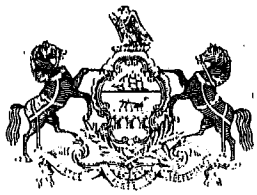
Environmental Hearing Board

Adjudications and Opinions



1993

Volume IV

COMMONWEALTH OF PENNSYLVANIA
Maxine Woelfling, *Chairman*

MEMBERS

OF THE

ENVIRONMENTAL HEARING BOARD

1993

Chairman.....MAXINE WOELFLING

Member .....ROBERT D. MYERS

Member .....RICHARD S. EHMANN

Member .....JOSEPH N. MACK

Secretary.....M. DIANE SMITH

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Thus: 1993 EHB 1

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FOREWORD

This volume contains all of the adjudications and opinions issued by the Environmental Hearing Board during the calendar year 1993.[1]

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

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1 This volume also contains one adjudication issued in 1992. That adjudication, South Fayette Township v. DER, 1993 EHB 1, was unintentionally omitted from the 1992 volume.

ADJUDICATIONS

OPINIONS AND ORDERS

1993 DECISIONS

COMMONWEALTH OF PENNSYLVANIA
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M. DIANE SMITH
SECRETARY TO THE BOARD

MEADOWBROOK/CORNWALLIS HOMEOWNERS ASSOC.	:	
	:	
v.	:	**EHB Docket No. 92-290-MR**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: September 22, 1993**
and EAST GOSHEN TOWNSHIP, PERMITTEE	:	

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

Robert D. Myers, Member

Syllabus:

DER approved a revision to an Official Sewage Facilities Plan providing for sewer service to a portion of the municipality by the use of grinder pumps rather than gravity flow. The Board rules that Appellant waived its challenge to this action by failing to file a post-hearing brief.

Procedural History

Meadowbrook/Cornwallis Homeowners Association (Appellant) instituted this proceeding on July 31, 1992, seeking review of the approval by the Department of Environmental Resources (DER) on July 2, 1992, of a Planning Module for Land Development revising the Official Sewage Facilities Plan of East Goshen Township, Chester County (Township). The revision provided central sewer service to 73 existing residential dwelling units on 200 acres of land in the Township. Appellant objects to the revision because it would involve the use of grinder pumps rather than gravity flow.

A hearing was scheduled to begin in Harrisburg on March 16, 1993 before Administrative Law Judge Robert D. Myers, a Member of the Board. Notice of this hearing, which was sent to the parties on January 20, 1993, admonished that requests for continuance had to be filed "at least two weeks before the scheduled hearing date." On March 8, 1993 (eight days prior to the scheduled hearing date), Appellant requested a continuance, which was denied by a Board Order dated March 11, 1993.

On March 11, 1993 Appellant's legal counsel withdrew his appearance and Appellant advised the Board that it would proceed without legal representation. On March 15, 1993 Appellant requested another continuance because of weather conditions. The Board office was closed that day and the request could not be considered until the morning of March 16, 1993. At that point, Appellant stated that the request was moot. Accordingly, it was not acted upon.

When the hearing convened on March 16, 1993 the Township and DER were represented by legal counsel and Appellant was represented by two of its officials. Upon being questioned by Judge Myers, these officials elected to proceed without legal counsel. Thereupon Judge Myers explained to them the procedures applicable to hearings before the Board.

During the hearing Appellant attempted to enter into evidence documents prepared by persons who were not intended to be called as witnesses. Since none of the hearsay exceptions applied, Judge Myers refused to admit them.[1] At the conclusion of Appellant's case-in-chief, the Township (joined by DER) moved for a directed Adjudication in its favor on the ground that

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[1] This ruling prompted one of Appellant's officials to acknowledge that their former legal counsel had forewarned them that they would run into this very difficulty.

Appellant had not made out a *prima facie* case. Judge Myers stated that he alone could not grant such a motion but was of the opinion that a *prima facie* case had not been made out. He gave the Township and DER the option of going forward with their cases-in-chief or of resting without presenting any evidence. They chose the latter and the hearing was adjourned.

Prior to the adjournment, Judge Myers informed the parties that a briefing order would be issued and explained to Appellant's officials the purpose of a post-hearing brief. The briefing order was issued on April 20, 1993 giving Appellant until May 14, 1993 to file its post-hearing brief. Appellant failed to file and on May 26, 1993 the Board issued an Order stating that Appellant's failure to file would constitute a waiver. The Township filed its post-hearing brief on June 10, 1993 within the time set by the Board's May 26 Order. DER elected not to file.

The record consists of the pleadings, a hearing transcript of 64 pages, a partial Stipulation of Facts and 3 exhibits.

After a full and complete review of the record, we make the following:

FINDINGS OF FACT

1. Appellant is the Homeowners Association for the Meadowbrook/ Cornwallis area of East Goshen Township, Chester County (partial Stipulation of Facts).

2. DER is an administrative department of the Commonwealth of Pennsylvania and is responsible for administering the provisions of the Clean Streams Law (CSL), Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 *et seq.*; the Pennsylvania Sewage Facilities Act (SFA), Act of January 24, 1966, P.L. (1965) 1535, as amended, 35 P.S. §750.1 *et seq.*; and the rules and regulations adopted pursuant to these statutes.

3. The Township is a Township of the Second Class, located in Chester County, with offices at 1580 Paoli Pike (partial Stipulation of Facts).

4. The Township Sewer System is owned by East Goshen Municipal Authority and leased to the Township (partial Stipulation of Facts).

5. On or about September 19, 1991 the Township submitted to DER a Planning Module for the installation of a low-pressure sewer system in the Meadowbrook/Cornwallis area of the Township (partial Stipulation of Facts).

6. On or about October 3, 1991 DER determined that the initial submittal by the Township was incomplete and returned it, in its entirety, to the Township (partial Stipulation of Facts).

7. The Township resubmitted the Planning Module on March 18, 1992 (partial Stipulation of Facts).

8. On or about July 2, 1992, DER approved the Planning Module which revised the Township's Official Sewage Facilities Plan (partial Stipulation of Facts).

9. The action of DER approving the revision to the Township's Official Sewage Facilities Plan was appealed by the Appellant to the Environmental Hearing Board (partial Stipulation of Facts).

10. A hearing on the appeal was held on March 16, 1993.

11. Appellant failed to file its post-hearing brief.

12. On May 26, 1993 the Board issued an Order declaring that Appellant's failure to file a post-hearing brief constituted a waiver.

DISCUSSION

Appellant has the burden of proof: 25 Pa. Code §21.101(a). To carry its burden Appellant must prove by a preponderance of the evidence that DER acted illegally or abused its discretion in approving the revision to the

Township's Official Sewage Facilities Plan: 25 Pa. Code §21.101. Our review of the matter is limited, however, to those issues raised by Appellant in its post-hearing brief. Any issues not raised in post-hearing briefs are deemed waived. *Lucky Strike Coal Co. and Louis J. Beltrami v. DER*, 199 Pa. Cmwlth. 440, 546 A.2d 447 (1988); *Delaware Valley Scrap Company, Inc. and Jack Snyder v. DER*, EHB Docket 89-183-W (Adjudication August 5, 1993).

Since Appellant did not file a post-hearing brief, it waived the only issue raised in its appeal. Accordingly, there are no issues for the Board to adjudicate.

CONCLUSIONS OF LAW

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

2. Appellant has the burden of proving by a preponderance of the evidence that DER acted illegally or abused its discretion in approving the revision to the Township's Official Sewage Facilities Plan.

3. Appellant failed to file its post-hearing brief.

4. Appellant waived the only issue raised in the appeal.

ORDER

AND NOW, this 22nd day of September, 1993, it is ordered that Appellant's appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

EHB Docket No. 92-290-MR

ROBERT D. MYERS
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: September 22, 1993

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M. DIANE SMITH
SECRETARY TO THE BOARD

LOWER TOWAMENSING TOWNSHIP	:	
	:	
v.	:	**EHB Docket No. 92-149-E**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: September 23, 1993**

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

By Richard S. Ehmann, Member

Synopsis

In the appeal from DER's rejection of its proposed 537 Plan revision, it is the municipality which bears the burden of proving DER erred. Where a regional treatment concept and local treatment concept are evaluated by DER and the proposal for a local treatment plant is rejected, the township appellant must show that DER's conclusion to the effect that a single regional facility is better than multiple plants was an abuse of its discretion. In reviewing proposed 537 Plan revisions, DER must consider more than the option costing the least amount and must review proposed revisions considering regional treatment facilities, present and future uses of the particular stream, and water quality management and pollution control in the entire watershed.

In an appeal from DER's rejection of a proposed 537 Plan revision, this Board conducts a *de novo* review and is not limited in the evidence it may consider to evidence previously offered to DER by the municipality.

Where DER confines its review of a municipality's proposed 537 Plan revision to the sewage facilities' issues and does not involve itself with analysis of local planning or zoning issues (or other issues of local concern), it may properly "second guess" the municipality as to the sewage facilities proposed without infringing on the municipality's responsibilities under the Sewage Facilities Act and Article I, Section 27 of the Pennsylvania Constitution. This is because of DER's separate but intermingled duties under this section of the Constitution, the Sewage Facilities Act and the Clean Streams Law.

Background

By letter dated March 10, 1992, DER advised Lower Towamensing Township ("LT") that DER was denying LT's proposed revision of its Official Sewage Plan. The letter pointed out that DER's review of the two options studied in LT's proposed revision caused DER to conclude that the preferred option for LT was a regional sewerage system with treatment at the existing Palmerton sewage treatment plant ("STP") rather than construction and operation by LT of a second separate STP. On April 8, 1992, LT appealed DER's decision to this Board.

In due course the parties filed their respective Pre-Hearing Memoranda. On September 17, 1992, the appeal was reassigned to the writer because of Board Member Fitzpatrick's resignation from the Board. On February

2 and 3, 1993, we conducted a hearing on the merits of LT's appeal, and we thereafter received the parties' Post-Hearing Briefs.

After a full and complete review of the record in this appeal, which consists of a transcript of 492 pages and 29 Exhibits, we make the following findings of fact.

FINDINGS OF FACT

1. DER is the agency with the duty and authority to administer and enforce the Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §§ 691.1-691.1001 ("Clean Streams Law"); the Pennsylvania Sewage Facilities Act, Act of January 24, 1966, P.L. (1965) 1535, *as amended*, 35 P.S. §§ 750.1-750.20a ("Act 537"); Section 1917-A of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, *as amended*, 71 P.S. § 510-17; and the rules and regulations promulgated thereunder. (Stip.)[1]

2. LT is a township located in southeastern Carbon County, Pennsylvania with a mailing address of R.D. #2, Box 211-A, Palmerton, PA 18071. (LT's Notice of Appeal; C-2)

3. LT can roughly be described as shaped like a lobster which, with its claws extended before it, surrounds the Borough of Palmerton (also located in Carbon County) on three sides. (R-47; B-2)

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[1] Stip. is a reference to the parties' Joint Stipulation, which includes stipulations of fact. It is Board Exhibit No. 1. R-___ is a reference to a page in the merits hearing's transcript. C-___ references one of DER's exhibits. T-___ references one of LT's exhibits and B-____ references a Board exhibit.

Palmerton's STP

4. PSC Engineers and Consultants, Inc., are the engineers for Palmerton and its Authority as to sewers and the STP. (T-6, R-277)

5. Chung Lyu Liu ("Liu") is a registered professional engineer employed by PSC. (R-313; C-26) He prepared all of PSC's studies for Palmerton. (R-386-388, 392)

6. Since 1966 Palmerton Borough's sewage needs have been served by a municipal sewage collection system and conventional contact stabilization STP which discharges to Aquashicola Creek. (T-6, T-7, T-10; C-11)

7. Palmerton's STP is made of concrete and has an estimated useful life in excess of 70 years. (R-333)

8. Palmerton's STP is owned by the Palmerton Municipal Authority, which leases the plant to Palmerton to operate and maintain. (R-264) The Palmerton Municipal Authority also owns the land adjacent to the STP on which there is a baseball field and basketball court. (R-271-272; C-22)

9. Roger Danielson ("Danielson") is Palmerton's Borough Manager (R-263) and is responsible for operation of Palmerton's STP. (R-263-264) Danielson is a licensed sewage treatment plant operator for an STP the size of Palmerton's STP and serves as one of the backup operators of Palmerton's STP. (R-268, 279)

10. The location of Palmerton's STP is circled in green on the map which is Exhibit C-16. (R-270)

11. Palmerton's STP is located between a half mile and a mile from the point where Aquashicola Creek enters the Lehigh River. (R-171, 265; C-2, C-16)

12. Palmerton's STP operates within the effluent limitation of the NPDES Permit[2] issued for its operation by DER. (R-266-267; C-14)

13. On an average, Palmerton's STP currently sees 450,000 gallons per day (gpd) of sewage flows (T-323-324), although there have been some peak flow exceedances of plant capacity. (T-223;T-6, T-7). To handle added projected sewage flows from LT would take a 30% expansion of the STP's aeration tank, and this expansion would be to handle peak flows. There is room within the fenced-in area at this STP to expand the STP not only to handle the .2 million gallons per day (mgd) (200,000 gallons per day) maximum projected volume of sewage from LT, but also to handle up to .56 mgd of added flow. (R-266, 323-326)

14. Palmerton's fenced-in STP is not within the 100-year floodplain of Aquashicola Creek but is within its 500 year floodplain, according to current Federal Emergency Management Agency ("FEMA") mapping. (R-419; C-16)

15. The relevant portion of Aquashicola Creek in Palmerton and LT is classified for trout stocking and migratory fish by DER in 25 Pa. Code §93.9(d). (Stip.)

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2 This is the National Pollutant Discharge Elimination System Permit issued by DER pursuant to Section 202 of the Clean Streams Law (35 P.S. §691.202) and 25 Pa. Code §§92.3 and 92.5.

Existing Sewage Treatment Plans

16. As early as 1969, Palmerton's Official Sewage Plan ("537 Plan") called for LT to dispose of its sewage at Palmerton's STP. (C-11)

17. Exhibit C-8 is an agreement dated November 12, 1973 between Palmerton, its Authority and LT which provides that LT may build a municipal sewage collection system to collect sewage from areas of LT adjacent to Palmerton and convey it to Palmerton's STP for treatment. Exhibit C-8 reflects that Carbon County's Master Sewerage Plan calls for this to occur also, and that at that time LT's engineers had conducted a study showing that this was then feasible. (C-8)

18. In late 1974 LT was issued Sewerage Permit No. 134401 by DER to construct a sewage collection system, and pump station and force main for conveyance of this sewage to Palmerton's STP for treatment. (R-380; C-7)

19. The sewerage system called for in Sewerage Permit No. 134401 was never built. (R-53)

20. DER's Comprehensive Water Quality Management Plan for the Upper Delaware Area ("COWAMP Plan") recommends regional treatment of sewage in this area. (R-409-411)

LT's 537 Plan

21. LT's consulting engineers are Spotts, Stevens & McCoy, Inc., ("SSC"). (R-89-121; C-2)

22. DER became aware of LT's proposal to build its own STP because LT applied to PennVEST for funding assistance as to this proposal and, pursuant

to a DER/PennVEST agreement, DER reviews Part 1 and Part 2 of applications for PennVEST funding on PennVEST's behalf. (R-379)

23. Because of this PennVEST review and the 1974 permit which DER issued to LT to connect to Palmerton's STP, DER advised LT that there was no 537 Plan authorizing what is proposed in LT's PennVEST application. (R-380)

24. As a result of LT's proposal, which is not for regionalized sewage treatment, DER set up a meeting in October of 1990 with LT, Palmerton, East Penn Township, Perrysville and Bowmanstown to discuss the need for new 537 Plans for all of the municipalities and regional sewage treatment. (R-125-128, 386, 408, 420)

25. This 1990 meeting also discussed an earlier PSC study as to the cost to expand Palmerton's STP to provide treatment for all five municipalities. (R-386-387)

26. Thereafter Bowmanstown, East Penn Township and Perrysville, which all naturally drain toward Bowmanstown and were proceeding with a unified plan for sewage collection and treatment, were dropped from further meetings. (R-127, 387-388)

27. The departure of the three municipalities to proceed with their own project reduced the needed expansion of Palmerton's STP to serve all five from 560,000 gpd to 200,000 gpd to cover LT's needs. (R-387) As a result PSC's Liu prepared Revision 1 to PSC's expansion costs projection on October of 1991 which addressed costs of expanding Palmerton's STP by only the 200,000 gpd flow projected for LT. (R-388-389)

28. LT's proposed 537 Plan commits to construction of a municipal sewage collection system and construction of an STP to be owned and operated by LT. (C-2) LT's proposed 537 Plan was completed in 1985 but not provided to DER for its review until August of 1991. (R-58; C-2)

29. When LT's engineers submitted the 1985 Plan, DER advised LT that DER could not approve the 1985 Plan because the regulations governing such plans had changed in 1989 and the plan did not meet these new requirements. (R-381)

30. Thereafter, when DER met with LT and Palmerton representatives, DER found some costs in PSC Revision 1 which did not belong there in DER's opinion, and LT's consultant found some errors in it as well, so PSC's Liu prepared Revision 2. (R-390, 392)

31. In response to Revision 2, LT's consultant prepared Addendum A, which was adopted in October of 1991 and submitted to DER in 1992. (Stip.; R-392; C-3) In part Addendum A addresses the cost comparison between LT's proposal and treatment of sewage from LT at Palmerton's STP. Addendum A also contains a proposed schedule for implementation of LT's proposal and attempts to further justify this proposal. (C-3)

32. LT's Addendum A was not satisfactory to DER in terms of the requirements for a revision of a 537 Plan because it included too great an engineering cost, inserted contingency funding at two separate locations, omitted all operation and maintenance costs and failed to fully break down LT's lump sum costs for its proposed STP. (R-392-394)

33. As a result, SSC prepared Addendum B for LT which was adopted by LT and received by DER in March of 1992. (Stip.; R-394; C-4) It is the first of the plans, revisions, and addendums to look at all at floodplain issues. (R-394)

Sewage Treatment Needs in LT

34. The parties agree that there is both a present and future need for a municipal sewerage system to serve the several populated areas of LT. (Stip.)

35. The village of Aquashicola is located within LT immediately adjacent to Palmerton. (C-5) There are numerous malfunctioning on-lot septic systems in Aquashicola and the Village of Walkton. (R-51) In these areas, wash water also flows from homes onto the public streets. (R-61)

36. Construction of either the STP and sewerage system proposed in LT's revision of its 537 Plan or a sewerage system connected to the Palmerton STP would fully address the need for sewage treatment in LT. (R-452) These two sewering options are nearly identical differing only as to sewage treatment. (R-384)

LT's Plant Site

37. The site proposed by LT for location of its STP is in Palmerton, not LT. (R-72-73) It is a 3.5 acre site owned by Horsehead Industries, Inc. (formerly Zinc Corporation of America) which has agreed in principle to lease it to LT for 99 years at $1.00 or $2.00 per year. (R-71; T-9) Zinc

Corporation of America operated a zinc smelting plant on a tract of land of which this 3.1 acres was a part and portions of this larger tract are a federal Superfund site, but not this 3.1 acres. (R-82, 86)

38. LT selected this proposed STP site because it is the lowest point in elevation to which LT's sewage could flow by gravity. (R-95, 158)

39. Palmerton's STP is at a lower elevation than the LT proposed STP site. (R-95) It is not clear whether a pump station and force main would be required to convey sewage from LT's collection sewer system to Palmerton's STP or if it could flow there by gravity, as this has not been formally studied. (R-362, 402, 479) Under LT's proposed 537 Plan, one pump station and force main would be built to convey sewage to LT's proposed plant from the east side of Aquishicola Creek. (R-463; C-2) However, there is no reason that that pump station plus a second one would be needed to convey LT's sewage to Palmerton. (T-402-403)

40. LT's proposed STP site is located on the inside of a curve of Aquashicola Creek, directly across from the point where Mill Creek joins Aquashicola Creek. (R-80, 87; T-16) It is approximately 5,700 feet upstream of Palmerton's STP on Aquashicola Creek. (R-80, 420)

41. Across from LT's site on Aquashicola Creek, the creek bank is an 8 to 10 foot high concrete retaining wall. (R-88-89, 275-276) On the proposed STP's side of the creek, the stream bank rises in a more gentle slope toward the proposed STP site. (R-88-89)

The 100 Year Flood Plain

42. LT's proposed STP plant site is located within the 100-year floodplain of Aquashicola Creek according to a mapping of this floodplain by FEMA. (R-431)

43. FEMA's mapping study of the area shows the 100-year flood's elevation to be 410 feet at the site of LT's proposed STP. (R-166)

44. Exhibit T-16 shows that a portion of the plant would be below this elevation and that there is no access to the plant during such a flood because all access roads are at a lower elevation. (R-434, 446-447)

45. Because Aquashicola Creek is part of the Delaware River Watershed, construction and operation of STPs are regulated in part by the Delaware River Basin Commission ("DRBC"). (R-468; C-11) Construction of LT's STP cannot occur without review and formal approval of the DRBC because the proposed STP location is in the 100-year floodplain. (R-468; C-10) In such situations DRBC requires an HEC-2 study to show the extent the proposed facility is in the floodplain and requires the STP to be flood-proofed (i.e., raised at least a foot above the 100-year flood's elevation). (R-468-469)

46. To the extent that the entire site for the proposed STP is at a 410 foot or less elevation, as shown by LT's Exhibit T-16, and this is the FEMA mapped 100-year flood elevation, the entire plant would have to be raised at least one foot above this 410 foot elevation to get DRBC approval. (R-433-434, 469)

47. A floodway is the main water carrying channel of a stream in flood (R-230), while the flood fringe is the area between the floodway of a

stream and the outside edge of the floodplain, and a floodplain will include the floodway and the flood fringe. (R-231)

48. Because the FEMA maps are not clear as to whether LT's proposed plant site is also within Aquashicola Creek's floodway, and DRBC regulations prohibit construction of STPs in such locations, a study demonstrating that this site is not in the floodway would have to be submitted before building of the plant could be approved. (R-435-437)

49. LT's engineer agrees that construction of an STP in a floodway is undesirable. (R-208)

50. If LT's proposed STP were inundated in a flood, this would represent a serious environmental hazard. (R-210)

51. LT's proposed STP site may also be subject to flood erosion because when Mill Creek is at flood, it aims it velocity at this site. (R-438)

52. There is no room to expand LT's proposed STP at the proposed site which is not in the 100-year floodplain or the floodway. (R-438, T-16)

53. Floodplain/flooding issues are normally addressed by DER as to sewerage proposals during its review of proposed 537 Plans. (R-467) DER initially denied LT's 537 Plan revision on the issues of cost and environmental issues without analysis of flood plain issues because it was unaware of any flood issue. (R-445, 459) DER was unaware of the flooding issue because LT's submissions showed floodplain mapping only for LT and not for Palmerton, which is proposed STP's site. (R-204)

54. Assuming that LT's proposed STP site is not in the floodway but on the floodplain, the cost of flood-proofing LT's proposed STP and

flood-proofing the access road to it in regard to the 100-year flood are not separately set forth in LT's cost analysis of this option (in Addendum B) but that analysis contains a 25% contingencies figure which would cover the estimated $55,000 cost. (R-208-211, 434-435)

55. The cost of doing the HEC-2 study necessary to address DRBC's flood plain concern is approximately $3,000. (R-332)

The Township Supervisors' Position

56. The township supervisors of LT do not wish to be a customer of Palmerton but want their own STP, even though they agreed to be a customer of Palmerton in 1972-73. (R-92, 95)

57. LT's supervisors directed its engineers to justify a township STP. (R-91-93)

58. SSC expects to be LT's engineers if LT's 537 Plan is approved and LT builds its own STP instead of connecting to Palmerton's STP. (R-218-219)

59. LT's supervisors anticipated expansion of their proposed STP based on need and at least in part based plans for this STP on this projected expansion. (R-114) Any need-based future expansion comes predominantly from existing and projected future sewage disposal needs at the Blue Mountain Ski Area, which is east of the village of Aquashicola. (R-114-115) However, Palmerton's STP is just as accessible to handle this additional gallonage. (R-188)

The Accuracy of Each Option's Cost

60. Charles Volk ("Volk") is an engineer with SSM who graduated from Penn State in 1985 and did not become a registered professional engineer in this state until 1992. (R-121-122)

61. Working with SSM's Theodore Stevenson, Volk prepared the costs data in Addenda A and B which LT contends justify the LT proposed STP. (R-124)

62. SSM's Ted Stevenson is not a registered professional engineer but is an engineer-in-training. (R-287)

63. As an engineer, Volk does not view it to be his responsibility to recommend to LT a plan which complies with the law, only to come up with the cheapest alternative without mandatorily accepting regionalization. (R-178)

64. SSM's proposal for LT is based on purchase of a prefabricated steel "package" treatment plant (R-158) which is easy to install at the plant site because it is prefabricated. (R-159)

65. Frank A. Luongo ("Luongo") has been a sanitary engineer employed by DER for 13 years. While he is not a registered professional engineer, he is a certified sewage treatment plant operator. (R-364-365, 369-371)

66. Luongo has reviewed over one hundred 537 Plan Revisions of this type for DER and reviewed LT's 537 Plan on DER's behalf. (R-373)

67. Assuming the figures in PSC's Revision 2 and SSM's Addendum B are accurate and reliable estimates, Luongo's review of the figures in Revision 2 and Addendum B shows the difference between each option, as measured by the costs to serve one average residence, is only 6%, which equals $40 per year. (R-66, 396)

68. In the past, Luongo has personally been involved in denials of four 537 Plan Revisions where the revision proposed locating a second STP as close to an existing STP as would occur if LT's option was approved. (R-420-421)

69. DER's Luongo did not tell LT that DER would approve the least cost option but said that DER would go with the most cost effective option if all other impacts are environmentally equal and technologically feasible. (R-399, 454-455)

70. In calculating costs for LT's proposed STP, SSM failed to include the costs of an emergency power generator or flow meter, though these costs are included in the expansion costs for the Palmerton STP. (R-195-196) The cost of such a power source and flow meter including installation is approximately $58,000. (R-225, 227, 331)

71. In addressing the comparative costs of the two options, despite the more limited life of the LT proposed STP, no consideration was given to the cost of replacing the STP by SSM, which only evaluated the options for the next 20 years. (R-200, 234)

72. Volk does not believe it is possible to directly compare Palmerton's STP and the LT's proposed STP to determine if there are economies of scale favoring operating a single large plant versus two smaller plants because they are two different types of facilities. (R-236)

73. SSM's Stevenson believes DER's rejection of LT's 537 Plan was correct, but that it was rejected for the wrong reason and should have been rejected because the costs data was unreliable. (R-307-308)

74. Based on investigation of the costs, Stevenson does not believe the cost figures that SSM put together for the comparison of the two options, as set forth in Addenda A and B, are accurate (R-300), although the construction costs for the Palmerton Plant expansion are accurate. (R-301)

75. While SSM has not addressed the flood-proofing, generator or meter costs explicitly in the costs estimates in Addendum B for LT's proposed revision, it includes therein a 25% construction, legal and engineering contingencies figure for sewer system and STP for the entire project. (C-4)

76. Addendum B's estimate of the cost for LT's proposed STP is $751,000. (C-4)

Regionalization

77. Volk is not familiar with any technical, administrative or environmental advantages of regional sewage treatment. (R-180) Despite this unfamiliarity, he conducted LT's evaluation of a regional concept. In so doing, Volk looked at regionalization only as an option which can be precluded if the economic cost of a regional plant caused him to conclude it is infeasible. (R-180)

78. Volk agrees it is technologically feasible to connect to Palmerton's STP and that if that STP is expanded, it could treat LT's projected sewage flow. (R-173-175)

79. If LT's proposed STP were built and subsequently malfunctioned, it would expose another mile of Aquashicola Creek to pollution than would be so exposed by a malfunction at Palmerton's STP. (R-186)

80. A prefabricated steel "package" STP has a life of approximately 20 years, with good maintenance. This short life span occurs because sewage corrodes the steel and the tank's walls become thin, with the tanks then needing repair or replacement. To undertake such repairs, the sewage flows must be bypassed around the tank. When this occurs the remaining half of LT's proposed STP is too small to provide adequate treatment of the entire flow. (R-202-203, 333-334)

81. Repairs to steel tanks may begin as soon as ten years after installation and typically such repairs take a month. (T-334-335)

82. The LT's proposed STP would be operated by part-time operators, while Palmerton's STP has a full time staff. (R-186, 236)

83. Dale Kratzer ("Kratzer") is a registered professional engineer with SSM who formerly worked for PSC and has approximately 20 years experience in sewage system design. (R-245, 247; T-17)

84. According to Kratzer there are a number of "pluses" to regionalization of sewage treatment. It is cost effective, reduces the number of STPs, potentially improves stream quality, and reduces administrative requirements. (R-248)

85. The only negative to regionalization identified by Kratzer was a loss of local control over sewage treatment, which loss of control is resisted by municipalities. (R-248-249)

86. Kratzer believes there could be a benefit to Aquashicola Creek by having one as opposed to two discharges to it. (R-249) While having two points of discharge spreads the pollutant load over a larger reach of stream

for waste assimilation purposes, this also means more of the stream's length is impacted by the discharges from two plants. (R-250, 254-255)

87. Kratzer believes there are administrative benefits from having only one plant to operate and maintain, but even if LT's sewage was treated at Palmerton's STP, LT would still have its own sewer system and would have to administer it. (R-250-251)

88. Having one STP decreases the numbers of STPs which can suffer an upset and malfunction. (R-254)

89. It takes less of a toxic or other substance to upset smaller STPs, causing them to malfunction, than larger STPs with larger volumes of flow. (R-407)

90. If LT's proposed STP is built and operated it will discolor Aquashicola Creek from the point of LT's proposed STP site downstream to the Palmerton STP. (R-405)

91. Reducing the number of plants from two to one reduces the number of operators to be employed and eliminates half the paperwork required. It also cuts down the amount of DER-mandated monitoring and testing. (R-350-352)

92. While there would be some increased operation and maintenance costs if Palmerton's STP is expanded, overall there is less operating and maintenance cost if there is only one STP. (R-348, 351)

93. A proliferation of STPs as LT proposes is not comprehensive regional sewage treatment (R-408, 420-421), because it unnecessarily creates a new entity to compete with a sewage-providing entity which has existed since 1968. (R-421-422)

94. LT's proposed STP does not comply with a comprehensive program of water quality management and pollution control. (R-441)

95. If Palmerton's STP provides sewage treatment services to LT's residences, it will charge the same flat rate of $150 per unit to LT's residents as is charged to Palmerton's current customers. (R-404)

Discussion

Where a township appellant challenges DER's denial of its proposed revision of the township's 537 Plan, there is no question that such a party bears the burden of proof. See 25 Pa. Code §21.101(a) and (c); Midway Sewerage Authority v. DER, 1991 EHB 1445. Moreover, here, LT must not only convince us its proposal should not have been rejected by DER but also that the plan which it and DER agreed to in the 1970s is no longer sound and should be replaced by its proposal. As is clear from the evidence, in the 1970s LT was going to secure sewage treatment by construction of a municipal sewerage system which connected to the Palmerton STP. Palmerton, its municipal authority and LT all agreed to this in the 1970s. (C-8) LT secured a permit for this sewer system from DER. (C-7) Apparently, Palmerton's plant was expanded in size to handle that flow but the collector sewerage system was not built in LT because federal monies to pay for its construction were not forthcoming. (R-53) Nevertheless, that sewage planning was in place and remained in place until LT tried to change it through its current proposal to DER.

In passing, we also note that apparently the driving force behind this change of plans was LT's desire not to be a customer of Palmerton despite

its prior agreement in this regard. As stated by LT township supervisor, George Robinson during cross examination:

> Q Did you meet with them prior to the preparation of Addendum A and B? I am not talking about meetings for handling the appeal.
>
> A I answered that in the last --
>
> Q You answered with yes?
>
> A The answer was yes.
>
> Q And did you provide them with instructions to try to come up with reports which would justify a township owned sewage treatment plant?
>
> A Yes, which I answered previously.
>
> Q You did not tell them to simply prepare an objective report, and that you would go either way, you had other reasons for wanting a township owned sewage treatment plant?
>
> A Well, you have made that clear previously.
>
> Q So the answer to that question is yes?
>
> A I answered it in a different way.
>
> Q Well, let me put it this way. Do you or the other township supervisors have a problem with being a customer of Palmerton?
>
> A Yes, for several reasons.

(R-91-92)

In support of its position on its rejected proposal, LT offers several arguments, many of which, not surprisingly, hinge on issues of relative costs between the two options or failure to give sufficient weight to LT's cost conclusions. LT asserts DER failed to give adequate consideration

to the relative cheapness of LT's proposed STP compared with sewage service at Palmerton's STP plant. It then asserts the cost differential between the two options is even greater than the initial figures show. Next, LT argues DER is asserting "regionalization" as a concept to justify the inadequate consideration it gave to the relative costs of these options. LT then argues that in making its rejection decision, DER has improperly second-guessed LT as to planning and that LT has independent planning responsibilities under Article I, Section 27 of the Constitution of this Commonwealth and Act 537. LT argues further that DER's decision to support sewage treatment at the Palmerton STP is unreasonable as this is more costly and ignores the data DER ordered LT to gather.

LT's next argument is that DER's assertion that LT failed to show its proposed STP is needed is incorrect because the parties agree there is a need for sewage treatment within LT. It argues the floodplain/floodway issue, as to the site which LT proposes for its STP, is merely a diversion and that there was no showing by DER that one plant is environmentally more sound than two STPs. LT's Brief also states that the evidence shows a properly maintained steel STP can have a long life, just like a concrete STP. Finally, LT says DER has not shown Palmerton will accept sewage from LT, so LT should not be compelled to act as if it will. In conclusion, based on these arguments, LT says we hold a *de novo* hearing and should use our discretion to substitute acceptance of LT's proposal for DER's rejection of it.

The Necessity Of An LT Plant

The parties all agree that there is a need for a municipal sewer system in LT. There are numerous malfunctions in the village of Aquashicola and they have existed at least since the 1970s.

There is also no dispute by the parties that the Village of Walkton also needs sanitary sewer service and that several other areas of LT, such as Maple Drive, and Marshall Hill and Red Hill Drive which abut Palmerton, should be sewered. Indeed, the evidence points to these last three areas being connected to Palmerton's STP even under LT's rejected proposal. (R-67) However, contrary to LT's assertion, this does not show LT's proposed STP is necessary. Because DER contends treatment at Palmerton's STP is the better option, we believe DER's suggestion that LT has failed to show its proposed STP is necessary must be read as DER's contention that LT has failed to show its proposed STP is necessary instead of treatment at the Palmerton STP. We address this latter question below.

LT also asserts DER has failed to show that Palmerton will accept sewage flows of up to 200,000 gpd from LT. The agreement among LT, Palmerton and Palmerton's municipal authority indicate Palmerton's willingness to accept sewage from LT's residents for treatment. The same may be said for the nearly twenty year old DER permit issued to LT and authorizing it to connect its sewer system to Palmerton's sewer system. Certainly, under a massive number of prior decisions by this Board which we elect not to cite here, Palmerton

can no longer appeal from DER's decision to issue LT the permit to connect its sewers to Palmerton's sewers, and logically, that also means it cannot avoid acceptance of LT's sewage for treatment.

Even if these documents did not exist and even if Palmerton opposed connection by LT to its STP (and there is no evidence this is true), there is no question that DER is empowered by the legislature to compel municipalities like LT and Palmerton to jointly address sewage collection and treatment. Section 203 of The Clean Streams Law, (35 P.S. §691.203(b)), provides in relevant part:

> ... Whether or not such reports [reports DER may require from a municipality as to the condition of its sewer system] are required or received by the department, the department may issue appropriate orders to municipalities where such orders are found to be necessary to assure that there will be adequate sewer systems and treatment facilities to meet present and future needs or otherwise to meet the objectives of this act. Such orders may include, but shall not be limited to, orders requiring municipalities to undertake studies, to prepare and submit plans, to acquire, construct, repair, alter, complete, extend, or operate a sewer system or treatment facility, or to negotiate with other municipalities for combined or joint systems or treatment facilities. Such orders may prohibit sewer system extensions.

Thus, DER need not prove Palmerton's willingness to accept sewage from LT, as DER is amply empowered to compel Palmerton to do so, assuming Palmerton was unwilling to do so.

DER Second-Guessing LT

LT next asserts that under the Pennsylvania Sewage Facilities Act, and Article I, Section 27 of Pennsylvania's Constitution it has independent duties to do environmental planning, it has performed those duties by adopting

this DER-rejected 537 Plan, and DER is thus wrongfully second-guessing LT by rejecting this new plan.

There is no doubt or dispute about LT having responsibility under the Sewage Facilities Act to undertake sewage planning within its borders. Section 5(a) of the Sewage Facilities Act (35 P.S. §750.5(a)) requires municipal adoption of a plan for sewage services within its borders. 25 Pa. Code Sections 71.11, 71.12, 71.21 and 71.31, as promulgated jointly under the Sewage Facilities Act and the Clean Streams Law, make this responsibility clear. DER does not dispute that this statute and these regulations vest LT with explicit powers and duties in the sewage planning field. Rather, the question raised by DER is whether LT's duties as to sewage planning are exclusive of DER review and, thus, to that extent, of DER's control.

The answer is that LT's duties and responsibilities under this legislation are not independent of DER's review. Even the statute as passed by the legislature recognizes this to be the case. Section 5(e) of the Sewage Facilities Act (35 P.S. §750.5(e)) authorizes DER to approve or disapprove of any LT 537 Plan or revisions thereto and Section 10 (35 P.S. §750.10) expressly empowers DER to order municipalities to submit 537 Plans and revisions thereto, to approve or disapprove of 537 Plans or revisions, and to order implementation of such plans and revisions. See Community College of Delaware County, et al. v. Fox, et al., 20 Pa. Cmwlth. 335, 342 A.2d 468 (1975) ("Fox"). 25 Pa. Code Section 71.31, again as promulgated under both of these statutes, mandates DER review and action upon any such proposed 537 Plans or revisions. While in Fox DER was barred from second-guessing local

municipalities on planning and zoning or other properly made decisions of similar local concern, there is no question that sewage facilities planning is not such an exclusively local decision. Morton Kise, et al. v. DER, et al., 1992 EHB 1580. Further, there is no evidence in the record of any zoning issues between LT and DER, and, as to planning or other local issues, the only planning issues about which there is evidence were sewage facilities planning issues.

Even the vague testimony about possible expansion of LT's proposed STP as future development occurs, (projected primarily to be in the area around the Blue Mountain Ski Area) concerned sewage gallonages (R-111-115) and how this area can be served as easily by either option. (R-188)

What is true as to DER's duties under the Sewage Facilities Act with regard to second-guessing is also true as to such claims under Article I, Section 27 of the Pennsylvania Constitution. LT never articulates a way in which DER is second-guessing LT on the issues in this appeal except in the review of this plan, which DER is mandated to conduct by the Sewage Facilities Act and the Clean Streams Law and 25 Pa. Code Chapter 71. Under these statutes, DER has certain duties *vis à vis* LT's 537 Plan and it is to perform them in conformance with its duties under Article I, Section 27. LT's duties under Article I, Section 27 are not exclusive of those of DER, but these DER duties and LT duties are intertwined and layered as to sewage facilities planning, with DER having duties as to statewide water quality management, regional pollution control and watershed management, whereas LT has control over land use planning, zoning and other local functions. As examined in Kise

and more recently in Gladfelter v. DER, EHB Docket No. 87-482-W (Adjudication issued April 23, 1993) ("Gladfelter"), DER's duty is not to do local planning or even to approve or disapprove of local planning, but under 25 Pa. Code §§71.16(e) and 71.32 to be sure the proposed 537 Plan's sewage services proposal:

> meets the requirements of 25 Pa. Code §§71.14 and 71.16, is consistent with a comprehensive program of water quality management, furthers the policies of the Sewage Facilities Act and the Clean Streams Law, and is consistent with the requirements of 25 Pa. Code Chapter 94.

Gladfelter at page 10.

Insofar as DER reaches a different conclusion than that of LT on this narrow area of concern, this is not an impermissible encroachment on LT's duties under Article I, Section 27 by DER but, because of the intertwined and layered nature of these duties, a constitutionally permissible conclusion, which then must be weighed versus LT's other arguments to see if it is judgmentally sound.

Regionalization

As to "regionalization", LT argues that DER is using this concept of regional sewage treatment to give insufficient consideration to the economic differences of the two options. LT also asserts that DER has failed to show one plant (a regional plant) is better than a multiplicity of plants, as LT proposes. As stated above, DER's duties in review of LT's proposal are not solely to look at the least cost alternative and to approve it. While LT's evidence suggested this is what DER said to it (R-64) and DER's evidence suggests it did not (R-399), it would not matter what was said at the meetings

DER held with these municipalities. DER has certain obligations under 25 Pa. Code §71.32 as to factors considered in its review of proposed 537 plan revisions which, while they include costs, include considerations beyond costs. For example, under Section 71.32(d), DER must decide if the plan meets the policies of Sections 4 and 5 of the Clean Streams Law (35 P.S. §§691.4 and 691.5). These plan review factors are mandated in regulations which cannot be ignored. Mil-Toon Development Group v. DER, 1991 EHB 209. Indeed, where DER fails to conduct the required reviews of proposed 537 plans and relies on the municipality to conduct them, its approval of such plans is subject to being overturned as a matter of law. Baney Road Association v. DER, et al., 1992 EHB 441.

Thus, we must turn to the evidence as to "regionalization" to see what the record shows. In support of its position, LT called Dale Kratzer as its chief witness on regionalization issues.[3] Kratzer has approximately twenty years experience in sewage facilities. (R-247; T-17) Charles Volk, who only became a registered professional engineer in 1992 (R-144), also testified on this issue on LT's behalf, but we assign his testimony little value. T.R.A.S.H. Ltd., et al v. DER, et al., 1989 EHB 487. We do this because Volk admitted being unfamiliar with any environmental, technical or administrative advantages to a regional sewage treatment plant. (R-180) Unlike Volk, Kratzer was able to list potential advantages from regional treatment. (R-248)

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[3] Theodore Stevenson also testified on its behalf, but Stevenson's role on these options dealt primarily with cost comparisons and he is not a registered professional engineer.

Moreover, despite his unfamiliarity with any such advantages, Volk testified he could weigh them and that regionalization as a concept could be overturned based solely on economics. (R-180) We cannot understand how a witness without familiarity with such issues can offer what purports to be expert opinions on how they can be outweighed. Perhaps it is Volk's relative newness in this field, compared to Kratzer, which allows him to feel that he can voice such opinions. Perhaps this explains the position he has adopted on LT's behalf, when coupled with his economic expectations that SSM will continue to serve as LT's engineer during plant construction. (R-218-219)[4] It certainly explains why we are led to discount them.

Turning back to Kratzer's testimony, he listed "regionalization" advantages as being reduced costs of administration, increased cost efficiency, and reduced numbers of sewage treatment plants. Almost as importantly, the only disadvantage he could name was a reduction in local government control over sewage treatment. (R-247-248) Moreover, on cross-examination, Kratzer agreed with DER's counsel that the chances of an "upset" at an STP (an upset of the STP's biological treatment process which causes it to cease treatment of sewage flowing into it), increase when the numbers of plants increase to two plants instead of one. (R-254) Obviously, such an upset means pollution of the receiving stream.

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4. In Addendum B (Exh. C-4) if LT's proposed STP were to be built, SSM would receive fees over and above the fees to be paid it with regard to its work as to the construction of the collection sewers.

DER's evidence confirmed Kratzer's position and identified other benefits and potential benefits from "regionalization". The evidence shows that under LT's proposal, its plant would only be operated by a part-time staff, while Palmerton's plant already has a full time staff. We see such a difference in staffing as more than an insignificant difference. Treatment plant malfunctions and upsets, whether caused by internal conditions or exterior events, can be spotted and hopefully addressed more quickly in order to minimize the pollutional impacts thereof on Aquashicola Creek, if there is full-time, as opposed to a part-time, staff. Operation and maintenance costs ("O&M") for one plant, even if it is expanded, should be less than if there are two plants. This is not to say that in the circumstance where LT's sewage is treated at Palmerton's plant that LT has no O&M, but only that LT's O&M is reduced to O&M for only the sewer lines from O&M for sewer lines and plant. Moreover, it is obvious that with only one STP the numbers of plant operators and the costs of their salaries is reduced from what it is if there are two STPs.

DER mandates monitoring of treatment plant operations and of the quality of their discharges. This occurs pursuant to 25 Pa. Code Chapter 94 and the submission of the Discharge Monitoring Reports ("DMRs") required under the National Pollutant Discharge Elimination System (NPDES) permit (in turn required for every discharge to the waters of the Commonwealth by 25 Pa. Code §92.3 and Section 202 of the Clean Streams Law (35 P.S. §691.202)). Clearly, the cost of effluent sample collection and analysis for submission of DMRs and preparation of the annual reports required by 25 Pa. Code Chapter 94 are

halved if there is only one STP instead of two, as LT proposes. Even Mr. Volk agrees that this is so. (R-350-351)

Moreover, because building the treatment plant in LT's proposed 537 Plan means building a plant a little more than a mile upstream of Palmerton's existing STP, such a plant's operation exposes another mile of Aquashicola Creek to the potential pollution from an STP's malfunction. This proposed STP thus creates an unnecessary potential adverse impact on the portion of this good quality stream. Additionally, even if this proposed STP is built and operated in accordance with its NPDES permit, the plant does not produce drinking water, and thus another mile of this creek is unnecessarily exposed to treated STP effluent. Further, the evidence suggests that two smaller plants are less able to deal with any shock to their biological treatment processes caused by toxics discharged to them than is a single larger plant, because dilution from the combined flows in the large plant can minimize the adverse impacts of at least smaller toxic discharges.

In addition, DER's Frank Luongo testified to discoloration of Aquashicola Creek from the site of LT's proposed STP to Palmerton's STP which will occur if LT's proposed STP is constructed. (R-405) He also asserted there will be odors from this plant's operation (R-406) although Volk denied this would be so. (R-189) Putting aside the question of the flooding of the site of LT's proposed STP, which is discussed below, it is thus clear that there are real benefits from a single treatment plant as opposed to two plants. These benefits are administrative benefits, environmental benefits and O&M benefits.

Further, as Gladfelter, Kise and similar decisions make clear, DER must base its review and rejection/approval decision on issues other than exclusively a proposal's costs. Section 5(a) of the Clean Streams Law (applicable through 25 Pa. Code §71.31) says that in acting under this statute DER must consider:

> (1) Water quality management and pollution control in 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 and technological knowledge;
> (5) The immediate and long-range economic impact upon the Commonwealth and its citizens.

35 P.S. §691.5(a).

If DER were to fail to consider joint treatment, protection of present and future uses of Aquashicola Creek or water quality management and pollution control in the watershed as a whole and look solely at the least cost option, it would violate this section of this statute and 25 Pa. Code §71.32(b). The same is true if it weighed economics so heavily that it was given greater emphasis than the other four factors, since the statute does not provide such a preeminent emphasis on economics over the other four factors.[5] DER must weigh all of these factors on reviewing LT's proposal, and when it does and

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[5] Indeed, the statute mentions economic impact, not to LT's residents alone but the impact to all of the citizens of Pennsylvania and to the Commonwealth itself. Thus, LT's costs are only a factor in such an economic evaluation. Further, such an evaluation of economic impact is more than the cost comparison of two alternatives and includes the economic impact to Pennsylvania of the degradation of waters of the Commonwealth which are not currently contaminated, the costs to our residents of providing no sewage treatment and other factors.

rejects a proposal, as between the municipality and DER, DER has the final authority. Borough of Delaware Water Gap, et al. v. DER, et al., 1980 EHB 199.

DER's duty under Section 5(a) of the Clean Streams Law is further explained under 25 Pa. Code §91.31(a) and (b) as cited in DER's brief. Section 91.3(a) and (b) provide in relevant part:

> **§91.31. Comprehensive water quality management.**
>
> (a) The Department will not approve a project requiring the approval under the act or the provisions of this article unless the project is included in and conforms with a comprehensive program of water quality management and pollution control provided, however, that the Department may approve a project which is not included in a comprehensive program of water quality management and pollution control if the Department finds that the project is necessary and appropriate to abate existing pollution or health hazards and that the project will not preclude the development or implementation of the comprehensive program.
>
> (b) The determination of whether a project is included in and conforms to a comprehensive program of water quality management and pollution control shall be based on the following standards:
>
> (1) Appropriate comprehensive water quality management plans approved by the Department.
>
> (2) Official Plans for Sewage Systems which are required by Chapter 71 (relating to administration of sewage facilities planning).
>
> (3) In cases where a comprehensive program of water quality management and pollution control is inadequate or nonexistent and a project is necessary to abate existing pollution or health hazards, the best mix of all the following:
>
> (i) Expeditious action to abate pollution and health hazards.
>
> (ii) Consistency with long-range development.

(iii) Economy should be considered in the evaluation of alternatives and in justifying proposals.

Unless LT can show its proposed project is included in and conforms with a comprehensive program of water quality management and pollution control or that this project is not only necessary now to abate existing pollution and will not preclude implementation of a comprehensive program, this regulation requires rejection of its proposed 537 Plan revision. LT has not tried to show the project it proposes conforms to any comprehensive water quality management and pollution control plan. Accordingly, this regulation mandates DER's rejection of LT's proposal since DER cannot ignore this regulation's requirement. See Mil-Toon Development Group v. DER, *supra*.

The only exception recognized in this regulation is if both halves of the alternative test are met. Here, there is no question that the first half is met. The parties do not dispute the existence of health hazards from inadequately treated sewage in the Village of Aquashicola. However, the second half of this test is not met. To the extent there is evidence as to a comprehensive plan, it appears that that plan favors treatment at the Palmerton plant. Clearly, the Carbon County's sewage plan provides for LT's sewage to go to Palmerton and Luongo says DER's regional COWAMP plan (C-9) for the area of which this creek is a part favors regionalization in sewage

treatment as well.[6] Further, there is no evidence to support a conclusion that a DER approval of LT's proposed plan revision, if it were given, would not preclude addressing sewage treatment in comprehensive fashion. Such evidence as exists suggests exactly the opposite conclusion. As the township supervisors have testified, they want no part of regional sewage treatment and neither do their engineers. If LT's proposed STP were built there would never be regional sewage treatment. If DER okayed LT's proposed revision, instead of cooperative endeavors to resolve the sewage disposal needs problem there would be local fiefdoms, each addressing any problem at its own pace and to the degree it desired. We conclude that under Section 91.31(a) and (b) the optional test is not met and thus this regulation also supports and requires DER's conclusion.

Accordingly, we conclude DER has not used the regionalization concept as an excuse to fail to consider economic issues. Rather, DER has reviewed the Section 5 policies quoted above, plus Section 91.3(a) and (b), and found use of the Palmerton STP to treat LT's sewage mandated by the requirements of Section 71.32. The evidence overwhelmingly supports DER's conclusion.

We also reject LT's argument that DER has failed to show one plant is better than two. As stated above, the burden of proof is on LT to show DER erred in rejecting LT's proposed 537 Plan. It is LT which proposes the second plant's construction after agreeing in the 1970s to be served by Palmerton's

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6 The less than full explanation within C-9, to wit "Joint 537 study to assess needs and evaluate alternatives" could be read to reach other conclusions as well.

existing STP. Indeed, LT township supervisor George Robinson testified that as far as he knew Palmerton's plant had been expanded previously to accommodate LT's sewage but that LT had not connected to it (i.e., built its own sewers and connected them to it) because "the Federal HUD money dried up in that year under the way Congress was budgeting". (R-53) Because LT has this burden of proof and has made this proposal, it has the burden of showing that two plants are at least as good as one plant, rather than the other way around, as argued in its Post-Hearing Brief. Based upon LT having this burden and the evidence produced by the parties on this issue, it is clear LT has failed to show that DER's rejection of LT's second plant concept was an error.

Flooding

When DER rejected LT's proposed 537 Plan, no mention was made of concerns about flooding at the proposed site for LT's STP. According to Luongo, this is because DER was unaware of it.

The evidence shows that LT's proposed 537 Plan included floodplain mapping for this township, that floodplain maps are prepared on a municipality by municipality basis, and that the floodplain mapping for this township would not show the floodplain area at LT's proposed plant site because that site is located in Palmerton, not LT. The record also makes it clear that LT's proposed plant site is in the floodplain of a 100-year flood (i.e., a flood of the size that is likely to occur with a statistical frequency of once in 100 years). DER's Luongo testified that DER did not learn this fact until after it had rejected LT's proposed 537 Plan revision, but had it been aware thereof before rejection it would have rejected the proposal for this reason as well.

(R-445) Further the record shows that the highest portion of the ground at the plant site is at an elevation of 410 feet, that a portion of the plant would be lower than this, that the 100-year flood elevation is 410 feet and that access to the plant would be cut off in even some statically more frequent (and thus smaller impact) floods because of the elevation of the roads accessing the proposed plant site.

The evidence also shows that the plant site is on a watershed tributary to the Delaware River and is thus subject to the rules of the Delaware River Basin Commission ("DRBC") as to building in floodplains. It shows that DRBC prohibits building in floodplains except under special permits issued by it and that to get such a permit, a prospective permittee must show the facility has been flood-proofed by building it at least a foot above flood stage. At the hearing, DER's witness estimated the cost to elevate this proposed plant and the access road to that height to be $55,000.

Finally, DER's testimony establishes that DRBC's regulations prohibit absolutely any building in the floodway[7], as opposed to the floodplain, and that the proposed plant site is on the border of the floodway and the floodplain (and possibly in the floodway), so a formal study would need to be undertaken by LT to determine the exact location of this site *vis à vis* the floodway and the floodplain before DER or DRBC permits could be issued for any

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7 The floodway is the main flow path of the stream when in flood, while the area beyond this area also inundated in a flood of a particular frequency is the flood fringe. Together, the floodway and flood fringe equal the floodplain. See Finding Of Fact No. 40.

plant's construction or operation. While LT's experts say they do not believe the plant site is in the floodway, their testimony suggests to us a lack of facts to back up this position. However, we have no hard evidence on which to make any finding on this issue.[8]

All of this evidence is important because DER urges its rejection of this plan is sound for this reason, too, while LT argues issues of flooding and the floodway are merely DER diversions.

Since LT's engineers agree inundation of this plant would create many pollution problems for this creek and the plant, we can hardly agree with LT that this issue is a mere diversion. We are, in fact, surprised that LT would adopt such a stand because to hide its head in the sand like an ostrich on this issue does not serve its interests. If this is a bad location for a plant because of flooding of the site, then flood-proofing the site is a cost LT's residents and plant users will have to bear. If this plant site is in the floodway, then even proposing to locate this plant here shows seriously flawed judgment.

However, in Gladfelter, where a third party challenged DER's conditional approval of a 537 Plan revision, we indicated that we would not review floodplain issues as to a proposed subdivision during review of proposed 537 Plans because DER's approval of that revision was conditioned to require permits for the STP in that revision under the Dam Safety and Encroachments Act, the Act of November 26, 1978, P.L. 1375, as amended, 32

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8 A "HEC-2" study would have to be done by LT before DRBC would act favorably on permits to build at this site, according to Luongo.

P.S. §693.1 *et seq.*, and the Flood Plain Management Act, the Act of October 4, 1978, P.L. 851, as amended, 32 P.S. §679.101 *et seq.* (Flood Plain Management Act). We follow that decision here and do not address the floodplain issue now. In doing so, we do not rule on the question of whether DER could properly reject LT's proposed 537 Plan if the proposed STP would be located in a floodway, in part because we were not offered clear evidence that this is or is not the situation. Moreover, we have no evidence to show consideration of either of these Acts as to this proposal by either party. In addition, there is a significant difference between building an STP in a floodway and building in the flood fringe portion of the floodplain. Gladfelter did not address this issue, nor were we faced with evaluating two options there as we are here. Gladfelter is also distinguishable from the instant appeal because here there are options to evaluate with one option facing less of a flooding hazard than the other. This was not the circumstance in Gladfelter. Gladfelter also did not examine this floodway/DRBC prohibition issue or whether in a circumstance where, as here, the Palmerton STP is not in the 100-year floodplain, DER might reject such a proposal under 25 Pa. Code §71.32 because such a rejection keeps environmental harm to a minimum as mandated by Article I, Section 27. Finally, we elect to not address this issue because if we found in either party's favor on it, that would not change the outcome of this appeal. If any new proposal is made by LT these issues will have to be addressed by it at that time, just as they will by DER.

Costs

The final areas of dispute between the parties concerns the difference in the costs of these two options. According to the cost estimate figures produced from the twice revised figures prepared at DER's request by PSC and the cost figures prepared by SSM and later revised by SSM, the difference between the costs to connect to Palmerton and the costs for LT's proposal is only 6%. That is to say LT's proposal is estimated to be 6% less expensive than the estimated costs of connecting to Palmerton's STP. This translates to $40 dollars per year for the average residence. (R-193)

From this difference alone, LT argues that DER failed to give adequate consideration to costs because if it had, it would have concluded LT's proposed 537 Plan should have been approved. LT also argues that the cost difference between the options is greater than shown.

Of course, in response, DER argues it gave full consideration to the costs projections of both options. DER also says the LT cost estimates are wrong and realistically the two options' costs are closer together. Finally, DER argues that in reviewing DER's rejection decision, this Board cannot consider evidence of greater costs difference than those submitted by LT to DER for review because DER has not had the opportunity to accept or reject them.

Initially, PSC considered the cost of expanding Palmerton's plant to accommodate sewage flows from LT which are projected to reach 200,000 gpd in 20 years plus flows from other municipalities. PSC revised these figures twice. The first revision was to cover a smaller expansion than initially

calculated because only LT would connect to Palmerton's plant in the revision, not LT, Bowmanstown Borough, Perrysville Borough and East Penn Township as first calculated. The second revision lowered the Palmerton option's costs still more because it eliminated costs of four items which DER said were not essential and corrected some calculation errors made in the first revision. In response to Palmerton's second revision, SSM prepared the cost figures for LT's option that are found in LT's Addendum A. It is important to note that the "division of labor" as to which municipality's engineer prepared estimates as to which costs placed on Palmerton's engineers the burden to estimate the costs of expansion of its plant, but only that. The estimate of cost to build LT's collecting sewers was LT's responsibility. LT also was responsible for costing out connection to Palmerton's expanded plant or, as LT proposed, to build its own plant. Errors and omissions as to these cost estimates in LT's Addendum A caused DER to ask LT to prepare Addendum B, which LT did. Thus, we are looking at the cost estimates in PSC's Revision 2 and SSM's Addendum B.

The major increase in costs beyond the 6% difference which LT asserts exists is its contention that a pump station costing $100,000 is needed if LT's sewage is conveyed to Palmerton's plant. This cost is not set forth in either of LT's Addenda. DER asserts that this Board should not consider this evidence in reaching our decision on the merits of this appeal because the need for this pump station and its cost was never presented to DER by LT for review before DER reached its decision.

We will admit that as DER has suggested it is troubling to see LT's

expert witnesses/engineers pick apart the costs of LT's Addendum B which they prepared. In this regard we note with interest that LT's Theodore Stevenson even went so far as to conclude that DER was correct to deny LT's proposed 537 Plan but that DER denied it for the wrong reason and should have denied it because the costs data in Addendum B was incorrect. (R-307-308) We are not willing, however, to agree to DER's assertion that we should not consider evidence offered by LT on costs or any other issue unless it was submitted previously to DER. If DER wanted the option to review this evidence, at the merits hearing it could have asked for a remand of this matter and withdrawn its rejection of LT's proposed plan until it considered this evidence and re-rendered its decision. It did not elect to do so. Moreover, as LT's Post-Hearing Brief points out, hearings before us are *de novo*. See Warren Sand & Gravel Co., Inc., et al. v. Commonwealth, DER, 20 Pa. Cmwlth. 186, 341 A.2d 556 (1975). When DER has made this identical argument in the past, we have interpreted *de novo* review and Warren Sand & Gravel Co., Inc., as rejecting it. See Willowbrook Mining Company v. DER, 1992 EHB 303. Finally, DER has also asked us to consider certain costs which it claims are omitted from Addendum B, and we are troubled by the seeming double standard DER asks us to support if we sustained DER on this argument but nevertheless consider its evidence on costs omissions by SSM which favor DER's position. We reject this argument here. Accordingly, we will consider this evidence.

Looking at the merits of this pump station issue, we see that DER's expert testimony disputes the need for such a pump station (R-362, 402, 479), leaving the need for such a pump station in doubt. Of course, this lack of

clarity as to need for a pump station does not help LT's position since it has the burden of proof on this issue. More importantly, however, DER points out SSM was to study and estimate costs to transport LT's sewage to Palmerton's STP and this cost study does not indicate the need for any such pump station. DER argues the lack of need for such a pump station is admitted by LT's engineers through its omission from the cost study. Clearly, if a pump station was needed and cost $100,000, putting this cost into Addendum B would have strengthened LT's position that building its own plant made strong economic sense. We cannot ignore LT's omission of this alleged cost until after its proposed 537 Plan was denied. We couple the pump station cost's omission from Addendum B, our lack of comfort with LT's picking apart its own costs estimate and the lack of convincing proof of need of a pump station, however, and conclude that we will not raise the estimated cost of connection to Palmerton STP by this figure as LT urges.

We do raise the cost of LT's plant, however, beyond the costs estimated in LT's Addendum B not only to include flood-proofing but for other items not considered by LT's engineers. A flow meter's cost of purchase and installation and a backup power generator's purchase and installation are clearly omitted in Addendum B and required by DER. (R-224-225) This raises the LT proposed STP's costs by roughly an estimated $58,000. (R-331) The HEC-2 study on flooding costs $3,000 (R-332) and flood-proofing will run another $55,000. (R-434-435) Such costs increases reduce the differences between the two options.

