGA argue that this language is not intended to apply to existing completed wells, but they do not explain why the Legislature--if it intended to exclude wells which had been drilled and completed--did not so state. A well

which has been completed is a well which "has been drilled."

Therefore, we see no ambiguity in the just-quoted language of Section 407(l). According to the Statutory Construction Act, 1 Pa. C.S.A. §1921(b), "When the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit." Moreover, even if we had been persuaded that Section 407(l) is ambiguous, the language "establishing a pool in a horizon covered by this act" would convince us that the Act was intended to apply to completed wells, because the Legislature normally would not expect that a pool could be established via an uncompleted well. Our view that Section 407(l) is intended to apply to completed wells is strengthened by the language of Section 407(5), which states:

> (5) Except where the circumstances reasonably require otherwise, spacing units shall be approximately uniform size and shape for the entire pool: Provided, however, That the commission shall have the power to vary the size and shape of any individual unit in order (i) to take account of wells already completed at the time the application is filed hereunder, or (ii) to make a unit conform to oil and gas property lines:
> (emphasis added)

A similar reference to already completed wells is to be found in 25 Pa. Code §79.26(a)(l). If Ter-Ex and PNGA are correctly interpreting the Legislature's intent (that the Act not apply to already completed wells) such references to already completed wells are superfluous. The Legislature (and the Environmental Quality Board) is presumed to have intended to avoid mere surplusage. Hubecker v. Nationwide Insurance Co., 299 Pa. Super. 463, 445 A.2d 1222 (1982). Thus Ter-Ex's ground (a) for summary judgment is rejected.

We find Ter-Ex's ground (b) for summary judgment rather obscure. Seemingly Ter-Ex is arguing that the spacing order is unfairly singling out Ter-Ex's Ramaley

No. 2 well, while ignoring other completed wells in the area. This argument, if it is Ter-Ex's argument, goes to the issue of whether--on all the facts--the terms of the spacing order constitute an abuse of DER's discretion. At this stage of these proceedings, before there has been a hearing on the merits to resolve disputed facts, we cannot sustain a holding that the terms of the spacing order were an abuse of DER's discretion. DER also has found it difficult to grasp the point of Ter-Ex's ground (b). Ter-Ex's reply brief states (p. 4): "Since the DER has such a hard time understanding this argument maybe we may as well skip it for the time being." If Ter-Ex is willing to skip the argument, so are we. Ground (b) for summary judgment is rejected.

Ter-Ex's ground (c), and the major portions of PNGA's briefs, appear to be maintaining that DER's spacing order is an unconstitutional taking of Ter-Ex's property (or property rights) for DER's own benefit. For example, PNGA writes (reply brief, p. 4): "In the present case, the DER has terminated a percentage of the right of Ter-Ex to operate the well. This right has been transferred to the DER without compensation to Ter-Ex. This is clearly violative of the Fourteenth Amendment." Ter-Ex argues (brief in support of motion, p. 21): "Most important, however, the permit under which the well has been drilled was issued by the Division, without qualification or right to modify, amend or revoke. As to the Division, hence the DER, Ter-Ex's rights under that permit are vested."

Section 407(1), quoted supra, allows "the operator of any lands directly and immediately affected by the drilling of the discovery well" to apply for a spacing order. The Act, 58 P.S. §402(7), defines: "'Operator' shall mean any owner of the right to develop, operate, and produce oil and gas from the pool." There is no indication that the Commonwealth, though an "owner of the right to develop, operate and produce oil and gas" from a pool, nevertheless was to be

excluded from the class of operators entitled to apply for a spacing order. 52 P.S. §408(a), pertaining to the integration of interests in a spacing unit, states:

> (a) When two or more separately owned tracts are embraced within a spacing unit, or when there are separately owned interests in all or a part of a spacing unit, the interested persons may integrate their tracts or interests for the development and operation of the spacing unit. (emphasis added)

But 58 P.S. §402(9) defines:

> (9) "Person" means any natural person, corporation, association, partnership, receiver, trustee, executor, administrator, guardian, fiduciary, or other representative of any kind and includes any department, agency or instrumentality of the Commonwealth, or any governmental subdivision thereof.

We conclude that the Legislature intended that the Commonwealth, no less than any other owner of oil and gas rights, be able to protect those rights by applying for a spacing order; correspondingly, we see no per se irregularity in the fact that Parks, a "governmental subdivision" of a "department of the Commonwealth" [the language of Section 402(9)] filed its application for a spacing order with another governmental subdivision of DER, namely Oil and Gas, because Oil and Gas is the governmental subdivision empowered to issue spacing orders under the Act. Whether Parks really does have gas rights in the land covered by the appealed-from spacing order, and whether the particular terms of the spacing order so unreasonably favor Parks as to constitute an abuse of DER's discretion, are issues dependent on disputed facts; those issues cannot now be resolved in any fashion warranting summary judgment in Ter-Ex's favor.

It follows that for the purposes of this Opinion, Parks must be regarded as an operator entitled to apply for a spacing order under Section 407(a). On this view, claim that granting the spacing order amounted to an unconstitutional

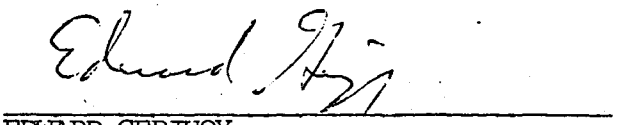
taking (irrespective of Parks' rights or the spacing order's terms) is equivalent to the claim that the Act is unconstitutional. We are not convinced by Ter-Ex's and PNGA's unconstitutionality arguments, but our failure to be convinced really is irrelevant. Under the holding of St. Joe Minerals v. Goddard, 14 Pa. Cmwlth. 624, 324 A.2d 800 (1974), this Board does not have the authority to rule that the Act is unconstitutional, in whole or in part; such rulings are the province of the Pennsylvania courts. A holding that under the facts of this appeal (concerning Parks' rights and the spacing order's terms) the spacing order is an unconstitutional application of DER's powers under the Act, e.g., an unconstitutional taking, cannot be sustained at this stage of these proceedings. Ter-Ex's ground (c) for summary judgment is rejected.

As for ground (d), DER quite rightly argues that Ter-Ex does not have standing to complain about Oil and Gas's dilatoriness in granting Parks' application for a spacing order; assuredly Ter-Ex has not alleged that it has been injured in any way by the delay. Therefore Ter-Ex's ground (d) for summary judgment also is rejected. As it happens, Ter-Ex itself writes (brief in support of motion, p. 22) that it does not wish to press its ground (d) unless "that is the only way it can receive what it is entitled to under any concept of Administrative Law, a due process hearing." The Board is far from confident that Ter-Ex and the Board agree on the definition of "due process", but Ter-Ex can be assured that Ter-Ex, like every other appellant before this Board, will receive full due process as the Board understands the term.

O R D E R

WHEREFORE, this 13th day of July, 1984, Ter-Ex's motion for summary judgment is rejected.

ENVIRONMENTAL HEARING BOARD



EDWARD GERJUOY
Member

DATED: July 13, 1984

cc: Bureau of Litigation
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Justina M. Wasicek, Esquire
William A. Jones, Esquire
Lawrence A. Demase, Esquire
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Barry K. Cosey, Esquire
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COMMONWEALTH OF PENNSYLVANIA

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HIGHWALL MINING COMPANY :

:

Docket No. 83-164-G

:

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER

Synopsis

Appeal from a DER assessment of civil penalties is dismissed pursuant to 25 Pa. Code §21.124 because appellant, after requesting and receiving an extension of time to file its pre-hearing memorandum did not file its pre-hearing memorandum nor take any other action to prosecute its appeal for over six months, even after issuance of the Board's order threatening dismissal for failure to take action in furtherance of the appeal within six months. The Board is reluctant to dismiss an appeal on purely procedural grounds, particularly where DER bears the burden of proof, but will not tolerate disregard of its orders.

OPINION

On August 9, 1983, Highwall appealed DER's assessment of an $8,000 civil penalty against Highwall, for various alleged violations of the Surface Mining

Conservation and Reclamation Act, 52 P.S. §1396.1 et seq. The Board, pursuant to its usual procedure then issued Pre-Hearing Order No. 1 ordering Highwall to file its pre-hearing memorandum on or before October 26, 1983.

On November 7, 1983, no pre-hearing memorandum having been received, the Board sent Highwall's counsel a certified letter, warning that sanctions under the Board's rules, 25 Pa. Code §21.124, including possible dismissal of the appeal, would be ordered against Highwall unless its pre-hearing memorandum was filed by November 17, 1983. The pre-hearing memorandum was not filed, but on November 21, 1983 the Board received a letter from Highwall's counsel, dated November 17, 1983, asking for a postponement of the pre-hearing memorandum due date to December 15, 1983 pending settlement negotiations.

Because of this letter, the Board--always reluctant to dismiss an appeal on purely procedural grounds--did not order sanctions against Highwall, and awaited receipt of its pre-hearing memorandum. By December 27, 1983 the pre-hearing memorandum had not been received, however, nor had the Board received another request for an extension of the due date. The last communication from the appellant was the aforementioned letter dated November 17, 1983.

Nevertheless, in spite of Highwall's seemingly flagrant disregard of the Board's orders, the Board still was hesitant to dismiss Highwall's appeal, especially because DER bears the burden of proof in appeals from civil penalty assessments. Western Hickory Coal Company v. DER, Docket No. 82-141-G (Adjudication, June 2, 1983); Armond Wazelle v. DER, Docket No. 83-063-G (Opinion and Order, September 13, 1983). Therefore, on December 27, 1983, the Board issued an Order continuing this matter indefinitely, pending settlement negotiations, or pending receipt of a petition for a hearing on the merits, accompanied by Highwall's pre-hearing memorandum. The last three paragraphs of this December 27, 1983 Order read as follows:

3. The parties are reminded of the Board's powers to impose sanctions for failure to meet Board ordered due dates. 25 Pa. Code §21.124.

4. The Board reserves the right to dismiss this appeal for inactivity if the Board receives no such petition (as described in paragraph 2) or other communication from the Appellant within six months from this date.

5. The parties will not again be reminded of the above deadlines, which will not be extended except for good cause shown.

As of this date, which is well past six months from December 27, 1983, the letter dated Novebmer 17, 1983 remains Highwall's last communication with the Board. Consequently, in view of the history of this appeal, recounted supra, the Board now sees no justification for retaining this appeal on the Board's docket. Rather, failure to dismiss the appeal would be contrary to our own precedents and would condone disregard of the Board's orders as well as wastage of the Board's time. Although we have been unwilling to dismiss an appeal merely for appellant's failure to file a pre-hearing memorandum when DER bears the burden of proof [Wazelle, supra], we have been willing to order dismissal, even though DER bore the burden of proof, when the appellant has ignored the Board's orders and made no attempt to prosecute his appeal. W. A. Cotterman v. DER, Docket No. 83-155-G (Opinions and Orders December 22, 1983 and February 23, 1984); Ben Franklin Coal Company v. DER, Docket No. 83-224-G (Opinion and Order, February 23, 1984); Mine Reclamation and Land Development Corporation v. DER, Docket No. 83-189-G (Opinion and Order, February 23, 1984).

O R D E R

WHEREFORE, this 18th day of JULY , 1984, this appeal is dismissed for inactivity and because of Highwall's failure to obey the Board's orders, 25 Pa. Code §21.124; DER's $8,000 civil penalty assessment against Highwall is sustained.

ENVIRONMENTAL HEARING BOARD

ANTHONY J. MAZULLO, JR.
Member

EDWARD GERJUOY
Member

DATED: July 18, 1984

cc: Bureau of Litigation
Diana J. Stares, Esquire
John M. Silvestri, Esquire

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FMC CORPORATION :

:

Docket No. 84-119-G

:

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER
SUR MOTION TO QUASH

DER has filed a motion to quash this appeal as untimely filed, pursuant to 25 Pa. Code §21.52(a). FMC requests the Board to deny the motion or, in the alternative, to grant leave for the filing of an appeal nunc pro tunc under 25 Pa. Code §21.53(a).

The following facts are not in dispute. By a letter dated February 17, 1984 DER notified FMC of its approval of FMC's NPDES permit. This letter and the accompanying permit were received by FMC on February 21, 1984. FMC objected to certain terms contained in the permit, in particular to the inclusion of discharge limitations for total toxic organics. By affidavit dated April 3, 1984, counsel for FMC avers that, on March 22, 1984, in reliance upon Chapter 25, Title 21 of the Pennsylvania Code, specifically Sections 21.32(e) and 21.51(b), he "caused the Notice of Appeal with a transmittal letter also dated March 22, 1984, to be placed in an envelope, with first class postage prepaid, certified mail, return receipt requested, addressed to the Board" at Blackstone Building,

First Floor Annex, 112 Market Street, Harrisburg, Pennsylvania 17101. Appellant's counsel's office is located in Philadelphia. On April 2, 1984 the envelope was returned to FMC's offices marked "Not Deliverable as Addressed--Unable to Forward." Appellant's counsel then called the Board, obtained the correct address, and remailed the appeal, which was received by the Board on April 4, 1984.

25 Pa. Code §21.52(a) requires that an appeal of a DER action be filed with the Board within 30 days after notice of such action has been received by the appellant. In this case, the thirty day period expired on March 22, 1984, the same day that counsel for FMC avers he caused the notice of appeal to be mailed. The Board's rules, 25 Pa. Code §21.11(a), make it clear that it is the date of receipt by the Board and not the date of mailing that is determinative. Eugene Petricca v. DER, Docket No. 83-239-G (Opinion and Order, January 13, 1984). Therefore, given the fact that the notice of appeal did not reach the Board until April 4, 1984, the appeal in this case unquestionably is untimely. The thirty day period is jurisdictional and the Board cannot waive the requirement that appeals be filed within that period. Rostosky v. DER, 26 Pa. Cmwlth. 478, 364 A.2d 761 (1976); Petricca, supra.

However, 25 Pa. Code §21.53 permits the Board to grant leave for the filing of an appeal nunc pro tunc. Our precedents clearly provide that such permission will be granted only where the delay in filing of the appeal is attributable to the Board's own operations; negligence by the appellant cannot justify a nunc pro tunc filing. W. P. Stahlman Coal Company v. DER, Docket No. 83-301-G (Opinion and Order, July 10, 1984), Petricca, supra. In Stahlman we held that the request for leave to file an appeal nunc pro tunc would be granted where the appellant had relied upon the address of the Board as printed in the current version of the Pennsylvania Code. We pointed out in Stahlman that counsel had exercised due diligence

in attempting to file his original notice of appeal. The original notice of appeal had been mailed a full week prior to the expiration of the thirty day period. In the instant case, counsel failed to mail the notice of appeal until the thirtieth day of the prescribed period. Under these circumstances it could not reasonably have been concluded by counsel for FMC that the appeal would be filed with the Board before the expiration of this thirty day period. Even if counsel had provided the Board's correct address it is extremely unlikely, if not impossible, that the notice of appeal would have been received by the Board on the same day as it was mailed.

Nevertheless, being extremely reluctant to dismiss an appeal for purely procedural reasons, the Board, by letter dated June 7, 1984, stayed any action on the Department's Motion to Quash for 30 days, giving counsel for FMC an opportunity to marshal evidence "showing that it would have been possible [under the facts stated above] for the appeal to have been received by the Board before the close of business on March 22, 1984." Counsel for FMC has responded to this opportunity by stating that such evidence is impossible to obtain.

Consequently, the Board cannot find that the failure to receive the appeal before the expiration of the thirty day jurisdictional period prescribed by 25 Pa. Code §21.52(a) is ascribable to some deficiency of the Board, rather than to the appellant's own negligence. Certainly, the mailing of a notice of appeal on the thirtieth day does not constitute due diligence. When an appeal has been mailed in Philadelphia on the thirtieth day, it is a reasonable assumption, based on every citizen's everyday experience, that even if counsel had been informed of the Board's correct address, the appeal would not have been received by the Board in Harrisburg within the prescribed period. Appellant, though given the opportunity, has produced no evidence to rebut this assumption. Appellant argues that the

assumption is rebutted by a presumption "that filing occurred in timely fashion," analogous to the presumption of regularity for official acts. Appellant cites no authority for his postulated presumption, however, and the Board is aware of none.

O R D E R

WHEREFORE, this 23rd day of JULY , 1984, the petition to file this appeal nunc pro tunc is rejected, and the appeal is dismissed as untimely filed.

ENVIRONMENTAL HEARING BOARD

ANTHONY J. MAZULLO, JR.
Member

EDWARD GERJUOY
Member

DATED: July 23, 1984

cc: Bureau of Litigation
Ward T. Kelsey, Esquire
Kenneth N. Klass, Esquire

COMMONWEALTH OF PENNSYLVANIA

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MUNICIPALITY OF BETHEL PARK and
MUNICIPAL AUTHORITY OF BETHEL PARK :

:

Docket No. 83-067-G
:

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER
SUR MOTION TO WITHDRAW APPEAL WITHOUT PREJUDICE

Synopsis

Request by appellants to withdraw appeal without prejudice "with the understanding that the withdrawal does not subject appellants to issue preclusion in the event other appeals are filed with respect to future DER actions premised on the same general grounds" is rejected by the Board because the 30-day appeal period of 25 Pa. Code §21.52(a) has long since passed. Withdrawal of an appeal without prejudice should return the parties to the status they would have had if no appeal ever had been filed; had no appeal been filed, the DER orders appealed-from would have become final after 30 days, with all the usual implications of such finality, including issue preclusion in actions to enforce those orders. However, DER's finding of fact that appellants' sewer system was overloaded at the time the orders were issued, even if not appealed, would not preclude the appellants from attempting to prove the sewer system no longer was overloaded at times subsequent to the date of the orders. In this appeal, the burden of proof

that DER's orders to reduce the overload and restrict new sewer connections were within DER's discretion is on DER, but the burden of proof that DER's rejection of submitted planning modules was outside DER's discretion falls on the appellants.

OPINION

On March 4, 1983 DER wrote the Municipality of Bethel Park ("Municipality") that DER was returning unapproved the previously submitted planning modules for two housing developments known as Lemon Tree Village and Kennedy Acres. DER's letter also stated, in pertinent part:

> The survey indicates your sewer system is hydraulically overloaded and several issues regarding the overload remain unresolved (please refer to our attached letter of March 3, 1983). It will be necessary for Bethel Park Borough, as permittee, to comply with 25 Pa. Code Section 94.21. This section requires that Bethel Park Borough:
>
> 1. Submit to this office a written plan setting forth the actions to be taken to reduce the overload and a schedule showing the dates of each step toward compliance with this section. (We suggest this plan and schedule be submitted within 45 days of receipt of this letter).
>
> 2. Restrict new connections to the sewer system tributary to the overloaded sewerage facilities to only those connections which fall within the exceptions stated in 25 Pa. Code Sections 94.55, 94.56, and 94.57 until the requested plan and schedule is approved by the Department. A copy of Chapter 94 is enclosed for your use.

The Municipality and the Municipal Authority of Bethel Park ("Authority") timely appealed this DER letter. Their appeal primarily objected to DER's rejection of the planning modules, but also claimed DER's conclusion that their sewer system "is hydraulically overloaded" was "erroneous".

Thereafter, the parties engaged in extensive but apparently fruitless settlement negotiations. However, on April 13, 1984, DER released additional connections to the sewer system. Appellants' counsel now have filed a motion to withdraw their appeal "without prejudice". Their motion embodies the following language:

> 4. By this filing, we formally move to withdraw our appeal without prejudice with the understanding that the specific appeal as to the two planning modules which were rejected and returned by DER in this matter cannot be reinstituted by us and that the withdrawal does not subject appellants to issue preclusion in the event other appeals are filed with respect to future DER actions premised on the same general grounds.

DER opposes withdrawal of the appeal without prejudice. DER argues [citing Hatfield Township Municipal Authority v. DER, Docket No. 82-081-M, 1982 EHB 331] that its finding of overloading (see the above-quoted March 4, 1983 letter) was an appealable action by DER, which if not appealed from would become final and not subject to collateral attack in subsequent appeals. In particular, DER asserts, once the finding of overloading had become final there would be "issue preclusion" in all subsequent cases based upon the hydraulic overload's existence or the overload's continuance. Therefore, DER argues, "Appellants must either continue this appeal and conclude it in their favor or suffer the results of having failed to so prevail."

We begin our discussion by noting that the language of DER's letter quoted supra is slightly ambiguous as to the obligations the letter is imposing on the appellants; certainly the phrase "it will be necessary...to comply..." is not as explicitly mandatory as would have been the forthright command "you must comply with...." Nevertheless, all the parties obviously have regarded the letter as an

order to comply with 25 Pa. Code §94.21, and the Board sees no reason to disagree with this construction.

With this understanding concerning the import of the March 4, 1983 letter, DER's reliance on Hatfield, supra, appears to be misplaced. In Hatfield we ruled that a letter requiring submission of a written plan to prevent sewer system overloading and ordering limits on new sewer connections was appealable. In other words, in Hatfield we ruled that orders like those listed in the numbered paragraphs 1 and 2 of DER's letter (quoted supra) were appealable DER actions. Hatfield did not rule that a mere finding of overloading, without accompanying orders to submit a written plan and restrict new sewer connections, would be appealable.

Moreover, we do not believe that a mere finding of overloading, without any implication that the finding imposed obligations on the appellants, would be appealable. To hold that an action imposing no obligations on the appellants is appealable would be contrary to the reasoning of Hatfield, to the language of 2 Pa. C.S. §101 and 25 Pa. Code §21.2, and to numerous Board rulings that a mere notice of violation is not an appealable action. Fred Erickson v. DER, Docket No. 84-079-G (Opinion and Order, June 20, 1984); Perry Brothers Coal Co. v. DER, Docket No. 82-122-H, 1982 EHB 501.

A finding which is not appealable cannot later be the basis for issue preclusion. On the other hand, had this appeal never been filed, the appealable orders contained in DER's March 4, 1983 letter would have become final after expiration of the 30-day appeal period of 25 Pa. Code §21.52(a). This finality would have meant that--in any future action by DER to enforce those orders or to penalize the appellants for not complying with those orders--DER's discretion to issue the orders, under the relevant facts as DER found them, could not be challenged; these (also unchallengeable in such future actions) relevant findings

of fact would include DER's finding that the sewer system was overloaded at the time DER wrote its March 4, 1983 letter.

Withdrawal of an appeal without prejudice should return the parties to the status they would have had if the appeal had never been filed. Thus in the present circumstances, when the appeal period has long since lapsed, withdrawal of the appeal without prejudice should make the orders in DER's March 4, 1983 letter final, with this finality having the implications stated in the preceding paragraph. Any agreement by us to permit withdrawal of this appeal "without prejudice" will carry those implications; to rule otherwise would be prejudicial to DER.

However, as we have stressed at the end of the penultimate paragraph, although failure to have appealed the letter would have made unchallengeable (in, e.g., enforcement actions) DER's finding that the system was overloaded on March 4, 1983, the appellants would not have been precluded from attempting to prove, in any later action, that the sewer system no longer was overloaded at times subsequent to March 4, 1983, because, e.g., the appellants had instituted remedial measures. Correspondingly, withdrawal of this appeal without prejudice will not preclude the appellants from challenging any DER claim that the sewer system was overloaded after March 4, 1983.

Because the appellants may not have fully understood the implications of their request to withdraw the appeal without prejudice, this request now is rejected, in all fairness to them. If renewed, in whole or in part, the request will be accepted, however, with consequent implications as described above. If the appellants will not renew all portions of their request to withdraw, with or without prejudice, then the remaining unwithdrawn portions of this appeal must take the customary course of advancing to a hearing on the merits.

In this connection, the appellants should recognize that if DER can sustain its claim the sewer system is overloaded, then the orders it issued were within its discretion, since those orders merely tracked the requirements of the regulation, 25 Pa. Code §94.21(a), DER is bound to follow. The burden of proof in this regard is on DER, as tentatively decided by us in the companion appeal by the Township of South Park [Township of South Park v. DER, Docket No. 83-068-G (Opinion and Order, December 12, 1983)] and as DER's pre-hearing memorandum now concedes. But if the appellants still intend to contest DER's rejection of the planning modules, they also should recognize that the burden of proof to show this rejection was an abuse of discretion falls on the appellants, as DER contends [see South Park, supra]. Furthermore, if the appellants have complied or are in the process of complying with DER's orders of March 4, 1983, those portions of this appeal challenging those orders will be dismissed for mootness unless the appellants can show there are exceptions which justify hearing the appeal even though the Board no longer can grant relief. Al Hamilton Contracting Company v. DER, Docket No. 83-248-G (Opinion and Order, February 23, 1984).

The following Order is consistent with this Opinion.

O R D E R

WHEREFORE, this 8th day of August, 1984, it is ordered that:

1. For the present, appellants' request to withdraw their appeal without prejudice is rejected.

2. Within twenty (20) days of the date of this Order, the appellants--jointly or severally--shall inform the Board whether they wish to renew their request to withdraw this appeal without prejudice, in whole or in part.

3. Unless the appeal is fully withdrawn, the appellants--jointly or severally--must file, within twenty (20) days of the date of this Order, a pre-hearing memorandum covering those portions of their appeal which have not been withdrawn; the pre-hearing memorandum must comport with the requirements of our Pre-Hearing Order No. 1, issued April 7, 1983.

4. Failure to file a pre-hearing memorandum as ordered in Paragraph 3 supra will result in:

(a) dismissal of the appeal, on issues wherein the appellants have the burden of proof; and

(b) imposition of the sanctions stated in Paragraph 1 of our Order of April 19, 1984, on issues wherein DER has the burden of proof.

5. The sanctions described in Paragraph 4(a) and 4(b) supra, which are fully justified under 25 Pa. Code §21.124 by the appeal's history of continuances (see this Board's letter of December 1, 1983 to the parties), will not be re-considered except on very good cause shown.

ENVIRONMENTAL HEARING BOARD

EDWARD GERJUOY
Member

DATED: August 8, 1984

cc: Bureau of Litigation
Richard S. Ehmann, Esquire, for DER
Victor R. Delle Donne, Esquire, of Baskin and Sears,
Pittsburgh, for Appellant (Municipality of Bethel Park)
Leo J. Kelly, Esquire, of Metz, Cook, Hanna & Kelly, Pittsburgh,
for Appellant (Municipal Authority of Bethel Park)

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BENJAMIN COAL COMPANY :

:

Docket No. 84-021-G

:

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER

Synopsis

Surface mine operator appeals from DER order requiring abatement of discharges. Appellant failed to timely file its pre-hearing memorandum despite an extension of time for so doing and a warning by the Board that such failure could result in the imposition of sanctions. Consequently, the Board did impose sanctions, which took into account the fact that DER at least nominally bears the burden of proof in this appeal. Appellant's participation at the hearing will be limited to cross examination of DER witnesses and the presentation of evidence in rebuttal.

Appellant filed its notice of appeal more than 30 days after the initial receipt of the DER order. Timely filing is a jurisdictional requirement. Therefore, the Board will dismiss the appeal unless Appellant justifies its apparent contention that the appeal should proceed as timely because the original order was cancelled and superseded by a second order.

OPINION

Benjamin Coal Company ("Benjamin") is engaged in the mining of coal by the surface mining method, at a site in Canoe Township, Indiana County, under mine drainage permit MDP 3975SM3. On December 9, 1983 DER sent Benjamin an abatement order, alleging that Benjamin had allowed discharges violating the effluent standards of 25 Pa. Code §87.102; Benjamin was ordered to abate the discharges.

On January 23, 1984 Benjamin filed an appeal of DER's aforesaid December 9, 1983 order. This appeal, which obviously was untimely under our rules, 25 Pa. Code §21.52(a), was labeled "Nunc Pro Tunc" by Benjamin. Benjamin's Notice of Appeal explained this "Nunc Pro Tunc" filing as follows.

> Appellant received a telephone call from Charles Gumno, of the Department of Environmental Resources ("Department") in Harrisburg, Pennsylvania in which he indicated the Department was rescinding the Abatement Order issued December 9, 1983, hereinbefore referred to. As a result of the Department's action, the Appellant was removed from the violation docket in Harrisburg and its permits were processed until January 5, 1984 when Appellant was notified that the Abatement Order was reinstated by the Department by a tleephone call from Mr. Wilson Kreitz of the District Office in Ebensburg. The present nunc pro tunc appeal is filed from said reinstatement of the Abatement Order received on January 5, 1984.

DER made no objections to the just-quoted explanation for Benjamin's late filing. Therefore the Board tentatively permitted this appeal to proceed in routine fashion, although it was apparent that the standards for filing an appeal nunc pro tunc had not been met. Eugene Petricca v. DER, Docket No. 82-239-G (Opinion and Order, January 13, 1984); W. P. Stahlman Coal Company v. DER, Docket No. 83-301-G (Opinion and Order, July 10, 1984; FMC Corporation v. DER, Docket No. 84-119-G (Opinion and Order, July 23, 1984). In particular, the Board issued

its usual Pre-Hearing Order No. 1, requiring Benjamin to file its pre-hearing memorandum on or before April 16, 1984.

On April 19, 1984 no pre-hearing memorandum had been filed. However, on this date Benjamin did file a petition requesting a 60-day extension of the due date for filing its pre-hearing memorandum. There being no objection by DER to this petition, the Board granted Benjamin's request; in fact, the pre-hearing memorandum due date was extended to June 26, 1984, well beyond the due date Benjamin had asked for.

Nevertheless, by July 6, 1984 no pre-hearing memorandum had been received, nor had there been any request for an additional extension of time. Thus, on July 6, 1984 the Board sent Benjamin's attorney a warning that sanctions, including possible default of this appeal, might be imposed under 25 Pa. Code §21.124 if Benjamin's pre-hearing memorandum was not filed by July 16, 1984.

On July 17, 1984 Benjamin's attorney's secretary telephoned the Board and spoke to the Board member handling this appeal. She stated that Benjamin's attorney had been very busy, but had asked her to call the Board to say he intended to file his pre-hearing memorandum, and to ask the Board not to impose sanctions. She was told that the Board would refrain from sanctioning Benjamin provided Benjamin's attorney would call the Board in the very near future to explain his failure to file the pre-hearing memorandum on the due date, and to assure the Board he would meet a newly set deadline. As of this date, no such call has been received from Benjamin's attorney, nor has the pre-hearing memorandum been filed, nor has there been any other communication from Benjamin or its attorney since July 17, 1984.

On these facts, and the Board's precedents under similar facts, the Board concludes that Benjamin should be sanctioned. Armond Wazelle v. DER,

Docket No. 83-063-G (Opinion and Order, September 13, 1983); Daniel A. Marino v. DER, Docket No. 83-198-G (Opinion and Order, January 25, 1984); W. A. Cotterman v. DER, Docket No. 83-155-G (Opinion and Order, February 23, 1984). Because DER at least nominally bears the burden of proof in this appeal, under 25 Pa. Code §21.101(b)(3), our sanction will follow the precedent established in Wazelle, supra. At the hearing on the merits of this matter, Benjamin's participation will be limited to cross examination of DER's witnesses and to presentation of such evidence as normally would be offered in rebuttal, not in Benjamin's case-in-chief. This ruling will be enforced even if--at the hearing on the merits--DER's case-in-chief indicates that the burden of proof should be shifted to Benjamin under 25 Pa. Code §21.101(d).

In addition, because timely filing is a jurisdictional requirement, and because (as already explained) there is no basis whatsoever for allowing this appeal nunc pro tunc, this appeal will be dismissed as untimely unless Benjamin can justify its timeliness. Rostosky v. DER, 26 Pa. Cmwlth. 478, 364 A.2d 761 (1976). In particular, Benjamin will have to justify its apparent contentions (see the quotation supra) that the December 9, 1983 abatement order was cancelled by DER, so that Benjamin now is timely appealing a new abatement order issued January 5, 1984. We will allow Benjamin to prove timeliness, but only timeliness, without the sanction imposed supra.

An Order, consistent with this Opinion, follows.

O R D E R

WHEREFORE, this 9th day of August, 1984, it is ordered that:

1. Within twenty (20) days of the date of this Order, DER is to file its pre-hearing memorandum in this appeal, although Benjamin has failed to file.

2. If DER intends to challenge the timeliness of Benjamin's appeal,

the pre-hearing memorandum should be accompanied by an appropriate motion to quash.

3. Benjamin will have twenty (20) days to respond to any such DER motion to quash; Benjamin's response must be accompanied by a statement of the facts it intends to prove, its legal contentions, etc., presented in a form reasonably consistent with the requirements of our Pre-Hearing Order No. 1.

4. If Benjamin so responds, DER will have fifteen (15) days to reply; if necessary, DER's reply should be accompanied by a suitable amendment to its pre-hearing memorandum, concerning evidence DER intends to present on this timeliness issue.

5. The Board will rule on the timeliness of this appeal after the parties have filed (or failed to file) the above-described documents.

6. If this appeal is not dismissed as untimely without a hearing, then at the hearing on the merits of this matter:

a. To establish timeliness, but only timeliness, Benjamin will be permitted to present its case without any sanction, if Benjamin complies with the filing called for in Paragraph 3 supra.

b. On issues other than timeliness, Benjamin's participation will be limited to cross examination of DER's witnesses, to presentation of such evidence as normally would be offered in rebuttal (rather than in Benjamin's case-in-chief) and to filing post-hearing briefs.

ENVIRONMENTAL HEARING BOARD

EDWARD GERJUOY, Member

DATED: August 9, 1984

cc: Bureau of Litigation
Timothy J. Bergere, Esquire, for DER
Carl A. Belin, Jr., Esquire, of Belin, Belin & Naddeo, Clearfield, for Appellant

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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KERRY COAL COMPANY :

:

Docket No. 82-142-G

:

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER
SUR PETITION FOR RECONSIDERATION

Synopsis

Reconsideration of a Board Adjudication is governed by 25 Pa. Code §21.122(a). Mere disagreement with the Board's interpretation of the evidence presented is not a sufficient reason for the Board to grant reargument. Excepting quite unusual circumstances, reconsideration is warranted only where the Board should consider previously unavailable legal arguments or evidence.

The Adjudication of June 4, 1984 does not hold that the activities of Kerry fall within one of the exceptions (i), (ii) or (iii) to the definition of surface mining provided in Section 3 of the Surface Mining Conservation and Reclamation Act, 52 P. S. §1396.3. Rather, the Board held that there had been no extraction or exposure and retrieval of coal as required by the above mentioned definition. Where there has not been extraction or exposure and retrieval and where the activities of which DER complains do not obviously fall within one of

the three exceptions, the Board must examine all relevant evidence to determine whether the activities are sufficiently connected with surface mining as to constitute surface mining within the definition provided in 52 P.S. §1396.3. In making this examination, the element of intent shall not be injected into the definition of surface mining; the Board's June 4, 1984 Adjudication was consistent with this precept.

The Adjudication did rest on an assignment of the full burden of proof to DER, consistent with 25 Pa. Code §21.101(b)(1). At no time did DER challenge this assignment nor did it argue that Kerry's defense was an affirmative defense which shifted the burden of proof to Kerry. The decision to place the burden on DER rested upon a legal ground which each party had full opportunity to consider. Therefore, reconsideration is not warranted. However, this Adjudication leaves open the question whether Kerry should have had the burden of proving that its activities were connected with parking lot construction, rather than surface mining, once DER had met its threshold burden.

OPINION

DER has petitioned for reconsideration of our Adjudication of the above-captioned appeal, issued June 4, 1984. The petition offers the following grounds for reconsideration:

> 1. The Board's decision is not supported by substantial evidence:
>
> (a) The evidence does not support a holding that Kerry's activities fell within the exceptions to the definition of surface mining in 52 P.S. §1396.3.

(b) In deciding that Kerry's activities did not constitute unpermitted surface mining, the Board should not have relied upon the type of explosive used by Kerry to blast the overburden, or upon Kerry's failure to conduct certain activities commonly associated with surface mining operations, e.g., Kerry's failure to construct treatment and or sedimentation ponds.

2. The Board's decision involved errors of law:

(a) The Board assigned the entire burden of proof to DER, whereas Kerry's defense that its activities fell within an exception to the definition of surface mining is an affirmative defense, whose burden should have rested on Kerry, according to Western Hickory v. DER, Docket No. 82-141-G (Adjudication, June 2, 1983).

(b) The Board should not have used "a sufficiently connected with surface mining" test to determine if Kerry's activities constituted unpermitted surface coal mining activities.

3. The Board's Adjudication makes it virtually impossible for DER to regulate unpermitted surface mining activities, because the Board has imposed the element of "intent to mine coal" into the definition of surface mining, without statutory authorization to do so.

Reconsideration of a Board Adjudication is governed by 25 Pa. Code §21.122(a):

§ 21.122. Rehearing or reconsideration.

(a) The Board may on its own motion or upon application of counsel, within 20 days after a decision has been rendered, grant reargument before the Board en banc. Such action will be taken only for compelling and persuasive reasons, and will generally be limited to instances where:

(1) The decision rests on a legal ground not considered by any party to the proceeding and that the parties in good faith should have had an opportunity to brief such question.

(2) The crucial facts set forth in the application are not as stated in the decision and are such as would justify a reversal of the decision. In such a case reconsideration would only be granted if the evidence sought to be offered by the party

> requesting the reconsideration could not with due diligence have offered the evidence at the time of the hearing.

Evidently, mere disagreement with an Adjudication is not sufficient reason to request reconsideration. Normally, a party who disagrees with an Adjudication is expected to appeal. Section 21.122(a) reflects the presumption (to which the Board is entitled) that the Board has carefully considered the record before it, so that reconsideration of the same record only would waste the Board's time without producing a different result. Excepting quite unusual circumstances, therefore, reconsideration is warranted only when the Board should be considering previously unavailable legal arguments or evidence.

Examining DER's grounds for reconsideration, listed supra, we find that only the ground 2(a) possibly can fall within the criteria of Section 21.122(a). Grounds 1(a) and 1(b) obviously are mere disagreements with the Board's analyses of the evidence. The issue of how to define surface mining was thoroughly discussed by DER in its brief, as remarked on p. 13 of our June 4, 1984 Adjudication; thus grounds 2(b) and 3 do not fall under §21.122(a)(2).

Nevertheless, setting aside the merits of ground 2(a) for the moment, we will make a few remarks about these other--now ruled out for reconsideration--grounds, because they suggest that our June 4, 1984 Adjudication is capable of misinterpretation. First of all, our Adjudication did not hold that Kerry's activities fell within the exceptions (i), (ii) and (iii) listed in 52 P.S. §1396.3. The first portion of the definition of surface mining in §1396.3, which the Board did not quote in its Adjudication, reads:

> "Surface mining" shall mean the extraction of minerals from the earth or from waste or stock piles or from pits or banks by removing the strata or material which overlies or is above or between them or otherwise exposing and retrieving them from the surface, including but not limited to

> strip, auger mining, dredging, quarrying and leaching, and all surface activity connected with surface or underground mining including but not limited to exploration, site preparation, entry, tunnel, drift, slope, shaft and borehole drilling and construction and activities related thereto, but not including those portions of mining operations carried out beneath the surface by means of shafts, tunnels or other underground mine openings.

The Board found (Finding of Fact 26), that "no coal had been exposed" as a result of Kerry's blasting activities, "nor had any coal been removed from the site." The Board therefore concluded that there had been no "extraction" of coal, or exposure and retrieval of coal, in the context of the above definition of "surface mining."