Importantly, LT's engineers looked at comparative costs for a 20 year period, and LT proposes a type of STP with a life of only about this length of time. LT's proposed plant has life of only about 20 years before its steel tank walls wear out.[9] The concrete tanks at Palmerton's STP have a life expectancy in excess of 70 years. In costing these options, SSM put nothing in Addendum B providing for amortization of replacement costs for the tanks in LT's plant after they wear out in 20 or so years. Therefore, it appears that the true cost of the two alternatives is not shown in Addendum B, if under LT's option its package plant would have to be replaced at least twice during the life of the tanks at Palmerton's STP.[10] This also means that even if the lower cost of LT's option is correct, it is a lower initial cost but is not necessarily the lowest long-range cost.

SSM's testimony on LT's behalf tries to overcome a portion of these problems by suggesting coverage of the costs of flood-proofing the flow meter, the standby generator and similar costs, but not the tank replacement costs in the contingencies segment of Addendum B. A figure of $654,500 exists in Addendum B for "Construction, Legal and Engineering Contingencies", but this is for the entire sewer system including the proposed plant. The $654,500

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9 LT's evidence suggests coating tank walls can extend the plant's life, but Addendum B does not provide for coating and recoating these walls. Further, bypassing sewage to the stream around the plant's treatment tank so its tanks can be periodically recoated makes such a plant less desirable from a pollution standpoint.

10 The parties do not dispute that pumps and similar equipment will wear out for both plants at similar rates.

figure is 25% of the total cost of the entire LT system. If the same 25% figure is applied solely to LT's proposed STP then that amount is $187,750. Based on the costs of the items outlined above, this amount's adequacy must be in question because the items outlined above make the value of known contingencies in excess of $100,000. We conclude from this mathematical exercise that the contingencies fund should not be used for these known costs. In turn, we are forced to conclude that LT's costs estimate for its proposal is low.

Even if it were not low or we ignored its lowness and the fact that this lowness may have been mandated to justify LT's desire to have its own STP, we are left with the fact that these are only estimates of costs, not actual costs. Moreover, LT's Charles Volk advised that the two plants cannot really be directly compared. (R-236) To the extent, however, that they can be compared, the cost estimates show small cost differences and with errors eliminated (and amortization included), perhaps much less than a $40 per year difference. Even if the $40 figure remains, however, it is insufficient to show an abuse of discretion by DER in rejection of LT's proposal because the cost estimates are as close as they are and factors such as regionalization concepts and environmental concerns must be weighed in DER's decision. As DER's Post-Hearing Brief points out, LT may not agree with DER's conclusion and may wish we would have the same difference of opinion, but more is required. As we stated in Sussex Inc. v. DER, 1984 EHB 355, 366:

> A mere difference of opinion ... is insufficient under Pennsylvania decisional law to constitute an abuse of discretion; such abuse comes about only where manifestly unreasonable judgment, partiality, prejudice, bias,

ill-will, misapplication or overriding of the law, or similarly egregious transgressions on the part of DER or other decision-making body can be shown to have occurred.

LT's evidence does not make such a showing. Accordingly, we make the following Conclusion of Law and enter the appropriate Order.

CONCLUSIONS OF LAW

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

2. In an appeal from DER's rejection of LT's proposed 537 Plan revision it is LT which bears the burden of proof.

3. Because of the nature of its proposal, LT must prove its proposal for a second sewage treatment plant on Aquashicola Creek is better than a single regional sewage treatment plant serving multiple municipalities.

4. Because this Board conducts a *de novo* hearing as to DER's rejection of LT's proposed Act 537 Plan revision, we may consider the evidence in support of its proposal which was not previously submitted to DER for its consideration.

5. For an appellant to show DER abused its discretion in denying a proposed 537 Plan revision, it must show more than a difference of opinion to show abuse of DER's discretion. The evidence must show manifestly unreasonable judgment, partiality, prejudice, bias, ill-will, misapplication of the law, overriding of the law or egregious transgressions by DER.

6. Because DER is empowered by Section 203 of the Clean Streams Law to force Palmerton to accept sewage from LT for treatment at the Palmerton

STP, DER need not prove Palmerton's willingness to accept this sewage as a prerequisite for its rejection of LT's proposal.

7. While LT has planning duties under the Sewage Facilities Act and those duties are not outside the scope of DER's review, this statute explicitly provides that proposed plans for sewage facilities within LT are to be reviewed by DER.

8. Because both LT and DER have responsibility for implementing Article I, Section 27 of the Constitution as to sewage facilities and the Sewage Facilities Act mandates DER review of LT's sewage facilities proposals, LT's performance of its duties as to sewage facilities planning are subject to DER review and evaluation.

9. While DER may not engage in land use or zoning/planning issues or similar local concerns under the sewage facilities Act, where it confines its review to sewage facilities planning issues, its actions are in conformance with the Sewage Facilities Act.

10. In reviewing a municipality's sewage facilities proposals as contained in revisions to its 537 Plan, DER must evaluate the proposals from more than a "least cost" perspective.

11. In evaluating a municipality's proposed 537 Plan revision DER must consider water quality management and pollution control in the watershed as a whole, the feasibility of joint treatment facilities, present and future uses of the stream and the immediate and economic long term impact of the proposal on all of the citizens of Pennsylvania. 35 P.S. §691.5(a).

12. DER is mandated to consider regional sewage treatment in reviewing LT's proposal. 25 Pa. Code §91.31(a) and (b).

13. Gladfelter does not address whether or not under Article I, Section 27 DER could reject a 537 Plan which proposes an STP's construction in a floodplain and does not rule on the merits of such a proposal's rejection if the STP is to be built in a floodway and DRBC's regulations prohibit same.

14. Where evidence shows the difference in cost estimates between two sewage treatment options to be less than $40 per year for the typical residence, and one option is a regional treatment facility with both real and potential environmental benefits, DER does not abuse its discretion by rejecting a local sewage treatment option in favor of the regionalized approach.

15. In reviewing two alternative sewage treatment proposals as to costs where one sewage treatment plant will have a significantly shorter life expectancy than the other, a cost factor for amortizing replacement costs for the shorter-lived system is appropriate in the comparison.

ORDER

AND NOW, this 23rd day of September, 1993, it is ordered that the appeal of LT is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: September 23, 1993

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M. DIANE SMITH
SECRETARY TO THE BOARD

MILFORD TOWNSHIP BOARD OF SUPERVISORS	:	
	:	
v.	:	**EHB Docket No. 93-138-MR**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: September 23, 1993**

OPINION AND ORDER
SUR
MOTION TO DISMISS APPEAL

Robert D. Myers, Member

Synopsis

An appeal is dismissed as untimely when it was filed more than 30 days after the Township received notice of DER's action. Receipt of notice was clear from a certified mail receipt signed by the Township's Earned Income Tax officer and by the Township's admission on the Notice of Appeal form. The Board rejects the Township's arguments that the Tax Officer's receipt should not be controlling because only the Township Supervisors had authority to act on the subject. A system such as that proposed by the Township would be uncertain and unworkable.

OPINION

Milford Township Board of Supervisors (Township) filed a Notice of Appeal on May 27, 1993 seeking review of an Order issued by the Department of Environmental Resources (DER) on April 15, 1993 directing the Township to revise its Official Sewage Facilities Plan pursuant to Sections 5 and 10 of the Pennsylvania Sewage Facilities Act, Act of January 24, 1966, P.L. (1965)

1535, as amended, 35 P.S. §750.5 and §750.10, and 25 Pa. Code §71.14(b), §71.16(a) and §71.16(b).

On August 4, 1993 DER filed a Motion to Dismiss Appeal on the ground that it was untimely, accompanied by a memorandum of law. The Township filed an Answer and New Matter, along with a memorandum of law, on August 11, 1993. On August 20, 1993 DER filed a reply memorandum of law,[1] prompting the Township to file a supplemental memorandum of law on September 3, 1993.

In its Motion to Dismiss Appeal, DER alleges that the Township received notice of DER's April 15, 1993 Order on April 26, 1993 when a copy delivered by certified mail was received at the Township office. This fact is established, according to DER, by the return receipt for certified mail (attached to the Motion as Exhibit "A") and by the Township's admission in paragraph 2(d) of the Notice of Appeal form. Since the Notice of Appeal was not received by the Board until May 27, 1993 - 31 days after receipt of the Order - it is untimely.

The Township acknowledges that DER's April 15, 1993 Order was received at the Township office via certified mail on April 26, 1993 and also acknowledges that its Notice of Appeal was not received by the Board until May 27, 1993. The Township argues, however, that the certified mail was received and signed for by the Township Earned Income Tax Officer. The Township Supervisors did not see the order until May 4, 1993. Since the Supervisors, and not the Earned Income Tax Officer, have the responsibility for revisions to the Official Sewage Facilities Plan, it is their receipt of the Order that controls. Accordingly, the appeal was timely.

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[1] DER on the same date filed a Motion to Strike New Matter with supporting legal memorandum. In view of our disposition of the Motion to Dismiss Appeal, we will not act on this Motion.

We are unwilling to adopt the Township's argument for several reasons. First of all, it would introduce an element of great uncertainty into the commencement of the appeal period. Since our jurisdiction depends upon timely filing, there should be as much certainty as possible in the commencement and termination of the appeal period.

The Township would have us consider the date when a person or persons with authority to deal with the subject matter of the DER action receive actual notice of the action. In our judgment, that would needlessly complicate the process and involve the Board in endless fact-finding missions before ever getting to the merits of an appeal. Where the appellant is a large municipality or corporation with hundreds or thousands of employees, many with overlapping responsibilities, the search for the precise person with the authority to act on a given matter may well be a Sisyphean task.

The Township refers to the Second Class Township Code, Act of May 1, 1993, P.L. 103, as amended, 53 P.S. §65101 *et seq.*, and particularly Section 570, 53 P.S. §65570, to show that the Earned Income Tax Officer has a limited responsibility. While that may be so, it is also obvious that this person is an elected Township officer: 53 P.S. §65402 and §65414. Such an official, present in the Township office, will be conclusively presumed to have the authority to receive notice of DER actions.

We affirm our prior decisions on this issue in, *inter alia*, *Charles A. Kayal v. DER*, 1987 EHB 809, *Borough of Lilly v. DER*, 1987 EHB 972, *Louis Beltrami and Beltrami Enterprises, Inc. v. DER*, 1989 EHB 594, and *Paradise Township Citizens Committee, Incorporated, et al. v. DER*, 1992 EHB 668.

ORDER

AND NOW, this 23rd day of September, 1993, it is ordered as follows:

1. DER's Motion to Dismiss Appeal is granted.

2. The appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Richard S. Ehmann

RICHARD S. EHMANN
Administrative Law Judge
Member

Joseph N. Mack

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: September 23, 1993

cc: See next page for service list

EHB Docket No. 93-138-MR

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M. DIANE SMITH
SECRETARY TO THE BOARD

ENVIROTROL, INC.	:	
	:	
v.	:	**EHB Docket No. 91-388-W**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: September 27, 1993**

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

By Maxine Woelfling, Chairman

Synopsis

The Board dismisses an appeal of a provision in a hazardous waste storage permit. The Board holds that the appellant failed to satisfy its burden of proving by a preponderance of the evidence that the Department of Environmental Resources (Department) acted contrary to law, abused its discretion, or acted in an arbitrary and capricious manner by issuing the permit with a provision prohibiting the storage of F032 waste.

The Department did not abuse its discretion by denying a request to authorize the storage of F032 waste where the public had neither notice of the request nor an opportunity to comment on it. The fact that the Department authorized the storage of other hazardous wastes without an opportunity for public comments does not demonstrate that the Department abused its discretion with respect to the F032 waste. Moreover, the fact that the Department treated the F032 waste and other chemically similar wastes differently does not demonstrate that the Department acted incorrectly with respect to the F032 waste.

INTRODUCTION

This matter was initiated with the September 13, 1991, filing of a notice of appeal by Envirotrol, Inc. (Envirotrol) seeking review of the Department's issuance of a permit to Envirotrol to store hazardous waste at its carbon reactivation facility (facility) in Beaver Falls, Beaver County. Envirotrol, a Pennsylvania corporation engaged in the business of reactivating spent carbon, challenged Part II, Paragraph N of the permit, which prohibited Envirotrol from storing spent carbon containing F032 waste.[1]

On October 21, 1991, Envirotrol filed an amended notice of appeal which incorporated the original notice of appeal's challenge to Part II, Paragraph N of the permit, banning the storage of F032 waste materials. In addition, however, the amended appeal contested another provision in the permit, one which prohibited the storage of waste materials containing a "loading of moisture and light volatiles" greater than fifty percent. In response to a motion from the Department, this Board dismissed the amended appeal as untimely on June 1, 1992.

The Board conducted a hearing on the merits on July 23, 1992. Envirotrol filed its post-hearing brief on August 31, 1992, and the Department responded with its post-hearing brief on October 15. On November 6, 1992, Envirotrol filed a post-hearing reply brief. Any issues not raised in the post-hearing briefs are deemed waived. Lucky Strike Coal Co. and Louis J. Beltrami v. Department of Environmental Resources, 119 Pa. Cmwlth. 440, 546 A.2d 447 (1988).

The permit issued to Envirotrol authorized the storage of certain hazardous wastes but did not authorize the storage of F032 waste. The

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[1] F032 hazardous waste is generated from wood-preserving processes utilizing chlorophenolic formulations. 40 CFR §261.31(a).

Department maintains that it did not abuse its discretion by denying Envirotrol's request to store that waste because Envirotrol did not request authorization to store F032 waste until after the public comment period expired, and because Envirotrol did not possess the authorization necessary under the Air Pollution Control Act, the Act of January 8, 1960, P.L. (1959) 2119, as amended, 35 P.S. §4001 *et seq.* (Air Pollution Control Act), to thermally process F032 waste.

While Envirotrol concedes that it did not request authorization to store F032 waste until after the public comment period expired, it maintains that this is not fatal because the EPA did not list F032 waste as hazardous until after the opportunity for public comments, because the Department authorized the storage of other categories of waste where the request for authorization was made only after the public comment period expired, and because the Department authorized the storage of wastes chemically similar to F032 waste. Envirotrol also argued that no further air quality authorization was necessary for Envirotrol to thermally process F032 waste.

The record consists of a transcript of 119 pages and 21 exhibits. After a full and complete review of the record, we make the following findings of fact.

FINDINGS OF FACT

1. Appellant is Envirotrol, a corporation which owns and operates a carbon reactivation facility in Beaver Falls, Beaver County (Ex. B-1, p. 2, ¶ 4; N.T. 13-14).[2]

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[2] Exhibits from Envirotrol are noted as "Ex. A-___;" exhibits from the Department are noted as "Ex. C-___;" and Board exhibits are noted as "Ex. B-___." The notes of testimony, meanwhile, are referred to as "N.T. ___."

2. Appellee is the Department, the agency with the authority to administer and enforce the Solid Waste Management Act, the Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 *et seq.*, the Air Pollution Control Act, and the rules and regulations promulgated thereunder.

3. Envirotrol stores and reactivates spent activated carbon at its Beaver Falls facility (Ex. B-1, p. 2, ¶ 4).

4. Activated carbon is used, among other things, to treat drinking water and wastewater, process food and pharmaceuticals, recover solvents, and purify chemicals (Ex. B-1, pp. 2-3, ¶ 4).

5. After it is used, activated carbon becomes spent - contaminated with various wastes and chemicals (Ex. B-1, p. 3, ¶ 5).

6. Envirotrol has stored spent carbon at its facility since 1978 (Ex. B-1, p. 3, ¶ 6).

7. From November, 1980, to August 15, 1991, Envirotrol stored spent carbon at its facility pursuant to the "interim status" provisions of the Federal Resource Conservation and Recovery Act, 42 U.S.C. §6901 *et seq.* (Ex. B-1, p. 3, ¶ 6).

8. On or about March 25, 1986, Envirotrol submitted an application for a hazardous waste permit authorizing Envirotrol's facility to store spent carbon contaminated with certain hazardous wastes (Ex. B-1, p. 2, ¶ 2).

9. On October 1, 1990, the Department issued a general public notice of its intent to issue a hazardous waste storage permit to Envirotrol and sent copies of the draft permit, a fact sheet, and the general public notice to Envirotrol, Beaver County and Beaver Falls officials, the Beaver Falls citizens' group STOP, the EPA, and state and federal legislators (Ex. A-2).

10. The public notice and the fact sheet accompanying it indicated that Envirotrol had not requested authorization to store wastes listed by the EPA for the presence of dioxin (N.T. 90).

11. The public comment period on Envirotrol's draft permit extended from October 1, 1990, though late November, 1990 (N.T. 90, 101).

12. On November 8, 1990, the Department held a public hearing regarding Envirotrol's draft permit (N.T. 90; Ex. B-1, p. 2, ¶ 3).

13. The EPA issued a final rule listing F032 waste as hazardous on December 6, 1990, after the public hearing and comment period (Ex. A-3, 50450-50490; N.T. 99-100).

14. The EPA, however, published notice that it proposed to list F032 waste as hazardous almost two years earlier, on December 30, 1988, before the public hearing or comment period (Ex. A-3, 50450-51).

15. Waste designated as "F032 waste" by the EPA includes waste waters, process residuals, preservative drippage, and spent formulations from wood preserving processes generated at plants that currently use or have previously used chlorophenolic formulations (Ex. B-1, p. 4, ¶ 10; Ex. A-3, 50451).

16. F032 waste is listed by the EPA for the presence of pentachlorophenol (PCP), as well as tetra-, penta-, hexa-, and heptachlorodibenzo-p-dioxins, and tetra-, penta-, hexa-, and heptachlorodibenzofurans (Ex. B-1, p. 4, ¶ 10; Ex. A-3, 50451).

17. On January 25, 1991, Envirotrol sent a letter and revised permit application to the Department adding four types of waste - K066, K088, K132, and F039 waste - to those it had previously sought authorization to store (Ex. A-23; N.T. 25).

18. On May 21, 1991, Envirotrol sent a letter and revised permit application to the Department adding another three types of waste - F032, F034, and F035 waste - to those it had previously sought authorization to store (Ex. A-24; N.T. 26).

19. On June 27, 1991, Envirotrol sent a letter and revised permit application to the Department adding one more type of waste - F025 waste - to those it had previously requested authorization to store (Ex. A-25; N.T. 28).

20. On August 15, 1991, the Department issued a hazardous waste storage permit to Envirotrol (Ex. B-1, p. 3, ¶ 7).

21. The permit issued to Envirotrol authorized the storage of K066, K088, KI32, F034, F035, F025 waste, but prohibited the storage of F032 waste (Ex. A-2; N.T. 25-28).

DISCUSSION

Under 25 Pa. Code §§21.101(a) and (c)(1), a permittee challenging the terms of a Department permit bears the burden of proof. Western Pennsylvania Water Co. and Armco Advances Materials Corp. v. DER, 1991 EHB 287. Envirotrol, moreover, must prove that it is clearly entitled to a hazardous waste storage permit authorizing the storage of F032 wastes before the Board will order the Department to issue that permit. Sanner Brothers Coal Co. v. DER, 1987 EHB 202.

Envirotrol stores and processes activated carbon at its facility, reactivating spent carbon by removing the wastes and chemicals contaminating it (Ex. B-1, p. 3, ¶ 5). On March 25, 1986, Envirotrol submitted an application to the Department for a hazardous waste permit authorizing the facility to store certain hazardous wastes (Ex. B-1, p. 2, ¶ 2). Envirotrol

planned to heat the contaminated carbon, driving the volatile contaminants from the carbon into the air, where they would be destroyed by the facility's air pollution control system (Ex. A-2).

On October 1, 1990, the Department issued a general public notice of its intent to issue a hazardous waste storage permit to Envirotrol and sent copies of the draft permit, a fact sheet and the general public notice to Envirotrol, Beaver County and Beaver Falls officials, the Beaver Falls citizens' group STOP, the EPA, and state and federal legislators (Ex. A-2). The public notice and the fact sheet accompanying it indicated that Envirotrol had not requested authorization to store wastes listed by the EPA for dioxin (N.T. 90).

The public comment period on the draft permit extended from October 1, 1990, through late November, 1990, with a public hearing on November 8 (N.T. 90, 101; Ex. B-1, p. 2, ¶ 3). In three separate instances after the public comment period closed, Envirotrol sent letters and revised permit applications to the Department, adding new types of waste to the list of wastes the facility requested authority to store (Ex. A-23, A-24, A-25; N.T. 25-28). In one of these instances - its request of May 21, 1991 - Envirotrol sought authorization to store waste classified by the EPA as F032 waste (Ex. A-24; N.T. 26). F032 waste is listed by the EPA for the presence of certain dioxins and furans, and for the presence of PCP (Ex. B-1, p. 4, ¶ 10; Ex. A-3, 50451). The EPA issued a final rule listing F032 waste as hazardous only on December 6, 1990 - after the close of the public comment period for the permit application - but the EPA had published notice that it proposed to list F032 waste as hazardous almost two years earlier, on December 30, 1988 (Ex. A-3, 50450-50490; N.T. 99-100).

The Department issued Envirotrol the hazardous waste storage permit on August 15, 1991. Although that permit authorized Envirotrol to store some of the wastes it requested authorization for only after the public comment period had closed, it did not give Envirotrol the authority to store F032 waste (Ex. A-2; Ex. B-1; N.T. 25-28).

The parties have stipulated that the only issue in this appeal is whether the Department acted contrary to law, abused its discretion, or acted in an arbitrary and capricious manner by refusing to issue a permit authorizing Envirotrol to store F032 waste (Ex. B-1, p. 10). We find that the Department's refusal to authorize the storage of F032 waste at the facility was appropriate.

Under the Department's regulations, a draft hazardous waste permit must be accompanied by a statement of basis or a fact sheet, which has been "publicly noticed" under 25 Pa. Code §270.41 and made available for public comment under 25 Pa. Code §270.42. 25 Pa. Code §270.33(j). Fact sheets are issued if the draft permit involves major issues, a subject of widespread public interest, or a major hazardous waste management facility or activity. 25 Pa. Code §270.33(l)(2). While a statement of basis need not necessarily include the type of waste for which authorization is requested, the regulations require that fact sheets set forth "the type and quantity of wastes" proposed to be stored at the facility. 25 Pa. Code §270.33(l)(2)(ii).

Where a draft permit is accompanied by a fact sheet, therefore, the Department's regulations guarantee that the public has notice of, and an opportunity to comment on, the types of waste a facility proposes to store. But is public notice and comment required where a permit applicant adds a waste, after the public notice and the comment period, to those it previously requested authorization to store? The regulations do not answer this question

directly, but the framework outlined in them would be compromised were public notice and comment not required. Under the scheme set forth in the regulations, the Department need only issue a fact sheet - and therefore need only list the types of waste proposed to be stored - where the proposal is likely to be controversial: where it involves major issues, a subject of widespread public interest, or a major hazardous waste management facility or activity. Yet, were we to hold that public notice and comment was not required with regard to wastes added after the initial public notice and comment period, we would allow permit applicants to escape the public notice and comment requirements in many instances where their proposals were most controversial. A permit applicant could simply withhold its request to authorize the storage of controversial wastes until after the public comment period had closed.

The public notice and comment provisions serve an important purpose in the hazardous waste permitting program. Residents in many communities become apprehensive when they discover that a facility in their area has requested authorization to handle "hazardous waste." They may be unsure of the types of waste the facility will handle, the reason the waste is regarded as hazardous, the potential threat the waste may pose, or the measures that the facility plans to employ to protect the community. They may have other questions. The public comment provisions provide the public with a vehicle to make their concerns known to the Department and ensure that the Department will address all the significant concerns expressed. Given the contentious and emotionally-charged environment in which many hazardous waste permit

proceedings take place, this exchange of information is crucial.[3] It serves an essential cathartic and educational purpose, one which would be frustrated were the public not given an opportunity to comment on amendments to permit applications.

Envirotrol argues that the Department should have authorized the storage of F032 - despite the fact that the public did not have an opportunity to comment on that proposal - because F032 waste is chemically similar to other wastes the permit authorized Envirotrol to store, because the Department authorized the storage of other wastes which Envirotrol requested the authority to store only after the public comment period ended, and because the EPA did not issue the final ruling listing F032 as hazardous until after the public comment period elapsed. None of these arguments is persuasive.

As noted earlier in this opinion, Envirotrol bears the burden of proving that it is clearly entitled to authorization to store F032 waste. To do so, Envirotrol had to do more than prove that the Department treated F032 waste differently from other wastes it authorized Envirotrol to store which were either chemically similar to F032 waste or which, like the F032 waste here, were not included in the public notice. Even assuming Envirotrol is correct when it argues that F032 waste was treated differently than these other wastes, that does not establish that Envirotrol was clearly entitled to authorization to store F032 waste. The Department could have treated the F032

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[3] Public input and feedback from the Department also play a prominent role in other aspects of the Commonwealth's hazardous waste policy. The Hazardous Sites Cleanup Act, the Act of October 18, 1988, P.L. 756, as amended, 35 P.S. §6020.101 *et seq.*, for instance, contains public comment and hearing provisions similar to those in the regulations governing the hazardous waste permitting program and directs the Department to develop a program to educate the public about the nature of hazardous waste generation and the need for environmentally safe methods for managing, treating, and disposing of the waste. See 35 P.S. §6020.309(f) (regarding public education) and 35 P.S. §6020.506(c) and (d) (regarding public comments and public hearings).

waste differently from other wastes and simply have acted inappropriately with respect to the other wastes.[4]

Envirotrol is no more successful when it argues that the Department should have authorized the storage of F032 because the EPA did not issue the final ruling listing the waste as hazardous until after the public comment period elapsed. While Envirotrol had no legal obligation to secure the Department's approval for storage of F032 waste until the EPA listed F032 as hazardous waste, Envirotrol, for whatever reason, did not submit the revised application until over five months after publication of EPA's proposal. Moreover, the fact that there is a change in the scope of regulated activities during the pendency of a permit application does not necessarily alter other applicable requirements. The Department was still bound to process Envirotrol's permit application in conformance with the relevant procedural and substantive regulations.

Although we have held that the Department's action was not an abuse of discretion, we note that perhaps this situation could have been avoided had the parties approached the permitting process differently. Envirotrol could have exercised more foresight in crafting its permit application. Instead, Envirotrol was content to submit a string of requests months after the draft permit was issued, asking the Department to authorize piecemeal the storage of additional types of waste. The Department, meanwhile, could have satisfied the public input requirement by issuing an amended draft permit and fact sheet

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[4] Whether the Department acted appropriately with regard to these other wastes is not before the Board. Envirotrol did not challenge the Department's approval of the wastes it asserts were chemically similar to F032 or were, like F032, not the subject of public notice or comment. Instead, Envirotrol appealed the Department's action only with respect to the Department's decision to deny Envirotrol's request for authorization to store F032 waste. Our jurisdiction, therefore, is limited to that issue.

when it received Envirotrol's additional submissions, as it had not taken final action on the permit application. It could also have held a public hearing on the wastes Envirotrol sought to add to its permit application after the draft permit was issued.

Because we find that the Department's refusal to issue a permit authorizing the storage of F032 waste was appropriate because the public did not have an opportunity to comment on Envirotrol's request, we need not examine the alternative rationales the Department offered to justify its decision.

CONCLUSIONS OF LAW

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

2. Envirotrol has the burden of proving that the Department abused its discretion by issuing Envirotrol a hazardous waste storage permit which did not authorize the storage of F032 waste. 25 Pa. Code §§21.101(a) and (c)(1); Western Pennsylvania Water Co. and Armco Advanced Materials Corp. v. DER, 1991 EHB 287.

3. Envirotrol must prove that it is clearly entitled to a hazardous waste storage permit authorizing the storage of F032 wastes before the Board will order the Department to issue that permit. Sanner Brothers Coal Co. v. DER, 1987 EHB 202.

4. Any issue not expressly addressed by the parties in their post-hearing briefs is waived. Lucky Strike Coal Company and Louis J. Beltrami v. DER, 119 Pa. Cmwlth. 440, 546 A.2d 447 (1988).

5. Where the Department issues a draft hazardous waste permit, the draft permit must be accompanied by a statement of basis or a fact sheet which

has been "publicly noticed" and has been made available for public comment. 25 Pa. Code §270.33(j).

6. Where the Department issues a fact sheet, the fact sheet must set forth, among other things, the type and quantity of wastes proposed to be stored at the facility. 25 Pa. Code §270.33(1)(2).

7. Envirotrol failed to prove that it is clearly entitled to a hazardous waste permit authorizing the storage of F032 waste where there was no public notice that Envirotrol requested authorization to store F032 waste and no public hearing or opportunity for public comment pertaining to that request.

ORDER

AND NOW, this 27th day of September, 1993, it is ordered that the Department of Environmental Resources' issuance of Hazardous Waste Storage Permit No. PAD 980707087 is sustained and Envirotrol's appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

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DATED: September 27, 1993

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M. DIANE SMITH
SECRETARY TO THE BOARD

DELAWARE ENVIRONMENTAL ACTION COALITION	:	
	:	
v.	:	**EHB Docket No. 91-430-MR**
	:	**(consolidated)**
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: September 29, 1993**
and M & S SANITARY SEWAGE DISPOSAL, INC.	:	
PERMITTEE	:	

OPINION AND ORDER
SUR
MOTION TO STRIKE PORTIONS OF APPELLANTS'
SUPPLEMENTAL PRE-HEARING MEMORANDA

Robert D. Myers, Member

Synopsis

The Board strikes citations to sections of the regulations having no bearing on the permit issued by DER. The Board refuses to strike a supplemental pre-hearing memorandum on the basis of untimeliness but holds that any new factual or legal contentions must fall within the scope of the objections contained in the Notice of Appeal. Because of the difficulty of determining that, the Board denies the motion to strike with leave to raise it again at the hearing.

OPINION

On June 15, 1993 we issued an Opinion and Order sur Motion to Limit Issues in which we granted the Motion in part, denied it in part, and directed Appellants to file supplemental pre-hearing memoranda "specifically

identifying each section of the regulations claimed to be violated in connection with the issues that have not been stricken." The Appellants complied with the Order on July 7 and 20, 1993, respectively. On September 7, 1993, M & S Sanitary Sewage Disposal, Inc. (Permittee) filed a Motion to Strike Portions of Appellants' Supplemental Pre-Hearing Memoranda. Appellants filed Answers to this Motion on September 23, 1993. DER advised us by letter dated September 10, 1993 that it had no objection to the Motion.

Permittee moves to strike those portions of Delaware Environmental Action Coalition's (DEAC) supplemental pre-hearing memorandum citing regulations at 25 Pa. Code §271.125(b), §271.201, §283.101(a) 1 and 2, §283.101(b) and §285.134. The Sections from Chapter 271 deal with municipal waste generally; those from Chapter 283 deal with municipal waste resource recovery facilities; and that from Chapter 285 deals with storage and transportation of municipal waste. We agree with Permittee that DEAC has not shown how these provisions relate to the issuance of a water quality management permit to construct a treatment plant for septage. Accordingly, the references to these Sections will be stricken.

Appellant Dr. James E. Wood did more in his supplemental pre-hearing memorandum than provide specific citations to statutes and regulations. He supplemented his recitation of facts and legal contentions and added himself as an expert witness. Contrary to Permittee's contention, Wood (and all other parties) may supplement pre-hearing memoranda so long as it is done in sufficient time prior to the hearing that other parties are not unfairly prejudiced. Wood's supplement was filed on July 7, 1993. The case was set for hearing on August 9, 1993. Permittee's Motion was not filed until a month later on September 7, 1993. The supplement was timely and will not be stricken on that ground.

As noted in our prior Opinion and Order in this case, factual and legal contentions stated in a pre-hearing memorandum must come within the scope of the objections set forth in the Notice of Appeal unless the right to amend after discovery is reserved. Wood did not reserve that right. Accordingly, the factual and legal contentions added by the supplemental pre-hearing memorandum must be judged by the objections in the Notice of Appeal. The problem with doing this lies in the confused, rambling nature of the language Wood employs. It may be, as Wood contends, that he is merely elucidating the prior contentions and adding nothing new. For this reason and the proximity of the hearing, we will deny Permittee's Motion as to Wood giving Permittee permission to raise it during the hearing whenever, in its discretion, it is appropriate.

Wood will be required to provide a written summary of his expert testimony.

ORDER

AND NOW, this 29th day of September, 1993, it is ordered as follows:

1. Permittee's Motion is granted as to DEAC with respect to the citations to Chapters 271, 283 and 285 of 25 Pa. Code.

2. Permittee's Motion is denied as to Wood with leave to raise it during the hearing.

3. On or before October 5, 1993 Wood shall provide to all other parties a written summary of his expert testimony.

ENVIRONMENTAL HEARING BOARD

ROBERT D. MYERS
Administrative Law Judge
Member

DATED: September 29, 1993

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CHESTER RESIDENTS CONCERNED FOR QUALITY LIVING	:	
v.	:	**EHB Docket No. 93-234-MR**
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES and THERMAL PURE SYSTEMS, INC., Permittee	:	**Issued: October 20, 1993**

OPINION AND ORDER
SUR
PETITION FOR SUPERSEDEAS

Robert D. Myers, Member

Synopsis

In denying a Petition for Supersedeas in an appeal challenging DER's issuance of a permit for an infectious and chemotherapeutic waste processing facility, the Board holds that processing facilities are not subject to the Pennsylvania Infectious and Chemotherapeutic Waste Plan or the moratorium established by the Infectious and Chemotherapeutic Waste Disposal Act. The Board holds further that emissions from the proposed facility are exempt under the Air Pollution Control Act, and that DER did not abuse its discretion with respect to traffic and a public hearing. Finally, the Board holds that the issuance of the permit does not constitute environmental discrimination or environmental racism.

OPINION

Chester Residents Concerned for Quality Living (Residents) filed a Notice of Appeal on August 18, 1993 seeking review of the Department of

Environmental Resources' (DER) action of July 22, 1993 issuing Permit No. 101618 to Thermal Pure Systems, Inc. (Permittee). The Permit, issued under the Solid Waste Management Act (SWMA), Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 *et seq.*, authorized a commercial infectious waste transfer station, six autoclave units, and a facility for processing infectious waste sharps and re-usable infectious waste containers at Front and Thurlow Streets in the City of Chester, Delaware County. The Residents' objections to issuance of the Permit were based on alleged violations by DER of regulatory, statutory and constitutional provisions, including alleged environmental racism.

On September 16, 1993 the Residents filed a Petition for Supersedeas with supporting Memorandum of Law. DER filed Objections to the Petition on September 28, 1993. On the very next day, Permittee filed a Response to the Petition with supporting Brief, Objection to the Petition and Motion to Dismiss. Also on that date, the Residents filed a Supplementary Memorandum of Law to which DER filed a Reply. A hearing on the Petition was held in Harrisburg on September 30, 1993 before Administrative Law Judge Robert D. Myers, a Member of the Board. All parties were represented by legal counsel and presented evidence in support of their respective positions. On October 6, 1993 the Residents filed Post-Hearing Statement. On the following day, Permittee filed a Memorandum of Law and a Response to the Residents' Statement. DER advised us on October 8, 1993 that it would not be supplementing its previous filings.

The record consists of the pleadings, a hearing transcript of 277 pages and 25 exhibits. The record reveals the following situation.

The Residents are an organization composed of persons residing within a few blocks of the site approved by the Permit. That site is a 2.29-acre

portion of a 52-acre tract lying between the Delaware River and the railroad tracks of Conrail. On or adjacent to this 52-acre tract are the Delaware County Resource Recovery Facility (referred to by the Residents as the Westinghouse incinerator), the DELCORA treatment plant, LCA Leasing, Inc. (a municipal waste transfer station) and Abbonizio Contractors. The 52-acre tract historically has been devoted to industrial use and has been zoned M-3 Heavy Industrial since the 1960s. The facilities located on the tract generate truck traffic on the nearby streets, especially West 2nd Street which is S.R. 291.

The Westinghouse incinerator is authorized to accept 4,100 tons per day and the transfer station is authorized to accept 1,600 tons per day. Since June 1992 Permittee has operated a truck-to-truck transfer of infectious and chemotherapeutic waste on the site, involving apparently about 25 tons per day. This type of operation did not require a DER permit.

On July 22, 1993 DER issued the Permit involved in this proceeding, authorizing Permittee to construct and operate on the site a commercial infectious waste transfer station, six autoclave units and a facility for processing infectious waste sharps and re-usable infectious waste containers. Permittee may accept up to 403 tons per day (288 tons for the autoclave units and 115 tons for the transfer station), 6 days per week (6:00 a.m. to 8:00 p.m. Monday through Friday and 6:00 a.m. to 2:00 p.m. Saturday). It may process the waste 24 hours per day, 7 days per week. When the transfer station authorized by the Permit becomes operational, Permittee must discontinue truck-to-truck transfer at the site.

Prior to applying for this Permit, Permittee had entered into a Host Community Agreement with the City of Chester in December 1991. Under that Agreement, Permittee bound itself, *inter alia*, to pay the City a host

community fee of $5.00 per ton, to employ a workforce made up at least to the extent of 80% of city residents, and to construct a new access road that would remove all commercial traffic from Thurlow Street. The City of Chester entered into this Agreement and supported the issuance of the Permit primarily because of the City's high unemployment rate and poor economic condition. The facility will employ about 120 persons when fully operational and will generate about $500,000 of revenues for the City per year.

Autoclaving, widely used by hospitals and medical practitioners for the past 100 years, is a sterilization process using steam (up to 275° F in this instance) to kill bacteria and pathogens. The storage, handling, transportation and disposal of infectious and chemotherapeutic waste is highly regulated by DER in Chapters 271, 272, 273, 283 and 285 of 25 Pa. Code. Once such waste arrives at Permittee's facility, it will be placed in the autoclave units and sterilized by steam generated by two on-site natural gas-fired boilers. Steam and ambient air evacuated from the units will be passed through filters before being discharged to the atmosphere. Volatile organic compounds (VOCs), estimated to amount to 700 pounds per year, also will be passed through the filters before being discharged to the atmosphere. The VOCs will come from solvents such as alcohols or acetones and may also come from the melting of bags containing the waste. After the waste is sterilized, it will be taken to an approved landfill for disposal.

Permittee's facility will serve hospitals and other medical centers in the City of Philadelphia and the surrounding counties in Pennsylvania and New Jersey, as well as Maryland, Delaware, Virginia, Washington, D.C., and the New York City area. At the time of the hearing, 2 autoclave units were in

operation and about 50 persons were employed, nearly all of whom are from the City and include residents within an 8-block area around the site. About 85% of these employees are African-Americans.

In processing the application for the Permit, DER requested the Pennsylvania Department of Transportation (PennDOT) to assess the traffic impacts associated with the proposed operation. PennDOT had made prior traffic assessments in the area with respect to permitting of the municipal waste transfer station and the Westinghouse incinerator and had concluded that the road system could handle the traffic. The application submitted by Permittee included a letter from the owners and operators of the transfer station agreeing to reduce their daily tonnage by 403 tons, the amount of daily tonnage requested by Permittee. On the strength of this letter, PennDOT concluded that the approval of the application would not result in an increase in traffic.

In processing the application for the Permit, DER concluded that it was unnecessary for Permittee to request and obtain a Plan Approval and Operating Permit under the Air Pollution Control Act (APCA), Act of January 8, 1960, P.L. (1959) 2119, as amended, 35 P.S. §4001 *et seq.* The autoclave units were considered to be a minor source under 25 Pa. Code §127.14(8) and the natural gas-fired boilers were considered to be exempt under 25 Pa. Code §127.14(3).

During the processing of the application, DER did not hold any public hearings. No formal written request for a hearing was made but the Reverend Horace Strand, Chairman of the Residents, made an oral request to DER in February 1993. While the City was considering the Host Community Agreement with Permittee, a series of public meetings were held by City Council and attended, at least in part, by DER personnel. City Council held another

public meeting after receiving a June 1992 petition with 300 signatures of persons opposed to the incineration of solid waste or treatment of medical waste. This meeting, also attended by DER personnel, focused almost exclusively on alleged problems with the Westinghouse incinerator. A copy of this petition was given to DER in February 1993.

In deciding whether or not to grant a permit for the processing or disposal of solid waste, DER does not consider the racial makeup of the surrounding area. According to the 1990 Census, African-Americans represent 65% of the City population and only 11% of the Delaware County population. The 11th Ward, which includes the site, is about 50% African-American. Within the 4 to 5 block areas around the site, the population is 50% African-American except on the north where it runs from 60% to 70%. Nearly all of the major waste processing and disposal facilities, including those handling infectious and chemotherapeutic waste, in DER's southeastern region (Philadelphia, Chester, Bucks, Montgomery and Delaware Counties) are located in areas where the surrounding population is predominantly Caucasian. The greatest concentration of these facilities is in lower Bucks County where the population is predominantly Caucasian.

The Residents are affected by the volume of truck traffic during all hours of the day and night, by diesel fumes, by odors and dirt and by health and safety concerns. Most of these problems arose when the Westinghouse incinerator began operating a few years ago. The incinerator is still the prime target of the Residents' complaints but they are also convinced that Permittee's facility will aggravate the problems.

The Residents contend that the Permit was issued in violation of the Infectious and Chemotherapeutic Waste Disposal Act (Infectious Waste Act), Act of July 13, 1988, P.L. 525, 35 P.S. §6019.1 *et seq.*; the Pennsylvania

Infectious and Chemotherapeutic Waste Plan (Waste Plan); the APCA; the regulations adopted pursuant to the APCA in 25 Pa. Code Chapter 127; and Sections 1, 26 and 27 of the Constitution of Pennsylvania.

We may grant a supersedeas if it is shown by a preponderance of the evidence (1) that the Residents will suffer irreparable harm, (2) that they are likely to prevail on the merits, and (3) that there is no likelihood of injury to the public or other parties. Where pollution or injury to the public health, safety or welfare exists or is threatened, a supersedeas cannot be granted: Section 4(d), Environmental Hearing Board Act, Act of July 13, 1988, P.L. 530, 35 P.S. §7514(d); 25 Pa. Code §21.78.

The Residents made no effort to show irreparable harm, relying instead on their contentions that DER acted without statutory and constitutional authority. If these contentions have merit, the absence of irreparable harm is meaningless: *Westinghouse Electric Corporation v. DER*, 1988 EHB 857.

The Infectious Waste Act, effective July 13, 1988, imposed duties on DER and the Environmental Quality Board (EQB) with respect to infectious and chemotherapeutic waste and imposed a moratorium on the issuance of permits for certain types of facilities handling such waste. The Legislature found that public health concerns required (1) the review and adoption of regulations for the "collection, transportation, processing, storage and incineration or other disposal" of such waste and (2) the development and implementation of a statewide plan addressing the needs of the Commonwealth "with regard to the incineration and disposal" of such waste: Section 1, 35 P.S. §6019.1.

In Section 2(a), 35 P.S. §6019.2(a), DER is directed to study, develop and prepare an Infectious and Chemotherapeutic Waste Plan addressing four issues. The first involves an assessment of the volume of such waste and

of the facilities for the "treatment, storage and disposal" of such waste. The remaining three all relate to facilities for the "incineration or other disposal" of such waste. Section 2(b), 35 P.S. §6019.2(b), directs DER to review and revise the regulations in at least three areas. The first is the "collection, transportation, processing, storage and incineration and disposal" of such waste and the siting of commercial facilities for the management of such waste. The second deals with the best available technology for air quality control of emissions from facilities used for the "incineration" of such waste. The third deals with liability insurance and emergency planning.

A moratorium on the issuance of permits for any commercial facility "for the incineration or disposal" of infectious and chemotherapeutic waste is established by Section 3(a) of the Infectious Waste Act, 35 P.S. §6019.3(a). No such permits can be issued by DER until the adoption of the Infectious and Chemotherapeutic Waste Plan and then only if they are consistent with the provisions of the Plan.

We think the Legislature made a clear distinction in the Infectious Waste Act between facilities used for the disposal of infectious and chemotherapeutic waste and those used for collection, transportation, processing or storage. A statewide plan was deemed necessary for the former, revised regulations for the latter. This distinction also was apparent to both DER and the EQB. Regulations, first proposed on April 14, 1990 (20 Pa. B. 2113) and finally adopted on August 7, 1992 (22 Pa. B. 4185), substantially revised Chapters 271, 273, 283 and 285 of 25 Pa. Code so as to govern the collection, transportation, processing, storage and disposal of infectious and chemotherapeutic waste. The Waste Plan, adopted on May 15, 1990, limits its focus to "noncommercial and commercial incineration facilities rather than all

possible types of processing facilities", thereby reflecting the "legislative authority provided by" the Infectious Waste Act (Waste Plan, Section 1.4).

The Residents argue that the legislative findings in Section 1 of the Infectious Waste Act, 35 P.S. §6019.1, include a determination that infectious and chemotherapeutic waste is best managed at the place of generation "with a minimum of transportation...and exposure to the public...." If that finding is important to the development of a plan for the siting of incineration and other disposal facilities, it also is important to the siting of processing facilities. Assuming that to be true, the argument falls short. The legislative findings set forth the the Legislature's reasons for acting. Based on those findings, the Legislature chose to proceed in two ways - by the adoption of a statewide plan and by revisions to the regulations. Both activities were expected to accomplish the legislative purpose.

Why the Legislature chose to deal only with disposal facilities in the plan is not material. It might have realized that the location of disposal facilities would govern, to an extent, the siting of processing facilities. A geographical distribution of the former (as mandated by the Waste Plan) would influence the location of the latter. Or it might have concluded that the siting of processing facilities was best handled by regulation. Whatever the reason, the legislative scheme and language are clear.

Since the Waste Plan does not apply to processing facilities, the Permit did not have to be consistent with the Waste Plan and was not governed by the moratorium provisions of the Infectious Waste Act. It only needed to be consistent with the regulations governing infectious and chemotherapeutic waste processing facilities. The Residents have presented no evidence establishing any such inconsistency.

The APCA was violated, the Residents contend, because no plan approval or permit was required. DER and Permittee point out, however, that the VOC emissions were exempt under 25 Pa. Code §127.14(8) and that the boilers were exempt under 25 Pa. Code §127.14(3). The exemption of air contamination sources of "minor significance" is authorized by Section 5(a)(9) of the APCA, 35 P.S. §4005(a)(9), and is accomplished by §127.14 of the regulations. The Residents did not challenge the evidence regarding these exemptions or make any effort to show that the facilities are not "minor sources" as contemplated by the APCA. Accordingly, they have failed to show a violation of the APCA.

A consideration of traffic impacts is required by the Waste Plan, according to the Residents' next argument. Since we have held that the Permit did not have to be consistent with the Waste Plan, we could disregard this argument. However, the Residents also cite 25 Pa. Code §271.126, a provision in the municipal waste management regulations requiring an environmental assessment. Accordingly, we will review the issue on the basis of this regulatory provision.

25 Pa. Code §271.126 states that an environmental assessment must be included in an application for a municipal waste processing permit. 25 Pa. Code §271.127, which discusses the details of an environmental assessment, specifically mentions traffic. Consequently, Permittee was required to address this issue in its application. Permittee submitted documentation to DER regarding prior traffic studies involved in the permitting of other facilities located on the 52-acre tract and a letter from LCA Leasing, Inc. (the municipal waste transfer station) agreeing to relinquish 403 tons per day of its own authorized volume. DER referred this material to Penn DOT. PennDOT advised that, in view of LCA's relinquishment, there would be no net

increase in traffic from that previously authorized. DER accepted this advice and concluded that Permittee's proposed facility would not involve an impact on traffic.

While the Residents question the binding nature of LCA's relinquishment, they do little else to challenge the prior traffic studies. They rely instead on the testimony of Residents who experience the flow of traffic and the diesel fumes emanating from it. Obviously, these conditions already exist, caused apparently by the Westinghouse incinerator and to a lesser extent, by the transfer station[1]. Permittee's facility will not add to them. For this reason, we cannot say that DER abused its discretion in issuing the Permit. In reaching this conclusion, we are not in any way discounting traffic problems for persons living along S.R. 291. We are simply affirming that the Permit under review did not create and will not aggravate those problems.

DER's failure to hold a public hearing on the application is another target of the Residents' attack. The SWMA does not require the holding of a public hearing; the regulations at 25 Pa. Code §271.143(a) make it discretionary. DER "may" hold such a hearing "whenever there is significant public interest" or DER "otherwise deems a hearing to be appropriate." According to the testimony, DER rarely activates this provision unless someone requests it in writing. Even then, a hearing does not automatically follow. DER personnel consider whether there is a "significant" public interest and whether other informal procedures will be satisfactory.

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[1] They also would be caused by trucks going into and out of Permittee's truck-to-truck transfer operation, but the number of these vehicles is so small compared to the other facilities that the impact is minimal.

No written request for a hearing was made in this case. An oral request was made, however, several months before the Permit was issued. DER's reasons for not honoring that request have not been precisely stated. It is clear, however, that DER personnel had attended public meetings of Chester City Council when Permittee's proposed facility was considered. Certainly, DER witnesses believed that all Chester residents had been afforded ample opportunity to air their concerns at those meetings. In addition, DER personnel had met with the Reverend Strand for a discussion of the Residents' specific objections to the facility. It may have been concluded that a public hearing would not accomplish anything more.

Whatever the precise reasons, we are not prepared to hold, at this point and on the basis of a truncated record, that DER abused its discretion in not holding a public hearing. Furthermore, there is no evidence of any prejudice suffered by the Residents as a result of DER's action in this regard.

The constitutional argument advanced by the Residents draws upon Article I, Section 1, Section 26 and Section 27, of the Constitution of Pennsylvania. Section 1 declares the inherent rights of mankind, Section 26 declares a non-discrimination policy, and Section 27 declares environmental rights. These Sections should be read together, according to the Residents, to establish that all people in the Commonwealth are entitled to equal environmental protection. The concentration of waste management facilities in the City of Chester, therefore, places a disproportionate risk of environmental harm on its residents. Since 65% of the City population is African-American, DER's issuance of yet another permit constitutes "invidious environmental discrimination" and "environmental racism."

The Residents concede that, under current case law, they must prove invidious discriminatory intent and not merely historical coincidence: *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed. 2d 450 (1977); *Barsky v. Commonwealth, Department of Public Welfare*, 76 Pa. Cmwlth. 417, 464 A.2d 590 (1983), affirmed, 504 Pa. 508, 475 A.2d 742 (1983), and concede that they have obtained no evidence as yet to establish that intent. Nonetheless, they argue, DER's violations in connection with issuance of the Permit are so numerous and egregious that discriminatory intent can be presumed. Since we have not found any violations, we have no basis for any presumptions about DER's intent.

The evidence presented by DER and Permittee supports the absence of discriminatory intent. That evidence shows that the area around the site is evenly divided racially except on the north where African-Americans predominate. This evidence goes a long way toward undermining the Residents' claim of environmental racism. That claim is further undermined by evidence concerning the location of other major waste management facilities in southeastern Pennsylvania. Nearly all of them are surrounded by populations that are predominantly Caucasian. The greatest concentration of such facilities, contrary to the Residents' claim, is not in Chester but in lower Bucks County where Caucasians predominate.

On the basis of the evidence before us, we cannot conclude that DER's issuance of the Permit violated the constitutional provisions cited to us. We could end this Opinion at this point but are moved to comment further.

Life in organized society necessarily involves risks, burdens and benefits. These all increase as the society grows larger and more complex. Ideally, they should be shared equally by all members of the society, but that is rarely, if ever, possible. Transportation facilities cannot be everywhere;

some persons will be close to one, others will not. Whether this is looked upon as benefit or burden will depend on the outlook and interests of each person. Parks and recreational facilities also cannot be in every neighborhood. Those not near to such a facility may feel burdened by the distance while those adjacent to it may feel burdened by the proximity.

Numerous other examples can be given but they would be repetitive as far as the principle is concerned. The point is that all persons in society have a mixture of risks, burdens and benefits in varying proportions to other persons. The equitable distribution of these factors is one of the most important functions of representative government, one that occupies all branches of that government on a daily basis.

Waste management facilities, like other social instrumentalities, must be located somewhere. They can be subjected to close regulation to make them as acceptable as possible, but inevitably will bring with them features such as traffic, noise and fumes that many persons find socially undesirable. The purpose of a Host Community Agreement and accompanying fees is to compensate the host community for accepting such facilities. As stated by the Legislature in Section 102(a)(7) of the Municipal Waste Planning, Recycling and Waste Reduction Act, Act of July 28, 1988, P.L. 556, 53 P.S. §4000.102(a)(7), "it is appropriate to provide those living near municipal waste processing and disposal facilities with additional guarantees of the proper operation of such facilities and to provide incentives for municipalities to host such facilities."

The Host Community Agreement entered into between Permittee and the City of Chester reflects the wide variety of matters that can become the

subject of these negotiations. Not only fees (which, in this case, are 5 times larger than that mandated by statute), but employment of City residents and construction of a new access road are included.

The existence of the Host Community Agreement justified DER in concluding that the City of Chester was willing to accept the facility. That does not mean that DER could simply issue the Permit without regard for the law and the regulations. The Host Community Agreement was based on the unspoken assumption that the permit application would be subjected to the same scrutiny it would receive if no Agreement existed. It does mean, however, that DER's issuance of the Permit cannot amount to environmental discrimination toward the City of Chester. If the Residents seriously believe that they were subjected to discrimination in the location of this facility, they should have mounted a legal challenge against the Host Community Agreement in the law courts.

EHB Docket No. 93-234-MR

ORDER

AND NOW, this 20th day of October, 1993, it is ordered that the Petition for Supersedeas is denied.

ENVIRONMENTAL HEARING BOARD

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

DATED: October 20, 1993

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M. DIANE SMITH
SECRETARY TO THE BOARD

BOROUGH OF GLENDON	:	
	:	
v.	:	**EHB Docket No. 92-071-W**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES and	:	**Issued:** October 26, 1993
GLENDON ENERGY COMPANY, Permittee	:	

OPINION AND ORDER SUR
MOTION TO DISMISS AS MOOT

By Maxine Woelfling, Chairman

Synopsis:

An appeal of the extension of an air quality plan approval is dismissed as moot where the plan approval has expired.

OPINION

This matter was initiated by the February 20, 1992, filing of a notice of appeal by the Borough of Glendon (Borough) seeking review of the Department of Environmental Resources' (Department) January 23, 1992, extension of an air quality plan approval originally issued to Glendon Energy Company (GEC) on February 5, 1990. The plan approval, which was issued pursuant to the Air Pollution Control Act, the Act of January 8, 1960, P.L. (1959) 2119, as amended, 35 P.S. §4001 *et seq.* (Air Act), authorized the construction of a municipal waste resource recovery facility in the Borough of Glendon, Northampton County.

The municipal waste resource recovery facility at issue herein has been the subject of previous litigation relating to the solid waste permit

issued by the Department for the facility. The Commonwealth Court, in Borough of Glendon v. Department of Environmental Resources, ___ Pa. Cmwlth. ___, 603 A.2d 226 (1992), allocatur denied,___ Pa. ___, 608 A.2d 32 (1992), held that the Department erred in issuing a solid waste permit to GEC where its proposed facility was within 300 feet of a park and the owner of the park refused to waive the distance limitation as required by §511(d) of the Municipal Waste Planning, Recycling and Waste Reduction Act, the Act of July 28, 1988, P.L. 556, 53 P.S. §4000.511(d)(Act 101). The invalidation of the solid waste permit by the Commonwealth Court, as well as the February 1, 1993, expiration of the plan approval now challenged by the Borough, prompted the February 1, 1993, filing of a motion by GEC to dismiss the Borough's appeal as moot.

The Borough, in its February 26, 1993, response to the motion, urges the Board not to act on GEC's motion to dismiss and, instead, rule on the Borough's August 31, 1992, motion for summary judgment. This is necessary, the Borough contends, in order to end a continuing controversy regarding the Department's interpretation of §511(d) of Act 101. The Borough also asserts that GEC filed the motion to gain a tactical advantage in pending civil rights litigation against the Borough and that the matter is not moot because there is a possibility that GEC may contest the Department's decision not to grant an additional extension of the plan approval.[1]

The Department took no position regarding the motion.

As was recently stated in Empire Sanitary Landfill, Inc. v. DER, EHB Docket No. 92-050-W (Opinion issued September 10, 1993):

> A matter before the Board becomes moot when an event occurs during the pendency of the appeal which deprives the Board of the ability to provide effective relief. Carol Rannels v. DER,

[1] The Borough suggests a number of other alternative arguments designed to protect its future appeal rights. We need not summarize them.

EHB Docket No. 90-110-W (Opinion issued April 29, 1993). Generally speaking, the Board has no jurisdiction over moot cases, but exceptions to the mootness doctrine exist for instances where the conduct complained of is capable of repetition yet would evade review or where an action involves questions of great public importance. County Council of Erie v. County Executive of County of Erie, 143 Pa. Cmwlth. 571, 600 A.2d 257 (1991).

Here, the expiration of the plan approval has deprived the Board of any ability to grant effective relief with regard to the plan approval. Max Funk *et al. v.* DER, 1990 EHB 161. If the Department extends the plan approval once more or if GEC pursues a new plan approval application, the Borough would have the opportunity to contest the Department's action.

As for the Borough's assertion that the Board should decide its summary judgment motion in order that the issue of interpretation of §511(d) of Act 101 be laid to rest, it is unnecessary for us to do so.[2] The Commonwealth Court has already definitively addressed the issue and its interpretation of the statute is binding on the Board and the Department.

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[2] While the resource recovery facility must also have a valid solid waste permit in order to proceed with construction, 25 Pa. Code §283.1 *et seq.*, neither party has advanced any arguments regarding the relationship of regulatory approvals under the Air Act and the Solid Waste Management Act, the Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 *et seq.* Rather, their arguments are confined merely to the existence or non-existence of the two approvals.

O R D E R

AND NOW, this 26th day of October, 1993, it is ordered that GEC's motion to dismiss is granted and the Borough's appeal is dismissed as moot.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Richard S. Ehmann

RICHARD S. EHMANN
Administrative Law Judge
Member

Joseph N. Mack

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: October 26, 1993

cc: **DER Bureau of Litigation**
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M. DIANE SMITH
SECRETARY TO THE BOARD

HUNTINGDON VALLEY HUNT	:	**EHB Docket No. 93-133-W**
	:	
v.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** October 28, 1993

OPINION AND ORDER SUR
MOTION TO DISMISS AND
MOTION FOR JUDGMENT ON THE PLEADINGS

By Maxine Woelfling, Chairman

Synopsis

A motion to dismiss for lack of jurisdiction is denied because the Department failed to show that its "decision" did not affect appellant's rights, privileges, or obligations, and that its decisions regarding the private use of public land are generally not appealable.

A motion for judgment on the pleadings is denied because there remain outstanding issues of material facts and because neither party is clearly entitled to judgment as a matter of law. Whether a party with a valid fox chasing permit has "control" over designated hunting areas in a state park cannot be resolved when the only information before the Board is the notice of appeal.

OPINION

This matter originated on May 20, 1993, when the Huntingdon Valley Hunt (Huntingdon) filed a notice of appeal from the Department of Environmental

Resources' (Department) April 21, 1993, letter denying Huntingdon's request to conduct fox chasing in Nockamixon State Park twice a week from September 1, 1993, to March 31, 1994.[1] Currently before the Board for disposition are the Department's August 26, 1993, motions to dismiss and for judgment on the pleadings.

The Department contends Huntingdon's appeal should be dismissed because the April 21 letter did not constitute an appealable action. The Board has jurisdiction to hear appeals from Department "actions" and "adjudications," as those terms are defined by our rules and the Administrative Agency Law. An "action" is defined by our rules as:

> 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....

25 Pa. Code §21.1(a). An "adjudication" is similarly defined by the Administrative Agency Law. 2 Pa. C.S. §101. We have long interpreted these provisions to mean that appealable actions are ones that affect personal or property rights, privileges, or obligations. County of Clarion v. DER, EHB Docket No. 92-274-W (Opinion issued April 23, 1993). See also, Benson Lincoln Mercury, Inc. v. Cmwlth., Dept. of Transportation, 145 Pa. Cmwlth. 159, 602 A.2d 496 (1992) (to be appealable as an "adjudication" under 2 Pa. C.S. §101, the agency action must have an effect on the party's rights).

The Department's April 21 letter states, in relevant part:

> This is in response to your letter dated March 22, 1993, regarding your request to hunt fox in

---

[1] Although the Department used the term "fox hunting" to describe Huntingdon's activity, we use the term "fox chasing," since that is how the activity is described in §2945 of the Game and Wildlife Code, 34 Pa. C.S. §2945.

> the designated hunting areas of Nockamixon State Park from September 1 through March 31....
>
> ... I am certain the participants in the hunt are conscientious and the mounts and hounds are well trained. However, due to the unpredictability of the fox, I have concern with the speed of the chase and the areas into which it may evolve.
>
> In reference to the Gallows Run Hounds activities, these are strictly demonstration in nature and their impact on Nockamixon State Park is being evaluated. It would not be prudent at this time to introduce the activities you suggest into the same area, as this could very easily interfere with this evaluation.
>
> I must, therefore, deny the Huntingdon Valley Hunt permission for the fox hunting activities that you propose in Nockamixon State Park....

While the Department does not deny that its April 21 letter amounts to a "decision" or "determination," it contends the letter did not affect any of Huntingdon's rights, privileges, or obligations, and, therefore, could not have been an "action" or "adjudication" under the Board's rules or the Administrative Agency Law.

The Department claims its letter did not abridge Huntingdon's rights because Huntingdon does not have a right to conduct fox chasing wherever it would like. Citing §2509(b) of the Game and Wildlife Code, 34 Pa. C.S. §2509(b), which states:

> In addition to the restrictions imposed by subsection (a), it shall be unlawful for any person hunting foxes by means of horses and hounds to hunt on any land which is not controlled by them.

the Department contends Huntingdon did not "control" the land in Nockamixon State Park and, therefore, had no right to chase fox there.

In response, Huntingdon claims that it does indeed have a right to chase fox in the park and the April 21 letter denied it that right. Huntingdon

contends it has a valid hunting license[2] from the Pennsylvania Game Commission, the Department designated areas for hunting in the park, and the Department's regulations at 25 Pa. Code §31.10 state that anyone with a valid hunting license may hunt in designated hunting areas as long as they do so in accordance with the Game Commission's rules and regulations. Because Huntingdon has been denied a right granted every other person with a hunting license, Huntingdon argues the April 21 letter was a Department "action" or "adjudication."