Consequently the Board further concluded that if Kelly had engaged in "surface mining," Kelly's activities must fall under the phrase "and all surface activity connected with surface or underground mining..." (emphasis added). The Board did not create the "connected with" surface mining test; the Legislature created the test. The Legislature did not indicate in any way that activities lying outside its exceptions (i), (ii) and (iii) could not be "connected with" surface mining. Thus, in any given fact situation, where there has been no extraction, exposure or retrieval of coal (as in the present appeal), and where activities DER complains of do not obviously fall under the exceptions (i), (ii) and (iii), the Board (again as in the present appeal) must examine those activities to see if they are sufficiently connected with surface mining to constitute "surface mining" under the §1396.3 definition. As Kerry argues in its reply to DER's petition, although the definition includes "borehole drilling" in the list of surface activities "connected with" surface mining, surely it is doubtful the Legislature intended that drilling a water well be regarded as surface mining per se under the definition.

In deciding whether the activities complained of were connected with surface mining, the Board can and should review all evidence possibly relevant to this crucial issue. The type of explosive used by Kerry, and Kerry's failure to construct treatment or sedimentation ponds, are relevant to the issue of whether Kerry's activities were connected with surface mining. These facts did not determine the Board's conclusion that Kerry had not been engaging in surface mining, but certainly the Board's conclusion would be less defensible if, e.g., Kerry had constructed a treatment pond.

DER's complaint that the Board unauthorizedly has imposed the element of "intent to mine coal" into the definition of surface mining is not well-founded. "Intent" played no role whatsoever in our Adjudication, and indeed is not even mentioned therein, as a careful reading will make manifest. Ironically, DER itself, in its post-hearing brief (p. 14), finds it worthwhile to argue: "There is no question that Kerry Coal intended to mine the site in question."

Returning now to ground 2(a), our Adjudication did rest on our assignment of the full burden of proof to DER, including the requirement that DER carry the burden of showing that Kerry's activities were sufficiently connected with surface mining to constitute surface mining under Section 1396.3. Our Conclusion of Law 5 explicitly held: "DER has failed to show by a preponderance of the evidence that Kerry was, at the time and place cited, engaged in unpermitted surface mining of coal; hence DER has not carried its burden of proof in this matter." In so assigning the burden of proof to DER, we followed the precept of 25 Pa. Code §21.101(b)(1), which states: "The Department shall have the burden of proof...where it files a complaint for a civil penalty." DER accepted without challenge the principle that in this appeal DER carries the burden of proof (DER post-hearing brief, p. 10). DER's brief nowhere argued that Kerry's defense was an "affirmative" defense which shifted the burden of proof to Kerry.

Therefore we do not agree that DER's contention 2(a) entitles DER to reconsideration under Section 21.122(a)(1). The decision rested on a legal ground every party had full opportunity to consider, namely that DER had the full burden of proof. Only if we had ruled as DER now requests, namely that the burden of proof had shifted to Kerry, would there have been grounds for reconsideration under Section 21.122(a), because then the decision would have rested on a legal ground not considered by the parties.

We stress, however, that our refusal to grant reconsideration does not imply DER's contention--that the burden of proof should have shifted to Kerry--wholly lacks merit. In Western Hickory, supra, which also involved an appeal from a civil penalty assessment for unpermitted mining, we held that--although DER had the burden of proof--once DER had met its threshold burden of showing there had been "willful" unpermitted mining, the appellant had the burden of establishing defenses to this showing, by, e.g., proving that DER actually had given the appellant permission to mine. Although Western Hickory is distinguishable from the instant appeal, therefore (because in the instant appeal the issue is not whether the unpermitted mining was "willful" but rather whether there was "mining" at all), the Western Hickory holding could be consistent with giving Kerry the burden of showing its activities had not been connected with surface mining, once DER had met its threshold burden of showing Kerry had engaged in such common surface mining activities as blasting and overburden removal.

The Board's rules and regulations, 25 Pa. Code §21.101(a) read:

> (a) In proceedings before the Board the burden of proceeding and the burden of proof shall be the same as at common law in that such burden shall normally rest with the party asserting the affirmative of any issue. It shall generally be the burden of the party asserting the affirmative of the issue to establish it by a preponderance of the evidence. In cases

> where a party has the burden of proof to establish his case by a preponderance of the evidence, the Board may nonetheless require the other party to assume the burden of going forward with the evidence in whole or in part if that party is in possession of facts or should have knowledge of facts relevant to the issue.

We take Section 21.101(a) to mean that, although under Section 21.101(b) DER has the burden of proof in civil penalty assessments, in some circumstances the appellant should be required to prove his affirmative defenses, once DER has met appropriate threshold burdens. This was the reason for our affirmative defense ruling in Western Hickory, supra. Our Adjudication in the instant appeal, which we refuse to reconsider, leaves open the question whether, under our rules, Kerry should have had the burden of proving its blasting and overburden removal activities were connected with parking lot construction, not surface mining, once DER had met its threshold burden.

O R D E R

WHEREFORE, this 16th day of August , 1984, it is ordered as follows:

1. DER's petition for reconsideration of our June 4, 1984 Adjudication in this matter is rejected.

ENVIRONMENTAL HEARING BOARD

ANTHONY J. MAZULLO, JR.
Member

EDWARD GERJUOY
Member

DATED: August 16, 1984
cc: Bureau of Litigation
Diana J. Stares, Esquire
Bruno A. Muscatello, Esquire

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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JAMES E. MARTIN, t/d/b/a
JAMES E. MARTIN COAL COMPANY :

:

Docket No. 83-120-G
:

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER
SUR MOTION FOR SUMMARY JUDGMENT

Synopsis

An appeal was taken from DER's refusal to alter the terms of an approved reclamation plan to provide for terracing rather than grading to AOC. The approved reclamation plan constitutes a condition of the operator's mining permit issued pursuant to the Surface Mining Act, 52 P.S. §1396.1 et seq. Such a refusal, while it may not alter the status quo, can affect the rights or obligations of the operator. Therefore the refusal is an appealable action within the meaning of 2 Pa. C.S. §101 and 25 Pa. Code §21.2. However, the operator's failure to appeal the terms of the original permit rendered those terms final. In such a case, an appeal can be had only upon a showing of truly exceptional circumstances. Since there has been no such showing here, DER's motion for summary judgment is granted.

OPINION

Two appeals have been consolidated under the above docket number, namely the appeals originally docketed at 83-120-G and 83-121-G. DER has filed a motion for summary judgment in the appeal originally docketed at 83-120-G; DER specifically does not seek summary judgment in the appeal originally docketed at 83-121-G. Therefore this adjudication will pertain solely to the appeal originally docketed at 83-120-G, not to the consolidated appeal. Unless explicitly stated otherwise, the phrases "the appeal" or "this appeal" used below refer to the originally docketed 83-120-G appeal only.

Martin has appealed from a May 23, 1983 DER letter to Martin, which in pertinent part reads:

> Dear Mr. Martin:
>
> As you did not stay to discuss the status of your reclamation alternatives after our May 3, 1983 site visit, this letter will act as a follow-up to that field inspection.
>
> Concerning the reclamation plan on the sites in question, please find:
>
> Since you have completed backfilling on your 419-6 & Amendments Permit and it would be unproductive to have you change to the approved approximate original contour backfill now, we will approve your terrace backfill after receiving a proof-of-publication advertising the revisions to your mine drainage permit, No. 35730SM14, and an amended Page 8 of the mine drainage.
>
> As for your other Permits, 419-7 on 3574SM12, 419-11 on 3573SM14, and 419-16 on 3578BC16, please be advised that since an approvable terrace backfill plan was never submitted and the terrace on these areas would not be beneficial or consistent with the post mining land use, we are hereby denying your terrace request. Your backfilling should progress in the approximate original contour manner which has been previously approved.
>
> This action of the Department may be appealable to the Environmental Hearing Board, Third Floor, 221 North Second Street, Harrisburg, Pennsylvania, 17101, (711-787-3483) by any aggrieved person pursuant to Section 1921-A of the Administrative Code of 1929, 71 P.S. Section 510-21; and the Administrative Agency Law, 2 Pa. C.S., Chapter 5A. Appeals must be filed with the Environmental Hearing Board within thirty (30) days of receipt of written notice of this action unless

the appropriate statute provides a different time period. Copies of the appeal form and the regulations governing practices and procedures before the Board may be obtained from the Board. This paragraph does not, in and of itself, create any right of appeal beyond that permitted by applicable statutes and decisional law.

Martin contests DER's denial of terrace backfilling on permits 419-7 and 419-16. Both parties appear to agree that the above denial letter, and this appeal, also include the denial of terrace backfilling on the area covered by permit 419-7(A); the Board takes the same view.

There is no dispute about the following relevant facts:

1. Mining permits 419-7, 419-7(A) and 419-16 were issued on May 22, 1975, June 29, 1976 and August 14, 1979 respectively.

2. These permits were issued under Section 4(a)(2) of the Surface Mining Act, 52 P.S. §1396.1 et seq. ("Act"), as it existed prior to the 1980 amendments to the Act, which became effective October 10, 1980.

3. As originally issued, the permits called for backfilling to approximate original contour ("AOC").

4. Martin did not timely appeal the permits when they were issued.

5. Martin's request for approval to terrace backfill on the areas covered by the permits was submitted on or about January 15, 1981, after the 30-day appeal period had lapsed for each of the permits under discussion. 25 Pa. Code §21.52(a).

DER claims that it is entitled to summary judgment on two grounds:

I. The above-quoted letter is not an appealable action of DER's.

II. Martin's failure to timely appeal the permits when issued has made their terms final insofar as Martin is concerned.

We proceed to examine these contentions.

I. Nonappealability

DER rests its contention that the above-quoted letter is not an appealable action on two distinct lines of reasoning. Primarily, DER argues that under appli-

cable agency law the letter is not appealable per se, wholly independent of the merits of Martin's reasons for seeking terrace backfilling rather than AOC. But DER also makes the secondary argument that even if the letter is not held to be per se unappealable, under the instant facts it should be ruled unappealable for public policy reasons. We shall examine these arguments in turn.

A. Per Se Nonappealability

DER argues that under Section 101 of the Administrative Agency Law 2 Pa. C.S. §101 et seq., the aforementioned letter is not appealable. In further support of this argument, DER cites Gateway Coal Co. v. DER, 41 Pa. Cmwlth 442, 399 A.2d 802 (1979), DER v. New Enterprise Stone and Lime, 25 Pa. Cmwlth. 389, 359 A.2d 845 (1976), and Annville Township Sewer Authority v. DER, 1980 EHB 425.

Administrative Agency Law Section 101, which these decisions construe, defines an adjudication from which an appeal would lie as:

> Any final order, decree, decision, determination or ruling by an agency affecting personal or property rights, privileges, immunities or obligations of any or all of the parties to the proceeding in which the adjudication is made.

In Annville, supra, the Board [relying on the precedents of New Enterprise and Gateway Coal, supra] interpreted this definition of an appealable adjudication to mean that DER's refusal to change a previously granted permit's waste water treatment requirements was not appealable, because DER's refusal to change the status quo did not alter the rights or obligations of the appellant permittee. DER correctly contends that the Annville facts are squarely on point with the instant appeal, wherein the DER action appealed from is no more than a refusal to alter the terms of Martin's original permit, which required backfilling to AOC, not terraces.

Recently, however, this Board has questioned the correctness of the Annville holding. Conemaugh Valley School District v. DER, Docket No. 84-047-G (Opinion and Order, June 1, 1984). The facts in Conemaugh also are squarely on point with the instant appeal; the Conemaugh School district had appealed DER's refusal to eliminate the requirement of a comminutor in a previously issued permit for construction of a sewage treatment plant. As we pointed out in Conemaugh, the argument that a refusal to change the status quo cannot be an appealable DER action obviously is inconsistent with the Board's standard practice--which DER has not challenged--of accepting appeals of DER permit denials; denying a permit to someone who has not previously held a permit (here we are concentrating on such appeals, and are excluding appeals from DER refusals to renew permits) certainly does not change the status quo. The flaw in DER's logic (and in the reasoning of Annville, supra) is that an action which refuses to change the status quo can affect rights and obligations, because the applicant's rights and obligations after the permit denial are very different from the rights and obligations the applicant would have after a permit grant. Section 101, quoted supra, uses the phrase "affecting... rights or...obligations"; to be consistent with DER's and Annville's reasoning, the language of Section 101 would have to be "which does not change...rights or... obligations." Indeed, the Board's own rules and regulations explicitly recognize that a refusal to grant a permit, though a maintenance of the status quo, can affect rights and obligations. 25 Pa. Code §21.2 reads:

> (a) The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise:
>
> Action - Any order, decree, decision, determination or ruling by the Department affecting personal or property rights, privileges, immunities, duties, liabilities or obligations of any person, including, but not limited to, denials, modifications, suspensions and revocations of permits, licenses and registrations...(emphasis added)

Despite these considerations, in Conemaugh, supra we followed Annville, saying;

> On the other hand, the Board can see good policy reasons for following its Annville rule. If we are to overturn Annville, we should not do so without convincing arguments for so doing. It was up to the District to furnish such arguments. The District has not done so; rather, the District has given us no reasons not to accept DER's urgings that we follow our previous Annville holding. Therefore, DER's is the course we shall take. (Emphasis in original)

In the instant appeal, however, the appellant has offered strong arguments for not following Annville. Martin contends (Brief in opposition to DER's motion, p. 9):

> [W]here there is latitude to amend the permit, and where issues may be raised which have not previously been adjudicated in any adversarial process, the Department should be held to a standard of reasonableness in making decisions as to whether previously approved permits can be amended. Without an ability to appeal from such decisions of the Department, the Department will be free to be as arbitrary and capricious as it cares to in denying such requests for amendment.

Martin also has called the Board's attention to Bethlehem Steel Corporation v. DER, 37 Pa. Cmwlth 479, 390 A.2d 1383 (1978). In Bethlehem--which explicitly made reference to New Enterprise, supra, on which Annville heavily relied--the Commonwealth Court held that DER's refusal to withdraw or modify a previously issued and unappealed (therefore final) variance order was an appealable action.

DER correctly points out that the Commonwealth Court's ruling--that DER's refusal to withdraw or modify its previously issued variance order was appealable--was based on the Court's application, to the Bethlehem, supra facts, of criteria for appealability originally enunciated in Man O'War Racing Association v. State Horse Racing Commission, 433 Pa. 432, 250 A.2d 172 (1969). DER then argues (see infra) that under the instant facts these appealability criteria, which involve public policy considerations, are not satisfied. However, whether or not we agree with this secondary argument of DER, it cannot be gainsaid that in Bethlehem the

Commonwealth Court explicitly examined, and rejected, the contention that DER's refusal to change the status quo was per se unappealable.

In other words, Bethlehem thoroughly confirms our criticisms, supra, of the deficiencies in our Annville holding; a refusal to change the status quo can affect personal or property rights or obligations. In the instant appeal, Martin's property rights and obligations under allowance of terrace backfill would be substantially different from his present property rights and obligations binding him to AOC backfilling. Therefore, on the authority of Bethlehem, we rule--rejecting DER's primary argument and the immediate implications of Annville--that DER's refusal to alter the terms of Martin's original permit, so that terrace backfilling would become acceptable, was an action affecting rights and obligations within the definitions of 2 Pa. C.S. §101 and 25 Pa. Code §21.2.

B. Nonappealability on Public Policy Grounds

The criteria for appealability originally enunciated in Man O'War, supra, are:

> (i) Was the decision (whose appealability is in question) of an adjudicative nature, involving an exercise of discretion under individual facts?
>
> (ii) Does public policy require the decision to be appealable?
>
> (iii) Did the decision substantially affect property rights?

The Bethlehem court held these three questions were answered affirmatively, making DER's decision appealable, under the Bethlehem facts concerning DER's refusal to withdraw or modify its previously issued variance order. But DER argues that under the instant facts, questions (ii) and (iii) must be given a negative answer; DER concedes that its decision not to allow Martin to terrace backfill was adjudicative. However, our discussion supra--to the effect that DER's decision in the instant

appeal lies within 2 Pa. C.S. §101 and 25 Pa. Code §21.2--implies that question (iii) actually must be given an affirmative answer under the instant facts. Thus only question (ii) remains to be examined.

The Bethlehem court used the following language in answering question (ii) affirmatively.

> Second, does public policy require that the decision in question be deemed appealable? Again, we conclude it does. The cost to industry of complying with environmental regulations is high and growing steadily and while industry is obligated to bear its share of the burden of cleaning and maintaining our environment, it should not be required to incur an expense not required by law which will ultimately be passed on to the consumer to the benefit of no one.

DER argues that in the instant appeal, public policy does not require appealability of its decisions refusing terrace backfilling because (DER further argues) the Act, both at the time Martin originally received his permit and in its present version, expresses the policy that surface mine sites be backfilled to AOC [see the former 52 P.S. §1396.4(a)(2)G and the present 52 P.S. §1396.4(a)(2)E]. Martin, asserting that "it is not only less expensive but also more environmentally advantageous (for Martin) to terrace his property rather than to contour it," contends the public policy reasons for the Bethlehem court's affirmative answer to question (ii) apply equally to the instant appeal.

We will not attempt to balance these opposing public policy arguments of DER and Martin, because in our view there is no need for us to do so. Overriding these policy arguments stemming from the above-quoted Bethlehem language is the public policy consideration that the citizens of this Commonwealth should not have any reason to think DER is "free to be as arbitrary and capricious as it cares to in denying such requests for amendments" (Motion Brief, p. 9, quoted supra). This policy consideration--which reflects the general need to ensure public respect for

the law in a democracy like ours, as well as the special need to ensure citizen respect for and cooperation with an environmental enforcement agency like DER--is embodied in constitutional due process clauses and in the definitions of 2 Pa. C.S. §101 and 25 Pa. Code §21.2 combined with the Legislature's grant of powers to this Board, 71 P.S. §510-21. In the face of these constitutional, legislative and regulatory enactments, we can find no basis for rejecting the appealability of DER's action under the instant facts, once we have ruled that DER's action affected rights and obligations within the definitions of 2 Pa. C.S. §101 and 25 Pa. Code §21.2. We recognize that the Bethlehem court did not reach any such conclusion, but we also recognize that the Bethlehem court--having already decided that public policy required appealability under the Bethlehem facts--did not need to examine the implications (vis-a-vis 2 Pa. C.S. §101 and 25 Pa. Code §21.2) of its holding that DER's action substantially affected the appellant's property rights.

In short, we hold that DER's refusal to modify Martin's permit, so as to allow terrace backfilling rather than the originally required AOC backfilling, was an appealable action of DER's.

II. Finality

The facts 1-5 listed at the outset of this Opinion show that Martin did not timely appeal the permits requiring AOC backfilling when those permits were issued, and did not request permission to terrace backfill until many years after those permits had been granted. DER contends that (irrespective of the appealability issue we have been discussing) Martin's failure to timely appeal the permits or to timely challenge their AOC requirement has made the AOC requirement final insofar as Martin is concerned.

We agree with this contention of DER, which Martin has not countered and which is consistent with our own and Pennsylvania court precedents. For example, in Allegheny County Sanitary Authority, Docket No. 82-269-G (Opinion and Order, July 22, 1983), we wrote:

> The validity of now final DER actions (those which under 71 P.S. §510-21(c) and 25 Pa. Code §21.52(a) are no longer appealable) cannot be litigated under the rubric of the instant appeal.

We also agree with DER's argument [citing Commonwealth, DER v. Wheeling-Pittsburgh Steel Corp., 22 Pa. Cmwlth 280, 348 A.2d 765, affirmed and remanded, 473 Pa. 432, 375 A.2d 320 (1977)], that public policy strongly disfavors untimely challenges to permits:

> To allow Martin and other operators to challenge the terms of issued unappealed permits at any indefinite future time simply by requesting changes to the permits and then appealing from the Department's decision, destroys any finality of permits issued by the Department. (DER Brief, pp. 10-11)

Therefore we reject Martin's argument, quoted earlier, that "where issues may be raised which have not previously been adjudicated in any adversarial process, the Department should be held to a standard of reasonableness in making decisions as to whether previously approved permits can be amended." The proper standard, consistent with the public policy favoring finality, must put a heavy burden on the party who seeks to modify his previously unappealed-from, now final permit. For example, Martin's burden might be to meet the standard for modifying the terms of a consent decree, which has been held to require a showing of "fraud, accident or mistake." Pa. Human Relations Commission v. Graybill, 482 Pa. 143, 393 A.2d 420 (1978). Because a permittee accepts and uses a permit wholly voluntarily, without any legal compulsion, a permittee who seeks to modify his previously unappealed-from permit appears to have much the same status in equity as a party who seeks to modify

a previously voluntarily entered-into consent decree.

In writing this last paragraph, we do not wish to imply that the only grounds for modifying a now final permit should be fraud, accident or mistake; we need not, and do not, rule on that issue now. However, we do wish to stress that an appellant permittee must not expect he will be allowed to modify his now final permit absent a showing of truly exceptional circumstances, warranting a collateral attack on that permit he previously had freely accepted. We see nothing exceptional in the instant circumstances. According to Martin's pre-hearing memorandum, Martin's reason for presently seeking modification of his permits is not more than:

> 9. Martin desires to construct terraces on his land as part of his reclamation requirements. Terraces will make the land more useful and valuable to him and more suited to the intended post-mining land use: farming and grazing.

Martin offers no explanation of his failure, in his original permit applications, to ask for—and to appeal if DER denied—terrace backfill; when Martin applied for and received his permits, requests to terrace backfill were allowed under the Act, former 52 P.S. §1396.4(a)(2)G. Martin makes no allegations of fraud, accident, mistake or other exceptional circumstances warranting a collateral attack on his permits.

Wherefore, DER's motion for summary judgment is granted. In so ruling we obviously have not examined (because we deem them irrelevant in view of Martin's just enunciated burden) the merits of DER's originally enunciated reasons for denying terrace backfill, stated in the appealed-from letter of May 23, 1983 quoted at the outset of this Opinion.

O R D E R

AND NOW, this 20th day of August, 1984, for reasons explained in the accompanying Opinion, it is ordered that:

1. Our Order of June 16, 1983, consolidating under the single docket number 83-120-G the appeals originally docketed at 83-120-G and 83-121-G, is vacated.

2. The appeal originally docketed at 83-120-G is dismissed.

3. Documents pertaining to the appeal originally docketed at 83-121-G henceforth shall be captioned with this original 83-121-G docket number.

ENVIRONMENTAL HEARING BOARD

ANTHONY J. MAZULLO, JR
Member

EDWARD GERJUOY
Member

DATED: August 20, 1984

cc: Bureau of Litigation
Zelda Curtiss, Esquire, for DER
Eugene E. Dice, Esquire, of Dice and Childe, Harrisburg, for appellant

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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ARMOND WAZELLE :

:

: Docket No. 83-063-G

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and BOROUGH OF PUNXSUTAWNEY, Intervenor

OPINION AND ORDER

Syllabus

The Board ruled on three issues of law delineating the matters to be addressed at the hearing in the above captioned appeal. It held that evidence concerning discussion between Appellant and DER regarding the consequences of his alleged violations would not be considered in light of the fact that an order directed to Appellant two years prior to DER's revocation of his permit notified Appellant that failure to comply with the Act could result in penalties. Secondly, the Board held that principles of finality preclude Appellant's challenge to either the content or the validity of prior DER orders where Appellant failed to appeal the same. Lastly, the Board found that DER is required to consider the economic effects of its actions when the Act under which the action is taken gives DER discretionary authority to act.

OPINION

On February 10, 1984, this Board ordered the parties in this appeal to submit memoranda addressing three legal issues relevant to the proceeding. Having received the requested memoranda, the Board now rules upon the parties' legal contentions.

DER and Wazelle were requested to address the following issue:

> 1. Whether or not the Board need consider any evidence about discussions, oral communications, etc. between DER and Wazelle concerning Wazelle's alleged violations, assuming arguendo that it has been established DER had mailed Wazelle a notice of such violations.

Wazelle maintains that such evidence is germane to the issue of the reasonableness of DER's revocation of Wazelle's Solid Waste Permit. The argument appears to be that discussions between Wazelle and DER concerning the alleged violations would be relevant to a determination of the reasonableness of DER's action in revoking the permit. In support of this argument, Wazelle cites Judge Kramer's concurrence in Sunbeam Coal Corp. v. DER, 8 Pa. Cmwlth. 622, 304 A.2d 169 (1973). Judge Kramer's comments are directed at a hypothetical situation which is not presented here, namely a DER refusal to issue a license based upon previous notices of violation. The concerns expressed in his opinion focus upon the fact that notices of violation are not appealable actions. Sunbeam, 304 A.2d at 171. The inability to challenge the DER findings contained in such notices might give rise to constitutional concerns if DER were to base its subsequent refusal to grant a license upon those findings. The operator would be deprived of his business for at least a few days without first having the opportunity to challenge the factual basis for the DER action. This, the judge felt, might amount to a taking of property without due process of law.

We need not comment upon the correctness of these observations; the circumstances of this case are clearly distinguishable from those which Judge Kramer describes. DER's revocation of Wazelle's Solid Waste Permit was based upon prior findings of violations. These findings were contained in two orders, dated December 3, 1980 and January 18, 1983, to which reference is made in the letter which forms the subject matter of the instant appeal. Both orders contained the statement that the DER action could be appealed to this Baord. Thus, DER's revocation of Wazelle's permit does not rest upon factual findings which Wazelle has not had an opportunity to challenge.

Wazelle argues that "mere receipt of alleged violations is not sufficient to revoke a permit, unless the consequences of such violations are clearly made known to any such party affected" (emphasis in original). Appellant's Memorandum of Law, p. 2. First of all, we do not believe that Sunbeam supports this contention. We note, also, that nothing in the Solid Waste Management Act, 35 P.S. §6018.101 et seq. imposes any such obligation upon DER.

Secondly, we observe that the short answer to this contention is contained in Paragraph I of the Order of December 3, 1980 which reads as follows:

> 2. Failure to comply with any term or provision of this Order shall subject Wazelle to all penalties and remedies set forth in the Solid Waste Act for violations of an order issued pursuant to said Act, including but not limited to, proceedings for injunctive relief, the assessment of civil penalties, and summary or misdemeanor criminal proceedings.

Thus, Wazelle received notice from DER of the possible consequences of his continued failure to comply with the terms of the Solid Waste Management Act, and the requirements imposed on him by DER pursuant thereto, well over two years prior to the date upon which DER revoked his permit. Wazelle is deemed to understand that, under the Act, DER may revoke a permit if it finds that the permittee has failed to comply with any provision of the Act. 35 P.S. §6018.503(c). In light of the

foregoing we find it unnecessary to consider evidence of discussions between Wazelle and DER relating to the consequences of his failure to comply.

The second issue which DER and Wazelle were requested to address was phrased as follows:

> 2. Whether findings set forth in unappealed-from orders to Wazelle are established by res judicata principles, and therefore cannot be disputed in these hearings.

As DER points out, concepts of finality and res judicata are generally considered interchangeable in the administrative law context. Finality of DER orders is governed by 71 P.S. §510-21(c), which reads in pertinent part as follows:

> Any action of the Department of Environmental Resources may be taken initially without regard to the Administrative Agency Law, but no such action of the department adversely affecting any person shall be final as to such person until such person has had the opportunity to appeal such action to the Environmental Hearing Board.

As noted above, the prior orders of DER directed to Wazelle expressly informed him of his right to appeal under this section. His failure to take an appeal of the orders rendered them "final" and foreclosed any attack upon their content or validity in this subsequent proceeding. Commonwealth v. Derry Township, 466 Pa. 31, 351 A.2d 606 (1976); Commonwealth, DER v. Williams, 57 Pa. Cmwlth. 8, 425 A.2d 871 (1981).

This Board recently had occasion to address issue 2 formulated supra in Municipality of Bethel Park v. Commonwealth, DER, EHB Docket No. 83-067-G (Opinion and Order dated August 8, 1984). There, the appellants sought to preserve the opportunity to challenge the findings set forth in prior DER orders. Having found that the orders had become final due to appellant's failure to timely appeal the same, the Board stated:

> This finality would have meant that--in any future action by DER to enforce those orders or to penalize the appellants for not complying with those orders--DER's discretion to issue the orders, under the relevant facts as DER found them, could not be challenged.

The Board also noted that the findings of fact themselves likewise would not be subject to subsequent challenge.

Wazelle, though given the opportunity, has not convinced this Board that its holding in this regard is contrary to Pennsylvania law. We do not find Bethlehem Steel v. DER, 37 Pa. Cmwlth. 479, 390 A.2d 1383 (1978), to which Wazelle directs us, applicable in the present context. There is no indication that the factual determinations which give rise to the legal duty upon which the DER orders are based have changed in any relevant aspect. Therefore, the Bethlehem court's discussion of res judicata principles does not move us to qualify our preceding discussion of finality. We hold that Wazelle will not be permitted to challenge the findings set forth in the DER orders of December 3, 1980 and January 18, 1983.

The Board requested a memorandum on the third issue from the Borough of Punxsutawney and gave DER the opportunity to respond to the Borough's arguments if it so desired. DER apparently has chosen to forego this opportunity. The issue was phrased as follows:

> 3. Whether, when deciding to revoke Wazelle's permit, DER was required to take into account the effects of such revocation on the Borough and its residents.

We have concluded that, under the circumstances of this case, DER must consider the reasonably foreseeable direct economic effects of its action.

Commonwealth Court recently has addressed this issue in Einsig v. Pennsylvania Mines Corporation, 69 Pa. Cmwlth. 558, 452 A.2d 558, 567 (1982):

> (W)here the language of the Act is mandatory, DER must enforce the mandatory provisions regardless of the economic consequences. If, however, the Act gives DER discretionary authority to act, i.e., setting up timetables, levying fines, granting waivers, etc., we believe DER must consider the economic impact of its actions. [quoting Rochez Bros., Inc. v. Commonwealth, DER, 18 Pa. Cmwlth. 137, 334 A.2d 790, 797, n.8 (1975)].

In light of this decision, we must initially determine whether the Solid Waste Management Act grants DER discretionary authority to act. Counsel for the Borough has pointed out that this issue apparently was resolved in Susquehanna County v. Commonwealth, DER, 58 Pa. Cmwlth. 381, 427 A.2d 1266 (1981), rev'd on other grounds, 500 Pa. 512, 458 A.2d 929 (1983). In Susquehanna, the Commonwealth Court affirmed a portion of the underlying adjudication by this Board which had held that a county does not have standing to challenge a DER order, in part because "the method chosen by DER to enforce its Solid Waste Management Act is discretionary . . ." Thus, it appears that, since it has been determined that DER's administration of the Act is discretionary, DER was required to consider the economic effects of its action in revoking Wazelle's permit.

This conclusion also is consistent with the meaning of standing to appeal, as interpreted under the standard of William Penn Parking Garage v. City of Pittsburgh, 464 Pa. 168, 346 A.2d 269 (1975). The Supreme Court's decision in Susquehanna, supra, held that a county did indeed have standing to appeal. Under William Penn, economic injury is specifically mentioned as an acceptable basis of standing.

We note, however, that Commonwealth Court has been careful to observe that DER is not "required to make a detailed economic impact study before issuing an order . . . DER must consider such adverse economic impact as can reasonably

be foreseen or determined at the time it issues its order." East Pennsboro Township v. Commonwealth, DER, 18 Pa. Cmwlth. 58, 334 A.2d 798, 803 (1975).

In the instant case, where the Borough has intervened specifically for the purpose of demonstrating the adverse economic effects of DER's action, DER should consider those effects which are direct and reasonably foreseeable. The Borough has alleged that the closing of Wazelle's operation will result in increased collection and disposal costs for the residents of the Borough. To the extent that such increased costs are the immediate and direct result of DER's action they should be considered. However, indirect effects, such as a possible long-term increase in refuse disposal costs resulting from decreased competition within the waste disposal industry, are too remote to be considered relevant to DER's decision-making process. Likewise, the general detriment to the "health, safety and welfare of the general public" which the Borough seeks to prove (Borough pre-hearing memorandum, p. 2) is harm far too vague and speculative.

O R D E R

WHEREFORE, this 21st day of August, 1984, it is ordered that:

1. Evidence relating to communications between Wazelle and DER prior to the permit revocation will not be admitted for the purpose of demonstrating that Wazelle received insufficient notice of the consequences of his alleged violations.

2. Neither the content nor the validity of the orders of December 3, 1980 and January 18, 1983 may be challenged at the hearing in this matter.

3. The Borough may present evidence demonstrating the direct, reasonably foreseeable effect upon refuse collection and disposal costs for the residents of the Borough. Indirect or remote effects of DER's action are deemed irrelevant; accordingly, evidence will not be received regarding the same.

ENVIRONMENTAL HEARING BOARD

Edward Gerjuoy

EDWARD GERJUOY
Member

DATED: August 21, 1984

cc: Bureau of Litigation
Patti J. Saunders, Esquire, for DER
R. Edward Ferraro, Esquire, Ferraro & Young, Punxsutawney, for Appellant
A. Ted Hudock, Esquire, Borough of Punxsutawney Solicitor, for Intervenor
Stephen L. Johnson, Manager, Borough of Punsxutawney

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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JOSEPH GEORGE :

:

: Docket No. 84-223-G

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
AND CONSOLIDATION COAL COMPANY, Permittee

OPINION AND ORDER

Synopsis

Permittee has moved to dismiss this appeal on the ground that Appellant has failed to allege sufficient facts to confer standing to challenge DER's permit issuance under the Bituminous Mine Subsidence and Land Conservation Act, 52 P.S. §1406.1 et seq. The motion is denied and Appellant is granted leave to amend its notice of appeal to contain the lacking factual allegations. 25 Pa. Code §21.51 is to be liberally construed; amendment of the notice of appeal is appropriate where it will further the just, speedy and inexpensive determination of the issues presented.

OPINION

On July 5, 1984 appellant Joseph George filed a notice of appeal with this Board. Attached thereto were copies of communications from DER personnel concerning the issuance of a Coal Mining Activity Permit and a Subsidence Control

Permit to Consolidation Coal Company. The permittee, Consolidation, has moved this Board to dismiss the appeal on the ground that the notice of appeal failed to contain certain items of information.

25 Pa. Code §§21.51(d) and (e) require only that the notice of appeal be accompanied by a copy of written notice of the DER action (if appellant has received the same) and that the notice of appeal set forth, in separate numbered paragraphs, the appellant's specific objections to the DER action. These requirements have been met in the instant case. As noted, appellant attached to the notice of appeal a copy of the relevant written notification from DER. The notice of appeal also complained of DER's "non-consideration" of the effects of Consolidation's proposed mining operation upon a surface stream, waterfall, and a coal seam overlying that which Consolidation intends to mine.

Consolidation also argues that appellant's appeal should be dismissed because he has failed to allege any ownership or leasehold interest in the stream, waterfall or overlying coal seam; this property interest, Consolidation maintains, is necessary to confer standing upon appellant under the provisions of the Bituminous Mine Subsidence and Land Conservation Act, 52 P.S. §1406.1 et seq. ("Subsidence Act"). In John F. Culp, III v. Commonwealth, DER (EHB Docket No. 83-194-G, Opinion and Order issued January 10, 1984), a case very similar to the present one, this Board held that 25 Pa. Code §21.51 is to be liberally construed to permit amendment of the notice of appeal where this will further the just, speedy and inexpensive determination of the issues presented. Consolidation has not alleged that the failure to allege this ownership interest has in any way prejudiced the preparation of its case. Accordingly, appellant is granted leave to amend its notice of appeal to state facts sufficient to confer standing to challenge the DER action.

O R D E R

WHEREFORE, this 29th day of August, 1984, Appellant is granted thirty (30) days from the date of this Order within which to amend its notice of appeal so as to contain allegations sufficient to confer standing to challenge the DER action at issue.

ENVIRONMENTAL HEARING BOARD

Edward Gerjuoy

EDWARD GERJUOY
Member

DATED: August 29, 1984

cc: Bureau of Litigation
Marc A. Roda, Esquire, for DER
William M. Baily, Esquire, of Thompson & Baily, Waynesburg, for Appellant
Daniel E. Rogers, Esquire, of Consolidation Coal Company, Pittsburgh
for Permittee

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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ALLEGHENY COUNTY SANITARY AUTHORITY :

:

Docket No. 83-075-G

:

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER
SUR DER MOTION TO DISMISS

Synopsis

Appeal was taken from DER's refusal to consider revised applications for grants under Act 339, 35 P.S. §701 et seq. The applications concerned facilities whose grant eligibility had been in dispute. DER's Motion To Dismiss is rejected. Act 339 requires that applications be filed before January 31 of the year following that for which the grant is sought; this alone does not preclude DER consideration of a revised application, particularly where DER in the past has accepted revised applications after the January 31 deadline. In addition, the failure of appellant to appeal at the time it received payment representing part of the requested grant will not be adjudged a failure to timely appeal within the meaning of 25 Pa. Code §21.52(a), in the absence of a clear statement by DER that the issuance of the check was a final action or a showing that appellant knew, at the time it received the payment, that the payment represented DER's final refusal of grants for the disputed facilities.

OPINION

Alcosan has timely appealed a DER letter to Alcosan, rejecting Alcosan's revised applications under Act 339 [35 P.S. §701 et seq.] for grants to defray certain sewage treatment plant costs covering the years 1977-1980 inclusive. This letter, dated March 16, 1983, reads as follows:

> This is in response to the Authority's letter of May 5, 1982 submitting revised Act 339 applications for the years 1977, 1978, 1979 and 1980.
>
> The revised Act 339 applications submitted on May 5, 1982 are not timely filed, and one copy of each is being returned for your files. As you are aware, Act 339 grant applications must, by virtue of Section 3 of Act 339, be filed by January 31 of the year following the year for which payment is sought. Furthermore, Act 339 payments were already made by the Commonwealth to ALCOSAN for the years 1977 through 1980 as follows:

Construction Year	Date Application Submitted	Amount of Payment	Date of Payment
1977	1/26/78	$1,898,873.31	2/ 7/79
1978	1/25/79	$1,915,357.22	3/27/80
1979	1/21/80	$1,923,671.22	12/19/80
1980	1/20/81	$1,925,560.51	8/20/81

> Unlike the ALCOSAN 1976 grant, you did not appeal any of these subsequent awards to the Environmental Hearing Board. Since these applications were not timely filed and are being returned, we haven't examined them in detail. However, our cursory review reveals that the revised applications seek reimbursement for facilities that are ineligible for subsidy under §§103.25 and 103.27. Moreover, as you know, the Department has previously determined these facilities as ineligible and, therefore, §103.28 precludes any grant award for these facilities.

Under Act 339, the yearly grants are to equal 2 percent of the eligible costs.

DER has moved to dismiss Alcosan's appeal, on the timeliness grounds stated in the above letter. In essence, DER argues:

> 1. The revised applications for the years 1977-80, filed May 5, 1982, are untimely because under Act 339, 35 P.S. §703, applications for any year must be filed no later than January 31 of the succeeding year.

2. The instant appeal cannot be regarded as a timely appeal of DER's refusal to make all grant payments Alcosan requested because, under the Board's rules [25 Pa. Code §21.52(a)], DER's refusal to defray eligible costs for 1977 had to be appealed within 30 days after DER made its 1977 payment [on February 7, 1979], and similarly for the years 1978-80.

As the above arguments indicate, DER's motion--though styled as a motion to dismiss--actually is based on specific factual allegations. Therefore we shall treat the motion as if for summary judgment; we find no difficulty in so doing, because the facts on which this Opinion rests are not in dispute.

1. Timeliness Under Act 339 and 25 Pa. Code Chapter 103

Recently this Board has ruled that under Act 339, and under 25 Pa. Code §103.23 on which DER also relies, an application for payment of any year's sewage treatment plant costs must be filed by January 31 of the succeeding year. Sanitary Authority of the City of Duquesne v. DER, Docket No. 83-055-G (Opinion and Order, April 25, 1984). In particular we held in Duquesne that DER's refusal to accept an application filed after the January 31 deadline was not an abuse of discretion. Duquesne left open the question whether--under the Act and the regulations—DER's acceptance of an application filed after the January 31 deadline would have been an abuse of discretion.

As Alcosan points out, however, the instant appeal pertains to DER's refusal to accept Alcosan's revised Act 339 applications. Alcosan's original applications for Act 339 grants covering the years 1977-80 were timely filed under the Act, on the respective dates: January 25, 1978 for the year 1977, January 25, 1979 for the year 1978, January 21, 1980 for the year 1979, and January 20, 1981 for the year 1980. The pertinent language of the Act and the regulations, in 35 P.S. §703 and 25 Pa. Code §103.23, uses the unadorned term "application," without any indication whether this language is intended to apply to revisions of a previously timely filed application. Duquesne dealt only with an original application, and

did not speak to this issue of the deadline for revisions of originally timely filed applications.

Under these just-described circumstances, DER's construction of the statute's and the regulation's deadlines for revised applications would be entitled to great weight. Norfolk and Western Railway Co. v. Pa. P.U.C., 489 Pa. 109, 413 A.2d 1047(1980); Lisa H. v. State Bd. of Education, 447 A.2d 669 (Pa. Cmwlth. 1982). In other words, if DER really had adopted the strict construction that 35 P.S. §703 and 25 Pa. Code §103.23 imply revised applications also must be filed within the January 31 deadline, we might have been inclined to adopt the same construction. But DER's own actions in connection with other (than for 1977-80) Alcosan Act 339 applications demonstrate that in fact DER has not adopted the aforesaid strict construction of 35 P.S. §703 and 25 Pa. Code §103.23. On March 16, 1977 DER wrote Alcosan a letter concerning Alcosan's 1976 Act 339 application. In addition to detailing certain costs DER refused to allow, DER stated:

> A preliminary review has been made of your 1976 application for a State subsidy under Act 339...
>
> Prompt submission of a revised Section E reflecting the deletion of the ineligible costs and the related engineering costs will enable us to complete the processing of your application.

Alcosan did not file the requested revision until October 28, 1977; a further revision was filed as late as April 7, 1978. Yet DER accepted as timely filed and considered both these revisions before finally making the 1976 Act 339 subsidy payment to Alcosan, on April 14, 1978. Similarly, on March 16, 1983, DER wrote Alcosan as follows:

> This is in response to your letters of April 19, 1982, May 5, 1982, and January 22, 1983 regarding ALCOSAN's Act 339 grant applications for 1981.

> In the May 5, 1982 letter, ALCOSAN indicated it was withdrawing the revised 1981 application submitted with its letter of April 19, 1982. Accordingly, the Department is returning one copy of it and will disregard the April 19 application submission...
>
> In order to complete the processing of your application, detailed cost breakdowns are needed for...
>
> Please submit this additional information as soon as possible so that we can complete the processing of your construction year 1981 application.

This March 16, 1983 letter was written well after the January 22, 1982 effective date of 25 Pa. Code §103.23. Furthermore, DER's Answers to Alcosan's First Set of Interrogatories filed by DER on July 18, 1983, include:

> 2.5 State the Department's policy with respect to the handling and processing of revised Act 339 grant applications submitted after the deadline for filing grant applications for a particular year.
>
> ANSWER:
>
> The Department will accept such a revised grant application for handling and processing if (1) the initial application was submitted timely, in accordance with 25 Pa. Code §103.23(a) and 35 P.S. §703 and (2) the initial application is still pending before the Department when such revised application is received by the Department.

We conclude that neither DER's post handling of Alcosan Act 339 applications, nor its presently stated policy, are consistent with any claim that DER has adopted a strict construction of 35 P.S. §703 and 25 Pa. Code §103.23, thereby making untimely per se Alcosan's revised applications for the years 1977-80, filed May 5, 1982. It follows that DER's rejection of these revised 1977-80 applications as untimely, if within DER's discretion, must be based on the specific facts of this appeal, not on an automatic reference to the January 31 deadline of Act 339 and 25 Pa. Code §103.23.

At this juncture, however, we note another argument of DER's with which we thoroughly agree, namely that a "revised" application filed after the January 31 deadline should not be a vehicle for rehashing disputes concerning sewage treatment facilities whose eligibility (for Act 339 grants) already had been the subject of final DER decisions. DER's rejection of such "revised" applications would not be an abuse of discretion. Therefore our consideration of DER's argument 1 supra cannot be divorced from our consideration of DER's argument 2 supra, to which we now turn.

2. Timeliness Under 25 Pa. Code §21.52(a)

In January of 1977, Alcosan submitted its Act 339 application for 1976. In this application Alcosan "included," as part of its subsidy base, certain segments of its facilities denoted as Chartiers and Turtle Creek interceptors, downshafts, diversion structures and river crossings (the "disputed facilities"); The word "included" has been put in quotes because actually the reference to the disputed facilities in the 1977 application was rather elliptical, as explained infra. On March 16, 1977, DER wrote Alcosan the letter of that date quoted supra, directing Alcosan to file a revised application deleting the disputed facilities, which DER had found to be ineligible for Act 339 subsidies. Alcosan, on October 28, 1977, first filed a revised application which deleted only some of the disputed facilities, but eventually, on April 7, 1978, Alcosan did file a revised application omitting all the disputed items. DER made its 1976 Act 339 payment to Alcosan on April 14, 1978, after writing Alcosan on March 31, 1978 that it would not process grant payments on the disputed facilities.

Alcosan timely appealed to this Board DER's March 31, 1978 refusal to include the disputed facilities in Alcosan's 1976 Act 339 subsidy base. This appeal,

docketed as EHB No. 78-053-H, was not adjudicated until March 10, 1982. On that date the Board ruled that the disputed facilities are "integral" and/or "necessary" parts of Alcosan's sewage treatment facilities, eligible for subsidies under the language of Act 339, notably 35 P.S. §702. Allegheny County Sanitary Authority v. DER, 1982 EHB 29.

In the meantime (between January 1977 and the Board's March 10, 1982 adjudication) Alcosan had timely filed its original applications for Act 339 grants covering the years 1977-80, as explained above (Alcosan's Act 339 subsidy for 1981, whose original application was filed in January 1982, is the subject of a separate appeal, docketed at EHB No. 83-074-G). The application forms used in 1977-80 contain only five brief sections A-E, on two printed pages. Sections A and C identify the applicant and ask for an affidavit that the form has been truthfully completed. Section B reads, in substantial totality:

CHECK APPROPRIATE BLOCK IF APPLICATION IS

☐ 1. For same facilities as last year, complete sections A, B and C

☐ 2. For additions and modifications of facilities which were previously eligible, complete all sections.

☐ 3. New construction, additions or modifications. Complete all sections.

☐ 4. Deletions from last year's application. Complete sections A, B, C and Column 2, section D.

Section D lists items such as "interceptor," dryer," "aeration tanks," etc.; next to each item are two blocks for possible checking, arranged in two columns. The instructions to section D state only:

CHECK FACILITIES FOR WHICH PAYMENT IS BEING REQUESTED FOR THE FIRST TIME IN COLUMN 1

CHECK FACILITIES WHICH WERE NOT IN USE DURING THE YEAR IN COLUMN 2.

Section E lists items such as "plant site," "treatment plant" and "main interceptors," with spaces for entering the "costs" of these items. The instructions to section E state:

> LIST THE ACTUAL EXPENDITURES MADE BY THE APPLICANT TOWARD THE ACQUISITION AND/OR CONSTRUCTION OF THE SEWERAGE FACILITIES. LIST ONLY COSTS FOR WHICH ITEMS 2 AND 3 WERE CHECKED UNDER SECTION B.

None of the original applications for the years 1977-80 make explicit reference to the disputed facilities. Section E of the original 1977 application does list items whose eligible costs total about $972,000, but these items obviously are not the disputed facilities, whose costs totaled about $19 million according to Alcosan's original 1976 application. The completed sections E of each of the original 1978-80 applications are much like the completed section E of the original 1977 application. Immediately following section E of the original 1977 application, Alcosan typed:

> The above costs are to be added to the approved costs of 1976 in the amount of $105,830,234.98 for a grand total of $106,823,171.79.

A similar typed statement follows section E of the original 1978 application, except that this 1978 application now speaks of adding to "the approved costs of 1977 in the amount of $94,943,665.62, for a grand total of $95,843,670.02." The original applications for 1979 and 1980 also have similar statements to those just quoted, with grand totals approximately at the same $95 million level as appeared in the statement typed on the original 1978 application.

Alcosan has explained how it arrived at the figures in these statements typed onto its original 1977-80 applications; DER does not dispute this explanation. Each year Alcosan customarily adds its newly requested costs to those costs found

to be eligible in preceding years. Thus, following section E of its original 1976 application, Alcosan typed:

> The above costs are to be added to the approved costs of 1975 in the amount of $93,666,095.00 for a grand total of $115,415,248.72.

The large difference between $115 million and $93 million mainly reflected Alcosan's 1976 attempt to have the disputed items declared eligible for subsidy, after many years of accepting a 1960 DER decision those facilities were ineligible. In January 1978, when Alcosan originally filed its 1977 application, Alcosan's aforementioned initially revised 1976 application, filed October 28, 1977, was still pending (and remained pending until March 31, 1978 when DER wrote the letter refusing to process 1976 subsidies for the disputed facilities, which letter was the subject of the Alcosan appeal docketed at 78-053-H). In its October 28, 1977 revision of its 1976 application, Alcosan had removed from its original 1976 grant request only about $8 million of the entire $19 million the disputed facilities had cost. Therefore, in January 1978 Alcosan still was assuming (or hoping) its 1976 eligible costs would be some $11 million larger than the 1975 approved costs. On August 18, 1978 Alcosan revised its 1977 application, deleting all disputed items from the 1977 grand total. Alcosan's 1978-80 original applications, all filed after August 18, 1978, followed the practice--set by Alcosan's August 18, 1978 revision of its 1977 application--of no longer including the disputed items in the grand total. Thus the typed statements on the original 1978-80 applications had grand totals near the 1975 "approved costs."

The grand totals on the final applications which have just been described--namely the August 19, 1978 revision of the 1977 application and the original 1978-80 applications--were the basis for DER's grant payments to Alcosan

for each of the years 1977-80. The checks for each of these years were mailed to Alcosan without any specific references to the status of the disputed facilities; Alcosan accepted the checks, without protests or appeals to this Board. On May 5, 1982, however, after the Board handed down its aforementioned March 10, 1982 adjudication at EHB No. 78-053-H, Alcosan filed revised applications for each of the years 1977-80, requesting grants for the disputed facilities the Board had declared eligible for subsidy.

DER's denial of these revised applications is the subject of this appeal. DER argues that because Alcosan did not contest--via appeals to this Board--the grant payments DER made for any of the years 1977-80, these payment amounts have become final, and cannot now be challenged long after the 30-day appeal period of 25 Pa. Code §21.52(a) has expired. Alcosan counters that there was nothing to indicate that any one of the subsidy checks for 1977-80 was to be interpreted as an unequivocal final refusal--constituting an appealable action under 25 Pa. Code §21.2 and/or 2 Pa. C.S. §101-- of Alcosan's requested subsidy for the disputed facilities. Therefore, Alcosan argues, it reasonably interpreted the payments it received as an indication that DER saw no reason to withhold the subsidies for Alcosan's incontestably eligible facilities while awaiting this Board's decision on the eligibility of the disputed facilities. Alcosan additionally argues that it was unreasonable for Alcosan to suppose that DER would be making final determinations of the eligibility of the disputed facilities when that eligibility was the subject of an as yet undecided appeal before this Board.

The logic underlying the just-stated finality argument of DER's is somewhat obscure. Initially DER seems to be contending that the amounts of the subsidy checks Alcosan received for the years 1977-80 were noteworthy facts which sufficed to make those checks appealable refusals of Alcosan's requested subsidies for the disputed facilities. We reject this contention. DER has offered no

authority for the proposition that a payment check, standing alone, impliedly is a final rejection of requests not covered by the check. In Lebanon Valley Council of Governments v. DER, EHB Docket No. 82-218-H (Opinion and Order, January 24, 1983), the Board ruled that a reimbursement check for incurred sewage facilities expenses was not a "final" action with respect to reimbursements not included in the check; in Lebanon the check even was accompanied by an explanation of the reimbursement. We also remark, as the Board remarked in Lebanon, that DER--though now insisting the subsidy payment checks it sent Alcosan were appealable actions--at the time did not enclose with those checks the written notice of appealability DER customarily mails to persons who are the subject of actions DER deems appealable. In sum, unless DER can point to additional information showing that when the checks were received Alcosan knew or must have known DER was finally refusing the 1977-80 subsidies for the disputed facilities, Alcosan's failure to appeal the checks did not make final any actions by DER concerning those disputed facilities requests.

DER apparently is contending that it can make the aforementioned showing. Obviously this contention, which is disputed by Alcosan's argument that it reasonably believed DER was postponing final decisions on the disputed facilities' eligibility for subsidy until the Board ruled at No. 78-053-H, cannot be the basis for summary judgment in favor of DER. We will point out, however, that in our view this contention of DER's is not yet demonstrated by the facts recounted supra. DER appears to be claiming that Alcosan filed its August 18, 1978 revision of its 1977 application [wherein the disputed facilities were wholly deleted from the grand total] because DER had made quite clear its unwillingness to make a subsidy payment for the disputed facilities. Similarly, according to DER, in 1978-80 Alcosan did not even try to include the disputed facilities in its original

applications because Alcosan knew there was no possibility DER would approve subsidies for them. On DER's view, its line of reasoning in this regard is not vitiated by Alcosan's claim that Alcosan deleted the disputed facilities from its original 1977 application at DER's request; if so, DER argues, Alcosan shou have appealed that request. DER points out that Alcosan followed precisely thi procedure in its original appeal [Docketed at 78-053-H] of DER's refusal to pay the 1976 subsidy for the disputed facilities.

We do not agree with DER's aforesaid line of reasoning. The crucial question remains: In the absence of an unequivocal statement of final refusal from DER, did Alcosan reasonably believe that DER would postpone a final determ ation on the eligibility of the disputed facilities for 1977-80 subsidies until this Board had ruled on Alcosan's appeal of DER's refusal to pay the 1976 subsi Under the facts we have before us, this belief of Alcosan's has not been shown to be unreasonable.

Moreover, Alcosan's actions--particularly its preparation of the original applications for 1977-80, and its revision of the 1977 application--- are quite consistent with such belief on Alcosan's part. The application forms described supra, seem very unsuited to a request for grant support of facilitie whose eligibility is uncertain. Section B only has blocks for facilities which were previously supported, or for new construction, additions or modifications. Section D only has blocks for which support is being requested for the first ti Section E has space only for the costs of facilities already listed in section Thus when Alcosan filed its original 1977 application, there was no obvious pla to request support of the disputed facilities: The disputed facilities were neither the same facilities supported the previous year, nor new construction, facilities whose support was being requested for the first time. Under these

circumstances, Alcosan took a reasonable course of appending a typed statement explaining that it wanted the costs listed in the original 1977 application section E to be added to the 1976 costs Alcosan still assumed (or hoped) DER would declare eligible. Alcosan's revision of its grand total for 1977 does not permit an inference beyond Alcosan's recognition that for the time being DER was refusing to process applications whose proposed grand total costs included any of the disputed facilities. The same considerations pertain to Alcosan's original 1978-80 applications.

However, DER does have an additional legal argument relative to its finality contention. DER points out that after the Board rendered its March 10, 1982 adjudication at 78-053-H, Alcosan petitioned for reconsideration, seeking to have the adjudication explicitly extend the eligibility determination to the 1977-80 applications which are the subject of the instant appeal. Board Member Dennis Harnish, who had written the adjudication, refused to grant reconsideration, on the grounds that DER's actions concerning the 1977-80 applications were not before the Board. As Mr. Harnish correctly stated in an April 13, 1982 letter to Alcosan's counsel, "This Board cannot issue advisory opinions." Therefore, the Board does not see that Mr. Harnish's denial of Alcosan's petition for reconsideration of the adjudication at 78-053-H has any binding implications for our present Opinion.

3. Conclusion

We conclude that for the purposes of this summary judgment motion DER's argument 2--that the instant appeal is untimely under the Board's rules--must be rejected. Correspondingly, as explained under section 1 of this Opinion, for the purposes of this summary judgment motion we must reject DER's argument 1--that the revised applications for the years 1977-80, filed May 5, 1982, are untimely under Act 339.

We further conclude that when the merits of this appeal are adjudicated we will have to hold that the instant appeal is timely, under the Board's rules and Act 339, unless DER can introduce evidence not yet on the record showing that--at or before the times Alcosan received its 1977-80 subsidy payments--Alcosan knew or must have known DER was finally refusing subsidy payments for the disputed facilities.

These holdings of ours do not limit the possibility that DER may be able to demonstrate justifications other than untimeliness for refusing the 1977-80 subsidies for the disputed facilities, such as waiver by Alcosan, or actions by Alcosan justifying estoppel of its claim for those subsidies. Such possibilities are more thoroughly discussed in a companion Opinion and Order in this matter, concerning Alcosan's motion for summary judgment.

O R D E R

WHEREFORE, this 29th day of August, 1984, DER's motion to dismiss is rejected.

ENVIRONMENTAL HEARING BOARD

EDWARD GERJUOY
Member

DATED: August 29, 1984

cc: Bureau of Litigation
Howard J. Wein, Esquire, for DER
Ward T. Kelsey, Esquire, for DER
Robert P. Casey, Esquire, of Dilworth Paxson Kalish & Kauffman, Scranton, for Appellant
John L. Heaton, Esquire, of Dilworth Paxson Kalish & Kauffman, Harrisburg, for Appellant

COMMONWEALTH OF PENNSYLVANIA

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BOROUGH OF BELLEFONTE

Docket No. 84-158-M

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION
and
ORDER

The Borough of Bellefonte (Appellant) filed with the Board, on May 21, 1984, an appeal from the issuance of a landfill permit (No. 100200) to it from DER. The permit was received by Appellant on April 18, 1984.

On June 11, 1984, Appellant filed an appeal contesting the imposition of certain conditions upon the landfill permit (No. 100200) issued to it by DER and received by Appellant, as stated hereinbefore, on April 18, 1984.

The Commonwealth filed a Motion to Dismiss on the grounds that both appeals, though consolidated for hearing purposes by the Board, were not filed within the prescribed time period following receipt of the permit.

Appellant filed an Answer To The Commonwealth's Motion To Dismiss, and the matter is ripe for decision by the Board.

The Board's Rules and Regulations provide that the Board has no jurisdiction over a matter if an appeal is not filed with the Board within

thirty (30) days of receipt of written notice of final action by DER. §25 Pa. Code §21.52(a).

Filing with the Board means the receipt by the Board of the document required to be filed, in this case, the notice of appeal.

In both of the appeals consolidated at EHB Docket No. 84-158-M, the notices of appeal were not filed with the Board within thirty (30) days of the receipt of the landfill permit by the Appellant. In such instances, the Board lacks jurisdiction. Joseph Bostosky Coal Company v. DER, 26 Pa. Commonwealth Ct. 478, 364 A. 2d 761 (1976); George and Barbara Capwell v. DER, EHB Docket No. 83-019-M (March 4, 1983).

ORDER

AND NOW, this 4th day of September, 1984, upon consideration of the Commonwealth's Motion To Dismiss, and Appellant's response thereto, the appeals of Appellant, Borough of Bellefonte, at EHB Docket Numbers 84-158-M and 84-191-M (consolidated at 84-158-M) are hereby dismissed.

ENVIRONMENTAL HEARING BOARD

ANTHONY J. MAZULLO, JR., MEMBER

EDWARD GERJUOY, MEMBER

cc: Litigation
Louis A. Naugle, Esq./Central
David A. Flood, Esquire

Dated: September 4, 1984

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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INGRAM COAL COMPANY : Docket No. 83-207-M

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER

On September 16, 1983, the Appellant Ingram Coal Company filed an appeal with the Board contesting an abatement order issued by the Department of Environmental Resources (DER).

The Board issued its Pre-Hearing Order No. 1 on September 23, 1983, requiring Appellant, inter alia, to file its Pre-Hearing Memorandum with the Board on or before December 6, 1983.

Upon Appellant's failure to file its Pre-Hearing Memorandum as required pursuant of Board Order, notices were sent to Appellant's counsel on two occasions (December 19, 1983 and February 6, 1983) ordering compliance with the Board's Pre-Hearing Order No. 1, and no responses were received by the Board.

Pre-Hearing Order No. 1 notes that sanctions may be imposed by the Board for failure to comply therewith.

The notices sent to Appellant's counsel also note that sanctions may be imposed by the Board for failure to comply with Board orders.

Under the provisions of Section 21.124 (25 Pa. Code §21.124) the Board may impose the sanction of dismissal of an appeal for failure to "abide by a Board order."

Pursuant to the request of DER, of which copies were sent to Appellant and its counsel, for movement of this appeal toward resolution, to which request neither Appellant nor counsel have responded, the Board finds that Appellant is in flagrant noncompliance of Board orders and is therefore subject to sanction by the Board.

ORDER

AND NOW, this 4th day of September, 1984, upon a finding that Appellant is in noncompliance with Board orders, the appeal of Ingram Coal Company at EHB docket No. 83-207-M is hereby dismissed with prejudice.

ENVIRONMENTAL HEARING BOARD

ANTHONY J. HAZULLO, JR., MEMBER

EDWARD GERJUOY, MEMBER

cc: Litigation
Richard S. Ehmann, Esq.
R. Edward Ferraro, Esq.

Dated: September 4, 1984

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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ALLEGHENY COUNTY SANITARY AUTHORITY :

:

Docket No. 83-075-G

:

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER
SUR ALCOSAN MOTION FOR SUMMARY JUDGMENT

Synopsis

Appellant moved for summary judgment on the issue of grant eligibility for certain disputed facilities under Act 339, 35 P.S. §701 et seq. The motion is denied. The Board recently ruled that this appeal would be dismissed if DER could show that, when subsidy requests were refused, appellant knew or should have known that the refusal was a final DER decision which should have been appealed at that time. Thus, summary judgment in favor of appellant cannot be granted now. Nevertheless, the merits of the appeal are addressed, assuming arguendo that the present appeal is timely.

The doctrine of issue preclusion makes binding the Board's determination --in a prior appeal--that the disputed facilities are eligible for grants under Act 339. That determination was essential to the Board's decision in that appeal. An exception to the application of the doctrine is not justified by the fact that 25 Pa. Code §103.25 is presently in force, although the regulation was not considered by the Board in the previous appeal. The existence of the regulation

does not constitute an intervening change in the applicable legal context. It essentially restates the policy put forth by DER in the prior appeal as its justification for denying grant eligibility for the disputed facilities. The Board in its prior ruling would have found these facilities eligible under Act 339 even if it had regarded DER's unpublished eligibility criteria as regulations rather than as mere expressions of DER policy. The use of issue preclusion does not result in an inequitable administration of the law. In addition, there has been no change in the burden of persuasion warranting an exception to the use of issue preclusion. Appellant has the burden of persuasion in both appeals.

The present determination does not amount to a ruling that 25 Pa. Code §103.25 is invalid per se. The holding is simply that, under the facts of this case, DER's application of the regulation to deny Act 339 eligibility for the disputed facilities would be an abuse of discretion.

Finally, DER's arguments of waiver and estoppel do not preclude application of issue preclusion to decide that the disputed facilities are eligible for Act 339 grants. However, DER is entitled to attempt to show that, under the facts of this appeal, for reasons, e.g., of waiver and estoppel, appellant does not deserve Act 339 subsidies even though the disputed facilities normally would be eligible for grants.

OPINION

Very recently, we have issued an Opinion under the above Docket Number concerning DER's motion to dismiss this appeal on grounds of untimeliness. Allegheny County Sanitary Authority v. DER (Opinion and Order, August 29, 1984).

The history of this appeal has been amply recounted in that Opinion and Order and will not be repeated here. The reader of the instant Opinion is advised to read our August 29, 1982 Opinion before proceeding further.

The instant Opinion is concerned with Alcosan's motion for summary judgment. Alcosan contends that DER's rejection of Alcosan's revised applications for 1977-80 subsidies under Act 339, 35 P.S. §701, filed May 5, 1982, was an abuse of DER's discretion. On August 29, 1982 we ruled that on the record before the Board at this stage of these proceedings, DER's motion to dismiss this appeal as untimely must be rejected. We left open the possibility, however, that at some later date DER would be able to show Alcosan knew or should have known, long before May 5, 1982, that DER previously had finally rejected the very subsidy requests Alcosan made in its May 5, 1982 revised applications. Without such a showing, we cannot conclude this appeal is untimely. But, because such a showing by DER still remains conceivable, at this point we cannot render summary judgment for Alcosan; if Alcosan's appeal is untimely, we cannot reach its merits.

Nevertheless, because it also is conceivable that DER will not be able to make the showing necessary to establish the untimeliness of this appeal, we now will examine the merits of Alcosan's motion, assuming arguendo the instant appeal is timely. Alcosan argues simply that this Board, in Allegheny County Sanitary Authority v. DER, Docket No. 78-053-H (Adjudication, March 10, 1982, 29 EHB 1982, hereinafter "Alcosan I") has ruled that certain parts of Alcosan's sewage system, the so-called "disputed facilities", are eligible for Act 339 funding; Alcosan goes on to argue that it clearly is the intent of Act 339 that facilities eligible for funding receive those subsidies. DER does not dispute Alcosan's argument that eligible facilities normally should be funded; nor does DER deny that in Alcosan I this Board has ruled as stated above. Rather, DER

offers various arguments in opposition to the thesis that our Alcosan I adjudication automatically implies DER should have made the 1977-80 subsidy payments for the disputed facilities, as requested by Alcosan in its May 5, 1982 revisions of its original 1977-80 Act 339 applications. We proceed to discuss these arguments of DER.

Issue Preclusion

The issue of the eligibility of the disputed facilities for Act 339 subsidy was thoroughly litigated in Alcosan I. Nevertheless, DER insists that the eligibility of these facilities may be relitigated in the instant appeal. DER argues first that the doctrine of res judicata does not apply to the present action. Under Pennsylvania law, in order for this Board's judgment in Alcosan I to be res judicata in the instant appeal, the instant appeal and Alcosan I must satisfy the "four identitites":

1. identity of the thing sued for;
2. identity of the cause of action;
3. identity of the parties to the action;
4. identity of the quality or capacity of the parties suing or sued.

Township of McCandless v. McCarthy, 7 Pa. Cmwlth. 611, 300 A.2d 815 (1973); Bethlehem Steel v. Commonwealth, 37 Pa. Cmwlth. 479, 390 A.2d 1383 (1978); Lebeau v. Lebeau, 393 A.2d 480 (Pa. Super. 1978). DER contends that the first identity is not satisfied, because Alcosan I involved an appeal of DER's refusal to make subsidy payments on items in Alcosan's 1976 application, whereas the instant appeal involves the 1977-80 applications.

We agree with this contention of DER. Alcosan I and the present appeal involve different applications, i.e. different things are being "sued for", as the Board remarked in an Opinion and Order preliminary to Alcosan I. Alcosan v. DER,

1979 EHB 288. Therefore our ruling in the instant appeal will not affect the finality of the judgment rendered in Alcosan I concerning the 1976 Act 339 payments DER was obligated to pay.

The question before us, however, is not whether the doctrine of res judicata implies our judgment in Alcosan I continues to determine the 1976 Act 339 subsidy, but rather whether the instant appeal should relitigate our Alcosan I holding that the disputed facilities are eligible for Act 339 funding. In other words, as DER recognizes, the question before us is whether collateral estoppel --or more accurately and descriptively, issue preclusion [Restatement 2d, Judgments, §27]--should be applied. The distinction between res judicata and collateral estoppel is clearly explained in McCandless, supra, which also states the criteria for application of collateral estoppel. The McCandless criteria for collateral estoppel are essentially the same as in the following, very carefully formulated rule:

> §27. Issue Preclusion--General Rule
>
> When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim. Restatement 2d, Judgments, §27.

An earlier, tentative draft of this Restatement 2d, Judgments rule, which we shall employ, has been followed in Lebeau, supra.

The key issue in Alcosan I, thoroughly litigated between the parties to the present appeal, was the eligibility of the disputed facilities for Act 339 subsidy. Therefore, we must conclude that our Alcosan I holding on the eligibility of the disputed facilities bars relitigation of this eligibility issue in the instant appeal, unless the exceptions stated in Restatement 2d, Judgments, §28 --to the above-quoted general issue preclusion rule--are germane.

Section 28 reads, in pertinent part:

> §28. Exceptions to the General Rule of Issue Preclusion
>
> Although an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, relitigation of the issue in a subsequent action between the parties is not precluded in the following circumstances:
>
> . . .
>
> (2) The issue is one of law and (a) the two actions involve claims that are substantially unrelated, or (b) a new determination is warranted in order to take account of an intervening change in the applicable legal context or otherwise to avoid inequitable administration of the laws; or
>
> . . .
>
> (4) The party against whom preclusion is sought had a significantly heavier burden of persuasion with respect to the issue in the initial action than in the subsequent action; the burden has shifted to his adversary; or the adversary has a significantly heavier burden than he had in the first action; or . . .

DER is contending (in effect) that the above exceptions (2) and (4) are germane and justify negation of our conclusion, supra, that the general issue preclusion rule bars relitigation of the disputed facilities eligibility issue.

The instant appeal is from a DER letter dated March 16, 1983, rejecting Alcosan's revised applications for 1977-80 subsidies, filed May 5, 1982. This letter, which was quoted in our companion Opinion and Order of August 29, 1984 in this matter, cites 25 Pa. Code §§103.25, 103.27 and 103.28 as authority for rejecting Alcosan's 1977-80 revised applications. However, DER--during oral argument on the various motions filed by the parties, and in the briefs supporting its position on those motions--seems to have abandoned its reliance on 25 Pa. Code §§103.27 and 103.28. Thus we need only consider the bearing of 25 Pa. Code §103.25

on the issue preclusion question before us. This fortunate simplification enables us to avoid the difficult task of discussing the outrageous Sections 103.27 and 103.28 in language which would not violate postal restrictions.

On its face, 25 Pa. Code §103.25 is concerned with the Act 339 eligibility of facilities such as those presently in dispute. 25 Pa. Code §103.25 became effective on January 23, 1982, before the May 5, 1982 filing of Alcosan's revised 1977-80 applications. Hence, DER argues that 25 Pa. Code §103.25 is applicable to the eligibility of the disputed facilities under consideration in the instant appeal. However, the hearings which resulted in our Alcosan I adjudication took place before January 23, 1982; also, it is undisputed that our Alcosan I adjudication did not take into account the promulgation of 25 Pa. Code §103.25. DER therefore contends that promulgation of 25 Pa. Code §103.25 has triggered the exception (2)(b) of Restatement 2d, Judgments, §28, quoted supra.

The relevant portion of 25 Pa. Code §103.25 reads as follows:

> (e) Interceptors which are considered integral portions of the sewage treatment works and therefore eligible for payment under the act shall include the following:
>
> (1) That portion of an interceptor between the treatment facility and the first connection.
>
> (2) An interceptor which picks up existing municipally-owned sewers which discharge untreated sewage into the same stream that receives the treatment facility effluent, regardless of the location of the point of discharge of the sewers. The interceptor is eligible from the treatment plant back to the point of interception of the furthest untreated sewage discharge from the plant.
>
> (3) An interceptor which picks up existing municipally-owned sewers which discharge untreated sewage into a tributary stream if that stream contributes at least 15% of the average daily flow to

> the stream receiving the effluent of the treatment plant, as measured at the point of effluent introduction to this main stream.
>
> (4) An interceptor which carries at least 50% of the total sewage flow from the sewered population of the applicant municipality to the treatment plant or sewer system of another municipality; provided that such interceptor meets the criteria described in paragraphs (1), (2) or (3). Where it is not feasible to obtain sewage flow statistics, demographic statistics may be used.

These criteria for interceptor eligibility under 25 Pa. Code §103.25(e) are essentially identical with criteria for interceptor eligibility offered by DER (in the litigation which led to Alcosan I) as justification for rejecting Alcosan's 1976 application for subsidization of the disputed facilities. Our holding in Alcosan I, however, recognized that at the time of the Alcosan I hearings the aforesaid criteria had not been promulgated as regulations; at the time these criteria merely represented DER policy, and as such were not entitled to the presumption of validity properly promulgated regulations normally enjoy. Thus DER further contends that promulgation of 25 Pa. Code §103.25 has triggered the exception of Restatement 2d Judgments §28(4), whether or not the Board deems that the exception of §28(2)(b) also has been triggered.

In Alcosan I the Board examined and rejected DER's arguments that the disputed facilities are ineligible for Act 339 subsidies. In so doing, the Board considered unpublished criteria for eligibility essentially identical with the criteria of 25 Pa. Code §103.25(e). Moreover, it is apparent from the language of Alcosan I that the Board would have found the disputed facilities eligible for Act 339 subsidies even if the Board had regarded DER's unpublished eligibility criteria as regulations rather than as mere expressions of DER policy. Conclusion of Law 2 in Alcosan I termed the aforesaid unpublished eligibility criteria as

"arbitrary and capricious, and inconsistent with the statutory purpose of Act 339." Elsewhere in Alcosan I we wrote:

> Comparing this list of advantages of the Alcosan facilities in question to the required considerations set forth in Section 5 of The Clean Streams Law . . . virtually requires that Act 339 be interpreted so as to permit payment of Act 339 funds on a base including these facilities . . . . Thus, any set of criteria which would exclude integral interceptors from eligibility such as DER's February 1977 criteria must fall for lack of statutory support.

The February 1977 criteria mentioned in this quote from Alcosan I are the unpublished eligibility criteria we have been discussing.

Based on the considerations of the preceding paragraph, we reject DER's contention that exception (2)(b) of Restatement 2d Judgments §28 was triggered by promulgation of 25 Pa. Code §103.25. There was no "change" in the applicable legal context; in Alcosan I we carefully examined and found insufficient--as justification for denying subsidies to the disputed facilities--essentially the same language DER now proposes as justification for once again denying subsidies to the same facilities. There have been no intervening new interpretations of that language since Alcosan I was decided (the typical circumstance when exception 2(b) is triggered, see Restatement 2d, Judgments, §28, illustrations 3 and 4). There is no evidence that retaining the Alcosan I ruling that the disputed facilities are eligible for Act 339 subsidy will result in inequitable administration of Act 339 in favor of Alcosan; rather, the history of Alcosan's attempts to obtain Act 339 subsidies for the disputed facilities, as recounted in Alcosan I and our companion Opinion of August 29, 1984, suggests that we presently are rectifying a heretofore inequitable administration of Act 339 in Alcosan's disfavor.

Similarly, we reject the contention that exception (4) of Restatement 2d Judgments §28 was triggered by promulgation of 25 Pa. Code §103.25. In the first

place, the burden of persuasion allocations in this appeal and in Alcosan I are largely irrelevant to the issue at hand, which is concerned with the proper construction of the subsidy eligibility criteria stated in Act 339. Moreover Alcosan had the burden of persuasion in Alcosan I, and has precisely the same burden in the instant appeal; the presumption of validity in favor of properly promulgated regulations, and the presumption in favor of DER's interpretation of its regulations (see our August 29, 1984 Opinion) do not further increase this burden. In Alcosan I the Board decided that language substantially identical to 25 Pa. Code §103.25 was "inconsistent with the statutory purpose of Act 339," and that any set of criteria which would exclude Alcosan's interceptors from Act 339 "must fall for lack of statutory support" (recall our quote, supra, from Alcosan I); such language is more than sufficient to overcome the aforementioned presumptions in favor of 25 Pa. Code §103.25 and DER's construction thereof. DER argues that the quoted language from Alcosan I was not essential to the Alcosan I adjudication, and therefore (recall Restatement 2d, Judgments, §27 quoted earlier) should not be relied on by us for issue preclusion; in our view, however, the Alcosan I ruling sustaining Alcosan's appeal could not have been reached without the decision that exclusion of the disputed facilities from Act 339 eligibility was, as the Board wrote, "arbitrary and capricious, and inconsistent with the statutory purpose of Act 339," because without this decision DER's refusal to pay Act 339 subsidies on the disputed facilities would not have been an abuse of DER's discretion.

Defenses to Issue Preclusion

DER also makes a number of arguments which may be lumped under the catchall heading of "defenses to issue preclusion." In essence, DER is arguing

that there are special reasons against permitting our eligibility ruling in Alcosan I to control the instant appeal, even though (as fully discussed supra) the availability of the exceptions in Restatement 2d, Judgments, §28 apparently do not defeat the applicability of the general issue precludion rule, Restatement 2d, Judgments, §27.

DER argues first that upholding the eligibility of the disputed facilities in the face of 25 Pa. Code §103.25 amounts to a ruling that 25 Pa. Code §103.25 is an invalid regulation; therefore, DER further argues, Alcosan I cannot preclude litigation of the validity of 25 Pa. Code §103.25, because Alcosan I surely did not examine the validity of any regulations. However, we disagree that our present upholding of the disputed facilities Act 339 eligibility amounts to a ruling that 25 Pa. Code §103.25 is an invalid regulation. Our ruling that the disputed facilities have Act 339 eligibility is equivalent to the assertion that, under the particular facts of Alcosan's sewage system, denial of Act 339 eligibility to the disputed facilities on the basis of 25 Pa. Code §103.25 would be an abuse of DER's discretion. This implication of our reliance on Alcosan I does not faze us. As we have explained recently [Coolspring Township v. DER, Docket No. 81-134-G (Adjudication, August 8, 1983 at 23)]:

> However, this Board can assess the validity or the constitutionality of a regulation in the context of a given appeal, e.g., the appeal presently before us. The EQB cannot envision all the complex factual circumstances which may occur. A regulation which passes constitutional muster may induce violations of constitutional guarantees in special circumstances; similarly, in special circumstances a regulation which normally faithfully implements a statute may prove contrary to the statute's intent. It would be an abuse of discretion for DER to insist on enforcing a regulation which produces such unwonted effects.

Our authority to review the validity (that is to say the consistency with legislative intent) of a duly promulgated DER regulation in the context of a specific appeal has been affirmed by the Commonwealth Court, United States Steel Corp. v. DER, 442 A.2d 7 (Pa. Cmwlth. 1982). The possible implications concerning the validity of 25 Pa. Code §103.25 as applied to the facts of the instant appeal furnish no acceptable reasons for relitigating any issues precluded by Alcosan I.