The problem with the Department's position in this motion is that it presumes the validity of its arguments. Before we can find that none of Huntingdon's rights or privileges were abridged, we must accept the Department's argument that Huntingdon did not "control" this land under 34 Pa. C.S. §2509(b). This issue, however, goes to the merits of Huntingdon's appeal and cannot be resolved at this stage of the proceeding.

The Department also contends that decisions concerning the private use of public lands under Department control are not appealable to the Board, and cites the Board's decisions in Bowman Petroleum Co., Inc. v. DER, 1987 EHB 583, Bob Groves Plymouth Co., *et al.* v. DER, 1976 EHB 266, and Joseph McFadden v. DER, 1974 EHB 25, for support. None of these cases, however, stands for this position. In Bowman, we held that the Board lacked the authority to order the Department to reimburse the appellant for the costs it incurred in conducting a Department-ordered pressure test of its underground storage tank. 1987 EHB at 584. In Bob Groves, we held that the Board lacked the authority

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[2] Under §2945(b) of the Game Code, 34 Pa. C.S. §2945(b), Huntingdon must acquire a fox chasing permit from the Game Commission and need not receive a furtaking license under Chapter 27 [34 Pa. C.S. §§2701-2743]. Huntingdon's use of the term "hunting license" is incorrect. For purposes of this motion to dismiss, we will presume Huntingdon meant to use the term "fox chasing permit."

to order Bob Groves Plymouth to reimburse the Borough of Ambler for work the borough did on a culvert. 1976 EHB at 267. And, in McFadden, we held that the Board lacked jurisdiction over contractual disputes between the Department and its contractors. 1974 EHB at 27.[3] While the Department argues it is unreasonable to conclude that the legislature intended to invest the Board with the power to review all of the Department's decisions regarding the utilization of state parks and forests, it failed to cite any statutory provisions or cases in support. On the contrary, the language of the Environmental Hearing Board Act giving the Board jurisdiction over the Department's "orders, permits, licenses or decisions" and of the definitions of the terms "action" and "adjudication" in our rules and the Administrative Agency Law do not contain any such limitations.

Accordingly, we find that the Department's April 21 letter denying Huntingdon's request to chase fox in Nockamixon State Park is an appealable action. The Department's motion to dismiss is denied.

Motion for Judgment on the Pleadings

The Department has also moved for judgment on the pleadings under Pa. R.C.P. No. 1034. We may grant judgment on the pleadings where there are no

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[3] These decisions notwithstanding, we have had cases before us based on Department "decisions" similar to that contained in the April 21 letter, but none was resolved on the issue of whether the "decision" was an appealable action. See, Academy of Model Aeronautics v. DER, 1990 EHB 34 (Department decision denying appellant permission to fly radio controlled aircraft in two state parks); Roger Wirth v. DER, 1990 EHB 1634 (Department decision prohibiting snowmobiling on a pond in a state park).

factual disputes and the law is clear.[4] James F. Wunder v. DER, EHB Docket No. 91-404-MR (Opinion issued January 22, 1993).

We must deny the Department's motion for judgment on the pleadings because we believe it is an inappropriate mechanism for summary disposition of this case. A motion for judgment on the pleadings "is to permit an [overall] examination of the pleadings...to determine whether judgment should be entered upon the pleadings prior to trial. It is not a 'summary judgment' proceeding.... It gives a party an unqualified opportunity to raise the question [of] the legal sufficiency of the opponent's pleadings under the pleading rules." 6 Standard Pennsylvania Practice 2d §31:1. In Harvey v. Hansen, the Supreme Court reiterated the distinction between summary judgment and judgment on the pleadings. 299 Pa. Super. 474, 445 A.2d 1228 (1992). Citing Goodrich-Amram 2d §1035(a)(3), the court stated:

> The motion for judgment on the pleadings is limited exclusively to the pleadings themselves and no outside material may be considered.... The motion for summary judgment is designed to supplement the motion for judgment on the pleadings to provide for an equivalent summary disposition of the case where the pleadings may be sufficient on their face, to withstand a demurrer but where, in actuality, there is no genuine issue of fact and this can be conclusively shown through depositions, answers to interrogatories, admissions or affidavits.

299 Pa. Super. ___, 445 A.2d at 1231 n.7.

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[4] While the Board has treated notices of appeal as pleadings for purposes of deciding motions for judgment on the pleadings, they are not true pleadings. Upper Allegheny Joint Sanitary Authority v. DER, 1989 EHB 303, 306 n.5. Under Pa. R.C.P. 1019(a), which governs the contents of pleadings, "[t]he material facts on which a cause of action...is based shall be stated in a concise and summary form." See, Santiago v. Pennsylvania National Mutual Casualty Insurance Co., 418 Pa. Super. 178, 613 A.2d 1235 (1992). In contrast, a notice of appeal need only contain a party's objections to the Department's action. 25 Pa. Code §21.51(c); see, Croner, Inc. v. Cmwlth., Dept. of Environmental Resources, 139 Pa. Cmwlth. 43, 589 A.2d 1183 (1991).

The Department has not, however, objected to the legal sufficiency of Huntingdon's notice of appeal. It has, instead, moved the Board to summarily resolve this appeal on its merits. Although judgment on the pleadings can be used to resolve the merits of a lawsuit, see, 6 Standard Pennsylvania Practice 2d, §31:8 (stating that such a motion can be raised to decide a controlling question of law when there is no dispute about the facts), it is not appropriate in this case because no facts were alleged in the notice of appeal and, therefore, all of the material facts are still in dispute.

In its notice of appeal, Huntingdon states:

> Denial was in violation of the Regulations for State Recreation Areas (25 Pa. Code Section 31.1 et seq.) which permit lawful hunting in accordance with Pennsylvania Game Commission rules.

Based on this scant information, the Department would like us to grant judgment in its favor because Huntingdon does not "control" the land in Nockamixon State Park, as required by 34 Pa. C.S. §2509(b), and because Huntingdon's activities would not comply with the Department's regulations regarding the use of state parks.

The Department's regulations make it unlawful for any person to conduct or participate in an "exhibition, competition, demonstration or organized event" without the Department's written permission or to ride or lead horses in "any...area which is not specifically designated for horseback riding." 25 Pa. Code §31.5(a)(6) and (20). The regulations further clarify that horses are only permitted "on the right side of State Recreation Area roads open to motor vehicles and designated horseback riding trails and areas." 25 Pa. Code §31.12(b). Huntingdon's notice of appeal does not contain any information from which we can determine whether its fox chase will violate any of these rules. Accordingly, issues of fact still exist.

As we stated above, the Game and Wildlife Code prohibits fox chasing with horses and hounds on land not "controlled" by the participants. 34 Pa. C.S. §2509(b). Looking at Huntingdon's notice of appeal, we cannot determine the nature of Huntingdon's permit to chase fox or whether Department personnel consider a fox chase permit sufficient "control" of a state park. Although the Department would like us to make a blanket statement regarding the meaning of the term "control" under §2509(b), we do not have enough information before us to apply §2509(b) to Huntingdon's proposed fox chase. Accordingly, issues of fact and law still exist.

O R D E R

AND NOW, this 28th day of October, 1993, it is ordered that the Department's motions to dismiss and for judgment on the pleadings are denied.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

DATED: October 28, 1993

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M. DIANE SMITH
SECRETARY TO THE BOARD

NEW CASTLE TOWNSHIP BOARD OF SUPERVISORS	:	
	:	
v.	:	EHB Docket No. 92-540-W
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: October 29, 1993
and READING ANTHRACITE COMPANY, Permittee	:	

OPINION AND ORDER SUR MOTION FOR SUMMARY JUDGMENT OR IN THE ALTERNATIVE MOTION TO LIMIT ISSUES

By Maxine Woelfling, Chairman

Synopsis

A permittee's motion for summary judgment in a third-party appeal of the renewal of a surface mining permit is denied. Material issues of fact remain, even in light of factual allegations deemed admitted as a result of appellant's failure to respond to the permittee's request for admissions. In addition, permittee has failed to establish it is entitled to judgment as a matter of law. Permittee's alternative motion to limit issues is also denied; although, in the abstract, the terms and conditions of a 1985 surface mining permit cannot be attacked in an appeal of the renewal of the permit, it is impossible to limit the appellant's objections where the relevant permits have not been provided to the Board.

OPINION

This matter arises out of New Castle Township Board of Supervisors' (New Castle) December 11, 1992, notice of appeal from the Department of

Environmental Resources' (Department) October 8, 1992, issuance of various permits, including a surface mining permit, which authorize Reading Anthracite Company (Reading Anthracite) to conduct surface coal mining at a site in New Castle Township, Schuylkill County, known as the Wadesville P-33 Stripping.

Presently before the Board for disposition is Reading Anthracite's February 17, 1993, motion for summary judgment or, in the alternative, motion to limit issues. Although it is rather difficult to characterize Reading Anthracite's arguments in support of its motion, the thrust of them is that no material facts are at issue due to New Castle's failure to respond to Reading Anthracite's request for admissions and that Reading Anthracite is entitled to judgment as a matter of law because New Castle abandoned certain of the objections set forth in its notice of appeal and is precluded from raising others as a result of its failure to appeal the original issuance of the surface mining permit in 1985. The alternative motion to limit issues seeks to prohibit New Castle from presenting any evidence which could have been presented in a challenge to the 1985 issuance of the surface mining permit.

Neither New Castle nor the Department responded to the motion.

The Board will grant summary judgment if the pleadings, depositions, answers to interrogatories, responses to requests for admissions and affidavits show there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Pa. R.C.P. No. 1035(6); Robert L. Snyder, et al. v. Dept. of Environmental Resources, ____ Pa. Cmwlth. ____, 533 A.2d 1001 (1991), petition for allocatur granted, ____ Pa. ____, 606 A.2d 904 (1992). In deciding a motion for summary judgment the Board will view the facts in a light most favorable to the non-moving party.

New Hanover Corp. v. DER, EHB Docket No. 90-225-W (Opinion issued April 19, 1993). For the reasons set forth below, Reading Anthracite's motion for summary judgment is denied.

According to the February 15, 1993, affidavit of counsel for Reading Anthracite, New Castle received Reading Anthracite's January 4, 1993, request for admissions no later than January 8, 1993. Since New Castle neither responded to the request nor asked for an extension to do so within thirty days, all matters set forth in the request are deemed admitted, Pa. R.C.P. No. 4014(b); Manor Mining and Contracting Corp. v. DER, 1990 EHB 66.

The deemed admissions establish the following facts:

> - Notice that Reading Anthracite had made application to renew its surface mining permit, which was originally issued in 1985, was published in the Pottsville Republican, a newspaper of general circulation (Request for Admissions 1, 2, 5 and 14).
>
> - Despite having actual and constructive knowledge that Reading Anthracite had applied to renew its surface mining permit, New Castle made no attempts to examine the permit application file in the Department's offices and did not submit any written objections to the Department (Request for Admissions 3, 4, 12).
>
> - New Castle has not been denied access to the Department's file relating to the permit (Request for Admissions 7).
>
> - The ownership information in the original and renewal permit files is identical (Request for Admissions 11).
>
> - New Castle does not own any property within the boundaries of the surface mining area or in the vicinity of the operation (Request for Admissions 8, 9).
>
> - Reading Anthracite owns the property within 300 feet of the occupied dwelling referenced in New Castle's notice of appeal (Request for Admissions 17).

- The boundaries of the renewal permit are identical to those of the original permit, with the exception of an 0.6 acre incidental boundary correction approved in 1988 (Request for Admissions 10).

- New Castle has not performed any studies regarding the alleged impacts from noise and blasting (Request for Admissions 16).

We will first address Reading Anthracite's arguments regarding New Castle's abandonment of certain of its objections.

Reading Anthracite contends that the deemed admissions result in the abandonment of the first two objections in New Castle's notice of appeal. These two objections state:

> 1. New Castle Township was never supplied with a copy of the permits, maps, etc. so that the township is not fully aware of the exact location, nature and scope of permitted mining activities.
>
> 2. DER did not supply New Castle Township with any help or technical assistance in reviewing the file in question.

New Castle's objections go to its contention that the Department was obligated to supply it with the permit application materials and assist it in reviewing them; the deemed admissions, on the other hand, are directed to New Castle's purported obligation to seek out the permit application materials and the Department's not hindering its access to them. Therefore, it cannot be concluded on the basis of the deemed admissions that Reading Anthracite is entitled to summary judgment with regard to the first two objections in New Castle's notice of appeal.

Reading Anthracite has also argued that it is entitled to summary judgment because New Castle's failure to challenge the 1985 issuance of the original permit operates to preclude it from attacking the renewal permit, since, with the exception of an 0.6 acre incidental boundary correction, the

boundaries of both permits are identical. As a general proposition, a party which fails to appeal a Department action is precluded from challenging that action in a subsequent proceeding. Department of Environmental Resources v. Wheeling-Pittsburgh Steel Corporation, 473 Pa. 432, 375 A.2d 320 (1977), cert. denied, 434 U.S. 969 (1977). Where renewal of a surface mining permit is at issue, however, a party is not completely barred from challenging the renewal by its failure to challenge the original permit issuance, for there may be differences between the permit as originally issued and the permit as renewed. Arthur and Carolyn Richards v. DER and Willowbrook Mining Company, 1990 EHB 382. Obviously, the critical issue is what was covered by the 1985 permit.

The deemed admissions establish that the boundaries of the original and renewal permits are almost identical. Since we have not been provided either the 1985 permit nor the renewal permit, it is impossible to decide what New Castle cannot challenge in this proceeding. All doubts must be decided in favor of the non-moving party and the moving party must demonstrate that its right to summary judgment is clear and free from doubt. That is not the case here.

Reading Anthracite has, in the alternative, moved to limit the issues in this appeal to preclude those issues which could have been raised in an appeal of the 1985 issuance of the surface mining permit. Again, without having the two permit documents before the Board, it is impossible to relate them to New Castle's objections. Therefore, the motion is denied.

ORDER

AND NOW, this 29th day of October, 1993, it is ordered that:

1) Reading Anthracite's motions for summary judgment and to limit issues are denied; and

2) New Castle shall file its pre-hearing memorandum on or before November 16, 1993.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

DATED: October 29, 1993

cc: **Bureau of Litigation**
Library: Brenda Houck
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Saint Clair, PA
For the Permittee:
James P. Wallbillich, Esq.
FRUMKLIN, SHRALOW & CERULLO
Pottsville, PA

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M. DIANE SMITH
SECRETARY TO THE BOARD

HAMBURG MUNICIPAL AUTHORITY/ BOROUGH OF HAMBURG	:	
v.	:	**EHB Docket No. 93-113-MR**
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: November 2, 1993**

OPINION AND ORDER
SUR
MOTION FOR SUMMARY JUDGMENT

Robert D. Myers, Member

Synopsis

Summary judgment is denied in a proceeding involving the obligation of a public water supplier to provide continuous filtration and disinfection by November 30, 1993 rather than by December 31, 1995 when there is a genuine dispute over the meaning of residual disinfectant concentrations measured in the water system and over the particular timetable applicable thereto.

OPINION

On May 4, 1993 the Borough of Hamburg (Borough) and the Hamburg Municipal Water and Sewer Authority (Authority) filed a Notice of Appeal seeking review of a Compliance Order (C.O.) issued by the Department of Environmental Resources (DER) on April 6, 1993. The C.O., issued pursuant to provisions of the Pennsylvania Safe Drinking Water Act (SDWA), Act of May 1, 1984, P.L. 206, 35 P.S. §721.1 *et seq.*, and Section 1917-A of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, as amended, 71

P.S. §510-17, directed Appellants to provide continuous filtration and disinfection for water derived from Furnace Creek Impounding Reservoir by November 30, 1993 or to sever the connection of this source to Appellants' water system by the same date.

On August 31, 1993 DER filed a Motion for Summary Judgment to which Appellants filed an Answer on September 24, 1993. In the Motion, DER asserts that daily samples taken by the Authority during November 1989 at the Piede residence (home of the first customer on the distribution system) showed a residual disinfectant concentration less than 2.5 milligrams per liter (mg/l). As a result, Appellants were required under 25 Pa. Code §109.202(c)(1)(iii)(B)(II)(-g-) to provide continuous filtration and disinfection within 48 months, i.e. by November 30, 1993. Since the C.O. is based upon the Authority's own samples and simply requires Appellants to comply with the regulation, DER's argument proceeds, there is no dispute as to any material fact and DER is entitled to judgment as a matter of law.

Appellants respond by alleging that the water system falls within the scope of 25 Pa. Code §109.202(c)(1)(iii)(A)(II), which provides that a system with extended contact times between the point of application and the first customer may maintain a residual disinfectant concentration less than 2.5 mg/l if the contact times established by the EPA are achieved. On the basis of this provision, Appellants argue, the November 1989 samples do not establish a failure to maintain an adequate residual disinfectant concentration. As a result, Appellants are governed by 25 Pa. Code §109.202(c)(1)(iii)(B)(III), which allows them until December 31, 1995 to provide continuous filtration and disinfection.

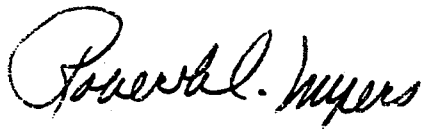
We can render summary judgment if the pleadings, answers to interrogatories, and admissions on file, together with the affidavits, if any,

show that there is no genuine issue as to any material fact and that DER is entitled to judgment as a matter of law: Pa. R.C.P. 1035(b). We must view the Motion in the light most favorable to Appellants: *Robert C. Penoyer v. DER*, 1987 EHB 131. When we apply these principles, it becomes obvious that we cannot grant the Motion. There is a dispute as to a material fact and DER, at this point, is not entitled to judgment as a matter of law.

ORDER

AND NOW, this 2nd day of November, 1993, it is ordered that the Motion for Summary Judgment is denied.

ENVIRONMENTAL HEARING BOARD



ROBERT D. MYERS
Administrative Law Judge
Member

DATED: November 2, 1993

cc: **Bureau of Litigation**
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M. DIANE SMITH
SECRETARY TO THE BOARD

HAROLD JOHNSON	:	
	:	
v.	:	**EHB Docket No. 93-137-MR**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: November 2, 1993**

OPINION AND ORDER
SUR
MOTION TO DISMISS

Robert D. Myers, Member

Synopsis

A Motion to Dismiss an appeal as untimely is denied where the Appellant filed with the Board by facsimile transmission, 29 days after receiving notice of DER's action, a letter stating his desire to appeal and the reasons supporting it. The letter was docketed as an appeal when received by the Board.

OPINION

In a Notice of Appeal received by the Board on May 26, 1993, Harold Johnson (Appellant) stated, *inter alia*, that he was challenging action of the Department of Environmental Resources (DER) denying an Official Plan Revision with respect to Appellant's property in Metal Township, Franklin County. Notice of the action had been received by Appellant on April 21, 1993 by mail.

On August 27, 1993 DER filed a Motion to Dismiss the Appeal for lack of jurisdiction, contending that it was untimely. Appellant filed an Answer

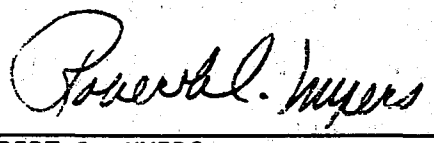
to the Motion on September 21, 1993. As alleged in the Answer, Appellant first filed a letter with the Board by facsimile transmission on May 20, 1993, stating his desire to appeal and the reasons supporting it. This letter was followed six days later by a formal Notice of Appeal on the Board's form.

The letter was docketed as an appeal when it was received on May 20, 1993. That was 29 days after Appellant received notice of DER's action and was clearly a timely filing. Even if the letter had been viewed as incomplete, it would have been docketed as a skeleton appeal under 25 Pa. Code §21.52(c) and would have been considered timely.

ORDER

AND NOW, this 2nd day of November, 1993, it is ordered that the Motion to Dismiss is denied.

ENVIRONMENTAL HEARING BOARD



ROBERT D. MYERS
Administrative Law Judge
Member

DATED: November 2, 1993

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M. DIANE SMITH
SECRETARY TO THE BOARD

LAWRENCE BLUMENTHAL	:	
	:	
v.	:	**EHB Docket No. 91-161-E**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: November 2, 1993**

ADJUDICATION

By Richard S. Ehmann, Member

Synopsis

In an appeal from DER's issuance of an administrative order, DER bears the burden of proof under 25 Pa. Code §21.101(a) and (b). Where, in the course of an appeal, a party waits until the filing of its Post-Hearing Brief to advance the legal theory recited therein as support for its position in the appeal and has failed to raise this theory earlier in any filing with this Board, the Board will not consider that theory in preparing its adjudication. If, in its Post-Hearing Brief, a party fails to address in any fashion the legal theories advanced prior to the merits hearing to support its position, those theories are deemed abandoned by that party. Where DER's administrative order is based on a legal theory which is subsequently abandoned in DER's Post-Hearing Brief, an appeal from such an order is sustained.

Where DER argues for individual liability through a piercing of the corporate veil, it must not only advance this theory before the merits hearing but must also supply proof sufficient to establish that such a piercing is factually justified.

Background

On March 19, 1991, the Department of Environmental Resources ("DER") issued an "Amended Order" to Lawrence Blumenthal ("Blumenthal") and Wayne Junk Company ("Wayne"). This order was issued pursuant to Sections 5, 316, 601 and 610 of the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §§691.5, 691.316, 691.601 and 691.610 (the "Clean Streams Law"). It was also issued pursuant to Sections 102, 104, 602 and 608 of the Solid Waste Management Act, Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §§6018.102, 6018.104, 6018.602 and 6018.608 ("SWMA"). Finally, DER cites Section 1917-A of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-17 ("Section 1917-A") and the rules and regulations promulgated under these statutes as authority for its administrative order. DER's order states that property owned by Wayne and/or Blumenthal in Waynesboro, Franklin County is contaminated with lead. It directs the owners of the property to cease dumping or depositing of lead on the property or allowing this to occur. It requires them to restrict access to the site, to submit to DER any records of how the site is contaminated, and to hire a qualified independent environmental consultant, who then will submit a site contamination assessment plan to DER which is to be implemented after DER approves it. Thereafter, the owners are to submit a plan to clean up the

contamination based on the assessment plan's results and, after DER approves the clean up plan, the owners are to implement it. On April 23, 1991, Blumenthal filed an appeal from DER's order with this Board. Wayne took no appeal.

Preliminarily, we note that this is not DER's first administrative order issued to Wayne and Blumenthal as to alleged lead contamination on this property in Waynesboro. On July 18, 1989, DER issued Blumenthal, Charles Fruman and Wayne an administrative order (later amended on September 13, 1989) which directs these three recipients to study lead contamination at this site and then to abate it. Blumenthal also appealed that order to this Board and sought a supersedeas thereof. In an opinion issued on March 6, 1990,[1] former Board Member Terrance J. Fitzpatrick granted supersedeas because DER's order was issued solely under the SWMA and that Act does not authorize DER to assign responsibility for such a clean up based solely on property ownership. Thereafter, on January 28, 1993, we denied DER's Motion To Consolidate the instant appeal with that earlier appeal at Docket No. 89-230-E. We had previously sustained Blumenthal's Motion For Summary Judgment in this earlier appeal by an opinion and order dated October 26, 1992,[2] and thus concluded that there was nothing with which to consolidate this appeal.

Thereafter, we denied DER's Motion For Summary Judgment in the instant appeal by Order dated February 18, 1993, and with the filing of the

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1 1990 EHB 187.

2 1992 EHB 1350.

parties' Pre-Hearing Memorandum, scheduled the merits hearing in this appeal for May 3, 1993. After that hearing the parties each filed a Post-Hearing Brief.

DER's Brief makes three arguments in support of its order. It asserts that DER has proven that the lead in the soil at this site poses a threat of pollution to the waters of the Commonwealth, so under Section 316 of the Clean Streams Law (35 P.S. §691.316) DER prevails. Next, it asserts it can proceed against Wayne, as titleholder of the property, to abate a public nuisance. Finally, DER argues that Blumenthal can be made to abate the nuisance personally by piercing the corporate veil of Wayne. In response, Blumenthal urges that DER has failed to meet its burden of proof because it showed lead without showing soil conditions which would cause leaching. His Brief also argues that Wayne cannot be compelled to carry out site clean up because it is exempt under the Hazardous Sites Clean Up Act (citation omitted throughout Blumenthal's Brief). Finally, Blumenthal asserts that DER cannot make a shareholder of a defunct corporation financially liable where Wayne has an asset but no liabilities. The parties are deemed to have abandoned all other issues not raised in these Post-Hearing Briefs. Lucky Strike Coal Co., et al. v. Commonwealth, DER, 119 Pa. Cmwlth. 440, 547 A.2d 447 (1988).

The record in this appeal consists of a merits hearing transcript of 94 pages and a Stipulation of the parties which is Board Exhibit No. 1. In the Stipulation document filed by the parties they stipulate to numerous facts. They also stipulate that the Board should use the transcripts of the depositions of Blumenthal and Arthur Howard Hamner (each dated November 17,

1989) and the portion of the supersedeas hearing transcript of January 11, 1990, relating to Blumenthal's testimony in the appeal at Docket No. 89-230-E as testimony in the instant appeal. After a full and complete review of the entire record in this appeal, this Board makes the following findings of fact.

FINDINGS OF FACT

1. The Appellant is Lawrence Blumenthal who resides at 2130 Fairfax, Hagerstown, Maryland 21740. (Stip.)[3] When deposed in November of 1989, he was 70 years old (B-4)

2. The Appellee is DER, the agency within the executive branch of government with the responsibility to administer the SWMA, the Clean Streams Law, the Hazardous Sites Cleanup Act ("HSCA"), Act of October 18, 1988, P.L. 756, No. 108, 35 P.S. §6020.101 *et seq.*, and the rules and regulations promulgated thereunder. (DER's Order attached to Blumenthal's Notice Of Appeal)

3. On March 19, 1991, DER's amended administrative order was issued to Blumenthal and Wayne. (Stip.)

4. In 1949, Max Zukerman ("Zukerman") operated a small junkyard at the site which is the subject of this Order. (H-4-5)

5. As a portion of his junkyard operation, Zukerman purchased used automobile batteries which he had his employees dismantle at this site.

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[3] Stip. is a reference to the parties' Stipulation. T-__ is a reference to a page of the hearing transcript. S-__ is a reference to the supersedeas transcript, while H-__ is a reference to the Hamner Deposition and B-__ is Blumenthal's deposition.

(H-5-6, 12; Stip.) Zukerman's employees would crack open the batteries and pile their lead plates in barrels for resale. (H-6) The battery acids were drained into Waynesboro sewers. (B-24) The broken battery cases were accumulated for 2 or 3 months and then Zukerman had them crushed and buried in pits approximately 10 feet x 6½ feet x 6 feet. These pits were located on the north side of the building at the site and usually had 2 to 3 feet of battery casings in them which were in turn covered with 2-3 feet of "good" dirt. (H-6, 12, 13)

6. Zukerman carried on his battery salvage operation until he got "bad health". (H-11)

7. In 1957, Blumenthal and Charles Fruman purchased this property from Zukerman to operate a waste paper and scrap iron business there. Blumenthal and Fruman also bought copper, brass and aluminum scrap. (S-8)

8. When Wayne's property was first purchased by Blumenthal and Fruman in 1957, they paid $32,000 for it, the building, and a truck scale. (B-17) At that time, Blumenthal was unaware of batteries being disposed of there by Zukerman. (S-9; Stip.)

9. Blumenthal and Fruman would buy used automobile batteries also, but they never broke batteries or disposed of batteries at the site and instead, stacked them on pallets to resell to scrap wholesalers. (S-9; Stip.)

10. There was no evidence of battery disposal at the site when Blumenthal and Fruman bought the property. (S-9; Stip.)

11. In the early 1960's, Fruman became ill and wanted to sell his interest in this business, so he and Blumenthal incorporated as Wayne. (S-8)

They then transferred title to the site to Wayne on April 1, 1959. (S-38; Stip.)

12. When Fruman died Blumenthal bought his shares of stock and was the sole decision maker for the company. (B-9)

13. By the time of the property's transfer to Wayne, Blumenthal was aware that batteries had been disposed of on this site (S-39-40) because pieces of the battery cases worked their way to the surface. (S-9, 10)

14. During the time Wayne was in operation, some years it made profits and some years it had big losses. (B-11)

15. Wayne ceased operation in 1979 because it was no longer profitable and because Blumenthal had a broken arm and broken leg. (B-11-12)

16. After Wayne ceased business in 1979, Blumenthal arranged to have the property's contents, including the building at the site, sold at public auction. (B-13, 14) This netted a total of $7,000. (B-13-14; S-28)

17. Wayne's only current asset is the site. (B-10, Stip.)

18. Since closure of Wayne, Blumenthal has been retired, living on social security and his investments, although he now works part-time for his son as a mechanic. (S-18; B-4-5)

19. Other than the site owned by Wayne, Blumenthal owns his home in Maryland and a piece of property in York, Pennsylvania which his son uses. Blumenthal owns these properties jointly with his wife. (B-6; S-38)

20. Today Wayne is owned by Blumenthal and his wife, but his son, Richard Blumenthal, who has been president of Wayne since about 1979, has some nominal shares. (B-9)

21. Wayne was incorporated for Blumenthal and Fruman by Attorney Bob Schumaker of Waynesboro, who drew up its bylaws and prepared its books, but he is now deceased and Blumenthal does not know where those records are. Attorney Schumaker also handled the sale of the property from Zukerman. (B-9)

22. Despite Attorney Schumaker's setting the corporation up, no share certificates were formally issued by Wayne. (B-9)

23. Blumenthal was responsible for preparation of Wayne's annual financial statements to banks and the government. He filed its tax returns but Wayne never prepared formal annual reports. (B-10-11)

24. At one point near 1977, during its operation, Wayne was about $25,000 behind in payments to the federal government of withholding taxes and the government threatened to lien Wayne's property, so Blumenthal borrowed the money personally to pay off the government. (B-11; S-27)

25. Blumenthal has twice tried to sell the Wayne site. The first time he had an offer for it of $65,000, but the deal fell through. (B-17,18) When he tried to arrange a sale of the property again several years ago, he had received an offer to purchase it for $38,000 but the prospective buyer backed out of the purchase. Blumenthal was later told that the reason he backed out of the purchase was because of the battery casings buried there. (B-18; S-12)

26. Based on his inability to sell this site, Blumenthal now thinks its value is less than zero. (B-17)

27. After being unsuccessful in selling this property, Blumenthal contacted DER to see if it could tell him what to do to make it saleable and

DER suggested that he arrange for some tests of the site's soil. (B-21; S-10-11)

28. Blumenthal collected some samples of soils from this property and had them analyzed by Enviro Lab. (B-21-22) The test results showed 6,700 parts of lead per million parts of soil. (T-14) Blumenthal paid the costs of these analyses out of his own pocket. (B-22)

29. After DER was shown the Enviro Lab's test results it sent Blumenthal a letter saying he was running a toxic waste site. DER's letter directed him to hire an environmental consultant and asked him to fence the area where the batteries were buried. (B-19-20; S-11)

30. Blumenthal fenced in that portion of the site where the battery casings were buried at his own expense. (B-20)

31. Through the scrap industry Blumenthal found a consultant who would address lead problems, but the consultant wanted $12,000 just to prepare a plan to test the site and Blumenthal could not afford that. (S-12)

32. According to DER's records an employee named Bob Stewart ("Stewart") collected a sample of the soil at the site to have it analyzed for leachable lead. Analyses of this sample showed 18.3 milligrams of leachable lead per liter. (T-14, 51) DER neither called Stewart nor its chemical analyst as a witness.

33. Anthony Lawrence Martinelli ("Martinelli") was employed by DER as a soils scientist since 1991. (T-10-12) Martinelli received a Bachelor's degree in agronomy and environmental science from Delaware Valley College in 1990. (T-11) Martinelli works in DER's Hazardous Sites Cleanup Program and is

this program's project officer for the Wayne site, which DER believes to be eligible for action under the Hazardous Sites Cleanup Act because of the high level of lead there. (T-13)

34. In addition to the two samples referenced above, DER did further site sampling in January of 1993. (T-15, 24-25)

35. Martinelli cannot verify that Blumenthal's sample came from the site or was properly collected. Martinelli cannot verify that Stewart's sample was properly collected, either. (T-20)

36. DER has no off-site samples of soils or water which show any lead contamination or off-site migration of lead. (T-18, 83)

37. Martinelli has observed debris on the site's surface. (T-16) It also has areas of grass and areas where there is stress vegetation, i.e., only weeds and moss. (T-16)

38. Ruth A. Bishop has been employed by DER as an environmental chemist for five years. During this time she has worked exclusively in DER's Hazardous Sites Cleanup program. Bishop has a Bachelor of Science degree in biology and a Master of Science degree in oceanography. (T-29-30)

39. At DER, Bishop advises other staff members on "fate and transport", i.e., how chemicals may migrate from a site, if they will migrate between different media and whether they will degrade into other chemicals. (T-31-32) Bishop also reviews risk assessments for DER as to the toxicology of various contaminants. (T-33)

40. Bishop has worked with EPA toxicologists and chemists in reviewing documents on Superfund sites. She has prepared two risk assessments

for DER and reviewed proposals for remedial investigations or feasibility studies as to remediation at hazardous sites. (T-33-34) Bishop has worked on 10 sites for DER. (T-34)

41. Chemistry was a minor in Bishop's Bachelor's degree, but she took several courses in it. Bishop has neither authored any scholarly works in this field nor prepared manuals for DER's use. (T-39-40)

42. Bishop has never testified as an expert witness previously. (T-40)

43. Bishop's only toxicological work has been with regard to reviewing toxicological data in risk assessments. She has only had one course in this subject matter area and it dealt with the histology of marine invertebrates; however, she performs toxicological investigations on DER's behalf and has attended EPA training courses on toxicological investigations. (T-40-47)

44. Bishop has read DER's file on this site and is familiar with it. Based on the sample data in the file, she believes the site has substantial lead contamination on it. Bishop reads the analysis result of Stewart's sample to show that some of the site's lead is leachable lead. (T-51, 65)

45. Bishop has reviewed a United States Environmental Protection Agency ("EPA") Guidance Document which deals with lead at battery reclamation sites in connection with Wayne's site. (T-61-62)

46. Based on information she has reviewed as to battery reclamation sites in general, Bishop says one can find lead, lead sulfates, lead

oxides and lead dioxides at such sites. (T-58-59) Lead sulfates and lead dioxides are soluble in water. (T-59)

47. The EPA Guidance Document says that factors impacting generally on the leachability of lead at battery reclamation sites include: (1) the pH of the soils (the lower the pH the more soluble the metal); (2) the amount of organic matter in the soil (organic matter increases pH and supplies "healing agents/compounds" which lock onto lead, making it more insoluble); and (3) the cation exchange process whereby anions in the soil capture lead. (T-64-65)

48. This EPA literature also indicates the amount of lead can be so great it overwhelms the soil's ability to absorb more lead, which means that lead may become leachable. (T-65)

49. Bishop is aware of one other battery reclamation site with which DER is involved. (T-91)

50. Bishop's observation of Wayne's site revealed that it has grass growing in some areas, with weeds and moss in some other areas. Some areas of the site are bare. (T-73-74)

51. Based on EPA's document, moss at the site, which she took to indicate acidic soils, and the analyses of Stewart's sample, Bishop opines that there is leachable lead at the site which could be dissolved into water and that this dissolved lead could reach the groundwater. (T-75-76)

52. Bishop was not asked to indicate whether she held this opinion with any degree of scientific certainty.

53. There has been no test to determine the pH of the soil at Wayne's site. (T-79-80)

54. Bishop agrees that soils can be acidic for many reasons. (T-76)

55. According to Bishop land can have moss on it for reasons other than acidic soils, such as if it were extremely wet. (T-80)

56. Because of the high lead levels and the nature of the surrounding area, i.e., it being residential, DER believes something must be done about this lead but it has not decided what, although it has brought a consultant to the site to prepare a plan to comprehensively sample it. (T-25-27)

57. The Wayne site is ¼ of a mile from the nearest public school and is located in a residential area where water for domestic use is provided by the city water supply. (S-15; T-16)

58. Bishop believes Wayne's site would be a threat to human health if someone were to go onto it. (T-90) There is no evidence to suggest that Bishop holds this opinion with a reasonable degree of scientific certainty.

DISCUSSION

In the instant appeal, the issue before us is the validity of DER's administrative order to Blumenthal as issued under authority of the Clean Streams Law, *supra*. As this appeal is a challenge to DER's order, it is DER which bears the burden of proof with regard thereto pursuant to 25 Pa. Code §21.101(a) and (b)(3).

Abandonment Of The SWMA And Section 1917-A

While DER's Order initially talks about liability under three different statutes, at this stage in this appeal we are only concerned with any liability which Blumenthal has under the Clean Streams Law, *supra*. Questions of Blumenthal's liability under the SWMA (one of these three

statutes) were decided against DER in Lawrence Blumenthal v. DER, 1992 EHB 1350, and DER's Post-Hearing Brief does not further argue liability under the SWMA. As to Blumenthal's potential liability for conditions on this site under Section 1917-A, this theory of liability, too, was initially raised in DER's Order but is unaddressed in its Post-Hearing Brief, so we deem it abandoned under the rationale in Lucky Strike Coal Co., *supra*. It is on this basis that we conclude that only Clean Streams Law issues remain.

Assertion Of New Legal Theories In Post-Hearing Briefs

DER's allegations as to Blumenthal's liability in its Order are that "Blumenthal and/or Wayne" own the site, that these "owners" do not have a permit to use the site for solid waste disposal, that between 1957 and 1960 these owners had a contractor bury 20-30 tons of battery casings on the site, that the owners own an unpermitted hazardous waste disposal facility, that the owners have permitted a condition at the site which causes or threatens to cause a discharge of industrial wastes to the waters of the Commonwealth, that the owners' past operations at the site caused contamination of the site's soil, that the owners' operation and maintenance of the site constitutes a danger to public health, safety and welfare and the environment, and that the owners' activities are unlawful. Thus, assertions in DER's order as to Blumenthal are based upon his direct personal liability for creation and maintenance of the conditions at the site[4] rather than on any theory of some indirect vicarious liability or liability derived from his being a shareholder

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4 The order also alleges Blumenthal is president of Wayne.

and officer of Wayne. DER does not assert liability for Blumenthal on any vicarious or derivative bases in its Pre-Hearing Memorandum. In the parties' Joint Stipulation (Stip.) no mention is made of this derivative liability a clean up of the site under the Clean Streams Law. Finally, DER made no such assertions at the hearing. Incredibly, however, DER makes no argument that Blumenthal has any direct personal liability as an owner or occupier of this site in its Post-Hearing Brief. DER has thus abandoned this theory of liability as to Blumenthal under the rationale of Lucky Strike Coal Co., *supra*. DER's abandonment of this theory is all the more startling because of its failure to advance any other theory of liability in its Order, its Pre-Hearing Memorandum, or the Joint Stipulation. This failure to raise any alternate liability theory coupled with DER's abandonment of the only legal theory it had advanced and the absence of any request by DER for permission to substitute its new liability theory compels the conclusion that Blumenthal's appeal must be sustained.

DER may argue that there is no objection to its raising a new theory of liability in its Post-Hearing Brief by Blumenthal and indeed that is true.[5] However, DER was warned by our Pre-Hearing Order No. 1, dated April

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[5] Blumenthal makes no argument on this point but curiously argues vigorously that DER cannot compel Wayne to clean up this site because it is exempt from the responsiblity under the Hazardous Sites Cleanup Act, *supra*. The only possible section of this Act which Blumenthal could be arguing applies (his brief fails to cite any specific sections of this Act) is Section 701 (35 P.S.§6020.701). Section 701 deals solely with liability for releases of hazardous wastes under this statute rather than liability under this act and other statutes like the Clean Streams Law. Accordingly, since DER took no (footnote continues)

25, 1991, that it "may be deemed to have abandoned all contentions of law ... not set forth in it Pre-Hearing Memorandum." There is good reason for this warning and this conclusion in terms of the factual scenario procedurally presented in this appeal. Since the docketing of this appeal, this Board has prepared itself to hear the merits of the appeal based on the legal reasoning of the parties as set forth in DER's Order, the Notice Of Appeal and the parties' Pre-Hearing Memoranda. Throughout the merits hearings we conduct, we are asked to rule on the admissibility of evidence and we base those rulings in large part on the positions each party has asserted as to each issue. So, when a new theory of liability bursts forth for the first time in the Post-Hearing Brief stage of an appeal, if allowed, it could require new evaluations of all of the admitted and excluded evidence. Further, where an opposing party prepares to offer evidence in its case-in-chief or as rebuttal, these decisions hinge on the legal theories of all parties as previously asserted. Additionally, there are a series of opinions by this Board, including Midway Sewerage Authority v. DER, 1991 EHB 1445, all of which go to the issue of the Board's attempts at establishing a level field on which the contesting parties set forth their respective positions on the disputed issues. Allowing DER to act in this fashion clearly subverts such efforts and

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(continued footnote)
action under this statute against Blumenthal and could not do so at this time (see 35 P.S. §6020.1301), Blumenthal's argument responds to a position not advanced by DER and we disregard it.

renders this Board's ability to make meaningful rulings during the hearing's progress an impossibility. Accordingly, we will not entertain such an inexplicably tardy argument on DER's behalf.

In reaching this conclusion, we recognize that there could be circumstances where a legal theory might appear at a merits hearing based upon the facts adduced there, and we are not stating that in appropriate circumstances we could not take it into account. However, this is not the circumstance in this appeal. DER made no mention of this theory at the merits hearing or any time subsequent thereto until the filing of its Post-Hearing Brief. In addition, its two witnesses at this hearing also offered no evidence in direct support of this theory and Blumenthal called no witnesses at that hearing on his own behalf. Further, the testimony cited by DER to support this theory came predominantly from the depositions and testimony recorded earlier and admitted into this appeal's record on stipulation of the parties. Thus, this is not a situation where this theory appeared at the merits hearing based on evidence produced there.

Accordingly, we make the following conclusions of law and enter the attached Order.[6]

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6 In reaching this conclusion, we do not address the merits of DER's piercing the corporate veil theory or the sufficiency of the quantum of evidence it offered in support of this theory. Had we done so, we would have found the evidence to be insufficient and rejected this argument. Regardless of whether the factors in United States v. Pisani, 646 F.2d 83 (3d Cir. 1981) are considered as suggested in Louis J. Novak, Sr., et al. v. DER, 1987 EHB 680, or we use those in The Village at Camelback Property Owners Ass'n, Inc. v. Frank P. Carr, III, et al., 371 Pa.Super. 452, 538 A.2d 528 (1988), to (footnote continues)

CONCLUSIONS OF LAW

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

2. Where DER's administrative order is challenged on appeal DER bears the burden of proof in the appeal proceeding under 25 Pa. Code §21.101(1) and (b).

3. A party is deemed to abandon all legal contentions not raised in its Post-Hearing Brief. Lucky Strike Coal Co.

4. In preparing its adjudication in an appeal this Board will not consider legal theories supporting a party's position in an appeal which are first asserted in a party's Post-Hearing Brief and which were not disclosed by the party at any time prior to the evidentiary hearing on the appeal's merits.

5. Where DER issues an administrative order to an appellant under only one theory of liability, maintains that single theory of liability in its Pre-Hearing Memorandum and the merits hearing, but totally abandons that theory of liability in its Post-Hearing Brief and attempts therein to raise a new theory of liability, the appeal challenging appellant's liability under DER's initial theory of liability must be sustained.

(continued footnote)
consider the evidence allegedly supporting this theory, DER failed to offer any evidence on some of these factors, and the evidence it points to to support it on other factors does not make the necessary showings.

ORDER

AND NOW, this 2nd day of November, 1993, it is ordered that the appeal of Lawrence Blumenthal is sustained.

ENVIRONMENTAL HEARING BOARD

MAXINE WOELFLING
Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: November 2, 1993

cc: **Bureau of Litigation**
Library: Brenda Houck
For the Commonwealth, DER:
Robert K. Abdullah, Esq.
Central Region

For Appellant:
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SECRETARY TO THE BOARD

COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
	:	
v.	:	**EHB Docket No. 92-429-CP-MR**
	:	
CROWN RECYCLING & RECOVERY, INC. et al.	:	**Issued: November 3, 1993**

OPINION AND ORDER
SUR
PRELIMINARY OBJECTIONS
AND
MOTION TO LIMIT SCOPE OF
JUDICIAL REVIEW

Robert D. Myers, Member

Synopsis

In a proceeding where DER seeks to recover interim response costs from responsible persons under the Hazardous Sites Cleanup Act (HSCA), the Board sustains certain Preliminary Objections, denies others, denies a DER Motion to Limit the Scope of Judicial Review and remands the matter to DER. In the course of its review for the first time of numerous provisions under the HSCA, the Board rules (1) that responsible persons must be given an opportunity to participate in the development of an Administrative Record, (2) that the recovery of interim response costs is governed by the mediation and moratorium provisions of the HSCA, and (3) that the enforcement actions alleged by DER to have been taken against the owners and operators of the site under other environmental laws are sufficient to remove the bars to cost recovery imposed by the HSCA. The Board declines to render opinions on a

personal jurisdiction objection, a lack of specificity objection, and whether DER may hold responsible persons jointly and severally liable.

OPINION

Background

On September 8, 1992 the Department of Environmental Resources (DER) filed with the Board a Complaint against Crown Recycling & Recovery, Inc. (Crown); Josephine Bausch Cardinale, Executrix for the Estate of Phillip Cardinale, deceased, and an officer of Crown (Josephine); Nancy Cardinale, Executrix for the Estate of Anthony Cardinale, deceased (Nancy); Magnetek/Universal (Magnetek); Schilberg Integrated Metals Corp. (Simco); and Wire Recycling, Inc. (Wire). The Complaint was filed with the Board pursuant to Section 507(a) of the Hazardous Sites Cleanup Act (HSCA), Act of October 18, 1988, P.L. 756, 35 P.S. §6020.507(a), to recover costs incurred by DER in an interim response action at a site in Lackawaxen Township, Pike County[1].

The procedural history subsequent to the filing of the Complaint is long and involved. It is unnecessary for us to describe it in detail for purposes of this Opinion. Suffice it to say that DER filed an Amended Complaint and a Second Amended Complaint, which apparently dealt only with the identification of Magnatek. By the Second Amended Complaint, DER has named both Magnatek, Inc. and Universal Manufacturing Corporation as Defendants but has alleged that they were one and the same.

All of the Defendants except Josephine, Crown, and Nancy filed Preliminary Objections to the several versions of the Complaint. Josephine filed an Answer to the original version and Answers with New Matter to the

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[1] This statement is based on paragraph 1 of the Complaint. The prayer for relief concluding the Complaint also requests the Board to find these same Defendants to be liable for future costs. This discrepancy will be dealt with later in this Opinion.

subsequent versions. DER filed Preliminary Objections to Josephine's New Matter. Crown and Nancy filed no pleadings or other documents.

DER also filed a Motion to Limit Scope of Judicial Review (with numerous exhibits) to which all of the Defendants except Crown and Nancy have filed Answers.

Because of the number of Preliminary Objections and the Motion, the Board issued an Order on February 2, 1993 staying proceedings pending action on the Preliminary Objections and Motion but allowing discovery by mutual consent of all parties. On March 19, 1993, in response to a joint Motion for Permission to File Briefs, the Board issued an Order establishing a briefing schedule and directing that briefs cover the Preliminary Objections and DER's Motion.

Wire, Simco and Magnetek filed their briefs on April 19, 1993. Josephine filed her brief on May 18, 1993, confined to the Motion, by incorporating the briefs of Simco and Magnatek. DER filed a brief on June 1, 1993 which also incorporated the legal memorandum previously filed on January 11, 1993. A supplemental brief was filed on July 21, 1993. Simco, Wire and Magnetek filed reply briefs on July 29, July 30 and August 2, 1993, respectively.

The issues before us, by and large, are presented for the first time under the HSCA. Because of the critical importance of that statute and the issues arising out of it, we wanted the best thinking of the legal profession before rendering our decision. We believe the briefs that have been filed, despite a certain amount of repetition, provide us with the tools we need. We compliment legal counsel on both sides for the quality of their products.

Administrative Record (AR)

DER may recover response costs from a responsible person, as defined in HSCA §701, 35 P.S. §6020.701, in proceedings before this Board: HSCA §507, 35 P.S. §6020.507. Response costs include costs of interim response: HSCA §702(a)(1), 35 P.S. §6020.702(a)(1). If, in the course of those proceedings, the defendants wish to challenge the selection and adequacy of a remedial action, they must confine themselves to the contents of the AR: HSCA §508, 35 P.S. §6020.508. In fact, the record in a response cost recovery proceeding is limited to the AR, as supplemented by additional evidence supporting or refuting DER's determination of who is a responsible person: HSCA §508, 35 P.S. §6020.508. Obviously, the contents of the AR and the manner in which it is compiled are of critical importance.

This is borne out by the detailed statutory provisions governing the AR in HSCA §506, 35 P.S. §6020.506. DER must give notice, both personal and by publication, of the development of an AR, setting a public comment period of at least 90 days, scheduling a public hearing, and establishing a time and place for inspection of the docket relating to the AR. All comments and other matters pertaining to the AR are to be noted on the docket and become part of the AR.

After the public hearing and the close of the public comment period, DER renders its written decision containing findings of fact, an analysis of the alternatives considered and reasons for selecting the one chosen. DER also must file a response to each of the significant comments, criticisms and new data submitted during the public comment period. The decision cannot be based, in whole or in part, on matters not in the docket.

Once the decision is rendered, the AR is closed and can be reopened only for one of four specific reasons. If DER agrees to reopen the AR, it

must give notice of another 60-day public comment period and the opportunity to request another public hearing. The docket must note all of the additional items submitted and DER's responses to significant comments.

The AR, developed in such a painstaking manner, becomes the only basis on which DER's action can be reviewed (except for supplemental evidence identifying responsible persons). In HSCA §508(d), 35 P.S. §6020.508(d), the statute discounts procedural errors in the development of the AR unless they are so serious and so related to matters of central relevance to the response action that "the action would have been significantly changed had the errors not been made." If that is shown to be the case, or if a response action is demonstrated to be arbitrary and capricious "on the basis of the administrative record," the Board must either (1) remand the matter to DER for the purpose of reopening the AR to receive additional information, or (2) deny DER's recovery of costs for an appropriate portion of the response action.

The time required to develop an AR is ill-suited to emergency situations. HSCA §505(b), 35 P.S. §6020.505(b), deals with that possibility, providing that DER may take an interim response before the development of an AR when there is a reasonable basis to believe that prompt action is required to protect the public health or safety or the environment. When an interim response is taken before the development of an AR, then the notice required by HSCA §506(b), 35 P.S. §6020.506(b), must be given within 30 days after initiating the interim response and must detail actions already taken and additional actions to be taken before close of the public comment period. The development of the AR then proceeds in the normal fashion.

The response action in this case was an interim response, alleged to consist of the erection of a fence around the site, the development of a base map, the removal of hazardous waste ash piles, and the furnishing of bottled

water to local residents. The cost, as of the date of filing the Second Amended Complaint, was claimed to be $457,500.02. Apparently, DER gave the public notice within 30 days after initiating the interim response but gave no personal notice to the Defendants. The AR was developed without any involvement on the part of the Defendants. By Motion, DER wants the Board to rule that, in this cost recovery proceeding, any challenge to the response action must be limited to the AR. Defendants have opposed this Motion and have filed Preliminary Objections to the Complaint in the form of a demurrer on this issue.[2]

DER justifies its failure to give personal notice to the Defendants on the ground that it was not certain at that time if they were responsible persons. HSCA §506(b)(2), 35 P.S. §6020.506(b)(2), requires DER to give notice by mail to "responsible persons whose identities and addresses are known to [DER]." Defendants allege that DER knew of the Defendants and their connections to the site at or prior to the time the interim response was taken. Obviously, there is a factual dispute here that cannot be resolved on the basis of the record presently before us.

It is immaterial in any event, DER suggests, because the very same statutory provision states that the failure of DER to provide the notice does not affect a responsible person's liability. Defendants counter that their constitutional right to due process of law is then impaired.

A person being called upon to pay interim response costs has the right to a judicial determination, at least of the following:

1. That an interim response was warranted;

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[2] The demurrer is an inappropriate "speaking" demurrer but contains similar allegations to those filed in response to DER's Motion. Since the allegations are appropriate in this latter context, we will ignore the "speaking" nature of the demurrer.

2. That the actions taken as part of the interim response were appropriate;

3. That the costs incurred in taking those actions were reasonable; and

4. That the person is a responsible person.

According to the HSCA, the first two of these four items are to be determined solely on the basis of the AR. If the person being charged has had no notice of the development of the AR and no opportunity to criticize DER's actions as part of the AR, he is faced with the prospect of having these two items determined on the basis of what may be a one-sided and self-serving AR. While this determination will have no effect on whether or not he is a responsible person, it could have a major impact on determining whether the costs are reasonable. Thus, three of the four items may, in reality, be beyond the power of the person to challenge. And, since DER's claim seeks to invade the person's financial resources, due process considerations are in order.

DER argues, however, that where interim responses are concerned the development of an AR has less significance. Since DER has already decided on the nature of the action to be taken and has already begun to implement it before any notice is required under §506(b), there is little or no opportunity for interested persons to influence that decision during development of the AR. This is undoubtedly correct, although comments received by DER prior to completion of the interim response could possibly bring about some modification.

The argument misses the point. Influencing the interim response action, in most situations, is not likely to occur. But the only opportunity responsible persons will have to criticize DER's interim response on a record

forming the sole basis of judicial review is during development of the AR. The opportunity to do that is of critical importance to these persons and cannot be taken away without infringing due process rights.

The other DER argument on this point also is flawed. Referring to HSCA §506(b)(2), 35 P.S. §6020.506(b)(2), DER points out that the Legislature specifically stated that DER's failure to provide notice of development of the AR does not affect a responsible person's liability. That failure, therefore, is a procedural error which under HSCA §508(d), 35 P.S. §6020.508(d), cannot be a basis for challenging the response action unless it is shown that the response action would have been significantly changed if the error had not occurred. Since the interim response had already been implemented, the argument goes, no error could possibly have changed it. Therefore, the error is meaningless.

Conceding that the failure to give the §506(b) notice may be only procedural, we nonetheless hold that the failure to give Defendants any opportunity to take part in the development of the AR is substantive. The Legislature recognized this, in our judgment, when it provided for reopening the AR when a person raising objection to a response action demonstrates that it was impracticable to raise the objection during the public comment period: HSCA §506(g), 35 P.S. §6020.506(g). We hold that a person from whom DER seeks to recover response costs and to whom a §506(b) notice was not sent has a constitutional right to have the AR reopened.[3]

We will remand the matter to DER with a direction to reopen the AR pursuant to HSCA §506(h), 35 P.S. §6020.506(h). We could end this Opinion at

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[3] The parties have cited numerous decisions of the Federal Courts in an effort to support their positions. We have not cited any of them because we think the principle is so fundamental that case citations are unnecessary.

this point but believe it is advisable to deal with certain other issues in order to guide the parties in their future dealings.

Mediation and Moratorium

When DER believes that there are two or more responsible persons, it must prepare a "nonbinding preliminary allocation of proportionate responsibility" (NBAR) among them. Written notice is to be given to the responsible persons and they are to be invited to participate in a dispute resolution procedure selected by DER, the purpose of which is to determine each responsible person's proportionate share of the response costs and the appropriate response action to be taken: HSCA §708(a), 35 P.S. §6020.708(a). The dispute resolution process can go on for a maximum of 120 days unless extended by mutual consent. The NBAR is not a final appealable action of DER and confers no rights or duties upon anyone.

While the dispute resolution process is in progress, DER may not commence a cost recovery action against any of the participating persons, or issue an enforcement order requiring a participating person to undertake response actions, or commence any response actions itself other than interim responses: HSCA §708(b), 35 P.S. §6020.708(b). Agreements reached through the dispute resolution process are binding on the signatories. The failure to reach agreement cannot be a factor in any subsequent proceedings: HSCA §708(c), 35 P.S. §6020.708(c).

Defendants' Preliminary Objections raise DER's failure to proceed under §708, claiming it is a bar to the proceedings before the Board. An agreement for alternative dispute resolution is a proper subject for Preliminary Objections: Pa. R.C.P. 1028(a)(6). A statutory provision requiring alternative dispute resolution also should come within the scope of the rule.

DER contends that HSCA §708 does not bar this proceeding because it does not apply to cost recovery actions for interim responses. We are not persuaded to adopt this view. One of the purposes of the dispute resolution process under §708(a) is determining each responsible person's share of "response costs." While that process is going forward, DER is barred from commencing an action to recover "response costs" from any participating person: §708(b).

HSCA §702(a), 35 P.S. §6020.702(a), states that a responsible person is liable for a list of five "response costs" and damages. The first item is "costs of interim response." Clearly, interim response costs are included within the term "response costs" as used in §708.

DER argues, however, that HSCA §708(a) also states that a purpose of the dispute resolution process is determining "the appropriate response action to be taken." That obviously cannot apply to interim responses since those actions will have been taken before §708 comes into play. Consequently, only remedial response costs are governed by §708. In addition, DER points out that interim responses are exempted from the §708(b) moratorium, a further indication of legislative intention to exclude interim response costs recovery proceedings from §708.

The provisions cited by DER are not enough to overcome the plain meaning of "response costs." While it is true that a dispute resolution process cannot determine the appropriate response action where an interim response is involved, it can deal with that issue where a remedial response is contemplated. Rather than showing an intent to *exclude* interim response actions, we believe the language shows an intent to *include* remedial response actions, exactly what is comprehended by the words "response costs."

As far as the moratorium is concerned, the exemption of interim response actions means only that DER will not be totally powerless while the dispute resolution process is going on. It cannot start a cost recovery action, or order a responsible person to undertake a response action, or commence a remedial response action on its own. But it can initiate an interim response action on its own - if the public health or safety or the environment requires it. DER's freedom to take such an action does not mean that DER can avoid the mediation requirements of §708(a) when it seeks to recover the costs of such an action.

Finally, we would point out to DER that, if we adopted DER's interpretation of "response costs" to exclude interim response costs, we would be compelled to dismiss the action. HSCA §507(a), 35 P.S. §6020.507(a), makes a responsible person liable for "response costs" which DER may collect in a proceeding before this Board. If "response costs" do not include interim response costs, as DER argues in connection with §708, then DER has no statutory basis for recovering the interim response costs it seeks from Defendants and the Complaint must be dismissed.

Our interpretation gives proper meaning to the critical words and phrases and, we believe, adopts the intention of the Legislature. For all its arguments, DER has not shown us why the Legislature would mandate mediation for remedial response costs and not for interim response costs.

Since we are remanding the matter to DER to reopen the AR, we are also directing DER to satisfy the requirements of §708 before resuming an action before this Board.[4]

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[4] The parties have cited cases interpreting provisions of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), footnote continued

Failure to Satisfy HSCA §1301

The first part of this Section, §1301(a), 35 P.S. §6020.1301(a), provides that DER may not proceed under the HSCA against an owner or operator of a site unless it has first instituted administrative or judicial enforcement actions under other environmental laws and the owner or operator either has failed to comply or is financially unable to comply. If the owner or operator has failed to comply, DER may proceed under the HSCA unless the owner or operator has obtained a supersedeas barring enforcement actions under the other environmental laws. The supersedeas must be based on whether there is a release or threatened release of a hazardous substance or a contaminant which constitutes a danger to the public health and safety or the environment.

Subsection (b), 35 P.S. §6020.1301(b), applies to enforcement orders or cost recovery proceedings under the HSCA against responsible persons with respect to a site coming under the provisions of subsection (a). DER may not issue enforcement orders or initiate cost recovery proceedings against such persons where the owner or operator of the site is financially able to comply with an enforcement action instituted under subsection (a), *and* either has undertaken appropriate action or has obtained a supersedeas (based on the same considerations as in subsection (a)).

The final subsection, 35 P.S. §6020.1301(c), simply states that nothing in the Section shall affect the authority of DER or the Governor to implement interim response actions.

Defendants argue that DER has not fulfilled the requirements of HSCA §1301. In their Preliminary Objections they limit their contention to future

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continued footnote
Public Law 96-510, 94 Stat. 2767, 42 U.S.C.A. §9601 *et seq.* Since these provisions are not identical to those of the HSCA, we find these citations to be of marginal value.

costs, conceding that DER has satisfied the requirements for interim response costs already incurred. They make no such distinction in their briefs, however. DER answered these Preliminary Objections by alleging the following:

1. Issuance of an Administrative Order on August 24, 1988 to Philip J. Cardinale and Anthony Cardinale t/d/b/a Crown Industries, under provisions of the Solid Waste Management Act (SWMA), Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 *et seq.*; the Clean Streams Law (CSL), Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 *et seq*; and Section 1917-A of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-17, requiring a cessation of operations and the taking of remedial action at the site.

2. Issuance of an Order by Commonwealth Court on November 30, 1988 (No. 2522 C.D. 1988) directing Anthony Cardinale[5] d/b/a Crown Industries to cease operations and to take remedial action pursuant to DER's Administrative Order of August 24, 1988. This Order was issued in response to DER's Petition to Enforce.

3. Issuance of an Order by Commonwealth Court on August 10, 1989 (No. 2522 C.D. 1988) finding that Anthony Cardinale d/b/a Crown Industries has failed to comply with DER's Administrative Order of August 24, 1988 and with the Court's Order of November 30, 1988, holding him in contempt and imposing certain sanctions. This Order was issued in response to DER's Petition for Contempt and Sanctions.

4. Issuance of an Order by Commonwealth Court on November 20, 1989 (No. 306 Misc. Docket 1989) directing Philip Cardinale to cooperate with, and

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[5] Apparently Philip Cardinale was not named in this proceeding because he was serving a term in Federal prison. He was released sometime during the fall of 1989.

not interfere with, DER's response activities at the site[6]. This Order was issued in response to a DER Petition.