DER also has argued that Alcosan's May 5, 1982 applications for 1977-80 Act 339 subsidies toward its disputed facilities had been previously waived, and that payment of the 1977-80 Act 339 subsidies toward the disputed facilities should be estopped. For example, DER has argued that its budgets for 1977-80 Act 339 grants relied on Alcosan's original 1977-80 Act 339 applications. These arguments do not contravene use of issue preclusion to decide the disputed facilities are eligible for Act 339 subsidies. However, it is possible that, under the facts of the instant appeal, DER can show Alcosan does not deserve 1977-80 Act 339 subsidies even though the disputed facilities normally would be eligible for such subsidies. DER is entitled to attempt such a showing; the record before us does not eliminate the possibility that DER can do so.

Conclusion

To sum it up, Alcosan's motion for summary judgment is rejected because it is possible DER can show this appeal is untimely, or can otherwise show Alcosan does not deserve 1977-80 Act 339 subsidies for its disputed facilities even though the disputed facilities normally would be eligible for such subsidies. If DER seeks to make such showings, Alcosan will be entitled to attempt its own showing that such defenses by DER to payment of the 1977-80 Act 339 subsidies toward the disputed facilities should be estopped. The eligibility of the disputed facilities

for Act 339 subsidy was decided in Alcosan I; that decision is binding in the instant appeal and will not be relitigated.

O R D E R

WHEREFORE, this 6th day of September, 1984, Alcosan's motion for summary judgment is rejected. The evidence admissible in this appeal, should it reach a hearing on the merits, will be limited as implied by the last paragraph of the above Opinion.

ENVIRONMENTAL HEARING BOARD

EDWARD GERJUOY
Member

DATED: September 6, 1984

cc: Bureau of Litigation
Howard J. Wein, Esquire, Co-counsel for DER
Ward T. Kelsey, Esquire, Co-counsel for DER
Robert P. Casey, Esquire, of Dilworth, Paxson, Kalish & Kauffman, Scranton, Co-counsel for Appellant
John L. Heaton, Esquire, of Dilworth, Paxson, Kalish & Kauffman, Harrisburg, Co-counsel for Appellant

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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WILLIAM FIORE :

:

Docket No. 84-246-G

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER

Synopsis

Appeal was taken of DER's failure to act upon a permit application under the Solid Waste Management Act, 35 P.S. §6018.101 et seq. The appeal will be dismissed on the grounds that no appealable action has occurred, if DER files a statement which either promises to act upon the application within 120 days or satisfactorily explains why such action cannot be taken within this 120-day period. In the absence of such a statement DER's failure to act will be deemed an appealable action.

OPINION

In June 1983 Fiore submitted to DER an application for a solid waste permit, pursuant to the Solid Waste Management Act, 35 P.S. §6018.101 et seq. Fiore claims that DER has failed or refused to act upon this permit application and has filed the above-captioned appeal seeking review of the alleged failure or refusal to act.

DER has filed a motion to dismiss, arguing that the failure to act upon a permit application is not an appealable action within the meaning of 25 Pa. Code §21.2. DER also argues that it cannot issue a permit to anyone who is in violation of an order of the Department, under 35 P.S. §6018.503(d), and notes that this Board has found Fiore to be in violation of a DER order.

The relevant portion of Section 503(d) of the Act reads as follows:

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

Section 610(9) of the Act provides that a violation of any order of the Department is unlawful.

In the recent case William Fiore v. Commonwealth, DER, (EHB Docket No. 83-160-G, Opinion and Order dated April 25, 1984), this Board ruled that Fiore was in violation of Paragraphs 4, 5, 7 and 9 of the Consent Order and Agreement entered into by Fiore and DER on January 25, 1983.

In light of the foregoing, it very well may be the case that DER possesses the authority to deny Fiore's permit application. Nevertheless, authority to deny is not equivalent to authority to indefinitely suspend action upon a permit application. We recognize the importance of affording DER substantial discretion in the performance of its administrative functions. In the present case, however, DER has moved to dismiss this appeal but has given no indication that it is in the process of reviewing the permit application, which was filed over a year ago. DER cannot be allowed to deny Fiore the opportunity for judicial review of the permit application process by indefinitely withholding decision on the permit's issuance. Consequently, DER must either deny or approve the permit application, or satisfactorily

explain its failure to do either. In the absence of such a denial, approval or explanation, DER's failure to act will be deemed an appealable action.

O R D E R

WHEREFORE, this 6th day of September, 1984, it is ordered that:

1. This appeal will be dismissed, on the grounds that no appealable action has occurred, provided DER--within thirty (30) days of the date of this Order--files a statement with this Board in which DER either 1) promises to act upon Fiore's permit application (i.e., deny or approve the same) within one hundred twenty (120) days of this Order, or 2) satisfactorily explains why it cannot take such action within this 120-day period.

2. In the absence of the statement called for in Paragraph 1, supra, or of a satisfactory explanation by DER of its failure to file such a statement, DER's failure to act will be deemed an appealable action, and Fiore's appeal will be accepted by this Board.

3. If this appeal is dismissed pursuant to Paragraph 1, supra, but DER fails to act on Fiore's permit application within 120 days of this Order, Fiore may renew his appeal, and DER's failure to act will be deemed an appealable action, unless DER can give very good reasons for not having acted.

ENVIRONMENTAL HEARING BOARD

Edward Gerjuoy

EDWARD GERJUOY
Member

DATED: September 6, 1984

cc: Bureau of Litigation
Dennis W. Strain, Esquire, for DER
Robert P. Ging, Jr., Esquire, Pittsburgh, for Appellant

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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REITZ COAL COMPANY :

:

: Docket No. 84-195-G

:

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER
SUR MOTION TO DISMISS

Synopsis

Appellant sought Environmental Hearing Board review of DER letter notifying appellant that failure to remedy existing violations could result in the imposition of legal sanctions. The Board held that the letter did not constitute an appealable action within the meaning of 25 Pa. Code §21.2(a) because it did not affect personal or property rights, privileges, immunities, duties, liabilities or obligations of the appellant. Consequently, the appeal was dismissed for lack of jurisdiction over the subject matter.

OPINION

The Department of Environmental Resources (DER) has filed a Motion to Dismiss this appeal, arguing that the DER letter from which the appeal is taken is not an appealable action within the meaning of 25 Pa. Code §21.2(a). We agree.

The letter which forms the subject matter of this appeal informed Reitz that DER had issued an order to Berwind Natural Resources (Berwind) citing violations at the Eureka No. 40 mine which had not been corrected to the satisfaction of DER. The letter further stated:

> The Clean Streams Law specifically provides that the Department shall not issue any new or renewed permit if it finds that the applicant or any associate, officer, subsidiary or subcontractor of the applicant has failed and continues to fail to comply with any permit, rule, regulation or order related to mining. Since corporate officials . . . of Reitz Coal Company are also officials of Berwind, the Department will be prohibited from issuing any permits to Reitz Coal Company until the violations cited in the order are being corrected to the Department's satisfaction. Permit applications will continue to be reviewed. However, if the review process is completed and the violations cited in the order are not being corrected to the satisfaction of the Department, the permits will be denied and the operations will be ceased.

Counsel for Reitz argues that this letter evidences a decision by DER to deny the permits and to do so without affording Reitz an opportunity for the informal hearing required by section 3.1 of the Surface Mining Conservation and Reclamation Act, 52 P.S. §1396.3a, and section 609 of the Clean Streams Law, 35 P.S. §691.609. DER has submitted an affidavit of the official responsible for the issuance of the letter quoted above, stating that it was not and is not DER's intention to deny Reitz the opportunity for this informal hearing. The affidavit further states that Reitz will be notified of its opportunity for an informal hearing before DER takes any final action on Reitz's pending permit applications.

In light of the foregoing, we hold that the DER letter here at issue does not affect personal or property rights, privileges, immunities, duties, liabilities or obligations of Reitz. It constitutes a notice that, should the violations attributed to Berwind not be corrected to DER's satisfaction, DER will

take action. Inasmuch as such action has not yet been taken, the letter does not constitute an appealable action withing the meaning of 25 Pa. Code §21.2(a)(1). See Sunbeam Coal Company v. DER, 8 Pa. Cmwlth 622, 304 A.2d 169 (1973); Fred Erickson v. DER, (EHB Docket No. 84-179-G, Opinion and Order issued June 20, 1984); Perry Brothers Coal Company v. DER, 1982 EHB 501.

Having reached this decision we find it unnecessary to address the other issues raised, and ably argued, by Reitz in its Answer to DER's Motion to Dismiss.

O R D E R

WHEREFORE, this 19th day of September, 1984, upon consideration of DER's Motion to Dismiss, Reitz's Answer thereto, and DER's Response to Appellant's Answer, DER's Motion to Dismiss is granted and the appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

ANTHONY J. MAZULLO, JR.
Member

EDWARD GERJUOY
Member

DATED: September 19, 1984

cc: Bureau of Litigation
Alan S. Miller, Esquire, for DER
Henry Ingram, Esquire, of Rose, Schmidt, Dixon & Hasley, Pittsburgh, for Appellant

COMMONWEALTH OF PENNSYLVANIA

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BENJAMIN COAL COMPANY :

:

Docket No. 84-148-G

:

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER

Synopsis

Appeal is dismissed for failure of appellant to timely file its pre-hearing memorandum. Appellant failed to comply with the Board's Pre-Hearing Order No. 1, requiring filing of the memorandum by a given date, and failed to respond to a default notice sent by the Board until after the deadline set forth in the notice had passed. The sole communication received from counsel for appellant was a request for a stay of proceedings, filed after the aforesaid deadlines had passed, and providing no explanation of the repeated failure to timely comply with the Board's order. Appellant bears the burden of proof in this appeal, 25 Pa. Code §21.101(c)(1). The default notice warned appellant that failure to comply with the deadlines set by the Board could result in the imposition of sanctions, including dismissal. Accordingly, dismissal of the appeal is appropriate.

OPINION

On May 8, 1984, the Board issued Pre-Hearing Order No. 1, which ordered Benjamin to file its pre-hearing memorandum in this matter no later than July 23, 1984. On August 7, 1984, no pre-hearing memorandum having been received, the Board wrote Benjamin's counsel a certified letter, warning that sanctions, including dismissal, may be imposed if Benjamin's pre-hearing memorandum was not filed by August 17, 1984. No pre-hearing memorandum has been received; the certified letter receipt has been returned to the Board. On September 4, 1984 the Board received a "Motion for Stay of Proceedings" from Benjamin's counsel, which nowhere specifically mentions the overdue pre-hearing memorandum, but which asks the Board "to enter an Order staying compliance" with Pre-Hearing Order No. I "for a period of 45 days from August 17, 1984," because Benjamin "is attempting to negotiate a remand on the appeal to resolve the merits of the appeal by submitting additional information as to the permit."

This appeal is from DER's denial of Benjamin's application for a mine drainage permit. In this appeal, Benjamin has the burden of proof. 25 Pa. Code §21.101(c)(1). The record shows no activity by Benjamin since its appeal was filed, other than its September 4, 1984 motion for a stay of proceedings. Certainly there is nothing on the record to show Benjamin has initiated any discovery. A motion for a "stay of proceedings", filed two weeks after a certified letter warning that Benjamin's pre-hearing memorandum already was overdue, without any explanation of Benjamin's repeated failure to timely file its pre-hearing memorandum or at least to request an extension before the pre-hearing memorandum's due date arrived, derogates the dignity of this Board.

In the past, the Board has dismissed appeals for failure to file pre-hearing memoranda after warnings, in some instances even when DER had the burden of proof.

Ingram Coal Company v. DER, Docket No. 83-207-M (Opinion and Order, September 4, 1984); Ben Franklin Coal Company v. DER, Docket No. 83-224-G (Opinion and Order, February 23, 1984); Daniel Marino, Jr. v. DER, Docket No. 83-198-G (Opinion and Order, January 25, 1984).

O R D E R

WHEREFORE, this 20th day of SEPTEMBER, 1984 it is ordered that the above-captioned appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

Anthony J. Mazullo, Jr.

ANTHONY J. MAZULLO, JR.
Member

Edward Gerjuoy

EDWARD GERJUOY
Member

DATED: September 20, 1984

cc: Bureau of Litigation
Donald A. Brown, Esquire, for DER
Carl A. Belin, Jr., Esquire, of Belin, Belin & Naddeo, Clearfield, for Appellant

COMMONWEALTH OF PENNSYLVANIA

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BLACK FOX MINING & DEVELOPMENT CORPORATION :

:

Docket No. 84-114-G

:

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER

Synopsis

Appeal from DER compliance orders and civil penalty assessment involving appellant's alleged mining without a permit in violation of the Surface Mining Conservation and Reclamation Act, 52 P.S. §1396.1 et seq. Assuming that the facts as proven will demonstrate that appellant's employees extracted, exposed or retrieved coal from the site in question, DER was justified in citing appellant for mining without a permit. Appellant's argument that it was merely exploring for coal fails; coal exploration is a type of surface mining within the meaning of the Surface Mining Act. Therefore, a permit is required unless the exploration will not result in the removal of coal. 25 Pa. Code §86.133(d). DER may waive this permit requirement where the exploration will require the removal of fewer than 250 tons of coal and where no coal removal has taken place prior to the waiver. Unless appellant intends to contest DER's claim that there was some coal removal by appellant, partial summary judgment will be granted for DER.

OPINION

This appeal concerns two DER compliance orders and a civil penalty assessment, all of which are the result of certain activities of appellant's employees at a site in Armstrong County in early October, 1983. The following facts apparently are not in dispute. On October 1, 1983 a DER mine inspector visited the site described above. There he observed appellant's employees operating a hi lift and noted the existence of a pit within which a coal seam was exposed. The pit measured approximately 12 ft x 12 ft x 20 ft. DER contends that appellant's employees removed coal from this pit. It is not entirely clear whether appellant intends to challenge this contention.[1] It is not disputed, however, that appellant had neither applied for nor received a permit to mine coal at this site. The DER inspector cited appellant for the violation of mining without a permit. Subsequently a civil penalty was assessed, based in part upon this alleged violation.

The Board requested counsel to prepare memoranda of law on the issue of whether, under the facts of this appeal, the activities of appellant's employees constituted surface mining within the meaning given that term by the Surface Mining Conservation and Reclamation Act, 52 P.S. §1396.1 et seq. This opinion is a provisional ruling upon this issue. The Board assumes, solely for the purposes of reaching this provisional decision, that appellant's employees did in fact remove coal from the earth at the site and date in question. The Board in no way intends to preclude either party from presenting evidence on this critical issue. The

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1. Appellant maintains that the "removal of less than 50 pounds of coal" does not constitute surface mining. (Appellant's Memorandum of Law, pp. 2, 4, 5 and 6). However, appellant has refused to admit--in response to DER's Requests for Admissions 16 and 17--that bags of coal allegedly observed by the DER mine inspector on the site on October 1 contained coal which had been removed from the pit.

importance of this factual issue to the resolution of the issues presented in this appeal is discussed more fully immediately below.

We begin with the statute itself. Section 3 of the Surface Mining Act provides that:

> "Surface mining" shall mean the extraction of minerals from the earth or from waste or stock piles or from pits or banks by removing the strata or material which overlies or is above or between them or otherwise exposing and retrieving them from the surface, including but not limited to strip, augur mining, dredging, quarrying and leaching, and all surface activity connected with surface or underground mining including but not limited to exploration, site preparation, entry, tunnel, drift, slope, shaft and borehole drilling and construction and activities related thereto, but not including those portions of mining operations carried out beneath the surface by means of shafts, tunnels or other underground mine openings. . .
>
> 52 P.S. §1396.3

Preliminarily it must be noted that the definition requires that there be extraction, exposure or retrieval of minerals. As noted above, we have assumed for the purposes of this ruling that this prerequisite will be met under the facts of this case as proven.

Appellant argues, in essence, that the activities of its employees constituted coal exploration, not surface mining for coal, and therefore it could not properly be cited for mining without a permit. The short answer to this contention is that the Act's definition explicitly makes reference to exploration. Exploration is a form of surface mining. This conclusion is reinforced by the observation that the definition expressly excludes certain activities, none of which refer to coal (or other mineral) exploration:

> "Surface mining" shall not include (i) the extraction of minerals (other than anthracite and bituminous coal) by a landowner for his own noncommercial use from land owned or leased by him; or (ii) the extraction of sand, gravel,

> rock, stone, earth or fill from borrow pits for highway construction purposes, so long as such work is performed under a bond, contract and specifications which substantially provide for and require reclamation of the area affected in the manner provided by this act; nor (iii) the handling, processing or storage of slag on the premises of a manufacturer as a part of the manufacturing process.
>
> 52 P.S. §1396.3

Indeed, the exclusion of coal from the first of these exceptions lends credence to the argument that the legislature intended that any removal of coal, no matter what the amount might be, should be considered surface mining.

Likewise, the regulatory definition of "surface mining activities" makes explicit reference to exploration:

> Surface mining activities--An operation whereby coal is extracted from the earth or from waste or stock piles or from pits or banks by removing the strata or material which overlies or is above or between the coal or otherwise exposing and retrieving the coal from the surface, including but not limited to strip, auger mining, dredging, quarrying, and leaching, and all surface activity connected with surface or underground mining, including but not limited to exploration, site preparation, entry, tunnel, slope, shaft, drift, and borehole drilling and construction and activities related thereto, but not including those portions of mining operations carried out beneath the surface by means of shafts, tunnels, or other underground mine openings. Surface mining activities shall include all activities in which the land surface has been or is disturbed as a result of or incidental to surface mining operations of the operator, including but not limited to private ways and roads appurtenant to any such area, land excavations, workings, refuse banks, spoil banks, culm banks, tailings, repair areas, storage areas, processing areas, shipping areas, and areas in which facilities, equipment, machines, tools, or other materials or property which result from, or are used in, surface mining activities are situated. (emphasis supplied).

Appellant argues that the language in the above quoted definition requiring that surface mining activities be "a result of or incidental to surface mining operations" precludes a finding that appellant was mining because "the removal of less than 50 pounds of coal is not the result of nor incidental to surface mining operations." (Appellant's Memorandum of Law, p. 5). The regulations provide no definition of the phrase "surface mining operations".[2] The context in which this phrase is employed in the regulatory definition quoted immediately above suggests that the phrase is to be broadly construed. In any event, in the first instance construction of the phrase must be governed by the statute itself. The statutory definition draws no distinctions on the basis of the amount of mineral removed. Apparently, the legislature intended that the removal of any amount of coal should be considered surface mining. Further, if--as appellant contends--the activities of its employees simply amounted to coal exploration there can be little dispute that such activities were "a result of or incidental to surface mining operations" since coal exploration is a form of surface mining, within the statutory definition.

Appellant argues that such a characterization is too harsh. It is absurd, appellant argues, to characterize the removal of a few pounds of coal as surface mining for which a permit is required.[3] Admittedly, the permitting process is a complex and time consuming one. However, the regulatory scheme takes this into consideration. In some circumstances coal exploration may be conducted without a permit. 25 Pa. Code §86.133(d) provides that:

---

2. The regulations do provide a definition of "surface mining" of coal. 25 Pa. Code 86.101 closely tracks the language of 52 P.S. §1396.3--the statutory definition of surface mining--and, like the statute, explicitly makes reference to exploration.

3. Section 4 of the Surface Mining Act, 52 P.S. §1396.4(a) requires that an application for a permit be submitted to DER before any mining "by the surface mining method" takes place.

> (e) Any person who intends to conduct coal exploration operations in which coal will be removed shall, prior to conducting the exploration, obtain a permit under this chapter; except that, prior to removal of any coal, the Department may waive the requirement for the permit to enable the testing and analysis of coal properties, if less than 250 tons is removed.

This regulation makes clear, however, that in the first instance a permit is required to conduct coal exploration operations where coal is to be removed--just as one is required to conduct full scale mining operations. In fact, the permit to be obtained "under this chapter" will be governed by the same regulations whether it is issued for exploration or for full scale mining. (See 25 Pa. Code §§86.11-86.70.) We note that the permit is necessary only where coal is to be removed--a requirement consistent with the statutory requirement that there be extraction or retrieval in order for activities to constitute surface mining.

25 Pa. Code §86.133(d) is the answer to appellant's argument that it would be unduly burdensome to require a permit when only a few pounds of coal will be removed. The Department has the discretion to waive the permit requirement (prior to the removal of any coal) when fewer than 250 tons are to be removed. In the absence of such a waiver, however, an operator must obtain a permit prior to beginning exploration in which coal will be removed. In effect, the appellant is asking DER to grant the waiver now, after the coal has been removed and appellant has been cited for doing so; we see no way to construe the regulations as allowing a waiver after unwaivered unpermitted coal removal has occurred.

A final argument of appellant may be dealt with quite briefly. In essence, it is argued that section 3.1 of the Surface Mining Act indicates that appellant's activities at the site in question were not subject to DER regulation.

Section 3.1 provides in relevant part that:

> After January 1, 1972, it shall be unlawful for any person to proceed to mine coal or to conduct an active operation to mine other minerals, by the surface mining method, . . . without first obtaining a license as a surface mining operator from the department.
>
> 52 P.S. §1396.3a.

Appellant contends that its activities do not constitute an "active operation" as the term is defined in the Act:

> "Active operation" shall mean one in which the surface mine operator has removed a minimum of five hundred (500) tons per acre of aggregate or mass of noncoal mineral matter for commercial purposes in the preceding year.
>
> 52 P.S. §1396.3.

We note, first, that the definition of active operation apparently applies only to noncoal operations. Secondly, section 3.1 of the Act states that a license is required to "mine coal or to conduct an active operation." The meaning is clearly disjunctive; therefore, we find no merit in appellant's argument on this point.

In conclusion, if the facts as proven demonstrate that appellant extracted, exposed or retrieved coal from the site in question, it is clear that such activity falls within the Surface Mining Act's definition of surface mining. Furthermore (again assuming proof of extraction, exposure or retrieval), since it is not disputed that no permit had been issued for coal removal, the citation for mining without a permit is proper--whether or not the activity is characterized as coal exploration.

O R D E R

AND NOW, this 25th day of September, 1984, it is ordered that:

1. Appellant's contention that its exploratory removal of less than fifty (50) pounds of coal was not "surface mining" is rejected.

2. Unless appellant intends to contest DER's claim that there was some coal removal by appellant, the Board will grant summary judgment for DER on those issues in this consolidated appeal which turn conclusively on the question of whether appellant was engaged in surface mining; DER will be permitted to move for such partial summary judgment at the outset of the forthcoming hearing on the merits of this appeal.

ENVIRONMENTAL HEARING BOARD

Edward Gerjuoy

EDWARD GERJUOY
Member

DATED: September 25, 1984

cc: Bureau of Litigation
Alan S. Miller, Esquire, for DER
Leo M. Stepanian, Esquire, of Stepanian & Muscatello, Butler, for Appellant

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

HAYCOCK TOWNSHIP

: Docket No. 83-058-M

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and RICHARD J. LANDGREEN, Permittee

OPINION AND ORDER

On February 24, 1983, the Department of Environmental Resources (DER) ordered Haycock Township, Bucks County, to revise its Official Sewage Facilities Plan pursuant to 25 Pa. Code 71.14(b) and 71.16(a) and (b); so that it would provide for the implementation of a single residence spray irrigation facility on the property of Richard J. Landgreen, Saw Mill and Old Bethlehem Roads, Haycock Township, Bucks County.

On March 25, 1983, Haycock Township filed a notice of appeal with this board from DER's issuance of said Order.

An evidentiary hearing was held on June 11, 1984, following which, the parties were ordered to submit briefs solely on the preliminary issue of whether Haycock Township could refuse to revise its Official Sewage Facilities plan on the grounds that the proposed site is not in compliance with the township's "guidelines" regarding spray irrigation systems, when

DER has already determined that the proposed site is in compliance with DER's guidelines.

The township's requirements are captioned, "Guidelines." Underneath the caption, "Guidelines," there is a statement to the effect that the township is adopting "by resolution," standards and procedures regarding spray irrigation systems.[1] These standards and procedures incorporate DER's standards for spray irrigation systems. However, the township's "guidelines" impose additional requirements.[2]

The township's attempt to regulate a private citizen with respect to the construction of a sewage disposal system gives rise to the issue of whether

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[1] Underneath the caption, "Guidelines," the following preceeds the enumeration of requirements:

> A RESOLUTION OF THE TOWNSHIP OF HAYCOCK, BUCKS COUNTY, PENNSYLVANIA, ESTABLISHING STANDARDS FOR THE CONSTRUCTION AND OPERATION OF SINGLE RESIDENCE SEWAGE TREATMENT SYSTEMS INVOLVING A BIOLOGICAL TREATMENT PROCESS FOLLOWED BY SPRAY IRRIGATION.
>
> The Board of Supervisors of the Township of Haycock, Bucks County, Pennsylvania, does hereby adopt by resolution the following standards and procedures:

[2] In terms of the factors considered in the first phase of the two-part permitting process, Haycock Township's guidelines are more stringent in that they require greater setback distances of the buffer area from property lines, buildings, streams, water courses, ponds, wells and high use areas; and they require certain setback distances from public and private rights of way, which are not mentioned in the DER guidelines. (See township's guidelines Section 300.2(c)) The township's guidelines set forth a more stringent requirement for the minimum depth to seasonally high groundwater table elevation. (See township's guidelines Section 300.3(h)) The township's guidelines require a spray application rate of two times the design influent rate of the sewage treatment plant which would result in requiring a larger spray area than what is required under DER guidelines. (See township's guidelines Section 400.3(b)) Finally, the township's guidelines require the buffer area surrounding the spray irrigation area to be a minimum of 15 feet in width. (See township's guidelines Section 400.4(a))

a second class township can regulate a private citizen through the enactment of "guidelines." This issue arises because the township did not enact these "guidelines" according to the requirements in the Second Class Township Code for enacting ordinances. See 53 P.S. §65741. This fact was admitted by the township's attorney at the hearing on June 11, 1984 (Transcript pp. 86-90).

A preliminary consideration in the determination of the legal effect of these "guidelines," is the authority of this board to rule on the validity of municipal enactments. As this board noted in Buckingham Township Civic Association v. DER, et al, 1977 EHB 236, "Beyond doubt, this board has no jurisdiction to review and determine the propriety of actions of the township supervisors. Administrative Code §1921A, 71 P.S. §510-21(a). As a matter of law, any challenge to the procedural regularity of ordinances and resolutions adopted by second class townships must be made within 30 days in the court of common pleas. 53 P.S. §65741." This is the exclusive procedure for making procedural challenges to ordinances or resolutions. See Hodge v. Zoning Board, 11 Pa. Cmwlth. 311, 312 A.2d 813 (1973); Roeder v. Borough Council of Hatfield, 439 Pa. 241, 266 A.2d 691 (1970).

Thus, this board must assume that these "guidelines" have been adopted pursuant to proper procedure. However, assuming this, this board must still determine the legal effect of these "guidelines." The township has admitted that they are not ordinances. (Transcript pp. 86-90). Therefore, an examination must be made as to what power a second class township has to engage in legislative acts, to regulate the actions of its citizens, other than its power to adopt ordinances.

It is well settled that townships, political subdivisions of the Commonwealth

possess only such powers as have been granted to them by the legislature, either in express terms, or which arise by necessary and fair implication or are incident to powers expressly granted, or are essential to the declared rights and purposes of townships. See Holland Enterprises, Inc. v. Joka, 64 Pa. Cmwlth. 129, 439 A.2d 876 (1982); United Tavern Owners of Philadelphia, et al v. School District of Philadelphia, et al, 441 Pa. 274, 272 A.2d 868 (1971); Commonwealth v. Ashenfelder, 413 Pa. 517, 198 A.2d 514 (1964); Commonwealth v. Hanzlik, 400 Pa. 134, 161 A.2d 340 (1960). Therefore, to determine the powers of a second class township to engage in legislative acts, one must look to the enabling legislation, which in this case is the Second Class Township Code (53 P.S. §65101 et seq).

53 P.S. §65741 is the only provision in the Second Class Township Code which enumerates procedures which are required for a legislative enactment by a second class township. This provision is captioned, "Ordinances," and describes the procedure for adopting an ordinance. However, the "guidelines" in question here state that they are, "A resolution of the Township of Haycock."

Although "resolution" is nowhere defined in the Second Class Township Code, the generally accepted distinction between a resolution and an ordinance is that the term "resolution" denotes something less formal than the term "ordinance." A resolution is an expression of the will or opinion of the township supervisors and is used in the administration of municipal affairs. McGinley v. Scott, 401 Pa. 310, 164 A.2d 424 (1960); Commonwealth ex rel. Tarner v. Bitner, 294 Pa. 549, 144 A. 733 (1929); Shaub v. Lancaster City, 156 Pa. 362, 26 A. 1067 (1893); Fuller v. Scranton, 2 Saddler 61, 4 A.

467 (1886). If a second class township wants to enact regulations which bind private citizens, they must adopt ordinances pursuant to 53 P.S. §65741. A second class township cannot circumvent the requirements for adopting ordinances by using resolutions to regulate citizens of the township. See Fuller v. Scranton, 2 Saddler 61, 4 A. 467 (1886). Since Haycock Township has admitted that the "guidelines" in question are not ordinances, it does not have the authority to refuse to amend its Official Sewage Facilities Plan on the basis that the proposed spray irrigation system is not in compliance with its "guidelines."

ORDER

AND NOW, this 2nd day of October, 1984, it is hereby ORDERED that:

1. Appellant, Haycock Township, shall not refuse to amend its Official Sewage Facilities Plan on the basis that the proposed spray irrigation system is not in compliance with its guidelines.

2. Appellant, Haycock Township, shall file a brief on the remaining issues in this case within thirty (30) days of the issuance of this Order. Permittee, Richard Landgreen, shall file a brief on the remaining issues in this case within twenty (20) days of the receipt of Appellant's brief. The Appellee, the Commonwealth, shall file its response, if any, to the aforesaid briefs within ten (10) days of the receipt of Permittee's brief.

ENVIRONMENTAL HEARING BOARD

Anthony J. Mazullo, Jr., Member

cc: Bureau of Litigation
James Morris, Esq.
Mary C. Eberle, Esq.

For Permittee: Brian J. McCullough, Esq.

DATED: October 2, 1984

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

CONSOLIDATION COAL COMPANY :

:

Docket No. 84-243-G

:

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and GEORGE ENTERPRISES, Permittee

OPINION AND ORDER
SUR MOTION TO DISMISS

Synopsis

Appellee/Permittee filed a Motion to Dismiss arguing that Appellant, by allegedly failing to timely file objections to proposed gas well locations, had waived its right to challenge DER's issuance of permits pursuant to the Gas Operations Well-Drilling Petroleum and Coal Mining Act, 52 P.S. §2101 et seq. The Motion is denied. Even assuming arguendo that objections were not timely filed with DER, this presumed fact has no bearing upon the statutorily provided appeal procedure set forth at 71 P.S. 510-21(a). There is no indication that the dispute resolution mechanism of the Gas Operations Act was intended to provide an exclusive remedy.

OPINION

Appellant Consolidation Coal Company ("Consol") has appealed DER's issuance of permits for the drilling of several gas wells. The permits were issued pursuant to the Gas Operations Well-Drilling Petroleum and Coal Mining Act, 52 P.S. §2101 et seq. ("Act"). Consol claims that the wells will interfere with the operation of its Purseglove No. 15 Mine.

Appellee/Permittee George Enterprises ("George") has moved this Board to dismiss the appeal for the reason that Consol failed to timely file objections to the proposed location of the said gas wells as provided in section 202 of the Act, 52 P.S. §2202. George argues that this alleged failure to timely file objections amounts to a waiver of any right Consol may have to challenge the wells' location in this proceeding. In response, Consol contends that even assuming arguendo that objections were not timely filed with DER, such a failure should in no way affect Consol's right to appeal the DER action since the right to appeal is governed by entirely separate statutory and regulatory provisions. We concur with Consol's position.

The Gas Operations Well-Drilling Petroleum and Coal Mining Act as originally enacted provided for an elaborate mechanism of dispute resolution. (See section 502 of the Act, 52 P.S. §2502. Portions of this section have since been repealed.) The Board can find nothing in the Act which in any way suggests that these dispute resolution procedures are intended to provide an exclusive remedy. In the absence of any such indication, the right of appeal to this Board as set forth in 71 P.S. 510-21(c) must govern. There is no dispute that Consol has properly perfected this appeal in accord with the mandate of that statutory section and the Rules governing practice before this Board, 25 Pa. Code, Chapter 21.

O R D E R

WHEREFORE, this 2nd day of October, 1984, in light of the foregoing, Appellee/Permittee's Motion to Dismiss is denied.

ENVIRONMENTAL HEARING BOARD

Edward Gerjuoy

EDWARD GERJUOY
Member

DATED: October 2, 1984

cc: Bureau of Litigation
Zelda Curtiss, Esquire
Henry Ingram, Esquire
William M. Baily, Esquire

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

WILLIAM B. MILLER :

:

Docket No. 84-143-M

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER
SUR
MOTION TO DISMISS

Synopsis

Appellants have appealed the issuance by the Department of Environmental Resources of a National Pollution Discharge Elimination System (NPDES) permit to Lake Winola Municipal Authority. Lake Winola Municipal Authority filed a motion to dismiss on the basis that one of the consolidated appeals was not timely filed. The records of the Board do not reveal that appellants have filed a response to this motion. Lake Winola Municipal Authority's motion to dismiss is granted and William B. Miller's appeal is dismissed.

Under the provisions of Section 21.52(a) of the Board's Rules and Regulations (25 Pa. Code §21.52(a)), the Board has no jurisdiction to hear an appeal unless the appeal is filed with the Board "within 30 days after notice of such action has been published in the Pennsylvania Bulletin." "Such Action,"

as prescribed by the Board's rules, in the instant appeal refers to the action by DER in issuing the NPDES permit. The issuance of the permit was published in the Pennsylvania Bulletin, March 24, 1984, and this appeal was filed with the Board on April 26, 1984.

OPINION

The Department of Environmental Resources (DER) caused to be published in the Pennsylvania Bulletin on March 24, 1984, a notice of the issuance to Lake Winola Municipal Authority (appellee) of a National Pollution Discharge Elimination System (NPDES) permit.

On April 26, 1984, appellants filed an appeal from the issuance of the NPDES permit to appellee, and the said appeal was docketed by the Board at EHB Docket No. 84-143-M.

On September 4, 1984 the Board ordered that said appeal be consolidated with a prior appeal filed by appellants, at EHB Docket No. 84-102-M for purposes of hearing.

On May 2, 1984, appellee, Lake Winola Municipal Authority filed a Motion to Dismiss with the Board, alleging the untimely filing of the appeal at EHB Docket No. 84-143-M by appellants. The records of the Board do not reveal that appellants have filed a response to Lake Winola's Motion to Dismiss.

Under the provisions of Section 21.52(a) of the Board's Rules and Regulations (25 Pa. Code §21.52(a), the Board has no jurisdiction to hear an appeal unless the appeal is filed with the Board "within 30 days after notice of such action has been published in the Pennsylvania Bulletin."

"Such Action" as prescribed in the Board's rules, in the instant appeal, refers to the action by DER in issuing the NPDES permit to appellee. The issuance of the permit was published in the Pennsylvania Bulletin March 24, 1984, and the appeal was filed with the Board on April 26, 1984.

Since the Board's rules provide that "...jurisdiction of the Board shall not attach to an appeal from an action of the Department unless the appeal is in writing and is filed with the Board..." the Board has consistently ruled that an appeal filed with the Board beyond the 30 day appeal period deprives the Board of jurisdiction, and the Commonwealth Court has sustained the Board's position upon appeal. Joseph Rostosky Coal v. DER, 26 Pa. Cmwlth. 478, 364 A.2d 761 (1976).

We are of the opinion that the instant appeal must be dismissed for lack of jurisdiction due to untimely filing of the appeal.

O R D E R

AND, NOW, this 2nd day of OCTOBER, 1984, upon motion of appellee, Lak Winola Municipal Authority to dismiss the appeal, the ORDER of the Board is that th appeal of William B. Miller at EHB Docket No. 84-143-M is hereby dismissed.

ENVIRONMENTAL HEARING BOARD

ANTHONY J. MAZULLO, JR.
Member

EDWARD GERJUOY
Member

DATED: October 2, 1984

cc: Bureau of Litigation
Dennis Abrams, Esquire
John Wilmer, Esquire
William B. Miller
Ralph Kates, Permittee

nb

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

CHRIN BROTHERS

Docket No. 84-283-M

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER
SUR
MOTION TO INTERVENE

After the filing by Appellant of its notice of appeal, a Petition For Leave To Intervene was filed on August 22, 1984, by an incorporated group named Save Our Lehigh Valley Environment (SOLVE).

Appellant filed an Answer to SOLVE's petition, and SOLVE thereafter filed its Reply to Appellant's Answer.

Argument upon the Petition of SOLVE was conducted, at which counsel for SOLVE, Appellant, and the Department of Environmental Resources (DER) participated, and the matter is therefore ripe for decision.

In its petition, SOLVE recites many substantial reasons why it should be granted intervention in this appeal. These reasons indicated that the interests of SOLVE will be directly and adversely affected if Appellant's appeal is sustained.

In support of its position that intervention should be granted, SOLVE argues that the Solid Waste Management Act (SWMA) of 1980, 35 P.S. 6018.615[1] mandates the grant of intervention in this appeal since the action before the Board herein involves the imposition of civil penalties.[2] We agree that SOLVE, a citizen of the Commonwealth of Pennsylvania, is a beneficiary of that statutory grant of the right to intervene.

By reason of our recognition of the statutory right to intervene on the part of SOLVE, we need not inquire further into the reasons advanced by Appellant in opposition to SOLVE's right to intervene herein.

As a necessary corollary to our holding, the intervention of SOLVE may not be limited in any way, as might be the case in an appeal wherein intervention was not statutorily mandated.

ORDER

AND NOW, this 5th day of October, 1984, for the reasons set forth in the foregoing opinion, the Petition For Leave To Intervene filed by SOLVE is granted, and SOLVE is hereby made a party to this action, without limitation upon its right to participate in the instant appeal.

ENVIRONMENTAL HEARING BOARD

ANTHONY J. MAZULLO, JR., MEMBER

1 Section 6018.615, Right of citizen to intervene in proceedings.
"Any citizen of this Commonwealth having an interest which is or may be adversely affected shall have the right on his own behalf, without posting bond, to intervene in any action brought pursuant to section 604 or 605."

2 Section 605, mentioned in footnote 1, supra, refers to 35 P.S. 6018.605, entitled "Civil Penalties," and it is uncontested that the imposition of civil penalties has been appealed by Appellant herein.

cc: Jim Morris, Esq.
William H. Eastburn, III, Esq.
DATED: October 5, 1984

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

RAY MARTIN :

:

Docket No. 84-002-G

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER

Synopsis

Appeal of DER civil penalty assessment is dismissed due to Appellant's failure to post the required appeal bond or to prepay the penalty as required by the Surface Mining Conservation and Reclamation Act, 52 P.S. §1396.1 et seq. and the Clean Streams Law, 35 P.S. §691.1 et seq. Appellant had alleged that his current financial status precluded the posting of a bond or prepayment of the penalty. Accordingly, the Board provided Appellant with an opportunity for oral argument on the issue of whether his allegation of lack of financial resources should operate to excuse him from the bonding/prepayment requirement of the applicable statutes. Appellant failed to avail himself of this opportunity. Therefore, the Board has no alternative but to dismiss the appeal for lack of jurisdiction.