If these allegations are true (copies of the Orders are attached to DER's Answer to the Preliminary Objections), they demonstrate that DER initiated both administrative and judicial enforcement actions against the owners and operators of the site under applicable environmental laws other than the HSCA. They demonstrate further that the owners and operators failed to comply with those enforcement actions. As a result, DER initiated response activites under the HSCA and now seeks to implement the cost recovery provisions of the HSCA.

Section 1301(a)'s bar to such actions under the HSCA is not applicable, because the enforcement actions were prosecuted by DER, were not complied with by the owners and operators, and a supersedeas was never issued. Consequently, DER is free to begin cost recovery proceedings against the owners and operators.

Defendants contend that DER's enforcement actions were directed against Anthony Cardinale and Philip Cardinale, both of whom are deceased. No enforcement actions have been brought against Josephine (Philip's Executrix) or Nancy (Anthony's Executrix), current owners of the site. By this argument, Defendants read more into §1301(a) than the Legislature put there. DER is only required to "initiate" administrative or judicial enforcement actions

---

[6] DER alleges that, after Anthony Cardinale died during the fall of 1989, DER concluded that an interim response under the HSCA would be the only way anything would be accomplished at the site. Apparently, Philip Cardinale refrained from interfering with DER's activities up to his death in October 1991.

under other environmental laws. While there may be an argument over the precise meaning of this term in the context of §1301(a), we are satisfied that what DER did in this case is enough to meet the requirements.

DER's enforcement actions lasted for about a year from August 1988 to August 1989, during which it issued an Administrative Order and obtained two Orders from Commonwealth Court, all directed to the then owners and operators of the site.[7] In September 1989 it decided to proceed under the HSCA, obtained a Court Order in November 1989 and began the interim response in July 1990. This, in our judgment, is sufficient compliance with §1301(a) to remove the bar imposed there.

The bar in HSCA §1301(b) also does not prohibit DER's cost recovery efforts against responsible persons other than the owners and operators. That bar comes into play when the owners or operators of the site are financially able to comply with the enforcement actions instituted by DER under other environmental laws *and* either have undertaken remedial action or have obtained a supersedeas. According to DER's allegations, detailed above, the owners and operators have not complied and have not obtained a supersedeas. Thus, regardless of the financial ability of the owners and operators, DER may proceed under the HSCA against other responsible persons. What we have said above regarding the current owners applies here as well.

As noted *supra* in footnote 1, DER's Complaint is ambiguous because it limits itself to interim response costs in one place but claims future (remedial) response costs in another. Although Defendants brought this to DER's attention at the outset, the ambiguity was not removed in the two later

---

[7] Since the personal representatives (Josephine and Nancy) stand in the shoes of the deceased owners and operators, separate enforcement actions against them is unnecessary, in any event.

versions of DER's Complaint. In addition, DER continued the ambiguity in its briefs. We have chosen to view the Complaint as seeking only interim response costs and not future (remedial) costs, although DER is free to modify this on remand. To the extent that future costs are involved, we want to clear up any misconception Defendants may still hold as to §1301.

In order to avoid the bars imposed by that section, DER does not have to demonstrate separate enforcement actions dealing with interim measures and remedial measures. The enforcement actions alleged by DER, if complied with, would have eliminated the immediate threat posed by the site and would have remediated the site to DER's satisfaction. Those enforcement actions, therefore, serve as conditions precedent to DER's recovery of both interim and future (remedial) costs.

Personal Jurisdiction

Wire raises a jurisdiction question, claiming that DER cannot exercise jurisdiction over Wire, a corporation based in New Jersey which allegedly does no business in Pennsylvania. DER answers by alleging that Wire arranged with Anthony Cardinale to have waste disposed of at the site. We see no need to resolve this issue at this time since we are remanding the matter to DER. If, in the future, DER begins proceedings against Wire before the Board, the issue can be raised again and dealt with at that time.

Joint and Several Liability

In the Complaint, DER requests the Board to hold that the Defendants are jointly and severally liable for the response costs. Defendants object that the Complaint does not conform to law in this respect and should be stricken. The HSCA does not impose joint and several liability, according to the argument, and the Board would be rendering an advisory opinion if it granted the request. We see no neeed to resolve this dispute at this time.

Lack of Specificity

Some of the Preliminary Objections claim that the allegations of DER are not specific enough to enable Defendants to answer. Since we are remanding the matter to DER, we will not address these issues now.

ORDER

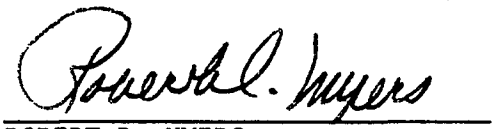
AND NOW, this 3rd day of November, 1993, it is ordered as follows:

1. Defendants' Preliminary Objections are granted, in part, and denied, in part, in accordance with the foregoing Opinion.

2. DER's Motion to Limit Scope of Judicial Review is denied.

3. The matter is remanded to DER for proceedings consistent with the foregoing Opinion.

ENVIRONMENTAL HEARING BOARD



ROBERT D. MYERS
Administrative Law Judge
Member

DATED: November 3, 1993

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Attention: Mr. Angelo Armenti

EHB Docket No. 92-429-CP-MR

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M. DIANE SMITH
SECRETARY TO THE BOARD

SEQUA CORPORATION	:	
	:	
v.	:	**EHB Docket No. 89-495-W**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: November 4, 1993**
and DUBLIN BOROUGH, Intervenor	:	

OPINION AND ORDER SUR
MOTION TO COMPEL, MOTION TO QUASH
APPEAL FOR LACK OF STANDING, AND
MOTION FOR JUDGMENT ON THE PLEADINGS

By Maxine Woelfling, Chairman

Synopsis

A motion to compel appellant to file a notice of appeal satisfying the requirements of 25 Pa. Code §21.52(c) is denied where the appellant's original notice of appeal is not a "skeleton," but is instead complete. Because the original notice of appeal is complete, appellant's second notice of appeal is quashed.

An appellant lacks standing under the Pennsylvania Constitution, Art. I, §27, to challenge the Department of Environmental Resources' (Department's) issuance of a public water supply permit if the appellant has not alleged a substantial interest in the outcome of the litigation. Appellant's allegations that the Department failed to carry out its duties as trustee of the environment amount to the same interest as any other citizen has in ensuring that the Department satisfies its obligations.

Appellant's interest is also not immediate, whether it is evaluated

under a causal connection or zone of interest standard. There is an insufficient causal connection between the Department's issuance of a water supply permit and appellant's obligation to investigate and remediate groundwater contamination where the water supply permit does not authorize the withdrawal of groundwater. Moreover, appellant's obligations to remediate groundwater contamination are not within the zone of interests protected by the Pennsylvania Safe Drinking Water Act, the Act of May 1, 1984, P.L. 206, as amended, 35 P.S. §721.1 *et seq.* (Safe Drinking Water Act).

OPINION

Sequa Corporation (Sequa) initiated these proceedings on October 20, 1989, when it filed with the Board a notice of appeal from the Department's September 21, 1989, issuance of Public Water Supply Permit No. 0989504 (Permit) to Dublin Borough (Dublin) for the construction and operation of two water supply wells in Dublin, Bucks County. Sequa's notice of appeal stated:

> This notice of appeal is a skeletal appeal. The September 21, 1989, public water supply permit issued to the Borough of Dublin is specially conditioned solely on quarterly testing of the well for trichloroethylene ("TCE") and submission of the test results to the Bucks County Department of Health. The permitted well is located in the vicinity of a known plume of TCE groundwater contamination. To appellant's information and belief, subsequent to the issuance of the permit, DER and the Borough of Dublin entered into a written agreement requiring the Borough to install a single monitoring well, the purpose of which is to monitor the plume of contamination and detect such contamination before it would or could reach the permitted well.
>
> Appellant contests whether DER, by issuing the permit without additional special conditions and by entering into an agreement with the Borough requiring the installation of a single monitoring well, has adequately met its duty to

protect the public health and safety and the environment.

Dublin filed a petition to intervene on November 13, 1989, which the Board granted on July 12, 1991. After numerous continuances to allow the parties to pursue settlement negotiations and numerous motions concerning discovery, Dublin filed a motion on January 29, 1993, to compel Sequa to file an appeal containing the information required by 25 Pa. Code §§21.52(c) or suffer dismissal, and to quash Sequa's appeal for lack of standing. On February 17, 1993, the Department filed a memorandum of law in support of Dublin's motion to dismiss for lack of standing, and Sequa filed its response to the motions, as well as a second notice of appeal. Sequa's new notice of appeal contained an "addendum to notice of appeal," which set forth fifteen paragraphs containing additional objections to the Department's issuance of the permit, but was otherwise the same as its October 20, 1989, notice of appeal.

On March 4, 1993, apparently in response to Sequa's second notice of appeal, Dublin filed a motion for judgment on the pleadings, which included excerpts from a deposition and water sample analyses. Sequa filed its response to this motion on March 26, 1993, while the Department did not respond. On May 3, 1993, Dublin and the Department filed a joint motion to stay this proceeding pending resolution of Dublin's three motions. After considering Sequa's May 4, 1993, response, the Board granted the motion on May 7, 1993, and stayed this action.

In its motion to compel Sequa to file an appeal containing the information required under 25 Pa. Code §21.52, Dublin argues that Sequa has only filed a skeleton appeal containing no specific objections, and, therefore, must either amend its notice of appeal or suffer dismissal. Sequa

contends in response that it has amended its notice of appeal and Dublin's motion, therefore, should be denied. We agree that Dublin's motion to compel should be denied, but only because Sequa's original notice of appeal is complete and may not be amended.

A "skeleton" notice of appeal is defined in the Board's rules as follows:

> An appeal which is perfected in accordance with the provisions of this section but does not otherwise comply with the form and content requirements of §21.51 of this title will be docketed by the Board as a skeleton appeal.

25 Pa. Code §21.52(c). The "provisions of this section" to which §21.52(c) refers, requires that the appeal be in writing, filed with the Board within 30 days after the appellant has received notice, and served on the recipient of the permit. 25 Pa. Code §21.52(a) and (b). The form and content requirements of §21.51 specify that the notice of appeal must be in writing and contain a caption stating the name, address, and telephone number of the appellant; must attach the written notification of the Department action, if any; must set forth in separate and numbered paragraphs the appellant's objections to the Department's action; and must be served on the Department and the recipient of the permit, license, etc. 25 Pa. Code §21.51(a)-(f).

In support of its amended notice of appeal, Sequa does not contend that its first notice of appeal fails to satisfy these requirements and, therefore, must be amended, but instead relies on the statement in its first notice of appeal that "[t]his notice of appeal is a skeletal appeal."[1] As

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1 Sequa also contends the Board recognized that the first notice of appeal was merely a skeleton when we ordered Sequa on February 2, 1993, to perfect its appeal. This argument blatantly mischaracterizes the nature of our February 2 correspondence, which stated: "The Environmental Hearing Board has footnote continued

we found in Steven Haydu v. DER, 1992 EHB 682, 683, the appellant's designation of its notice of appeal as a "skeleton" is not dispositive. If a notice of appeal satisfies the Board's regulations regarding form and content, it is complete. *Id.* Upon careful review of Sequa's original notice of appeal, we find that it satisfies the Board's requirements for form and content, and is not a "skeleton" despite Sequa's contrary assertion. Thus, Dublin's motion to compel Sequa to file an appeal conforming with 25 Pa. Code §21.52 is denied.

Sequa further contends that even if the Board finds its orginal notice of appeal to be complete, Sequa should still be permitted to amend because the allegations contained in the "addendum" were only learned during discovery. Again, we disagree. In NGK Metals Corp. v. DER, 1990 EHB 376, we stated that a notice of appeal may be amended to include issues learned during discovery if the appellant reserves the right in its notice of appeal to do so. 1990 EHB at 379. See also, Commonwealth, Pennsylvania Game Comm. v. Commonwealth, Dept. of Environmental Resources, 97 Pa. Cmwlth. 78, __, 509 A.2d 877, 886, (1986), aff'd on other grounds, 521 Pa. 121, 555 A.2d 812 (1989) (allegation that new issues were learned through discovery does not constitute good cause to amend a notice of appeal under the Board's practice unless the party has made such a reservation in its notice of appeal); James and Margaret Arthur v. DER, 1992 EHB 1185, 1188. Because Sequa did not reserve the right to amend its notice of appeal to add new issues learned during discovery and its amended appeal was filed long after the tolling of

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continued footnote
received from the Borough of Dublin a MOTION TO COMPEL AND TO QUASH FOR LACK OF STANDING in the above matter. This is to advise you that any objection to said motion must be received by the Board no later than Febuary [sic] 17, 1993."

the thirty day appeal period, Sequa's second notice of appeal, filed February 17, 1993, is quashed. Envirotrol, Inc. v. DER, 1992 EHB 685.

We turn now to Dublin's motion to quash Sequa's notice of appeal for lack of standing. Dublin argues Sequa lacks standing to bring this appeal because Sequa has admitted it owns no property within Dublin Borough, and has not stated any personal privileges, immunities, duties, liabilities, or obligations that are directly affected by the permit. Dublin further contends Sequa lacks standing because it has not stated how the public health and safety and the environment, the bases for its appeal, are threatened. Sequa responds it has standing to bring this appeal because it has contractual obligations to investigate and remediate the TCE contamination in the groundwater underlying Dublin Borough that are impaired by the Department's issuance of the permit and because the Department has not satisfied its duties as trustee of the environment under Art. I, §27, of the Pennsylvania Constitution.

In order to have standing to challenge a Department action, the appellant must be "aggrieved" by that action. See, William Penn Parking Garage, Inc. v. City of Pittsburgh, 464 Pa. 168, ___, 346 A.2d 269, 280 (1975). A party is "aggrieved" by an action if it has a direct, immediate, and substantial interest in the litigation challenging that action. *Id.* RESCUE Wyoming, *et al.* v. DER, EHB Docket No. 91-503-W (Opinion issued June 17, 1993). For an interest to be "direct," it must have been adversely affected by the matter complained of, South Whitehall Twsp. Police Service v. South Whitehall Twsp., 521 Pa. 82, ___, 555 A.2d 793, 795 (1989), while a "substantial" interest is "an interest in the outcome of the litigation which surpasses the common interest of all citizens in procuring obedience to the law." *Id.*; Press-Enterprise, Inc. v. Benton Area School District, 146 Pa.

Cmwlth. 203, ___, 604 A.2d 1221, 1223 (1992). We have not found, however, any such simple test to determine what constitutes an "immediate" interest in the outcome of a proceeding.

In William Penn, the Pennsylvania Supreme Court stated that in determining whether an interest is "immediate," the "concern is with the nature of the causal connection between the action complained of and the injury to the person challenging it." 464 Pa. at ___, 346 A.2d at 283. The court developed two guidelines to aid in determining whether a causal connection is sufficient. First, the "possibility that an interest will suffice to confer standing grows less as the causal connection grows more remote." *Id.* And second, "standing will be found more readily when protection of the type of interest asserted is one of the policies underlying the legal rule relied on by the person claiming to be aggrieved." 464 Pa. at ___, 346 A.2d at 284. These guidelines involved both a question of fact (the extent of the causal connection between the action and the injury) and a question of law (whether the interest is protected by the legal rule relied upon).

Both the Board and the Commonwealth Court have traditionally placed more emphasis on the extent of the causal connection between the challenged action and the injury claimed. "To qualify the interest as immediate rather than remote, the party must show a sufficiently close causal connection between the challenged action and the asserted injury." Commonwealth, Higher Education Assistance Agency v. State Employes' Retirement Board, ___ Pa. Cmwlth. ___, ___, 617 A.2d 93, 95 (1992). See also, Maillie v. Greater Delaware Valley Health Care, Inc., ___ Pa. Cmwlth. ___, ___, 628 A.2d 528, 532 (1993); Skippack Community Ambulance Assoc., Inc. v. Twsp. of Skippack, 111 Pa. Cmwlth. 515, ___, 534 A.2d 563, 565 (1987). "'Immediacy' of an interest

involves the nature of the causal connection between the action complained of and the injury to the party challenging it." RESCUE Wyoming, *supra*, at p.4. See also, Roger Wirth v. DER, 1990 EHB 1643, 1645. Since William Penn, however, our Supreme Court has tended to place more emphasis on the second guideline.

In Upper Bucks County Vocational-Technical School Education Ass'n v. Upper Bucks County Vocational Technical School Joint Comm., the Pennsylvania Supreme Court stated:

> Within the requirement that the interest of the plaintiff be "immediate" in order to confer standing, is the concept that the "protection of the type of interest asserted is among the policies underlying the legal rule relied upon by the person claiming to be 'aggrieved'." Wm. Penn., 464 Pa. at 198, 346 A.2d at 284. The United States Supreme Court has phrased this guideline as whether "the interest the plaintiff seeks to protect is arguably within the zone of interests sought to be protected by the statute or constitutional guarantee in question." Association of Data Processing Services, Organization, Inc. v. Comp, 397 U.S. 150, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970).

504 Pa. 418, ___, 474 A.2d 1120, 1122 (1984). After Upper Bucks, the Supreme Court appears to have discarded the first of William Penn's two guidelines altogether.

> An "immediate" interest involves the nature of the causal connection between the action complained of and the injury to the party challenging it, Wm. Penn Parking Garage, Inc., *supra*, 464 Pa. at 197, 346 A.2d at 283, and is shown where the interest the party seeks to protect is within the zone of interests sought to be protected by the statute or constitutional guarantee in question. Upper Bucks County Vocational-Technical School Education Ass'n, *supra*, 504 Pa. at 423, 474 A.2d at 1122.

South Whitehall Twsp. Police Service, 521 Pa. at ___, 555 A.2d at 795. In other words, an "immediate" interest is one that is within the zone of

interests protected by the statute relied upon. See, Nernberg v. City of Pittsburgh, ___ Pa. Cmwlth. ___, ___, 620 A.2d 692, 695 (1993); In Interest of Garthwaite, ___ Pa. Super. ___, ___, 619 A.2d 356, 358 (1993).

Because the courts seem to have accepted both the zone of interests and causal connection standards to determine whether an interest is "immediate," the Board will examine Sequa's standing under each of the tests.

Sequa claims it has standing to appeal the Department's issuance of the water supply permit because it has an obligation, pursuant to consent orders and agreements with the Department and the EPA, to investigate and remediate groundwater contamination, and operation of the water supply wells pursuant to the permit will exacerbate that contamination. After carefully reviewing the Safe Drinking Water Act and the regulations promulgated thereunder, 25 Pa. Code Chapter 109, we cannot find any evidence that this statute was designed to protect an interest arising from an obligation to investigate and remediate groundwater contamination in the same borough as is receiving a water supply permit. While the Department does have the responsibility to ensure an adequate, safe, and clean water supply, 35 P.S. §721.2(a), Sequa has not claimed any interest in a clean water supply. Sequa has, instead, claimed that operation of the well pursuant to the permit will make it more difficult for Sequa to satisfy its obligations. Sequa lacks an "immediate" interest under the zone of interests test.

Sequa also lacks an "immediate" interest under the causal connection standard. In order to find a sufficient causal connection, the Department's issuance of the permit, which is the challenged action, must have caused an

exacerbation of the groundwater contamination, which is the harm alleged.[2] In this case, however, there is no such connection. The Department issued this permit to ensure that these wells are designed, built, and operated in accordance with the design and construction standards of 25 Pa. Code Ch. 109, Subch. F, and provide an adequate, safe, and potable supply of drinking water. 35 P.S. §721.5(b) and (c); 25 Pa. Code §503(a). The harm Sequa alleges, however, does not flow from the Department's approval because the permit itself does not authorize the withdrawal of groundwater. In Dublin, the withdrawal of groundwater is governed by the Delaware River Basin Commission. See, the Delaware River Basin Compact, 32 P.S. §815.101.[3]

In William Penn, *supra*, the Pennsylvania Supreme Court found an "immediate" interest, and, therefore, standing, among parking lot owners to challenge a city tax on parking lot patrons. 464 Pa. at ___, 346 A.2d at 289. The court stated that although the tax was not levied on the owner's themselves, it was levied on the transaction between the parking lot owners

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2 Sequa contends in its February 17, 1993, brief in support of its opposition to Dublin's motion to quash for lack of standing that operation of the well pursuant to the terms of the permit will alter hydrogeologic flow in the borough and worsen existing groundwater contamination.

3 Pursuant to its authority under §10.2 of the Compact, the Commission established the southeastern Pennsylvania groundwater protection area, which includes Dublin Borough. 18 CFR §430.7(a). Pursuant to §10.3 of the Compact, the Commission has prohibited the withdrawal of groundwater in excess of 10,000 gallons per day in this area without a "protected area permit." 18 CFR §§430.7(b) and 430.13. Since Dublin plans to withdraw 145,440 gallons per day from these wells (see, the Permit application, which is incorporated by reference in the Permit), it must first receive a protected area permit before these wells begin operation.

Under 18 CFR §430.29, any person "aggrieved" by the Commission's issuance of a protected area permit may timely file a request for a hearing under Art.6 of the Commission's rules of practice and procedure [18 CFR §401.81 *et seq.*]. Sequa, therefore, may have a right to appeal Dublin's protected area permit to the Commission.

and their patrons. The owner's interest, therefore, was only one step removed from the challenged action. *Id.* The court contrasted the owner's situation with that of a business in the city, which would argue that it has standing to challenge this tax because it will reduce the number of people parking in the lots, and thereby reduce the number of customers in its store. 464 Pa. at ___, 346 A.2d at 290, n. 37. This interest, the court found, would not be "immediate" because it was more than one step removed from the challenged action. *Id.*

Because the Permit was not issued to authorize groundwater withdrawal, we find that Sequa's interest in the outcome of this litigation is more than one step removed from the Department's issuance of the permit. Sequa's interest, therefore, is not "immediate" under the causal connection standard. Since it does not have an "immediate" interest in the outcome of this proceeding, Sequa lacks standing to challenge the Department's issuance of the Permit before the Board.

Sequa further contends it has standing to challenge the Department's issuance of the Permit because the Department failed to satisfy its duties as trustee of the environment under Art. I, §27. Sequa has not, however, alleged a "substantial" interest in the outcome of this litigation. By merely stating that the Department has failed to satisfy its duties under Art. I, §27, Sequa has only alleged an interest equal to that of the general public in ensuring compliance with that provision. Accordingly, Sequa does not have standing to challenge the Department's issuance of the permit under Art. I, §27. See, Sierra Club v. Hartman, 529 Pa. 454, 605 A.2d 309 (1992).

Having determined that Sequa does not have standing to challenge the Department's issuance of the Permit, it is unnecessary for the Board to address Dublin's motion for judgment on the pleadings.

ORDER

AND NOW, this 4th day of November, 1993, it is ordered that:

1) Dublin's motion to compel Sequa to file an appeal conforming to 25 Pa. Code §21.52 is denied;

2) Sequa's amended notice of appeal is quashed; and

3) Dublin's motion to dismiss Sequa's appeal for lack of standing is granted.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

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Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
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Member

Richard S. Ehmann

RICHARD S. EHMANN
Administrative Law Judge
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DATED: November 4, 1993

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M. DIANE SMITH
SECRETARY TO THE BOARD

WOOD PROCESSORS, et al.	:	
v.	:	**EHB Docket Nos. 90-442-E and 91-219-E**
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: November 5, 1993**

OPINION AND ORDER
SUR
MOTION FOR REASSIGNMENT

By: Richard S. Ehmann, Member

Synopsis

DER's Motion for reassignment of one of these two appeals because of its concern that negative inferences may flow from the appeal at Docket No. 90-442-E, where only Costs Act issues as to the amount of legal fees DER must pay remain, to that at Docket No. 91-219-E, where an adjudication of the appeal's merits must be issued, is denied. Since DER neither challenges the impartiality or honesty of the Board or its Members, it has failed to set forth any reasonable basis for disqualification under Canon 3-C of the Code of Judicial Conduct and has failed to assert any other basis for its request. Where this Board did not adjudicate the merits of DER's legal theories in the first appeal at Docket No. 90-442-E before DER withdrew its order, there is no prejudice to DER to arising from the scenario where the same Board Member conducts both the limited hearing on the Costs Act petition mandated by Commonwealth Court and prepares a draft opinion for this Board, while

simultaneously preparing a draft adjudication from a stipulated record in an appeal from DER's amended and reissued order.

Background

On October 20, 1993, the Department of Environmental Resources ("DER") filed a single Motion For Reassignment in these two appeals which seeks reassignment of one of these two appeals to another Board Member.[1] DER's Motion is premised on its contention that the peculiar procedural status of these appeals makes it advisable to reassign one of these appeals to avoid the possibility that negative inferences as to the merits of DER's position in either appeal might occur if one Board Member hears and decides both appeals. Upon receipt of this Motion, this Board issued a letter to counsel for Archie Joyner and Wood Processors, Inc., directing that by November 1, 1993, he file any response of his clients to the Motion. By letter, counsel for these appellants has advised us that his clients take no position on the Motion's merit.[2]

By Order dated October 21, 1993, we also directed DER to file a brief with this Board by November 1, 1993 setting forth DER's position on the legal issues raised by its motion. We were "faxed" a Brief by DER's counsel, but it discusses the facts it contends precede the DER's actions generating these

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[1]DER's Brief in support of its Motion says DER asks this Board to reassign one or both of these appeals. We assume that the suggestion of a need to reassign both appeals was a mistake by DER's counsel, as there is nothing offered in the motion or brief to support it.

[2]This brief response time was necessitated by the fact that a hearing in the appeal at Docket No. 90-442-E is scheduled for November 9, 1993.

appeals and the status of each appeal. This latter aspect of DER's Brief merely rehashes the Motion's allegations and the Brief fails to address the legal issues raised by the Motion.[3]

Discussion

It is important to note in regard to the instant Motion that these two appeals are in dissimilar procedural posture.

In the appeal at Docket No. 90-442-E, DER issued an administrative order to Appellants on September 21, 1990 ("September Order") and the appeal was assigned to former Board Member and Administrative Law Judge Terrance J. Fitzpatrick for primary handling. In response to a Petition For Supersedeas, Board Member Fitzpatrick issued an Opinion and Order on April 5, 1991, granting the petition in part. See 1991 EHB 607. That opinion granted the Petition For Supersedeas filed on behalf of Archie Joyner ("Joyner") and Wood Processors, Inc. ("Processors") as to Joyner but not as to Processors. As to Joyner, Board Member Fitzpatrick's Opinion and Order granted supersedeas as to any piercing-the-corporate-veil theory for Joyner. It also barred DER's use of an "officer participation" theory as to Joyner. Thereafter, DER withdrew this September Order and simultaneously issued an Amended Order on April 24, 1991 ("April Order") in part addressing its "officer participation" liability theory.

After the September Order's withdrawal, which effectively ended the appeal at Docket No. 90-442-E, Joyner filed a petition to recover his legal fees incurred through participating in this appeal under the Act of December 13, 1982, P.L. 1127, No. 257, *as amended*, 71 P.S. §2031 *et seq.* ("Costs Act").

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[3]With one exception, DER's Brief fails to cite any legal authority for the contentions advanced in the Motion.

On April 2, 1992, this Board issued an opinion authored by then Board Member Fitzpatrick denying Joyner's Petition. See 1992 EHB 405. This opinion, though initially drafted by Board Member Fitzpatrick, was signed by all five Board Members (unlike the Opinion on the Petition For Supersedeas which was signed solely by Administrative Law Judge Fitzpatrick).

Joyner successfully appealed to the Commonwealth Court from our denial of his Petition. See Archie Joyner v. Commonwealth, DER, ___ Pa. Cmwlth. ___, 619 A.2d 406 (1992) ("Joyner v. DER").[4] In its opinion, the Commonwealth Court recognized that while hearings are not mandated to be held on all Cost Act matters, one was appropriate here to allow Joyner to offer evidence on how much of the fees charged by his attorney were apportionable to representation of Joyner as opposed to representation of Processors. It ordered a remand of this appeal for a hearing on this issue. Thereafter, the Supreme Court of Pennsylvania denied DER's request for *allocatur* on October 6, 1993. On or about October 12, 1993, the Commonwealth Court returned this appeal's file to us. Because of Administrative Law Judge Fitzpatricks' resignation from this Board in the interim, this appeal was reassigned to Board Member Ehmann on its return from Commonwealth Court. DER voiced no objection to this reassignment when made. It is the hearing mandated by the Commonwealth Court which Board Member Ehmann has scheduled for November 9, 1993.

When DER issued its April Order in 1991 to Joyner, Processors and Art Foss, only Joyner and Processors appealed. This new Joyner and Processors appeal is docketed at EHB Docket No. 91-219-E. Originally, this appeal was

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[4]The Commonwealth Court denied reargument of this appeal on February 8, 1993.

also assigned to Administrative Law Judge Fitzpatrick. DER voiced no complaint to this assignment at that time. During this appeal's pendency, Joyner asked for a stay pending resolution of its appeal to the Commonwealth Court and the Board denied that request on July 30, 1992. This is of interest because in writing to the Board to oppose the stay, DER's current counsel stated in his letter of July 21, 1992: "Thus, there are two separate proceedings at this point that are quite unrelated". With former Administrative Law Judge Fitzpatrick's resignation from the Board, this matter was reassigned to Board Member Ehmann. Again, this occurred without objection from DER. The parties then proposed the submission of this appeal for adjudication based on a stipulated record consisting of five depositions and the supersedeas transcript in the appeal of the September Order, plus certain exhibits and a factual stipulation. Because the September Order's appeal remained in the appellate courts on the Cost Act issue, even though the parties' Post-Hearing Briefs were filed, the supersedeas hearing transcript was not available to the Board until that record was returned in October as stated above. Thus, while there will not be the taking of oral testimony in this appeal based upon the stipulated record, the appeal at Docket No. 91-219-E is ready for adjudication by the entire Board.

With this background, it is easier to define the shape of DER's argument. DER is concerned that negative inferences will flow from the September Order's appeal proceeding (where we now must determine what costs to award from DER to Joyner) to the April Order's proceeding, where we must prepare our adjudication of the merits of the appeal and DER's arguments in

support of its April Order. It is unfortunate from DER's standpoint that we can see the outline of its argument, however, because once it is discerned its lack of merit becomes readily apparent.

DER's Brief offers us no basis for its Motion other than its fear of some type of "cross contamination". The only citation in DER's Brief to legal authority for its position is Canon 3-C of the Code of Judicial Conduct. This citation offers no help, however. As quoted by DER, it states that "a judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned". However, DER does not assert any challenge to any Board Member's impartiality; it merely worries that a negative inference might flow from the appeal at Docket No. 90-442-E to the appeal at Docket No. 91-219-E. DER offers no evidence, whether on the record or off, of reasons to have such concerns. Further, it offers no citations to case law showing this Canon was intended to cover the scenario before us and we could find none ourselves. Clearly, this Canon does not require self-disqualification whenever there is any challenge to impartiality but only if the judge's impartiality may reasonably be questioned.[5] Considering that this Board has yet to adjudicate the merits of DER's legal theories in the appeal at Docket 91-219-E nor even adjudicated the merits of the appeal at Docket 90-442-E, we can see no reasonable bases for DER's "negative inferences" concerns here, either. This conclusion is reinforced by DER's admission in its Brief that the body of evidence presented in the appeal at Docket No. 91-219-E "differs

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[5]Also importantly, Canon 3-C applies to disqualification. Disqualification means no participation in the adjudicatory process by the disqualified judge. DER does not ask for disqualification in either appeal; it merely asks that the Board Member conducting the hearing be different in each appeal. That is not what this Canon addresses.

significantly from that presented during the supersedeas hearing in that the supplemental unrefuted depositional evidence offered by the Department strongly supports and supplements the Department's case against Joyner".

Despite this admission, DER asserts the legal issues are the same. Here, DER is simply wrong; they are not the same. In one appeal, where as a Board we never passed on the validity of any of DER's legal theories, we are directed by the Commonwealth Court to hold a limited hearing as to attorney's fees under the Costs Act. In the second appeal, we have yet to act in any fashion on the merits of DER's legal arguments, and in this second appeal they are based on a "significantly" different factual record than existed in the first proceeding. In point of fact the legal issues, the factual issues and the procedural postures of the two appeals differ dramatically.

Moreover, any Costs Act opinion issued by this Board is issued by the Board *en banc*. DER's motion is incorrect when it suggests one Member decides these matters. Each Board Member reviews the draft opinion prepared by a single Board Member, the parties' Briefs, etc., and a decision, if unanimous, then comes from the entire Board. The same is true as to each adjudication. They are Board adjudications and Board actions. Contrary to DER's assertion, neither is issued by a single Board Member. Thus, reassignment of one of the appeals for hearing and preparation of a draft opinion will not address DER's concerns. The only solution to DER's concerns would be for both of these matters not to be considered by the same Board Members, i.e., only a portion of this Board would consider each appeal (with no Member considering both). It goes without saying such an approach is not authorized by our rules or the Environmental Hearing Board Act, the Act of July 13, 1988, P.L. 530, No. 94, 35 P.S. §7511 *et seq*. Further, even if this

approach were authorized, it would not truly solve DER's problem because all four of the current Board Members participated in the first Costs Act decision in the appeal at Docket No. 90-442-E. Thus, if negative inferences flow from the two opinions at Docket No. 90-442-E (one by the Board on costs and one by Mr. Fitzpatrick on supersedeas) and the Commonwealth Court's decision in Joyner v. DER, they infect us all and we are all equally contaminated (or uncontaminated.) thereby.

DER's motion and brief make a point of stating they do not challenge the integrity either of this Board or the Administrative Law Judge/Board Member to whom the appeals are both assigned. In light of the numbers of appeal to this Board by various corporations and individuals which continually pit the same parties against each other before us, the Board would hope this is not the situation, since we often have a Board Member conducting our hearing in more than one appeal involving the same parties. Indeed, sometimes these appeals also involve the same statute and the same facilities. However, this is a common judicial occurrence. The same is true for other adjudicators, be they judges in the Courts of Common Pleas of less populous counties or referees in Pennsylvania's workers' compensation program. Clearly, this Board cannot assign a new Board Member to each appeal by the same party to avoid "unfavorable inferences" without quickly running out of Administrative Law Judges to hear the appeals.

As DER offers no other challenge or basis for this motion, we reject it.

ORDER

AND NOW, this 5th day of November, 1993, it is ordered that DER's Motion For Reassignment is denied.

ENVIRONMENTAL HEARING BOARD

RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: November 5, 1993

cc: **Bureau of Litigation**
Library: Brenda Houck
For the Commonwealth, DER:
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COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
	:	**EHB Docket No. 93-052-CP-W**
v.	:	
CBS, INC.	:	**Issued:** November 5, 1993

OPINION AND ORDER SUR PRELIMINARY OBJECTIONS

By Maxine Woelfling, Chairman

Synopsis:

The Department of Environmental Resources' (Department) preliminary objections to CBS, Inc.'s (CBS) preliminary objections are dismissed because CBS was required by the Board's rules, 25 Pa. Code §21.66(b), to set forth in its answer all of its legal objections to the Department's complaint for the assessment of civil penalties.

CBS' motion to dismiss for lack of specificity is denied. In the alternative, CBS' motion for a more specific pleading is granted and the Department is ordered to amend certain paragraphs that do not adequately aver time and place as required by Pa. R.C.P. 1019(f).

CBS' preliminary objections in the nature of a demurrer are dismissed because it is not clear that the Department's complaint fails to state causes of action under the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 *et seq.* (CSL), the Solid Waste Management Act, the Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 *et seq.* (SWMA), and

the Department's Special Water Pollution Regulations, 25 Pa. Code §101.1 *et seq.* (SWP Regulations). With only the facts of the complaint before the Board, it cannot be determined that the migration of waste from two waste disposal lagoons, which the Department alleges occurred after 1980, does not constitute "disposal" under the SWMA. Furthermore, in arguing that the Department has failed to state claims under the CSL and the SWP Regulations, CBS has made an impermissible "speaking demurrer" by attempting to introduce facts not clear from the face of the complaint.

OPINION

This matter was initiated on March 8, 1993, when the Department filed with us a Complaint for Assessment of Civil Penalty against CBS, pursuant to §605 of the CSL and §605 of the SWMA. In the five count complaint, the Department alleged that CBS and its predecessors, Hubley Toys and Gabriel Industries, violated various provisions of the CSL, the SWMA, and the SWP Regulations by virtue of their conduct at a manufacturing facility at 110 Pitney Road, East Lampeter Township, Lancaster County. The Department specifically alleged that CBS failed to notify the Department of actual or potential contamination; illegally discharged industrial, residual, and/or hazardous waste; illegally maintained, used, and closed an impoundment; failed to take necessary measures; and illegally transferred property.

On April 30, 1993, CBS filed its answer to the complaint, along with new matter and the preliminary objections that are the subject of this opinion. In its preliminary objections, CBS moved to dismiss the complaint or, in the alternative, to order a more specific pleading, and petitioned the Board to dismiss all five counts of the Department's complaint because they failed to state claims under the CSL, the SWMA, or the SWP Regulations. On June 21, 1993, the Department answered CBS' new matter, replied to CBS'

preliminary objections, and raised its own preliminary objections to CBS' preliminary objections. CBS responded to the Department's preliminary objections on June 30, 1993. Both parties filed briefs in support of their respective positions on July 12, 1993.

The Department's Preliminary Objection

In its answer to CBS' new matter and preliminary objections, the Department objected that CBS' preliminary objections were invalid because CBS waived its right to file preliminary objections when it answered the complaint. CBS correctly pointed out in response that the Board's rules of procedure require the answer to set forth all legal objections, including those that would ordinarily be raised as preliminary objections, in a single pleading. 25 Pa. Code §21.66(b). Therefore, the Department's preliminary objection on this basis is dismissed.

Motion to Dismiss or, in the Alternative, for a More Specific Pleading

CBS first contends the Department's complaint is not sufficiently specific, as required by Pa. R.C.P. No. 1019(f), which provides "Averments of time, place and items of special damage shall be specifically stated." CBS moves the Board to dismiss the complaint or, in the alternative, to order the Department to amend its nonspecific paragraphs.

To satisfy the requirements for specificity, a pleading "must set forth material facts which establish a cause of action and which enable the defendant to know the nature of his alleged wrongdoing so that he may prepare a defense." General State Authority v. Lawrie and Green, 24 Pa. Cmwlth 407, ___, 356 A.2d 851, 856 (1976). See also, DER v. Monesson, Inc., 1991 EHB 568, 575. CBS alleges the complaint sets forth causes of action based on activities that occurred between the mid-1950's and February 1992, but does not give specific dates for any of those allegedly unlawful actions. CBS

further contends the complaint alleges that four separate entities, Hubley Toys, Gabriel Industries, CBS, and Playskool, have conducted operations at the site during this time, but fails to state which entity is responsible for which activity.

In support of these claims, CBS points to Paragraphs 15 and 19, which group together the activities of Hubley, Gabriel, and CBS; Paragraphs 37 and 38, which fail to state which entity operated the site during the alleged activities; and Paragraphs 80, 82, and 83, which do not specify the types of waste discharged or the waters to which they were discharged.[1]

After carefully reviewing Paragraphs 15 and 19, we find they are not sufficiently specific to allow CBS to formulate its defense. Both paragraphs refer to the operations of "CBS Inc. and/or Gabriel Industries and/or Hubley Toys." CBS believes this characterization is insufficient because it does not differentiate among the activities of CBS, Gabriel, and Hubley. While the Department has alleged in Paragraph 10 that "CBS Inc. is the successor corporation to both of the prior owners/operators of the Site, Gabriel Industries and Hubley Toys," apparently in the belief that it need not distinguish among the actions of CBS, Gabriel, and Hubley, we will not accept as true allegations that are not well-pleaded. See, Bower v. Bower, 531 Pa.

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[1] Although CBS lists Paragraphs 15, 19, 37, 38, 80, 82, and 83 "[b]y way of example," we will only examine CBS' claim that the complaint lacked the necessary specificity with respect to these paragraphs. Rule 1028(b) states that preliminary objections "shall state specifically the grounds relied upon." To the extent CBS believes other paragraphs are insufficient, this can only be inferred from Paragraph 136 of CBS' motion, which states that "[t]he complaint fails to allege specific facts on numerous critical issues." We do not believe this inference satisfies Rule 1028(b)'s requirement that the grounds for a preliminary objection be specifically stated. Furthermore, it is not the Board's responsibility to review each of the 114 paragraphs of the complaint for specificity. If CBS believes that other paragraphs are insufficient because they fail to allege specific facts on critical issues, CBS must list these paragraphs and provide the reason(s) why they are insufficient.

54, __, 611 A.2d 181, 182 (1992).[2] The Department, therefore, must distinguish among the activities of CBS, Gabriel, and Hubley, and is ordered to amend Paragraphs 15 and 19 accordingly.

After carefully reviewing Paragraphs 37 and 38, we find that they are also insufficient. Paragraph 37 states:

> A former Hubley, Gabriel and/or CBS Inc. employee reported a spill or release of TCE to the sanitary sewer.

Paragraph 37 is insufficient because it does not state whose employee, Hubley's, Gabriel's, or CBS', reported the spill. Paragraph 38 states:

> A former Hubley, Gabriel and/or CBS Inc. employee was directed by his supervisor to empty approximately twenty (20) to thirty (30) skids containing three 55 gallon drums each (i.e., 60-90 drums).

Paragraph 38 is also insufficient because, again, it fails to state whether the employee at issue worked for Hubley, Gabriel, or CBS. The Department is ordered to amend Paragraphs 37 and 38 of its complaint.

Finally, after reviewing Paragraphs 80, 82, and 83, we find Paragraphs 80 and 83 to be insufficient. Paragraph 80 states:

> From the time that CBS Inc. purchased the Site and began operations on the Site in 1978, CBS Inc. engaged in activities that discharged or resulted in the discharge of polluting substances, including, but not necessarily limited to, spent solvents, metals, or other industrial waste chemicals onto the ground at the site, into the drainage ditch discussed at Paragraphs 27-28 and

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[2] We do not believe this is a well-pleaded allegation because the statement that CBS is a "successor corporation" is a legal conclusion, not a fact. See, Hill v. Trailmobile, Inc., 412 Pa. Super. 320, __, 603 A.2d 602, 605 (1992). Even if the term "successor" has both a factual and legal meaning, if it is intended to be used in a legal context, it cannot be treated as a statement of fact. See, Sredrick v. Sylack, 343 Pa. 486, __, 23 A.2d 333, 337 (1941). Because CBS can be held liable for the activities of Gabriel and Hubley only if it is a legal "successor" to their interests and obligations, we find that the Department intended to use this term in a legal context.

into waters of the Commonwealth.

This paragraph is deficient because it does not state whether ground or surface waters, or both, were affected. Paragraph 83 states:

> CBS Inc. knew, had reason to know, or should have known that the spent solvents and other waste industrial chemicals that it discharged or permitted to discharge onto the ground were entering the waters of the Commonwealth.

This paragraph likewise fails to specify whether ground or surface waters were affected. The Department, therefore, must amend Paragraphs 80 and 83.

We believe Paragraph 82 is sufficient because it can be reasonably inferred that the Department contends both ground and surface water were affected. Paragraph 82 states:

> The spent solvents and other industrial waste chemicals that CBS Inc. discharged or permitted to discharge onto the ground flowed, leached, or migrated through the ground and washed over the ground into the waters of the Commonwealth.

We believe the statement that wastes leached through the ground reasonably infers groundwater was affected, and the statement that wastes washed over the ground reasonably infers surface water was affected. We further believe that all three paragraphs, 80, 82, and 83, sufficiently allege the nature of the wastes involved because Count II, of which these paragraphs are a part, incorporates by reference: Paragraphs 16-18, which describe the manufacturing processes at the site; Paragraph 20, which describes some of the chemicals used; Paragraph 33, which describes some of the wastes dumped into Lagoon Y; Paragraph 50, which specifies the compounds discovered by excavating Lagoon Y; Paragraph 60, which describes the wastes currently contaminating groundwater at the site; and Paragraph 62, which describes the compounds currently contaminating the soil at the site.

CBS' motion to dismiss the Department's complaint for lack of

specificity is denied. In the alternative, we grant in part its motion for a more specific pleading and order the Department to amend Paragraphs 15, 19, 37, 38, 80, and 83.

CBS' Preliminary Objections in the Nature of a Demurrer

Because CBS claims in its petitions to strike Counts I-V that the Department has failed to state various causes of action, we will treat them as preliminary objections in the nature of a demurrer under Pa. R.C.P. 1028(a)(4). By demurring to the Department's complaint, CBS, in essence, contends that even if everything the Department alleges is true, the Department has not alleged CBS engaged in unlawful activity.

"[P]reliminary objections in the nature of a demurrer will be sustained only where a complaint is clearly insufficient to establish a right to relief." Olon v. Commonwealth, Department of Corrections, 147 Pa. Cmwlth. 22, ___, 606 A.2d 1241, 1242 (1992). To determine the sufficiency of a complaint, the court must accept as true all well-pleaded, material, and relevant facts, and every inference fairly deduced from those facts. County of Allegheny v. Commonwealth, 507 Pa. 360, ___, 490 A.2d 402, 408 (1985). The court may not, however, accept "conclusions of law, unwarranted inferences from facts, argumentative allegations, or expressions of opinion" contained in the challenged pleading, nor may it accept facts averred by the demurring party that are "not apparent from the face of [that pleading]." Martin v. Cmwlth., Department of Transportation, 124 Pa. Cmwlth. 625, ___, 556 A.2d 969, 971 (1989). Any doubt about the sufficiency of the pleading must be resolved in favor of overruling the demurrer. Olon, 147 Pa. Cmwlth. at ___, 606 A.2d at 1242.

A demurrer is not the equivalent of a motion for judgment on the pleadings or a motion for summary judgment. A motion for judgment on the

pleadings, authorized by Pa. R.C.P. 1034, is similar to a demurrer, but is made after the pleadings are closed and accepts as true all well-pleaded allegations of the non-moving party, as well as all facts that the non-moving party specifically admits. Kerr v. Borough of Union City, ___ Pa. Cmwlth. ___, ___, 614 A.2d 338, 339 (1992). A motion for summary judgment, authorized by Pa. R.C.P. 1035, also provides for summary disposition of a case, but is based on pleadings, depositions, answers to interrogatories, admissions on file, and affidavits. Pa. R.C.P. 1035(a) and (b). We point out these differences because there is a tendency among practitioners to blur the lines between a demurrer and a motion for judgment on the pleadings or for summary judgment. Because CBS has raised preliminary objections in the nature of a demurrer to the Department's complaint, we will only consider those facts that are well-pleaded and apparent from the face of the complaint.

Petition to Strike Count I

In Count I of the complaint, the Department alleges CBS violated §403(b)(12) of the SWMA and 25 Pa. Code §101.2(a) because CBS failed to notify the Department about spills and discharges of industrial and hazardous wastes at the site. The Department further alleges CBS violated §501(c) of the SWMA and 25 Pa. Code §101.4(b) because CBS failed to notify the Department of the location, size, construction, and contents of Lagoon Y, which was one of two lagoons used for the disposal of industrial and hazardous wastes on the site.[3] In its petition to strike, CBS contends §403(b)(12) of the SWMA and 25 Pa. Code §101.2(a) are inapplicable because the Department acknowledged in its brief that any spills or discharges occurred prior to CBS' purchase of the site in 1978. CBS further contends §501(c) of the SWMA and 25 Pa.Code

[3] The other being Lagoon X.

§101.4(b) do not apply because Lagoon Y was non-operational and abandoned when CBS took over. The Department responds that it is not citing CBS for "historic contamination" and that Lagoon Y was open and operational when CBS purchased the site.

Section 403(b)(12) of the SWMA requires any person "who generates, transports, stores, treats or disposes of hazardous waste" to notify the Department of any "spill or accidental discharge" of that waste. 35 P.S. §6018.403(b)(12). Section 101.2(a) of the SWP Regulations requires a person to notify the Department if a toxic substance is discharged into the waters of the Commonwealth or is placed so that it may discharge into the waters of the Commonwealth because of an "activity or other incident." 25 Pa.Code §101.2(a). CBS contends the phrases "spill or accidental discharge" and "activity or other incident" indicate that §403(b)(12) of the SWMA and 25 Pa. Code §101.2(a) only apply to current activities, but the complaint merely alleges the existence of "historic contamination" leftover from previous owners. Because the Department failed to state a cause of action, CBS argues, Count I must be stricken. We disagree.

The complaint expressly states a cause of action for violation of 25 Pa. Code §101.2(a). In Paragraphs 22, 24, 27, and 31-34, the Department alleges, *inter alia*, that CBS dumped wastes into a lagoon on the site that drained into the Conestoga River and engaged in chemical handling practices that contributed to the contamination of groundwater at the site.

In support of its cause of action under §403(b)(12) of the SWMA, the Department argues the "spills or accidental discharges" for which CBS is being held liable include CBS' active waste dumping into Lagoon Y and "ongoing contamination" on the site. CBS argues in response that since the phrase "spill or accidental discharge" has never been construed to include the

discovery of historic contamination (i.e. wastes dumped into lagoons on the site before CBS took over), Count I fails to state a cause of action.[4]

In order for the Board to grant a demurrer, it must be clear that the complaint does not state a cause of action. Olon, *supra*. Furthermore, any doubt about whether the complaint states a cause of action must be resolved against the demurrer. *Id.* We must, therefore, deny this portion of CBS' petition to strike Count I. We do not have enough information on the nature of the alleged "ongoing contamination" to determine that it does not constitute "spills" or "discharges" under §403(b)(12) of the SWMA. After the parties complete discovery or present evidence at the merits hearing, the nature and extent of the ongoing contamination should be more clear.

Section 501(c) of the SWMA requires any person "owning or operating a facility for treatment, storage or disposal" of hazardous waste to notify the Department of the activity and the wastes involved. 35 P.S. §6018.501(c). A "facility" is defined as "[a]ll land, structures and other appurtenances or improvements where municipal or residual waste disposal or processing is permitted or takes place, or where hazardous waste is treated, stored or disposed." Section 101.4(b) of the SWP Regulations requires a person who owns, operates or is in possession "of an existing impoundment containing polluting substances" to notify the Department of its location, size, construction, and contents. 25 Pa. Code §101.4(b). An "impoundment" is defined as "[a] depression, excavation or facility situated in or upon the ground, whether natural or artificial and whether lined or unlined." 25 Pa. Code §101.1.

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[4] To the extent CBS contends it did not deposit any wastes into Lagoon Y, CBS is relying on facts not alleged in the complaint. In Paragraphs 32-34, the Department alleges CBS dumped wastes into Lagoon Y. As we stated above, CBS has not moved for judgment on the pleadings. To demur, CBS must admit as true all well-pleaded facts in the Department's complaint.

After reviewing the contents of the complaint, we find it sufficiently alleges a violation of 25 Pa. Code §101.4(b). For purposes of this demurrer, the Department's description of Lagoon Y as an unlined, permeable, excavated, earthen pit that drains into the Conestoga River satisfies the definition of impoundment. Furthermore, in Paragraph 75, the Department alleged that CBS failed to notify it of Lagoon Y's location, size, construction, and contents.

We further find that the Department's complaint sufficiently alleges a violation of §501(c) of the SWMA. From the face of the complaint, we can infer that the Department considers Lagoon Y to be a disposal facility. While CBS contends the only contamination at Lagoon Y is "historic" (occurring prior to 1980) and, therefore, cannot be governed by §501(c), the Department considers contamination and, therefore, disposal at Lagoon Y to be ongoing and subject to the notification provisions of §501(c).

The key to this issue, whether the Department has alleged ongoing disposal or merely historic contamination, is the meaning of the term "disposal" under the SWMA. If, as CBS argues, waste leaking from Lagoon Y after 1980 (the effective date of the SWMA) does not constitute disposal, then §501(c) of the SWMA did not require CBS to notify the Department of the existence of the lagoon. If, on the other hand, waste leaking from Lagoon Y after 1980 constitutes disposal, then the complaint has alleged a violation of §501(c).[5]

"Disposal" is defined in the SWMA as:

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[5] The Department has admitted in Paragraphs 22 and 33 that CBS stopped depositing wastes into Lagoon Y in 1978. We cannot apply §501(c) of the SWMA retroactively, to CBS' dumping in 1978, because the language of this section does not expressly state the legislature's intent to do so. See, McMahon v. McMahon, 417 Pa. Super 592, 612 A.2d 1360 (1992). Because we can't apply §501(c) retroactively, in order to apply §501(c) to CBS, we must find that waste leaching from Lagoon Y into the surrounding environment, which we can infer the Department believes occurred between 1980 and 1986, constitutes "disposal."

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

35 P.S. §6018.103. Unfortunately, the courts of the Commonwealth have not yet determined the scope of this term. To get around the lack of apparent precedent, both parties refer us to our decision in New Castle Junk Co. v. DER, 1992 EHB 579, in which we stated that the definition of disposal in the SWMA is similar to the definition of disposal in the the Resource Conservation and Recovery Act, 42 U.S.C. §6901 *et seq.*, and the Comprehensive, Environmental Response, Compensation and Liability Act, 42 U.S.C. §9601 *et seq.* What the decisions construing these statues show us, however, is that this issue is not clear and free from doubt. Some courts have held that the term "disposal" includes the passive migration of waste, while others have held that it does not. See, U.S. v. Peterson Sand & Gravel, Inc., 806 F. Supp. 1346 (N.D. Ill. 1992), and Snediker Developers Limited Partnership v. Evans, 773 F. Supp. 984 (E.D. Mich. 1991) (holding that passive migration of waste constitutes disposal); Nurad, Inc. v. William E. Hooper & Sons, Inc., 966 F.2d 837 (4th Cir. 1992), and CPC International, Inc. v. Aerojet-General Corp., 759 F. Supp. 1269 (W.D. Mich. 1991) (holding that passive migration of waste constitutes disposal). Because this issue is not free from doubt, it cannot properly be resolved by demurrer. The Department, therefore, has sufficiently stated a violation of §501(c) of the SWMA.

Based on the foregoing, CBS' petition to strike Count I must be denied.

First Petition to Strike Count II

Count II of the complaint seeks civil penalties for violations of the CSL and the SWMA. The Department alleges CBS violated §§301 and 402 of the CSL by discharging or permitting the discharge of industrial waste into the waters of the Commonwealth. The Department further alleges CBS violated §§301, 302(a), and 401 of the SWMA because it stored, processed, treated, and disposed of residual and hazardous waste on the site. CBS first argues that Count II should be stricken because the complaint alleges hazardous and industrial wastes were dumped into Lagoon X until 1966 and into Lagoon Y until 1978, but the SWMA was not enacted until, and does not apply to, activities that occurred prior to 1980. The Department responds that it has alleged post-SWMA activities for which CBS is liable, including discharging or permitting the discharge of industrial wastes.

Section 301 of the SWMA prohibits a person from storing, transporting, processing, or disposing of residual waste unless such activity is consistent with or authorized by the Department's rules and regulations. Section 302(a) makes it unlawful for a person "to dispose, process, store, or permit the disposal, processing or storage of any residual waste" in a manner contrary to the Department's rules and regulations. And finally, §401 of the SWMA prohibits a person from storing, transporting, treating, or disposing of hazardous waste unless authorized by the Department's regulations. Because the Department contends it has alleged post-SWMA activities, including the passive migration of waste from Lagoons X and Y, this issue is not appropriate for resolution by demurrer. It is not clear whether the passive migration of waste, which is similar to "ongoing contamination," constitutes "disposal" under the SWMA. CBS' first petition to strike Count II is denied.

Second Petition to Strike Count II

CBS next argues that Count II should be stricken because §§301 and 402 of the CSL and §§301, 302(a), and 401 of the SWMA only apply to "new spills and discharges of waste into the environment, rather than to the passive migration of materials previously placed in the environment by other parties." The Department responds that §§301 and 402 of the CSL apply to a person that allows the passive migration of waste, and that §§301 and 302 of the SWMA apply to storage and disposal of waste, not just new spills and discharges. Since we have already examined the scope of the term "disposal" under the SWMA, and found that it does not present an issue appropriate for resolution by demurrer, we deny CBS' second petition to strike Count II with respect to the SWMA.

Section 301 of the CSL prohibits a person from placing, permitting to be placed or discharged, or continuing to discharge or permit to flow, any industrial wastes into the waters of the Commonwealth. Section 402, meanwhile, authorizes the Department to require a permit for any activity, "including but not limited to the impounding, handling, storage, transportation, processing or disposing of materials or substances," that creates a danger of pollution to the waters of the Commonwealth, and further makes it unlawful to undertake such activity without a required permit.

Turning first to §301, we find that the Department has sufficiently alleged a violation of that provision. In Paragraphs 22-34, the Department states, *inter alia*, that CBS dumped wastes into Lagoon Y, which drains into a a detention pond, then to a drainage ditch, and on to the Conestoga River, and that CBS' chemical handling practices have contributed to contamination of groundwater at the site. For purposes of this demurrer, these allegations suffice.

Looking next at §402, we find that these same allegations are sufficient to state a violation of this provision.[6] Contrary to CBS' assertions, these allegations do not rely on activities that occurred prior to CBS' acquisition of the site.[7] Because the Department has sufficiently alleged violations of §§301, 302(a), and 401 of the SWMA and §§301 and 402 of the CSL, CBS' second petition to strike Count II is denied.

Petition to Strike Count III

In Count III of the complaint, the Department alleges CBS violated §501(a) of the SWMA and 25 Pa. Code §101.4(a) because CBS improperly maintained, used, and closed Lagoon Y after it purchased the site in 1978. CBS responds in its petition to strike Count II that it could not have violated §501(a) of the SWMA or 25 Pa. Code §101.4(a) because those provisions only apply to active, operational waste impoundments and Lagoon Y was no longer in use when CBS bought the site.

In making this argument, CBS fails to admit as true the allegations contained in Paragraphs 32-34 of the complaint, which contend: Lagoon Y was open when CBS bought the site; CBS deposited industrial wastes into Lagoon Y; and CBS closed Lagoon Y. Because we must accept these allegations as true,

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[6] While CBS argues in its brief that Count II fails to state a violation of §402 because it does not specifically allege CBS acted without a permit, this argument goes way beyond the scope of CBS' preliminary objections and will be disregarded. In its second petition to strike Count II, CBS states: "To the extent that Count II relies on activities that occurred prior to CBS' acquisition of the Site (see, eg., Complaint, [Paragraphs] 22-31), CBS could not have violated 35 P.S. §§691.301, 691.402 ... as a matter of law." When the brief goes beyond the scope of the pleading or motion, our decision will be limited to the issues raised in the pleading or motion. Ernest Barkman, *et al.* v. DER, EHB Docket No. 90-412-W (Opinion issued May 21, 1993).

[7] This is not say that if the Department had relied on pre-1978 activities Count II would not have sufficiently alleged a violation of §402 of the CSL. We do not decide that issue here.

CBS' petition to strike Count III is denied.[8]

Petition to Strike Count IV

The Department alleges in Count IV of the complaint that CBS violated §401 of the CSL, 25 Pa. Code §101.3(a), and §302(b)(1) and (3) of the SWMA because CBS failed take measures necessary to prevent pollution and adverse effects to public health and the environment. CBS contends in its petition to strike Count IV that it has not violated these provisions because they only apply to active waste handling practices rather than to contamination leftover from prior owners.

Turning first to §302(b)(1) and (3) of the SWMA, we run into the same issue as in CBS' other petitions to strike causes of action under the SWMA. These provisions make it unlawful for any person who "stores, processes, or disposes of residual waste" to fail to use methods and facilities that are necessary to control discharges, etc. from residual waste, or to design and use facilities that adversely affect public health or the environment. The Department contends in its brief, and we can infer from the allegations in its complaint, that it holds CBS liable for violating these provisions because of ongoing disposal CBS failed to correct. As we stated above, however, the issue of whether the continuing migration of waste constitutes "disposal" under the SWMA is not properly resolved by a demurrer.

Section 401 of the CSL makes it unlawful for any person "to put or place into any of the waters of the Commonwealth, or allow or permit to be discharged from property owned or occupied by such person into any of the waters of the Commonwealth ..." any substance that will result in pollution.

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[8] By stating facts that are not on the record, CBS has made an impermissible "speaking demurrer." To the extent CBS' demurrer to Count III relies on these facts, it must be denied. Martin v. Cmwlth., Department of Transportation, 124 Pa. Cmwlth. 625, 556 A.2d 969 (1989).

In arguing that it could not have violated this section because Count IV only refers to activities that occurred before it bought the site, CBS fails to accept as true the allegations contained in Paragraphs 22-41 of the complaint.[9] These paragraphs state, *inter alia*, that CBS used and closed Lagoon Y and engaged in chemical handling practices contributing to groundwater contamination at the site.

Section 101.3(a) of the Department's regulations requires persons "engaged in an activity, which includes the impoundment, production, processing, transportation, storage, use, application or disposal of polluting substances [to] take necessary measures to prevent the substances from directly or indirectly reaching waters of this Commonwealth, through accident, carelessness, maliciousness, hazards of weather or from another cause." 25 Pa. Code §101.3(a). Looking again at Paragraphs 22-41, we find that the Department has sufficiently stated a cause of action for the violation of 25 Pa. Code §101.3(a). Based on the foregoing, CBS' petition to strike Count IV of the complaint is denied.

Petition to Strike Count V

In Count V of the complaint, the Department alleges CBS violated §405 of the SWMA, 35 P.S. §6018.405, because CBS incorrectly and inaccurately stated in an affidavit attached to its sale of the site to Hasbro/Playskool that it was not currently disposing of hazardous waste, had not disposed of hazardous waste, and had no knowledge of previous hazardous waste disposal. The Department further alleges that CBS knew about the historic disposal of hazardous waste on the site, that CBS knew hazardous substances were present on the site before CBS acquired it, and that CBS knew its activities would

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[9] With the exception of Paragraphs 37 and 38, which we have ordered the Department to amend.

result in pollution or create a danger of pollution on the site. CBS responds that the Department never expressly alleged CBS disposed of, or had actual knowledge of previous disposal of "hazardous waste" on the site, and that activities prior to September 6, 1980, cannot constitute the disposal of regulated hazardous waste.

Section 405 requires "the grantor in every deed for the conveyance of property on which hazardous waste is presently being disposed, or has ever been disposed by the grantor or to the grantor's actual knowledge", to acknowledge in the deed the existence of such disposal. 35 P.S. §6018.405. The Department's failure to use the term "hazardous waste" to describe the substances allegedly disposed of, or that CBS knew were disposed, is not fatal to Count V. The term "hazardous waste" is a defined term, 35 P.S. §6018.103, and as such is a legal conclusion. See, Sredrick, *supra* (even though term can have both a factual and legal meaning, if it is intended to be used in a legal context, it must be treated as legal term). Because the term "hazardous waste" is a legal term, it does not have to be specifically averred. It is sufficient if there are enough facts in the complaint to infer that the substances being disposed of are "hazardous." See, Pennsylvania Rail Co. v City of Pittsburgh, 335 Pa. 449, ___, 6 A.2d 907, 913 (1939).

CBS' argument that no activity prior to enactment of the SWMA can constitute "disposal" under that act seems to be based on its belief that the SWMA does not apply retroactively. This argument overlooks the plain language of §405, which refers to hazardous waste that has "ever" been disposed of by the grantor or to the grantor's knowledge. We believe the General Assembly's use of the word "ever" is evidence of its intent to expand the scope of this section to include disposal that occurred before 1980. See, 1 Pa. C.S. §1926; McMahon v. McMahon, 417 Pa. Super. 592, ___, 612 A.2d 1360, 1364 (1992).

Accordingly, we find that if CBS ever disposed of hazardous waste on the site or knew that anyone else ever disposed of hazardous waste on the site, CBS was required by §405 of SWMA to disclose this information to the grantee of the deed.

Looking at the complaint, we find: it alleges in Paragraphs 110 and 111, "CBS Inc. knew of the historical" industrial activities and disposal that occurred at the site; in paragraphs 46 and 50 it refers to both the M & M and CTEK reports, which indicate the existence of a disposal pit that should be tested for heavy metals and residual organics and which detailed the compounds revealed from a sample of the test pit; and in Paragraphs 32 and 34 it avers CBS used and closed Lagoon Y after it purchased the site in 1978. The Department contends CBS violated §405 because, despite the allegations summarized above, CBS attached to its sale of the site an affidavit stating that it did not dispose of any hazardous waste nor have knowledge of any other hazardous waste disposal. Based on the foregoing, we believe the Department sufficiently stated a cause of action for the violation of §405 of the SWMA and deny CBS' petition to strike Count V.

O R D E R

AND NOW, this 5th day of November, 1993, it is ordered that:

1) CBS's motion to dismiss is denied;

2) CBS's alternative motion for a more specific pleading is granted in part. On or before December 3, 1993, the Department shall amend Paragraphs, 15, 19, 37, 38, 80, and 83 of its complaint in accordance with this opinion;

3) CBS's preliminary objections are otherwise dismissed; and

4) The Department's preliminary objections are dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

DATED: November 5, 1993

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JAMES E. FULKROAD, d/b/a JAMES FULKROAD DISPOSAL and JAMES E. AND MILDRED I. FULKROAD	:	
v.	:	**EHB Docket No. 91-141-W**
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** November 9, 1993

OPINION AND ORDER SUR PETITION FOR RECONSIDERATION

By Maxine Woelfling, Chairman

Synopsis

The Board reconsiders its August 24, 1993, adjudication that the Department of Environmental Resources' (Department) issuance of an order to cease illegally dumping solid waste and remediate a site was not an abuse of discretion. The Board modifies several of its earlier findings of fact but affirms its earlier adjudication.

OPINION

On August 24, 1993, the Board issued an adjudication dismissing an appeal by James E. Fulkroad, d/b/a James Fulkroad Disposal and James E. and Mildred I. Fulkroad (collectively, the Fulkroads) of a March 12, 1991, order from the Department requiring the Fulkroads to cease dumping solid waste without a permit and to remove and properly dispose of the illegally dumped waste.

On September 13, 1993, the Fulkroads petitioned the Board for reconsideration of Findings of Fact Nos. 29, 32, and 33, alleging that the findings were erroneous for a variety of reasons. The Department's September 15, 1993, response to the petition maintains that the findings were correct and supported by the record but, even if they weren't, modification of the disputed findings would not justify a reversal of the adjudication.

Reconsideration was granted by the Board in an order dated September 16, 1993. Although not set forth in the order, our basis for granting reconsideration was that the findings, if not as stated in the adjudication, could justify a reversal of our decision. 25 Pa. Code §21.122(a)(2). Before we examine each of the disputed findings, we will address two issues which are relevant to the reconsideration of all three findings.

The first issue involves the weight to be accorded expert and lay testimony on the same subject and, in particular, the testimony of Mr. Fulkroad and his consultants regarding the amounts of solid waste disposed of at the site. A lay witness or an expert witness can offer opinion evidence.[1] Bessemer Stores v. Reed Shaw Stenhouse, 344 Pa. Super. 218, 496 A.2d 762, 766 (1985). Evidence in the form of expert opinion testimony is entitled to relatively low weight where the opinion, based on theoretical

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[1] The difference between expert and lay testimony is described in McCormick on Evidence §13 (4th ed. 1992):

> An observer is qualified to testify because he has firsthand knowledge of the situation or transaction at issue. The expert has something different to contribute. This is the power to draw inferences from the facts.

assumptions, is rebutted by direct evidence.[2] In re Smith's Estate, 454 Pa. 534, 314 A.2d 21 (1974); Pennsylvania Evidence, Packel and Poulin, §702.4.

The second general issue pertains to the nature and extent of judicial notice. Simply put, judicial notice relates to matters of common knowledge within the jurisdiction of the tribunal. Among the types of knowledge of which a tribunal may take judicial notice are time, days, dates, weights, measures, values, and the laws of mathematics. Pennsylvania Evidence, Packel and Poulin, §201.2. In administrative proceedings, the presiding officer can take official notice of matters that might be judicially noticed by the courts, such as mathematics, *i.e.* performing simple calculations. 1 Pa. Code §35.173. We will turn now to the allegedly erroneous findings of fact.

Finding of Fact No. 29 in the Board's August 23, 1993, adjudication stated:

> 29. There was a considerable discrepancy between the estimates of the amount of waste material at the site. Mr. Templeton and Mr. Nawrocki estimated 17,378 tons of waste material, while Mr. Fulkroad has variously stated approximately 300 to 400 tons and approximately 600 tons (N.T. 81, 108, 109; Ex. A-4).

The Fulkroads allege this finding is erroneous because Mr. Fulkroad did not make those estimates of total waste and the estimate of "17,378 tons of waste material" includes waste and soil.

Mr. Fulkroad did testify regarding the amount of solid waste disposed of at the site. He estimated that four to five tons of solid waste were

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[2] Direct evidence is evidence of the precise fact in issue and on trial by witnesses who can testify that they saw the acts done or heard the words spoken which constituted the precise fact to be proved. Black's Law Dictionary, 546 (Revised 4th Ed.).

dumped on the site twice a week from November, 1989, through February or March, 1991 (N.T. 106-107). And, the parties stipulated that waste was deposited on the site from November, 1989, to sometime prior to March, 1991 (Stipulation No. 5). Taking official notice that there were 70 weeks in the period November, 1989, through February, 1991, and multiplying that figure by eight to 10 tons per week of solid waste yields the figure of 560 to 700 tons of solid waste dumped at the site. Viewing this in the light most favorable to the Fulkroads, we conclude that approximately 600 tons of solid waste were dumped at the site over the period in question. As for the consultants' estimates, whether or not they involved solid waste, cover material, or both, we give them little weight for, unlike Mr. Fulkroad, the consultants were not at the site during the period in question. The finding will be modified consistent with the foregoing discussion.

Finding of Fact No. 32 in the August 24, 1993, adjudication stated:

> 32. Further assuming a volume/weight ratio of three cubic yards per ton of solid waste and 1.5 cubic yards per ton of soil and using Mr. Fulkroad's estimate that 600 tons of solid waste were deposited on the site, Rathfon concluded that 1,114 tons of material would have to be removed and disposed at a permitted landfill (N.T. 113).

The Fulkroads allege that this finding is erroneous because the Board disregarded the calculations of a qualified expert, there was no evidence that Mr. Rathfon concluded that 1,114 tons of material would have to be removed, and that if the 1,114 tons were the result of a calculation, it was not apparent how the calculation was performed.

The Fulkroads are correct that Mr. Rathfon did not perform this calculation. Rather, the finding is derived from the Department's proposed finding No. 30 and the calculations in support thereof at footnote 3 of the

Department's post-hearing brief and is based on testimony that appears in the transcript of the hearing on the merits. The site consists of approximately 70% waste and 30% soil (N.T. 25). There are roughly three cubic yards (yd^3) per ton of solid waste and 1.5 yd^3 per ton of soil (N.T. 113). Since approximately 600 tons of solid waste were disposed of at the site, this equates to approximately 1800 yd^3 of solid waste at the site. If 1800 yd^3 of solid waste represents 70% of the volume of material on the site which must be properly disposed of, a simple algebraic operation produces the total volume of material which must be properly disposed of, as well as the volume of soil associated with that waste:

X = Total volume of material which must be properly disposed of
and
$.7X$ = 1800 yd^3
X = 2571 yd^3

Therefore, the amount of soil to be disposed of is .3 (2571 yd^3) or 771 yd^3. Thus, the total volume of material which must be removed and properly disposed of is 2571 yd^3 or 1114 tons (600 tons of solid waste and (771 yd^3 x 1 ton/1.5 yd^3) or 514 tons of soil). This finding will be modified consistent with this discussion.

The last challenged finding, No. 33, read:

> 33. Accepting the estimates of the Fulkroads' consultants for excavation and stockpiling overburden; backfilling with suitable on-site material; and revegetating the disturbed area, but applying the per unit costs for excavation ($12.00 per cubic yard) and transport and disposal ($41.20 per ton) to 2,571 cubic yards and 1,114 tons of material, respectively, Rathfon concluded the cost of compliance would be $113,974 (N.T. 113; Ex. A-4).
>
> (footnote omitted)

The Fulkroads contend this finding of fact is erroneous because there is no evidence of record to support the factual conclusion that Mr. Rathfon concluded the cost of compliance would be $113,974.

As with Finding of Fact No. 32, the Fulkroads are correct that Mr. Rathfon did not reach this conclusion. And, again, as with Finding No. 32, the Board's finding is taken from the Department's proposed finding No. 30 and the supporting footnote. The estimated cost of compliance is arrived at by substituting 2571 yd^3 of waste material and 1114 tons of waste material in the second and third elements of Fulkroads' consultants' estimated costs in Ex. A-4:

Excavation and Stockpiling Overburden	4,563 yd^3	@ 1.90/yd^3 =	$ 8,670
Excavation and Transporting Waste Material	2,571 yd^3	@ 12.00/yd^3 =	30,852
Permitted Landfill Acceptance of Waste Material	1,114 tons	@ 41.20/ton =	45,897
Backfill with Suitable On-Site Material	14,421 yd^3	@ 1.65/yd^3 =	23,795
Revegetation of Disturbed Area	10,000 square yards (yd^2)	@ 0.471/yd^2 =	4,700
		Total Cost =	$113,974

The finding will be modified consistent with the foregoing.

Next, we address whether these changes to the three findings result in a reversal or modification of the Board's conclusion that the remedial measures prescribed in the order were not an abuse of discretion. They do not, for, in the absence of evidence that the closure-in-place alternative was as protective of the environment as the removal alternative, the costs are irrelevant to the issue of whether the order was an abuse of discretion. Furthermore, the conclusion that the Fulkroads' ability to pay for the remedial measures is irrelevant at this stage of the proceedings is also unchanged.

O R D E R

AND NOW, this 9th day of November, 1993, it is ordered that:

1) Findings of Fact Nos. 29, 32, and 33 of the Board's August 24, 1993, adjudication are modified as follows:

29. Approximately four to five tons of solid waste were deposited on the site twice a week from November, 1989, through February, 1991, for a total of approximately 600 tons of solid waste (N.T. 106-108, Stip. No. 5).

* * * * *

32. Assuming that the ratio of volume to weight is 3 yd^3 per ton of solid waste and 1.5 yd^3 per ton of soil (N.T. 113); that the site consists of approximately 70% waste and 30% soil (N.T. 25); and that approximately 600 tons of solid waste were dumped on the site (Finding of Fact No. 29), the total volume of waste material which must be disposed of is:

X	=	Total volume of waste material which must be properly disposed of and
.7 X	=	600 tons of solid waste (3 yd^3/ton)
.7 X	=	1800 yd^3 of solid waste
X	=	2571 yd^3 of waste material

Therefore, 30% of 2571 yd^3 or 771 yd^3 is soil. This, in turn, equates to a total of 1114 tons of waste material, arrived at by applying the same weight to volume ratios for the solid waste and soil:

Y	=	Total weight of waste material which must be properly disposed of and
Y	=	600 tons of solid waste plus (771 yd^3 x 1 ton/1.5 yd^3) of soil
Y	=	600 tons of solid waste plus 514 tons of soil
Y	=	1114 tons of waste material

33. Accepting the cost estimates of the Fulkroads' consultants for excavation and stockpiling overburden; backfilling with suitable on-site material; and revegetating the disturbed area, but applying the per unit costs for excavation and disposal of the solid waste and soil to 2571 yd^3 and 1114 tons of waste material, the cost of compliance is $113,974, arrived at in this fashion:

Excavation and Stockpiling Overburden	4,563 yd^3	@ 1.90/yd^3 =	$ 8,670
Excavation and Transporting Waste Material	2,571 yd^3	@ 12.00/yd^3 =	30,852
Permitted Landfill Acceptance of Waste Material	1,114 tons	@ 41.20/ton =	45,897
Backfill with Suitable On-Site Material	14,421 yd^3	@ 1.65/yd^3 =	23,795
Revegetation of Disturbed Area	10,000 yd^2	@ 0.471/yd^2 =	4,700
		Total Cost =	$113,974

(Finding of Fact No. 32, Ex. A-4)

2) The adjudication is affirmed in all other respects.

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DATED: November 9, 1993

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NATIONAL FORGE COMPANY	:	
	:	
v.	:	**EHB Docket No. 93-227-E**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: November 10, 1993**

OPINION AND ORDER
SUR MOTION TO DISMISS

By Richard S. Ehmann, Member

Synopsis

Where we evaluate a Motion to Dismiss an appeal from DER's letter, which concludes that its residual waste regulations apply to appellant's settling pond and that appellant should submit certain forms to DER as to this impoundment, we construe the motion in favor of the appellant as the non-moving party and resolve doubts about the motion against granting it. Where the parties' allegations, when read together, suggest that previously DER has orally advised the appellant that these regulations both do and do not apply to its impoundment, DER's letter stating they do apply appears to be a final decision of DER which in turn mandates certain action by appellant to comply with the applicable regulations. Accordingly the motion must be denied.

OPINION

On July 14, 1993, the Department of Environmental Resources' ("DER") Brian Mummert wrote to National Forge Company ("Forge") advising it that in

DER's opinion, Forge's wastewater treatment plant impoundment is a residual waste impoundment subject to the applicable residual waste regulations rather than being subject to municipal waste regulations. This letter also states that since the impoundment receives industrial wastewater, Forge must complete and submit "Form T-3" in accordance with 25 Pa. Code §287.111(a). It then says that the form should be submitted within thirty days. Forge has appealed this letter to this Board.

In response to this appeal, counsel for DER has filed a Motion to Dismiss the appeal, alleging that this letter does not constitute an appealable action or adjudication of DER. Forge timely responded thereto and asserts the contrary. On November 1, 1993, DER submitted to this Board its unsolicited Reply Memorandum To National Forge Company's Memorandum Opposing DER's Motion To Dismiss For Lack of Jurisdiction. Other than citing more cases purported to support its argument, this Reply plows no new ground.

As suggested by Forge, in commencing our review of DER's motion we keep in mind that DER's motion must be construed in favor of the non-moving party and we must resolve any doubts in Forge's favor. John and Sharon Klay d/b/a Fayette Springs Farms v. DER, EHB Docket No. 92-280-E (Opinion issued February 4, 1993) ("Klay"), and Scott Township, Allegheny County v. DER, EHB Docket No. 92-548-E (Opinion issued March 4, 1993) ("Scott").

DER's letter to Forge provides in relevant part:

> In response to your letter dated June 15, 1993, the Department has clarified its position since our on-site visit of March 26, 1993, and has determined that this impoundment is a residual waste impoundment subject to the Residual Waste Regulations.
> . . .
>
> Additionally, since this impoundment takes industrial wastewater, Form T3 (enclosed) needs to be completed in accordance with Section 287.111(a) of the Residual Waste Regulations.

Please submit this completed form within thirty (30) days of receipt of this letter.

DER's motion takes the position that this letter is not a "final action" or "adjudication" by DER because it does not direct Forge to take any action with regard to its impoundment. Because this is so, DER asserts that this Board, being one of limited jurisdiction, lacks jurisdiction to hear this appeal and must, therefore, dismiss it. DER cites JEK Construction Company, Inc. v. DER, EHB Docket 90-111-E (Opinion and Order, May 18, 1990)[1] for this proposition. Forge, on the other hand, contends DER's letter not only reflects a final decision by DER that the residual waste regulations apply to its settling pond after DER had said both that they did and did not apply, but also directs the submission of the "Form T-3". Forge asserts this letter must thus be read as a final action or adjudication of DER which it may appeal to us. In support for its position it cites Meadville Forging Company v. DER, 1987 EHB 782.

As we have often written in the past, this Board's jurisdiction is limited. Section 4(a) of the Environmental Hearing Board Act, the Act of July 13, 1988, P.L. 530, 35 P.S. §7514, limits us to appeals from orders, permits, licenses or decisions of DER. Any of these is a DER action. Under 25 Pa. Code §21.2(a), this term includes an order, decree, decision, determination or ruling by DER which affects the appellant's personal or property rights immunities, duties, liabilities or obligations. Lancaster County Solid Waste Management Authority *et al.* v. DER, EHB Docket No. 92-447-MR (Opinion issued May 17, 1993) ("Lancaster"). As we pointed out in Lancaster, it is the

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[1] The proper citation for this opinion is 1990 EHB 535, since it has been published in the bound volumes of the Board's adjudications for over two years.

letter's content and impact which are decisive, with DER's provision of information or statements of its interpretation of the law being unappealable. See also, Ed Peterson *et al.* v. DER, 1990 EHB 1224.

The instant letter appears to fall within the appealable class. While we have no record before us, the factual allegations of the parties in their Motions (with attached exhibits), Memorandums and other filings suggest that in late 1992 and early 1993, DER's staff told Forge both that its residual waste regulations apply to this impoundment and that they do not so apply. (See Exhibit B to DER's Motion.) In response, Forge wrote to DER to confirm that they do not apply, and received in response the DER letter quoted above. No matter how much DER might like to characterize this letter as expressing mere advice or merely its interpretation of the law, under these apparent circumstances this letter appears to be a DER final decision that the regulations apply.

Because DER has reached this conclusion, certain consequences flow from it. 25 Pa. Code §287.111 requires that each operator of a residual waste storage or disposal impoundment submit certain information to DER by January 4, 1993. This information, called a "notice" by the regulation, is to be on a DER form, and we presume from DER's letter that it must be "Form T-3". The notice required of the impoundment's operator by Section 287.111 is much more than the word notice implies. It must, in the appropriate case, include descriptions of the facility's leachate collection and treatment facility, the results of groundwater or surface water monitoring, a statement of whether the operator will file a closure plan for the impoundment or an application to permit it, a bond of the type required in 25 Pa. Code §287.312, a water quality monitoring plan, a description of actual or potential air emissions and other information. Moreover, those who do not file such notices in a

timely fashion are mandated by subsection (c) of Section 287.111 to cease use of the impoundment and close it by July 5, 1993. Thus, even submitting this notice to DER will take Forge's commitment of time and resources, and its failure to do so in a timely fashion seems to require Forge to promptly close down this impoundment.

It is true that DER's letter does not order the notices's submission by Forge but asks that it please be submitted. However, this does not change either the regulation's requirement that this form be submitted or the conclusion that the regulatory deadline for its submission to DER by Forge has passed.

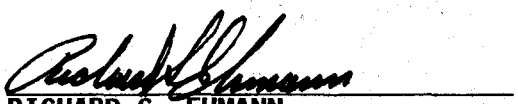
We also believe it is fair to observe that if DER had intended this letter to be less than its final decision on whether these regulations apply to this impoundment (and thus, that Forge must submit "Form T-3") and was surprised by Forge's appeal, it has always retained the ability to issue an amendment to or substitute for its letter of July 14, 1993, which would clarify DER's intent. This Board has not been made aware of any such modification of DER's position and we are reasonably sure at least one of the parties would have brought it to our attention, if it existed.

In sum, this letter is DER's final conclusion and from it flows obligations for Forge. Thus, it is appealable. Meadville Forging Company v. DER, *supra*; Scott. To hold otherwise would be to allow DER to conclude that these requirements are placed on Forge but to find that Forge may not now challenge this conclusion and must wait for further actions against it by DER based on Forge's non-compliance with this regulation before Forge may challenge DER's decision. We are unwilling to so conclude, having previously found that when we consider motions of this type and have doubts, the doubts must be resolved in favor of the appeal's continuance. See Klay and Scott.

ORDER

AND NOW, this 10th day of November, 1993, it is ordered that DER's Motion To Dismiss is denied.

ENVIRONMENTAL HEARING BOARD



RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: November 10, 1993

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M. DIANE SMITH
SECRETARY TO THE BOARD

CHESTER RESIDENTS CONCERNED FOR QUALITY LIVING	:	
v.	:	**EHB Docket No. 93-234-MR**
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES and THERMAL PURE SYSTEMS, INC., Permittee	:	**Issued: November 23, 1993**

OPINION AND ORDER
SUR
MOTION FOR RECONSIDERATION OR REHEARING
EN BANC AND
MOTION FOR CERTIFICATION OF INTERLOCUTORY ORDER

Robert D. Myers, Member

Synopsis

The Board denies a Motion for Reconsideration or Rehearing *en banc* of an order denying a Petition for Supersedeas because of the absence of exceptional circumstances. The fact that the order represents the first interpretation of record of a statute does not, in and of itself, create exceptional circumstances. The Board denies a Motion for Certification of Interlocutory Order because of the absence of substantial grounds for a difference of opinion as to the interpretation of a statute and because the Board is not persuaded that immediate interlocutory appeal would hasten the ultimate determination of the case. Instead, the Board directs the filing of Motions for Summary Judgment.

OPINION

Chester Residents Concerned for Quality Living (Appellants) filed a Notice of Appeal on August 18, 1993 seeking review of the July 22, 1993 action of the Department of Environmental Resources (DER) issuing Permit No. 101618 to Thermal Pure Systems, Inc. (Permittee). The Permit, issued under the Solid Waste Management Act (SWMA), Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 *et seq.*, authorized a commercial infectious waste transfer station, six autoclave units, and a facility for processing infectious waste sharps and re-usable infectious waste containers at Front and Thurlow Streets in the City of Chester, Delaware County. Appellants' objections to issuance of the Permit were based on alleged violations by DER of regulatory, statutory and constitutional provisions, including alleged environmental racism.

On September 16, 1993 Appellants filed a Petition for Supersedeas to which DER and Permittee filed responses. A hearing on the Petition was held in Harrisburg on September 30, 1993 before Administrative Law Judge Robert D. Myers, a Member of the Board. After receipt of post-hearing briefs, the Board issued on October 20, 1993 an Opinion and Order sur Petition for Supersedeas in which it denied the Petition.

On November 2, 1993 Appellants filed a Motion for Reconsideration or Rehearing *en banc* and Motion for Certification of Interlocutory Order. On the next day, they filed an Amendment to their appeal dropping all objections except those related to the applicability of the Infectious and Chemotherapeutic Waste Disposal Act (Infectious Waste Act), Act of July 13, 1988, P.L. 525, 35 P.S. §6019.1 *et seq.* Appellants' Motions are limited to this same issue. Permittee and DER filed Objections to the Motions on November 16 and 17, 1993, respectively.

Our rules at 25 Pa. Code §21.122 provide that we may grant reconsideration or rehearing "for compelling and persuasive reasons." Generally, such action is taken only (1) when the decision rests on a legal ground not considered by parties to the appeal or (2) when the decision rests on an erroneous finding of fact. Where reconsideration or rehearing is requested with respect to an interlocutory order, such as that involved here, "exceptional circumstances" must be present: *The Carbon/Graphite Group, Inc. v. DER*, 1991 EHB 690.

Appellants' Motions fail to satisfy either standard. They raise the same legal arguments concerning the interpretation of the Infectious Waste Act as they raised in their briefs on the Petition for Supersedeas. They point to no factual errors in our opinion, stating that there are "no material facts at issue." The only basis they give for their request is the fact that our interpretation of the Infectious Waste Act is the first by any judicial or quasi-judicial tribunal. As important as this may be, we do not agree that, in and of itself, that circumstance is "exceptional". Accordingly, we will deny the Motion for Reconsideration or Rehearing *en banc*.

Appeal of an interlocutory order may be allowed, in the discretion of the appellate court, when the "court or other government unit" entering the order is of the opinion that (1) the order involves a controlling question of law, (2) as to which there is substantial ground for difference of opinion and (3) an immediate appeal from the order may materially advance the ultimate termination of the matter: 42 Pa. C.S.A. §702(b). A request to have such a statement included in the interlocutory order must be made within 30 days after entry of the order: Pa. R.A.P. 1311(b). The "court or other government unit" must act on the request within 30 days after it is made.

Appellants' Motion for Certification of Interlocutory Order was filed timely. Since the Infectious Waste Act is now the only issue remaining in the appeal, the interpretation of it is the controlling question of law. We are not satisfied that the other two necessary elements are present, however. Even though our interpretation is the first of record, it does not follow automatically that there exists a "substantial ground" for difference of opinion. We have given careful consideration to Appellants' arguments, but have found little support for them within the language of the Infectious Waste Act. Appellants obviously disagree, but that is not enough.

We also are not persuaded that an immediate appeal from this interlocutory order will materially advance the ultimate termination of the matter. Appellants' abandonment of all issues except the Infectious Waste Act and their statement that no material facts remain at issue make the appeal ripe for summary judgment under Pa. R.C.P. 1035. Such a judgment would be a final order which Appellants could appeal as of right. An interlocutory appeal, as noted above, can be pursued only with the acquiescence of the appellate court. Even if the appellate court agreed to entertain the appeal, the case would eventually be returned to us for final disposition. The more efficient process, in our judgment, would be the entry of a final order by this Board from which Appellants could appeal by right. Accordingly, we will deny Appellants' Motion for Certification of Interlocutory Order.

We cannot enter summary judgment *sua sponte*, but we can direct DER and Permittee to file Motions for Summary Judgment. To make certain that this is done without delay, we will place time limits in our Order.

ORDER

AND NOW, this 23rd day of November, 1993, it is ordered as follows:

1. Appellants' Motions for Reconsideration or Rehearing *en banc* and for Certification of Interlocutory Order are denied.

2. DER and Permittee shall file Motions for Summary Judgment with supporting briefs on or before December 14, 1993. Appellants shall have the right to file a Cross-Motion or Responses to the Motions and supporting briefs within 20 days after the filing by DER and Permittee.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Richard S. Ehmann

RICHARD S. EHMANN
Administrative Law Judge
Member

Joseph N. Mack

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: November 23, 1993

cc: See next page for service list

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M. DIANE SMITH
SECRETARY TO THE BOARD

AL HAMILTON CONTRACTING COMPANY	:	
	:	
v.	:	**EHB Docket No. 84-187-W**
	:	**(Consolidated Docket)**
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** November 24, 1993
HOUTZDALE MUNICIPAL AUTHORITY,	:	
Intervenor	:	

D J U D I C A T I O N

By Maxine Woelfling, Chairman

Synopsis:

Consolidated appeals from numerous compliance orders are dismissed. A surface mine operator is liable for discharges in violation of the effluent limits of 25 Pa. Code §87.102 that emanate from areas within the boundaries of its mine drainage permit. A surface mine operator is also liable for discharges in violation of the effluent limits of 25 Pa. Code §87.102 that are emanating from areas located outside the boundaries of its mine drainage permit because those discharges are hydrogeologically connected to areas the operator has mined.

In determining whether discharges violate applicable effluent limits, the Board admits into evidence the Department of Environmental Resources' (Department) water sample analyses under the Uniform Business Records as Evidence Act, 42 Pa. C.S. §6108 (Business Records Act). Accordingly, the Department was not required to offer the testimony of every individual who handled the water samples. The testimony of the custodian of records and of the sample collectors is sufficient.

The Department may extend the time for satisfying the requirements of a compliance order before the regulatory deadline of 90 days expires, may impose stricter pollution standards than the federal guidelines before ordering an operator to cease its mining activities, and may issue compliance orders for effluent limit violations through employees other than mine conservation inspectors. Ice at the end of an overflow pipe from a treatment pond and on the ground beneath the pipe, coupled with the fact that the operator used a tank truck to transport water from the pond to other treatment facilities, is sufficient evidence that the treatment facility was not adequate; therefore, the Department did not abuse its discretion by ordering the operator to upgrade this facility.

The surface mine operator is not protected by either the constitutional prohibition against self-incrimination, since it is a corporation, or the constitutional prohibition against double jeopardy, since the orders at issue are merely remedial in nature.

INTRODUCTION

Currently before us are the consolidated appeals of Al Hamilton Contracting Company (Hamilton) from various compliance orders and civil penalty assessments issued by the Department for alleged violations at Hamilton's Brenda Gayle surface coal mining operation (mine site) in Rush Township, Centre County.

The Department issued compliance order (C.O.) HRO 84-44 on May 16, 1984, citing Hamilton for discharges in violation of the effluent limits of 25 Pa. Code §87.102 from two springs on the Mountain Branch side of the mine site and two sedimentation ponds. Hamilton appealed this C.O. to the Board on June 11, 1984, and it was docketed at No. 84-187-M. The Department then issued C.O. HRO 84-114 on September 26, 1984, to extend the deadline by which

Hamilton had to comply with an August 6, 1984, inspection report. Hamilton filed a notice of appeal from this C.O. on October 29, 1984 (Docket No. 84-367-M). This appeal was consolidated with Docket No. 84-187-M at the earlier docket on January 24, 1986. The Department next issued C.O. HRO 84-120, citing Hamilton for its failure to adequately comply with C.O. HRO 84-44 on October 18, 1984, which Hamilton appealed on November 15, 1984, at Docket No. 84-380-M. This appeal was subsequently consolidated at Docket No. 84-187-M on October 9, 1985. On March 15 and March 26, 1985, the Department issued C.O.s 85-H-027 and 85-H-027A, for unlawful discharges from treatment ponds on both sides of the mine site and from another discharge on the Mountain Branch side of the mine site. Hamilton appealed these orders on April 5, 1985, at Docket No. 85-102-M, which was then consolidated at Docket No. 84-187-M on May 2, 1985. The Department issued C.O. 85-H-035 on April 1, 1985, for Hamilton's failure to comply with C.O. 85-H-027A. On May 3, 1985, Hamilton filed a notice of appeal at Docket No. 85-183-M, which was consolidated at Docket No. 84-187-M on October 9, 1985. And finally, the Department issued C.O. 85-H-122 on December 16, 1985, because Hamilton failed to construct and maintain adequate treatment facilities on the Mountain Branch side of the mine site. Hamilton appealed this order on January 17, 1986, at Docket No. 86-025-W, which was later consolidated at Docket No. 84-187-W on May 28, 1986.

In addition to these compliance orders, the Department also issued Hamilton civil penalty assessments on February 3, 1986, February 5, 1986, and February 26, 1988, which Hamilton appealed to the Board at Docket Nos. 86-108-W, 86-109-W, and Docket No. 88-093-W, respectively. These appeals were subsequently consolidated at Docket No. 84-187-W. Pursuant to an agreement between the parties and with the consent of the Board, the civil penalty

portion of this consolidated appeal was continued until Hamilton's liability was determined.

The Houtzdale Municipal Authority's (Houtzdale) October 26, 1984, petition to intervene was granted on October 31, 1984. The Board later rescinded this order pending a review of Hamilton's November 2, 1984, motion to strike Houtzdale's petition to intervene. On March 5, 1985, following a review of Hamilton's motion and Houtzdale's December 10, 1984, response to its loss of intervenor status, the Board again granted Houtzdale's petition to intervene.

This matter was reassigned to Board Chairman Maxine Woelfling following the resignation of Board Member Anthony Mazullo in 1986. On May 27, 1987, Chairman Woelfling conducted a view of the mine site accompanied by representatives for Hamilton, the Department, and Houtzdale. A hearing was held over 14 days: July 27-29 and November 9-10, 1987, and February 22-25, April 12-14, and April 21-22, 1988, before Chairman Woelfling at the Board's offices in Harrisburg.[1] On April 19, 1988, during the course of the hearing, Hamilton again moved to dismiss Houtzdale as an intervenor. This motion was denied on April 29, 1988.

On May 16, 1988, after receiving the last hearing transcripts, the Board ordered the Department, Houtzdale, and Hamilton to file their post-hearing briefs by June 20, July 8, and August 29, 1988, respectively. After several extensions, the Department's brief was filed on November 1,

---

[1] With the exception of the November 9-10, 1987, hearings, which were conducted at the Department's Hawk Run District Mining Office in response to a request from Houtzdale.

1988, Houtzdale's brief on December 6, 1988, and Hamilton's brief on January 23, 1989. Houtzdale and the Department filed their replies to Hamilton's brief on February 7 and February 10, 1989, respectively.

The primary issue in this case, which is reflected in the parties' post-hearing briefs, is Hamilton's liability for the on- and off-permit discharges of mine drainage. Hamilton focuses on the Department's failure to properly authenticate its water quality evidence and the Department's failure to prove a hydrogeologic connection between the mine site and the discharges. Hamilton also offers alternative theories of liability and raises several constitutional questions. The Department argues Hamilton bears the burden of proof, but nevertheless also contends it has proven Hamilton's liability for both the on- and off-permit discharges. Houtzdale limited its post-hearing brief to concerns about Hamilton's delaying tactics and the Department's failure to fully enforce its obligations under various statutes and regulations.

Any arguments the parties did not raise in their post-hearing briefs are waived. Lucky Strike Coal Co. and Louis J. Beltrami v. Commonwealth, Department of Environmental Resources, 119 Pa. Cmwlth. 440, ___, 547 A.2d 447, 449 (1988).

The record in this matter consists of a transcript of 3,101 pages and 76 exhibits. After a full and complete review of this record, we make the following findings of fact.

FINDINGS OF FACT

1. Appellant is Hamilton, a corporation with a business address of R.D. #1, Box 87, Woodland, PA 16881.

2. Appellee is the Department, the agency of the Commonwealth with the authority to administer and enforce the Clean Streams Law, the Act of June

22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 *et seq.* (the Clean Streams Law), the Surface Mining Conservation and Reclamation Act, the Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1 *et seq.* (the Surface Mining Act), and the regulations adopted thereunder.

3. Intervenor is Houtzdale, a municipal authority organized under the Municipality Authorities Act, the Act of May 2, 1945, P.L. 382, as amended, 53 P.S. §301 *et seq.*, which is authorized to provide water to three boroughs and three townships in Clearfield County.

4. The mine site is located in Rush Township, Centre County, on a ridge between Mountain Branch and Moshannon Creeks, upstream from their confluence (Exs. C-15, C-70).[2]

5. The hillsides of the mine site slope away to the northeast, towards Houtzdale's water intake on the Mountain Branch, and to the southwest, towards Moshannon Creek (N.T. 1960, Ex. C-70).

6. Both deep and surface mining occurred on the mine site prior to 1972 (N.T. 30, 2500).

7. As a result of the pre-1972 surface mining, spoil piles existed throughout the mine site (Exs. C-5, C-70; N.T. 77, 1678-79).

8. Mine Drainage Permit (MDP) No. 4770BSM9, authorizing surface mining on the mine site, was issued to W.G. Moore & Sons, Inc. on January 18, 1972 (Exs. C-2, C-8; N.T. 23).

9. A February 26, 1976, amendment to MDP 4770BSM9 authorized W.G. Moore to conduct an additional 52 acres of mining.

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[2] References to "N.T." are to the notes of testimony taken during the hearings on the merits. "Ex. C-__" denotes exhibits introduced into evidence by the Department.

10. The Department issued a second amendment to MDP 4770BSM9 on April 14, 1977, authorizing 60 acres of mining on the Mountain Branch side of the mine site (Exs. C-7, C-8; N.T. 39).

11. MDP 4770BSM9 was transferred to Hamilton on October 9, 1979; the transfer authorized Hamilton to conduct surface mining on the entire area encompassed by the MDP and its amendments (Ex. C-11; N.T. 68-69).

12. Additional Special Condition Two of MDP 4770BSM9 states, *inter alia*:

> Discharges of water from areas disturbed by surface coal mining and reclamation operations must meet all applicable Federal and State laws and regulations, and at a minimum, the following numerical effluent limitations:
>
> EFFLUENT LIMITATIONS, IN MILLIGRAMS PER LITER, mg/l, EXCEPT FOR pH
>
> | Effluent Characteristics | Maximum Allowable | Average of Daily Values for 30 Consecutive Discharge Days |
> |---|---|---|
> | Iron, total | 7.0 | 3.5 |
> | Manganese, total | 4.0 | 2.0 |
> | Total suspended solids | 70.0 | 35.0 |
> | pH | within the range 6.0 to 9.0 | |
>
> These effluent limits take precedence over any standards mentioned in the Standard or Special Conditions of this Mine Drainage Permit.
>
> * * * * *
>
> Drainage which is not from an active mining area shall not be required to meet the limitations as long as such drainage is not conmingled [*sic*] with untreated mine drainage which is subject to the limitations.
>
> * * * * *
>
> (Ex. C-11)

13. Hamilton's mining began at the south of the mine site, near monitoring point D-2, and advanced to the southeast, parallel to the ridge separating the two sides of the mine site (N.T. 2709).

14. Mining then turned to the northeast, perpendicular to and then through the ridge, and continued towards Mountain Branch (N.T. 2710).

15. Upon reaching the "A" or Clarion coal highwall that was left by pre-1972 mining, Hamilton then began mining towards the northwest, along the Clarion highwall, while the pits remained oriented from the southwest to the northeast (N.T. 2711).

16. Hamilton also operated a second set of pits that were oriented parallel to the ridge, southeast to northwest, on the Moshannon Creek side of the mine site (N.T. 2712).

17. These pits were connected at the apex of the "L" they formed, with one leg parallel and the other perpendicular to, and through, the ridge (N.T. 2712).

18. As mining progressed, Hamilton encountered and mined through pre-1972 mining spoils, which were located primarily on the eastern and northeastern extremes of the Mountain Branch side of the mine site (Ex. C-70; N.T. 2755).

19. Hamilton did not reaffect the old spoils that were located closest to the Mountain Branch just outside the permitted area (Ex. C-70, N.T. 2754, 2759).

20. The discharge point Spring One is located approximately 500 feet from the northeast side of the mine site and 300 feet to the southwest of Houtzdale's water intake on Mountain Branch (Exs. C-14, C-14A).

21. Spring One did not exist when Hamilton began its operations in March 1979; Department Inspector Jim McDonald discovered this seep on March 5, 1984 (N.T. 754-755).

22. Discharge point Spring Two is located approximately 200 feet to the northeast of the mine site and 600 feet to the south - southeast of Houtzdale's water intake on Mountain Branch (Ex. C-14, C-14A).

23. Drainage from Springs One and Two flows into a drainage swale that empties into Mountain Branch upstream of Houtzdale's intake (Exs. C-14, C-14A; N.T. 53).

24. The area of seepage known as the Fugitive Discharge is located adjacent to the western side of the road between Springs One and Two (Hamilton's road) (N.T. 475).

25. Drainage from the Fugitive Discharge flows north along Hamilton's road towards Spring One, abruptly turns to the northeast under Hamilton's road and an access road leading to Houtzdale's water intake, and eventually drains into Mountain Branch below the intake (N.T. 475-76, 636).

26. The Fugitive Discharge did not exist when Hamilton began its operations, or as late as May 16, 1984, when the Department issued C.O. HRO 84-44 (Ex. C-15; N.T. 1118).

27. The Department first discovered the Fugitive Discharge in the spring of 1985 (N.T. 1120).

28. Erosion and sedimentation pond one (Pond One) is located on the northeast side of Hamilton's permitted area (Ex. C-14).

29. Erosion and sedimentation pond two (Pond Two) is located on the southern side of Hamilton's permitted area (Ex. C-14).

30. On the Moshannon Creek side of the mine site, there is a series of five ponds in the west-southwest corner of the permitted area that are used to treat acid mine drainage from the mine site (Ex. C-14; N.T. 146, 237).

31. Paragraph one of C.O. HRO 84-44 cited Hamilton for discharges from Springs One and Two and ordered Hamilton to provide interim treatment so that the final discharges to Mountain Branch satisfied the effluent limits of 25 Pa. Code §87.102. Hamilton was also ordered to divert the flow from these discharges to below Houtzdale's intake on Mountain Branch and to submit a plan for permanent abatement of the discharge (Ex. C-15).

32. Paragraph two of C.O. HRO 84-44 cited Hamilton for discharges from Ponds One and Two and ordered Hamilton to treat these discharges to comply with the effluent limits of 25 Pa. Code §87.102 (Ex. C-15).

33. Hamilton's first attempt to collect and treat the discharges from Springs One and Two involved two small wooden dams that raised the water level of the discharges so they could be collected by a pipe. From there, the water flowed through soda ash briquette liners and a silt fence and was discharged into the Mountain Branch below Houtzdale's intake (N.T. 2721-22).

34. Since precipitating metals had clogged the silt fence, Hamilton then constructed a small catchment pond to force metals to precipitate out of the drainage (N.T. 2724-25).

35. The Department inspected the mine site on August 6, 1984, and in its inspection report, directed Hamilton to submit a permit application for the area to be affected by Hamilton's treatment facilities (Ex. C-46).

36. On September 26, 1984, the Department issued C.O. HRO 84-114, extending the time for compliance with the August 6, 1984, inspection report from September 7 to October 31, 1984 (Ex. C-46).

37. The Department issued C.O. HRO 84-120 on October 18, 1984, ordering Hamilton to cease all mining operations until it complied with C.O. HRO 84-44 as a result of Hamilton's alleged failure to provide adequate interim treatment, as evidenced by a discharge from Hamilton's treatment facilities (Ex. C-22).

38. In late October or early November 1984, Hamilton began construction on a plan to use separate electric pumps to pump the drainage from Spring One and Spring Two to the Moshannon Creek side for treatment. Construction was completed in January 1985 (N.T. 2729-30).

39. Because the electric pumps could not handle all of the flow from the springs, drainage continued to flow into the small catchment pond. To prevent a release of untreated drainage into the Mountain Branch, Hamilton used a 1,000 gallon tank truck to transport the overflow to the Moshannon Creek side for treatment (N.T. 167, 2733).

40. The Department issued Hamilton C.O. 85-H-027 on March 15, 1985 (Ex. C-37).

41. Paragraph one of C.O. 85-H-027 cited Hamilton for a discharge from the catchment pond in excess of the effluent limits at 25 Pa. Code §87.102 and ordered Hamilton to upgrade the treatment and pumping facilities so that its discharges to Mountain Branch complied with the applicable effluent limits (Ex. C-37).

42. Paragraph two of C.O. 85-H-027 cited Hamilton for a discharge from the final treatment pond on the Moshannon Creek side and directed Hamilton to upgrade its treatment facilities so that all discharges satisfied applicable effluent limits (Ex. C-37).

43. Paragraph three of C.O. 85-H-027 cited Hamilton for the Fugitive Discharge and ordered Hamilton to upgrade its treatment facilities to treat this discharge as well (Ex. C-37).

44. On March 26, 1985, the Department issued C.O. 85-H-027A, which extended the time for compliance with paragraph three of C.O. 85-H-027 from March 22 to March 29, 1985, (Ex. C-39).

45. The Department issued C.O. 85-H-035 on April 1, 1985, ordering Hamilton to cease its mining activities on the mine site until it complied with paragraph three of C.O. 85-H-027A (Ex. C-40).

46. James McNeil, Vice President of Energy Environmental Services, could not recall whether Hamilton ceased its mining activities before April 1, 1985, the date on which the Department issued C.O. 85-H-035 (N.T. 2742-43).

47. Bernard Robb was a Department mining specialist when he signed C.O.s 85-H-027 and 85-H-035 (N.T. 460).

48. On December 16, 1985, the Department issued C.O. 85-H-122, citing Hamilton for its collection and treatment facilities for Springs One and Two and the Fugitive Discharge. The Department ordered Hamilton to upgrade the capacity of the pump that sends the drainage to the Moshannon Creek side for treatment and the capacity of the holding pond that collects overflow from the pump (Ex. C-28).

49. Bryce Putman, a mine conservation inspector responsible for inspecting the mine site, never witnessed a discharge from the outfall pipe of the holding pond. He inspected the pond in December 1985 and observed ice hanging from the outfall pipe and ice buildup on the ground under the pipe (N.T. 367, 370).

50. At the time of the hearing on the merits, Hamilton pumped the drainage from the Fugitive Discharge and Spring One uphill to Spring Two,

where the combined drainage flowed by gravity down to a pump that sent it to the Moshannon Creek side for treatment. Any overflow from this pump was collected and pumped to a second set of treatment ponds on the Moshannon Creek side (N.T. 376-77).

51. At the time of the hearing on the merits, Milton McCommons was the Chief of the Environmental Study Section in the Bureau of Mining and Reclamation's Division of Environmental Analysis and Support (N.T. 1626).

52. From 1975 to 1986, McCommons was a hydrogeologist with the Department, and during that time reviewed the potential of the mine site to cause pollution (N.T. 1625, 1629, 1638).

53. On April 3, 1984, McCommons visited the mine site to review the stratigraphy, topography, and jointing at the mine site (N.T. 1664-68).

54. McCommons re isited the mine site on February 3, 1988, and observed that the Clarion highwall was located further to the west, spoil material had been pushed into the Clarion pit, and a new pit was open on the Lower Kittanning coal seam (N.T. 1710- 1).

55. Joseph Lee was, at the time of the hearing on the merits, a hydrogeologist in the Department's Bureau of Mining and Reclamation; he had held the position since 1979 N.T. 1983).

56. Lee conducted an initial geophysical survey of the mine site from April 17 to April 21, .984 (N.T. 1952).

57. Lee next visited the mine site in August 1984 to survey the Mountain Branch from Houtzdale's intake upstream to Trim Root Run (N.T. 1956).

58. In October 1984 and November 1985, Lee measured static water elevations and took water quality samples from drill holes on the mine site (N.T. 1957).

59. Lee examined manifestations of the pollution plume around Springs One and Two in March 1985 (N.T. 1958).

60. In the summer of 1986, Lee took water quality samples from the wells in the northeast area of the mine site (N.T. 1958).

61. In February 1988, Lee again measured static water elevations and took water quality samples from drill holes on the mine site (N.T. 1956).

62. A water sample is "fixed" by adding nitric acid. Nitric acid lowers the pH of the sample, thereby keeping metals in the solution (N.T. 2242-43).

63. Water samples are "iced" to maintain their temperature at approximately 40 degrees Fahrenheit (N.T. 280). Water samples that are not properly cooled can experience bacterial degradation that may result in inaccurate laboratory results (N.T. 901).

64. Bryce Putman collected water samples in a single 500 milliliter (ml) bottle: he first rinsed the bottle with the sample, then filled it with the sample, capped it, and labeled it (N.T. 15-16).

65. After the Department began to use three 100 ml bottles for water samples, Putman still collected his samples in a single 500 ml bottle and then filled the smaller bottles from it (N.T. 258).

66. Putman did not fix any of his samples (N.T. 269).

67. Putman did not ice any of his samples before 1984 (N.T. 264, 279).

68. Putman left sample 2020 in a cool cellar for several days after he collected it (N.T. 247; Ex. C-9).

69. Putman took his samples to a Purolator drop-off point in State College for shipment to Harrisburg (N.T. 247).

70. Bernard Robb was a mining specialist from September 1983 to June 1985 and a mine conservation inspector from June 1985 until the time of the hearing (N.T. 460).

71. Robb collected his water samples in three 100 ml bottles, which he rinsed with the sample, filled, capped, labeled with the sample number, placed in a plastic bag to segregate different samples, and stored in a cooler containing ice (N.T. 469-71).

72. Robb did not fix any of his samples (N.T. 563).

73. Robb took his samples to either the Department's Phillipsburg office or the Purolator drop off point in State College for shipment to the Department's laboratory in Harrisburg (N.T. 582-85).

74. James McDonald was a mining specialist from February 1981 to December 1985 and a mine conservation inspector from December 1985 until the time of the hearing (N.T. 671-72).

75. McDonald collected his samples in a single 500 ml bottle until December 1984, when the Department began to use three 100 ml bottles (N.T. 681, 725).

76. To collect a sample, McDonald rinsed each bottle with the sample, filled each bottle, capped each bottle, and labeled each bottle with the date and sample number (N.T. 681-82).

77. McDonald did not fix any of his samples (N.T. 733).

78. McDonald began icing his samples in October 1983 (N.T. 737).

79. McDonald took his samples to either the Department's district office or the Purolator drop off point in State College for shipment to the Department's laboratory in Harrisburg (N.T. 682).

80. Joseph Lee used four bottles to collect each of his water samples; he rinsed each bottle with the sample three times, filled it, capped

it, and labeled it with the date, sample number, and investigation (N.T. 2033-34).

81. There was no evidence regarding the size of the sample bottles used by Lee.

82. Lee fixed one of the four bottles with two ml of concentrated nitric acid (N.T. 2033).

83. Lee packed his samples in ice in a cooler (N.T. 2034).

84. Lee took the samples to either the Department's Hawk Run district office or the Purolator drop off point in State College for delivery to the Department's Harrisburg laboratory (N.T. 2034, 2250).

85. David Spotts was an employee of the Pennsylvania Fish Commission when he collected Samples 6709-100 through 105 and when he testified at the hearing (N.T. 1185-86; Ex. C-75).

86. Spotts collected each sample in two 500 ml bottles, which he rinsed with the sample three times, filled, and capped (N.T. 1201).

87. Spotts fixed one bottle with five ml of concentrated nitric acid (N.T. 1201).

88. Spotts packed both bottles in ice (N.T. 1202).

89. Spotts brought the samples to the Department's Phillipsburg office for shipment to the Department's laboratory in Harrisburg (N.T. 1202).

90. John Arway was a fisheries biologist with the Pennsylvania Fish Commission at the time he inspected the mine site in August 1984 and at the time of the hearing (N.T. 971-73).

91. Arway collected water samples in two 500 ml bottles, which he rinsed three times with the water to be analyzed, filled, and capped (N.T. 977-78, 988).

92. Arway fixed one bottle with five ml of concentrated nitric acid

(N.T. 978, 991).

93. Arway packed both bottles in ice in a cooler (N.T. 978).

94. Arway took the samples to either the Department's Hawk Run office or the Purolator drop off point in State College for shipment to the Department's laboratory in Harrisburg (N.T. 992-93).

95. At the time of the hearing on the merits, Vincent White had been the Chief of the Department's Division of Inorganic Chemistry since July 1980 (N.T. 779).

96. White was responsible for establishing the policies and procedures of the division, as well as for all of the samples the division received and the reports it produced (N.T. 780).

97. The Department's Division of Inorganic Chemistry employs approximately 60 people, including chemists, microbiologists, entomologists, and technicians, 25 to 30 of whom are involved in analyzing acid mine drainage samples (N.T. 802, 933).

98. Every business day between 3:00 and 4:00 p.m., Purolator Courier picks up the sample coolers that Department field personnel have left at designated drop-off points (N.T. 795).

99. Purolator delivers the coolers every weekday morning by 7:00 a.m. to the Department's laboratory at Third and Reily Streets in Harrisburg (N.T. 795).

100. Upon arrival, Purolator contacts a designated Department employee who receives the coolers into the laboratory (N.T. 796).

101. The sample bottles are removed from the coolers and the sample numbers on the bottles are matched with the sample numbers on the submission forms (N.T. 796-97).

102. Samples are divided into groups ranging from the cleanest samples, i.e. drinking water samples, to the dirtiest, i.e. sewage and leachate samples (N.T. 797).

103. Acid mine drainage samples comprise their own group (N.T. 797).

104. Each sample receives a new laboratory identification number that is stamped onto the submission form and affixed to the sample bottle with a numerical and bar code seal (N.T. 797).

105. The original seven-digit sample number, three-digit analysis code, and legal seal number, if any, for each sample is logged into the computer (N.T. 798).

106. The narratives from the submission forms, e.g. "Test hole drilled in spoil to A hole," are entered by secretarial personnel, not the employees who log in the sample numbers and analysis code (N.T. 861).

107. White did not state that the new laboratory identification number is also logged into the computer for each sample.

108. After all of the samples are logged in, the computer determines how many analyses must be performed and prints out a worksheet for each analysis, e.g. iron (Fe) assays (N.T. 799).

109. The worksheets are given to the chemists or analysts who will be performing that work (N.T. 799).

110. The individual bottles in each sample are placed on a counter, one behind the other, and the samples are placed next to each other in a row (N.T. 854).

111. The first bottles in the row are taken to the pH working area, the second to the sulfate (SO_4) working area, and the third to the metals working area (N.T. 854).

112. White did not testify how samples with less than, or more than, three 100 ml bottles are handled.

113. All of the analyses for mine drainage constituents (iron (Fe), manganese (Mn), aluminum (Al), sodium (Na), SO_4, pH, alkalinity ($CaCO_3$), and acidity) are automated (N.T. 786).

114. The individuals who operate these machines are either chemists or chem-technicians (N.T. 803).

115. The chemists and chem-technicians identify each sample by its laboratory identification number (N.T. 803).

116. The instruments that perform the analyses are not connected to the Department's computer (N.T. 866).

117. Each instrument produces a printout containing the results of its analyses (N.T. 867).

118. The chemist or technician operating the instrument enters the data from the printout into the Department's computer (N.T. 811).

119. To verify that the information was entered correctly, the chemist or technician enters the data again (N.T. 811).

120. The computer records the initials of the chemist or technician who verified the data, then indicates on the test results that they were verified (N.T. 811).

121. After all of the analyses have been entered and verified, the computer automatically prints its final report (N.T. 804).

122. The results for each sample are reviewed for anomalies and signed (N.T. 873-74).

123. The laboratory attaches the test results to the submission form, so that the analysis request and the results for each sample constitute one packet (N.T. 808).

124. The packets are sorted by region, i.e. Hawk Run, and sent there as the official record of the laboratory (N.T. 808-09).

125. The test results for Sample 2020 on Ex. C-9 were compiled and reported in a different manner because the laboratory had not yet acquired its computer system (N.T. 806).

126. At the time Sample 2020 was analyzed, technicians entered the test results onto worksheets, instead of into the computer, and the worksheets were sent to a central reporting area (N.T. 871-72).

127. Analysis results for each sample were then compiled from the data contained in the worksheets (N.T. 873).

128. After review for anomalies, the completed analysis forms became the official results of the laboratory, which were sent to the individual who collected the sample (N.T. 807).

129. The Department did not introduce testimony from employees of Purolator, from the employees who received the samples into the laboratory, or from the chemists and technicians who operated the machines.

130. The Department's laboratory does not keep a copy of the test results, but instead retains the data on computer tape (N.T. 807, 899).

131. The test results are maintained on file by the Department at the regional offices (N.T. 157, 683).

132. The field personnel who collected the sample receive a copy of the test results (N.T. 471, 807, 979, 1203).

133. To test for Fe, Mn, Al, and Na, the Department uses a process called inductively coupled argon plasma emission spectrometry (ICP emission spectrometry) (N.T. 786).

134. Prior to 1983 or 1984, the Department used flame atomic absorption spectrometry (FAAS) (N.T. 786).

135. The Department switched to ICP emission spectrometry because it analyzes a sample in less time but is just as accurate (N.T. 817-18).

136. Both processes measure the light emitted by an atomized sample after the application of an energy source (N.T. 787).

137. ICP emission spectrometry uses a plasma torch as its energy source, while FAAS uses an open flame (N.T. 782, 787).

138. The Department uses the methyl thymol blue test to analyze SO_4 (N.T. 783).

139. The methyl thymol blue test involves a reaction between the sample and a certain substance to create a color that can be measured by a spectrophotometer (N.T. 783).

140. The tests for pH and $CaCO_3$ are performed by the same instrument, which conducts an electromagnetic analysis for pH and then titrates the sample with sulfuric acid to determine $CaCO_3$ (N.T. 781-82).

141. The Department presented no evidence on its test(s) for total acidity, hot.

142. The Department has a quality assurance program to ensure the validity of its test results (N.T. 793).

143. Quality assurance focuses on the reproducibility and accuracy of each result (N.T. 793).

144. Reproducibility refers to the ability to reproduce the results from an analysis of a sample (N.T. 793).

145. Accuracy refers to the ability to correctly analyze the contents of a known sample (N.T. 794).

146. To determine reproducibility, the laboratory re-tests every 9th sample, meaning every 9th and 10th samples tested are the same (N.T. 794).

147. The results from the 9th and 10th samples do not have to match exactly, but they must be within the Department's deviation guidelines (N.T. 912).

148. For scientific purposes, results that fall within these guidelines are deemed to be the same (N.T. 912).

149. If the difference is outside the Department's guidelines, the 9th sample is re-run, compared to the other two results, and the official result is the average of the second 9th sample and the next closest result (N.T. 881).

150. To determine accuracy, every 11th sample that is tested is a known (N.T. 794).

151. The result from a known does not have to be exactly correct, but must fall within the Department's deviation guidelines (N.T. 891).

152. If the result is outside the guidelines, the machine operator lets it run until the next known. If the second known is correct, the operator accepts all of the previous results, but if it is also outside the guidelines, the previous results are invalidated and the machine is recalibrated (N.T. 891).

153. If the results of a known sample continue to show a bias towards a certain result over four or five runs, the supervisor would be called in to check the instrument (N.T. 889).

154. Every instrument is recalibrated at the beginning of each work shift (N.T. 886).

155. The laboratory reports all sample results that satisfy the quality assurance program (N.T. 912). White did not testify whether the Department laboratory reports sample results that fail the quality assurance program.

156. Both the equipment used and the procedures followed to analyze the samples are accepted within the scientific community and industry to test mine drainage samples (N.T. 791-92).

157. The Department took samples of Spring One on March 5 and June 4, 1984, which exhibited the following quality:

Parameter	March 5, 1984	June 4, 1984
pH	3.9	8.9
$CaCO_3$	0	2,320
SO_4	2,652	2,123
Fe	.95	3.3
Mn	95.38	141.9
Al	74.68	97
Acidity	906	0

(Exs. C-16, C-33)[3]

158. The Department took four samples of Spring Two between December 15, 1983, and February 4, 1988, which exhibited the following quality:

Parameter	December 15, 1983	March 5, 1984	June 4, 1984	February 4, 1988
pH	3.8	3.5	9.9	4.0
$CaCO_3$	0	0	6,630	2.0
SO_4	2,082	2,838	3,000	894
Fe	.17	8.82	10.5	.401
Mn	70.68	134.71	103.4	39.3
Al	42.37	95.95	7.3	14.3
Acidity	346	960	0	134

(Exs. C-16, C-32, C-33, C-63)

159. Hamilton attached the results of an April 25, 1980, sample from Spring Two to its July 1980, update application; the sample indicated the following water quality:

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[3] All test results are reported in mg/l, except pH, which is reported in standard units. If the symbol "-" appears following a parameter, it indicates that the sample was not analyzed for the parameter.

Parameter	
pH	3.72
$CaCO_3$	0
SO_4	315.16
Fe	.04
Mn	10.58
Al	-
Acidity	85

(Ex. C-12; N.T. 94, 838)

160. The Department took five samples of the Fugitive Discharge between March 5 and April 1, 1985, which exhibited the following quality:

Parameter	March 5, 1985	March 25, 1985	March 25, 1985	March 25,[4] 1985	April 1, 1985
pH	4.3	3.7	4.1	4.7	4.3
$CaCO_3$	9	0	3	14	5
SO_4	1,219	3,014	960	1,319	299
Fe	<.7	<.3	<.3	<.3	<.3
Mn	59.3	195.8	34.08	49.38	14.11
Al	38.15	186.4	16.89	12.49	8.69
Acidity	398	818	138	148	74

(Exs. C-38, C-41, C-50)

161. The Department took four samples of the Fugitive Discharge between March 4, 1986, and August 19, 1986, which showed the following quality:

Parameter	March 4, 1986	July 3, 1986	July 30, 1986	August 19, 1986
pH	3.8	3.7	3.6	3.6
$CaCO_3$	-	0	0	0
SO_4	3,000	3,762	3,718	6,615
Fe	.485	<.3	1.57	7.24
Mn	210	197	197	183
Al	166.5	143	154	137
Acidity	1,266	1,330	1,246	1,144

(Exs. C-30, C-57, C-61, C-62)

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[4] The three March 25, 1985, samples were taken from different points along the Hamilton road, both above and below a soda ash and treatment hopper (Ex. C-38, N.T. 478-481).