OPINION

Martin has timely filed an appeal of a DER assessment of civil penalties under the Surface Mining Conservation and Reclamation Act ("SMCRA"), 52 P.S. §1396.1 et seq., and the Clean Streams Law ("CSL"), 35 P.S. §691.1 et seq., in the total amount of $10,000.00. However, Martin's Notice of Appeal was not accompanied by the prepayment or appeal bond required by section 18.4 of the SMCRA, 52 P.S. §1396.22, and by section 605(b) of the CSL, 35 P.S. §691.605(b). Martin's Notice of Appeal, dated January 3, 1984, was accompanied by a covering letter from his attorney, stating:

> Mr. Martin has recently been discharged from the hospital and is unable to forward a $10,000.00 cash payment. Efforts to obtain a surety bond have, to this date, also been unsuccessful, but will continue. The Notice of Appeal is sent for filing without the bond on the advice of Stanley Geary, local Attorney for the Department of Environmental Resources, since the time for appeal expires January 4, 1984.

On March 12, 1984, DER filed a Motion to Dismiss this appeal, on the grounds that Martin's failure to prepay the $10,000.00 or post an equivalent bond has deprived the Board of jurisdiction to hear the appeal. These precise grounds for our dismissal of an SMCRA civil penalty assessment appeal recently have been upheld by the Commonwealth Court. Boyle Land and Fuel Co. v. EHB, 475 A.2d 928 (Pa. Cmwlth. 1984).

In Boyle, however, the Commonwealth Court noted (footnote 6 of Boyle) that the appellant whose appeal to the Board was dismissed previously had stipulated it had the financial capacity to post the security necessary to perfect its appeal under Section 18.4 of the SMCRA. The Board felt that this fact, deemed worthy of note by the Commonwealth Court, might serve to distinguish Boyle from

the instant appeal. On August 2, 1984, therefore, the Board issued an Order in the above-captioned matter, which in pertinent part read as follows:

> 1. Oral argument will be scheduled on the sole issue: Under the holding of Boyle Land and Fuel v. DER, 475 A.2d 928 (Pa. Cmwlth. 1984), is this Board required to dismiss an appeal of a civil penalty assessment under 52 P.S. §1396.22 and/or 35 P.S. §691.605(b), where the appellant has not placed the statutorily mandated amount in escrow, but where the appellant alleges that he has been unable to meet the mandated amount from his own resources or from outside funds such as a bank loan or a surety bond?
>
> 2. Within twenty (20) days of the date of this Order, DER shall arrange a conference call with the appellant and the Board, to schedule the oral argument.

On or about September 1, 1984, DER's counsel informed the Board that he had been unable to arrange the conference call mandated in paragraph 2 of the above-quoted Order because (DER's counsel stated) Martin's counsel had not returned numerous phone calls placed by DER's counsel. DER's counsel agreed to keep trying, and to keep the Board informed. On September 7, 1984, DER's counsel informed the Board that he still had not been able to contact Martin's counsel to arrange the mandated conference call.

Thereupon the Board, on September 7, 1984, placed its own call to Martin's counsel. Martin's counsel was unavailable, but a careful and stern message was left with his secretary. Martin's counsel was informed that he was expected to cooperate in arranging the conference call, and that failure to do so could be deemed refusal to comply with an order of this Board, punishable under 25 Pa. Code §21.124 by sanctions including dismissal of Martin's appeal. Nevertheless, as of this date neither DER's counsel nor the Board has received any communication whatsoever from Martin's counsel in response to the Board's September 7, 1984

message. In fact, the last communication to the Board from Martin's counsel was April 9, 1984, when Martin filed his answer to DER's aforementiond Motion to Dismiss.

Under the circumstances, the Board sees no alternative but to dismiss this appeal on the authority of Boyle, supra. On its face, Boyle certainly is consistent with such dismissal, but the Board was willing to give Martin the opportunity to argue that Boyle does not foreclose acceptance of an appeal when failure to file the penalty assessment prepayment is explained by inability to raise the prepayment. However, it was up to Martin to seize the opportunity thus offered; it is not the Board's or DER's responsibility to ensure the opportunity by tracking down Martin's counsel.

O R D E R

WHEREFORE, this 15th day of October, 1984, the above-captioned appeal is dismissed for lack of jurisdiction.

ENVIRONMENTAL HEARING BOARD

ANTHONY J. MAZULLO, JR.
Member

EDWARD GERJUOY
Member

DATED: October 15, 1984

cc: Bureau of Litigation
Alan S. Miller, Esquire, for DER
J. E. Ferens, Jr., Esquire, of Waggoner and Ferens, Uniontown, for Appellant

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

EVERETT STAHL :

:

: Docket No. 83-299-M

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER

Synopsis

Appellant, Everett Stahl, has appealed the issuance by the Department of Environmental Resources (DER), of an Assessment of Civil Penalty against appellant for alleged violations of the Clean Streams Law, specifically 35 P.S. §691.315(a), and violations of the Surface Mining Act, specifically 52 P.S. §§1396.3.1(a) and 1396.4(a). DER's Motion to Dismiss is granted.

In matters where one is served with a notice of Assessment of Civil Penalty, an appeal of such assessment lies to the Board. However, the mere filing of such appeal does not preserve the appealing party's rights.

Under the provisions of the Surface Mining Act, Section 18.4, and the Clean Streams Law, Section 605(b), both of which statutes appellant is alleged to have violated, the party appealing the assessment of civil penalty must forward the amount of the proposed penalty, or post a bond in that amount with DER.

Since appellant failed to file an answer to DER's Motion to Dismiss, appellant has waived the right to contest DER's allegation that neither the amount of the penalty was forward nor was a bond in the amount of the civil penalty filed.

Therefore, since appellant has not forwarded the amount of the penalty to DER or filed a bond with DER in the amount of the proposed penalty in the time period prescribed by law, the appeal is not perfected as required by law.

OPINION

By telegram received on December 20, 1983, addressed to the Environmental Hearing Board (Board) Everett Stahl (appellant) filed a skeleton notice of appeal with the Board and later perfected the appeal.

The appeal contested the action of the Department of Environmental Resources (DER) in assessing civil penalties against appellant "for mining without a license, mining without a mining drainage permit and mining without a mining permit."[1] The action upon which this appeal was based was the issuance by DER of an Assessment of Civil Penalty dated December 1, 1983 by Thomas R. Vayansky, District Mining Manager, DER, and received by appellant on December 1, 1983.[2]

Other than the telegram received and filed with the Board on December 30, 1983, and the formal Notice of Appeal filed with the Board on February 1, 1984, the Board has not received any other documents, writings or communications, written or oral, from appellant.

On February 3, 1984 the Board, pursuant to its normal and usual practice, issued its Pre-Hearing Order No. 1, wherein, inter alia, the parties to the appeal were ordered to file answers to motions or petitions within (20) days after receipt thereof, and that upon failure to file an answer thereto a party shall be deemed to have waived the right to contest any motion or petition so filed. The Order was mailed to counsel for appellant on February 3, 1984.

On April 25, 1984, DER filed with the Board a Motion to Dismiss appellant's appeal for the reason that the appellant had failed to forward the amount of the penalty

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1. Appellant's formal Notice of Appeal paragraph 2(a) filed with the Board on February 1, 1984.

2. Appellant's formal Notice of Appeal, paragraph 2(b), filed with the Board on February 1, 1984.

assessed, or a bond in lieu of the penalty assessed, to DER or the Secretary of DER, in the time period prescribed by law.[3] Appellant has not filed an answer to the said Motion to Dismiss with the Board.

By reason of appellant's failure to file an answer to DER's Motion to Dismiss, the appellant is hereby deemed to have waived the right to contest DER's allegation that the amount of the penalty was not forwarded, or that a bond in the amount of the civil penalty had been filed, pursuant to the Board's Pre-Hearing Order No. 1.

The activities of appellant, which caused the issuance of DER's Assessment of Civil Penalty of December 1, 1983, allegedly constituted violations of the Clean Streams Law, Act of June 22, 1937, P.L. 1987, 35 P.S. §691.1 et seq, specifically Section 691.315(a)[4], and violations of the Surface Mining Act, Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1 et seq, specifically Section 1396.3.1(a)[5], and Section 1396.4(a)[6].

In matters where one is served with a notice of assessment of civil penalty, an appeal of such assessment lies to the Board. However, the mere filing of an appeal does not preserve the appealing party's rights when the appeal is from an assessment of civil penalty.

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3. Under the provisions of the applicable statutes a party appealing the assessment of a civil penalty is required to post the amount of the penalty within thirty (30) days of receipt of the notice of assessment thereof.

4. Section 691.315(a) prohibits surface mining prior to the receipt of a permit in this case a mine drainage permit.

5. Section 1396.3.1(a) prohibits surface mining without first obtaining a current surface mining operator's license.

6. Section 1396.4(a) prohibits surface mining prior to the receipt of a permit, in this case a mining permit.

Under the provisions of the Surface Mining Act, Section 18.4,[7] and the Clean Streams Law, Section 605(b),[8] both of which statutes the appellant is alleged to have violated, the party appealing the assessment of civil penalty must forward the amount of the proposed penalty, or post a bond in that amount with the department (DER).

In a case recently decided by the Commonwealth Court, based upon the aforementioned requirement that the amount of the fine, or a bond in the face amount of the bond be filed with the notice of appeal, the Court upheld the dismissal of an appeal by the board for the failure of the appellant therein to prepay the penalty assessment. Boyle Land and Fuel v. EHB, 475 A.2d 928 (Pa. Cmwlth. 1984).

In this appeal, the appellant has filed its notice of appeal with the Board, but appellant has not forwarded the amount of the penalty to DER nor has appellant filed a bond with DER in the amount of the proposed penalty, Therefore, the appeal is not perfected as required by law.

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7. Section 18.4 provides:

> "...the person or municipality charged with the penalty shall then have thirty (30) days to pay the proposed penalty in full or, if the person or municipality wishes to contest the amount of the penalty or the fact of the violation, forward the proposed amount to the secretary for placement in an escrow account with the State Treasurer or any Pennsylvania bank, or post an appeal bond in the amount of the proposed penalty, such bond shall be executed by a surety licensed to do business in the Commonwealth and be satisfactory to the department..."

8. Section 605(b) provides:

> "...The person or municipality charged with the violation shall then have thirty days to pay the proposed penalty in full, or if the person or municipality wishes to contest either the amount or the fact of the violation, to forward the proposed amount to the department for placement in an escrow account with the State Treasurer or any Pennsylvania bank, or post an appeal bond in the amount of the proposed penalty, such bond shall be executed by a surety licensed to do business in the Commonwealth of Pennsylvania and be satisfactory to the department..."

O R D E R

AND, NOW, this 19th day of OCTOBER , 1984 upon consideration of Department of Environmental Resources Motion to Dismiss, and upon review of the record in this appeal, the appeal of Everett Stahl at Environmental Hearing Board Docket No. 83-299-M is dismissed.

ENVIRONMENTAL HEARING BOARD

ANTHONY J. MAZULLO, JR.
Member

EDWARD GERJUOY
Member

DATED: October 19, 1984

cc: Bureau of Litigation
Alan S. Miller, Esquire , for DER
William D. Boyle, Esquire , of Boyle & Thiel, for Appellant

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

MID-CONTINENT INSURANCE COMPANY :

:

Docket No. 84-044-M

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER

Synopsis

Appellant, Mid-Continent Insurance Company, appealed DER's forfeiture, Bureau of Mining and Reclamation notice received by appellant on January 3, 1984, of two surety bonds issued to Neshaminy Enterprises International, Inc in the total amount of forty-three thousand one hundred and ninety dollars ($43,190.00). Appellant's appeal, filed with the Board on February 13, 1984--more than thirty (30) days after appellant's receipt of DER's forfeiture notice--is dismissed pursuant to 25 Pa. Code §21.52(a) for lack of jurisdiction due to appellant's untimely filing.

OPINION

By notice dated December 28, 1983[1] Ernest F. Giovannitti, Director, Bureau of Mining and Reclamation, Department of Environmental Resources, advised Neshaminy Enterprises International, Inc. (NESHAMINY) that the bonds posted for the site in question were declared forfeited.

Mid-Continent Insurance Company (MIC), which had issued surety bonds[2] upon the subject site, received a copy of the notice, sent to NESHAMINY, on January 3, 1984[3] and filed its notice of appeal with the Environmental Hearing Board (Board) on February 13, 1984.

The Board assigned MIC's appeal Docket Number 84-044-M.

Upon motion of the Commonwealth for consolidation, filed March 1, 1984, to which Motion MIC did file a response, MIC's appeal was consolidated with an appeal at EHB Docket Number 84-043-M by reason of similarity of factual circumstances of the two appeals.

On April 30, 1984, the Commonwealth filed a Petition to Quash appeal with the Board. Appellant, MIC, has not filed a response to said Petition to Quash appeal with the Board.

The appeal is ripe for decision by the Board.

Under the provisions of Section 21.51(a) of the Board's Rules and Regulations (25 Pa. Code §21.51(a)) appeals from a final action of the Department of Environmental Resources (DER) commence "with the filing of a written notice of appeal with the Board.

---

1. The notice was in the form of a letter addressed to Bruce L. Cauffman, President, and referenced a mining site in Greene and Montgomery Townships, Indiana County, as to which site a violation notce had been sent to Neshaminy by letter of January 20, 1983. The notice also stated that a copy was being forwarded to Mid-Continent Insurance Company by certified mail.

2. MIC issued two surety bonds for the subject site:
   a. Surety bond No. BD2527 was posted for 12.43 acres in the sum of $37,290.00.
   b. Surety bond No. BD2401 was posted for 5.9 acres in the sum of $5,900.00.

3. See paragraph 2(b) of MIC's notice of appeal, executed by E. Kent Landefeld, President of MIC.

The time period within which appeals must be filed with the Board is provided for in 25 Pa. Code §21.52(a), and is thirty (30) days from the date of receipt of notice of "action of the Department" (DER).

In its notice of appeal MIC admitted that it received DER's forfeiture notice of December 28, 1983 on January 3, 1984, and the notice of appeal was filed with the Board Board on February 13, 1984, which latter date was more than thirty (30) days after MIC's receipt of the forfeiture notice.

The failure of MIC to perfect its appeal in accordance with the provisions of 25 Pa. Code §21.52(a) deprives the Board of jurisdiction over this appeal. Joseph Rostosky Coal Company v. Commonwealth of Pennsylvania, DER, 1976 EHB 12, aff'd 26 Pa. Cmwlth 478, 364 A.2d 761 (1976).

Since the Board has no jurisdiction in this appeal, the appeal must be dismissed.

O R D E R

AND, NOW, this 22nd day of OCTOBER, 1984, the appeal of Mid-Continent Insurance Company, appellant herein, at EHB Docket No. 84-044-M, and consolidated at EHB Docket No. 84-043-M, is dismissed.

ENVIRONMENTAL HEARING BOARD

ANTHONY J. MAZULLO, JR.
Member

EDWARD GERJUOY
Member

DATED: October 22, 1984

cc: Bureau of Litigation
Richard S. Ehmann, Esquire, for DER, Western Bureau
E. Kent Landefeld, Esquire, President for Mid-Continent Insurance
Sidney M. Zilber, Esquire, for Fortune Assurance Co., Housepian and Sandler

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

221 NORTH SECOND STREET
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HARRISBURG, PENNSYLVANIA 17101
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PAUL C. HARMAN :

:

Docket No. 82-121-M

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER

Synopsis

Appellant, Paul C. Harman, has appealed a denial by the Department of Environmental Resources (DER) of a mining license renewal under section 3.1(b) of the Surface Mining and Reclamation Act, P.L. 1198 as amended, 52 P.S. §1396.3a(b). DER's motion to dismiss is granted.

The sole relief requested by appellant in this appeal was that DER be ordered to issue appellant a 1982 Surface Mining Operator's License. Since the calendar year 1982 is over, it is impossible for this Board to grant the relief requested. When, during the course of appeal, events occur which render it impossible for the Board to grant any relief, the appeal must be dismissed as moot.

OPINION AND ORDER

Appellant, Paul C. Harman, filed on or about May 19, 1982, an appeal with this Board, of a denial by the Department of Environmental Resources (DER), Bureau of Mining and Reclamation, of a mining license renewal under section 3.1(b) of the Surface Mining and Reclamation Act, P.L. 1198 as amended, 52 P.S. §1396.3a(b). Appellant also filed with this Board on or about May 19, 1982, a Petition for Supersedeas requesting that DER be ordered to issue appellant a 1982 Surface Mining Operator's License. A supersedeas hearing was held and on June 24, 1982, this Board issued an Interim Order, requiring inter alia that DER issue to appellant a temporary mining license subject to certain conditions, and that DER issue a 1982 mining license to appellant upon compliance by appellant of the terms and conditions of the Interim Order.

DER issued to appellant on June 24, 1982, in compliance with this Board's Interim Order, a temporary Surface Mining Operator's License, with an expiration date of August 12, 1982. However, DER never issued appellant a 1982 Surface Mining Operator's License subject to normal terms and conditions because DER believed that appellant had not complied with the terms of this Board's Interim Order or the terms of the temporary license.

Appellant never applied for a 1983 or 1984 Surface Mining Operator's License as required by 52 P.S. §1396.3a(b). Following two requests for status reports, appellant's attorney informed this Board by letter dated February 9, 1984, that appellant had filed Chapter 11 proceedings in bankruptcy on October 6, 1982, and that he has not operated as a surface miner since that time.

On March 14, 1984, DER filed with this Board a Motion to Dismiss this appeal as moot. DER's motion to dismiss is granted because the sole relief requested by appellant in this appeal was that DER be ordered to issue appellant a 1982 Surface Mining Operator's License. Since the calendar year 1982 is over, it is impossible for this Board to grant the relief requested by appellant. When, during the course of appeal, events occur which render it impossible for the Board to grant any relief, the appeal must be dismissed as moot. Silver Spring Township v. DER and Pennsy Supply, Inc. 28 Pa. Cmwlth. 302, 368 A.2d 866 (1977); Cambria Coal Company v. DER, 1982 EHB 517; Highway Auto Service v. DER, 1980 EHB 10, aff'd. 64 Pa. Cmwlth. 160, 439 A.2d 238 (1982).

ORDER

AND NOW, this 26th day of October, , 1984, the appeal of Paul C. Harman, at EHB Docket No. 82-121-M, is hereby dismissed as moot.

ENVIRONMENTAL HEARING BOARD

ANTHONY J. MAZULLO, JR. MEMBER

EDWARD GERJUOY, MEMBER

cc: Bureau of Litigation
Timothy J.Bergere, Esq.
Blair F. Green, Esq.
Robert Lampl, Esquire

DATED: October 26, 1984

nb

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

BEAR CREEK WATERSHED AUTHORITY, et al. :

:

Docket No. 84-242-G

:

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER

Synopsis

DER moved to quash this appeal as being untimely filed under the requirements of 25 Pa. Code 21.52(a). DER issued an order to Appellants. Shortly thereafter it reissued the order, amended to reflect a change in the composition of the appellant Municipal Authority Board. Both orders advised Appellants that they had thirty days from "receipt of written notice of this action" within which to file their appeal. Under these circumstances, Appellants' appeal--filed thirty days after receipt of the amended order--will not be dismissed. The Board is reluctant to dismiss an appeal on purely procedural grounds; the Appellants' belief that the later amended order supplanted the original order was not unreasonable, and estops DER from maintaining the time for filing the appeal must run from the date of the original order.

OPINION

On June 6, 1984, DER issued an order to the Bear Creek Watershed Authority and to Authority Board Members Jack, Bowser, Buzard, Cajka, Bullman and Ekas. The order was directed to these Board Members in their official capacities and provided that they were to undertake a series of actions, the purpose of which was construction of a municipal sewerage system. Service of the order upon the Authority and each of the Board members mentioned above was accomplished on June 7 and 8, 1984.

After this service was accomplished, DER learned that Robert Jack had been replaced by Rachel Linamen on the Board. As a result, DER modified the June 6, 1984 order, replacing references to Mr. Jack with references to Ms. Linamen and changing the date of the order to June 15, 1984. No other changes were made. The modified order was served upon Ms. Linamen on June 16, 1984. A covering letter accompanying the June 15, order informed Ms. Linamen that this was "an amended order of the Department substituting you for Robert Jack on the Bear Creek Water Shed Authority." Both the June 6 and the June 15 orders contained the following paragraph:

> This action of the Department may be appealable to the Environmental Hearing Board, Third Floor, 221 N. Second Street, Harrisburg, PA 17101 (717-787-3483) by any aggrieved person pursuant to Section 1921-A of the Administrative Code of 1929, 71 P.S. Section 510-21; and the Administrative Agency Law, 2 Pa. C.S., Chapter 5A. Appeals must be filed with the Environmental Hearing Board within 30 days of receipt of written notice of this action unless the appropriate statute provides a different time period. Copies of the appeal form and the regulations governing practice and procedure before the Board may be obtained from the Board. This paragraph does not, in and of itself, create any right of appeal beyond that permitted by applicable statutes and decisional law.

On July 16, 1984, the thirtieth day following service of the amended order upon Ms. Linamen, a notice of appeal of the amended order was filed with this Board. The timeliness of that filing and its jurisdictional consequences are at issue here. DER has filed a Petition To Quash the appeal, contending that the thirty-day filing requirement of 25 Pa. Code 21.52(a) has not been met. In essence, DER argues that the appeal should have been filed within thirty days of receipt of the original order dated June 6, 1984.

In response, the appellants argue that given the language of DER's covering letter and the appeal paragraph quoted above, they reasonably believed that they had thirty days from receipt of the amended order in which to file their notice of appeal. They argue that the second order is a complete, fully integrated document, that DER--as the drafter of that document--should be bound by the language it contains, and that, therefore, the appeal is timely and should not be dismissed. The appellants also claim--and in the context of DER's Petition to Quash must be believed--that although the modified order was served only on Ms. Linamen she, as Board secretary, immediately told the other Board members she had received a modified order.

There is no doubt that failure to file an appeal within the thirty-day period specified by 25 Pa. Code §21.52(a) deprives this Board of jurisdiction to hear the merits of an appeal. Joseph Rostosky v. DER, 26 Pa. Cmwlth. 478, 364 A.2d 761 (1976). The instant appeal is untimely, however, only if the original order really is the only order the appellants could timely appeal. DER's use of the term "amended order" to describe the June 15, 1984 order, and DER's failure to point out in its June 15 order that the thirty-day notice quoted supra still ran from June 6, 1984, gave all the appellants who learned of the modified order a reasonable basis for believing that the June 15 order was intended to supplant the

June 6 order. If the June 6 order had been supplanted, then the instant appeal is timely.

DER insists, of course, that it did not intend to supplant the June 6 order. But what DER actually intended is not germane; what is germane, and legally consequential, is that the appellants' belief DER intended to supplant the June 6 order--or at the very least intended to give them thirty days from June 15 to file their appeal--was reasonable. In other words, we have here a classic illustration of estoppel. Where DER's own language in its June 15 order reasonably caused the appellants to believe they had extra time to file their appeal, and where the appellants' reasonable reliance on this belief would operate to their great detriment if this reliance were now to be rejected, DER must be estopped from bringing the earlier June 6 order before this Board and from contending that the appellants should have disregarded the plain thirty-day notice language of the June 15 letter. Estoppel can run against the Commonwealth. Humphreys v. Cain, 477 A.2d 32 (Pa. Cmwlth. 1984); Hauptmann v. PennDOT, 429 A.2d 1207 (Pa. Cmwlth. 1981). If DER is estopped from urging the appeal deadline specified in the June 6 order, the Board has no legal basis for rejecting the instant appeal, which was filed within the thirty-day deadline specified by the June 15 order.

Therefore DER's petition to quash the appeal is denied, as to the Authority and each Board member in his or her representative capacity. We believe this result is consistent with the precepts of the Commonwealth's General Rules of Administrative Practice and Procedure, especially 1 Pa. Code §31.2, which states that our rules "shall be liberally construed to secure just . . . determination of the issues presented." Indeed, this Board repeatedly has stated that it is reluctant to dismiss an appeal on purely procedural grounds. See, e.g., Benjamin Coal Co. v. DER (Docket No. 84-021-G, Opinion and Order dated August 9, 1984). We are particularly reluc-

tant to do so where the confusion which has resulted in this dispute was generated by DER itself. DER has not claimed that the allowance of this appeal, filed thirty days after receipt of the amended order, will prejudice its ability to present its case at a hearing on the merits.

We stress that we are accepting this appeal as timely filed, not nunc pro tunc. It remains the case that this Board will not accept an untimely filed appeal nunc pro tunc unless the late filing can be ascribed to some breakdown in the Board's own routines. Eugene Petricca v. DER (Docket No. 83-239-G, Opinion and Order dated January 13, 1984); FMC Corporation v. DER (Docket No. 84-119-G, Opinion and Order dated July 23, 1984).

O R D E R

WHEREFORE, this 29th day of October, 1984, our October 19, 1984 order in this matter, rejecting DER's petition to quash this appeal, is affirmed.

ENVIRONMENTAL HEARING BOARD

EDWARD GERJUOY
Member

DATED: October 29, 1984

cc: Bureau of Litigation
Richard S. Ehmann, Esquire
Bresci R. P. Leonard, Esquire

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

221 NORTH SECOND STREET
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HARRISBURG, PENNSYLVANIA 17101
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SNYDER TOWNSHIP RESIDENTS FOR ADEQUATE WATER SUPPLIES :

:

Docket No. 84-316-G

:

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER

Synopsis

Appeal is dismissed as having been taken from an action of DER which does not affect personal or property rights, privileges, immunities or obligations and which, therefore, does not constitute an appealable action. 2 Pa. C.S. §101; 25 Pa. Code §21.2. Appellants seek to challenge decisions or opinions of DER staff reached during review of a mine drainage permit application. The permit has not been issued; DER's action is not yet final. While issues of appealability often turn upon public policy considerations, Appellants have offered no good reasons to extend the concept of finality here. It is possible that the permit ultimately will be denied. In the event it is not, they will have an opportunity to challenge DER's decision via an appeal of the permit grant.

OPINION

On August 1, 1984, DER wrote Mrs. Debra S. Bovaird (presumably one of the Residents who have filed this appeal) a letter responding to questions Mrs. Bovaird had raised concerning Doan Mining Company's application for a Mine Drainage Permit. This letter stated, in pertinent part:

> It is my understanding that groundwater data is contained in the Company's Mine Drainage Permit # 33840101....As you are probably aware, the current application involves areas which have been previously mined or are adjacent to areas which have been mined. The data which our staff has gathered from the current operations indicates that there is no need for an overburden analysis.
>
> Based on their review of the application, it is staff opinion that the mining activity will not impact private or public water supplies. It is our policy not to issue permits when it is likely that such supplies would be degraded.
>
> I can assure you that permits will be issued for this mining operation only if that activity will comply with all applicable rules and regulations of the Department.

The Residents have appealed this letter, on the grounds, inter alia, that:

> 5. The Department's decision to accept information received in prior mining with reference to the Lower Freeport coal is arbitrary, capricious, an abuse of discretion and an error of law.
>
> 6. The Department's decision that proposed mining activity will not affect public or private water supplies is arbitrary, capricious, an abuse of discretion and an error of law in that the decision is incorrect and not supported by information submitted by the Doan Mining Company.

DER has moved to dismiss this appeal, on the grounds that DER's above-quoted letter to Mrs. Bovaird--which quotes staff opinion about Doan's permit application but which clearly indicates the application remains under review--is not an appealable DER action. DER cites: Standard Lime and Refractories Co.

v. DER, 2 Pa. C. 434, 279 A.2d 383 (1971); Sunbeam Coal Co. v. DER, 8 Pa. C. 622, 304 A.2d 169 (1972); and Perry Brothers Coal Co. v. DER, 1981 EHB 583. The Residents' response to DER's motion terms these cites "in opposite" (sic), "in that, unlike a notice of violation, the Department has made a final determination of a matter which affects the rights of appellant." The Residents also assert that the "cases cited by the Department are of doubtful vitality in the light of the Board's comments in Huey vs. DER", EHB Docket No. 84-042-G (Opinion and Order, May 15, 1984).

The appealability of a DER action is governed by 2 Pa. C.S. §101 and 25 Pa. Code §21.2. To be appealable, a DER action must affect "personal or property rights, privileges, immunities or obligations", and must be "final". To some extent, the decision to include an action in the class termed "appealable" involves public policy considerations. Man O'War Racing Association v. State Horse Racing Commission, 433 Pa. 432, 250 A.2d 172 (1969); Bethlehem Steel Corporation v. DER, 37 Pa. Cmwlth. 479, 398 A.2d 1383 (1978); James E. Martin v. DER, Docket No. 83-120-G (Opinion and Order, August 20, 1984). Under the facts of the instant appeal, however, DER's appealed-from action clearly is not final, and the Residents have suggested no good public policy reasons for stretching the definition of finality to accommodate their appeal.

In particular, DER has not yet acted on the permit application, and still may refuse it, for reasons which might include a revision of DER's original opinion that "there is no need for an overburden analysis" and that "the mining activity will not impact private or public water supplies." If the permit is granted, the Residents will have a chance to challenge these opinions via an appeal of the permit grant, which will be an appealable action. The Residents' citation of Huey, supra, is not to the point because Huey did not involve a

permit application, whose possible future grant could be appealed. In Huey, the appellant complained that the coal company's mining and blasting activities, on an existing permit, had degraded his water supply. DER's rejection of this complaint was an action which Huey would not have another opportunity to rectify. Moreover, although the Board's Huey opinion questioned the logic of the adjudication on which the Huey opinion rests, namely George Eremic v. DER, 1976 EHB 249, the Board did not rule that DER's rejection of Huey's complaint was appealable.

O R D E R

WHEREFORE, this 30th day of October , 1984, the above-captioned appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

ANTHONY J. MAZULLO, JR.
Member

EDWARD GERJUOY
Member

DATED: October 30, 1984

cc: Bureau of Litigation
Richard S. Ehmann, Esquire, for DER
Lee R. Golden, Esquire, of Robert P. Ging, Jr.,
Pittsburgh, for Appellant

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

221 NORTH SECOND STREET
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BOROUGH OF TAYLOR : Docket No. 82-179-H

(issued 10-30-84)

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

and BICHLER SANITARY LANDFILL,
Permittee

OPINION AND ORDER SUR
PERMITTEE'S "PETITION TO VACATE ORDER"

Permittee-intervenor, Bichler Sanitary Landfill, filed a "Petition to Vacate Order" on May 6, 1983, in which Bichler moved the Board to overturn its Order of March 10, 1983 (and, by implication, its Clarification Order of March 15, 1983) wherein the Board granted the appeal of appellant Borough of Taylor of DER's issuance to Bichler of a solid waste permit amendment for Bichler's sanitary landfill, located in the Borough of Taylor, Lackawanna County, Pennsylvania. The practical effect of the Board's Orders, which were based upon Bichler's failure to defend, was the revocation of the solid waste permit amendment granted to Bichler by DER. The Board conducted a hearing on the merits of Bichler's petition on December 9, 1983, Board Member Anthony J. Mazullo, Jr. presiding, and reserved ruling on appellant's motion to

dismiss for lack of jurisdiction. Even though the Board held a hearing on the merits of Bichler's petition, the Board need not reach the merits due to our resolution of the case based upon jurisdictional grounds. Appellant's motion to dismiss is granted for the following reasons.

While Environmental Hearing Board Rules and Regulations do not provide for a "Petition to Vacate Order," Section 21.122 does provide for a petition for rehearing or reconsideration. 25 Pa. Code §21.122. In pertinent part, Section 21.122 states that: "[t]he Board may on its own motion or upon application of counsel, within [twenty] 20 days after a decision has been rendered, grant reargument before the Board en banc." 25 Pa. Code §21.122(a) (emphasis added). Bichler's "Petition to Vacate Order" is, in essence and for all practical purposes, a petition for rehearing or reconsideration.

Because the Board received Bichler's petition on May 6, 1983-- more than twenty (20) days after the Board's final Opinion and Order of March 15, 1983-- Bichler's petition has been filed in an untimely fashion and the Board has no jurisdiction to consider it. Cf. East Lampeter Township Sewer Authority v. Butz and DER, 71 Pa.Cmwlth 105, 109, 455 A.2d 220, 222 (1983); Toro Development Company v. DER, et al., 56 Pa.Cmwlth 471, 480, 425 A.2d 1163, 1168 (1981); Lebanon County Sewage Council v. DER, 34 Pa.Cmwlth 244, 246, 382 A.2d 1310, 1311 (1978); Rostosky v. DER, 26 Pa.Cmwlth 478, 481, 364 A.2d 761, 763 (1976). Although these citations admittedly deal only with timely appeals, their reasoning appears to be

applicable to untimely petitions for rehearing or reconsideration. This inference is supported by the limited Pennsylvania case law on this issue. Mayer v. Unemployment Compensation Board of Review, 27 Pa.Cmwlth 244, 366 A.2d 605 (1976).

Nevertheless, Bichler argues that, because the Board's Order was issued as a result of his failure to defend, it should be construed as a default judgment; as a result, Bichler further argues that the Board should exercise its "equity power" to open the so-called default judgment. Unfortunately for Bichler, however, the Board does not possess any equitable jurisdiction under these circumstances, if at all, and Bichler has not cited any persuasive or binding authority in support of such a novel contention.

On the contrary, the twenty-day period for timely filing of a petition for rehearing or reconsideration is established by administrative regulation, which has the force of law and which is binding upon the Board. Rostosky, supra; Mayer, supra. The untimeliness of Bichler's filing deprives the Board of jurisdiction. Rostosky, supra.

Accordingly, Bichler's "Petition to Vacate Order" is hereby denied for lack of jurisdiction, and we do not, and need not, discuss the factual allegations contained in said petition.

ORDER

AND NOW, this 30th day of October, 1984, appellant's Motion to Dismiss is hereby granted and permittee's "Petition to Vacate Order" is hereby denied.

ENVIRONMENTAL HEARING BOARD

Anthony J. Mazullo, Jr.
Member

Edward Gerjuoy
Member

DATED: October 30, 1984

For appellant:
Lawrence J. Moran, Esq.
Abrahamsen and Moran
Scranton, Pa.
For Commonwealth of Pennsylvania,
Department of Environmental Resources:
Timothy Bergere, Esq.
Lynn Wright, Esq.
Assistant Counsel
Harrisburg, Pa.
For permittee-intervenor:
Linus E. Fenicle, Esq.
Ernico and Fenicle
Harrisburg, Pa.

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

221 NORTH SECOND STREET
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MICHAEL G. SABIA, SR., and THE WAREHOUSE 81 LIMITED PARTNERSHIP :

: Docket No. 83-275-M

: Issued: November 1, 1984

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION
AND
ORDER
SUR MOTION TO DISMISS

Synopsis

Appellants have appealed from a letter from DER which expressed concern over appellants' proposals to inject air stripped ground water back into the water table, and over the "existence of the buried sludge impoundment." Also, the letter proposed a meeting to discuss these concerns. DER's Motion to Dismiss on the basis that the letter appealed from was not an appealable action of DER is granted.

This Board has no jurisdiction to hear this appeal because there has been no "final action" of DER as defined by 25 Pa. Code §21.2 which would affect "personal or property rights, privileges, immunities or obligations" of appellant as required by 71 P.S. §1710.2. Although the letter stated that appellant should present a detailed proposal, DER did not demand or order that the proposal be submitted.

OPINION
AND
ORDER
SUR MOTION TO DISMISS

By notice filed with the Board on December 8, 1983, Appellants appealed from a letter of DER dated November 16, 1983, wherein William P. Parsons, Regional Water Quality Manager, Department of Environmental Resources, expressed concern over Appellant's proposals to inject air stripped ground water back into the water table, and concern over the "existence of the buried sludge impoundment," and proposed a meeting to discuss those concerns.

DER filed a Motion To Dismiss on the basis that the letter appealed from was not on appealable action of DER and that the Board therefore lacked jurisdiction in this matter.

Appellants filed its Response to the motion to dismiss alleging that the language of the November 16, 1933, letter imposes an obligation upon Appellants "to test, analyze and submit a remedial proposal to the Department," and therefore is an appealable action.

The portion of the November 16, 1983, letter which forms the basis of this appeal is as follows:

> "Our other area of concern is the existence of the buried sludge impoundment immediately adjacent to the manufacturing building underneath a reprocessed fluff pile. We have found photographs taken several years ago which clearly depict the existence of this impoundment. A detailed proposal for evaluating the impact of this impoundment and remedial action should be presented."

Appellants cite this portion as imposing a "liability" and "obligation" upon them and therefore is appealable.

We are of the opinion that the Appellants have "jumped the gun" in this matter. In the letter, the writer stated that the detailed proposal (relating to the buried impoundment) should (emphasis added) be presented. Also, a meeting was proposed for the purpose of further discussing the matter of the impoundment and other DER concerns.

DER did not demand, or order, that the proposal be submitted within any time frame. The suggestion that the proposal be submitted is clear by the use of the term "should be presented" and by the invitation to meet and discuss the matter further.

In order for the conduct of DER to be such as to constitute "final action," the writing must be construed as an adjudication. An adjudication is a final action by an agency which would affect "personal or property rights privileges, immunities or obligations" of Appellant herein.[1]

Final action is defined in Title 25, Part 1, Subpart A, Chapter 21, §21.2 of DER's regulations,[2] and the action herein complained of does not fit that definition, for the reason that DER advised Appellant that the action it recommended "should" be taken.

There being no final action of DER under the facts presented in this appeal, this Board has no jurisdiction to hear the appeal. See Sunbeam Coal v. DER, 8 Pa. Cmwlth. 623, 304 A. 2d 169 (1973); Donnelly Printing Company v. DER, EHB Docket No. 83-048-M (Opinion and Order dated 7/12/83); 71 P.S. §510.21(a), 25 Pa. Code §21.2(a).

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[1] Administrative Agency Law, Act of June 4, 1945, P.L. 1388, as amended, 71 P.S. §1710.2.

[2] "Action--Any order, decree, decision, determination or ruling by the Department or local agency affecting personal or property rights, privileges, immunities, duties, liabilities or obligations of any person, . . ."

ORDER

AND NOW, this 1st day of November , 1984, upon motion of DER, the appeal of Michael G. Sabis, Sr. and Warehouse 81 Limited Partnership is hereby dismissed.

ENVIRONMENTAL HEARING BOARD

ANTHONY J. MAZULLO, JR., MEMBER

EDWARD GERJUOY, MEMBER

cc: Central Bureau
David J. Brooman, Esq.

DATED: November 1, 1984

nb

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

221 NORTH SECOND STREET
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(717) 787-3483

DALE F. JAMES AND ASSOCIATES :

:

Docket No. 82-153-H

:

Issued: November 1, 1984

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER

Synopsis

Dale F. James and Associates, appellants, has appealed a denial by the Bucks County Department of Health of license to conduct a public eating and drinking place. This appeal is dismissed on the Board's own motion because the Board has no jurisdiction.

Pursuant to section 1921-A of the Administrative Code, 71 P.S. §510-21 (a), the Environmental Hearing Board has jurisdiction over appeals from any order, permit, license or decision of the Department of Environmental Resources (DER). The denial by the Bucks County Department of Health of a license to conduct a public eating and drinking place does not constitute an order, permit, license or decision of DER because the Bucks County Department of Health was acting pursuant to a statutory grant of authority under the Public Eating and Drinking Places Act, which is separate from the authority of DER under this Act. 35 P.S. §655.2. Counties are given the authority to create departments of health under another direct statutory grant of authority known as the "Local Health Administration Law". 16

P.S. §12001, et seq. Therefore, the proper place to bring this appeal was the Court of Common Pleas of Bucks County, and not the Environmental Hearing Board. 2 Pa. C.S.A. §752, 42 Pa. C.S.A. §§102 and 933(a)(2).

OPINION

Dale F. James and Associates, appellant, filed with this Board, on June 18, 1982, an appeal from the refusal by the Bucks County Board of Health to issue appellant a license to conduct a public eating and drinking place. Since this Board has concluded that it has no jurisdiction over this appeal, this case is dismissed on the Board's own motion without holding a hearing or making any findings of fact other than those necessary to describe the procedural posture and nature of the appeal.

On March 9, 1982, Dale F. James applied to the Bucks County Department of Health for a license to operate a soft ice cream establishment at 550 North Main Street, Doylestown, Bucks County, Pennsylvania. Following an administrative hearing, the Bucks County Department of Health issued on May 19, 1982, an Adjudication Order denying the issuance of an Eating and Drinking Establishment license to appellant. The stated basis for denial was that the individual sewage disposal system serving the property in question was not in compliance with Bucks County Department of Health regulations pertaining to individual sewage systems. The adjudication by the Bucks County Department of Health also stated that its regulations incorporate Chapters 71 and 73 of 25 Pa. Code, the regulations promulgated by the Pennsylvania Department of Environmental Resources (DER), pursuant to the Sewage Facilities Act 35 P.S. §750.9.

Section 1921-A of the Administrative Code, 71 P.S. §510-21 (a), provides that the Environmental Hearing Board shall have the power and its duties shall be to hold hearings and issue adjudications under the provisions of the act of June 4, 1945 (P.L. 1388), known as the "Administrative Agency Law", 71 P.S. §1710.1 et seq., on any order, permit, license, or decision of the Department of Environmental Resources. However, the denial by the Bucks County Department of Health of a license to conduct a public eating and drinking place does not constitute an order, permit, license or decision of DER.

The Bucks County Department of Health has powers under the Public Eating and Drinking Places Act (35 P.S. §655.1 et seq.), which are separate from those of

DER under this Act. In this case, the Bucks County Department of Health was acting pursuant to 35 P.S. §655.2 which requires the proprietor of a public eating or drinking place to obtain a license from the county department of health, whenever such public eating or drinking place is located in a political subdivision which is under the jurisdiction of a county department of health.[1] This is a direct statutory grant of authority to county departments of health and is not pursuant to a regulation promulgated by DER. Counties are given the authority to create departments of health under another direct statutory grant of authority known as the "Local Health Administration Law". 16 P.S. §12001, et seq.

Subchapter B of Chapter 7 of Title 2, 2 Pa. C.S.A. §752, provides that persons aggrieved by an adjudication of a local agency have the right to appeal to the court vested with jurisdiction of such appeals pursuant to Title 42. 42 Pa. C.S.A. §933 (a) (2), provides that the courts of common pleas have jurisdiction over appeals from "government agencies" under Subchapter B of Chapter 7 of Title 2. "Government Agency" is defined in 42 Pa. C.S.A. §102, as to include local agencies and authorities. Therefore, the proper place to bring this appeal was the Court of Common Pleas of Bucks County, and not the Environmental Hearing Board.

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1. Since the denial of the license by the Bucks County Department of Health was based at least in part on the failure of appellant to comply with regulations promulgated by DER under the Sewage Facilities Act (25 Pa. Code §§71 and 73), it should be noted that the Public Eating and Drinking Places Act specifically provides that the county departments of health may base a denial of a license upon failure to comply with the rules and regulations of the "department" 35 P.S. §655.3. DER is the "department" referred to in the Public Eating and Drinking Places Act. See 35 P.S. §655.1 and 71 P.S. §510-1 (11).

ORDER

AND, NOW, this 1st day of NOVEMBER, 1984 the appeal of Dale F. James and Associates, at EHB Docket No. 82-153-M, is hereby dismissed.

ENVIRONMENTAL HEARING BOARD

ANTHONY J. MAZULLO, JR.
Member

EDWARD GERJUOY
Member

DATED: November 1, 1984

cc: Bureau of Litigation
Burton Spear, Esquire, of Renninger, Spear & Kupits, for Appellant
Louise S. Thompson, Esquire , for DER

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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FRANKLIN LYONS :

:

Docket No. 84-045-G

:

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER

Synopsis

The appeal is dismissed for Appellant's failure to comply with the Board's order directing him to file a pre-hearing memorandum. Appellant failed to file the same despite the Board's repeated warning that failure to do so could result in the dismissal of the appeal. Although DER at least initially bears the burden of proof in this matter, pursuant to 25 Pa. Code 21.101 (b0(3), the appeal is dismissed; Appellant has given no indication of his intention to comply with the Board's order for over three months.

OPINION

By an order dated March 6, 1984 the Board ordered Appellant to file his pre-hearing memorandum on or before May 21, 1984. To date, Appellant has failed to do so. This failure has occurred despite the Board's repeated warning that the appeal might be dismissed in the absence of the filing of the pre-hearing memorandum. The second such warning was contained in a notice which was sent via certified mail; the returned receipt indicates that Appellant received the

same. This is an appeal of a DER compliance order. Therefore, DER would normally bear the burden of proof, at least initially. 25 Pa. Code 21.101(b)(3). Nevertheless, the Board can see no reason to permit this appeal to remain on its docket. There has been no indication for over three months that Appellant has any intention of complying with the Board's orders. See W. A. Cotterman v. DER, (EHB Docket No. 83-155-G, Opinion and Order dated February 23, 1984); Ben Franklin Coal Company v. DER (EHB Docket No. 83-224-G, Opinion and Order dated February 23, 1984).

O R D E R

WHEREFORE, this 13th day of November, 1984, the appeal captioned above is dismissed.

ENVIRONMENTAL HEARING BOARD

ANTHONY J. MAZULLO, JR.
Member

EDWARD GERJUOY
Member

DATED: November 13, 1984

cc: Bureau of Litigation
Alan S. Miller, Esquire, for DER
Franklin Lyons, Appellant

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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EUGENE PETRICCA :

:

: Docket No. 84-112-G

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER SUR
PETITION FOR SUMMARY JUDGMENT

Synopsis

Summary judgment is granted for DER. Appellant's Responses to DER's Requests for Admissions disposed of every factual issue relevant to the appeal with the possible exception of the identity of the administrative order to which the compliance order herein appealed made reference. However, given that Appellant failed to challenge the identity of the administrative order in his response to DER's Motion for Summary Judgment, the Board determines that there are no disputed factual issues. Since it is not disputed that a condition exists which will not be abated within the period specified in the earlier administrative order, DER's issuance of the compliance order, pursuant to its mandatory duty under 25 Pa. Code 86.212(a), was reasonable. DER is entitled to summary judgment as a matter of law.

OPINION

This is an appeal of a DER compliance order dated February 17, 1984 which concerns a site in Elizabeth Township, Allegheny County. The compliance order cited Appellant for having failed to comply with an administrative order. DER has moved for summary judgment. In ruling upon DER's motion we are guided by the precepts of Pennsylvania Rule of Civil Procedure 1035 which provides in relevant part that summary judgment "shall be rendered if the pleadings, . . . and admissions on file . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Pa. R.C.P. 1035(b).

Appellant has responded to DER's Request for Admissions. Said responses conclusively dispose of every factual issue relevant to the disposition of this appeal with one possible exception, i.e., the identity of the administrative order to which the instant compliance order makes reference: Appellant has admitted that it received an administrative order dated September 12, 1983 on or about September 14, 1983 and that said administrative order concerned the Elizabeth Township site. (Appellant's Answer to DER's Request for Admission No. 1). Appellant has also admitted that the appeal it took from the September 1983 administrative order was subsequently dismissed by this Board. (Appellant's Answer to DER's Request for Admission Nos. 3 and 4). Appellant has refused to admit, however, that the administrative order of September 1983 is the same administrative order to which the compliance order herein appealed makes reference. (Appellant's Answer to DER's Request for Admission No. 5). It is this simple factual issue which provides the sole possible point of dispute.

We note first that we are not entirely convinced that a refusal to admit, in response to a narrowly worded DER statement, necessarily implies that one intends to actively contest the validity of DER's statement. We need not reach that point, however, since Appellant did not raise the issue of the identity of the administrative order in its Response to DER's Motion for Summary Judgment. Pa. R.C.P. 1035(d) requires that a party opposing a Motion for Summary Judgment must "set forth specific facts showing that there is a genuine issue for trial" or summary judgment will be entered against him. Consequently, the identity of the administrative order referenced in the compliance order which forms the subject matter of this appeal is deemed not to be in dispute. Appellant himself appears to have tacitly conceded that the only administrative order which is relevant to this proceeding is that of September 12, 1983. (See, e.g., Appellant's Pre-Hearing Memorandum paragraphs 9, 21 and 22.)

Having established the identity of the administrative order, the remaining issues in this appeal are quite simple. This Board's dismissal of the appeal of said administrative order rendered the order final. (The appeal was docketed at No. 83-239-G; the dismissal was by way of an Opinion and Order dated January 13, 1984.) This finality precludes any challenge to the content or validity of the administrative order in this subsequent proceeding. Commonwealth v. Derry Township, 466 Pa. 31, 351 A.2d 606, 610 (1976). Furthermore, Appellant has admitted that he failed to comply with the terms of the administrative order. (Appellant's Answer to DER's Requests for Admission Nos. 6, 9 and 10.) This being the case, the sole issue becomes whether DER acted properly in issuing the compliance order from which this appeal has been taken.

25 Pa. Code §86.212(a)(3) imposes a mandatory duty upon DER to "issue a cessation order, or take other appropriate enforcement action to accomplish

cessation, if the Department determines that a condition, practice, or violation exists which . . . will not be abated within an abatement period specified in a Department order." DER issued the instant compliance order in conformity with the duty imposed upon it by this regulation. Where DER acts pursuant to a mandatory duty the sole questions before the Board is whether to uphold or vacate DER's action. Warren Sand and Gravel Co., Inc. v. DER, 20 Pa. Cmwlth. 186, 341 A.2d 556 (1975). Under the circumstances of this case we cannot say that DER's action was in any way unreasonable; DER acted according to its legal duty. Therefore, since there are no remaining factual issues in dispute, we find that DER is entitled to judgment as a matter of law.

O R D E R

WHEREFORE, this 13th day of November, 1984, it is ordered that DER's Motion for Summary Judgment is granted and Appellant's appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

ANTHONY J. MAZULLO, JR.
Member

EDWARD GERJUOY
Member

DATED: November 13, 1984

cc: Bureau of Litigation
Alan S. Miller, Esquire, for DER
J. Philip Bromberg, Esquire, Pittsburgh,
for Appellant

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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ARMOND WAZELLE :

:

Docket No. 83-063-G

:

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and Borough of Punxsutawney, Intervenor

OPINION AND ORDER
SUR PETITION FOR SUPERSEDEAS

Synopsis

Appellant landfill operator's petition for supersedeas is granted. The DER order appealed-from revoked Appellant's permit and required closure of the landfill. Pursuant to an order of the Commonwealth Court, Appellant has ceased depositing waste at the landfill, and Appellant therefore has threatened to cease picking up solid waste in the communities serviced by his landfill. The possibility that waste pick-up will cease poses a threat to the health of these communities. Although Appellant has not made a showing sufficient to justify the grant of a supersedeas on his own behalf, the threat to the health of the communities is real. This threat must be weighed against the possible environmental harm resulting from continued operation of a landfill which has been shown to have been in violation of environmental statutes and regulations. Given the fact that the landfill's violation history has shown significant improvement in the recent past, the Board finds that a limited thirty-day supersedeas is warranted so as to

give the communities time to conclude other arrangements for the pick-up and disposal of their solid waste. Appellant must furnish DER with a bond to guarantee compliance with DER regulations during the period of the supersedeas.

OPINION

Wazelle is the operator of the Wazelle Brothers Sanitary Landfill in McCalmont Township, Jefferson County. He has appealed a DER order, dated March 18, 1983, revoking his solid waste permit, No. 100412. The Borough of Punxsatawney, which makes heavy use of the Wazelle Landfill, has intervened. Shortly after filing his notice of appeal, Wazelle also filed a petition for supersedeas of DER's March 18, 1983 order. This petition was not pursued, however, causing the Board to defer indefinitely a hearing on that petition (see our Opinion and Order of September 13, 1983, at this Docket Number).

In the full course of time, hearings on the merits of this appeal have been scheduled and completed, amounting to five days of hearing in all. On November 5, 1984, the final day of these hearings, Wazelle orally renewed his motion for supersedeas, calling the Board's attention to the following facts:

> 1. Although DER issued its order revoking Wazelle's permit and ordering cessation of his landfill operation on March 18, 1983, until relatively recently DER has made no attempt to enforce its cessation order, despite the fact that Wazelle openly had continued to operate his landfill.
>
> 2. On October 22, 1984, the Commonwealth Court granted DER a preliminary injunction, ordering Wazelle "to cease disposing of solid waste at the Wazelle Landfill within twenty-four (24) hours" of the filing of the Commonwealth Court's Order.
>
> 3. Wazelle now has ceased operations, in compliance with the Commonwealth Court's Order.

4. The residents of Punxsutawney and other communities near the Wazelle Landfill have relied very largely on Wazelle to pick up their solid waste, as well as to dispose of the waste at his landfill.

5. Now that his landfill has been closed, Wazelle has been hauling the solid waste he picks up to considerably more distant disposal sites.

6. Wazelle is threatening to cease picking up solid waste unless he once again will be permitted to dispose of the waste at this landfill.

7. The residents of Punxsutawney, and of other communities which have been relying on Wazelle to pick up and dispose of their solid waste, have made no plans for alternative pick up and disposal in the event Wazelle suspends his pick up operation.

In view of the fact that the hearing on the merits of this appeal already had been almost completed, the Board regarded the November 5, 1984 final hearing day as a consolidated hearing on the merits of the appeal and on Wazelle's supersedeas petition. At the close of the hearing the Board orally granted a thirty (30) day supersedeas of DER's March 18, 1983 order; on November 7, 1984 the Board issued a written Order which, without explanation, affirmed the Board's November 5, 1984 oral ruling. This written Order is reproduced infra, following this Opinion. The remainder of this Opinion provides, for the record, the Board's rationale in granting the 30-day supersedeas.

The facts 1-7 listed supra are amply supported by the testimony in these hearings, and will be part of the Findings of Fact in the Board's forthcoming Adjudication of the merits of this appeal. However, these facts--and the rest of the evidence brought out at the hearing on the merits--do not come close to warranting the grant of a supersedeas for relief of Wazelle. Under our rules, 25 Pa. Code §21.78(a), a petition for supersedeas requires the Board to consider the following factors:

(1) irreparable harm to the petitioner;

(2) The likelihood of the petitioner's prevailing on the merits; and

(3) the likelihood of injury to the public.

It has been the Board's practice to place on the petitioner the burden of establishing that these factors weigh toward granting a supersedeas. Butler County Mushroom Farm v. DER, Docket No. 78-132-B, 1978 EHB 356; William Fiore v. DER, Docket No. 83-160-G (Opinion and Order, August 24, 1983).

Wazelle's burden under criterion (2) above is to show that it is likely the Board will decide DER's March 18, 1983 order was an abuse of discretion. In arriving at its final decision, the Board will place on DER the burden of showing that its order was not an abuse of discretion. 25 Pa. Code §21.101(b)(2). At the hearings, however, DER presented testimony establishing that during the decade preceding March 18, 1983, and for some time past that date, Wazelle's landfill operations had resulted in many many violations of DER rules and regulations. In the light of such established facts, we must conclude Wazelle did not establish (in fact, he didn't come close to establishing) the Board is likely to find DER's order was an abuse of discretion; of course, in so holding we do not foreclose the possibility of ultimately concluding (as Wazelle urges) that ordering permit revocation and cessation of landfill operations was too harsh a sanction on Wazelle, outside DER's discretion. As for criterion (1) supra, the only irreparable harm to Wazelle which the supersedeas would avert is the economic loss to Wazelle from being forced to terminate his landfill operations. Although this harm cannot be gainsaid, it is harm which cannot justify a supersedeas unless there is a reasonable likelihood the Board will find the appealed-from order was outside DER's discretion and thus unjustified. William Fiore, supra. We already have explained that Wazelle

has not shown any such likelihood. Therefore Wazelle also has not met his burden of showing irreparable harm warranting a supresedeas.

We still have not discussed criterion (3) supra, the likelihood of injury to the public. The testimony of DER's own witnesses made it apparent that Wazelle recently had very considerably improved the operation of his landfill, although those witnesses would not concede that the landfill now is free of violations. Wazelle certainly did not meet his burden of convincing the Board that--at the time the operation ceased by virtue of the Commonwealth Court's injunction--the landfill was being operated in complete conformity with DER's rules and regulations. The Board was unable to come to any definite conclusion about the seriousness--from an environmental standpoint--of the presently extant violations alleged by DER. However, if one assumes that the overall purpose of the regulations established by the Environmental Quality Board is to preserve the environment in accordance with the Legislature's intent--as expressed in the Clean Streams Law, 35 P.S. §691.1 et seq.--then Wazelle's inability to convince the Board his landfill is violation-free leads to the presumption it is likely that the environment, and therefore the public, will be harmed by the grant of a supersedeas. Furthermore, under the doctrine of Pa. P.U.C. v. Israel, 356 Pa. 400, 52 A.2d 317 (1947), a violation of the regulations constitutes injury to the public per se (see also DER v. Coward, 489 Pa. 327, 414 A.2d 91 (1980).

On the other hand, the Board previously has pointed out that it is not convinced the criterion of 25 Pa. Code §21.78(a)(3) was intended to be interpreted so rigidly that any violation automatically precludes a supersedeas under the Israel doctrine, even without actual reason to believe the violation is an indicator of potential environmental harm. William Fiore, supra. Moreover, there was considerable testimony that the sudden (24 hour) closing of the landfill has disrupted the

normal handling of the solid wastes produced by the communities near Wazelle's landfill which have been using Wazelle's services for waste pickup and/or disposal. It also was clear that these communities long ago should have concluded arrangements for replacing Wazelle's pick-up and/or disposal services whenever his landfill finally was closed; after all, this closing now has been threatened ever since DER's original March 18, 1983 order. The inability of these communities to find replacements for Wazelle's services, just as soon as he closed his landfill in compliance with the Commonwealth Court's order, is the fault of these communities alone.

Nevertheless, whether at fault or not, these communities do need to dispose of this solid waste, and do face a health hazard if their solid waste is not picked up by licensed haulers, and thus either piles up in the streets or else gets dumped illegally, as already has begun to happen. This far from speculative potential health hazard must be weighed against the injury to the public which is likely to accrue from permitting operation of the landfill for an additional limited period, to give the aforementioned surrounding communities a chance to conclude the alternative arrangements that (they now surely must perceive) no longer can be avoided or postponed. In performing this balance, we cannot ignore the fact that DER itself has been willing to tolerate the landfill's operation from March 18, 1983 until quite recently, when DER finally sought the Commonwealth Court injunction which did end the landfill's operations.

The foregoing explains the Board's rationale in ruling orally as it did on November 5, 1984, and in issuing its written Order of November 7, 1984.

O R D E R

WHEREFORE, this 13th day of November, 1984, our Order of November 7, 1984 is affirmed. In particular, it is ordered that:

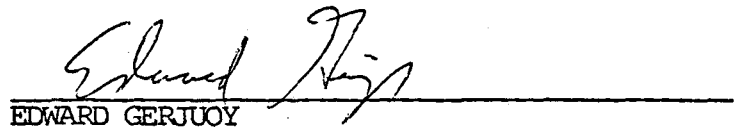
1. Wazelle's Petition for Supersedeas of DER's March 18, 1983 cessation order is granted for a 30-day period, counting from the hearing date; the supersedeas expires at 6:00 PM December 5, 1984.

2. This supersedeas is contingent upon Wazelle's compliance with DER regulations during the period of supersedeas, and on Wazelle's furnishing DER with a bond in the amount of $10,000 to guarantee such compliance (this clause in our oral order of November 5, 1984 was inadvertently omitted from our written Order of November 7, 1984).

3. This limited (in time) supersedeas has been granted primarily to allow those persons and communities which have been depositing their solid waste at the Wazelle landfill to make other arrangements; those persons and communities are warned that it is very unlikely the Board can be convinced to extend the supersedeas beyond the aforementioned December 5, 1984 date, irrespective of the fate of the preliminary injunction presently barring operation of the landfill (see paragraph 4 infra).

4. Of course, this supersedeas does not affect the preliminary injunction closing the Wazelle landfill, granted October 22, 1984 by Commonwealth Court at DER's request; petitions to vacate that injunction must be addressed to Commonwealth Court.

ENVIRONMENTAL HEARING BOARD



EDWARD GERJUOY
Member

DATED: November 13, 1984

cc: Bureau of Litigation
Patti J. Saunders, Esquire
R. Edward Ferraro, Esquire
A. Ted Hudock, Esquire
Stephen L. Johnson, Manager,
Borough of Punxsutawney

COMMONWEALTH OF PENNSYLVANIA

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BETHLEHEM MINES CORPORATION :

:

:

Docket No. 82-067-G

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and UNITED MINE WORKERS OF AMERICA, Intervenor

OPINION AND ORDER

Synopsis

This opinion supplements the adjudication earlier issued at this docket number. The Board previously had refused to approve a settlement agreement entered into by DER and the mine operator. Said settlement agreement had been appealed by the United Mine Workers of America ("UMW"). The Board informed the parties that it would approve the settlement if certain suggested modifications were incorporated into it. However, the mine operator and DER were unable to agree to the requested modifications and the Board therefore entered an order sustaining the UMW appeal and reinstating the original Bethlehem appeal which the proposed agreement had attempted to settle. An opportunity to reopen the record of the original appeal for the purpose of taking additional testimony was afforded, however. Only DER has requested the opportunity to present additional testimony; the mine operator has opposed this request. The Board agrees with the mine operator that the issues upon which DER seeks to present new evidence either were

fully addressed in the record already before the Board and in the earlier adjudication, or else are not in contention. Therefore, DER's request is rejected. This rejection is consistent with the requirements of 1 Pa. Code §35.231.

DER's affirmation of its earlier order, requiring a dispatcher to be present in the mine on any shift where there would be more than one track-mounted vehicle operating in the mine at any given time, was an abuse of discretion. DER's own willingness to enter into a settlement agreement permitting dispatcher-free idle day operation suggests that DER itself no longer believes that compliance with the previous order is necessary for safe operation. Therefore, Bethlehem's appeal of DER's affirmation of its earlier order must be sustained insofar as it forbade dispatcher-free operation on all idle days with more than one track-mounted vehicle on the haulage at any given time.

Having found that DER abused its discretion, the Board substitutes its discretion for that of DER. An order governing the operative work rules in the mine is entered.

The UMW has objected to the Board's consideration of the settlement proposals of DER and the mine operator on the basis that they are inadmissible as evidence. The Board does not regard the settlement proposals as evidence; they are akin to proposed conclusions of law and prayers for relief. It is emphasized that the parties remain free to come to a mutually agreeable resolution of the problems regarding the operative work rules in the mine.

OPINION

This Opinion and Order supplements our Adjudication of April 25, 1984, at the same docket number. The history of this matter until April 25, 1984 is fully recounted in that adjudication and need not be repeated here. This Opinion affirms, and adopts, all Findings of Fact and Conclusions of Law stated in our April 25, 1984 adjudication. However, this Opinion does modify our Order of April 25, 1984, for reasons explained infra.

Our April 25, 1984 adjudication was concerned largely with a March 23, 1983 settlement agreement between DER and Bethlehem, which had been appealed by the United Mine Workers of America ("UMW"). Our April 25, 1984 Order refused to approve the settlement in the form originally agreed to by DER and Bethlehem; we stated, however, that we would approve the settlement if certain suggested modifications were incorporated therein. Bethlehem and DER were given sixty (60) days to submit a modified settlement agreement consistent with our suggestions. Our Order stated that if a modified settlement agreement was not submitted within 60 days, UMW's appeal of the March 23, 1984 settlement agreement would be sustained, and Bethlehem's appeal of DER's January 28, 1982 affirmation of DER's March 23, 1981 order that Bethlehem must employ a dispatcher even on "idle" days (the appeal which the March 23, 1984 agreement sought to settle) once more would be before the Board.

At the close of the 60-day period, the Board was informed that DER and Bethlehem had been unable to agree on a modified settlement. Nevertheless, the Board did not sustain UMW's appeal, but instead gave DER and Bethlehem another 60 days to come up with a settlement agreement. By the end of this second 60-day period, however, the DER and Bethlehem still were unable to agree. The substantive

terms of the modified settlement Bethlehem proposed, but which DER refused to accept, are attached to this Opinion, as Appendix A.

On September 10, 1984, therefore, the Board issued an Order sustaining UMW's appeal of the March 23, 1983 settlement agreement, and affirming that Bethlehem's appeal of DER's January 28, 1982 affirmation letter had become (as it still is) the subject of the appeal at the above docket number. Our September 10, 1984 Order also stated:

> 2. On the record presently before us, the Board expects to rule that the January 28, 1982 letter was an abuse of DER's discretion.
>
> 3. The Board expects to substitute its own discretion for DER's, i.e., the Board anticipates that its forthcoming adjudication of this appeal will modify the terms of Mr. Fulton's original March 23, 1981 order to Bethlehem, which the appealed-from January 28, 1982 letter affirmed.
>
> 4. The aforementioned forthcoming adjudication will define the circumstances under which dispatcher-free operation in Bethlehem's Somerset No. 60 coal mine will be permitted, as of the date the Board's adjudication is issued.

I. Reopening the Hearings

Although the record already amassed in this appeal (after seven days of hearings) is very voluminous and quite complete, and although the hearings were not closed until all parties had been given full opportunity to present their cases-in-chief and testimony in rebuttal, the Board--taking into account the complex procedural posture of this appeal, wherein the primary appellant has been first Bethlehem, then UMW, and now Bethlehem again--offered the parties the possibility of having the hearings reopened for presentation of additional evidence. Consequently our September 10, 1984 Order gave the parties, UMW included, 20 days to list the additional evidence they wished to present, along with an explanation

of why such additional evidence should be allowed. All the parties now have listed the additional evidence they might wish to present. Bethlehem and UMW do not seek to present additional evidence, but have reserved the right to present evidence should any other party do so. DER has proposed additional testimony, but Bethlehem characterizes this testimony as unnecessary "to determine whether Bethlehem's appeal should be sustained or what, if any, modifications should be made in the order of March 23, 1981, to permit operation of Mine 60 without a dispatcher."

DER has described its proposed new testimony in the following language:

> The Department proposes to present testimony which would establish the following:
>
> A. Improving Signal Lights
>
> 1. Providing dual lights at each signal block switch will reduce the risk of vehicles entering a signal block without an operative light. To do this, however, the lights must be wired parallel, so that one light going out would not cause the other to go out.
>
> 2. Derailments often deactivate signal lights by tearing ground wires from the switch. Providing a second ground wire on the side of the switch opposite the existing ground wire, makes it unlikely that a single derailment will effect both groundwires.
>
> 3. By placing conduits around the wires running between the trolley wire and the signal switch, those wires are protected from being damaged by jumping trolley poles.
>
> B. Repairing Signal Lights
>
> 4. If each vehicle is equipped with replacement bulbs, it is more likely that a defective bulb will be replaced upon discovery, than it would be if the bulbs were stored at a distant location.
>
> 5. Because signal lights are relied upon by everyone travelling on the haulage, a defective light should be repaired as soon as possible. Until it is repaired, a warning sign is needed at each end of the signal block in order to alert approaching vehicles that the light is defective.

C. Common Haulage Measures

6. Along the common haulage, vehicles can self-dispatch only if they are equipped with phones which can use both the Mine 60 and Mine 51 frequencies. To assure that all vehicles are on the same frequency, signs must designate the frequency to be used within the area.

7. When enough Mine 51 vehicles are employed to require a dispatcher, their need to use the common haulage necessitates the use of a dispatcher in Mine 60 as well.

8. The only way to eliminate hazards associated with the common haulage is to restrict its use to one of the two mines.

D. Haulage Rules

9. Parking a vehicle along the haulage jeopardizes approaching vehicles and violates Section 270 of the Pennsylvania Bituminous Coal Mine Act (52 P.S. Section 701-270).

Examining these DER proposals, we find ourselves in agreement with Bethlehem —DER's proposed testimony is unnecessary. The problems associated with defective signal lights, the common haulage and the haulage rules (the matters with which DER's headings A through D are concerned) were examined ad nauseam during the aforesaid seven days of hearings, and were fully discussed in our April 25, 1984 adjudication. It is true that the testimony during the hearings, and our April 25, 1984 discussion of that testimony, did not examine all the specific issues DER lists, e.g., the issue (in paragraph 1 quoted supra) that dual lights must be wired in parallel. On the other hand, many of these not previously examined issues are not really in contention. For example, Bethlehem's response to DER's statement of proposed evidence is agreeable to providing dual lights wired in parallel at each signal block. Of the above-quoted DER issues still in contention, the Board believes that additional evidence would be useful only for DER's issue 3, to help decide whether conduits around the wires running between the trolley wires and

signal switch would reduce the probability of switch damage by derailed trolley poles, a claim Bethlehem rejects. But the analysis in our April 25, 1984 adjudication does not imply that failure to reduce this probability (though such reduction doubtless would be desirable) would seriously thwart efforts to reduce the risks from signal light failures. The thrust of our former adjudication was that the risk from signal light failures arose mainly not from the great frequency of those failures, but rather from the lack of systematic mine procedures to: (1) rapidly correct inoperative lights, and (2) to warn vehicles entering not-yet-corrected signal blocks that the vehicles must proceed with caution.

Therefore the Board rejects DER's request to reopen the hearings so as to receive DER's proposed additional evidence. We add that we have reached this decision on the basis of criteria described above, considerably more favorable to DER's request than the criteria stated in the General Rules of Administrative Practice and Procedure, 1 Pa. Code §35.231, governing reopening of proceedings for the purpose of taking additional evidence.

II. Modification of Former Order

We now turn to our Order of April 25, 1984 and the required modifications thereof. First of all, as anticipated in our Order of September 10, 1984, quoted supra, we explicitly rule that DER's letter of January 28, 1982, affirming Mr. Fulton's original March 23, 1981 order to Bethlehem, was an abuse of discretion, for reasons which readily follow from our April 25, 1984 discussion and from our Opinion and Order of February 16, 1983 at this docket number. In our February 16, 1983 Opinion, we already have ruled that Section 270(d) of the Pennsylvania Bituminous Coal Mining Act ("BCMA"), 52 P.S. §701-270(d), does not mandate a dispatcher on idle days merely because Bethlehem employs a dispatcher on other days. That

February 16, 1983 Opinion then specified DER's burden in this Bethlehem appeal as follows:

> Under the Board's rules, particularly 25 Pa. Code §21.101(b)(3), it is DER's burden in this appeal to show that Bethlehem's previous (before March 23, 1981) procedure of not using a dispatcher on some light-traffic shifts is unsafe; DER also has the burden of showing that its proposed cure for the unsafe operation namely the assignment of a dispatcher "to be in attendance, on. . . shifts, . . . , where there are more than one track mounted vehicle operating in the mine at any given time," will provide safe operation.

DER has not met these burdens for all idle days when "there are more than one track mounted vehicle operating in the mine at any given time," although it has met these burdens for idle days when there are a sizeable number of track mounted vehicles operating in the mine at any given time. DER's willingness to accept a settlement (the settlement which UMW appealed) permitting dispatcher-free idle day operation with as many as eight vehicles on the haulage (see Finding of Fact 20 in our April 25, 1984 adjudication) strongly implies that DER itself no longer believes that Mr. Fulton's March 23, 1981 order was necessary for safe operation on idle day shifts with only two vehicles in use. Bethlehem's appeal of DER's January 28, 1982 affirmation of Mr. Fulton's order must be sustained, at least insofar as that order forbade dispatcher-free operation on all idle days with more than one track mounted vehicle on the haulage at any given time.

Next, DER having abused its discretion, we shall substitute our discretion for DER's, again as anticipated in our above-quoted September 10, 1984 Order. Warren Sand and Gravel Company, Inc. v. DER, 20 Pa. Cmwlth. 186, 341 A.2d 556 (1975). An Order, embodying our modifications of DER's March 23, 1981 order and of our April 25, 1984 Order follows this Opinion. The remainder of this Opinion amplifies the reasons for, and the intent of, those modifications. Our expectation that we

would be forced to rely on our own discretion to "define the circumstances under which dispatcher-free operation in Bethlehem's Somerset No. 60 coal mine will be permitted" was set forth in our September 10, 1984 Order quoted supra, and has not been objected to by any party.

At the time we prepared our April 25, 1984 adjudication we felt that the limitations imposed by the UMW-appealed proposed settlement between DER and Bethlehem (again see Finding of Fact 20 of our adjudication) were reasonably consistent with the evidence about the mine's safety requirements. We were concerned, however, that the proposed settlement did not provide for relatively inexpensive and unoppressive measures which might "reduce the hazards of dispatcher-free operation associated with signal light failures and the common haulage." Thus we rejected the settlement agreement as originally proposed, in the hope that DER and Bethlehem would come up with a new settlement agreement remedying these deficiencies. We also stated (paragraph 2 of our April 25, 1984 Order):

> 2. The resubmitted settlement agreement should include, inter alia, terms stating:
>
> a. The requirement that while there is a common haulage between Bethlehem Mines Nos. 51 and 60, Mine No. 60 will schedule a dispatcher whenever Mine No. 51 has a regular working shift; and
>
> b. The types and total number of Mine No. 51 vehicles permitted to use the common haulage on shifts when Mine No. 60 is operating dispatcher-free.

The Order which follows is consistent with the immediately foregoing considerations. Our adoption of the terms of the originally proposed settlement reflects our belief that those terms will reasonably prevent excessive (therefore unsafe) traffic on the haulage during dispatcher-free operation, provided measures of the sort recommended in paragraphs 1 and 2 of our April 25, 1984 Order are additionally imposed. Paragraph 3 of the following Order embodies such additional

measures, adopted by the Board as an amalgam of the suggested modifications (to the original settlement) the various parties have proposed in response to paragraph 5 of our April 25, 1984 Order and paragraphs 5-7 of our September 10, 1984 Order.

UMW, on October 18, 1984, has filed objections to the Board's consideration of Bethlehem's and DER's settlement proposals, terming those proposals inadmissible evidence. The Board rejects these objections. The Board agrees that these proposals are inadmissible as evidence, and has not regarded these proposals as evidence; the Board's Findings of Fact were completed on April 25, 1984. However, the Board sees no reason why these settlement proposals--which were brought to the Board's attention by DER and Bethlehem themselves--should not be examined by the Board in the same fashion as the Board examined the parties' previously furnished proposed conclusions of law and prayers for relief, to which these settlement proposals are akin.

Finally, we observe that from the very outset of these hearings the Board has stressed its belief that an adjudication by this Board is a highly unsuitable means of resolving the instant dispute, which really is a matter of "work safety rules" (recall note 5 of our April 25, 1984 adjudication). For this reason, the Board has made every effort to have the parties--who are far more cognizant of the mine's operational problems and its safety problems--settle this dispute themselves. The parties have refused to do so, and have forced the Board to make its best resolution of this appeal. Therefore, if any or all of the parties are dissatisfied with this Board's final Order in this matter, they have only themselves to blame. We do not intend to give the parties an opportunity to relitigate this same dispute in this forum, even if it is possible that the Board's Order could be improved. The parties still are free to come to any mutually agreeable decision about the operative work rules in the mine.

Appendix A. Bethlehem's Proposed Modified Settlement Agreement

The substantive clauses of Bethlehem's proposed modified settlement agreement (titled Amended Consent Order and Agreement) submitted in compliance with our April 25, 1984 Order consisted of the terms of the original settlement agreement (reproduced in Finding of Fact 20 of our April 25, 1984 adjudication) plus the following additional terms:

> (g) Within 90 days of the date of this Agreement, Bethlehem will install an additional light at the boundary of every signal block within Mine 60 where presently only one light marks the boundary of the particular signal block. Such light will be connected "in parallel" so that it should operate independently of the status of the existing light. During this period, Bethlehem may continue to operate without a dispatcher if the other conditions, herein described, are met.
>
> (h) Within 120 days of the date of this Agreement, Bethlehem will install an additional ground for the signal lights in each signal light block. During this period Bethlehem may continue to operate without a dispatcher if the other conditions, herein described, are met.
>
> (i) Each employee operating a vehicle in Mine 60 on a shift when no dispatcher is employed will be instructed that, when an inoperative signal light is discovered, it should be replaced with a replacement bulb which will be provided at designated locations in the mine. Employees will also be instructed that, when a malfunctioning light cannot be repaired by replacement of the bulb, this fact should be reported to the foreman in charge of the shift so that he may inform the oncoming shift of the malfunction.
>
> (j) Consistent with its normal practices and policies Bethlehem will require compliance with its haulage rules with respect to parking on the main line haulage on days when no dispatcher is present.
>
> (k) On shifts when Mine 60 would not be required to employ a dispatcher under this Agreement, a dispatcher will be employed at Mine 60 if Mine 51 is operating a full production shift.

(1) Within 90 days of the date of this Agreement, Bethlehem will provide employees who are patrolling in the area of the "common haulage", near the Somerset Portal and the 4D haulage, with access on their vehicles to the Mine 51 trolley phone frequency on shifts when Mine 60 would not be required to employ a dispatcher under this Agreement. During this period Bethlehem may continue to operate without a dispatcher if the other conditions, herein described, are met.

O R D E R

AND NOW, this 13th day of November, 1984, it is ordered that the Order accompanying our adjudication of April 25, 1984 in the above-captioned matter is modified as follows:

1. Paragraph 1 of our Order of September 10, 1984, which sustained UMW's appeal of the March 23, 1983 settlement agreement between DER and Bethlehem, is affirmed.

2. Bethlehem's appeal of DER's January 28, 1982 affirmation of Mr. Fulton's March 23, 1981 order is sustained, insofar as that order required Bethlehem to employ a dispatcher on idle days whenever more than one track mounted vehicle was operating in the mine at any given time.