162. The Department took four samples from the outfall of Pond One between December 15, 1983, and February 21, 1986, which exhibited the following quality:

Parameter	December 15, 1983	April 18, 1984	March 1, 1985	February 21, 1986
pH	5.9	4.8	6.4	5.1
$CaCO_3$	0	8	86	60
Na	-	-	733	6
SO_4	27	72	136	51
Fe	.91	.34	<.7	.919
Mn	1.17	3.42	2.99	1.97
Al	.54	2.07	<1.0	1.0
Acidity	14	46	0	20

(Exs. C-29, C-32, C-34, C-36)

163. The Department took four samples from the outfall of Pond Two between June 6, 1983, and February 21, 1986, which exhibited the following quality:

Parameter	June 6, 1983	December 15, 1983	April 18, 1984	February 21, 1986
pH	4.1	7.5	4.7	4.7
$CaCO_3$	3	64	7	6
Na	-	-	-	<10
SO_4	135	110	62	81
Fe	.37	.12	.31	.58
Mn	6.33	4.15	3.01	1.67
Al	2.73	1.71	1.9	1.41
Acidity	80	0	40	16

(Exs. C-29, C-31, C-32, C-34)

164. The Department took five samples between March 1, 1983, and February 21, 1986, from the outfall of the final treatment pond on the Moshannon Creek side of the operation, which exhibited the following quality:

Parameter	March 1, 1983	March 18, 1985	April 1, 1985	February 7, 1986	February 21, 1986
pH	illegible	9.3	10	8.2	8.5
$CaCO_3$	258	314	398	384	334
Na	>300	>300	>300	>300	>300
SO_4	2,043	2,202	2,292	1,668	1,986
Fe	<.7	<.3	<.3	1.02	.364
Mn	61.3	4.25	.37	37.77	37.44
Al	2.12	<.5	<.5	<.5	<.5
Acidity	0	0	0	0	0

(Exs. C-24, C-29, C-36, C-41, C-43)

165. Groundwater flow is generally controlled by the topography of the land and the structure and fracturing/jointing of the underlying strata (N.T. 1667-68, 2073).

166. Topography affects groundwater flow because groundwater tends to flow from areas of high hydrologic pressure, or areas with greater overburden, to areas of low hydrologic pressure, or areas with less overburden (N.T. 1690, 2485).

167. Structure affects groundwater flow because groundwater tends to flow downgradient, or, in other words, at right angles to the structure contours depicted on a contour map (N.T. 1690).

168. Joints and fractures encourage groundwater to flow in the direction of their orientation (N.T. 1604). They tend to have more influence over vertical groundwater flow, allowing infiltration into deeper strata, than over horizontal flow (N.T. 1668).

169. The mine site is located at a topographic high, atop a ridge between Moshannon Creek and the Mountain Branch and uphill from the three discharges, which are located near the Mountain Branch, a topographic low (N.T. 1960; Ex. C-70).

170. Spring One is approximately 34 vertical feet below the mine site, while Spring Two is approximately 21 feet below the mine site (N.T. 228).

171. The structure of the Clarion coal is generally sloped to the northwest under the mine site, but at the northeastern end of the mine site and between the mine site and the Mountain Branch, the structure of the Clarion coal dips towards the northeast and the three discharges (N.T. 1773; Ex. C-14A).

172. McCommons and Lee observed jointing in the highwall of the last active Clarion pit highwall (N.T. 1809, 2232).

173. The primary joint is oriented to N25-30^{o}W, is nearly vertical, and is systemic, extending through all of the different strata (N.T. 1809, 1814).

174. Even though the pits were backfilled, and, therefore, no longer contained joints, voids exist in the backfill that permit infiltration and dispersion (N.T. 2291-92).

175. The jointing seen in the Clarion highwall extends into the area between the mine site and the Mountain Branch (N.T. 2291-92).

176. A recharge area is the area where water is infiltrating into the ground (N.T. 2166).

177. The water emanating from the three discharges originally infiltrated into the ground in the recharge area for these discharges (N.T. 2168).

178. Based on the topography, structure, and joints, McCommons determined that the recharge area for Springs One and Two and the Fugitive Discharge extends from these discharges to almost the top of the ridge in the middle of the mine site (Ex. C-70, N.T. 1689-90, 1696-1701).

179. Groundwater also flows from areas of higher hydrologic potential to areas of lower hydrologic potential; Lee determined the hydrologic gradient

from static groundwater elevations in July 1984 and February 1988 and plotted it onto two hydrologic gradient maps (Exs. C-71, C-71A; N.T. 2076).

180. Lee obtained the July 1984 static groundwater levels from information contained on Ex. C-69, "site plan-groundwater investigation" (N.T. 2079).

181. Lee measured the February 1988 static groundwater levels himself (N.T. 2085).

182. Lee produced the hydrologic gradients by hand using the difference method (N.T. 2082).

183. Lee testified that hydrologic gradients under the mine site indicate groundwater flows from the areas Hamilton mined towards the northeast and the discharges (Exs. C-71, C-71A; N.T. 2081).

184. Terry Rightnour is the President of Energy Environmental Services, Inc. and was qualified as an expert in the following disciplines: interpretation of water chemistry data; determination of recharge areas; determination of groundwater flow; and the use of data from piezometers to prepare hydrologic gradient maps (N.T. 2961, 1969).

185. For three years prior to March 1985, Rightnour was the compliance director in the engineering department of Bradford Coal Company, which is affiliated with Hamilton (N.T. 2866, 2900).

186. Rightnour testified that the hydrologic gradients on Exs. C-71 and C-71A are valid because Lee used static groundwater elevations in their development (N.T. 3035).

187. Rightnour believes that the geologic structure underlying the mine site is complex, and the groundwater is contained in multiple confined and unconfined aquifers (N.T. 3030-33).

188. Rightnour based this opinion on varying static water elevations in the same drill hole between July 1984 and February 1988; varying water quality in neighboring drill holes, varying depths of drill holes; and discrepancies in the data from drill holes 17, 46, and 47 (N.T. 3030-33).

189. Piezometers monitor hydrostatic pressure at discrete zones of strata and can be used to determine the extent of vertical groundwater flow (N.T. 3035).

190. Rightnour testified that because the hydrogeologic structure underlying the mine site is so complex, the only way to determine hydrologic potential is to examine both horizonta and vertical flow, which cannot be done with static groundwater elevations (N.T. 3035-36).

191. Lee testified that piezometers are not necessary to determine hydrologic gradients because groundwater under the mine site is responding to a fracture-controlled environment, in which fractures and joints allow groundwater to migrate vertically and horizontally, between and within strata (N.T. 2289-90).

192. Water quality will differ among neighboring drill holes because groundwater experiences dispersion, dilution, and continuing geochemical reactions (N.T. 2534-35).

193. Different static water elevations in July 1984 and February 1988 are the result of seasonal variations (N.T. 2306).

194. Taking the hydrogeologic evidence as a whole, we find Lee's testimony on the necessity of piezometers to be more reasonable than Rightnour's.

195. Based on the topography, structure, and jointing of the mine site, as well as the hydrologic gradient maps, Lee determined that the recharge area for Springs One and Two and the Fugitive Discharge extends from

Mountain Branch, past these discharges, to the upper reaches of the ridge dividing the mine site (N.T. 2116; Ex. C-14A).

196. Hamilton mined approximately one-third of the recharge area of these discharges (N.T. 2175-76). The remaining two-thirds of the recharge area lies between the mine site and the discharges (Ex. C-14A).

197. Rock strata in a layered configuration promote the horizontal flow of infiltrating water, as opposed to allowing water to penetrate the ground (N.T. 2121-22).

198. Removing layered rock strata promotes the infiltration of water into the ground (N.T. 2122).

199. The top of a hill, such as that dividing the Moshannon Creek and Mountain Branch sides of the mine site, is relatively flat and allows much more infiltration of water into the ground than the slopes of a hill (N.T. 2122).

200. Removal of the Lower Kittanning deep mine workings on the mine site allowed more water to penetrate lower seams (N.T. 2123).

201. Removal of vegetative cover on the mine site would increase the amount of infiltration (N.T. 2124).

202. Water being recharged in the areas mined by Hamilton flowed to the discharge areas in a timeframe coincident with the degradation of those discharges (N.T. 2138).

203. Increased infiltration due to mining in the recharge area increased the flow of groundwater (N.T. 2212).

204. The increased flow of groundwater in the recharge area manifested itself as a "surface expression" or spring (N.T. 2212).

205. The Fugitive Discharge was caused by the flow of groundwater from the mine site towards the discharge area (N.T. 2217).

206. One way to determine the time it took for groundwater to flow from the mine site to the discharges is to determine when the water quality from the discharges began to be degraded by acid mine constituents from the mine site (N.T. 2344).

207. The Department did not perform any determinations of groundwater "velocity" under the mine site, but instead relied on hydrologic gradients and the appearance of elevated levels of sulfates in the discharges (N.T. 2343-2352).

208. Acid mine drainage is characterized by low pH, low alkalinity, high acidity, and elevated metals and SO_4 (N.T. 1676).

209. Severe acid mine drainage is characterized by SO_4 in excess of 1,000 mg/l, low pH, and high metals concentration (N.T. 2112).

210. Acid mine drainage is a byproduct of the breakdown of pyrite, an iron disulfide, into Fe and SO_4 when exposed to air and water. This breakdown initiates secondary reactions that result in an increase in the acidity of groundwater and a release of metals, such as Mn and Al, from surrounding rock (N.T. 1908).

211. Lee observed lithologies in the highwall of the "B" or Lower Kittanning pit on the Moshannon Creek side of the mine site indicating secondary pyrite formation (N.T. 1962).

212. Lee also observed dark grey shales with fossil indicators showing they were from a brackish environment, which is the point in the paleo-environmental depositional model of coal fields where fine grain pyrite would be deposited (N.T. 1962).

213. Lee found further evidence of pyrite in drill hole returns that were coated with yellowboy (ferrous oxyhydroxide) (N.T. 1965). Yellowboy, so

named for its distinguishing color, is an Fe oxide resulting from pyrite exposed to air (N.T. 2099).

214. Yellowboy in the drill returns indicates pyrites were disturbed during drilling (N.T. 1965).

215. Lee also found evidence of pyrites in the Fe coatings on rock fragments in the spoil piles used to fill in the last active Clarion pit on the Mountain Branch side of the mine site (N.T. 1966-67).

216. To determine whether the pyrites in the backfill and spoil piles were actually creating acid mine drainage, Lee examined water quality samples from drill holes in the old spoils reaffected by Hamilton and in the old spoils left untouched (N.T. 2104-2112).

217. Water quality in the old spoils reaffected by Hamilton was measured on two occasions:

Parameter	Test Hole (TH) 5 June 22, 1984	Hole P-2 February 4, 1988
pH	2.9	3.6
$CaCO_3$	0	0
SO_4	1,815	2,827
Fe	165	9.6
Mn	112.2	170
Al	70	64.6
Acidity	1,234	412

(Exs. C-17, C-63)

218. TH-5 is located along the access road stretching to the south-southeast of the last active Clarion pit (Ex. C-14A).

219. Hole P-2 is also located to the southeast of the last active Clarion pit (Ex. C-14A).

220. Four samples were taken by the Department at sampling point P-1, which is located in the Clarion pit, with the following quality:

Parameter	March 23, 1983	May 6, 1983	September 8, 1983	September 6, 1984
pH	2.5	3.5	3.5	4.2
$CaCO_3$	0	0	0	0
SO_4	-	1,053	1,375	3,348
Fe	10	8	6.5	7.2
Mn	750	137	65	61.7
Al	-	-	-	-
Acidity	9,960	1,690	667	799.9

(Ex. C-66)

221. Water quality sampling of the unaffected spoils on the mine site showed the following quality on June 27, 1984:

Parameter	TH-29	TH-30	TH-31	TH-32	TH-33
pH	3.9	5.0	5.3	4.2	5.0
$CaCO_3$	0	16	8	4	13
SO_4	205	2,538	42	205	2,772
Fe	134	378.4	6.4	27.3	592.9
Mn	9.5	78.1	.7	5.4	38.1
Al	2,100	4.8	2	1.5	3.6
Acidity	138	1,276	118	158	1,790

(Ex. C-17)

222. THs 29-33 were located along an access road that ran from the northeast end of the Clarion pit to the north-northwest (Ex. C-71).

223. Sampling of the unaffected spoils on the mine site showed the following quality on July 2, 1986:

Parameter	Test Hole 31
pH	5.5
$CaCO_3$	15
SO_4	196
Fe	1.18
Mn	1.3
Al	<.5
Acidity	34

(Ex. C-56)

224. Sampling of the unaffected spoils on the mine site showed the following quality on February 4, 1988:

Parameter	Hole P-4	Hole P-5	Hole P-7
pH	3.3	3.3	3.1
$CaCO_3$	0	0	0
SO_4	7,329	7,119	2,010
Fe	>300	>300	8.62
Mn	>300	>300	72.7
Al	131	107	66.4
Acidity	1,596	1,592	530

(Ex. C-63)

225. Drill Holes P-4, P-5, and P-7 are located to the south-southeast of THs 29-33 along the same access road (Ex. C-71A).

226. Groundwater in the unaffected old spoils exhibited the characteristics of acid mine drainage.

DISCUSSION

Burden of Proof

The Department first argues that although it initially bore the burden of proof in this matter under 25 Pa. Code §21.101(b)(3), the burden of proof shifted to Hamilton under 25 Pa. Code §21.101(d) because the Department showed that some degree of environmental harm was occurring and Hamilton is in possession of facts relating to that damage. In support of its argument, the Department states: "[T]hough the Department possesses some information, Hamilton by virtue of its daily presence has far superior access and, therefore, should bear the burden of proof." Without any explanation of which facts Hamilton has, or should have, in its possession and why these facts force Hamilton to bear the burden of proof, the Department has failed to show why the burden of proof should shift under 25 Pa. Code §21.101(d). Accordingly, the burden of proof in this matter remains on the Department, under 25 Pa. Code §21.101(b)(3), to prove that it did not abuse its discretion or commit an error of law in issuing these compliance orders to Hamilton. See, C & K Coal Company v. DER, 1992 EHB 1261, 1288.

Scope of Review

Hamilton expended considerable time in its post-hearing brief downplaying the Board's *de novo* scope of review, arguing that it does not permit the Board to hear evidence the Department developed after it issued the compliance orders currently before the Board. Unfortunately, we have been down this road before. As we have repeatedly held, the Commonwealth Court decided in Warren Sand and Gravel Co., Inc. v. DER, 20 Pa. Cmwlth. 186, 341 A.2d 556 (1975), that the Board's scope of review is *de novo* in cases in which the Department has acted with discretionary authority. See, Hrivnak Motor Company v. DER, EHB Docket No. 88-473-F (Opinion issued April 6, 1993); Al Hamilton Contracting Company v. DER, 1992 EHB 1458, 1487. Our duty is to determine whether the Department's action is supported by the evidence before us, not the evidence the Department had before it in making its decisions. Warren, 20 Pa. Cmwlth. at ___, 341 A.2d at 565. There is no reason to treat this appeal differently.

Self-Incrimination

Hamilton also contends that the Department's use, in these proceedings, of information Hamilton provided to the Department in its permit applications violates Hamilton's right against self-incrimination found in the Fifth Amendment of the U.S. Constitution and Article I, §9, of the Pennsylvania Constitution. These arguments are without merit. As we held in Kerry Coal Co. v. DER, 1990 EHB 1359, 1364, the Fifth Amendment protection against self-incrimination does not apply to corporations. See also, Bellis v. United States, 417 U.S. 85, 94 S.Ct. 2179, 40 L.Ed.2d 678 (1974). Because the self-incrimination privileges of the United States and Pennsylvania

Constitutions are identical, the protection against self-incrimination contained in Article I, §9, also does not apply to Hamilton. See, Commonwealth v. Webster, 323 Pa. Super. 164, ___, 470 A.2d 532, 536 (1983).

With these introductory arguments behind us, we turn now to the heart of the matter in this proceeding. In order to prove that Hamilton is liable for the discharges cited in the numerous compliance orders, the Department must show that the discharges violate the effluent limitations of 25 Pa. Code §87.102 and are either located on or hydrogeologically connected to Hamilton's permitted area. Penn-Maryland Coals, Inc. v. DER, 1992 EHB 12. Admissibility of Water Quality Evidence.

Before we reach the issue of whether the discharges violate the effluent limits of 25 Pa. Code §87.102, we must first determine the admissibility of the Department's water quality evidence. The Department introduced numerous water quality samples in support of its position that the discharges are unlawful. Hamilton argues that these samples were inadmissible because the Department failed to satisfactorily authenticate them. In response, the Department contends its samples are admissible under the Business Records Act without introducing the testimony of every individual who had contact with them. For the reasons that follow, we agree with the Department.

Hamilton broke down its argument into attacks on the method for collecting the samples, the chain of custody, and the procedures used to analyze the samples. We will attempt to follow this categorization in our discussion of these issues.

All of the individuals who collected samples did so in roughly the same fashion. In general, the collection process began with three new 100 ml bottles, two of which were clear and one red. These three bottles constituted

one "sample." Each bottle was labeled with at least the sample number, and sometimes also the date and a description of the site being sampled. Each bottle was then rinsed out with the mine drainage being collected, filled to the top, and capped. Before capping the red bottle, the sampler added a pre-determined amount of nitric acid to "fix" the sample. The three bottles were then packed in ice in a cooler.

For each sample, the sampler completed a "sample analysis report," which contains the sample's four-digit identification number, the three-digit sample number, and the three-digit analysis code which identified what analytical test the laboratory was to perform. The sample analysis report also contains a short narrative briefly describing the location of the sample point. After the sample analysis report is placed in the cooler, the cooler is taken to a Purolator drop-off point in either State College or the Department's Phillipsburg or Hawk Run offices for shipment to the Department's laboratory in Harrisburg.

The process of adding nitric acid, or "fixing," is done to lower the sample's pH to keep any metals in the sample in solution. If the pH rises, metals could precipitate out of solution, resulting in a metals analysis that is too low (N.T. 2242-43). Sample bottles are packed in ice to lower their temperature to approximately 40° F. (N.T. 280). Otherwise, bacterial degradation of the sample could occur (N.T. 901).

Some of the individuals whose samples are in evidence employed sample collection techniques which deviated slightly from the routine described above. Bryce Putman, Bernard Robb, and Jim McDonald all testified that they did not fix their samples (N.T. 269, 563, and 733, respectively). Furthermore, Putman did not ice his samples until March 1984, while McDonald began icing his samples in October 1983 (N.T. 274, 737). Hamilton contends

all of Putman's, Robb's and McDonald's samples should be disregarded because they were not properly fixed and iced.[5]

Hamilton's argument is erroneous because a sample that is not fixed will yield a lower metals count, or one closer to the effluent limits of 25 Pa. Code §87.102. As we stated above, a sample is fixed to keep metals in solution. Metals that precipitate out of solution will not be measured. With respect to icing, while White testified that a warm sample could suffer bacterial degradation, there is no evidence before us indicating the effects of such degradation. In other words, we cannot determine whether bacterial degradation will affect the validity of the results at issue here. Nevertheless, we will disregard the two samples that were not properly iced after they were collected: Putman's Sample 2020, dated November 16, 1976, (Ex. C-9); and McDonald's Sample 44174497, dated June 6, 1983.[6]

Purolator picks up the coolers from its drop-off locations every Monday thro Friday between 3:00 and 4:00 p.m. It delivers these coolers to the Department's Harrisburg laboratory at Third and Reily Streets every Monday to Friday morning before 7 a.m. (N.T. 795).[7] The Department presented no

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[5] Although not pointed out by Hamilton, there were other irregularities in the sampling procedures. Putman and McDonald used a single 500 ml bottle, (N.T. 15, 681), and Arway and Spotts used two 500 ml bottles, (N.T. 977, 1201), to collect their samples, while Lee used four bottles of unknown size, (N.T. 2033).

[6] Sample 2020 must also be disregarded because it was not fixed. The Department offered this sample as a background reading of Spring Two, arguing that subsequent samples show further degradation in the water quality. Because sample 2020 was not fixed, the actual metals present may have been higher than those recorded, and the further degradation to which the Department refers may simply be the result of better techniques and more accurate metals readings.

[7] Arway testified that he sent his samples to the Department's laboratory in Erie (N.T. 978; Ex. C-20).

testimony that the coolers are delivered the next business day. When Purolator arrives, it contacts a designated Department employee who receives the coolers into the laboratory (N.T. 797).

Processing begins immediately (N.T. 796). The sample bottles and submission forms are removed from the coolers, and the sample numbers on both are checked to ensure they match (N.T. 796-97). Once the sample numbers are matched, the samples are divided into groups ranging from the cleanest, i.e. drinking water samples, to the dirtiest, i.e. sewage and solid waste management samples. Acid mine drainage samples comprise their own group (N.T. 797).

The Department assigns each sample a new laboratory identification number, which is stamped onto the submission form and affixed to the sample bottles by a numerical and bar code seal. *Id.* The seven-digit sample number, three-digit analysis code, and legal seal number, if any, are logged into the computer for each sample (N.T. 798). White did not testify whether the new identification number for each sample is logged in as well. After all of the samples are entered, the computer prints a worksheet for each analysis, e.g. Fe assays, indicating how many, and which, samples are to be tested (N.T. 799). The samples are then taken to the different work areas: pH, SO_4, and metals (N.T. 854).

All of the tests performed for acid mine drainage constituents are automated (N.T. 786). The individuals who operate these machines are either

chemists or chem-technicians (N.T. 803). White testified that these operators identify a sample by its laboratory identification number only. This is done, according to White, to eliminate the possibility of bias in the results.[8]

To test for Fe, Mn, Al, and Na, the Department uses a process called inductively coupled argon plasma emission spectrometry (ICP Emission Spectrometry) (N.T. 786).[9] To test for SO_4, the Department uses a methyl thymol blue test (N.T. 783).[10] While White did not name the tests for pH and alkalinity, he testified that pH is determined by electromagnetic analysis and alkalinity is determined after titrating the sample with sulfuric acid (N.T. 781-82). The Department presented no evidence on its test(s) for total acidity, hot.

While the instruments used are, in large part, responsible for the reliability of test results, the Department has instituted a quality assurance

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[8] Although White did not testify that the laboratory identification numbers are also entered into the computer, because the technicians work from the worksheets produced by the computer and because they identify samples only by the laboratory number, it is reasonable to conclude that the worksheets contain the laboratory number.

Hamilton argues this procedure does not work because Ex. C-32 contains no analysis code, and yet, the laboratory performed a standard acid mine drainage analysis. Hamilton overlooks the fact that the analysis code is entered by the operator who also logs in the sample number and, therefore, has seen the submission form and knows the sampler requested a mine drainage analysis. See, Ex. C-32, entitled "Stream and Mine Drainage Analyses."

[9] Prior to 1983 or 1984, the Department used flame atomic absorption spectrometry (FAAS), instead (N.T. 786). The Department switched to ICP Emission Spectrometry because it analyzes each sample in less time but is just as accurate (N.T. 817-18). Both processes are essentially the same in that they measure the light emitted by an atomized sample after application of an energy source. ICP Emission Spectrometry uses a plasma torch as its energy source, while FAAS uses an open flame. C.C. Lee, Environmental Engineering Dictionary (1989); N.T. (782, 787).

[10] This test involves reacting the sample with a known substance to create a color, which is measured by a spectrophotometer (N.T. 783).

program to further ensure their validity. This program focuses on the reproducibility and accuracy of the test results (N.T. 793). "Reproducibility" refers to the ability to accurately duplicate the results from an unknown sample. To test the reproducibility of its results, every 9th and 10th sample in a testing run are the same (N.T. 794). While the results do not have to exactly match, the difference must fall within the Department's deviation guidelines (N.T. 881). For scientific purposes, results that are within the guideline are considered to be the same (N.T. 912). If the difference is greater than the guidelines allow, the 9th sample is rerun and the official result is the average of the second 9th sample and the result closest to it (N.T. 881).

"Accuracy" refers to the ability to successfully analyze the constituents of a known sample (N.T. 794). Again, the results do not have to be perfect, but must be within the Department's guidelines. If the results fall outside the guidelines, the operator allows the machine to run until it re-tests the known sample. If the second known is correct, the operator accepts all of the previous results, but if it is incorrect, all of the results from the last correct known are invalidated and the machine is recalibrated (N.T. 891).

As further evidence of the laboratory's quality assurance, White testified that each instrument is recalibrated at the beginning of each work shift (N.T. 886). In addition, if the results of a known sample continue to show a certain bias over four or five runs, the supervisor would be called in to check the instrument (N.T. 889). The laboratory reports all results that pass the quality assurance program (N.T. 912).

The instruments that conduct the various analyses are not connected to the Department's computer. After an instrument completes its analyses, it

produces a printout containing the results (N.T. 866-67). The individual operating the machine enters the data from the printout into the Department's computer (N.T. 811). To verify the results, the operator is required to re-enter the same data. If correct, the computer then records the initials of the operator re-entering the data and indicates on the test results that the results were verified. *Id.*

After all of the anlyses for a sample have been entered and verified, the computer prints the test results for that sample (N.T. 804). The results are reviewed for anomalies and signed (N.T. 873-74). White testified that reviewing for anomalies does not mean determining the validity of the test results, but rather looking for inconsistent results such as a pH of 8.7 and a hot acidity of 250 mg/l. *Id.* The laboratory attaches the test results to the sample analysis report and sends it to the region, i.e. Hawk Run, from which it came (N.T. 808-09). The laboratory does not keep a hard copy of the test results, but instead maintains the data on computer tape (N.T. 807, 899).

Hamilton contends the Department's water quality evidence should be disregarded because the Department has not established a satisfactory chain of custody. Hamilton specifically mentions the Department's failure to offer the testimony of the employees who accepted the samples, logged the sample data into the computer, ran the tests, and entered the test results into the computer. We disagree. Evidence may be admitted despite gaps in the testimony regarding its custody. Lackawanna Refuse Removal, Inc. v. DER, 65 Pa. Cmwlth. 374, ___, 442 A.2d 423 (1982). "[T]here is no requirement that the Commonwealth establish the sanctity of its exhibits beyond a moral certainty. Every hypothetical possibility of tampering need not be eliminated; it is sufficient that the evidence, direct or circumstantial,

establishes a *reasonable* inference that the identity and condition of the exhibit remained unimpaired until it was surrendered to the trial court." Commonwealth v. Hudson, 489 Pa. 620, ___, 414 A.2d 1381, 1387 (1980).

The situation currently before the Board is analogous to that faced by the Commonwealth Court in Brunson v. Commonwealth, Unemployment Compensation Board of Review, 131 Pa. Cmwlth. 462, 570 A.2d 1096 (1990), *appeal denied*, 527 Pa. 603, 589 A.2d 693 (1990), where the court was called upon to examine a claim that a proper chain of custody had not been established for the time between when a urine sample was collected and the laboratory issued its analysis. The court, upon reviewing the testimony of the laboratory technician who collected the sample and the toxicologist who supervised the testing, as well as a statement signed by appellant acknowledging a proper chain of custody, ruled that a proper chain of custody was established. 131 Pa. Cmwlth. at ___, 570 A.2d at 1098. The court did not review any testimony regarding the transfer of the sample from the medical facility where the sample was collected to the laboratory where it was tested, or from the technician who actually performed the test. 131 Pa. Cmwlth. at ___, 570 A.2d at 1097.

We believe that the testimony presented by the Department is sufficient to establish a satisfactory chain of custody. While the Department did not present the testimony of the employees who accepted the samples from Purolator, or the testimony of any of the chemists and chem-technicians who operated the various instruments and entered the data into the computer, their testimony is not necessary. See, Brunson, *supra*. We heard testimony from the individuals who collected the samples and the individual responsible for testing the samples and reporting those results. This testimony establishes a reasonable inference that the samples remained unimpaired and in essentially

the same condition from the time they were collected until the time the results were reported. See, Hudson, *supra*.

Furthermore, we believe the methods used by the Department to analyze the samples are sufficiently reliable. In this Commonwealth, the standard for admissibility of all "scientifically adduced" substantive evidence is the long-established Frye test, Frye v. U.S., 293 F.2d 1013 (D.C. Cir., 1923). Commonwealth v. Nazarovitch, 496 Pa. 97, 101, 436 A.2d 170, 172 (1981); Al Hamilton Contracting Co. v. DER, 1992 EHB 1366. Under the Frye test, scientific evidence is admissible if the process by which the evidence was developed is accepted within the scientific field in which it belongs. Nazarovitch, *supra*. White testified that both the equipment used and the procedures followed are accepted within the scientific community and industry to analyze mine drainage samples (N.T. 791, 92). We find that this testimony is sufficient to satisfy the standards established in Frye.[11]

Even though the Department's laboratory results satisfy our chain of custody inquiry and the Frye standard of reliability, this is merely an indication that they are trustworthy. It does not alter the fact that they are hearsay, and, therefore, inadmissible unless they fall within a recognized exception to the hearsay rule. See, Commonwealth v. Coleman, 458 Pa. 112, 115, 326 A.2d 387, 388 (1974); C & K Coal Co. v. DER, 1992 EHB 1261, 1297.

Hamilton contends that in order to make these reports admissible, the Department had to offer the testimony of every chemist or chem-technician who operated the machines responsible for the various analyses. The

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[11] The U.S. Supreme Court recently overturned Frye in Daubert v. Merrell Dow Pharmaceuticals Inc., ___ US ___, 113 S.Ct. 2786, ___ L Ed.2d ___ (1993), holding that the admissibility of scientific evidence is governed by Rules 402 and 702 of the Federal Rules of Evidence. Nevertheless, Frye remains the law of this Commonwealth. Martin L. Bearer t/d/b/a North Cambria Fuel Co. v. DER, EHB Docket No. 83-091-G (Adjudication issued August 2, 1993), at p. 55.

Department responds that it offered the testimony of White and of the individuals who collected the samples, which is sufficient for admission under the Business Records Act. For the reasons that follow, we agree with the Department.

The Business Records Act states:

> A record of an act, condition or event shall, insofar as relevant, be competent evidence if the cutodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business at or near the time of the act, condition or event, and if, in the opinion of the tribunal, the sources of information, method and time of preparation were such as to justify its admission.

42 Pa. C.S. §6108(b). The purpose of the Business Records Act is to overcome the difficulties inherent in attempting to introduce the records of most organizations. There is often no one person responsible for their preparation, and it would be virtually impossible to elicit testimony from each employee. The Pennsylvania Supreme Court recognized this problem in discussing the admissibility of a plaintiff's military medical records.

> The general purpose of the Business Entry Statute[12] was to enlarge the old common-law shopbook exception to the hearsay rule by eliminating the many illogical distinctions which had evolved during the period when the one-man type of business enterprise was the predominant form of business organization. Today, instead of a single shopkeeper who transacts and records the sale, there are a myriad of salesgirls, department heads, bookkeepers, etc., etc., etc., who compile summaries and consolidate the records made by others. Quite often, different individuals have personal knowledge of the

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[12] The "Business Entry Statute" to which the court referred was the Commonwealth's previous business records act, the Act of May 4, 1939, P.L. 42, 28 P.S. §§91a, 91b, and 91d. It was reenacted in substantially the same form by the current Uniform Business Records as Evidence Act. In re Estate of Indyk, 488 Pa. 567, ___, 413 A.2d 371, 373 (1979).

> various phases of a transaction so that no one individual has knowledge of the entire transaction. In addition, the frequent turnover of personnel often makes it impossible to identify the employee - if it were only one - who took part in the transaction. Under these circumstances, to require the entrant to have personal knowledge of the event recorded, and to require proof of the identity of the recorder, would exclude almost all evidence concerning the activities of large business organization ...."

Fauceglia v. Harry, 409 Pa. 155, ___, 185 A.2d 598, 600 (1962).

The situation described by the court in Fauceglia is analogous to that faced by the Board here. White testified that the Department's Division of Inorganic Chemistry employs approximately 60 people, 25 to 30 of whom are involved in analyzing acid mine drainage samples (N.T. 933). With this number of employees, no one person can testify about every analysis performed on every sample. To bring in each chemist or technician who operated each machine at the time every sample was analyzed would be a logistical nightmare. It would also be of little or no help to the Board, since these tests were automated, requiring no analysis by the chemists and technicians, and were performed years before the hearing. See, Panama Canal Co. v. Stockard & Co., 391 Pa. 374, ___, 137 A.2d 793, 798 (1958).

Hamilton argues that without the testimony of each chemist and technician, it will be unable to determine whether an instrument was biased toward a certain result.[13] While it may be true that the chemists and technicians could possibly tell whether an instrument is biased, we are satisfied with the Department's quality assurance program, which we described in detail above. Additional testimony regarding the operation of these machines for each sample is not necessary.

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[13] The appropriate time to explore these issues is during the course of discovery.

The Department offered Vincent White as the custodian of records for the purpose of authenticating the Department's water sample results under the Business Records Act (N.T. 771-772). In Indyk, *supra*, the court discussed the qualifications necessary to be an authenticating witness.

> The purport of the [Business Records] Act is to merely require that the basic integrity of the recordkeeping is established. Where it can be shown that the entries were made with sufficient contemporaneousness to assure accuracy and that they were made pursuant to the business practices and not influenced by the litigation in which they are being introduced, a sufficient indicia of reliability is provided to overcome their hearsay nature.

488 Pa. at ___, 413 A.2d at 373. To do this, the authenticating witness does not have to be the person who made the entries or the custodian of records at the time the entries were made. Indyk, 488 Pa. at ___, 413 A.2d at 374. The authenticating witness must only have "adequate knowledge of the regularity of the recordkeeping process." Ganster v. Western Pennsylvania Water Co., 349 Pa. Super. 561, ___, 504 A.2d 186, 190 (1985). Personal knowledge of the contents is not required. R. A. Freudig Assoc. v. Commonwealth, Insurance Dept., 110 Pa. Cmwlth. 311, ___, 532 A.2d 509, 512 (1987).

The courts have, on several occasions, determined what testimony is sufficient under the act. In Fauceglia, *supra*, the court found sufficient the testimony of the Veteran Administration's custodian of records, who testified that the records were made after a medical officer examined the subject and were part of the agency's records. 409 Pa. at ___, 185 A.2d at 599. In R.A. Freudig, *supra*, the court accepted the testimony of an insurance company's resident manager, who stated that his responsibilities included reviewing the reports in question, that the reports were prepared by a subordinate, and that his secretary maintained these records for him. 110 Pa. Cmwlth. at ___, 532

A.2d at 512. Lastly, in Commonwealth v. Sullivan, the court found to be acceptable the testimony of the director of a testing laboratory, who testified about his own qualifications, the qualifications of the chemist who performed the test, the chain-of-custody, the test performed, the laboratory's operating procedures, and how he interpreted the results. 399 Pa. Super. 124, ___, 581 A.2d 956, 958 (1990).

We find that White's testimony was sufficient to authenticate the Department's samples under the Business Records Act. As we explained above, White is the Chief of the Division of Inorganic Chemistry. He is responsible for establishing the laboratory's policies and procedures and for the results reported (N.T. 779-780). He testified concerning the chain of custody observed by the laboratory, the techniques and instruments the laboratory uses to analyze water samples, and the laboratory's method for reporting its results. White further testified that the official laboratory record, which consists of the verified and reviewed computer print-out and the "sample analysis report" that accompanied the sample, is returned to the sampler at his field office (N.T. 807-808). Upon receipt in the field office, the report is placed in the Department's files there (N.T. 157, 683).[14]

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[14] Even though the Department failed to elicit testimony expressly describing how these records were maintained, this issue was waived by Hamilton's failure to raise it in Hamilton's post-hearing brief. Lucky Strike Coal Co., *supra*. Nevertheless, we find there is sufficient circumstantial evidence on the record to indicate that the Department maintains the water sample reports in its files at the field offices. See, testimony of Putman and McDonald indicating the Department files the water sample reports (N.T. 157, 683); and testimony of Robb, Arway, and Spotts indicating they received copies of the water sample reports from the Department's laboratories (N.T. 471, 979, and 1203).

In future proceedings, the Department should take better care in eliciting testimony regarding how and where it maintains the laboratory's water sample reports. Otherwise, the Department may not be able to prove the regularity of its recordkeeping process.

Courts have long held that in order to qualify as a business record, the document must report a fact and not an opinion. Commonwealth v. Nieves, 399 Pa. Super. 277, 582 A.2d 391 (1990); Commonwealth v. Karch, 349 Pa. Super. 227, 502 A.2d 1359 (1986). Business records containing an opinion are inadmissible unless the author is presented for cross-examination on that opinion. Commonwealth v. DiGiacomo, 463 Pa. 449, 345 A.2d 605 (1975). In Nieves and Karch, the court admitted medical records containing the results of gonorrhea and blood-alcohol tests, respectively. In both decisions, the court determined that these results were facts and not opinions. While they did not elaborate on these determinations, it is clear that the test results were facts because they merely reported the contents of the substances tested. In contrast, the court in DiGiacomo held inadmissible the admitting diagnosis of a physician who was not presented to testify. The court believed a diagnosis was more than merely a description of the symptoms. A diagnosis adds the expert insight of the person making it. 463 Pa. at ___, 345 A.2d at 608. See also, Morris v. Moss, 290 Pa. Super. 687, ___, 435 A.2d 184, 186 (1981).

The situation currently before the Board is analogous to that faced by the court in Nieves and Karch. These reports only indicate the constituents present in the various water samples. They do not determine whether the water samples are characteristic of acid mine drainage. This determination was made, instead, by the Department's hydrogeologists, Milton McCommons and Joseph Lee.

By definition, in order to be a business record, a record must be made in the regular course of the organization's business. Ganster, 349 Pa. Super. at ___, 504 A.2d at 190. "'In the regular course of business' includes entries made systematically and as part of a regular routine which requires the recording of events or occurences, the reflection of transactions with

others." *Id.* Records or reports made in anticipation of litigation are not made in the regular course of business. Newman v. Pittsburgh Railways Co., 392 Pa. 640, ___, 141 A.2d 581, 582 (1958).

The water reports at issue here were made in the regular course of business and not for the purpose of litigation. Under the Federal Surface Mining Control and Reclamation Act, the Act of August 3, 1977, P.L. 95-87, 30 U.S.C. §1201 *et seq.* (Federal SMCRA), the Department was required to conduct quarterly inspections of the mine site. See, 30 U.S.C. §1267(c); 30 CFR §840.11(b). These quarterly inspections had to include water sampling to ensure Hamilton's compliance with the effluent limits in its permit and 25 Pa. Code §87.102. See, 30 CFR §840.11(b). Furthermore, while Hamilton was actively engaged in mining or reclamation, the Department was required to conduct at least 12 partial inspections of the mine site each year and could conduct more as necessary to ensure effective enforcement of its regulations. See, 30 CFR §840.11(a). A partial inspection could include water quality sampling to determine whether Hamilton was complying with applicable effluent limitations. See, *Id.*

Even though the Department used its water samples against Hamilton, this alone does not mean that they were prepared for the purpose of litigation. Courts have long accepted the results of blood alcohol tests under the Business Records Act in drunk driving cases even though the blood tests were performed to determine whether defendant's blood alcohol level exceeded the limits established in 75 Pa. C.S. §1547(d). See, Commonwealth v. Sullivan, 399 Pa. Super. 124, 581 A.2d 956 (1990); Commonwealth v. Seville, 266 Pa. Super. 587, 405 A.2d 1262 (1979). Similarly here, the Department tested these samples merely to determine whether the water quality at the sampling points violated the effluent limits of 25 Pa. Code §87.102. Based on

the Department's duty under the Federal SMCRA, *supra*, and the courts' holdings in analogous situations, we find that the Department made these water sample reports in the regular course of business.

The last requirement for admissibility under the Business Records Act is that the records be trustworthy. Ganster, 349 Pa. Super. at ___, 504 A.2d at 190. In determining whether a record is trustworthy, the court stated that the factors to be considered are: motive or opportunity to prepare an inaccurate record; period of delay before preparing the record; nature of the information recorded; regularity and continuity in maintaining the record; and any business reliance on the record. *Id.* The court, however, also stated that "[i]n the case of records kept in the regular course of business the circumstantial guarantee of trustworthiness arises from the regularity with which they are kept." *Id.* (citing Fauceglia, 409 Pa. at 160, 185 A.2d at 601). Since we have already found that the Department's water samples are kept in the regular course of business, their trustworthiness is inferred.[15]

Although the Department's water sample reports satisfy all of the criteria for admissibility under the Business Records Act, Hamilton contends they are inadmissible under Thomas v. Allegheny and Eastern Coal Co., 309 Pa. Super. 333, 455 A.2d 637 (1982). Hamilton asserts that under Thomas, White's testimony alone was insufficient to authenticate the Department's water quality analyses. In Thomas, the trial court denied the admission of

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[15] Looking nevertheless at the five factors listed by Ganster, we still find that the Department's water sample reports are trustworthy. There is no motive or opportunity to create an inaccurate record. The tests are automated and the machine operators do not know the identity of the organization being investigated. There is no delay in preparing the record because the Department's computer produces it as soon as it is complete. The information recorded consists only of the numerical value of the constituents present in the water sample. The Department maintains the records in its field office files. And lastly, the reports provide the Department with its only knowledge of the water quality at the sampling points.

laboratory analyses of the BTU content of coal because they were not sufficiently trustworthy for admission under the Business Records Act. 309 Pa. Super. at ___, 455 A.2d at 640. The situation presently before the Board is not similar to that faced by the court in Thomas. In Thomas, the BTU test was ordered by the ultimate consumer of the coal, who by agreement would receive a price reduction if the BTU content fell below a certain level per ton. 309 Pa. Super. at ___, 455 A.2d at 638, 640. Furthermore, there was no indication that the tests were automated, placing great importance on the testimony of the individual who performed the analyses.

We have already found, above, that the Department had no incentive or opportunity to adjust the results of its water quality analyses. In addition, these tests were performed by machines that are generally accepted for analyzing acid mine drainage samples. For these reasons, we find that Thomas is inapplicable to this proceeding. The Department's water quality reports (Exs. C-9, -16, -17, -18, -21, -23, -24, -25, -26, -27, -29, -30, -31, -32, -33, -34, -35, -36, -38, -41, -42, -43, -44, -45, -48, -49, -50, -51, -52, -53, -54, -55, -56, -57, -58, -59, -60, -61, -62, -63, -64, and -75) are admissible under the Business Records Act.[16]

Hamilton's liability for discharges from its treatment facilities.

The Department has issued Hamilton two C.O.s for discharges from its treatment facilities on both the Mountain Branch and Moshannon Creek sides of the mine site. C.O. HRO 84-44 cites Hamilton for discharges that violate the effluent limits of 25 Pa. Code §87.102 from Ponds One and Two (Ex. C-15), which are located on the northeastern and southern sides of Hamilton's permitted area, respectively (Ex. C-14). C.O. 85-H-027 cites Hamilton for

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[16] Except Samples 2020 and 4417497, which we held above were inadmissible.

discharges from the final treatment pond on the Moshannon Creek side of the mine site that violate the effluent limits of 25 Pa. Code §87.102 as well (Ex. C-37). This treatment pond is the last of a series of five treatment ponds on the western side of the mine drainage permit that are used to treat acid mine drainage (Ex. C-14; N.T. 146, 237).

Liability for acid mine drainage is founded in §315(a) of the Clean Streams Law, which states:

> No person or municipality shall operate a mine or allow a discharge from a mine into the waters of the Commonwealth unless such operation or discharge is authorized by the rules and regulations of the department or such person or municipality has first obtained a permit from the Department.

We have long held this section to mean that a mine operator is liable for all discharges that arise from within its permitted area. Halfway Coalyard, Inc. v. DER, EHB Docket No. 83-133-W (Adjudication issued January 26, 1993). See also, Thompson & Phillips Clay Co. v. DER, 136 Pa. Cmwlth. 300, 582 A.2d 1162 (1990), pet. for alloc. denied, ___ Pa. ___, 598 A.2d 996 (1991). To prove that Hamilton is liable for the discharges from its on-permit treatment facilities, therefore, the Department must only show they violated the effluent limits of 25 Pa. Code §87.102.

Under 25 Pa. Code §87.102[17] and Additional Special Condition Two of MDP 4770BSM9, the discharges from Hamilton's treatment facilities may not exceed the following effluent limits:

> Fe .... 7.0 mg/l
> Mn .... 4.0 mg/l
> pH ... greater than 6.0; less than 9.0
> alkalinity greater than acidity

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[17] Section 87.102 was amended on June 15, 1990, 20 Pa. B. 3383. These amendments, however, have no effect on the outcome of this appeal since Hamilton is only subject to the effluent limits in effect at the time the Department issued its orders.

25 Pa. Code §87.102(a); Ex. C-11. In support of its burden of proving Hamilton's liability, the Department offered into evidence the results of four water quality samples from the outfall of Pond One, which were taken on December 15, 1983, April 18, 1984, March 1, 1985, and February 21, 1986 (Exs. C-29, C-32, C-34, C-36). The 1983, 1984, and 1986 samples violated the effluent limits for pH and acidity. From the outfall of Pond Two, the Department offered samples taken on December 15, 1983, April 18, 1984, and February 21, 1986 (Exs. C-29, C-31, C-32, C-34). The 1984 and 1986 samples violated the effluent limits for pH and acidity, while the 1983 sample violated the effluent limit for Mn. From the outfall of the final treatment pond, the Department took samples on March 1, 1983, March 18 and April 1, 1985, and February 7 and 21, 1986 (Ex. C-24, C-29, C-36, C-41, C-43). The 1985 samples violated the effluent limit for pH, and all of the samples except that of April 1, 1985, violated the effluent limit for Mn.

Because the discharges from Ponds One and Two and the final treatment pond violated the effluent limits of 25 Pa. Code §87.102, the Department did not abuse its discretion in issuing Hamilton paragraph two of C.O. HRO 84-44 and paragraph two of C.O. 85-H-027.

Hamilton's liability for the off-permit discharges

The Department also issued Hamilton several C.O.s for off-permit discharges to the northeast of the mine site. C.O. HRO 84-44 cited Hamilton for discharges in violation of the effluent limits of 25 Pa. Code §87.102 from two springs that are commonly known as Springs One and Two. (Ex. C-15; N.T. 107-108, 1087). Spring Two is located approximately 200 feet to the northeast of Hamilton's permitted area, while Spring One is located an additional 300 feet to the north, and downgradient, of Spring Two. (Exs. C-14 and C-14A).

In addition, Spring One is located within 300 feet of Houtzdale's water intake on Mountain Branch. Drainage from both springs flows into a drainage swale that empties into Mountain Branch upstream of Houtzdale's intake. (*Id.*; N.T. 53). C.O. 85-H-027 cited Hamilton for discharges in violation of the effluent limits of 25 Pa. Code §87.102 from an area of seepage referred to as the Fugitive Discharge. (Ex. C-37). The Fugitive Discharge is located just west of the road between Springs One and Two (Hamilton's road). Drainage from this discharge flows adjacent to Hamilton's road to the north towards Spring One. (N.T. 475-476). Before reaching Spring One, this water abruptly flows to the northeast through drainage pipes under Hamilton's road and under an access road leading to Houtzdale's water intake, then eventually drains into Mountain Branch below the intake. (*Id.*; N.T. 636).

The Department contends Hamilton is liable for all three of these discharges, even though they are located off-permit, because they are hydrogeologically connected to Hamilton's mine site. Hamilton disagrees, arguing that the Department offered no valid background samples for the discharges and, therefore, cannot prove Hamilton caused the acid mine drainage emanating from them. For the reasons that follow, we find Hamilton is liable for these discharges.

To establish liability for off-permit discharges under §315(a) of the Clean Streams Law, *supra*, the Department must show that they violate applicable effluent limits and are hydrogeologically connected to the operator's mine site. Penn-Maryland Coals, Inc. v. DER, 1992 EHB 12, 34; Hepburnia Coal Co. v. DER, 1986 EHB 563, 602. Hamilton argues that the Department must also prove it degraded Spring Two, which existed before it began its operation, and prove it caused Spring One and the Fugitive Discharge. We disagree. In C&K Coal v. DER, 1987 EHB 786, 789, we explained "liability for the treatment or

abatement of an off-permit, pre-existing discharge may be imposed under §315(a) of the Clean Streams Law where there is a hydrologic connection between the mining operation and the off-permit discharge...." Under C&K Coal, therefore, Hamilton is liable for the unlawful discharge from Spring Two even if the Department fails to prove Hamilton affected it. See also, Bologna Mining Co. v. DER, 1989 EHB 270. With respect to Spring One and the Fugitive Discharge, the Department must only show they are hydrogeologically connected to the mine site. It does not have to prove Hamilton caused them. See, Thompson & Phillips Clay Co. v. DER, *supra* (holding that §315(a) does not require proof that an operator caused acid mine drainage for liability to attach).

The Department introduced into evidence the results of numerous water samples that show the drainage from Springs One and Two and the Fugitive Discharge violate the effluent limits of 25 Pa. Code §87.102(a) and are characteristic of acid mine drainage. From Spring One, the samples taken on March 5 and June 4, 1984, both violated the effluent limit for Mn and contained elevated levels of SO_4 and Al (Exs. C-16, C-33). The March 5 sample also violated the effluent limits for pH and acidity. From Spring Two, the Department took samples on December 15, 1983, March 5 and June 4, 1984, and February 4, 1988, all of which violated the effluent limits for pH and Mn, and contained elevated levels of SO_4 (Exs. C-16, C-32, C-33, C-62). Furthermore, the 1983, 1988, and March 5, 1984, samples violated the effluent limit for acidity, and the 1984 samples violated the effluent limit for Fe.[18] And

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[18] In addition to these samples, the Department contends in its post-hearing brief that it offered samples 4417581 (Ex. C-33), 4407441 (Ex. C-18), and 4407528 (Ex. C-16) for Spring One and samples 4407429 (Ex. C-16), 4407445 (Ex. C-21), and 4407468 (Ex. C-24) for Spring Two. We disagree. After reviewing these exhibits and the transcript, we find no support for the Department's belief that these samples were taken from Springs One or Two. footnote continued

finally, the Department took nine samples from the Fugitive Discharge between March 5, 1985, and August 19, 1986, all of which violated the effluent limits for pH, Mn, and acidity, and contained elevated levels of SO_4 (Exs. C-30, C-38, C-41, C-50, C-57, C-61, and C-62).[19]

Based on these results, we find the Department showed that discharges from Springs One and Two and the Fugitive Discharge violated the effluent limits of 25 Pa. Code §87.102(a) and are characteristic of acid mine drainage.[20] We must now examine whether the Department has also proven there is a hydrogeologic connection between the mine site and Springs One and Two and the Fugitive Discharge.

Milton McCommons and Joseph Lee, both Department hydrogeologists, were qualified by the Board as experts in hydrogeology and testified there is a hydrogeologic connection between the mine site and the discharges (N.T. 1663, 1950). Terry Rightnour, President of Energy Environmental Services, Inc., was qualified as an expert in the areas of: interpretation of water chemistry data; determination of recharge areas; determination of groundwater

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continued footnote
Even though sample 4422075 (Ex. C-40) was offered for Spring Two, it is illegible and will not be considered.

[19] With the March 4, 1986, sample, we cannot determine whether acidity exceeded alkalinity because the result for alkalinity states: "not amenable to analysis," and the Department failed to explain the meaning of this comment. See, Ex. C-30.

[20] The Department also introduced samples from Point B-3 on Ex. 14A, which is the intersection of the drainages from Springs One and Two, and from Mountain Branch at the point where the combined drainage from Springs One and Two enters the stream. While we understand the Department's desire to ensure it introduced enough samples to show that the three discharges were acid mine drainage, we do not need to examine these samples. The Department introduced enough samples from the discharges to prove they contained acid mine pollution.

flow; and the use of data from piezometers to prepare hydrologic gradient maps, and testified that the evidence the Department used to prove a hydrogeologic connection is invalid (N.T. 2961, 2969).

Groundwater flow is generally controlled by the topography of the overlying land, and the structure contours and jointing of the underlying strata (N.T. 1667-68, 2073). Topography affects groundwater flow because groundwater tends to flow from areas of higher hydrologic pressure, or areas with thick overburden, to areas of lower hydrologic pressure, or areas with less overburden (N.T. 1690, 2485). Here, the mine site sits astride a ridge, which is a topographic high, and the discharges are closer to the Mountain Branch, in an area that is topographically lower (N.T. 2116). Structure affects groundwater flow since groundwater tends to flow downgradient, at right angles to the structure contours depicted on a contour map. The structure contour for the Clarion coal under the mine site is shown on Ex. C-14A and depicts a general roll in the coal towards the northwest, which is supported by the strike and dip information shown on Ex. C-70 (N.T. 1773). In the areas mined by Hamilton, however, the coal structure rolls towards the northeast and the Mountain Branch (N.T. 2070). Lee saw the Clarion coal in the last active Clarion pit and testified that the structure contours on Ex. C-14A accurately portray the localized roll towards the northeast (N.T. 2219). See also, N.T. 2748 (testimony of James McNeil that in the last cut of the Clarion coal the structure rolled to the northeast).

And finally, joints and fractures encourage groundwater to flow in the direction of their orientation (N.T. 1804). These features, however, tend to have more influence over vertical groundwater flow, allowing infiltration into deeper strata, than over horizontal flow (N.T. 1668). On the mine site, McCommons used a brunt and compass method to measure the orientation of

jointing and fracturing in the exposed highwall of the Clarion and Lower Kittanning pits (N.T. 1667, 1773).[21] Based on his own observations of the jointing, Lee testified that they would encourage groundwater movement and orient it through the non-spoil material towards Mountain Branch (N.T. 2116-17).[22]

Based on these controls, McCommons testified that the water emanating from the discharges originally infiltrated the ground, to some extent, in areas Hamilton mined. The recharge area for Springs One and Two and the Fugitive Discharge, McCommons explained, extends from the discharges to almost the top of the ridge dividing of the mine site (N.T. 1689-90 and 1696-1701).

In addition to the controls on which McCommons relied, Lee also examined the hydrologic potential of groundwater in the area between the mine site and the discharges. See, Exs. C-71 and C-71A. Because groundwater flows from areas of higher hydrologic potential to areas of lower hydrologic potential, Lee used this information to determine whether it was flowing from the mine site to the discharge area (N.T. 2076). On both Exs. C-71 and C-71A, the hydrologic gradients show that groundwater flows from the mine site to the discharges, supporting the groundwater flow pattern indicated by the area's topography and underlying structures and jointing. Using all of this information, Lee testified that the recharge area for the discharges extended to the south-southwest towards the hill dividing the Mountain Branch and

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[21] McCommons testifed that the joint in the Clarion pit is oriented at N25-30° W, is nearly vertical, and is systematic (running through all of the different rock strata) (N.T. 1809).

[22] Neither McCommons nor Lee observed jointing in the area between the mine site and the discharges. McCommons did testify, however, that his experience suggests to him that jointing is similar in that area (N.T. 1796).

Moshannon Creek sides of the mine site (N.T. 2116).[23] See also, Ex. C-14A.

Hamilton objects to Lee's characterization of the recharge area for several reasons, all of which focus on his interpretation of the hydrologic gradients of the groundwater underlying the mine site. Hamilton first contends the hydrologic gradients are invalid because Lee did not have enough data points in the area of the discharges. Lee, however, testified that he plotted the gradients himself, using techniques that are common in the field of hydrogeology (N.T. 2082). While there are few data points in that area, we accept Lee's ability, based on his education and experience, to extrapolate these hydrologic gradients from the information he had.

Hamilton next contends that the method Lee used to develop these gradients, static groundwater elevations, is inadequate. Hamilton's expert, Terry Rightnour, testified that the hydrogeologic structure underlying the mine site is quite complex in terms of groundwater flow. By "complex," Rightnour meant that the structure is non-homogenous, non-continuous, and non-isotropic, and that groundwater is contained in multiple confined and unconfined aquifers (N.T. 3033). Rightnour based his belief on groundwater data revealing varying static water levels between two monitoring periods, varying water quality in neighboring drill holes, varying drill hole depths, and discrepancies in data from drill holes 17, 46, and 47 (N.T. 3030).

Rightnour explained that the only way to determine groundwater flow in such a complex environment is to examine both the vertical and horizontal components of flow, (N.T. 3035), or in other words the extent of flow both within and between different levels of strata. The extent of vertical flow can be determined with data from piezometers, which can be used to monitor

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[23] Lee further testified he could not determine the upper extent of the recharge area because of a lack of data from the dividing hill (N.T. 2318).

hydrostatic pressure within discrete zones of strata (N.T. 3035). Because the hydrogeologic environment is so complex, Rightnour contends groundwater flow is not so uniformly distributed as Lee depicts in Exs. C-71 and C-71A, and these gradients are, therefore, invalid.

Lee, however, explained that piezometers are not necessary to determine hydrologic gradients at this site (N.T. 2308). The groundwater here is fracture-controlled, responding to fractures in the underlying geology that allow groundwater to migrate throughout the various strata and lithology (N.T. 2290).[24] Groundwater pollution under the mine site, therefore, is contained in one pollution plume (N.T. 2572). Lee states that water quality results between different test holes will nevertheless vary because of dispersion, dilution, and continuing geochemical reactions (N.T. 2534). In addition, we believe that different water levels between the same holes on C-71 and C-71A represent seasonal variations in groundwater levels. (See, N.T. 2306.)[25]

It is clear from this testimony that Lee and Rightnour disagree about the necessity of piezometers to determine hydrologic gradients. Because of Lee's more extensive education and experience in the field of hydrogeology, we find his testimony to be more persuasive.

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[24] In the backfilled pit(s), fractures and voids have been replaced by voids in the backfill, which also permit extensive infiltration (N.T. 2292).

[25] Rightnour also stated that there were discrepancies between the depth of holes 17, 46, and 47, and the groundwater elevation Lee found there (N.T. 3023-3027). While these discrepancies could affect the weight we give Lee's hydrologic gradients because some of the values used to develop them may be incorrect, Rightnour did not challenge the groundwater elevations for that reason. Instead, this information was used as one of the bases of Rightnour's opinion that the hydrogeology underlying the site is complex, necessitating the use of piezometers. Hamilton reiterated this view of Rightnour's testimony in its post-hearing brief. We do not, however, understand how this information, if correct, supports Rightnour's belief that the underlying hydrogeology is complex. We have instead focused above on what we believe to be the relevant portions of Rightnour's testimony.

Given McCommons' and Lee's testimony that the recharge area for Springs One and Two and the Fugitive Discharge is the upper part of the mine site, and Lee's hydrologic gradient maps indicating groundwater flows from the mine site towards the discharges, we find that Springs One and Two and the Fugitive Discharge[26] are hydrogeologically connected to the mine site. Hamilton, therefore, is liable for any non-complying discharges from these springs.

In addition to a hydrogeologic connection between the mine site and the discharges, we have also found that Hamilton caused Spring One and the Fugitive Discharge and degraded the quality of Spring Two. Neither Spring One nor the Fugitive Discharge existed when Hamilton began its operations on the mine site in March 1979. Spring One was not discovered until March 5, 1984 (N.T. 754-55). The Fugitive Discharge, meanwhile, did not come into existence until the spring of 1985 (N.T. 1120). Because these discharges did not begin to flow until several years after Hamilton began to mine the site, we can infer that Hamilton caused them. Lee offered support for this opinion when he testified that Hamilton's operations had increased the infiltration rate within the recharge area and, therefore, the amount of groundwater under the mine site, and that the timing of the degraded discharges coincided with the time it took for the increased amount of groundwater to reach the discharge area (N.T. 2122-2138, 2212, 2217, 2343-44).

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[26] Hamilton argues that it cannot be liable for the fugitive discharge under the Supreme Court's decision in Wheatly v. Bough, 25 Pa. 528 (1855). In Wheatly, Hamilton contends the court held that a mine operator cannot be liable for disturbing groundwater. Since the fugitive discharge is merely a surface representation of the underlying groundwater, Hamilton reasons that Wheatly is applicable. We disagree.

Hamilton was not cited for "disturbing groundwater." It was cited for allowing discharges from the mine site into "waters of the Commonwealth," which includes "bodies ... of conveyance ... of underground water." See, 35 P.S. §691.1. Wheatly is inapplicable here.

In April 1980, Hamilton took water quality samples from Spring Two that violated the effluent limits for pH and Mn (Ex. C-12). In March 1984, the water quality from Spring Two had degraded to the point where pH was lower and SO_4, Fe, Mn, Al, and acidity were all higher (Ex. C-32). Because the water discharging from Spring Two originated on the mine site, we find that Hamilton's operations caused this degradation.

Our belief that Hamilton's operations caused the degradation is supported by Lee's finding that the mine site has the potential to create, and is in fact creating, acid mine drainage. Acid mine drainage is characterized by low pH and alkalinity, and elevated acidity, metals, and SO_4 (N.T. 1676). It is a by-product of the breakdown of pyrite, which is an iron disulfide, into Fe and SO_4 when it is exposed to air and water. This breakdown initiates secondary reactions that result in an increase in the acidity of groundwater and a release of metals, such as Mn and Al, from the surrounding rock (N.T. 1908).

Upon examining the mine site, Lee found evidence of pyrites spread throughout. In the highwall of the Lower Kittanning pit on the Moshannon Creek side of the mine site, Lee observed lithologies indicating secondary pyrite formation, as well as dark grey shales, which promote the formation of pyrites (N.T. 1962). Lee also found evidence of pyrites in the spoil piles Hamilton used to backfill the last active Clarion pit (N.T. 1966-67),[27] and in drill returns from the Clarion seam in the Lower Kittanning pit (N.T. 1965).[28]

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[27] Lee observed evidence of pyrites in the iron coatings on rock fragments in the spoil (N.T. 1966-67).

[28] The drill hole returns Lee observed were covered with a yellow coating

footnote continued

The mere existence of pyrites in the overburden or spoil does not, however, necessarily lead to the creation of acid mine drainage (N.T. 2377-78). They must still be exposed to air and water, which normally happens when soil and rock are disturbed by a mining operation (N.T. 2378). To determine whether acid mine drainage was actually being created here, Lee analyzed water quality data from test holes drilled into the backfill, into old spoils that Hamilton reaffected, and into old spoils that were not reaffected.

From TH-5, which is located immediately to the southeast of the active Clarion pit as shown on Ex. C-14A, the Department introduced three water quality samples, one of which is admissible.[29] Dated June 27, 1984, it shows that in TH-5 the levels of pH, Fe, Mn, and acidity exceeded the effluent limits of 25 Pa. Code §87.102(a), while SO_4 exceeded 1,000 mg/l, a level that Lee described as characteristic of "severe" acid mine drainage (Ex. C-17; N.T. 2112). From sample point P-2, which is located in reaffected spoils in the southeast corner of Ex. C-71A, the Department introduced a February 4, 1988, sample showing water quality that violates the effluent limits for pH, Fe, and Mn, as well as SO_4 in excess of 1,000 mg/l.[30] The

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continued footnote
that is commonly referred to as "yellowboy" because of its distinctive yellow color (N.T. 1965). This coating, ferrous oxyhydroxide, is the result of pyrites being exposed to air and water. Pyrite in the drill return indicates there is pyrite in the soil and rock disturbed by the drilling (N.T. 1963-66).