3. This matter is remanded to DER, which within 30 days shall vacate Mr. Fulton's original order to Bethlehem, and shall replace that order by a new order whose substantive clauses shall embody the following terms:

a. Paragraph 13 of the originally proposed March 23, 1983 settlement between DER and Bethlehem; these terms are recorded in Finding of Fact 20 of our April 25, 1984 adjudication; and

b. Paragraph 13(g) of Bethlehem's Proposed Amended Consent Order and Agreement, filed with the Board on June 25, 1984 (see Appendix A supra), except that the 90 days shall be counted from the date of this Order; and

c. Paragraph 13(h) of Bethlehem's aforesaid Amended Agreement, except that Bethlehem shall be given only 90 days from the date of this Order (not 120 days as in the original paragraph 13(h) to comply with this requirement; and

d. Paragraph 13(i) of Bethlehem's aforesaid Amended Agreement; and

e. The requirement that in the aforesaid paragraph 13(i) the "designated locations" for storing replacement bulbs shall be in the immediate vicinity of each signal block in the mine, in readily recognizable storage containers, so that signal light replacements can be very readily made at any signal block at the moment a bulb failure is first noticed; and

f. The requirement that instructions be issued to mine personnel to replace a burned-out bulb at the moment the bulb failure is first noticed, unless there are good reasons, e.g., an emergency elsewhere in the mine, for not pausing to immediately take care of the bulb replacement when the failure is noticed; and

g. The requirement that when a malfunctioning light cannot be replaced by the bulb, then not only is this fact to be reported to the mine foreman, but also a warning sign must be placed at each switch of the signal block, to be removed only after the malfunctioning light is repaired; warning signs shall be stored in the immediate vicinity of each signal block in the mine, adjacent to the containers containing the replacement bulbs; and

h. Paragraph 13(j) of Bethlehem's aforesaid Amended Agreement; and paragraph 13(k); and

i. Paragraph 13(l) of Bethlehem's Amended Agreement, with the 90 days counting from the date of this Order, and with the additional requirement that Mine 60 employees be instructed that they must use the Mine 51 trolley phone frequency whenever entering any access point to the common haulage, which access points shall be unmistakably designated; and

j. Even if Mine 51 is not operating a full production shift, a dispatcher will be required in Mine 60 whenever the number of vehicles being employed in Mine 51 is more than twice the total number of vehicles which --under the Mine 51 agreement--requires employment of a dispatcher in Mine 51.

4. The new order issued by DER is not to contain any terms imposing substantive obligations on Bethlehem--as to the requirements for dispatcher-free operation, limitations on the numbers of vehicles, requirements for replacing light bulbs, etc.—beyond the obligations embodied in paragraph 3 supra.

5. Bethlehem's appeal of DER's January 28, 1982 affirmation of Mr. Fulton's March 23, 1981 order is dismissed, insofar as that appeal might be extended to an appeal of a DER order embodying the terms of paragraph 3.

6. Any future appeal by Bethlehem of the new order called for in paragraph 3, and limited as in paragraph 4, will be dismissed without a hearing, on the grounds that all factual and legal issues raised by such an appeal will be res judicata, as having been thoroughly litigated and adjudicated in the instant appeal.

7. Any future appeal by Bethlehem of the new order called for in paragraph 3, if not limited as in paragraph 4, will be sustained without a hearing, for the same reason stated in paragraph 6 supra.

ENVIRONMENTAL HEARING BOARD

ANTHONY J. MAZULLO, JR.
Member

EDWARD GERJUOY
Member

DATED: November 13, 1984

cc: Bureau of Litigation
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COMMONWEALTH OF PENNSYLVANIA

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ROBERT KWALWASSER,

Appellant,

Docket No. 84-108-G

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and KERRY COAL COMPAY, Permittee.

OPINION AND ORDER

Synopsis

Appellant's Notice of Appeal contained many, broad factual allegations but failed to identify any factual circumstances indicating a basis for Appellant's standing to challenge the DER action appealed from. Therefore, in an effort to conserve the time and energy of the Board, Appellant was ordered to provide a statement of those issues which he believed he had standing to raise and an explanation of his conclusions in this regard. Appellant's response to the Board's order does explain that Appellant owns property adjacent to the mine site but provides no specifics regarding how that land ownership might relate to the many, factual issues which Appellant apparently intends to raise. Appellant is not necessarily entitled to raise any possible objection to the DER action which any citizen of the Commonwealth might have. Therefore, the Board enters an order precluding Appellant from presenting evidence on certain of those issues. Appellant is afforded an opportunity to provide the requested demonstration of standing with regard to other issues, including those raised in his Pre-Hearing Memorandum.

OPINION

Kwalwasser has timely appealed DER's grant of Mine Drainage Permit No. 10800108 to Kerry. Kwalwasser's Notice of Appeal responds as follows to the Notice of Appeal form's instruction, "Specify objection to the action of the Department":

1. The Department failed to require an overburden analysis, and the Applicant did not ask for a waiver, as required under the rules and regulations of the Environmental Quality Board.

2. The Pennsylvania Fish Commission did not approve the permit because of the potential for pollution.

3. The Permit is adjacent to three (3) deepmines, the Mary Elizabeth, Kathyrn and Coates deepmines, which deepmines are discharging water high in iron and otherwise pollutional in nature, and which deepmines may be intercepted by the Permittee during the course of its mining operation.

4. The Mary Elizabeth deepmine is currently causing substantial degradation to Semiconon Creek.

5. The Department failed to do a mass balance to determine whether or not the receiving streams would be degraded by discharges at the limits set forth in the permit.

6. The issuance of this permit caused the Department to change its plans to seal all deepmines in the area, thus allowing pollution to continue to the waters of the Commonwealth.

7. The area for which the permit was issued covered most of the Mary Elizabeth, Kathryn and Coates deepmines complex.

8. The issuance of the permit was not approved by the Bureau of Deepmine Hazards, and the Division of Abandoned Mine Reclamation, as a result of the existing deepmines.

9. The Division of Abandoned Mine Lands agreed to the issuance of the permit only if the application demonstrated the nature of the existing mine pools, and developed an adeqate method of draining and treating the mine pools. The application made no such demonstration.

10. The application does not insure no degradation to receiving streams.

11. The Division of Abandoned Mine Reclamation would approve the permit only if most of the deep mine complexes were removed and they will not be according to the current mining plan.

12. The operator did not provide any assurances to the Department that it would assume liability for any discharges from any deep mines encountered during the mining.

13. The bonds posted by the operator are insufficient to assure that the Commonwealth could sustain the costs of any degradation to the waters of the Commonwealth which could or may occur, as well as to reclaim the mining site in the event that the operator is unable to reclaim it himself.

14. The special conditions attached to the permit indicate that approximately 11 water supplies will be taken by Permittee's mining operation.

15. The Department issued the mine drainage permit in clear contravention of Section 315(g) of the Clean Streams Law, in that the operator failed to provide a "landowners consent to entry" for all of the landowners listed on the exhibits to the mine drainage permit application.

16. The permit does not contain an emergency contingency plan for treating acid mine drainage from the abandoned deep mines.

17. The permit has been opposed by over three hundred (300) citizens in the area of the permit, including the Appellant.

18. The Appellant has failed to demonstrate that the surface mine will not degrade discharges from existing deepmines, or further degrade the waters of the Commonwealth.

19. There are acid mine drainage prone shales located in the area of the Coates deepmine, and no plans for special handling are contained in the mine drainage permit.

20. The Permittee has, in the past, violated the laws of the Commonwealth of Pennsylvania with respect to the operation of a surface mine.

21. Exhibit 5 to the mine drainage permit lists thirty-four (34) landowners as being covered by the mine drainage permit, however only one landowner consent to entry is contained in the Department's mine drainage file.

22. The permit fails to take into consideration steep-slope mining.

23. The permit does not include a plan for de-watering deepmines.

24. The Department failed to comply with Chapter 87 of the rules and regulations of the Environmental Quality Board and Section 315 of the Clean Streams Law.

25. The operation of a strip mine in the area where it was proposed in the instant case will cause a disruption of the peaceful enjoyment of the property of numerous citizens in the area.

Thereafter, the parties have filed their pre-hearing memoranda and have pursued discovery. Kwalwasser's Pre-Hearing Memorandum, under the heading "A Statement of Facts Each Party Intends to Prove," contains 89 numbered paragraphs, including paragraph 89 "reserving the right to amend this portion of his Pre-Hearing Memorandum." The first 25 of these paragraph are a verbatim repeat of the 25 above-quoted allegations in Kwalwasser's Notice of Appeal. The additional alleged "facts" in paragraphs 26-88 of Kwalwasser's Pre-Hearing Memorandum, like the above-quoted Notice of Appeal objections, contain numerous purely conclusory contentions, e.g.,

60. The permit fails to demonstrate that the provisions of the Air Pollution Act will be complied with.

Kwalwasser's Pre-Hearing Memorandum also included a list of more than 25 possible witnesses, as well as 23 Citations of Law, among which one finds:

7. The permit application failed to contain the description of the existing, pre-mining resources within and adjacent to the permit area that may be impacted or affected by the proposed surface mine, in violation of Section 87.41 of the rules and regulations of the Environmental Quality Board.

At no point in either the Notice of Appeal or Appellant's Pre-Hearing Memorandum were any facts alleged--indicating who Mr. Kwalwasser is, what property or other interests he may have which could be adversely affected by the permittee's mining operation, when such effects, if any, would take place, etc.

In view of the above just-recounted circumstances, the Board--whose docket is increasingly crowded--decided that efforts shall be made to prevent unnecessary, time-wasting testimony during the possibly very long hearing on the merits this appeal was threatening to produce. Therefore on October 10, 1984 --following a telephone conference call with the parties when the Board's intentions were explained--the Board issued an Order stating:

1. Not later than October 24, 1984 counsel for Appellant shall provide the Board with a brief statement of which of the issues raised in Appellant's Notice of Appeal counsel believes Appellant Kwalwasser has standing to litigate and an accompanying explanation of his conclusions in this regard.

Kwalwasser has timely filed the statement called for by this Board's Order, but this statement is totally unresponsive to the clearly expressed intent of the Order. Kwalwasser merely has filed a Memorandum of Law arguing--because

his property lies adjacent to the land Kerry will be mining under the permit—he has standing to appeal under the "substantial, immediate and direct injury" test of William Penn Parking Garage, Inc. v. City of Pittsburgh, 464 Pa. 168, 346 A.2d 269 (1975). However, the Board never has intimated that Kwalwasser does not have standing to file the instant appeal. What the Board did indicate during the aforementioned telephone call preceding the Board's above-quoted Order, is that Kwalwasser's uncontested standing associated with possible substantial, immediate and direct injury to Kwalwasser, does not imply that Kwalwasser then has standing to raise any objection any citizen of this Commonwealth conceivably might have to DER's action. Nowhere in the Acts on which Kwalwasser's appeal relies, (e.g., the Clean Streams Law ("CSL"), 35 P.S. §§691.1 et seq., and the Surface Mining Conservation and Reclamation Act ("SMCRA"), 52 P.S. §§1396.1 et seq.), is there any suggestion that the Pennsylvania legislature intended that citizens like the Appellant were to act as "private attorneys-general," looking over DER's shoulders as DER administered the CSL or the SMCRA, as this Board has stated previously in connection with the Solid Waste Management Act, 35 P.S. §6018.101 et seq., Concerned Citizens Against Sludge, EHB Docket Nos. 82-220-G and 82-221-G (Opinion and Order, February 9, 1983). The Board expected Kwalwasser to list, with explanations, those issues he has raised which (Kwalwasser believes) are associated with possible substantial, immediate and direct injury to him. Nothing in Kwalwasser's Memorandum of Law bears even the slightest resemblence to such a list.

Nevertheless, we now shall limit the issues raised by Kwalwasser's Notice of Appeal as best we can, on the basis of the information Kwalwasser actually has filed. If this information does not fully explain Kwalwasser's

standing to raise the very numerous issues he has flung aloft. Kwalwasser has only himself to blame; the Board already has devoted very considerable time to this appeal and has given Kwalwasser every opportunity to acquaint the Board with his legal theories.

The Order which follows is consistent with the foregoing Opinion.

O R D E R

WHEREFORE, this 15th day of November , 1984, in the interests of keeping manageable the hearing on the merits of the above-captioned appeal, it is ordered that:

1. At the hearing on the merits, Kwalwasser--having made absolutely no showing of standing to raise such issues--will not be allowed to present evidence on the issues implied by paragraphs 1, 2, 6, 8, 9, 11, 12, 13, 15, 17, 21 and 25.

2. Kwalwasser will be allowed to present evidence bearing on other issues raised by his Notice of Appeal, e.g., the issues implied by paragraphs 3, 7 and 16, only if he can demonstrate under the William Penn test, supra, he has standing to raise these issues.

3. The Board expects to limit similarly, on the basis of whatever information is available, the issues implied by paragraph 26-88 in Part A of Kwalwasser's Pre-Hearing Memorandum, and by paragraphs 1-22 of Kwalwasser's Pre-Hearing Memorandum Part B, unless the Board receives from Kwalwasser--within twenty (20) days of the date of this Order--a list, with explanations, of the issues implied by those paragraphs which (Kwalwasser believes) he has standing to raise in this appeal.

4. The document called for in paragraph 3, supra may contain the

list and explanations concerning the issues raised by Kwalwasser's Notice of Appeal, originally called for in our Order of October 24, 1984; however, the Board will not modify the rulings in paragraphs 1 and 2, supra without very good cause shown for Kwalwasser's failure to timely supply that information.

5. DER will have fifteen (15) days to respond to any filing by Kwalwasser pursuant to paragraphs 3 and/or 4, supra.

ENVIRONMENTAL HEARING BOARD

Edward Gerjuoy

EDWARD GERJUOY
Member

Dated: November 15, 1984

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ARMOND WAZELLE :

:

Docket No. 83-063-G

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and BOROUGH OF PUNXSUTAWNEY, Intervenor

OPINION AND ORDER
SUR ADMISSIBILITY OF DOCUMENTARY EVIDENCE

Synopsis

Evidence of previous summary convictions in the form of copies of citations is provisionally admitted. Appellant is given the opportunity to object to this ruling.

OPINION

At the hearing on the merits of the above-captioned appeal, DER sought to introduce evidence of Wazelle's previous summary convictions for violations of the rules and regulations governing operation of his landfill. The evidence was in the form of copies--from DER's files--of citations issued by DER inspectors, together with the magistrate's signed notations (on the back of the citation forms) concerning the disposition of the citations. Wazelle objected that the citations which had been offered into evidence did not display the magistrate's official seal. The Board then ruled that the citations would be admitted provided official copies, displaying the magistrate's seal, were obtained from the magistrate's office.

DER now has furnished the Board with an official letter from the magistrate, reading as follows:

> Please be advised that according to the Rules of the Supreme Court of Pennsylvania, Summary Cases are destroyed after three years of the date of issuance, therefore we do not have these cases on file.

Under the circumstances, the Board provisionally has decided to admit into evidence the aforesaid citation copies offered by DER, on the understanding that (as DER promises) these copies will be accompanied by copies of transmittal letters and checks representing fines paid, along with affidavits of the responsible DER inspectors. This decision has been reached for the following reasons:

> 1. Under the Board's rules, 25 Pa. Code §21.107(a), the Board is not to be bound by technical rules of evidence.
>
> 2. The citation copies, taken from DER files, signed by the magistrate, and accompanied by supporting documents as described above, have a high degree of reliability.
>
> 3. In view of their origin in DER's files, these citation copies probably can fall under the business records exception to the hearsay rules.
>
> 4. The citation copies appear to be admissible under the Uniform Photographic Copies of Business and Public Records as Evidence Act, 42 Pa.C.S. §6109.

The Board has made the foregoing decision provisional because Wazelle should have the opportunity to object to this ruling. The Board will entertain such objections, and will reopen the hearings for oral argument on this sole issue, and possibly for taking testimony (with opportunity for cross examination) from the aforementioned responsible DER inspectors, if the objections warrant such reopening. However, the Board will not countenance reopening of the hearing for these possible purposes if the objections to admission of the citations seem designed solely to delay the final adjudication of this matter.

The Order which follows is consistent with the foregoing considerations.

O R D E R

WHEREFORE, this 21st day of November, 1984, it is ordered that:

1. Upon receipt of copies of transmittal letters and checks representing the fines paid, along with affidavits of inspectors who filed the citations, the Wazelle citations described in DER's letter of November 7, 1984 to District Justice Guy M. Lester provisionally will be accepted into evidence as parts of Commonwealth Exhibit 14 in the hearing on the merits of this matter.

2. Within fifteen (15) days of the receipt of the documents described in paragraph 1 supra, Wazelle shall file his objections, if any, to admission into evidence of the aforementioned citations. He shall accompany his objections by:

a. A memorandum of law in support of his objections; and

b. An affidavit by Mr. Wazelle to the effect that--to Wazelle's best knowledge and belief--some or all of the aforesaid citations did not result in Wazelle guilty pleas and fines paid.

3. After receipt of the aforesaid objections, if any, the Board:

a. Will reopen the hearing for oral argument on the admissibility of the citations, and possibly for testimony (including cross examination) of the cognizant DER inspectors, provided the objections to admissibility are deemed non-frivolous, and provided the Wazelle affidavit indicates a serious intent to dispute the occurrence of the alleged guilty pleas and fines paid; or

b. Otherwise will affirm the admissibility of the citations, without any further hearing.

4. The Intervenor is deemed to have no standing to pursue this issue, and objections to admissibility from the Intervenor will not be entertained.

ENVIRONMENTAL HEARING BOARD

Edward Gerjuoy

EDWARD GERJUOY
Member

DATED: November 21, 1984

cc: Bureau of Litigation
Patti J. Saunders, Esquire
R. Edward Ferraro, Esquire
A. Ted Hudock, Esquire
Stephen L. Johnson, Manager,
Borough of Punxsutawney

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AMARRACA, INC.
(formerly Food World, Inc.) :

:

Docket No. 84-306-G

:

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER
SUR MOTION TO DISMISS

SYNOPSIS

Appellant failed to appeal a previous DER denial of a proposed supplement to a township's Official Sewage Plan. The failure to appeal rendered that DER decision final. Therefore, in the absence of a showing by Appellant that it chose not to appeal because of certain statements allegedly made by DER employees and in the absence of any legal basis for holding otherwise, the appeal will be dismissed. Appellant is simply attempting to recreate an opportunity to appeal the earlier DER action by resubmitting the identical proposal to DER for review. Appellant is given twenty days from the date of Opinion and Order within which it may present the lacking factual and legal elements identified above.

OPINION

This appeal concerns the attempts of Amarraca, Inc. ("Appellant") to secure permission from DER to connect its newly constructed food complex to the sewerage facilities presently existing in the Girty's Run Watershed of

Allegheny County. Sometime prior to March 19, 1984, Appellant submitted -- by way of Ross Township -- certain "Modules for Land Development" to DER for approval. The modules were submitted as a proposed supplement to Ross Township's Official Sewage Plan. DER reviews proposed revisions to a municipality's Official Sewage Plan to ascertain that the proposal conforms to the requirements of 25 Pa. Code, Chapter 94. See 25 Pa. Code §71.16 (e) (5); 25 Pa. Code §94.14.

On March 19, 1984 DER denied the proposed supplement, having determined that "the submittal is inadequate and is being returned because the Girty's Run Interceptor is hydraulically overloaded and the additional sewage flows from this proposed development will contribute to the overloaded conditions." Additionally, DER found that the supplement could not be approved because -- since the system had been found to be hydraulically overloaded -- no connections to the system could be authorized by the municipality until a corrective action plan was submitted to and approved by DER. Since no such plan had been submitted, no further connections were possible. 25 Pa. Code §94.21 provides that if DER establishes that sewerage facilities are overloaded, the permittee of the facilities shall prohibit new connections to those facilities. Certain exceptions are authorized by 25 Pa. Code §§94.55 - 94.57 but have not been shown to be applicable here.

Appellant failed to appeal DER's March 19, 1984 letter. As a consequence, the denial decision became final. Commonwealth, DER v. Williams, 57 Pa.Cmwlth 8, 425 A.2d 871 (1981); Armond Wazelle v. DER and Borough of Punxsutawney (EHB Docket No. 83-063-G, Opinion and Order dated August 21, 1984).

Exactly four months after DER's March 19th decision, Appellant resubmitted the same proposed supplement to DER. DER again denied it, in a letter dated July 27, 1984. Appellant's challenge to this second denial is

the subject matter of the instant appeal.

DER has moved to dismiss this appeal on the ground, inter alia, that "the instant appeal is merely a subsequent collateral attack upon DER's initial rejection of the Supplement which had become final by virture of Amarraca's failure to timely appeal from the initial denial thereof by DER." (DER's Memorandum of Law, p. 3).

In response to DER's argument, Appellant contends that DER's July 27 decision embodied new reasons for the rejection of the proposed supplement (review of which would not be foreclosed by principles of finality). In order to determine whether this contention is an accurate statement it is necessary to examine the language of the two DER denial letters. The first letter (that of March 19, 1984) stated in pertinent part:

> The submittal is inadequate and is being returned because the Girty's Run Interceptor is hydraulically overloaded and the additional sewage flows from this proposed development will contribute to the overloaded conditions. . . 25 Pa. Code Section 94.19 and 25 Pa. Code Section 71.16 (e) (5) state that no Official Plan or revision will be approved, nor will a supplement be considered adequate by the Department, that is inconsistent with the requirements of 25 Pa. Code Chapter 94. When an acceptable Wasteload Management Corrective Action Plan and Schedule is received and approved by this office, the "Modules for Land Development" may be resubmitted for review provided that they are compatible to and consistent with the approved Corrective Action Plan.

The second letter contained three separate paragraphs. The first paragraph states that "the basis for the flow projections from this development . . . is inadequate. An amplification of the basis for these flow projections must be provided." The second paragraph explains in detail the steps that must be taken before the proposed supplement can be approved. Specifically, this

paragraph informs Appellant that Ross Township — not Appellant — must submit the proposed supplement to DER for review. (This procedure was correctly followed in the initial submission of the proposal. The second submission was made directly by Appellant.) Although Appellant failed to comply with this procedural requirement -- which would normally be a prerequisite to DER's consideration of the proposed supplement — it is apparent that DER did consider the merits of the resubmitted proposal. Paragraph one of the July 19 letter, quoted supra, indicates as much.

The third paragraph of the July 19 letter reads as follows:

> Our letter of March 19, 1984 stated that planning modules could be resubmitted for our review when an acceptable Corrective Action Plan and Schedule is received and approved by this office. This has not occurred to date, therefore a resubmission by Ross Township appears to be premature. (Emphasis in original).

Most significantly, the July letter again informed Appellant that its proposal could not be approved "due to the condition of hydraulic overload in the Girty's Run Sewer System." It is obvious that this portion of the second decision is simply a reiteration of the conclusion reached by DER in its first decision. Likewise, the lack of a corrective action plan was a basis for the denial of the proposed supplement in both instances.

Paragraph two of the second letter, which discusses the procedural prerequisites to approval of the proposed supplement, cannot form a basis for this appeal since it is apparent that DER did consider the resubmitted proposal despite the absence of these procedural formalities. In essence, DER simply warned Appellant that, at the very least, certain procedures would have to precede its next attempt at gaining approval for its proposed supplement to

the township's Official Sewage Plan.

In our view, the most forceful argument in support of Appellant's contention that the July 27 letter embodies new reasons for the denial of the proposal is that based upon paragraph one of the letter, quoted supra. Nevertheless, we hold that Appellant likewise cannot prevail of this ground. Paragraph one merely states in greater detail the inadequacy referred to in the first denial (that of March 19, 1984). Had Appellant chosen to appeal the March 19 letter the stated inadequacy would have been more fully explained.

In sum, DER's letter of July 27, 1984 is nothing more than a reiteration of its earlier decision. In other words, it is the same DER action. It is readily apparent that the major obstacles to DER approval of the proposed supplement are the hydraulic overload in the sewerage system and the lack of an acceptable corrective action plan. Appellant has made no suggestion that the factual circumstances of these problems have changed in the four months since the initial denial. If a showing to that effect had been proposed, our holding here might well have been different. Under the present circumstances, however, we view Appellant's actions as simply an attempt to recreate an opportunity for appeal which it relinquished by failing to appeal the initial DER action.

DER is entitled to rely upon the finality of its decisions once the opportunity for appeal has passed. This principle of finality has been stated by Commonwealth Court, in a somewhat different context, as follows:

> We agree that an aggrieved party has no duty to appeal but disagree that upon failure to do so, the party so aggrieved preserves to some indefinite future time in some indefinite future proceedings the right to contest an unappealed order. To conclude otherwise, would postpone indefinitely the vitality of administrative orders and frustrate the orderly operation of administrative law. Commonwealth, DER v. Wheeling-Pittsburgh Steel Corp. 22 Pa. Cmwlth 280, 348 A. 2d 765 (1975).

This reasoning is equally applicable in the present context, although we are not concerned here with the issuance of an administrative order. Where no showing has been made that the factual basis of the DER decision has changed since the decision was reached and the right to review of that decision has been waived, we see no reason to permit a party to force DER to defend the validity of its original decision every few months. Certainly, this would "frustrate the orderly operation of administrative law." As stated above, we view DER's July 27 letter as nothing more than a restatement of its original decision. Therefore, our consideration of the content and validity of that decision is foreclosed in this subsequent proceeding. See Armond Wazelle, supra. Therefore, we are inclined to dismiss this appeal.

Appellant, however, has alleged that DER employees made certain statements as a result of which Appellant chose to forego the opportunity to appeal the March 19, 1984 decision. Appellant has not, however, provided the Board with affidavits supporting these allegations, nor has Appellant articulated a legal theory supporting its claim that the alleged DER representations justify this Board's consideration of the merits of the instant appeal or otherwise preclude the application of principles of finality. The following order is consistent with the foregoing.

O R D E R

AND NOW, this 27th day of November, 1984, it is ordered that:

1) Appellant is hereby granted twenty (20) days from the date of this order within which it may file sworn affidavits in support of its claim that it chose to forego the opportunity to appeal the March 19, 1984 DER action as a result of certain statements allegedly made by DER employees.

2) Any affidavits submitted in conformity with paragraph one, supra, must be accompanied by a memorandum of law setting forth a legal theory which,

in light of the allegations supported by the affidavits, would justify this Board's consideration of the merits of this appeal or which would otherwise preclude the application herein of principles of finality.

3) In the absence of the filing of the documents referred to in paragraphs one and two supra within twenty days of this date, the appeal will be dismissed.

ENVIRONMENTAL HEARING BOARD

Edward Gerjuoy

EDWARD GERJUOY
Member

DATED: November 27, 1984

cc: Bureau of Litigation
Richard S. Ehmann, Esquire
David Onuscheck, Esquire

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

ALLEGHENY RIVER COALITION

:

:

Docket No. 84-227-G

:

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and DAVISON SAND & GRAVEL CO., Permittee

OPINION AND ORDER
SUR MOTION TO DISMISS

Synopsis

This appeal from two DER actions concerning a sand and gravel dredging operation is dismissed for lack of standing. Appellant failed to respond to either of two Motions to Dismiss; Appellant has made no showing of an interest which may substantially, directly, and immediately affected by the DER action.

OPINION

This appeal was filed by the Allegheny River Coalition, a non-profit corporation based in Kittanning, Pennsylvania. Appellant seeks to challenge two actions of the Department of Environmental Resources ("DER") which concern a sand and gravel dredging operation located on Pool No. 6 of the Allegheny River. Specifically, Appellant appeals the entry of a consent order and agreement between DER and Davison Sand and Gravel and DER's issuance of a

Water Obstruction and Encroachment Permit to Davison ("permittee").

Both DER and the permittee have moved to dismiss this appeal for lack of standing. They argue that Appellant has failed to allege any interest in the subject matter of the DER actions. Appellant has not responded to either of the two Motions to Dismiss filed with the Board.

As DER correctly notes, the sole allegation in the Notice of Appeal which in any way relates to Appellant's standing is the statement that "appellant is . . . . a corporation organized under the non-profit corporation laws of the Commonwealth of Pennsylvania." (Notice of Appeal p.1) We note that Appellant did state in its pre-hearing memorandum that the "Allegheny River Coalition had been formed in 1982 as a coalition of local organizations and citizens concerned with the dredging issue and other problems in the lower Allegheny Drainage Basin . . . " (Appellant's Pre-Hearing Memorandum p. 3) Although this Board has embraced the concept of representational standing (Del-AWARE Unlimited, Inc. v. DER et al., EHB Docket Nos. 82-177-H, 82-219-H, Adjudication issued June 18, 1984 at p. 88) the statements quoted supra fall far short of the showing required to demonstrate standing, representational or otherwise. Appellant has not indicated, e.g., that any of its members reside along the Allegheny River. A prospective corporate litigant of this coalition's sort must be prepared to demonstrate that it, or some of its members, have an interest which may be substantially, immediately, and directly affected by the action it seeks to challenge. William Penn Parking Garage v. City of Pittsburgh, 464 Pa. 168, 346 A.2d 269 (1975).

O R D E R

WHEREFORE, this 30th day of November, 1984, the above-captioned appeal is dismissed for lack of jurisdiction.

ENVIRONMENTAL HEARING BOARD

ANTHONY J. MAZULLO, JR.
Member

EDWARD GERJUOY
Member

DATED: November 30, 1984

cc: Bureau of Litigation
Maxine Woelfling, Esquire, for DER
Lee J. Calarie, Esquire, Calarie & Calarie, Kittanning, for Appellant
Robert Thomson, Esquire, Pittsburgh, for Permittee

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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MATHIES COAL COMPANY :

:

Docket No. 84-015-G

:

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER

Synopsis

This is an appeal from a DER letter notifying Appellant that it had been found to be the cause of subsidence damage sustained by a private property owner and requiring Appellant, pursuant to the Bituminous Mine Subsidence and Land Conservation Act, to either place in escrow an amount equivalent to the cost of repair of the damage or demonstrate to DER that the claim had been otherwise satisfied. 52 P.S. 1406.6(a). The DER letter warned that failure to comply would result in the loss of Appellant's subsidence control permit. The appeal is dismissed as having been taken from an unappealable action. The DER letter was simply a violation notice. Appellant has been furnised an opportunity to demonstrate to DER that the claim has been satisfied.

OPINION

On December 20, 1983, DER wrote Mathies a letter reading, in substantive part, as follows:

> We have been advised by Mr. T. B. Alexander, Chief of Mine Subsidence Regulation, that an investigation has disclosed that damage to the residence of Arthur Santomo, 176 N. Spring Valley Rd., Canonsburg, PA was caused by mining operations of the Mathies Mine, Mathies Coal Company. By our records, your company was notified of this damage on or prior to May 16, 1983.
>
> Section 6(a) of the Bituminous Mine Subsidence and Land Conservation Act of 1966 requires that within six months of being notified of such damage, a permit holder must either (a) provide this Department with Evidence that the damage has been repaired or that all claims arising therefrom have been satisfied, or (b) provide this Department with an estimate of such damages from a reputable expert, and place in escrow the amount estimated as equal to such damage or the reasonable cost of repair thereof. As of this date, your company has failed to comply with either of these requirements, and, as a result, is in violation of Section 6(a) of the Bituminous Mine Subsidence and Land Conservation Act of 1966 (Act of April 27, 1966, P.L. 31 (Special Session), 52 P.S. Section 1406.1 et seq.).
>
> Accordingly, you are hereby notified that your Subsidence Control Permit No. 34-1A-2 may be suspended or revoked after a hearing, if you have not come into compliance with the Act within thirty days of your receipt of this notice. An escrow deposit of $6,500.00 will be considered sufficient for compliance if evidence of a settlement cannot be provided.

On January 13, 1984, Mathies filed an appeal of this letter. Thereafter, DER filed a Motion to Quash the appeal, on the grounds that sending Mathies a notice of violation is not a DER action which can be appealed to this Board. In support of its motion, DER cites Standard Lime and Refractories Co.

v. DER, 2 Pa. Cmwlth. 434, 279 A. 2d 383 (1971), Sunbeam Coal Co. v. DER, 8 Pa. Cmwlth. 622, 304 A.2d 169 (1972), and Perry Brothers Coal v. DER, 1982 EHB 501; these cites all uphold the thesis that a mere notice of violation is not an appealable DER action, because the notice as such does not affect personal or property rights. 2 Pa. C.S. §101; 25 Pa. Code §21.2(a).

In response to DER's motion, Mathies has attempted to distinguish the instant appeal from the aforementioned precedents. Mathies agrees that although DER's above-quoted letter merely says Mathies' permit "may be suspended or revoked after a hearing" (emphasis added), in fact, DER must suspend or revoke Mathies' permit unless Mathies meets one of the alternatives (a), (b) stated in paragraph 2 of DER's letter. 52 P.S. §1406.6. Therefore, Mathies further argues, in actuality the DER letter does affect Mathies' personal or property rights, i.e., is appealable.

Despite Mathies' contentions, the instant facts really are not distinguishable from the facts in Perry Brothers, supra. In Perry Brothers, DER notified the Appellant by letter that it was in violation of several permit conditions. The last sentence of the letter stated that no new permits would be issued to Perry Brothers until all violations were corrected. This assertion was consistent with Section 3.1(b) of the Surface Mining Conservation and Reclamation Act ("SMCRA"), 52 P.S. §1396.3 a(b), which states that DER shall not issue any surface mining permits if it finds, after investigation and opportunity for an informal hearing, that the applicant is in violation of the SMCRA. Thus in Perry Brothers, supra, as in the instant appeal, the Appellant was confronted with a non-discretionary legislative mandate to DER requiring further action against the Appellant unless the Appellant, after opportunity for a hearing, convinced DER the alleged violations had been corrected.

This Board refused to term DER's letter to Perry Brothers an appealable action. Moreover, the Board recently has upheld Perry Brothers, under facts essentially identical with Perry Brothers. Reitz Coal Company v. DER, EHB Docket No. 84-195-6 (Opinion and Order, September 19, 1984). Despite these precedents, there might be reason to reject DER's petition if granting the petition could be thought to countenance unreasonably unfair DER procedures. Where DER can decide on its own that a damage claim against a permittee is justified, and where the statute then mandates suspension or revocation of the permit unless the permittee (no matter how unjustified the permittee thinks the claim is) either repairs the damage or places the estimated repair costs in escrow, it borders on an abuse of discretion for DER to issue an unappealable notice of violation instead of--as so easily could have been issued--an order requiring the permittee to repair or to escrow; such an order would have been appealable, and therefore would have allowed the permittee to challenge the underlying damage claim before the mandated permit suspension or revocation became imminent.

However, DER has informed us that it is establishing policies which will ensure that a permittee in Mathies' situation receives an appealable order to repair or to escrow before permit suspension or revocation is ordered. Insofar as the instant appeal is concerned, Mathies has been given the opportunity to submit--and to have DER review--Mathies' evidence that the damage claims had been settled. Under the totality of thse circumstances, therefore, we see no reason to reject the logic of precedents such as Perry Brothers and Reitz, supra.

O R D E R

WHEREFORE, this 30th day of November , 1984, DER's Motion to Quash this appeal is granted; the appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

ANTHONY J. MAZUELO, JR.
Member

EDWARD GERJUOY
Member

Dated: November 30, 1984

cc: Bureau of Litigation
Marc A. Roda, Esquire, for DER
Daniel E. Rogers, Esquire,
for Appellant

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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SUGARCREEK TOWNSHIP :

:

Docket No. 84-257-G

:

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER

Synopsis

Appellant township seeks to challenge DER's denial of a private party's request that DER order the township to revise its official sewage facilities plan to accommodate the private party's needs. 35 P.S. §750.5(b). The appeal is dismissed for lack of standing. The township is not aggrieved or harmed by the DER action.

OPINION

Appellant Sugarcreek Township ("Township") has filed this appeal with the Board seeking to challenge the Department of Environmental Resources' ("DER") denial of a request made by 268 Center, Inc. that DER order the Township to revise its official sewage facilities plan. The DER action which is being appealed is contained in a letter from DER's Regional Water Quality Manager to 268 Center, Inc.

The letter reads in pertinent part as follows:

> According to the information supplied to the Department, the Township has not refused to revise or supplement its Sewage Facilities Plan to accommodate 268 Center, Inc. The Township indicated it cannot make a final decision on revising this Plan or refusing to do so due to a lack of information which the Plan requires be submitted. Further this Department cannot make the decision as to whether or not the requirements set forth in the Official Plan apply to the 268 Center, Inc. proposal. That decision is a Township function and the Township has advised us that these requirements do apply. If you submit the information requested by the Official Plan and the Township fails to act thereon, refuses to act thereon or refuses to amend its Official Plan then DER would be in a position to support your request. At this time however, your private request for the Department to order Sugarcreek Township to revise or supplement its Official Sewage Facilities Plan to accommodate the 268 Center, Inc. proposal is hereby denied.

268 Center has also appealed the DER action, That appeal has been docketed at 84-252-G. Sugarcreek Township has been granted intervenor status in that appeal.

The Township characterizes this appeal as a "cross appeal". After having reviewed the circumstances of this case, the Board advised Appellant that it would have to make an initial showing of standing in order to be allowed to prosecute this appeal. In response to the Board's request, the Township has filed a Statement of Facts which (the Township argues) suffice as a basis for its standing. The Township's argument is summarized in the following paragraphs of its Statement of Facts:

> The action challenged . . . is the failure of the Department to base its denial of the private request by 268 Center, Inc. for modification of the Official Plan for Sewage Disposal of Sugarcreek Township upon all of the possible grounds for denial. Should the decision of the Department later be reversed . . . the township might then be foreclosed from later asserting as bases for refusing the requested modification the fact that the proposal does not comply with applicable departmental regulations, the fact that the proposal infringes rights guaranteed the citizenry of the township under Article 1, Section 27 of the Pennsylvania Constitution and the fact that . . . the modification sought by 268 Center, Inc. is discretionary with the Board of Supervisors . . . . The harm which the challenged action works is the loss of the opportunity to assert these other bases as grounds for denying the modification sought by 268 Center, Inc., should the basis upon which the department chose to rely ultimately prove insufficient ....

The Pennsylvania Supreme Court has stated that there are three prerequisites to a determination that a litigant has standing: the litigant must be prepared to demonstrate that the action which he seeks to challenge affects an interest of his which is substantial, direct and immediate. William Penn Parking Garage v. City of Pittsburgh, 464 Pa. 168, 346 A.2d 269 (1975). The William Penn court summarized each of these requirements as follows:

> (T)he requirement of a "substantial" interest simply means that . . . there must be some discernible adverse effect to some interest other than the abstract interest of all citizens in having others comply with the law. 346 A.2d at 282.
>
> The requirement that an interest be "direct" simply means that the person claiming to be aggrieved must show causation of the harm to his interest by the matter of which he complains. Id.

> The remaining requirements . . . are that the interest be "immediate" and "not a remote consequence of the judgment" . . . . Here the concern is with the nature of the causal connection between the action complained of and the injury to the person challenging it. 346 A.2d at 283.

The Township cannot meet the William Penn test. The reason is very simple: the Township has not been "aggrieved" by the DER action. The "harm" which the Township foresees here cannot materialize.

The basis for the DER action is contained in the following sentences from the letter quoted supra:

> According to the information supplied to the the Department, the Township has not refused to revise or supplement its Sewage Facilities Plan to accommodate 268 Center, Inc. The Township indicated it cannot make a formal decision on revising this Plan or refusing to do so due to the lack of information which the Plan requires to be submitted . . . . (emphasis supplied).

In essence, DER determined that 268 Center's request was premature. The issue in an appeal of such an action is simply whether or not DER was correct in making this determination. DER clearly did not reach the "merits" of 268 Center's request.

35 P.S. §750.5(b) provides that:

> Any person who is a resident or property owner in a municipality may request the department to order the municipality to revise its official plan where said person can show that the official plan is inadequate to meet the resident's or property owner's sewage disposal needs. Such request may only be made after a prior demand upon and refusal by the municipality to so revise its official plan. (emphasis supplied).