[29] Sample 4422073 from Ex. C-49 is illegible and cannot be deciphered, and the sample data for TH-5 on Ex. C-68 is expressed in numerical values without any units (ex. mg/l, etc.). We will not attempt to determine what values should be assigned to these numbers.

[30] The Department attempted to introduce water quality information for
footnote continued

Department also introduced evidence of the water quality on the pit floor that was characteristic of acid mine drainage.[31] (Ex. C-66, sample point P-1.) Samples taken on March 23, April 6, and September 8, 1983, as well as on September 6, 1984, violate the effluent limits of 25 Pa. Code §87.102(a) for pH, Mn, and acidity. Every sample, except that taken on September 8, 1983, violates the effluent limits for Fe, while SO_4 exceeds 1,000 mg/l for every sample, except that of March 23, 1983.

From Lee's analysis of the water quality in spoils not reaffected by Hamilton, we are further able to infer the presence of pyrites in the overburden of the mine site, as well as the ability of these pyrites to create acid mine drainage. Samples taken from a series of wells to the north-northwest of the last active Clarion pit continually show acid mine drainage in excess of the effluent limits of 25 Pa. Code §87.102 for pH, Fe, Mn, and acidity, as well as SO_4 well in excess of 1,000 mg/l (Exs. C-17, C-63).[32]

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continued footnote
TH-4, which is also located in spoils reaffected by Hamilton, through Ex. C-68. As we explained above, this water quality data lacks units and is, therefore, inadmissible.

[31] While the narrative in Ex. C-66 describes this water merely as "raw pit water," Lee clarified that the water comes from the Clarion pit (N.T. 2111). We are, however, unsure from where on the Clarion pit this water was taken, since we cannot locate sampling point P-1 on any of the Department's exhibits. This data, therefore, will be weighted accordingly.

[32] Lee testified that these old spoils explain the degraded water quality evident in early samples, such as the April 25, 1980, sample from Spring Two (N.T. 2370). We use this data merely to reinforce our position that the soil and rock disturbed by mining on this mine site contain pyrites that have the potential to create acid mine drainage. Because the water quality from Spring Two was significantly degraded by Hamilton's operation, we do not believe that the acid mine drainage flowing from Spring One and the Fugitive Discharge only comes from the unaffected old spoils.

We have sufficient evidence before us to conclude: Springs One and Two and the Fugitive Discharge are hydrogeologically connected to the mine site; Hamilton's operations on the mine site caused the formation of Spring One and the Fugitive Discharge; Hamilton's operations on the mine site degraded the quality of the discharges from Spring Two; the mine site had the potential to create acid mine drainage; and the mine site was creating acid mine drainage. Based on these conclusions, we find that the Department did not abuse its discretion in holding Hamilton liable for the acid mine discharges emanating from Springs One and Two and the Fugitive Discharge.

Now that we have settled Hamilton's liability for both the on- and off-permit discharges, we turn our attention to several side issues Hamilton raised that could affect the validity of the Department's orders.

Double Jeopardy

Hamilton contends that the Department's compliance orders violate the prohibition against double jeopardy as outlined in the Fifth Amendment to the United States Constitution and made applicable to the states by the Fourteenth Amendment. Hamilton specifically argues that violation number three of C.O. 85-H-027, regarding the Fugitive Discharge, violates the prohibition against double jeopardy because the groundwater that emanates from that discharge is the same as the groundwater that emanates from Springs One and Two.

We do not find any merit to Hamilton's position. It is well established that the Fifth Amendment's double jeopardy protection only applies to actions that are essentially criminal in nature. Breed v. Jones, 421 U.S. 519, 528, 955 S.Ct. 1779, ___, 44 L.Ed.2d 346, ___ (1975). Paragraph three of C.O. 85-H-027, which orders Hamilton to upgrade its treatment facilities, is, however, merely remedial in nature. See, In re Friedman, 72 Pa. Cmwlth. 274, 457 A.2d 983 (1983). In an attempt to sidestep this requirement, Hamilton

points to the Department's February 3, 1986, and February 26, 1988, civil penalty assessments, which it contends are "quasi-criminal" and subject to the double jeopardy restriction. While this may be true, it does not support Hamilton's assertion that C.O. 85-H-027 violates its double jeopardy protection. Accordingly, we find that the prohibition against double jeopardy does not apply here.

Additional Special Condition Two

Additional Special Condition Two of Hamilton's mine drainage permit states, in relevant part:

> Drainage which is not from an active mining area shall not be required to meet the limitations as long as such drainage is not conmingled [sic] with untreated mine drainage which is subject to the limitations.

(Ex. C-11). Hamilton contends this condition prohibits the Department from holding Hamilton liable for off-permit discharges, since they are not from an active mining area. The Department responds that these discharges are from an active mining area because they are hydrogeologically connected to the mine site, and that the clause is not a license to pollute since other effluent limits apply if those in additional special condition two do not.

We have already explained at length that Springs One and Two and the Fugitive Discharge are hydrogeologically connected to the mine site and the areas Hamilton mined. Drainage emanating from these discharges is, therefore, coming from an active mining area and subject to the effluent limits of Additional Special Condition Two.[33] Hamilton's argument that it cannot be

[33] These limits are identical to those contained in 25 Pa. Code §87.102(a).

held liable for off-permit discharges is without merit.[34]

C.O. HRO 84-114

On September 26, 1984, the Department issued C.O. HRO 84-114, which extended the date for compliance with an inspection report dated August 6, 1984. The inspection report, which is not in evidence, directed Hamilton to submit a permit application for the area on which Hamilton built its treatment facilities for Springs One and Two. The C.O. extended the deadline for Hamilton to comply with the inspection report from September 7, 1984, to October 31, 1984 (Ex. C-46). Hamilton contends on appeal that C.O. HRO 84-114 is invalid because 90 days had not expired since the Department issued the inspection report, as required by 25 Pa. Code §86.211, and because Hamilton had submitted an application for that area, but the Department never issued a permit.

With respect to the 90 day deadline, there is no language in 25 Pa. Code §86.211 prohibiting the Department from extending the deadline for compliance before 90 days expires. This argument, therefore, is without merit. With respect to the Department's failure to issue a permit covering this area, we have previously held that we lack jurisdiction to hear an appeal concerning Department inaction when the Department's authority to act is

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[34] We are confused about the Department's approach to this issue. This provision is invalid to the extent it contradicts the liability imposed by §315(a) of the Clean Streams Law, 35 P.S. §691.315(a). See, Bologna Mining Co. v. DER, 1989 EHB 270. In Bologna, we reiterated that liability under the Clean Streams Law is "absolute," regardless of any attempt to relax it by regulation or other policy, and that a surface mine operator, therefore, has no right to a continuing relaxation of that liability. 1989 EHB at 278-79. See also, Ingram Coal Co., *et al.* v. DER, 1990 EHB 395, 404 (affirming our holding in Bologna that an operator does not receive a right to allow a discharge merely because it had been tolerated earlier).

discretionary. Robert and Sharon Royer, *et al.* v. DER, 1992 EHB 611. Jurisdiction over such an action lies with Commonwealth Court. *Id.*; Marinari v. DER, 129 Pa. Cmwlth. 564, 566 A.2d 385 (1989).

The Department's cessation orders

On October 18, 1984, the Department issued C.O. HRO 84-120 ordering Hamilton to cease operations on the mine site because it had failed to provide adequate interim treatment as required by C.O. HRO 84-44 and because Special Condition 26 of Hamilton's mine drainage permit prohibits discharges into Mountain Branch (Ex. C-22). On April 1, 1985, the Department issued C.O. 85-H-035, again ordering Hamilton to cease its operations on the mine site, but this time because Hamilton failed to abate the Fugitive Discharge, as required by paragraph three of C.O. 85-H-027A (Ex. C-40).

Hamilton contends C.O. HRO 84-120 was issued in error because Additional Special Condition Two of Hamilton's mine drainage permit allows Hamilton to exceed the effluent limit for pH while treating for Mn, Special Condition 26 does not expressly authorize the Department to order Hamilton to cease mining if a discharge occurs to Mountain Branch, and the Department did not satisfy the requirements of 25 Pa. Code §86.212. We find these arguments to be without merit. Additional Special Condition Two of Hamilton's MDP authorizes the Department to allow the pH level to exceed 9.0 in order to achieve the effluent limitation for Mn.[35] This provision is not mandatory, however, and the Department was entitled to require Hamilton to comply with the effluent limits for both pH and Mn.

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[35] Additional special condition two states, in relevant part: "Where the application of neutralization and sedimentation treatment technology results in an inability to comply with the manganese limitation, the Department may allow the pH level in the final effluent to be exceeded to a small extent in order that the manganese limitation will be achieved" (emphasis added) (Ex. C-11).

Even assuming for the sake of argument that Special Condition 26 does not expressly authorize the Department to order Hamilton to cease mining after discharging to Mountain Branch, both the Clean Streams Law and the Department's regulations do. Under §610 of the Clean Streams Law, the Department may issue any orders necessary to aid in its enforcement of the Clean Streams Law and its regulations, including cessation orders. See also, 25 Pa. Code §86.213. The lack of express authority in Special Condition 26 is irrelevant.

The requirements of 25 Pa. Code §86.212 on which Hamilton relies are the minimum standards the Department may tolerate under the Federal SMCRA and the regulations thereunder, 30 CFR §§40.13 and 43.11. The Department, however, is expressly authorized to impose more stringent standards, i.e. tolerate less pollution, before ordering an operator to cease its surface mining operations. 25 Pa. Code §86.212(b). The Department, therefore, does not have to prove that the discharges were sufficient to warrant a cessation order under 25 Pa. Code §86.212(a).

Under §4 of the Surface Mining Act and §610 of the Clean Streams Law, the Department may issue any order that is necessary to aid in the enforcement of the provisions of those acts, including orders requiring the immediate cessation of activities. Because Sample 4407445 showed a pH level of 9.1 and a Mn level of 13.3 mg/l, Hamilton not only violated the effluent limits of 25 Pa. Code §87.102, but also failed to comply with C.O. HRO 84-44.[36] The Department's cessation order in C.O. HRO 84-120 was, therefore, not an abuse of discretion.

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[36] Paragraph one of C.O. HRO 84-44 states: "Al Hamilton Contracting Company shall provide interim treatment for the affected spring(s) to insure that the final discharges from the spring(s) comply with the 25 Pa. Code Chapter 87.102 Effluent Standards."

Hamilton contends C.O. 85-H-035 was moot when it was issued, because Hamilton had already voluntarily complied with C.O. HRO 84-120 and ceased its operations. We have no evidence before us, however, showing that Hamilton had ceased its operations pursuant to C.O. HRO 84-120 before April 1, 1985. While Hamilton cites the testimony of James McNeil for the proposition that activities had been stopped by then, McNeil clearly stated he could not recall whether Hamilton had ceased its operations before or after the Department issued C.O. 85-H-035 (N.T. 2742-43). We cannot conclude, therefore, that the second cessation order was moot. We find this cessation order to be an appropriate exercise of the Department's power under 52 P.S. §1396.4c and 35 P.S. §691.610.

Compliance orders issued by Mining Specialists.

Hamilton contends C.O. 85-H-027 and C.O. 85-H-035 are invalid because they were issued by Bernard Robb, a mining specialist. Under 52 P.S. §1396.4b, Hamilton argues, only a mine conservation inspector has the authority to issue compliance orders. This section states, in relevant part:

> The department through the mine conservation inspectors shall have the authority and power to enforce the provisions of this act and the rules and regulations promulgated thereunder by him.

52 P.S. §1396.4b(a).

Although the Surface Mining Act expressly uses the term "mine conservation inspector," in issuing these compliance orders, the Department acted not only under the Surface Mining Act, but also under the Clean Streams Law, which prohibits discharges from a mine site to waters of the Commonwealth. Hamilton's argument overlooks §610 of the Clean Streams Law, which states "[t]he department may issue such orders as are necessary to aid in the enforcement of the provisions of this act." 35 P.S. §691.610. Under

the Clean Streams Law, a Department employee other than a mine conservation inspector may issue orders enforcing the statute and its regulations. We find that C.O.s 85-H-027 and 85-H-035 are valid.

The Department's orders to upgrade treatment facilities.

On December 16, 1985, the Department issued C.O. 85-H-122, ordering Hamilton to upgrade the facilities it used to treat the discharges from Springs One and Two. Specifically, Hamilton was required to upgrade the capacity of the holding pond and pump used to send the discharge to the Moshannon Creek side of the mine site for final treatment and release (Ex. C-28). Hamilton argues this order is invalid because the Department presented no evidence showing that the required work was necessary.

Putman testified that he issued C.O. 85-H-122 because the holding pond that collected the overflow from the pump was too small and did not retain water long enough for the soda ash to raise the pH and allow the metals to precipitate out (N.T. 166, 365). Putman was also concerned that in times of high flow the treatment pond would be inadequate, resulting in a discharge into Mountain Branch (N.T. 170). Putman's final concern was that Hamilton used a single 1,000 gallon truck to transport the overflow to the Moshannon Creek side of the mine site (N.T. 167-68; Ex. C-100). Such a system, Putman contended, would be subject to the vagaries of weather and mechanical breakdowns, again possibly leading to a discharge to Mountain Branch (N.T. 386-87).

To show that a discharge from the holding pond would violate the effluent limits of 25 Pa. Code §87.102 and be characteristic of acid mine drainage, the Department introduced into evidence samples 4407441 (Exh. C-18), and 4407445 (Exh. C-21), dated August 27 and October 9, 1984, respectively, showing violations of the effluent limit for Mn and SO_4 in excess of 1,000

mg/l.[37] While Hamilton is correct to point out that these samples were taken over one year before the Department issued C.O. 85-H-122, the dates of the samples are irrelevant since Hamilton was not cited for a polluted discharge from the holding pond. It was cited for an inadequate treatment facility.

While Putman testified that he never witnessed a discharge from the treatment pond, and that his only evidence of a discharge was ice on the end of the outfall pipe and on the ground beneath the pipe, N.T. 367, 370, we believe the ice at the end of the pipe and on the ground is sufficient circumstantial evidence that the pond was overflowing. We further believe that Hamilton's treatment facilities on the Mountain Branch side, including the pump, the holding pond, and the trucking operation, were inadequate. The Department did not abuse its discretion in ordering Hamilton to upgrade the capacity of the pump and holding pond.[38]

CONCLUSIONS OF LAW

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

2. The Department bears the burden of proof under 25 Pa. Code §21.101(b)(3) to show that it did not abuse its discretion or commit an error of law by issuing Hamilton these compliance orders.

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[37] Sample 4407445 also violated the effluent limit for pH.

[38] We note that this issue is now moot because the system in place at the time of the hearing has corrected these problems. Hamilton now pumps the discharge from Spring One and the Fugitive Discharge uphill to Spring Two and the combined drainage flows downhill to a pump that sends it to the Moshannon Creek side of the mine site for treatment. Any overflow from this pump is collected in a holding pond and pumped to a second set of treatment ponds on the Moshannon Creek side (N.T. 376-77).

3. The Board's scope of review is *de novo*. Our duty is to determine whether the Department's action is supported by the evidence before us, not by the evidence before the Department when it acted.

4. Hamilton is not protected from self-incrimination by the Fifth Amendment of the U.S. Constitution or Article I, §9, of the Pennsylvania Constitution.

5. The Department's water quality samples are admissible into evidence under the Business Records Act.

6. Hamilton is liable for on-permit discharges in excess of the effluent limitations of 25 Pa. Code §87.102 from Ponds One and Two and the final treatment pond on the Moshannon Creek side.

7. Hamilton is liable for off-permit discharges in excess of the effluent limitations of 25 Pa. Code §87.102 from Springs One and Two and the Fugitive Discharge.

8. Holding Hamilton liable for polluted drainage from the Fugitive Discharge does not violate the double jeopardy protection of the Fifth Amendment to the U.S. Constitution.

9. Additional Special Condition Two of Hamilton's MDP 4770BSM9 does not relieve Hamilton of liability for polluted discharges from Springs One and Two and the Fugitive Discharge.

10. The Department did not have to wait 90 days before extending the date by which Hamilton had to comply with an inspection report.

11. The Board does not have jurisdiction to hear an appeal concerning Department inaction when the Department's authority to act is discretionary.

12. Additional Special Condition Two does not require the Department to allow Hamilton to violate the effluent limit for pH while attempting to comply with the effluent limit for Mn.

13. Lack of express authority in Special Condition 26 did not prohibit the Department from ordering Hamilton to cease its operations after a discharge occured to Mountain Branch.

14. The Department does not have to satisfy the conditions of 25 Pa. Code §86.212(a) before issuing a cessation order. It may impose more stringent standards, i.e. tolerate less pollution, before ordering an operator to cease its surface mining operations.

15. Compliance orders 85-H-027 and 85-H-035 are not invalid merely because they were issued by a mining specialist.

16. The Department did not abuse its discretion by ordering Hamilton to upgrade its treatment facilities.

ORDER

AND NOW, this 24th day of November, 1993, it is ordered that:

1) The Department's issuance of compliance orders HRO 84-44, HRO 84-114, HRO 84-120, 85-H-027, 85-H-027A, 85-H-035, and 85-H-122 is sustained;

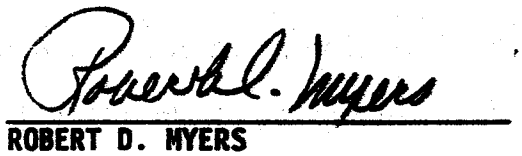
2) Hamilton's appeals at Docket Nos. 84-187-W, 84-367-W, 84-380-W, 85-102-W, 85-183-W, and 86-025-W, all consolidated at Docket No. 84-187-W, are dismissed; and

3) Hamilton's appeals of civil penalty assessments at Docket Nos. 86-108-W, 86-109-W, and 88-093-W, are unconsolidated from Docket No. 84-187-W and consolidated at Docket No. 86-108-W.

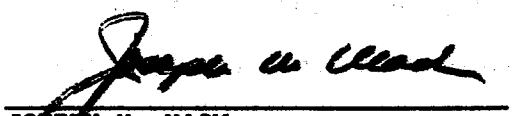
ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman



ROBERT D. MYERS
Administrative Law Judge
Member



JOSEPH N. MACK
Administrative Law Judge
Member

Member Richard S. Ehmann did not participate in this decision

DATED: November 24, 1993

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M. DIANE SMI
SECRETARY TO THE

ALTOONA CITY AUTHORITY	:	
	:	
v.	:	**EHB Docket No. 90-570-MJ**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** November 29, 1993

ADJUDICATION

By Joseph N. Mack, Member

Synopsis

The Department met its burden of proving that its order involving the clean-up of two hazardous waste disposal pits discovered on property owned by the appellant was an appropriate exercise of its authority. The appellant failed to meet its burden of proving that the Department should be equitably estopped from enforcing its order. The evidence does not demonstrate that the Department misrepresented to the appellant that it would not be held responsible for clean-up of the site; nor does the evidence indicate that the Department had knowledge of the waste disposal pits when it approved construction on the site where the pits were discovered.

Background

This matter arose on December 27, 1990 when the Altoona City Authority ("the Authority") filed a notice of appeal seeking review of a November 26, 1990 order ("the order") issued by the Department of Environmental Resources ("Department" or "DER"). The order concerns the

clean-up of two waste disposal pits located on the site of the Easterly Sewage Treatment Plant ("ESTP") in Blair County, which is owned and operated by the Authority. The waste pits were discovered by the Authority during construction of a wastewater treatment plant at the ESTP site pursuant to a 1989 consent decree which the Authority had entered into with the Department and the federal Environmental Protection Agency.

Portions of this appeal have been decided in two earlier opinions issued by the Board: Altoona City Authority v. DER, 1991 EHB 1381 (Opinion and Order Sur Motion for Judgment on the Pleadings) ("1991 Opinion") and Altoona City Authority v. DER, 1992 EHB 779 (Opinion and Order Sur Motion for Summary Judgment) ("1992 Opinion"). In the 1991 Opinion, we granted partial judgment on the pleadings to the Department on the following issues raised in the Authority's appeal: (1) whether the Department's order was issued under the Hazardous Sites Cleanup Act ("HSCA"), Act of October 18, 1988, P.L. 756, 35 P.S. §6020.101 *et seq.* and (2) whether the Department was required to consider the economic impact of its order. Judgment on the pleadings was granted to the Authority with respect to a provision contained in DER's order regarding the HSCA.[1] The 1992 Opinion granted summary judgment to the Department on the issue of ownership under §316 of the Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 *et seq.*, at §691.316.

A joint stipulation ("Jt. Stip.") was filed by the parties on July 2, 1992. A hearing on the merits was held before Board Member Joseph N. Mack on July 14 and 15, 1992. The record consists of two volumes of transcript

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[1] The Authority had also raised the issues of laches and statute of limitations, as well as certain constitutional issues in its notice of appeal. However, in its brief in opposition to the Department's motion for judgment on the pleadings, the Authority withdrew these issues as bases for its appeal.

totaling 284 pages, twelve exhibits introduced by the Authority, and twenty-two exhibits introduced by the Department.

Two issues remained for adjudication: (1) whether DER is precluded from enforcing its order by the doctrine of equitable estoppel and (2) whether the actions required to be taken by the order will result in a violation of the HSCA. However, the Authority presented no evidence as to the latter issue at hearing, nor did it raise this issue in its post-hearing brief, and, therefore, the question of whether the actions required by the order will violate the HSCA is deemed to be waived. Lucky Strike Coal Co. v. Commonwealth, DER, 119 Pa. Cmwlth. 440, 547 A.2d 447 (1988).

After a full and complete review of the record, we make the following findings of fact:

FINDINGS OF FACT

1. The appellant is the Authority, a municipal authority authorized under the Pennsylvania Municipal Authorities Act, Act of May 2, 1945, P.L. 382, as amended, 53 P.S. §301, *et seq.*, and incorporated on August 3, 1948. The Authority owns and operates a sewage treatment plant, known as the ESTP in Blair County, Pennsylvania. (Jt. Stip. 1)[2]

2. The appellee is the Department, the executive agency of the Commonwealth charged with the duty and authority to administer and enforce the Solid Waste Management Act, Act of July 7, 1980, P.L. 380, as amended, 35 P.S.

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[2] As referenced in the findings of fact herein, "Jt. Stip. ___" refers to a stipulated fact in the joint stipulation filed by the parties, "Ex. A-" refers to an exhibit introduced by the Authority, and "Ex. C-" refers to an exhibit introduced by the Department. Because the hearing transcript consists of two volumes which were not numbered sequentially, references to pages in the transcript shall be as follows: "Vol. 1, p. ___" for volume 1 of the transcript and "Vol. 2, p. ___" for volume 2 of the transcript.

§6018.101 *et seq.*; the Clean Streams Law, 35 P.S. §691.1 *et seq.*; the HSCA, 35 P.S. §6020.101 *et seq.*; Section 1917-A of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-17 ("Administrative Code"); and the Rules and Regulations promulgated thereunder. (Jt. Stip. 2)

3. The ESTP is located approximately .25 miles north of the village of East Altoona, along East Sixth Avenue (Legislative Route 07026) in Logan and Antis Townships, Blair County. It is bordered by the Little Juniata River on the west and Sixth Avenue on the east and south. (Jt. Stip. 3)

4. Until 1986, the Authority functioned only as a financing mechanism with respect to sewage treatment. Prior to 1986, the ESTP was operated by employees of the City of Altoona ("the City"), a separate entity from the Authority. In 1986, the Authority took over operation of the ESTP. (Jt. Stip. 4)

5. As early as 1953, two waste pits were constructed at the north end of the ESTP site. (Jt. Stip. 6) The location of the pits is less than 25 feet from what is now the area of the treatment plant. (Ex. A-2A)

6. The Authority owns the property on which the waste pits were located. (Jt. Stip. 7) The Authority acquired the parcel of property on which is situated one of the waste pits and one-half of the other pit in 1950. It acquired the parcel containing the remainder of the second waste pit in 1978. (Ex. A-5)

7. The waste pits were used throughout the 1950's and 1960's for the disposal of hazardous and industrial wastes, including wastes from the Pennsylvania Railroad/Penn Central railroad yards in Altoona. (Jt. Stip. 8)

8. The pits were covered with demolition debris sometime between 1971 and 1973. (Jt. Stip. 9)

9. A Waste Discharge Inspection report of February 13, 1973 which came from DER files identified two impoundments in Antis Township approximately one-fourth mile, or 1320 feet, from the ESTP site. The report references these impoundments as being located southwest of the railroad bridge in Pine Croft and 1000 feet west of the Little Juniata River, which would be on the opposite side of the river from the ESTP site. (Ex. C-5; Vol. 1, p. 73-76)

10. Pursuant to a Consent Decree between the Authority and the Department and the United States Environmental Protection Agency, the Authority agreed to construct certain improvements at the ESTP in order to bring the facility into compliance with its National Pollutant Discharge Elimination System ("NPDES") Permit No. PA 0027014. The Authority began this construction in the summer of 1989. (Jt. Stip. 10)

11. In August 1989, during excavation for construction of the improvements at the ESTP site, the Authority's contractor discovered the concealed waste disposal pits. The Authority notified DER of their existence. (Jt. Stip. 11)

12. After the Authority notified the Department of the existence of the two waste pits at the ESTP, the Department initiated an investigation of the site. (Jt. Stip. 12)

13. On November 3, 1989, the Authority, through its chairman Andronik Pappas, met in Harrisburg with Mark McClellan, Deputy Secretary of DER, regarding the ESTP site. (Vol. 1, p. 108, 111)

14. As a result of the meeting between the Authority and DER, the Authority located a site for temporary storage of the contaminated soil. At that time, the Authority also agreed to treat the groundwater. (Vol. 1, p.

157, 158) The Authority also gave DER access to the Authority's property for the purposes of investigation, cleanup, and storage. (Vol. 1, p. 158)

15. At the meeting, McClellan explained the Department's duties under the HSCA and informed the Authority about what immediate action was going to be taken by DER pursuant to the HSCA. (Vol. 1, p. 132, 135)

16. At the time of the meeting, the Department did not know conclusively which parties would be held responsible for the cost of clean-up. (Vol. 1, p. 132-133)

17. McClellan made no statement at the meeting to the effect that the Authority would not be held financially responsible for any abatement activity at the ESTP site; nor did he exempt the Authority from any liability for clean-up of the site. (Vol. 1, p. 133, 135-136)

18. McClellan also discussed the possibility that an order could be issued to the Authority pursuant to the Clean Streams Law or the Solid Waste Management Act. (Vol. 1, p. 134-135)

19. On the same date as the meeting in Harrisburg, the Department issued a news release regarding clean-up of the ESTP site. The news release states, "Under an agreement reached between the Altoona Municipal Authority and DER, the department will excavate more than 3,200 cubic yards of contaminated soil and sludges and store the material in an environmentally safe facility until it can be incinerated." The release further quotes Governor Casey as saying that the state will investigate to determine who the responsible parties are and will seek reimbursement of money spent by the Commonwealth to restore the area. (Ex. A-10)

20. During its investigation, the Department excavated twenty-two test pits to procure waste samples for laboratory chemical characterization of

the wastes. Waste samples collected from within the pits contained volatile organic compounds ("VOCs"), phenolic compounds, and polychlorinated biphenyl compounds ("PCBs"). (Jt. Stip. 13)

21. Total VOC concentrations ranged from 50 milligrams/kilogram (mg/kg) to 7,600 mg/kg; total semi-VOC concentrations ranged from 500 mg/kg to 154,000 mg/kg; phenol concentrations ranged from below the analytical method of detection to 1,600 mg/kg; and total PCB concentrations ranged from .32 mg/kg to 110 mg/kg. (Jt. Stip. 13)

22. The Department installed six groundwater monitoring wells around the waste pits to assess groundwater quality and to define aquifer characteristics. (Jt. Stip. 15)

23. Testing of groundwater samples obtained from the monitoring wells revealed that the groundwater was contaminated with VOCs and semi-VOCs. Total groundwater VOC concentrations ranged from 21.7 micrograms/liter (ug/l) to greater than 13,000 ug/l; total semi-VOC concentrations ranged from 12 ug/l to 149 ug/l. (Jt. Stip 16)

24. The six groundwater monitoring wells were also used to determine the groundwater flow direction using the wells and a triangulation method. (Vol. 1, p. 21, 22, 23)

25. After conducting its investigation, the Department initiated a hazardous sites cleanup response, pursuant to the HSCA, in an attempt to protect the safety of workers in the area of the pits and also to allow the Authority to continue with its plant upgrades and to remove the groundwater contamination present on the site. (Vol. 1, p. 61, 62, 63)

26. One of the factors which prompted the Department's decision to take immediate action with respect to the hazardous waste pits was the potential for further groundwater contamination. (Vol. 1, p. 131)

27. DER removed the waste from the pits and transferred it for temporary storage to a lined impoundment which DER constructed at the ESTP site with the Authority's permission. (Vol. 1, p. 94) This process took over one year. (Vol. 1, p. 159-160)

28. The Department's removal of the hazardous waste was complicated by rain and flooding and by the fact that the hazardous waste was also mixed with up to 3,500 cubic yards of municipal waste. Furthermore, in order to prepare the site for construction, fill had to be brought from other sources after the hazardous waste and the municipal waste were removed. (Vol. 2, p. 65-69)

29. It was initially estimated that approximately 6,000 cubic yards of material would have to be removed from the pits; that figure was later upgraded to 8,000 cubic yards to allow for contingency factors and temporary storage. (Vol. 1, p. 64)

30. Construction continued on the wastewater treatment plant during the period that the hazardous waste cleanup was being done by DER. However, only 40 to 50 percent of the construction work was able to be accomplished during that time because the hazardous waste pits were located on a large portion of the site on which construction was to take place. (Vol. 1, p. 164)

31. Because the major part of the construction was to be done in the waste pit areas, there was a delay of approximately twelve to eighteen months in completing construction. (Vol. 2, p. 26)

32. The impact of the delay during the removal of the hazardous waste cost the Authority approximately $6,500,000. (Vol. 2, p. 33)

33. The groundwater in the area flows in a southwesterly, northeasterly and northwesterly direction from the site primarily away from the area of the waste pits. (Vol. 1, p. 24)

34. Groundwater pollution from the ESTP site will eventually impact the Little Juniata River and/or a nearby area of wetlands. (Vol. 1, p. 70-71)

35. Since approximately 1991, the Authority has been pumping the groundwater through monitoring wells and treating it before returning it to the groundwater table. (Vol. 1, p. 92-93)

36. The Authority continued to treat the groundwater up until the time of the hearing. (Vol. 1, p. 157, 158)

37. On November 26, 1990, DER issued the order which is the subject of this appeal. The order requires the Authority, *inter alia*, to properly dispose of the waste placed into the storage impoundment, to remove additional waste found in the pits, and to perform groundwater monitoring.

DISCUSSION

The Department carries the burden of proving by a preponderance of the evidence that its order was an appropriate exercise of its authority under the Clean Streams Law. 25 Pa. Code §21.101(b)(3); C & L Enterprises, Inc. v. DER, 1991 EHB 514. Once the Department has met its initial burden of making out a prima facie case, the burden then shifts to the Authority to prove any affirmative defenses which it has asserted. 25 Pa. Code §21.101(a); Davis Coal v. DER, 1991 EHB 1908.

The order was issued pursuant to §§316 and 610 of the Clean Streams Law, 35 P.S. §§691.316 and 691.610. Section 610 of the Clean Streams Law

provides the Department with authority to "issue such orders as are necessary to aid in the enforcement of the provisions of this act...Such an order may be issued if the department finds that a condition existing in or on the operation involved is causing or is creating a danger of pollution of the waters of the Commonwealth..." 35 P.S. §691.610.

Section 316 specifically deals with the responsibilities of landowners and land occupiers as follows:

> Whenever the department finds that pollution or a danger of pollution is resulting from a condition which exists on land in the Commonwealth the department may order the landowner or occupier to correct the condition in a manner satisfactory to the department or it may order such owner or occupier to allow a mine operator or other person or agency of the Commonwealth access to the land to take such action. For the purpose of this section, "landowner" includes any person holding title to or having a proprietary interest in either surface or subsurface rights.
>
> 35 P.S. §691.316

In our 1992 Opinion, we granted summary judgment to the Department on the question of whether the Authority was the owner of the site on which the waste pits were discovered. 1992 EHB at 782. We further held that "fault is not a prerequisite for liability under §316 of the [Clean Streams Law], and an owner or occupier of property may be held liable for any condition on his or her property causing water pollution or a threat thereof, regardless of whether he or she caused or contributed to it...Thus, as the owner of the site, the Authority may be held liable under §316 for any condition at the site causing water pollution or a threat thereof, regardless of whether it caused or contributed to it." *Id.* at 782-783 (Citations omitted).

The evidence presented by DER at the hearing clearly demonstrated that the hazardous waste on the ESTP site has caused groundwater contamination and continues to pose a threat of further contamination to waters of the Commonwealth. (F.F. 20, 21, 23, 34) Because this condition exists on land owned by the Authority, the Department properly exercised its authority under §§316 and 610 of the Clean Streams Law in ordering the Authority to remove the waste from the site. Thus, we find that the Department has met its initial burden of demonstrating that its order was authorized under §§316 and 610 of the Clean Streams Law.

The Authority, however, argues that the Department should be equitably estopped from enforcing its order based on the following allegations: (1) DER was aware of the existence of the waste pits when it issued the permit to the Authority for construction of improvements at the ESTP, with knowledge that the construction would cause a release from the pits and (2) the Authority relied to its detriment on DER's representation that state funds would be used for remediation of the ESTP site. Because this is an affirmative defense raised by the Authority it bears the burden of proof. 25 Pa. Code §21.101(a).

It is well-established that a governmental agency may not be estopped from performing its statutory duties and responsibilities. Commonwealth, DER v. Philadelphia Suburban Water Co., 135 Pa. Cmwlth. 283, 581 A.2d 984 (1990); *allocatur denied*, ___ Pa. ___, 593 A.2d 427 (1991); Lackawanna Refuse Removal, Inc. v. Commonwealth, DER, 65 Pa. Cmwlth. 372, 442 A.2d 423, 426 (1982); F.A.W. Associates v. DER, 1990 EHB 1791, 1795-96. However, there are certain situations in which equitable estoppel may be applied against a government agency. See, *e.g.*, Yurick v. Commonwealth, 130 Pa. Cmwlth. 487, 568 A.2d 985,

989 (1989); Commonwealth, Department of Public Welfare v. Soffer, 118 Pa. Cmwlth. 180, 544 A.2d 1109 (1988).

In Chester Extended Care Center v. Commonwealth, Department of Public Welfare, 526 Pa. 350, 586 A.2d 379 (1991), the Pennsylvania Supreme Court set forth three elements necessary to find estoppel: (1) misleading words, conduct, or silence by the party against whom the estoppel is asserted, (2) unambiguous proof of reasonable reliance upon the misrepresentation of the party asserting the estoppel, and (3) the lack of a duty to inquire on the party asserting the estoppel.[3]

In Chester, the appellant, which operated a skilled nursing facility was notified by the United States Department of Health and Human Services ("HHS") and the state Department of Public Welfare ("DPW") that it was being terminated from the Medicare and medical assistance programs. The appellant appealed the termination, and the state Department of Health ("DOH") agreed to work with the appellant to correct the violations. During this time, there was no interruption of medical assistance payments by DPW, and no effort was made by DOH or DPW to remove medical assistance patients from the appellant's facility. In addition, DPW continued to certify new medical assistance patients for admission to the appellant's facility. When the appellant was subsequently denied readmission into the Medicare program and was informed for the first time that the state was still evaluating its termination of the appellant's participation in the medical assistance program, DPW notified the

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[3] In our 1992 Opinion and Order, we relied on the language in Yurick, *supra*, in setting forth the three elements necessary for finding estoppel against a governmental agency. See 1992 EHB 783-784. The Supreme Court, however, stated these elements differently in Chester, and, therefore, in discussing the issue of estoppel herein, we rely on the definition set forth in Chester.

appellant that it had been ineligible to receive medical assistance payments and that DPW would seek to recover all medical assistance payments made to the appellant during the ineligible time period. On appeal from the Commonwealth Court, the Supreme Court ruled that DPW and DOH had misled the appellant into believing that it was eligible to continue receiving Medicare and medical assistance payments during the period in question and that the appellant's reliance on the assurances of these agencies was reasonable so that the state was estopped from seeking to recover the payments.

The Authority claims that, like the situation in Chester, it was misled by representations made by DER at the November 3, 1989 meeting in Harrisburg which was attended by Andronik Pappas, chairman of the Authority, and hosted by Mark McClellan, Deputy Secretary of DER, and by DER's subsequent actions related to clean-up of the site. The Authority claims that DER represented to the Authority at the November 3 meeting that it would clean the site and incinerate the waste without the use of Authority money. The Authority also points to a press release issued by DER on the date of the meeting as further evidence that such an agreement was reached. The Authority contends that in reliance on the Department's representation it (1) gave DER access to the ESTP site to conduct its investigation and clean-up; (2) provided DER with an area to construct the impoundment into which the waste was transferred; (3) provided personnel and equipment for use by DER in conducting its investigation and remedial activities; (4) redesigned and rescheduled its construction of improvements at the ESTP; and (5) refrained from supervising DER's investigation and remedial activity which the Authority

believes could have been completed in less time and at less cost. Based on this, the Authority argues that the Department should not be allowed to renege on its agreement.

The Authority appears to be asserting that the alleged misrepresentation by DER was twofold: first, representations allegedly made by DER at the November 3 meeting and in the press release which led the Authority to believe that it would not be liable for the cost of clean-up and, secondly, the initial clean-up actions taken by DER, which led the Authority to believe that the work would be completed by DER.

The Authority fails, first of all, to demonstrate that DER's statements at the November 3 meeting and the press release of the same date amount to "misleading words or conduct" or any form of misrepresentation. The Department discussed with the Authority the Department's duties under the HSCA and the initial clean-up response it would be pursuing under the HSCA. We find no evidence of misrepresentation in the statements made by DER at the meeting or in the press release. In fact, the press release stated that the Commonwealth would determine which parties were to be held financially responsible for the cost of clean-up. (F.F. 19) Furthermore, at the meeting McClellan discussed the possibility that an order could be issued to the Authority pursuant to the Clean Streams Law. (F.F. 18)[4]

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[4] In its reply brief, the Authority argues that the Board should draw a negative inference from DER's failure to call as witnesses the other two Departmental representatives who attended the November 3, 1989 meeting. However, DER was not required to provide cumulative testimony in presenting its case. Moreover, the Authority was free to call these individuals as witnesses if it believed that their testimony would have been different from that of McClellan.

Nor did DER's actions of initiating the clean-up amount to misleading conduct. If we accept the Authority's argument, then any time DER responds to an emergency situation in an effort to abate the immediate threat of pollution, all responsibility for correcting the condition must remain with DER, and DER would be estopped from seeking reimbursement or ordering a party to take any action with respect to the condition.

The Authority also claims that DER's alleged misrepresentation caused it to act to its detriment by granting access to DER to the site for investigation and clean-up, providing an area for DER to construct a lined impoundment for temporary storage, providing personnel and equipment to assist DER in the investigation and remediation, redesigning and rescheduling the construction of improvements at the site, and, finally, refraining from supervising the cost and extent of the work. With the exception of the latter of these "detriments", all of these are steps for which the Authority would have been responsible on its own, without DER's assistance, if DER had <u>not</u> undertaken the initial work of removing the hazardous waste from the pits. As to the fifth "detriment", that the Authority refrained from supervising the extent and cost of the work, the Authority could have raised the issue of cost and supervision with DER at any time and chose not to do so. Moreover, the Authority never introduced any evidence demonstrating that the amount or cost of the work done by DER was excessive or that the Authority could have undertaken the work at less cost.

The second basis on which the Authority claims the Department should be equitably estopped from enforcing its order is on the grounds that the Department allegedly knew of the existence of the concealed waste pits when it issued the permit to the Authority for construction of improvements at the

ESTP site. The Authority bases this argument on a February 13, 1973 Waste Discharge Inspection report in DER's files which references two waste disposal impoundments. The Authority contends that this is not simply a prior absence of enforcement by DER, for which DER could not be estopped from carrying out its duties; rather, the Authority argues that DER's approval of the permit for construction at the site, knowing that the construction would cause a release from the pits, constituted negligent misrepresentation.

We dismiss the Authority's argument that the 1973 inspection report in DER's files placed DER on notice of the disposal pits at the ESTP site. The inspection report identified two impoundments in Antis Township approximately one-quarter of a mile, or 1320 feet, from the ESTP site, whereas the waste pits which are the subject of this appeal are located on the ESTP site, less than 25 feet from the treatment plan. The 1973 report further identified the impoundments referenced therein as being located southwest of the railroad bridge at Pine Croft and 1000 feet west of the Little Juniata River, which would place them on the opposite side of the river from the ESTP site. (F.F. 9) Based on these discrepancies, we have no basis for finding that the 1973 inspection report identified the waste disposal pits involved in this appeal, and, therefore, we must dismiss the Authority's argument that the Department had knowledge of the pits when it approved construction at the ESTP site.

Based on the above, we find that the Authority has failed to meet its burden of proof as to equitable estoppel.

The Authority makes two final arguments: first, that it is an abuse of discretion for DER to order a municipal authority with limited financial resources to correct the conditions at the ESTP, and, second, that certain deposition testimony which was introduced into evidence by DER is irrelevant.

The first issue has already been addressed in our 1991 Opinion, wherein we granted judgment on the pleadings to DER with respect to the Authority's argument that DER failed to consider the economic impact of its order on the Authority. See Altoona Authority, 1991 EHB at 1389-1390. The Authority's financial ability to comply with the Department's order cannot be raised at this stage. See Ramey Borough v. Commonwealth, DER, 15 Pa. Cmwlth. 601, 327 A.2d 647, 650 (1974), aff'd, 466 Pa. 45, 351 A.2d 613 (1976).

The Authority also argues that the deposition testimony of William Burris and Ralph Moorehead, retired employees of the City of Altoona, and Robert Filer, a retired employee of the ESTP, which testimony was introduced into evidence by the Department, is not relevant to the issues involved in this appeal. Because we did not rely on the deposition testimony of these individuals in reaching any conclusion in this adjudication, the Authority's argument is moot.

In conclusion, we find that the Department has met its burden of proof with respect to the order which is the subject of this appeal and that the Authority has failed to meet its burden of proving the affirmative defenses it has raised. Accordingly, we make the following conclusions of law and enter the appropriate order:

CONCLUSIONS OF LAW

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

2. The Department has the burden of proving by a preponderance of the evidence that its order was not an abuse of discretion or an inappropriate exercise of its authority under the applicable statutes and regulations. 25 Pa. Code §21.101(b)(3).

3. Issues not preserved in a party's post-hearing brief are waived. Lucky Strike, *supra*.

4. The burden of proving any affirmative defenses is on the Authority. 25 Pa. Code §21.101(a).

5. The Department's order was an appropriate exercise of its authority under §§316 and 610 of the Clean Streams Law. 35 P.S. §§691.316 and 691.610.

6. The Authority failed to prove that the Department should be precluded from enforcing its order under the doctrine of equitable estoppel.

O R D E R

AND NOW, this 29th day of November, 1993, the appeal of the Altoona City Authority docketed at 90-570-MJ is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Richard S. Ehmann

RICHARD S. EHMANN
Administrative Law Judge
Member

Joseph N. Mack

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: November 29, 1993

cc: **DER, Bureau of Litigation**
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M. DIANE SMITH
SECRETARY TO THE BOA

RICHARD A MERRY II	:	
	:	**EHB Docket No. 92-224-MJ**
v.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** December 2, 1993

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

By Joseph N. Mack, Member

Synopsis

In an appeal of the Department of Environmental Resources' (DER's) issuance of an order directing the appellant to plug oil wells on his property and to restore the well sites under §316 of the Clean Streams Law, the Board finds that the order was not an abuse of discretion. By its express language, the Oil and Gas Act does not impair DER's ability to take action authorized under the Clean Streams Law. Therefore, the appellant's argument that he cannot be held liable under the Clean Streams Law on the basis of his claim that the wells in question are "orphan wells" under the Oil and Gas Act is without merit.

PROCEDURAL BACKGROUND

This matter was initiated with the June 22, 1992 filing of a notice of appeal by Richard A. Merry II, an individual who is representing himself in

this matter.[1] Mr. Merry owns eight oil wells, as well as the property on which they are located, in Foster Township, McKean County. He seeks review of DER's May 21, 1992 Order directing him to collect and dispose of all oil, brine, other such fluids, industrial wastes and contaminated soil at five of the eight well sites, to plug the five wells, and to restore those five well sites.

DER's order was issued pursuant to the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 *et seq.* (CSL); the Oil and Gas Act, the Act of December 19, 1984, P.L. 1140, as amended, 58 P.S. §601.101 *et seq.* (OGA); and §1917-A of the Administrative Code, the Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-17 (Administrative Code). DER contends that Mr. Merry violated the CSL by allowing the oil wells to leak, thereby contaminating the ground, water, and wetlands around the wells, threatening to pollute Kendall Creek, and constituting a public nuisance.

The Board conducted a hearing on the merits on January 19, 1993. DER filed its post-hearing brief on March 11, 1993 and Mr. Merry filed his post-hearing brief on March 30, 1993. DER filed a Reply Brief on April 5, 1993. Any issues not raised in the post-hearing briefs are deemed waived. Lucky Strike Coal Co. and Louis J. Beltrami v. DER, 119 Pa. Cmwlth. 440, 546 A.2d 447 (1988).

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[1] As it will become evident in the remainder of this adjudication, Mr. Merry's *pro se* status has presented problems for him. The Board has noted on a number of occasions that individuals who represent their own interests without legal counsel assume the risk that their lack of knowledge may lead to an adverse ruling. Doreen V. Smith and Evelyn Fehlberg v. DER and Herbert Kilmer and Joseph Bendick, 1992 EHB 226; David C. Palmer v. DER and York County Solid Waste and Refuse Authority, EHB Docket No. 92-466-W (Opinion issued April 8, 1993).

The record consists of a transcript of 158 pages and 16 exhibits. After a full and complete review of the record, we make the following findings of fact.

FINDINGS OF FACT

1. The appellant, Richard A. Merry II, is an individual who resides at the Homestead Hotel in Emporium, PA. (Stip. V.A.)[2]

2. The appellee is the Commonwealth of Pennsylvania, Department of Environmental Resources which is the agency charged with the duty and authority to administer and enforce the provisions of the CSL and the OGA, the rules and regulations promulgated thereunder, and §1917-A of the Administrative Code.

3. Mr. Merry owns land situated east of Route 46 and south of Totten Hollow Road in Foster Township, McKean County, which he acquired from his father by deed dated March 2, 1974 and recorded in Deed Book 491, page 261 in the McKean County Recorder of Deeds office. (Stip. V.D and E; Comm. Ex. 4 and 15)

4. Mr. Merry owns the surface rights and certain oil and mineral rights to the aforesaid property in Foster Township. (Stip. V.C) In particular, he owns the surface rights to eight wells and the mineral rights to the tract of land where the wells are located. (Stip. V.H and I)

5. Mr. Merry also owns the eight wells. (Stip. V.J)

6. The eight wells are located on a portion of the land which is bounded by Route 46, Totten Hollow Road and Kendall Creek. (Stip. V.G)

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[2] A reference to "TR" is to the hearing transcript; reference to "Stip." is to the Joint Stipulation of the parties. References to "Comm. Ex. ___" are references to DER's exhibits; references to "App. Ex. ___" are references to Mr. Merry's exhibits.

7. The eight wells are unplugged. (Stip. V.K)

8. Five of the wells (M-1, M-4, M-6, M-7 and M-8) are located on the land described in Parcel I of the March 2, 1974 deed from Mr. Merry's father to Mr. Merry, which is bounded by Route 46, Totten Hollow Road and Kendall Creek. (TR. 51, 84; Comm. Ex. 15)

9. Well M-1 is in Kendall Creek. (Stip. V.S; TR. 67; Comm. Ex. 1)

10. Well M-4 is approximately five feet from Kendall Creek. (Stip. V.L; TR. 69, 123)

11. Well M-6 is approximately 30 to 40 feet from Kendall Creek and sits above the creek with a five to six foot bank sloping down into a wetland adjoining Kendall Creek. (TR. 44, 114)

12. Well M-7, located along Kendall Creek, sits on a bank of land; the bank drops approximately five to six feet into a wetland adjoining Kendall Creek. (Stip. V.L; TR. 122)

13. Well M-8, located in a low lying wetland, is approximately 100 feet from Kendall Creek. (TR. 38-41, 109)

14. On May 23, 1986, an adjoining landowner filed a complaint that the wells were leaking oil into Kendall Creek. (TR. 31)

15. On May 30, 1986, Bob Voegele, a Water Quality Specialist with DER's Bureau of Oil and Gas Management, along with DER's Dick Howell, an oil and gas inspector, and Bill Brit, a water quality specialist in training, visited Mr. Merry's property to investigate the complaint. (TR. 32)

16. On May 30, 1986, Mr. Voegele saw wells M-1, M-4, M-5, M-6, M-7, M-8 and three others that are located adjacent to Route 46. (TR. 33 and 34)

17. Mr. Voegele walked out on the debris which had accumulated around well M-1 and looked inside the surface casing which rises approximately

six feet above the creek. He saw oil which was within four feet of overflowing the top of the casing. (TR. 36)

18. Stream debris, consisting of logs, brush, tires, and trash, had been caught by the surface casing and was piled against the outside of the casing. (Stip. V.U; TR. 67, 85, 125) A shift in the debris could cause the casing pipe to shear off or rupture, which would result in oil spilling into Kendall Creek. (TR. 85, 125)

19. Mr. Voegele saw deposits of weathered oil on and around wells M-6 and M-8 as well as floating on the surface of standing water next to well M-8. (TR. 38-43; Comm. Ex. 5A-E)

20. On June 10, 1986, DER sent Mr. Merry a notice of violation notifying him either to plug the wells or to produce, register and bond the wells. (TR. 52; Comm. Ex. 6)

21. On June 25, 1986, Mr. Voegele met with Mr. Merry at the site, where they walked around the property and looked at the well sites and discussed what Mr. Merry had to do to correct the situation. (TR. 53 and 54)

22. Mr. Merry said he would clean up the oil around wells M-6, M-8 and the tank battery (a series of linked tanks for the collection of oil). (TR. 54)

23. Mr. Merry did not do the work specified in finding of fact 22 above. (TR. 55)

24. In late 1986, Mr. Voegele's supervisor requested that he schedule another meeting with Mr. Merry in an attempt to resolve the matter. (TR. 55 and 56)

25. On January 14, 1987, DER sent Mr. Merry a second notice of violation which invited Mr. Merry to attend a meeting with DER officials. (TR. 56; Comm. Ex. 7)

26. On February 3, 1987, a meeting to discuss the violations was held and was attended by Mr. Voegele, his supervisor, the oil and gas inspector supervisor, the oil and gas inspector for McKean County, and Mr. Merry. (TR. 57; Comm. Ex. 8)

27. At the meeting, DER requested and Mr. Merry agreed to submit registration applications and bonding for the wells as well as to survey the south property line; all this was to be accomplished by March 1987. (TR. 58)

28. Mr. Merry failed to supply the promised information. (TR. 58)

29. On July 15, 1987, DER sent Mr. Merry a third notice of violation asking him for the same information and advising him that unless DER received it, the case would be referred to DER's legal counsel. (TR. 58)

30. On April 29, 1991, Mr. Voegele, accompanied by Joel Fair and Brian Mummert, who were to survey the south property line, visited the site again in order to verify that the conditions were the same as in prior years since DER was contemplating issuing an order. (TR. 60-62)

31. On this visit, they looked at wells M-1, M-4, M-6, M-7, M-8 and the tank battery and saw oil around wells M-4, M-6, M-7 and M-8. (TR. 61)

32. On April 30, 1992, Mr. Voegele visited the site with Mr. Sturba, a hydrogeologist, to get his opinion on why the wells were leaking and if they would continue to leak in the future. (TR. 62)

33. Mr. Voegele and Mr. Sturba looked at each of the wells in question and noted that M-4, M-6, M-7 and M-8 were leaking oil and water during the time of inspection. (TR. 62)

34. On May 21, 1992, DER issued an order to Mr. Merry to plug wells M-1, M-4, M-6, M-7 and M-8 and to restore the well sites. (Order; TR. 63)

35. On June 22, 1992, Mr. Voegele returned to the site with Mr. Buckley, a wetland biologist, to determine what permits would be needed by Mr. Merry to take corrective action in the wetland area and creek in connection with plugging the wells. (TR. 63)

36. Mr. Voegele and Mr. Buckley walked to each of the wells, looked at the topography and vegetation and determined which access route to each well would have the least amount of impact on the wetland area and Kendall Creek. (TR. 64)

37. On October 15, 1992, Mr. Voegele and Mr. Buckley returned to the site and examined the wells to verify that pollution was continuing or that there was a potential for pollution. (TR. 64)

38. At well M-1, Mr. Voegele saw oil approximately one to two feet above the surface of the creek in the well casing and gas bubbles coming up through the oil. (TR. 66-68)

39. At well M-4, Mr. Voegele observed discoloration between the bottom and top of the well due to the fact that oil and water were being discharged from between the conductor or production pipe and the outside casing. (TR. 69 and 70)

40. Well M-6 was covered with old, weathered oil. Oil leaked from all points on the well head, from seals on the top, from the casing and from the annular space between the surface casing and the conductor pipe, and there was an area of oil-soaked vegetation. (TR. 71 and 72)

41. At well M-7, oil was leaking from between the conductor pipe and the surface casing. (TR. 72 and 73)

42. During a visit to the site on October 22, 1992, Mr. Buckley noticed gas bubbles and the smell of crude oil at well M-1. (TR. 125)

43. Downstream of and behind well M-4, in a small floodway channel, Mr. Buckley saw oil in puddles; he also saw old oil in a small area of rocks and in a puddle. (TR. 123)

44. Near well M-6, downstream soil samples taken by Mr. Buckley were oily, and the sample holes filled up with water which had a sheen of oil. Mr. Buckley testified that he had to be careful where to walk in this area so as not to get oil on his boots. (TR. 116 and 117)

45. Well M-8 is located in a wetland. Every downstream soil sample taken by Mr. Buckley near the well and at 50 feet away smelled of crude oil. (TR. 110-113) In addition, oil would come to the surface where he walked. (TR. 113)

46. The discharge of oil/water from well M-4 flows into Kendall Creek. (Stip. V.R)

47. The discharge of oil/water from wells M-6, M-7 and M-8 flows into wetlands. (Stip. V.Q; TR. 114-115)

48. The soil surrounding wells M-4, M-6, M-7, and M-8 is contaminated with oil. (Stip. V.O)

49. There is oil-soaked vegetation near wells M-6 and M-8. (TR. 40-41, 71-72)

50. Robert Sturba, a hydrogeologist, visited the site twice to determine the source of the pollution, whether pollution would continue and what corrective action might be required. (Stip. III.C; TR. 143 and 144)

51. The wells will continue to flow as long as they remain in their current condition because of their location at a valley bottom along a stream in a groundwater upwelling area. (TR. 153-154)

52. If the wells are not plugged, they will continue to leak crude oil. (Stip. V.V)

DISCUSSION

In this appeal of the Department's order to Mr. Merry to plug five of his eight[3] oil wells to stop or prevent unauthorized discharge of oil and to collect and properly dispose of all the oil, brine, such other fluids, industrial wastes and contaminated soil, the burden of proof rests with DER to show by a preponderance of the evidence that its order was not an abuse of discretion. 25 Pa. Code §21.101(b)(3).

DER contends that the issuance of the order was appropriate because §316 of the CSL authorizes DER to order a landowner or occupier to correct a condition where it finds pollution or a danger of pollution resulting from a condition. DER argues, *inter alia*, that Mr. Merry is a §316 landowner/occupier, that the conditions at Mr. Merry's wells have caused pollution and continue to present threats to wetlands and Kendall Creek, and that the issuance was a proper exercise of discretion.

Mr. Merry did not address these issues in his post-hearing brief, so he has waived any objections he might have had to them. Lucky Strike, *supra*. In his post-hearing brief, Mr. Merry contends that the wells are "orphan

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[3] The order at issue in this case places no requirements on Mr. Merry as to the remaining three wells identified in the transcript. In addition, although the Department's post-hearing brief refers to nine wells in total, only eight are expressly identified in the Department's order at paragraph E and on the map attached thereto as Appendix A.

wells", as defined in the OGA.[4] Mr. Merry argues that the wells were abandoned prior to the effective date of the OGA, that he was neither the driller nor operator when the wells first came into existence, that he has not considered himself the owner or operator of the wells, and that he has not received any economic benefit therefrom since any production and shipment of oil was unintended, totally involuntary, and done only to preserve his land.

In order to establish by a preponderance of the evidence that its order was not an abuse of discretion, DER must provide the Board with such proof as to lead the Board to conclude that it is more probable than not that Mr. Merry violated the CSL and that the remedial measures prescribed in the order are appropriate. Fulkroad v. DER, EHB Docket No. 91-141-W (Adjudication issued August 24, 1993 and as modified by Opinion and Order Sur Petition for Reconsideration issued November 9, 1993); South Hills Health System v. Commonwealth, Department of Public Welfare, 98 Pa. Cmwlth. 183, 510 A.2d 934 (1986). Mr. Merry's argument that the wells are "orphan wells" under the OGA is an affirmative defense, and thus, Mr. Merry bears the burden of producing evidence to support that defense. 25 Pa. Code §21.101(a).

Initially, we will address the issue of whether a party can use the OGA as a way to deny liability under the CSL. This issue appears to be a matter of first impression as the Board has never had an occasion to address the interplay of the OGA with the CSL. Mr. Merry argues that the wells are "orphan wells" and that he is not responsible for them. On the other hand,

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[4] "Orphan wells" -- any well abandoned prior to the effective date of this act that has not been affected or operated by the present owner or operator and from which the present owner, operator or lessee has received no economic benefit, except only as a landowner or recipient of a royalty interest from the well. 58 P.S. §601.103

DER argues that the CSL, which specifically regulates water pollution, prevails over inconsistent general provisions that cover the same matter in the OGA, which regulates development and production of mineral resources. Section 603 of the OGA supports DER's interpretation, as it indicates that no provision of the OGA should be construed to curtail DER's ability to enforce the CSL. The language of §603 of the OGA expressly states as follows:

> The provisions of this act shall not be construed to affect, limit, or impair any right or authority of the department under the act of June 22, 1937 (P.L. 1987, No. 394), known as the Clean Streams Law...
>
> 58 P.S. §601.603

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. 1 Pa. C.S. §1921(b). The statutory provision is clear and cannot be ignored. The OGA cannot affect DER's actions authorized under the CSL.[5] Since DER's order was based on §316 of the CSL, Mr. Merry's argument that he is not liable because the wells are "orphan wells" under the OGA is without merit.[6]

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[5] Although DER argued that the CSL as specific legislation prevails over inconsistent general provisions that cover the same matter in the OGA, it is unnecessary to address this argument since, based on the statutory language, there is no apparent inconsistency between the OGA and the CSL with respect to this matter.

[6] Even if the orphan well argument did apply, Mr. Merry failed to prove that he satisfied the standards needed to qualify as an "orphan well". An orphan well is any well abandoned prior to the effective date (1985) of the OGA that has not been affected or operated by the present owner or operator and from which the present owner, operator or lessee has received no economic benefit, except only as a landowner or recipient of a royalty interest from the well. 58 P.S. §601.103. Mr. Merry failed to prove that he has not

footnote continued

Next we must determine whether DER's action is an abuse of discretion. In order to make that determination, we must consider the issue of whether Mr. Merry can be liable under §316 of the CSL. A landowner or occupier need not be at fault in order to be liable under §316 of the CSL. Western Pennsylvania Water Co. v. DER, 127 Pa. Cmwlth. 26, 560 A.2d 905, 908 (1989) aff'd 526 Pa. 443, 586 A.2d 1372 (1991). Whenever DER finds that pollution or a danger of pollution is the result of a condition which exists on land in the Commonwealth, it may order the landowner or occupier to correct the condition in a manner satisfactory to DER. 35 P.S. §691.316. We will consider whether DER has proven both requirements - landownership or occupier status and pollution.

For the purpose of §316, "landowner" is any person holding title to or having a proprietary interest in either surface or subsurface rights. Here the evidence demonstrates that Mr. Merry is a landowner. Mr. Merry owns the title to the property by a March 2, 1974 deed from Richard A. Merry to Richard A. Merry II. (F.F. 3) The deed transferred title to several parcels, one of which, Parcel I, is the land on which wells M-1, M-4, M-6, M-7 and M-8 are situated. (F.F. 8) Mr. Merry also qualifies as a landowner since he owns the surface and certain oil and mineral rights to the land, the surface rights to all eight wells, the mineral rights to the tract of land where the eight wells are located, and also the eight wells (F.F. 4, 5). Thus, Mr. Merry qualifies as a landowner and/or occupier under §316 of the CSL.

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continued footnote
affected the wells and has not received an economic benefit. Moreover, Mr. Merry did not present any evidence at the hearing and, therefore, is deemed to waive any affirmative defenses by virtue of his failing to provide evidence in support of his contentions.