268 Center made its request to DER under the authority of this provision. Apparently, DER determined that the essential prerequisite to DER action (a prior demand upon and refusal by the municipality) had not been shown to be present. If the Board were to determine that DER erred in making this determination, the Board likely would be constrained to remand the case to DER for further consideration. Warren Sand and Gravel Company, Inc. v. DER, 20 Pa. Cmwlth. 186, 341 A.2d 556 (1975). We would have no occasion to address isues such as those which the township feels it will be precluded from asserting--nor would we even if we were to affirm the DER decision. The issue presented here appears to be quite narrow. Since issues going to the merits of the request would be neither "actually litigated" nor "essential to the judgment", the Township would not be precluded from asserting them in subsequent litigation with the parties to this action. (See Restatement 2d of Judgments §27). Therefore, the harm which the Township fears does not exist. The Township is not "aggrieved" by the DER action, and consequently, does not have standing to appeal the same.

O R D E R

WHEREFORE, this 30th day of November, 1984 the appeal of Sugarcreek Township is dismissed. In light of this dismissal, the Township's petition to consolidate this appeal with that of 268 Center, Inc., docketed at 84-252-G, is denied.

ENVIRONMENTAL HEARING BOARD

Anthony J. Mazullo, Jr.

ANTHONY J. MAZULLO, JR.
Member

Edward Gerjuoy

EDWARD GERJUOY
Member

Dated: November 30, 1984

cc: Bureau of Litigation
Richard S. Ehmann, Esquire, for DER
David F. Megnin, Esquire, Kittanning, for Appellant
J. D. Heim, Esq., for 268 Center (84-252-G)

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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ROBERT C. PENOYER,
t/a D.C. PENOYER and COMPANY
(formerly SRP COAL COMPANY)

Docket No. 82-303-M

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER

Synopsis

The Board granted a rule upon SRP Coal Company (SRP) to show cause why this appeal should not be dismissed for failure to comply with a Board Order, and for failure to respond to a Motion for Sanctions filed by the Commonwealth. SRP filed with the Board a Reply and Rule Returnable, which explained why SRP had delayed in complying with the Board Order. SRP also filed a Motion to Substitute Appellant. Appellant is hereby permitted to file answers nunc pro tunc to the Commonwealth's interrogatories, and request for production of documents. SRP Coal Company, Inc. is hereby stricken as party appellant, and Robert C. Penoyer, t/a D.C. Penoyer and Company is hereby substituted as party appellant.

OPINION

On October 9, 1984, the Board granted a rule upon SRP Coal Company (SRP) to show cause why this appeal should not be dismissed for failure to comply with a

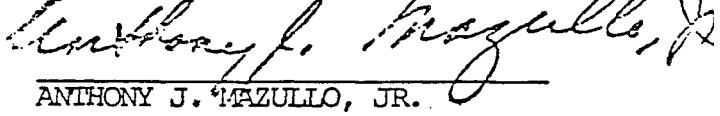
dated April 14, 1984, directing SRP to answer Interrogatories and Request for Production of Documents filed by the Commonwealth; and for failure to respond to the Commonwealth's August 20, 1984, Motion for Sanctions or in the alternative, Motion to Compel Appellant to Answer Interrogatories and Request for Production of Documents. On October 19, 1984 SRP filed with the Board answers to the interrogatories that the Board had ordered SRP to answer. On October 22, 1984, SRP filed with the Board a Motion to Substitute Appellant because the permits that are the subject of the compliance order from which appeal was taken had been transferred from SRP to Robert C. Penoyer, t/a D.C. Penoyer and Company. Finally, on November 2, 1984, SRP filed with the Board a Reply and Rule Returnable, which alleged that the delay by SRP in complying with the Board's order of April 14, 1984 was a result of difficulties which developed during negotiations concerning the transfer of the permits in question. The Reply and Rule Returnable also alleged that SRP had made a good faith effort to comply with all orders and requests in this matter.

In light of the above facts, and since DER has no objection, appellant is hereby permitted to file answers nunc pro tunc to DER's interrogatories and request for production of documents. Also, SRP is hereby stricken as party appellant and Robert C. Penoyer, t/a D.C. Penoyer and Company is hereby substituted as the party appellant in the above-captioned appeal.

O R D E R

AND, NOW, this 3rd day of DECEMBER, 1984, appellant is hereby permitted to file answers nunc pro tunc, to DER's interrogatories and request for production of documents. SRP Coal Company, Inc. is hereby stricken as party appellant, and Robert C. Penoyer, t/a D. C. Penoyer and Company, P.O. Box 433 Clearfield, Pennsylvania 16830, is hereby substituted as party appellant at EHB Docket No. 82-303-M.

ENVIRONMENTAL HEARING BOARD



ANTHONY J. MAZULLO, JR.
Member

DATED: December 3, 1984

cc: Bureau of Litigation
Donald A. Brown, Esquire, for DER
Alan Kirk, Esquire, for Appellant

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

221 NORTH SECOND STREET
THIRD FLOOR
HARRISBURG, PENNSYLVANIA 17101
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JOSEPH GEORGE,

Appellant

Docket No. 84-223-G

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES,

Appellee,

and

CONSOLIDATION COAL COMPANY,

Permittee

OPINION AND ORDER SUR
MOTION TO DISMISS

Synopsis

This appeal from DER's issuance of a permit pursuant to the Bituminous Mine Subsidence and Land Conservation Act, 52 P.S. 1406.1 et seq., is dismissed. Although Appellant may have standing to bring this appeal before the Board, he has failed to state a legally cognizable cause of action. The Subsidence Act does not require DER to consider possible effects of subsidence upon overlying coal seams when considering a permit application under the Act. DER is required to consider the possible effects of subsidence upon a surface stream only if the stream is a significant source of a public water supply. Appellant has not alleged that his stream deserves such a characterization, nor has he alleged that his waterfall is associated with a stream which may be thus characterized. Therefore, the appeal is dismissed.

OPINION

This is an appeal of a permit issued to Consolidation Coal Company ("Consol") under the authority of the Bituminous Mine Subsidence and Land Conservation Act, 52 P.S. §1406.1 et seq. Appellant contends that Consol's mining operation would adversely affect a coal seam, surface stream and waterfall. Appellant, however, failed to allege any ownership interest in those three natural features. Consol moved to have the appeal dismissed, among other reasons, for lack of standing. In an Opinion and Order dated August 29, 1984, this Board in part denied Consol's Motion to Dismiss and granted Appellant leave to amend his Notice of Appeal. The Board reserved ruling on two other issues raised by Consol's Motion. Appellant has provided the lacking factual allegations in an Amendment to Notice of Appeal. Therefore, we proceed to address, first, the question of Appellant's standing to challenge the DER action, and second, the remaining issues contained in Consol's Motion to Dismiss.

Appellant has alleged--in his amended Notice of Appeal--that he is the owner of the aforesaid coal seam, surface stream, and waterfall. Under the test of William Penn Parking Garage v. City of Pittsburgh, 464 Pa. 168, 364 A.2d 269 (1975), a litigant must be able to demonstrate that the action he seeks to challenge threatens an interest of his which is substantial, direct, and immediate. To be substantial, the interest must be other than the "abstract interest of all citizens in having others comply with the law." 346 A.2d at 282. Appellant clearly has overcome this first hurdle. He has alleged that he owns certain natural features which apparently overlie the area which Consol proposes to mine. Should Consol's mining activities cause subsidence, appellant's land very well

may be injured as a consequence. This possibility may also satisfy the second and third requirements of the William Penn test. Appellant must be able to demonstrate "causation of the harm to his interest by the matter of which he complains" (the requirement of directness), as well as "the nature of the causal connection" (the requirement of immediacy). 346 A.2d at 282-83. Although we believe that Appellant likely has satisfied the William Penn standard, we need not reach this issue here. Even assuming for the purpose of argument that Appellant has standing, this appeal must be dismissed. Appellant has failed to state a legally cognizable cause of action under the Subsidence Act.

Appellant seeks to challenge the alleged failure of DER to consider the effects of Consol's mining operations upon his coal seam, surface stream, and waterfall. In order to state a cause of action, he must first demonstrate that the Subsidence Act requires DER to give consideration to such natural features. The Board has previously ruled that the Act does not protect overlying coal seams and that, therefore, DER is not required to consider the possible effects of subsidence upon the seams when reviewing a permit application. John F. Culp, III v. DER, (EHB Docket No. 83-194-G, Opinion and Order dated March 11, 1984). The issue whether the Subsidence Act grants protection to surface streams and waterfalls has not been addressed previously by this Board. The parties were requested to discuss these issues in their pre-hearing memoranda. Appellant and DER have done so. Consol apparently has been content to have DER represent its position on these questions.

Appellant argues that our holding in Culp was erroneous. The arguments presented in support of this contention essentially amount to a restatement of those presented to this Board in that earlier appeal. We are constrained to

take the Act at face value. The section listing the items which the Act is designed to protect makes reference only to "surface structures". 52 P.S. §1406.4. There is absolutely no indication that an overlying coal seam is among those items which the legislature saw fit to protect. In short, Appellant has provided us with no arguments sufficient to persuade us to reach a conclusion different than that we reached in Culp. Therefore, Consol's Motion to Dismiss is granted insofar as it relates to issues which turn upon DER's alleged failure to consider the effects of Consol's mining upon the Appellant's coal seam.

The parties also were requested to address the issue of whether the Subsidence Act is intended to protect features such as a surface stream and waterfall. Appellant argues that Section 1406.5(e) of the Act supports his contention that these features are within the Act's protection. Section 1406.5(e) provides in part that a coal mine operator shall employ measures "to prevent subsidence causing material damage to the extent technologically and economically feasible, to maximize mine stability, and to maintain the value and the reasonably foreseeable use of such surface land . . . ." Appellant contends that the loss of surface streams and a waterfall will decrease the value and use of his land and that therefore they are to be protected against possible subsidence.

The loss of a water supply most certainly could adversely affect Appellant's land. Other provisions of the Act suggest that the scope of protection afforded is not as broad as Appellant claims. However Section 1406.4 --noted supra-- grants certain "surface structures" an absolute right of support. DeLuca v. Buckeye Coal Company, 345 A.2d 637 (Pa. S.Ct. 1975). The term "structure" is employed repeatedly throughout the Act. See, e.g., §1406.3 (declaration of policy), §1406.6(a) (damage to structures), §1406.15 (proceedings

for protection of surface structures). No provision in the Act provides any right of support for such features as surface streams and waterfalls.

Appellant has directed the Board's attention to certain regulations promulgated pursuant to the Subsidence Act, 25 Pa. Code, Chapter 89. Section 89.145 provides in relevant part:

> General Requirements
>
> (a) Underground mining activities shall be planned and conducted in a manner which prevents subsidence damage to the following:
>
> * * *
>
> (4) perennial streams . . . .
>
> (b) The damage prohibited by subsection (a) includes . . . the draining of perennial streams.
>
> * * *
>
> (d) Underground mining activites shall be planned and conducted in a manner which avoids or minimizes damage to all other surface features listed pursuant to §89.142 . . . the draining of perennial streams. The damage to be avoided or minimized includes . . . the draining of surface waters.

Appellant claims that these regulations indicate that the alleged failure of DER to consider the possible adverse effects upon his surface stream and waterfall of Consol's mining was an abuse of discretion. (We note that Appellant has not claimed that these regulations evidence a legislative intent to protect these natural features against possible subsidence.) As DER has pointed out in its pre-hearing memorandum, the regulations quoted supra have been suspended by an order of the Chairman of the Environmental Quality Board effective July 2, 1983. The suspension was based upon a finding that the provisions had been adopted solely for the purpose of implementing federal requirements which had been viewed as prerequisites to the Commonweath obtaining

primacy in the enforcement of its subsidence control program. The federal regulations have since been relaxed. Under the new federal regulations (and therefore under the revised Pennsylvania program) surface streams are assured a degree of protection only if they are a "significant source of a public water supply." 13 Pa. Bull. 2058-59.

Appellant has not alleged that his surface stream is a significant source of a public water supply, nor has he alleged that the waterfall is associated with a stream which may thus be characterized. Therefore, we can find absolutely no basis for holding that DER is required to consider the possible effects of subsidence upon a surface stream and waterfall when considering a permit application under the Subsidence Act.

O R D E R

WHEREFORE, this 3rd day of December, 1984, it is ordered that the appeal captioned above is dismissed.

ENVIRONMENTAL HEARING BOARD

ANTHONY J. MAZULLO, JR.
Member

EDWARD GERJUOY
Member

Dated: December 3, 1984

cc: Bureau of Litigation
Marc Roda, Esquire, for DER
William M. Baily, Esquire,
Thompson & Bailey, for Appellant
Donald E. Rogers, Esquire, for Permittee

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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

WALTER H. OVERLY, t/a
WALTER H. OVERLY COAL COMPANY :

:

Docket No. 84-026-G

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER

SYNOPSIS

Appeal is dismissed pursuant to 25 Pa. Code §21.124, as a result of Appellant's failure to comply with the Board's orders directing him to file a pre-hearing memorandum. Although DER bears the burden of proof in a bond forfeiture proceeding, Appellant's continued disregard of the Board's order—despite warnings that failure to comply would result in sanctions -- justifies dismissal of the appeal.

OPINION

In February, 1984 the Board ordered Appellant to file a pre-hearing memorandum on or before April 23, 1984. Shortly before the expiration of this period, Appellant requested an extension of time within which to file the memorandum. By an order dated April 19, 1984, the Board granted the requested extension; Appellant was ordered to file the memorandum by July 23, 1984. When no memorandum had been filed by August 15, 1984, the Board issued a notice informing Appellant that this failure could result in the imposition of sanctions. The notice was not received by Appellant, however. The Board revised the notice, requiring compliance by September 28, 1984, and mailed it

again -- this time to a different address. This notice was received by Appellant. Shortly after the issuance of this second notice, the Board received a phone call from Appellant requesting that the Board grant a further extension. By an order dated September 17, 1984, the Board set a deadline for filing of the memorandum of November 16, 1984 (unless DER withdrew the bond forfeiture order -- a condition which has not occurred). The order of September 17 warned Appellant "for the last time" that failure to comply would result in the imposition of sanctions, including possible dismissal of the appeal. Appellant has not complied.

DER bears the burden of proof in a bond forfeiture proceeding (Chester A. Ogden and Coal Hill Contracting Company, Inc. v. DER, Docket No. 82-193-G, Adjudication issued August 6, 1984). Nevertheless, dismissal of this appeal is appropriate. See W.A. Cotterman v. DER, (Docket No. 83-155-G, Opinion and Order dated February 23, 1984). The Board has been very generous in its granting of extensions at Appellant's request. Appellant has been afforded ample warning of the consequences of his disregard of the Board's order.

O R D E R

WHEREFORE, in light of the foregoing, it is ordered that the appeal captioned above is dismissed.

ENVIRONMENTAL HEARING BOARD

ANTHONY J. MAZULLO, JR.
Member

EDWARD GERJUOY
Member

DATED: December 7, 1984

cc: Bureau of Litigation
Alan S. Miller, Esquire
Walter H. Overly

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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HARRISBURG, PENNSYLVANIA 17101
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COONEY BROTHERS COAL COMPANY

:

:

Docket No. 84-232-G

:

v. :

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

OPINION AND ORDER
SUR
MOTION TO DISMISS

SYNOPSIS

Appeal is dismissed as having been taken from an unappealable DER action. 25 Pa.Code §21.2(a). Appellant sought review of a DER civil penalty worksheet but did not allege that a civil penalty had been assessed. The civil penalty worksheet is analogous to a notice of violation; it is not appealable and dismissal of the appeal is justified.

OPINION

Appellant herein seeks the Board's review of an action of DER which — in Appellant's words — "propose(s) civil penalty assessments against Appellant for allegedly violating provisions of the Surface Mining Act and the Clean Streams Law." (Appellant's Notice of Appeal, paragraph 2, emphasis added). DER has moved to dismiss the appeal, arguing that the action herein appealed is not an "order, decree, decision, determination or ruling by the Department affecting personal or property rights, privileges, immunities, duties, liabilities or obligations" of the Appellant, 25 Pa. Code §21.2(a), and therefore,

is not an appealable action. Appellant has not responded to DER's Motion to Dismiss.

The Board's rules require that an appellant attach a copy of the written notification of the DER action to the Notice of Appeal. 25 Pa. Code §21.51(d). Appellant herein has attached a copy of a DER civil penalty worksheet. Appellant has not alleged that DER actually assessed a civil penalty against Appellant. DER has stated that "the worksheet was not intended to constitute a binding penalty assessment, but was simply a notification to (Appellant) that the Department was contemplating the assessment of such a penalty . . ." (DER's Motion to Dismiss, paragraph 2).

Under these circumstances, it is clear that the worksheet is analogous to a notice of violation, such as that which the Commonwealth Court held not appealable in Sunbeam Coal Corporation v. DER, 8 Pa.Cmwlth 622, 304 A.2d 169(1972). Inasmuch as Appellant has provided no arguments to the contrary, dismissal of this appeal is fully justified.

O R D E R

WHEREFORE, this 7th day of DECEMBER 1984, it is ordered that the appeal captioned above is dismissed.

ENVIRONMENTAL HEARING BOARD

ANTHONY J. MAZULLO, JR.
Member

EDWARD GERJUOY
Member

DATED: December 7, 1984

cc: Bureau of Litigation
William F. Larkin, Esquire, for DER
Bruno A. Muscatello, Esquire, of
Stepanian & Muscatello, Butler, for
Appellant

BEFORE THE PENNSYLVANIA ENVIRONMENTAL HEARING BOARD

TOWNSHIP OF ABINGTON, Appellant	:	Docket No. 84-017-M
vs.	:	
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES, Appellee	:	

OPINION AND ORDER

AND NOW, this 10th day of December, 1984, after review of the record in this appeal and after pre-hearing conference with counsel for the parties, during which conference counsel for Appellant orally moved the Board to order summary judgment in favor of Appellant, which oral motion the Commonwealth contested, and after oral argument by counsel, the Board finds from the uncontested facts underlying this appeal that:

1. The activities performed by Appellant in the construction of the project do not constitute such activities as would be subject to the provisions of 25 Pa. Code Section 103.14 entitled "Changes in Scope";

2. The activities of the Appellant wherein reimbursement is sought are found to be change orders for which reimbursement to the Appellant is proper under the circumstances;

3. Under appropriate federal case law precedent, the activities engaged in by the Appellant are not within the procurement regulations of 40 C.F.R. Section 35.936 through 35.938-9. Mt. Joy Construction Co. v. Schramm, 486 F. Supp. 32 (E.D. Pa. 1980).

The Department of Environmental Resources is hereby directed to forthwith process all the applications of the Appellant for change orders for reimbursement under appropriate provisions of the law.

ENVIRONMENTAL HEARING BOARD

ANTHONY J. MAZULLO, JR., MEMBER

EDWARD GERJUOY, MEMBER

DATED: December 10, 1984

cc: Bureau of Litigation
Paul A. Logan, Esq.
John Wilmer, Esq./ Eastern

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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K and J COAL COMPANY, INC., and AQUITAINE PENNSYLVANIA, INC.,
Appellant

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
Appellee

Docket No. 81-084-M
(issued 12-10 -84)

OPINION AND ORDER

Synopsis

Appellants', K & J Coal Company, Inc. and Aquitaine Pennsylvania, Inc., appeal is dismissed pursuant to 25 Pa. Code §21.124 for failure to comply with Board orders.

OPINION

By an order dated June 11, 1981, the Board ordered appellants, K and J Coal Company, Inc., and its alleged successor corporation, Aquitaine Pennsylvania, Inc., to file a pre-hearing memorandum on or before July 13, 1981. Following the Board's grant of six extensions of time for such filing, appellants were to file their memorandum on or before December 2, 1983. Following appellants' failure to do so, the Board issued its customary sanction letter on December 19, 1983 which reminded appellants of the past due date for filing their pre-hearing memorandum and which informed appellants that failur to comply by December 29, 1983 could result in the imposition of sanctions, including the dismissal of the appeal pursuant to 25 Pa. Code §21.124. Said Sanction notice was the third such notice issued by the Board during the pendency of this appeal; all three sanction notic were sent by certified mail and return receipts in the Board's posession indicate that appellants, through their attorney, received said sanction notices. To date, appellants have failed to file their prehearing memorandum.

Since this is an appeal of The Commonwealth of Pennsylvania, Department of Environmental Resources' (DER) denial of a mine drainage permit transfer request, it appears that appellants would normally carry the burden of proof. 25 Pa. Code §21.101(c)(1). Thus, the Board has no difficulty in fulfilling the promise contained in its sanction notices, especially since there has been no indication for almost a year that appellants intend to comply with the Board's orders See Franklin Lyons v. DER, EHB Docket No. 84-045-G (Opinion and Order issued November 13, 1984). Accordingly, the Board enters the followin order.

ORDER

AND NOW, This 10th day of December, 1984, the appeal captioned at EHB Docket No. 81-084-M (formerly 81-084-H) is dismissed.

ENVIRONMENTAL HEARING BOARD

Anthony J. Mazullo, Jr.

ANTHONY J. MAZULLO, JR.
Member

Edward Gerjuoy

EDWARD GERJUOY
Member

DATED: December 10,1984

cc: Bureau of Litigation
Elissa A. Parker, Esq., Chief Counsel,
Western Region, Pittsburgh,
for DER
William S. Scott, Esq.,
Pittsburgh, for Appellants

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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(717) 787-3483

DANIEL A. MARINO, JR.,
Appellant

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES
Appellee

Docket No. 80-117-M
(issued 12-10-84)

OPINION AND ORDER

Synopsis

The appeal of appellant Daniel A. Marino, Jr. of a DER order denying an Act 537 Sewage Facilities Plan revision is dismissed as moot following DER's approval of appellant's land planning module.

OPINION

On July 16, 1980, the Board docketed the appeal of appellant Daniel A. Marino, Jr. from an order of the Commonwealth of Pennsylvania, Department of Environmental Resources (DER) dated June 16, 1980, which denied an Act 537 Sewage Facilities Plan revision for Phase Two of Saybrook Village, located in the city of Greensburg, Westmoreland County, Pennsylvania. Following the submission of pre-hearing memorandums by both parties, the appeal was continued by the Board until June 27, 1981.

After a two year period of inactivity, the Board issued an order dated February 14, 1983, which informed the parties that the appeal would be marked discontinued without prejudice unless the parties wished to reactivate the appeal. In response to a request by appellant to again continue the appeal, the Board, by order dated March 29, 1983, continued the appeal until August 1, 1983.

On August 31, 1983, the Board ordered both parties to file amended and updated pre-hearing memorandums within twenty (20) days after receipt of said order. Neither party complied with the Board's order of August 31, 1983, although DER did file a set of interrogatories and a request for a production of documents on September 29, 1983. After a further one year period of inactivity, the Board issued an order dated October 31, 1984 requesting a status report from both parties by November 13, 1984. Lo and behold, DER informed the Board on November 19, 1984, and appellant did likewise on November 23, 1984, that this appeal should be dismissed as moot because on June 29, 1984 (and unbeknowst to the Board) DER approved a land planning module for appellant. Thanking the parties for their attention to this matter, the Board happily complies with their desires. Accordingly, the Board enters the following order.

ORDER

AND NOW, This 10th day of December, 1984, the appeal docketed at EHB Docket No. 80-117-M (formerly 80-117-B) is dismissed as moot.

ENVIRONMENTAL HEARING BOARD

ANTHONY J. MAZULLO, JR.
Member

EDWARD GERJUOY
Member

DATED: December 10, 1984

cc: Bureau of Litigation
Zelda Curtiss, Esq., Assistant
Counsel, Western Region
Pittsburgh, for DER
William C. Stillwagon, Esq.,
Greensburg, for Appellant

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

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ORCT CORPORATION,
Appellant

: Docket No. 84-009-M
: (issued 12-10-84)

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES,
Appellee

OPINION AND ORDER

Synopsis

Appellant ORCT Corporation's appeal of DER's civil penalty assessment is dismissed due to appellant's failure to perfect its appeal by posting a bond in the amount of DER's assessment. Surface Mining Conservation and Reclamation Act, 52 P.S. §1396.22; Clean Strea Law, 35 P.S. §691.605(b).

OPINION

This matter arises from a civil penalty assessed against appellant, ORCT Corporation, by Commonwealth of Pennsylvania, Department of Environmental Resources (DER), on November 15, 1983 in the amount of fifteen thousand dollars ($15,000.00). DER assessed said civil penalty pursuant to the Surface Mining Conservation and Reclamation Act (SMCRA), 52 P.S. §1396.1 et seq., and the Clean Streams Law (CSL), 35 P.S. §691.1 et seq., for ORCT's failure to obtain the required mining and mine drainage permits and licenses prior to conducting surface mining operations at the former site of the Peggs Run Coal Company Washery in Greene Township, Beaver County, Pennsylvania.

In a letter dated January 4, 1984, (received by the Board on January 9, 1984), the president of ORCT, Mr. Joseph Castellucci, informed the Board of correspondence between Mr. Castellucci and Mr. Thomas Vayansky, the DER District Mining Engineer responsible for the issuance of the civil penalty at issue herein. In that correspondence with DER, Mr. Castellucci apparently was attempting to appeal DER's civil penalty assessment and to gain an extension of time for such "appeal," due to Mr. Castellucci's allegedly severe health problems. Mr. Castellucci's "appeal" on behalf of ORCT was incorrectly filed with DER despite unambiguous directions contained in DER's civil penalty assessment notice as to the proper forum for filing of an appeal. In addition, DER's civil penalty assessment notice indicated that failure to follow the proper appeal procedures as set forth in Section 18.4 of SMCRA and Section 605(b) of CSL would result in the waiver of ORCT's right to appeal. Both Section 18.4 of SMCRA

52 P.S. §1396.22, and Section 605(b) of CSL, 35 P.S. §691.605(b), state that a party appealing a DER civil penalty assessment has thirty (30) days within which to perfect said appeal and both sections also require the posting of an appeal bond (or cash) in the amount of the assessment.

On January 13, 1984, and again on January 31, 1984, the Board requested additional information from ORCT for the purpose of perfecting ORCT's appeal pursuant to 25 Pa. Code §21.51. Despite receiving said notices, ORCT failed to supply the Board with the requested information. Instead, ORCT filed two requests (by Mrs. Castellucci for extensions of time within which to perfect ORCT's appeal. In answer to said requests, the Board issued a "Rule to Show Cause and Order" on September 24, 1984 which required ORCT to explain in a satisfactory manner why ORCT's appeal should not be dismissed for lack of perfection and prosecution. Following the Board's granting of an extension of time until November 19, 1984 for the filing of ORCT's reply to the Board's Rule to Show Cause, said reply was received on November 13, 1984, with an amendment thereto received on November 19, 1984.

In addition, prior to the receipt of ORCT's reply, the Board received on November 2, 1984 a letter (dated October 31, 1984) from DER requesting that ORCT's appeal be dismissed for lack of perfection. DER's letter of October 31, 1984 indicated that Mr. Castellucci was sent a copy of DER's letter; as yet, Mr. Castellucci (or anyone representing ORCT) has not specifically responded to DER's letter. However, ORCT, in its reply to the Board's Rule to Show Cause, addresses the issue of lack of perfection, the grounds proffered by DER for its informal motion to dismiss.

In its reply to the Board's Rule to Show Cause, ORCT states:

> In lieu of the submission of a cash bond in the amount of the penalty assessed ($15,000), Appellant has submitted a financial statement (Exhibit "D") attesting to the fact that the net assets of the Appellant exceed six times the amount of the penalty assessed (i.e. $90,000) in accord with the general principles of posting bonds as set forth in the Surface Mining Conservation and Reclamation Act, 52 P.S. §1396.4 (d)(5).

However, unfortunately for ORCT, Section 1396.4(d)(5) does not apply to the posting of bond or cash following a civil penalty assessment. Rather, Section 1396.4(d)(5) applies, inter alia, to the posting of a self-bond prior the the commencement of surface mining operations; there is no indication in SMCRA that Section 1396.4(d)(5) provides an exception to the bond requirements of Section 18.4 of SMCRA. 52 P.S. §1396.22. In addition, ORCT does not cite any case support (and, indeed, the Board can find none) for ORCT's attempt to circumvent the unambiguous bond requirements of Section 18.4 of SMCRA and Section 605(b) of CSL.

Rather, the bond requirements of SMCRA and CSL have recently withstood a constitutional challenge and have been upheld by Commonwealth Court. Boyle Land and Fuel Company v. Commonwealth of Pennsylvania, Environmental Hearing Board, _____ Pa. Cmwlth. _____, 475 A.2d 928 (1984). In addition, the Board has continued to dismiss appeals whenever appellants fail to post bond as required by SMCRA and CSL. Everett Stahl v. DER, EHB Docket No.83-299-M (Opinion and Order issued October 19, 1984); Ray Martin v. DER, EHB Docket No.84-002-G (Opinion and Order issued October 15, 1984).

Finally, although the Board has endeavored in the past to

ascertain whether or not an appellant's failure to post bond could have been justified by the appellant's inability to raise the pre-payment (see Ray Martin, supra), there is no indication that ORCT finds itself in this situation. Rather, ORCT has submitted a financial statement to the Board indicating that the net assets of ORCT exceed ninety thousand dollars ($90,000.00). In view of this fact, it seems that ORCT has sufficient financial resources with which to post a bond in the amount of fifteen thousand dollars ($15,000.00). However, as noted previously in this opinion, ORCT's failure to post a bond in the amount of DER's civil penalty assessment, as required by Section 18.4 of SMCRA and Section 605(b) of CSL, results in a failure to perfect its appeal as required by law. Accordingly, ORCT's appeal is dismissed.

ORDER

AND NOW, this 10th day of December, 1984, upon review of the record in this appeal and the applicable statutes and court and Board decisions, the appeal of ORCT Corporation at EHB Docket No.84-009-M is hereby dismissed due to lack of perfection.

ENVIRONMENTAL HEARING BOARD

Anthony J. Mazullo, Jr.

ANTHONY J. MAZULLO, JR.
Member

Edward Gerjuoy

EDWARD GERJUOY
Member

DATED: December 10, 1984

cc: Bureau of Litigation
Diana J. Stares, Esq., Assistant Counsel,
DER, Western Region, Pittsburgh
J. Philip Bromberg, Esq.,
Pittsburgh, for Appellant

COMMONWEALTH OF PENNSYLVANIA
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ANTHONY J. MAZULLO, JR., MEMBER
EDWARD GERJUOY, MEMBER

M. DIANE SMITH
SECRETARY TO THE BOARD

In the Matter of:

COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES,	:	
Plaintiff	:	
v.	:	
WILBUR GUILES	:	Docket No. 84-332-G
ANGELO SWANHART		Docket No. 84-333-G
FRANCIS DWYER	:	Docket No. 84-334-G
JAMES MILLIGAN		Docket No. 84-335-G

OPINION AND ORDER
SUR PRELIMINARY OBJECTIONS
AND MOTION TO DISMISS

Synopsis

DER has filed a complaint seeking revocation of certificates of qualification under the Bituminous Coal Mine Act, 52 P.S. 701-101 et seq. Defendant has responded to the complaint by way of preliminary objections. Defendant's contention that the complaint fails to state a cause of action under section 228 of the Act has merit. However, DER is granted leave to amend its complaint to supply the lacking factual allegations. In the absence of amendment the demurrer will be sustained. Defendant's Motion for a More Specific Pleading is denied; the complaint provides Defendant with sufficient notice of the charges against him so as to enable him to formulate an answer and defend. Greater specificity may be obtained through discovery. Defendant's Motion to Dismiss for Multiplicity is denied, as of now, but may be renewed at a later date. The pleadings before the Board do not prove that the complaint pleads the same violation in separate counts.

OPINION

DER has served Defendant with a complaint seeking revocation of Defendant's certificates of qualifications issued pursuant to section 206 of the Bituminous Coal Mine Act, 52 P.S. 701-206, ("Act"). Jurisdiction of this Board is invoked pursuant to 71 P.S. §510-21 and 25 Pa. Code §21.61.

Defendant has responded to the complaint by filing preliminary objections. No notice to plead accompanied the preliminary objections. No response to a pleading is required unless it is endorsed with a notice to plead. Pa.R.C.P. 1026. Since preliminary objections are specifically treated as "pleadings" under Pa.R.C.P. 1017--entitled "Pleadings Allowed"--the absence of the notice to plead presumably meant that DER need not respond to the preliminary objections. Under these circumstances, the Board would have been extremely reluctant to enter any ruling on the objections adverse to DER. However, the Board was nearly as reluctant to reject the preliminary objections out of hand, although such a course would not have been entirely unwarranted.[1] Accordingly, on November 7, 1984 an Order was entered requiring DER to treat the objections as if they had been endorsed with a notice to plead. DER subsequently filed a timely response to the objections.

Defendant has included a Motion to Dismiss with the objections. Under Pa.R.C.P. 1017, such a Motion is not permitted to be treated as a preliminary objection. Nevertheless, in the interest of economy, we address the Motion (and DER's Response thereto) herein.

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1. See, e.g., Pa.R.C.P. 1029(d): "Averments in a pleading to which no responsive pleading is required shall be deemed to be denied." See also Goodrich Amram §1025:3, n.61.

Defendant's first objection is styled as a demurrer to Counts I, II and V of the complaint. These counts allege violations of the Act arising from the defendant's alleged failure to properly examine the mine in question and record the fact of examination in a record book. Defendant argues that the complaint fails to state a cause of action in that no reference is made to the existence of any work shifts at or about the time of the alleged violations.

Section 228(a) of the Act imposes a duty upon mine examiners to examine a mine "within three hours immediately preceding the beginning of a coal-producing shift, and before any workmen in such shift . . . enter the underground areas of the mine." In addition, "a second examination . . . shall be made during the working hours of every working place where men are employed" and "no person on a non-coal producing shift . . . shall enter any underground area in a gassy mine, unless such area . . . has been examined as prescribed in this subsection within three hours immediately preceding his entrance into such area." Thus it is apparent that there are three separate circumstances under which an examination is required, all of which are tied to the existence of work shifts, though not necessarily coal-producing shifts. The examiner's duty to record the examination arises "immediately after the examination of such mine . . ." and therefore, is likewise tied to the existence of a work shift.

DER's complaint makes no reference to the existence of a work shift. Defendant argues that this amounts to a failure to state facts essential to establish a cause of action under the Act, "particularly in light of the fact that the alleged violations occurred during the miner's vacation." (Defendant's Response to Complaint, paragraph 5). DER has not taken advantage of the opportunity to amend afforded by Pa.R.C.P. 1028(c)

It is clear that no duty to examine and record exists under section 228 of the Act unless there is a work shift either about to begin or already taking place. Since DER has failed to allege the existence of a work shift in connection with the alleged violations, we could sustain Defendant's demurrer to Counts I and II, and to Count V insofar as it alleges a violation of section 228. This is a serious complaint, however, which should not be lightly decided on purely procedural grounds. Therefore, in the interests of a just resolution of this matter, consistent with Pa.R.C.P. 126 and the liberal amendment provisions of Pa.R.C.P. 1033, DER is granted an opportunity to amend the complaint to supply, if possible, the lacking factual allegations. In this connection, the Board notes, sua sponte, that DER has not alleged Defendant was acting, or had been designated to act, as a mine examiner at the time of the alleged violations; section 228 refers to the duties of mine examiners, whereas DER's complaint merely states, "At all times relevant to this complaint, he acted as an assistant mine foreman of the Helen Mining Company Mine." (Paragraph 3 of the complaint)

Defendant's second objection to the complaint is framed as a Motion for a more specific pleading. Defendant argues that DER's failure to allege that a workshift was either to take place or was in progress on the date of the allegedly improper examinations, renders a proper answer to the complaint impossible because "the requirements for such examinations, depending on the circumstances, are different." (Defendant's Response to Complaint, paragraph 10). Defendant does not, however, provide examples of how these requirements allegedly differ; our reading of the statute leads us to the conclusion that the requirements are the same regardless of the type of shift. Therefore, Defendant's Motion is rejected; since the requirements of the examinations are the same, Defendant need only look to the language of section 228(a) to determine the specific requirements of the examinations required thereunder.

Defendant further objects that:

> DER has failed to allege the dates, times and locations of the examinations it alleges were improper. DER has failed to allege the specific entries in the mine examiner's books which it alleges were improper. DER has failed to allege the specific face areas of the Helen Mine which were allegedly not inspected.
> (Defendant's Response, paragraph 12).

We note, initially, that the first portion of the statement just quoted is not entirely accurate. Paragraphs 4, 8 and 9 of the Complaint allege that the violations occurred at the Helen Mining Company Mine during the period from June 26, 1983 through July 3, 1983. Although DER does not set forth particular times of the day at which the alleged violations took place, the complaint certainly is sufficiently specific with regard to the times and location of the alleged violations to put the defendant on notice of the general circumstances DER considers relevant to the alleged violations. Greater specificity may be obtained from DER via normal discovery procedures. DER is correct when it states that "the complaint need not be an all-inclusive narrative of events underlying the claim." (DER's Response to Preliminary Objections, paragraph 5). The idea behind the filing of a complaint is to provide the defendant with notice. Although under the Pennsylvania Rules the provisions regarding pleading may not be as liberal as those of the federal system, it is clear that the Pennsylvania system does not contemplate the perpetuation of the cumbersome fact pleading requirements of an earlier era. (See e.g., Pa.R.C.P. 126, Goodrich Amram §1017:1.) Therefore, Defendant's Motion for a more specific pleading is rejected in its entirety.

Defendant's Motion to Dismiss argues that "the doctrine of multiplicity precludes DER from pleading the same violation of the Act in separate counts." (Defendant's Response to Complaint, paragraph 27.) If the Act imposes upon a mine examiner separate duties, then failure to comply with each of those duties could legitimately form the basis for independent counts of a complaint and, presumably, independent sanctions. It is clear that section 228(a) of the Act imposes at least two duties upon a mine examiner: to examine and to record the examination. What is not clear from the face of DER's complaint is whether the defendant failed to perform both of those duties. It seems not unreasonable to construe paragraph 19 of the complaint as simply a restatement of the allegations contained in paragraph 15 of the complaint. In other words, we are not convinced that if an examiner accurately recorded the fact that an examination had been conducted, the fact that the examination had been improperly conducted would mean that the examiner had violated the duty imposed upon him by the second paragraph of section 228(a).

However, we do not see that the defendant has supplied arguments in support of his motion for dismissal of Counts II, IV and V of the complaint which are sufficiently forceful to convince this Board--at this stage of these proceedings that dismissal is warranted. Accordingly, Defendant's Motion to Dismiss is rejected at this time. Defendant, however, is not precluded from raising these arguments at a later stage of this appeal. However, if Defendant intends to do so, he must accompany the renewed motion with a brief complete with applicable legal citations supporting his contentions in this regard.

O R D E R

WHEREFORE, this 10th day of December, 1984 it is ordered that:

1. Defendant's demurrer to Counts I, II and V of the complaint will be sustained insofar as they allege violations of 52 P.S. §701-228, unless, within twenty (20) days of the date of this Order, DER files an amended complaint setting forth those factual allegations, presently lacking, which are necessary in order to state a cause of action under the Act.

2. Defendant's Motion for a More Specific Pleading is rejected.

3. Defendant's Motion to Dismiss is rejected at this time, but may be renewed at a later date.

ENVIRONMENTAL HEARING BOARD

Edward Gerjuoy

EDWARD GERJUOY
Member

DATED: December 10, 1984

cc: Bureau of Litigation
William F. Larkin, Esquire
R. Henry Moore, Esquire