In addition, DER demonstrated that the wells had caused pollution and that there continues to be a danger of further pollution. The evidence presented by DER and the testimony of DER personnel who visited the site demonstrated that wells M-4, M-6, M-7 and M-8 leak oil or water mixed with oil, which flows either into Kendall Creek or into an adjacent area of wetlands. (F.F. 33, 39-41, 46, 47) In addition, the soil surrounding wells M-4, M-6, M-7, and M-8 is contaminated with oil and there is oil-soaked vegetation near wells M-6 and M-8. (F.F. 48, 49) On his earliest visit to the site, Water Quality Specialist Bob Voegele saw deposits of old, weathered oil floating on the surface of water near well M-8. (F.F. 19) During a visit to the wetland area on October 22, 1992, wetland biologist Gordon Buckley observed oil in puddles near well M-4, and oil rose to the surface when he walked in the area near wells M-6 and M-8. (F.F. 43- 45) Finally, the surface casing of well M-1, located in the middle of Kendall Creek extends above the water surface and has oil inside the pipe with gas bubbling up through the oil. (F.F. 9, 17, 38) Debris, consisting of logs, brush, tires, and trash, has been swept up against the casing of well M-1. There is a potential for oil to overflow into the creek, particularly if the casing pipe is sheared off by a shift of the debris. (F.F. 18) Moreover, the parties stipulate to the fact that if the wells are not plugged, they will continue to leak crude oil. (F.F. 52)

The evidence is clear that the wells in question are owned by Mr. Merry and that, unless the wells are plugged, they will continue to leak crude oil polluting Kendall Creek and adjacent wetlands. Therefore, DER was justified in exercising its authority under §316 of the CSL to require plugging of the wells and restoration of the well sites. Accordingly, we find

that DER has met its burden of proof, and we make the following conclusions of law and enter the appropriate order.

CONCLUSIONS OF LAW

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

2. In an appeal from DER's administrative order to abate water pollution, DER bears the burden of proving by a preponderance of the evidence that the order was not an abuse of discretion. 25 Pa. Code §21.101(b)(3)

3. Mr. Merry bears the burden of proving any affirmative defenses. 25 Pa. Code §21.101(a).

4. DER has demonstrated by a preponderance of the evidence that the order was not an abuse of discretion, nor was it arbitrary or capricious.

5. The Oil and Gas Act does not prohibit or limit DER actions authorized under the Clean Streams Law.

O R D E R

AND NOW, this 2nd day of December, 1993, it is ordered that the appeal of Richard A. Merry II at EHB Docket No. 92-224-MJ is dismissed.

ENVIRONMENTAL HEARING BOARD

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Richard S. Ehmann

RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

Board Chairman Maxine Woelfling is recused.

DATED: December 2, 1993

cc: DER, Bureau of Litigation
Library: Brenda Houck
For the Commonwealth, DER:
Zelda Curtiss, Esq.
Southwest Region
For Appellant:
Richard A. Merry II, pro se
Homestead Hotel
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M. DIANE SMITH
SECRETARY TO THE BOARD

LOWER WINDSOR TOWNSHIP	:	
	:	
v.	:	**EHB Docket No. 91-412-E**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
and MODERN TRASH REMOVAL OF YORK, INC.	:	
Permittee	:	**Issued: December 3, 1993**

OPINION AND ORDER
SUR RECONSIDERATION

By Richard S. Ehmann, Member

Synopsis

The Board reconsiders paragraph 3 of its September 15, 1993 order accompanying its Adjudication at EHB Docket No. 90-580-E (Consolidated). The Board rejects the contention that we should not have granted the appellant relief in the form of an order directing the permittee, Modern Trash Removal of York, Inc. (Modern), to remove waste from a single-lined area of its municipal waste landfill where we found the Department of Environmental Resources (DER) improperly approved disposal there. There is no requirement that the appellant must specify in its notice of appeal the form of relief it seeks. While the costs associated with Modern's removal of the waste are irrelevant to our decision, we should consider the environmental impact from our ordering the waste removal, however. As there is no evidence before us in the record on this issue, we accordingly must order a reconsideration evidentiary hearing so we can determine whether there will be less environmental harm from leaving the waste in place. Likewise, we were not

made aware of a federal Consent Decree between EPA and Modern regarding contamination at Modern's landfill entered into with regard to litigation under CERCLA, 42 U.S.C. §9601 *et seq.*, at the time we issued our order, and we will take evidence at the reconsideration hearing so that we can determine whether our order improperly interferes with that federal Consent Decree. We will not reconsider our assignment of the burden of proof, however, and it will be Modern and DER who will bear the burden on these issues at the reconsideration hearing.

OPINION

On September 15, 1993, the Board issued an Adjudication at EHB Docket No. 90-580-E (Consolidated), in which we ruled on two consolidated appeals, Docket Nos. 90-580-E and 91-412-E. Our reconsideration of our Adjudication as to Docket No. 91-412-E (but not 90-580-E) is now sought by Modern and DER.

The appeal at Docket No. 91-412-E was filed by Lower Windsor Township (Lower Windsor) on October 3, 1991 seeking our review of a September 3, 1991 Consent Order and Adjudication (COA) entered into between Modern and DER to partially settle issues in a previous appeal at Docket No. 91-001-W filed by Modern. Paragraph 2(a) of the COA provide that Modern could dispose of municipal waste on a single-lined area of its landfill (known as the slope cap area) up to the contours permitted by Modern's 1986 permit modification.

Our Adjudication first rejected the argument that Lower Windsor's challenge to the COA was rendered moot by Modern's completion of disposal on the slope cap area pursuant to the COA in 1992 and its capping of all but four acres of that area.

Further, citing City of Bethlehem v. DER, 1991 EHB 224, issued on February 15, 1991, we rejected DER's contention that §271.112(c) authorized Modern's continuation of waste disposal on the single-lined slope cap area up

to the final elevations contained in Modern's 1986 permit modification, without any specific cut-off date and limited only by the remaining disposal capacity there. We accordingly concluded DER had abused its discretion when it entered into paragraph 2(a) of the COA. In paragraph 3 of our Order, we thus sustained the appeal at Docket No. 91-412-E and directed Modern to remove the waste which Modern disposed of on the single-lined slope cap area after the September 3, 1991 COA to a disposal area which complied with DER's regulations in order to return the parties to the *status quo ante* with regard to the COA.[1]

Presently before the Board are requests for reconsideration of our adjudication brought by Modern and DER pursuant to 25 Pa. Code §21.122(a). Section 21.122(a) of our rules provides the following:

> (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. The 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 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.

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[1]We note that Paragraph 3 of our order inadvertently included PAC in the order sustaining Docket No. 91-412-E, whereas PAC had not intervened in that matter and had intervened only in Docket No. 90-580-E.

As neither Modern nor DER is seeking reconsideration of our decision that DER's regulation at 25 Pa. Code §271.112(c) does not authorize continued disposal on an area of a landfill which does not conform with the standards in the 1988 amendments to DER's regulations regarding landfills, we will not further discuss that ruling here.

Both Modern and DER argue in support of reconsideration that the issue of relief was not properly before the Board because the appellant's notice of appeal sought only "reversal" of DER's action and the appellant did not specifically raise exhumation of the waste in its pre-hearing memorandum or subsequently until filing its post-hearing reply brief. Modern and DER also argue the Board lacks jurisdiction and authority to order affirmative relief until DER has had the opportunity to take some type of enforcement action in view of the Board's finding that paragraph 2(a) of the COA was improper. Further, Modern argues it undertook its continued disposal and capping of the slope cap area in view of the Board's approval of this COA.

Both Modern and DER also urge that the parties should have an opportunity to show whether exhumation will increase the risk of environmental harm over leaving the waste in place. Modern also asserts that the Board should take into account the costs involved in exhumation of the waste and balance these costs against any potential benefit from exhumation. Further, Modern argues paragraph 3 of our September 15, 1993 order violates the Supremacy Clause of the U. S. Constitution, based on the contention that our order interferes with a consent decree, entered as part of federal litigation by the federal district court for the Middle District of Pennsylvania on June 14, 1993. This Federal Superfund Consent Decree was not made part of the

record before the Board but is attached as Exhibit 3 to the affidavit of Andrew S. Levine, which is Exhibit B to Modern's motion. Modern also seeks to have us reconsider the burden of proof assignment.

Did The Board Improperly Nullify The COA?

Initially, we wish to dispel the suggestion that Modern undertook its continued disposal on the slope cap area in accordance with the Board's endorsement of that activity as being in conformance with DER's regulations. A copy of the Board's September 9, 1991 order at Docket No. 91-001-W is attached to Modern's motion as Exhibit C.[2] This order reflects that we approved the parties' partial settlement with the expectation that its major substantive provisions would be published in the Pennsylvania Bulletin and with the provision that our partial dismissal of 91-001-W based on the COA was subject to reinstatement if a timely appeal were filed by an aggrieved party challenging the settlement in accordance with 25 Pa. Code §21.120(b). Our approval of the COA thus made Modern and DER aware that it was not absolute. According to the page of the Pennsylvania Bulletin which is Exhibit B attached to Lower Windsor's notice of appeal, publication of the COA at Docket No. 91-001-W occurred on September 21, 1991. The Board's rules at §21.120(a) of 25 Pa. Code provide:

> (a) In cases where a proceeding is sought to be terminated by the parties as a result of a settlement agreement, the terms of such settlement shall be submitted to the Board for approval and the major substantive provision thereof shall simultaneously be published in the *Pennsylvania Bulletin*. The settlement, unless the terms of the settlement itself provide otherwise, is effective immediately upon approval by the Board subject to reopening if an objection

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[2]Although this order was not made part of the record at Docket No. 90-580-E (Consolidated), we may take judicial notice of it as it is part of our own records. Hawkey v. Workmen's Compensation Appeal Board, 56 Pa. Cmwlth. 379, 425 A.2d 40 (1981).

> is filed as set forth in subsection (b), and upheld by the Board. Any aggrieved party objecting to the proposed settlement may, within 20 days after publication, appeal to the Board under this section and request a hearing on its objections.

This regulatory section's provision of a right to an aggrieved person to challenge a Board-approved COA would be meaningless if we could not later reverse an approval we had previously given to a COA upon reviewing the aggrieved party's timely filed objections thereto. We thus find no merit to the contention that we improperly nullified the Board-approved COA here.

Was The Issue Of Relief Before The Board?

We also reject the contention that we should reconsider whether the issue of relief was properly before the Board and whether the Board has authority to order the relief measures to be taken by Modern or must first remand to DER. Both the Environmental Hearing Board Act (EHB Act), Act of July 13, 1988, P.L. 530, 35 P.S. §7511, *et seq.*, and its predecessor statute, §1921-A of the Administrative Code, the Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-21, empower the Board to conduct a *de novo* review of DER's actions. Robert L. Snyder, *et al.* v. DER, 1990 EHB 428, affirmed in part and reversed in part, 138 Pa. Cmwlth. 534, 588 A.2d 1001 (1991), allocatur granted, ___ Pa. ___, 606 A.2d 904 (1992). The Board is under a duty to determine whether DER's action can be sustained or supported by the evidence put before the Board. Warren Sand & Gravel Co., Inc. v. Commonwealth, DER, 20 Pa. Cmwlth. 186, 341 A.2d 556 (1975).

While we have consistently explained that according to the Commonwealth Court's decision in Commonwealth, Pennsylvania Game Commission v. Commonwealth, DER, 97 Pa. Cmwlth. 78, 509 A.2d 877 (1986), aff'd on other grounds, 521 Pa. 121, 555 A.2d 812 (1989), an appellant's specifying its objection to DER's action in its notice of appeal is jurisdictional, see,

e.g., C & K Coal Co. v. DER, 1992 EHB 1261, 1293, an appellant is not required to explicitly request the form of relief it is seeking. Upon finding an abuse of DER's discretion, the Board has either fashioned some form of relief for the appellant or has remanded the matter to DER as the Board sees fit according to the circumstances. The Commonwealth Court has upheld the Board's authority to substitute its discretion for that of DER. See Morcoal Co. v. Commonwealth, DER, 74 Pa. Cmwlth. 108, 459 A.2d 1303 (1983). We reject the position advanced by Modern and DER, as this essentially would amount to a two-tiered review process, with the Board first reviewing for successful objections to DER's action and then conducting a review on the issue of the appropriate relief. Such a two-tiered review system was not envisioned by the General Assembly.

Must The Board Remand To DER?

We also reject the suggestion that the Board must remand the matter to DER to devise an appropriate form of relief which would then be open to challenge in an appeal from DER's imposition of the relief measures.[3] That remand is not always the desirable course for the Board to take is especially apparent in the instant matter, where DER's petition for reconsideration and memorandum reflect that DER is still not convinced that any relief is even necessary.[4]

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[3]We point out that Modern's citation to Skotedis v. DER, 1988 EHB 760, for the proposition that the Board has ruled that remand to DER is effective relief and an alternative to the removal of waste materials, is misplaced. In Skotedis, the Board denied a motion to dismiss an appeal for mootness, noting remand to DER was one possible course of action open to the Board in that matter.

[4]At page 10 of its memorandum, DER argues, "the Board should have remanded to the Department to determine, in the first instance, what remedy and/or sanction (if any) should be chosen."

In support of reconsideration, DER somewhat disingenuously argues that this appeal does not involve an exercise of DER's discretion, so the Board was not free to substitute our discretion for that of DER. DER contends there was no exercise of DER's discretion here because the Board found DER's regulations did not permit DER to enter paragraph 2(a) of the COA. This argument runs counter to the position taken by DER in its post-hearing brief, where DER argued it acted within its discretion in authorizing Modern to fill the slope cap area to its previously-permitted elevations. There can be no doubt that DER exercised its discretion here in agreeing to enter into the COA containing paragraph 2(a) which runs contrary to DER's own mandatory regulations concerning continued operation under prior permits and this Board's previous interpretation of those regulations in City of Bethlehem, *supra*. We have elected to substitute our discretion for that of DER in order to see that Modern complies with these regulations as to the slope cap area.

Was The Form Of Relief Available To The Board Limited?

DER urges we should have taken into account whether our ordering this waste to be removed was reasonable and whether it made sense to require Modern to dig up part of a cap and remove only some of the waste from the slope cap area. DER's argument essentially is that because Modern acted pursuant to the COA and continued to fill the slope cap area while Lower Windsor's appeal was pending, the Board must limit the relief it fashions for the appellant in view of the fact that the waste has already been disposed of and the area capped.

Our review of DER's action is not so limited, however. Were we to limit the type of relief we order in accordance with whether the permittee has already acted pursuant to a challenged permit before we were able to issue our adjudication, the rights of third party appellants challenging permits issued by DER would be curtailed, as pointed out in our Adjudication and in Concerned

Citizens Against Sludge, 1983 EHB 442. Rather, as we explained in our Adjudication, it is the permittee, Modern, who assumed the risk, in continuing disposal on the slope cap area and capping the area, that our Adjudication might not conclude in favor of the COA.[5] We point out that this is not the only area of law in which a party who goes forward with an activity assumes the risk that it might be ordered to reverse that activity. See, e.g., D'Amato v. Zoning Bd. of Adjustment, 137 Pa. Cmwlth. 157, 585 A.2d 580 (1991) (economic loss occasioned by zoning board's denial of variance is self-imposed, where property owner proceeds to build a structure which does not comply with zoning requirements without first obtaining variance); Heinl v. Pecher, 330 Pa. 232, 198 A. 797 (1938) (building erected without filing plans and specifications and securing the necessary permit and for purpose not designated in township zoning ordinance was subject to order of removal as nuisance).

Moreover, we reject the suggestion by DER that it would be up to a court (and not the Board, as a quasi-judicial agency) to order Modern to exhume the waste from the slope cap area.[6] Contrary to DER's assertion,, the Board was not granting equitable relief in the nature of an injunction when it directed Modern to remove the waste disposed of on the slope cap area pursuant to the COA, but was acting to return the parties to the *status quo ante* based on the evidence in the record.

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[5]We note in passing that this is not the first time Modern has been involved with relocating previously disposed of solid waste. See Modern Trash Removal v. DER, ___ Pa. Cmwlth. ___, 615 A.2d 824 (1992).

[6]In fact, where an issue within the Board's expertise is involved, the courts have indicated that the matter is more appropriately dealt with by the Board. See, e.g., Machipongo Land & Coal v. Commonwealth, DER, ___ Pa. Cmwlth. ___, 624 A.2d 742 (1993).

Should The Board Reconsider The Issue Of Environmental Harm?

We also disagree with the contention raised by Modern and DER that our Adjudication is inconsistent with our decisions in Concerned Residents of the Yough, Inc. (CRY) v. DER and Mill Service, Inc., Permittee, EHB Docket No. 89-133-MJ (Adjudication issued July 19, 1993), and Fulkroad v. DER, EHB Docket No. 91-141-W (Adjudication issued August 24, 1993, reconsideration granted September 16, 1993, Opinion and Order Sur Reconsideration issued November 9, 1993). Unlike the present appeal, neither CRY nor Fulkroad involved our review of DER's approval of disposal of waste which was to occur on an area which did not meet the requirements of DER's regulations.

In contrast to CRY and Fulkroad, the parties presented no evidence in this matter as to whether the environmental harm from the waste disposed of on the slope cap area contrary to DER's regulations would be greater if the waste were ordered removed or allowed to remain in place. Responsibility for this lack of evidence in the record does not rest with the Board but with the parties. The evidence Modern and DER seek to have us now take into account on reconsideration was not before us at the time of our adjudication. An offer to produce it was not made at the hearing, either. Modern and DER claim this evidence was not introduced prior to our adjudication because the issue of relief was not before the Board. As we have explained in this opinion, the parties should have anticipated that the Board would consider what relief to give the appellant, in the event the Board ruled in Lower Windsor's favor, and that ordering exhumation was one form of relief open to the Board. Even assuming that Modern and DER could not have introduced some of this evidence

at the time of the merits hearing,[7] this Board ordinarily expects that a party will make a pre-adjudication request to reopen the record to introduce new evidence pursuant to 1 Pa. Code §35.231(a).[8] Delaware Valley Scrap Company, Inc. v. DER, EHB Docket No. 89-183-W (Consolidated Docket) (Adjudication issued August 5, 1993). We did not receive any pre-adjudication petition to reopen the record in this matter. The reasons advanced by Modern and DER in support of our reconsideration of the issue of environmental harm thus do not fall within 25 Pa. Code §21.122(a). It would appear that Modern and DER are seeking a second chance at prevailing in this matter; that is not an appropriate reason for our reconsideration of an adjudication.

Since Modern and DER were afforded ample opportunity to offer evidence and argument concerning the environmental impact from our ordering removal of the waste from the slope cap area at the merits hearing and failed to do so, our reconsideration would ordinarily be inappropriate here. Indeed, it could be argued that Modern and DER waived their opportunity to argue against removal

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[7]The June 14, 1993 Federal Superfund Consent Decree, for instance, did not exist at the close of the merits hearing, and was not entered until after the close of the merits hearing but before we issued our Adjudication. Thus, evidence as to the terms of this federal consent decree could not have been presented at the merits hearing.

[8]It is then up to the Board's discretion to decide, where the petitioning party has met the standard of showing material changes of fact which have occurred after the conclusion of the hearing, whether to grant the pre-adjudication petition to reopen the record. Spang & Co. v. DER, 140 Pa. Cmwlth. 306, 592 A.2d 815 (1991). We have indicated that we may deny a petition to reopen the record where the petitioning party fails to exercise due diligence in gathering the additional evidence and where the addition of the evidence would be prejudicial to the opposing party. Spang & Co. v. DER, 1992 EHB 701. This is because there must be a point at which the parties are no longer engaged in gathering evidence and seeking its addition to the record so that we may render an adjudication without the administrative adjudication process before this Board continuing *ad infinitum*.

of the waste from the slope cap area now by failing to offer this evidence when they had the opportunity. In substituting our discretion for that of DER, however, this Board, like DER, has an obligation to see that our order conforms to the requirements of the SWMA (which implements Article I, §27 of the Pennsylvania Constitution) [9] and the regulations promulgated thereunder. It is DER's duty under the SWMA to "issue permits, licenses and orders and specify the terms and conditions thereof, and abate public nuisances to implement the purposes and provisions of [the SWMA] and the rules, regulations and standards adopted pursuant to [the SWMA]", and we must ensure that DER's duty is upheld. 35 P.S. §6018.104. In addition to implementing Article I, §27, another of the purposes of the SWMA is to protect the public health, safety and welfare from the short and long term dangers of transportation, processing, treatment, storage, and disposal of all wastes. 35 P.S. §6018.102(4), (10). Moreover, it is our function to adjudicate the parties' rights and responsibilities pursuant to the EHB Act.

As an independent quasi-judicial agency of the Commonwealth, we have an obligation to see that the provisions of Article 1, §27 are carried out. See, e.g., Concerned Citizens For Orderly Progress v. Commonwealth, DER, 36 Pa.Cmwlth. 192, 387 A.2d 989 (1978); Payne v. Kassab, 11 Pa.Cmwlth. 14, 312 A.2d 86 (1973), aff'd, 468 Pa. 226, 361 A.2d 263 (1976); 35 P.S. §7513(a). Under the three-pronged test for compliance with Article 1, §27 devised in Payne, *supra*,

> it is the obligation of the agency or instrumentality of the Commonwealth involved to balance benefits against

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

> environmental damages, where an action of that instrumentality or agency might cause a diminution of Pennsylvania's public natural resources as set forth in Article 1, Section 27.

Concerned Citizens For Orderly Progress, *supra*, 36 Pa.Cmwlth. at ___, 387 A.2d at 994. Modern and DER waived any argument concerning Article 1, §27 as related to the issue of relief in this matter by their failure to raise this issue in their pre-hearing memoranda or post-hearing briefs. See Lucky Strike Coal Co. v. Commonwealth, DER, 119 Pa.Cmwlth. 440, 547 A.2d 447 (1988). However, pursuant to our ability to *sua sponte* reconsider our orders and upon further reflection on Paragraph 3 of our September 15, 1993 order, we believe we should have given consideration to whether there will result greater environmental harm and whether the public will be subjected to greater short and long term dangers from returning the parties to the *status quo ante*, as we ordered at Paragraph 3, or from leaving the waste in place. Since we cannot undertake such an evaluation based on the record as it presently exists, however, we must order a hearing held so we can reconsider this issue.

We stress that this is an unusual case, one of first impression before the Board, and this opinion should not be considered precedent as to when we will grant reconsideration in the future. Our decision to grant reconsideration is, thus, limited in accordance with this opinion.

Should The Board Reconsider The Impact Of its Order On The Federal Consent Decree?

Finally, we turn to the matter of the effect of Paragraph 3 of our order vis a vis the Federal Superfund Consent Decree.[10]

Modern's petition asserts that the Remedial Investigation and Feasibility Study (RI/FS) which it undertook to study the effectiveness of its

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[10]DER's petition and supporting memorandum do not address this issue.

groundwater extraction system culminated in the issuance of the Record of Decision (ROD) by EPA on June 28, 1991. Modern has attached a copy of this ROD to its petition at Exhibit 1 to the Levine Affidavit. Modern states that the ROD calls for a remedy including "completion and maintenance of the landfill cap and final cover system" over the unlined part of the landfill, citing p. 28 of Exhibit 1 to the Levine Affidavit. Modern then offers two affidavits to state that the remedy selected by the ROD includes the single-lined area, since the single-lined area is on top of the unlined area (citing Affidavit of Levine, Exhibit B at paragraph 4, and Affidavit of Matthew D. Neely, Exhibit A at paragraph 21).

Modern claims that a proposed Consent Decree was filed by Modern and EPA in the United States District Court for the Middle District of Pennsylvania at Civil Action No. 1-CV-92-0819, in June of 1992 for the court's review and approval (citing Affidavit of Levine, Exhibit B at paragraph 6, and the certified docket from that action which is Exhibit 2 to the Levine affidavit), and that the proposed Consent Decree was approved by the U. S. District Court and the Consent Decree entered on June 14, 1993 (citing Affidavit of Levine Exhibit B at paragraph 7, and certified docket, Exhibit 2 to Levine affidavit at paragraph 30). Modern's petition states that in this Consent Decree, Modern agreed to implement the remedy selected in the ROD (citing the Consent Decree, which is Exhibit 3 to the Levine affidavit, at paragraph 6). Modern also argues that removal of the waste from the slope cap area pursuant to our September 15, 1993 order "will cause destruction and removal of the cap over the slope cap area which is part of the actions implemented pursuant to the federal court-approved Consent Decree", (citing the Affidavit of M. Neely Exhibit A at paragraph 22, and Affidavit of Levine Exhibit B at paragraph 8).

Modern also asserts paragraph 3 of our Order amounts to pre-enforcement judicial review of remedial actions undertaken pursuant to CERCLA, which it says is proscribed by §113(h) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. §9613(h), and that our order should thus be reversed.

We do not agree with Modern's argument that paragraph 3 of our order amounts to pre-enforcement review under §113(h) of CERCLA, 42 U.S.C. §9613(h).[11] As explained in U. S. v. Colorado, 990 F.2d 1565 (10th Cir. 1993) [36 ERC 1377, 1385, 1388], §9613(h) of CERCLA only limits federal court jurisdiction to review challenges to CERCLA response actions. See also Boarhead Corporation v. EPA, 923 F.2d 1011 (3d Cir. 1991) [32 ERC 1537]. The Court in U. S. v. Colorado stated,

> Congress' expressed purpose in enacting §9613(h) was 'to prevent private responsible parties from filing dilatory, interim lawsuits which have the effect of slowing down or preventing EPA's cleanup activities.

U. S. v. Colorado, *supra*, 990 F.2d at 1576 [36 ERC at 1385] (citations omitted). As there is no filing of an action before federal court in this matter, §9613(h) is clearly inapplicable to our order.

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[11] This section provides in relevant part:

> (h) Timing of review
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> No Federal court shall have jurisdiction under Federal law other than under section 1332 of Title 28 (relating to diversity of citizenship jurisdiction) or under State law which is applicable or relevant and appropriate under section 9621 of this title (relating to clean up standards) to review any challenges to removal or remedial action selected under section 9604 of this title, or to review any order issued under section 9606(a) of this title, in any action...

Section 113(h) of CERCLA, 42 U.S.C. §9613(h). We note the exceptions listed in this section are not applicable in the present matter.

Citing United States v. Akzo Coatings of America, Inc., 949 F.2d 1409 (6th Cir. 1991), Modern contends that the District Court's entry of the Consent Decree gave the Consent Decree the force and effect of federal law and that the Board's Order interferes with the federal court order and should be reversed. Also citing Akzo Coatings, Modern argues that "CERCLA prevents states from unduly delaying remedies properly entered by a federal court pursuant to CERCLA," and "a state may not interfere with the proper implementation of the decree." Modern also asserts that there is a "fundamental inconsistency between the federal court-approved Consent Decree (i.e., capping the slope cap area) and the Board's Adjudication, a state administrative ruling," and that the Board's order should, thus, be reversed (citing Akzo Coatings, 949 F.2d at 1454-55). Modern supports this argument by pointing us to Westinghouse Electric Corporation v. DER, 1988 EHB 857, 863-64, which it says prohibits our interference with an EPA CERCLA action, and asserting that in the present case, exhumation will directly interfere with actions ordered both by EPA and the federal district court under CERCLA.

As Modern's petition points out, we have previously stated that as to actions taken by EPA pursuant to CERCLA, while the federal government has not preempted the field, its actions take precedence over conflicting state actions. Westinghouse, *supra*, at 863 (citing U. S. Constitution, Article VI, Section 2; In re Cochran's Estate, 398 Pa. 506, 159 A.2d 514 (1960)).

Akzo Coatings, *supra*, which Modern also relies upon, involved, *inter alia*, an appeal by the State of Michigan challenging the legality of the remedial action imposed by a consent decree entered into between EPA and twelve defendants pursuant to CERCLA and seeking to prevent entry of that Consent Decree by the federal court. The United States Court of Appeals for the Sixth Circuit, in Akzo Coatings, addressed, *inter alia*, whether the U. S.

District Court for the Eastern District of Michigan had properly held the three counts of the state's complaints which sought injunctive and declaratory relief pursuant to Michigan statutory law and Michigan's common law of public nuisance did not state viable actions because they were preempted by CERCLA. The Sixth Circuit upheld the District Court's decision, stating that if remedies proposed by a state law do not become embodied in the consent decree by virtue of CERCLA's provision for incorporation of state applicable or relevant and appropriate requirements (ARARs), 42 U.S.C. §9621(d), the state may only enforce against the potentially responsible parties (PRPs) the remedies adopted in the consent decree, and no others.

At the time we issued our Adjudication, Modern had not made us aware of the existence of the June 14, 1993 federal Consent Decree. While this federal Consent Decree was not entered until after the merits hearing in this matter, the ROD was issued in 1991, according to Modern's petition. If Modern believed the remedy called for in the ROD had a bearing on the instant appeal, it could, with due diligence, have offered the ROD into evidence at the hearing, but it chose not to do so. Thus, we cannot say that this reason for reconsideration meets the criteria at 25 Pa. Code §122(a). However, we have granted reconsideration of this issue pursuant to our inherent power to *sua sponte* reconsider our own orders, because we were unaware of this important issue when we rendered our September 15, 1993 decision and the peculiar circumstances of this appeal compel us to do so.

Accordingly, although the ROD and federal Consent Decree were not made part of the record before we issued our Adjudication, we will review them on reconsideration so that we can avoid issuing an order which interferes with EPA's actions here. Unlike the situation before the Akzo Coatings court, however, it is not clear that our order impermissibly interferes with the

federal Superfund Consent Decree which preceded it. It is not clear from the information before us that in entering the Consent Decree, EPA or the federal District court was aware of the existence of Lower Windsor's timely challenge to the September 3, 1991 COA between Modern and DER which was pending before the Board or the Board's ruling in Bethlehem, *supra*. Further it is not clear from the sections of the ROD and Consent Decree cited us by Modern that the violation which the Consent Decree addresses encompassed Modern's disposal of waste on the slope cap area which we have held was contrary to DER's regulations. It is also unclear from the information before us that Modern cannot comply with both our order and Consent Decree or that any of the parties to the Consent Decree (other than Modern) would oppose Modern's compliance with both our order and that Consent Decree. The parties will have to address this matter at the reconsideration hearing so that we may make a determination on the validity of paragraph 3 of our order. These are but some of the issues upon which evidence may need to be introduced at the reconsideration hearing.

Should The Board Reconsider The Burden Of Proof And Economic Impact?

We will not reconsider our Adjudication's assignment of the burden of proof, however. The burden of proof (persuasion) in this matter was with Lower Windsor to show DER abused its discretion by entering into paragraph 2(a) of the COA. Once assigned, the burden of proof on this issue never left Lower Windsor. See, e.g., McCloskey v. NuCar Carriers, Inc., 387 Pa. Super. 466, 564 A.2d 485, 487 (1989), appeal denied, ___ Pa. ___, 575 A.2d 115 (1990); Penn-Maryland Coals, Inc. v. DER, 1992 EHB 12; Easton Area Joint Sewer Authority, et al. v. DER, et al., 1990 EHB 1307.

Modern and DER contend that Lower Windsor had the burden as to whether removal of the waste disposed of on the slope cap area contrary to

DER's regulations would be more environmentally harmful than leaving the waste in place and that our Adjudication improperly assigned the burden to Modern (and implicitly DER). In response, Lower Windsor asserts that Modern's decision to continue to fill the slope cap area, knowing of Lower Windsor's challenge to paragraph 2(a) of the COA, should not result in burdening Lower Windsor with showing that removal of that waste would be environmentally preferable to leaving it in place. We agree with Lower Windsor. When we ordered Modern to remove the waste from the slope cap area in Paragraph 3 of our order, it was to return the parties to the *status quo ante* with regard to Paragraph 2(a) of the COA. As it is Modern and DER who are affirmatively asserting that removal of the waste will be more environmentally harmful than leaving it in place and that our order interferes with the federal Consent Decree, it is they who will bear the burden of proof on both issues. See Davis Coal v. DER, 1991 EHB 1908; 25 Pa. Code §21.101(a).[12] We will not, however, as part of this reconsideration hearing, take evidence on the economic impact of removing and properly disposing of the waste on Modern. As Lower Windsor has pointed out in its response to Modern's petition, such evidence is irrelevant to our decision in this matter since DER's regulations required that Modern cease disposal on the slope cap area, as we explained in our Adjudication. See Rochez Brothers, Inc. v. Commonwealth, DER, 18 Pa.

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[12]We note that our Adjudication, in response to the allegation in DER's post-hearing brief that there was no evidence in the record to suggest that DER had any reason to question the integrity of the slope cap area's single liner, indicated that at the same time, it is possible that some of the leachate thought to be travelling solely from the unlined area of the landfill could in part be leaking from the slope cap area, and that no evidence had been introduced to show that area's single liner is not responsible for a portion of this leachate, either.

Cmwlth. 137, 334 A.2d 790 (1975); Sechan Limestone Industries, Inc. v. DER et al., 1986 EHB 134, 166-167. We accordingly enter an order granting reconsideration in conformance with the foregoing discussion in this Opinion.

O R D E R

AND NOW, this 3rd day of December, 1993, it is ordered that:

1. The Board's Order issued on October 14, 1993 granting reconsideration is affirmed in accordance with the Opinion accompanying this order; and

2. Within thirty days of this order's issuance, DER and Modern shall provide the Board with a written statement of which issues on which they each plan to present evidence during reconsideration in accordance with the opinion accompanying this order and what each party's evidence will consist of. Twenty days thereafter, Lower Windsor shall file its responding statement. Upon our receipt of all of this information, the Board will schedule a time for the hearing addressing this evidence.[13]

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

[13]Board Member Joseph N. Mack abstained from participation in our initial adjudication, and, so, did not participate in this reconsideration.

RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: December 3, 1993

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M. DIANE SMITH
SECRETARY TO THE BOARD

ALTOONA CITY AUTHORITY	:	
	:	
v.	:	**EHB Docket No. 92-244-E**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: December 8, 1993**

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

By: Richard S. Ehmann, Member

Synopsis

The Board dismisses an appeal by the Altoona City Authority (Authority) from the Department of Environmental Resources' (DER) denial of its request for change order grant assistance to pay for costs incurred during the removal of hazardous waste encountered at its sewage treatment plant site during construction on a plant renovation project under a Step 3 construction grant under the Federal Water Pollution Control Act, 33 U.S.C. §1251 *et seq.* The Board finds the provision at §202(a)(1) of the Clean Water Act, 33 U.S.C. §1282(a)(1), regarding the Altoona project did not require DER to approve these change order requests. The Board also finds DER did not abuse its discretion in concluding that the Authority, itself or through its consulting engineers, knew or should have known of the existence of the waste pits. We further find DER did not abuse its discretion in finding that the change order requests were ineligible for funding pursuant to its policy and pursuant to 40 C.F.R.

Chapter 1, Part 35, Subpart I, Appendix A, §A.1.g. The Board further rejects the Authority's argument that DER is equitably estopped from denying the challenged change order requests.

Background

Appellant Altoona City Authority (Authority) commenced this appeal on July 10, 1992 seeking our review of DER's June 10, 1992 denial of the Authority's request for change order grant assistance to pay for delay impact costs incurred during the removal of hazardous waste encountered while the Authority's Easterly Sewage Treatment Plant (ESTP), located in Logan and Antis Townships, Blair County, was being renovated under a Step 3 construction grant pursuant to the Federal Water Pollution Control Act, 33 U.S.C. §1251 *et seq.* (commonly referred to as the Clean Water Act).

After the parties completed their discovery, a hearing on the merits was held before Board Member Richard S. Ehmann, to whom this matter was assigned for primary handling, on March 17-18, 1993. Both parties have filed their respective post-hearing briefs, and the Authority has filed its post-hearing reply brief. The parties are deemed to have abandoned all arguments not raised in their post-hearing briefs. Lucky Strike Coal Company v. Commonwealth, DER, 119 Pa. Cmwlth. 440, 547 A.2d 447 (1988).

The record consists of two volumes of transcripts of the merits hearing and a number of exhibits. After a full and complete review of it, we make the following Findings.

FINDINGS OF FACT

1. Appellant is the Authority, a municipal authority created by the City of Altoona (Altoona) to finance various sewage treatment facilities and water treatment facilities located in the vicinity of Altoona, Pennsylvania. (B-1)[1]

2. Appellee is DER, the agency with the authority to administer and enforce the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 *et seq.* (Clean Streams Law); the Sewage Facilities Act, the Act of January 24, 1966, P.L. 1535, as amended, 35 P.S. §750.1 *et seq.*, (SFA); Section 1917-A of the Administrative Code, the Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-17 (Administrative Code), and the rules and regulations promulgated thereunder. (B-1)

The ESTP

3. The Authority became an operating entity with respect to sewage treatment in 1986. Until 1986, the Authority functioned only as a financing mechanism for the sewerage system. (B-2, at 152-153)

4. The Authority has a five member Board appointed by Altoona City Council which is separate from the Altoona City Council, and the Authority has separate officers and employees. (B-2, at 153)

5. The Authority is, and at all relevant times has been, the record title holder of the real estate upon which the ESTP is located. (B-1)

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1 "B-" is a reference to a stipulated Board Exhibit, "A-" is a reference to an exhibit of the Authority, while "C-" is a reference to an exhibit of the Commonwealth.

Ownership of the real estate on which the ESTP is located is set forth in a composite deed draft dated March 1991. (N.T. Vol. 1 at 62; A-5)[2]

6. The ESTP site includes both the ESTP itself and the adjoining land which is now owned by the Authority. (N.T. Vol. 1, at 62-63; B-1; A-5)

7. The ESTP site is located approximately .25 miles north of the Village of East Altoona, along East Sixth Avenue (Legislative Route (LR) 07026) in Logan and Antis Townships. It is bordered by the Little Juniata River on the West and Sixth Avenue on the east and south. (B-1; A-2A)

8. The ESTP site is located approximately one mile south of Pinecroft. (A-3; B-2 at 48).

9. The original ESTP was constructed in the 1800s on filled wetlands. (N.T. Vol. 1, at 51-52) Initially, the Little Juniata River flowed through the ESTP site, but its channel was straightened in connection with the ESTP's construction. (N.T. Vol. 1, at 51-52)

10. The updated ESTP was constructed in 1948. (N.T. Vol. 1, at 51)

11. Pursuant to a Consent Decree between the Authority and DER and the United States' Environmental Protection Agency (EPA), the Authority agreed to renovate and upgrade the ESTP. (B-1)

12. DER administers the Federal Construction Grant Program for sewerage construction projects in Pennsylvania through its Bureau of Water Quality Management, Division of Municipal Facilities and Grants. This program

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[2] There are two volumes of transcript in this matter. "N.T. Vol. 1" indicates a reference to the transcript of the proceedings on March 17, 1993, while "N.T. Vol. 2" indicates a reference to the transcript of the proceedings on March 18, 1993.

is authorized by §201 of the Federal Water Pollution Control Act, 33 U.S.C. §1281, and the regulations promulgated pursuant thereto at 40 C.F.R., Part 30, Subchapter B. (B-1)

13. On February 16, 1989, EPA and the Commonwealth of Pennsylvania entered into an agreement captioned, "Agreement For The Delegation of Certain Wastewater Treatment Construction Grant Functions" (C-9), in which DER assures EPA that it will "execute all functions and responsibilities delegated to it by EPA in full and complete conformance with the intent and substance of all applicable Federal laws, regulations, orders, and policies, as interpreted by EPA, which are presently in effect or which may come into effect during the life of this AGREEMENT". (C-9)

14. The Authority is a grantee under the Federal Construction Grants Program and is to use its grant for the renovation and upgrading of the ESTP. The Authority received its Step 3 construction grant on September 23, 1988. (B-1; C-8)

15. The Step 3 federal grant agreement for the ESTP project entered into between EPA and the Authority (Exhibit C-8) which is dated September 23, 1988 describes in detail the nature of the grant, the amounts awarded, and sets forth special conditions under which the grantee is required to operate. (N.T. Vol. 1, at 176; C-8)

16. Exhibit C-8 reflects that Andronic Pappas was chairman of the Authority at the time of the grant agreement. (C-8)

Uncovering Of The Waste Pits

17. In August of 1989, during excavation for the construction of the ESTP renovations, two hazardous waste lagoons were uncovered. At that time the Authority notified DER of the existence of the waste lagoons. (B-1)

18. In 1989, prior to the point where the hazardous waste pits were uncovered during construction, the pits were not visible on the surface. (B-2, at 35)

19. Construction on the ESTP renovations ceased in August of 1989 and did not resume until January of 1991. (B-1)

20. DER ordered the Authority to take measures to clean up the waste lagoons/pits on November 26, 1990. Additionally, DER required suspension of construction activities during the investigation and remediation of the site. (B-1)

21. During the interim remediation, the Authority retained its contractors on site to resume construction activities after the remediation was completed. (B-1)

22. DER removed the waste from the site pursuant to the Hazardous Sites Cleanup Act (HSCA), Act of October 18, 1988, P.L. 756, 35 P.S. §6020.101 *et seq.* This removal included the excavation of the waste and the removal of the contaminated material to a lined disposal facility which DER constructed at the ESTP site. (B-1)

History of the Waste Lagoons

23. The two waste lagoons/pits were constructed north of the ESTP as early as 1953. (B-1)

24. The two hazardous waste lagoons lie east and west of each other. (B-2, at 49-50) The lagoons are known as the easterly and westerly lagoons. (A-5) Exhibit A-2A is a drawing prepared by the Authority's consulting engineers after the waste lagoons were uncovered, and it shows the ESTP plant as redesigned. The labels for the easterly waste lagoon and the westerly waste lagoon which are indicated on Exhibit A-2A should be switched because they are incorrect as originaly indicated on the drawing. (N.T. Vol. 1, at 49-50; A-2A)

25. The westerly lagoon is approximately 100 feet by 30 feet, while the easterly lagoon is approximately 100 feet by 40 feet. (N.T. Vol. 1, at 116)

26. The easterly and westerly lagoons are located in Logan Township, east of the Juniata River, approximately 400 feet south of the border of Antis Township and Logan Township. (B-2, at 49-50; A-5; A-13B, at 18-19)

27. The Authority is, and has been, record title holder of the real estate upon which the easterly lagoon and a portion of the westerly lagoon are located since 1950. (N.T. Vol. 1, at 63; A-5) Title to this portion of the site was transferred to the Authority from Altoona at that time. (A-5) The Authority has been the record title holder of the real estate upon which the remaining portion of the westerly lagoon lies since 1978. (N.T. Vol. 1, at 63; A-5) Title to this portion of the site was transferred to the Authority from Penn Central Corporation in 1978. (A-5)

28. A Pennsylvania Railroad (PRR) facility and rail line are located west of the ESTP, on the opposite side of the Little Juniata River from the ESTP site. (N.T. Vol. 1, at 90, 93-95; A-3)

29. The two lagoons were used throughout the 1950s and 1960s for disposal of hazardous and industrial waste. (B-1)

30. The PRR dumped oil and other wastes into the two waste lagoons. (B-1)

31. The Altoona Redevelopment Authority dumped demolition waste into the waste lagoons on the ESTP site in 1973. (B-1)

32. The Altoona Redevelopment Authority purchased the former PRR "test building" located on 17th Street on September 11, 1973. The Redevelopment Authority contracted with Tri-State Demolition for removal of the building. Demolition waste from this building was used to fill-in and close the waste pits at the ESTP site. (A-15)

33. Since the construction of the ESTP in the late 1940s, a fence has separated the ESTP from the area where the hazardous waste pits were located. (N.T. Vol. 1, at 111, 116) This fence was a chain link fence which surrounded the plant but did not obstruct the view from the plant. (N.T. 111, 118)

The Authority's Knowledge Of The Waste Pits

34. The only access to the area where the waste lagoons were located was by means of an asphalt road running through the ESTP. (B-1) In order to dump wastes into the lagoons, PRR employees had to drive their trucks across the asphalt road located on the ESTP site. (B-1)

35. Anyone seeking to enter Altoona's property would have had to obtain Altoona's permission to do so, otherwise Altoona would have charged the person with trespassing. (N.T. Vol. 2, at 20)

36. Altoona never charged PRR with trespassing on Altoona property. (N.T. Vol 2, at 20)

37. Access to the waste lagoons through the ESTP's fence was through a locked gate, the keys to which were held by Altoona's STP operator. (N.T. Vol. 1, at 117) The gate might not have been locked at all times, however. (N.T. Vol. 1, at 117)

38. William Burris began working at the ESTP in 1951 and retired in 1982. (B-4, Deposition of William Burris at 7) Burris knew that the waste pits were located northeast of the ESTP plant, outside the fence. While employed in the operation of the sewage plant, Burris observed PRR dumping wastes into the waste pits. The gate in the fence was usually bolted shut and sometimes was locked, and ESTP employees would open it so that trucks travelling through the plant could reach the waste pits and dump their waste. Burris believed the property on the side of the chain link fence opposite the ESTP plant was owned by the railroad, but he was not sure whether Altoona or the Authority had purchased it from the railroad. (B-4, Deposition of William Burris, at 9-11)

39. Robert Filer began working at the ESTP in 1963 and worked there for a short while then began working at the westerly STP. (B-4, Deposition of Robert Filer, at 6) Filer left his employment there in 1991. (B-4, Deposition of Robert Filer, at 7) While employed at the ESTP, Filer observed a black

truck with a tank on it, which he assumed was a railroad truck, dumping some unknown substance into the pit on the property outside the fence surrounding the ESTP (which he assumed was property owned by the PRR). (B-4, Deposition of Robert Filer at 6-9)

40. Ralph Moorehead began working at the ESTP in January of 1960 and worked there until July of 1979, also working briefly at the westerly STP. (B-4, Deposition of Ralph Moorehead at 6-7) Moorehead observed tanker trucks which he believes had "PRR" indicated on them entering the ESTP site several times daily. (B-4, Deposition of Ralph Moorehead at 9-10) Moorehead believes the existence of the waste lagoons was general knowledge among the ESTP employees. Until 1975, Moorehead observed that the gate in the chain link fence separating the ESTP from the waste pits was not locked. (B-4, Deposition of Ralph Moorehead at 10, 14)

41. Milton Rhodes began working for the ESTP in 1957 and, after a short time, was transferred to the westerly STP, where he worked until 1991. (B-4, Deposition of Milton Rhodes, at 7-8) Rhodes observed tank trucks dumping wastes into the waste lagoons near the ESTP and he believed it was the PRR which was doing the dumping. (B-4, Deposition of Milton Rhodes, at 8-10) At the time of the dumping, Rhodes believed the property on which the dumping was occurring belonged to the PRR. (B-4, Deposition of Milton Rhodes, at 10) Rhodes noted that the wastes being dumped smelled like cleaning fluids and lye to him. (B-4, Deposition of Milton Rhodes, at 10)

42. Norman S. Schorner was formerly the superintendent for both the ESTP and the westerly STP. Schorner began working for Altoona at the ESTP in

1953 and went on sick leave (and subsequently disability) on June 6, 1986, just before the Authority assumed operation of the ESTP. (B-4, Deposition of Norman S. Schorner, at 6, 9, 13-14) While Schorner worked at the ESTP, he was aware of the existence of a waste pit on the other side of the fence from the ESTP plant. (B-4, Deposition of Norman S. Schorner, at 8, 13)

43. Burris, Moorehead, and Rhodes each observed water fowl become sick or die after being exposed to the waste in the lagoons. (B-4, Deposition of William Burris, at 15-16, 33-34, Deposition of Ralph Moorehead, at 11-12, Deposition of Rhodes at 10)

44. The odor emanating from the waste lagoons masked the odor of the dying water fowl. (B-4, Deposition of William Burris, at 16-17)

45. The Altoona Mirror, which is a newspaper local to the Altoona area, published an article on March 31, 1970 with two accompanying photographs concerning water fowl landing in the lagoons and subsequently dying. (N.T. Vol 2, at 16; C-3)

46. At the time of the merits hearing, the Altoona Mirror, was the only local newspaper for Altoona, but there had previously been two newspapers. (N.T. Vol. 2, at 16)

47. Andronic Pappas was the Chairman of the Authority at the time of the merits hearing. (B-I)

48. Pappas was the Altoona council member in charge of the Bureau of Sewers from 1968 through 1971. (N.T. Vol. 2, at 10; B-1) While he served as Director of the Bureau of Sewers, Pappas met with the City engineer, Gwin Dobson and Foreman (GDF) and the superintendent of the sewage treatment plants

Schorner, on a weekly basis to listen to any complaints they had and to discuss policy matters and exercise general oversight. (N.T. Vol. 1, at 48, N.T. Vol. 2, at 11)

49. Also, as Director of the Bureau of Sewers, Pappas periodically toured the ESTP, walking around and examining the plant. (N.T. Vol. 2, at 13)

50. Pappas is unaware of any investigation by Altoona to determine why the water fowl were dying. (N.T. Vol. 2, at 19)

51. Pappas is unaware of any activity by either the Authority or Altoona in 1970 to discover what was taking place on the property adjacent to the ESTP, and he would have known if such activity had been undertaken by Altoona. (N.T. Vol. 2, at 20)

52. Pappas did not know about the waste pits until he received a call from Executive Director Cochran in August of 1989 informing him that the waste pits had been uncovered. (B-2, at 154)

The Consulting Engineers' Knowledge Of The Waste Pits

53. Louis Gwin, the founder of GDF, is a former city engineer for Altoona. Gwin was involved in construction of the ESTP in the 1940s. Gwin founded GDF in 1954 and became the consulting engineer of record for Altoona. Gwin and his firm have been the consulting engineers for Altoona (and later the Authority) with regard to the ESTP since the 1950s. (N.T. Vol.1, at 48-49, 112-113, N.T. Vol. 2, at 20)

54. GDF did consulting work for the ESTP during the 1960s and 1970s and was the consulting engineer for the Authority at the time of the merits hearing. (N.T. Vol. 1, at 48, 112)

55. GDF's Mr. Butler has performed work at the ESTP since 1968. (N.T. Vol. 1, at 107)

56. Louis Gwin was active in GDF until 1971. (N.T. Vol. 1, at 113)

57. In 1973, GDF conducted some preliminary studies for Altoona in connection with renovation of the ESTP. Subsequently, in 1979, GDF began a facilities plan. (N.T. Vol. 1, at 49)

58. The Authority applied for and received DER's approval of its plans for the ESTP renovation between 1979 and 1985. After the Authority received a construction grant in 1986, GDF initiated the design for the ESTP renovation. (N.T. Vol. 1, at 49)

59. Mark Glenn is a civil engineer who has been employed by GDF since 1977 and who has been president of GDF since 1985. (N.T. Vol. 1, at 32)

60. Mark Glenn and GDF first became aware of the existence of the hazardous waste pits in August of 1989. (N.T. Vol. 1, at 53; A-13B, at 24-25)

61. Exhibit A-1A is a photocopy of an aerial photograph taken on September 4, 1967 by the United States Department of Agriculture which depicts the ESTP as it existed in 1967. (N.T. Vol. 1, at 55-56; A-1A) The northern border of the ESTP's fence is indicated in red on Exhibit A-1A, while the road which runs through the center of the ESTP is indicated in blue. (N.T. Vol. 1, at 110-111; A-1A) The waste lagoons are visible on Exhibit A-1A to the north of the ESTP. (N.T. Vol. 1, at 56; A-1A) Mark Glenn did not review the September 4, 1967 aerial photo until after the hazardous waste pits were uncovered in August of 1989. (N.T. Vol. 1, at 97-98)

62. Exhibit A-1B is a photocopy of a United States Geologic Survey (USGS) photograph from May 23, 1972 showing the ESTP, but the waste pits are not visible. The general location of the waste pits is indicated in red on Exhibit A-1B. (N.T. Vol. 1, at 57-58; A-1B)

63. Exhibit A-3 is a photocopy of a 1972 USGS topographic map based on the May 23, 1972 aerial photograph which is Exhibit A-1B. This map showed the ESTP as well as two blue dots which were the hazardous waste pits. (N.T. Vol. 1, at 60; A-3)

64. Mark Glenn relied on the 1972 USGS map in connection with his work on the ESTP renovation project. (N. T. Vol. 1, at 96-98) He did not believe the 1972 USGS map indicated anything out of the ordinary regarding ground and topographic conditions for the area. (N. T. Vol. 1, at 97)

65. When Mark Glenn reviewed the 1972 USGS map during GDF's designing of the ESTP renovations, he believed the blue dots on the map indicated water retention areas resulting from Hurricane Agnes. (N.T. Vol. 1, at 60, 96) He further believed that the blue dots were insignificant to the ESTP's design because the entire site was surrounded by low-lying water retaining wetland-type areas which would retain water not only during an Agnes-type storm but also at any time of the year during high water conditions. (N.T. Vol. 1, at 60-61) There is no evidence that Glenn further checked to confirm his assumption that the lagoons were water retention areas.

66. Hurricane Agnes occurred in June of 1972, after the May 23, 1972 photograph was taken. (N.T. Vol. 1, at 96)

67. During the design phase of the ESTP renovations on April 13, 1986, GDF had additional aerial photographs of the ESTP site taken. Exhibit A-1D is a photocopy of one of these April 13, 1986 photographs. Exhibit A-1D does not show depression or areas holding water in the area where the waste pits were uncovered in 1989. (N. T. Vol. 1, at 61; A-1D) The area where the waste pits were located is indicated on Exhibit A-1D in red. (N.T. Vol. 1, at 62; A-1D)

68. Mark Glenn relied on the 1986 aerial photography of the site in connection with the ESTP renovation project. (N.T. Vol. 1, at 97)

69. The areas where the waste pits were uncovered were high mounded areas where the land was otherwise low-lying wetlands. (N.T. Vol. 1, at 83; A-13B, at 53)

70. Glenn did not find it significant that in 1972, the area appeared to be retaining water and in 1986, the same area had a couple of earthen piles on it. (N.T. Vol. 1, at 97)

71. It was GDF's responsibility to determine whether the soils at the ESTP plant site were structurally sound for purposes of the renovation project. (N.T. Vol. 1, at 106) GDF caused a subsurface investigation of the ESTP site to be performed during the design phase of the renovation project. The subsurface investigation was conducted by L. Robert Kimball & Associates Consulting Engineers (Kimball). The purpose of the investigation was to determine the soil and rock conditions at the site. (N. T. Vol. 1, at 65)

72. Exhibit C-4 is the test boring location plan which was included in the contract documents for the ESTP renovation project under Glenn's

engineering seal. (N.T. Vol. 1, at 82-83) Earth piles were indicated on Exhibit C-4 in the area where the hazardous waste pits were eventually uncovered. (N.T. Vol. 1, at 95)

73. The results of the subsurface investigation were indicated in the bid documents and contract documents for the renovation project which were submitted to DER, EPA, and the United States Army Corps of Engineers (Army Corps of Engineers). (N.T. Vol. 1, at 66) The boring logs were shown on the drawings contained in these documents and the subsurface investigation was included by reference. (N.T. Vol. 1, at 66)

74. Kimball took a number of core boring samples according to a boring plan prepared by GDF. (N.T. Vol. 1, at 86-87) Borings numbers 3 and 4 were conducted in the area where the waste pits were uncovered. The test boring logs for borings number 3 and 4 are contained in Exhibits C-1 and C-2. (N.T. Vol. 1, at 87-88) These test borings are circled in red on the map which is Exhibit C-4. (N.T. Vol. 1, at 82, 88; C-4)

75. Exhibit B-3 is a jointly stipulated exhibit containing Kimball's test boring logs for the ESTP site. (N.T. Vol. 1, at 77; B-3) It was included in the documents submitted to DER, EPA and the Army Corps of Engineers only by reference. (N.T. Vol. 1, at 95)

76. The sampling results for core hole number 4 indicate that ashes were present there in September of 1986. (N.T. Vol. 1, at 88; B-3; C-2) The sampling results for core hole number 25 also indicated the presence of ashes in September of 1986. (N.T. Vol. 1, at 91, 110; B-3) Core hole number 25 is circled in blue on Exhibit C-4. (N.T. Vol. 1, at 110)

77. In Glenn's experience, ashes are not a naturally present condition. (N.T. Vol. 1, at 93)

78. Mark Glenn studied the boring logs contained in B-3 at the time GDF was performing the design work for the renovations. (N.T. Vol. 1, at 87)

79. The ash material indicated for core hole number 4 indicated to Glenn a condition which he had observed at the site regarding the composition of the ground's surface. (N.T. 88)

80. Mark Glenn had observed ash or cinder material at the ESTP site in areas other than the areas where the two waste pits were uncovered. (N.T. Vol. 1, at 88)

8i. Mark Glenn also observed ash or cinder material on the side of the Little Juniata River opposite of the ESTP site at the rail classification yard and at the Easterly CSO facility one mile upstream along the railroad's main line. (N.T. Vol. 1, at 90)

82. No rail line has ever run through the ESTP site. (N.T. Vol 1, at 94)

83. In connection with the design work for the ESTP renovation project, Mark Glenn and other GDF employees spoke with the ESTP's superintendent, Norman Schorner, and could have spoken with any other employees who worked at the ESTP. (N.T. Vol. 1, at 107)

Estoppel

84. DER approved the design plans the Authority submitted to it locating the clarifiers over the area where the waste pits were uncovered. (A-13B, at 34-35) Neither DER, EPA, nor the Army Corps of Engineers required

an environmental audit for hazardous waste at the site. (N.T. Vol. 1, at 67; A-13B, at 58-59)

85. Neither DER, EPA nor the Army Corps of Engineers raised any questions with GDF concerning the subsurface investigation after receiving the Authority's bid documents and contract documents for the renovation project, nor did they recommend that any further subsurface investigation be performed. (N.T. Vol. 1, at 66)

86. A Department of Health Sanitary Engineering report dated May 27, 1970 regarding Penn Central Railroad's (Penn Central) Logan Township facility indicates that Penn Central was removing waste oil to a cinder landfill in Antis Township. (A-6 at No. 5)

87. A DER Bureau of Water Quality Management Waste Discharge Inspection Report dated February 13, 1973 regarding Penn Central's facility in Pinecroft, Antis Township, Blair County indicates Penn Central had two impoundments located southwest of the railroad bridge in Pinecroft. This report further indicates that both impoundments contained thick, dark oil and oil sludge and that neither of the impoundments was lined. The report describes these impoundments as lying 1,000 feet west of the Little Juniata River and 20 feet higher in elevation than the river. The report says the northern lagoon is 40 feet by 30 feet and 5 feet deep, and the southern lagoon is 100 feet by 50 feet and approximately 8 feet deep. DER's February 13, 1973 report states that the southern lagoon was half full of oil, along with piles

of track ties, old tires, cans and other solid wastes, and that the company transported oil to unpermitted, unlined impoundments in violation of the law. (A-6 at No. 6)

88. A second DER Bureau of Water Quality Management Waste Discharge Inspection Report dated February 18, 1973 regarding the Penn Central facility in Pinecroft, Antis Township indicates that Penn Central had dumped additional oil into both impoundments since DER's previous inspection. The inspector noted that he observed a Penn Central tank truck driving on a dirt road which ran parallel to the railroad tracks, the valve on the tank was open, and that the tank was spilling thick, black oil onto the road. The inspector further noted that he had stopped the truck and questioned the driver as to whether he had ever dumped oil into the two lagoons and that the driver had responded that he did so once a week and that the oil was from the Penn Central shops. DER's February 18, 1973 inspection report then noted a continuing violation regarding the unpermitted impoundments. (A-6 at No. 7)

89. In a letter dated May 3, 1973 from DER to Penn Central, DER stated that its inspector had reported that two impoundments located southwest of the railroad bridge in Pinecroft contained thick, dark oil and oil sludge. The letter continued to explain that since the two impoundments were approximately 1,000 feet from and approximately 20 feet higher in elevation than the Juniata River and were unlined, groundwater contamination had resulted. DER then directed Penn Central to advise DER of the steps it had taken to remedy this situation. (A-6 at No. 2)

90. In a letter dated May 14, 1973, Penn Central advised DER that the two oil impoundments located southwest of the railroad bridge in Pinecroft were closed as of March 14, 1973 but had left a deep hole which had been filled. (A-6 at No. 3)

91. The DER HSCA site Status Reports for the waste pits at the ESTP site indicated:

> Pit #1, situated to the west is approximately 40'x30'x5' deep and Pit #2, situated to the east is approximately 150'x50'x5' deep. These estimates are based on a 1973 inspection report.

(A-6, at No. 1)

DER's Review Of The Authority's Change Order Requests

92. The Authority submitted to DER change order funding requests[3] for grant assistance to pay for the costs related to the delay of construction caused by removal of the hazardous waste from the lagoons. (B-1) The change orders requests which are the subject of this appeal amount to approximately $5,755,729. (B-1)

93. DER reviews change order requests using a policy and procedure jointly developed between EPA and DER for the review of change orders under the Title II Construction Grants Program. (N.T. Vol. 1, at 135) Under this policy, DER first conducts an administrative completeness review and then

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[3] As we explained in Upper Montgomery Joint Authority v. DER, EHB Docket No. 92-172-E (Opinion issued February 11, 1993), change orders cover circumstances where there is a need to modify an element of the project during construction from what was approved in the terms of the original grant as to the contract's plans and specifications.

performs a technical allowability and eligibility review of the change order requests. (N.T. Vol. 1, at 135-136)

94. DER's policy separates change orders into two broad categories: routine, i.e., those under $100,000, and non-routine, i.e., those in excess of $100,000. (N.T. Vol. 1, at 136-137)

95. With non-routine change orders, the grantee, the contractor, and the engineer negotiate a change order, coming to an agreement on an amount they believe is fair and reasonable, and then submit the appropriate documentation and cost and pricing data to DER's regional office. DER's regional office forwards copies of this submission to its central office and the Army Corps of Engineers, which then all conduct simultaneous parallel reviews. (N.T. Vol. 1, at 136-137)

96. The Authority submitted Change Order No. 11 to contract 118 to DER in August of 1990, and an initial review was undertaken by DER and the Army Corps of Engineers. (N.T. Vol. 1, at 138)

97. When DER's Thomas Shaul, who is a project manager with DER, was assigned the Altoona projects in January of 1991 (upon the departure of the previous project manager), preliminary comments had been provided to the grantee and its consulting engineer for response. (N.T. Vol. 1, at 134, 138-139)

98. The Authority submitted change order requests Nos. 12 and 34 to Contract 118 and No. 8 to Contract 119 to DER after Shaul was assigned the Altoona projects. (N.T. Vol. 1, at 138)

99. DER's Bureau of Solid Waste Management was also involved in the investigation of the hazardous waste lagoons and requested DER's Bureau of Investigation (BOI) to perform an investigation of the lagoons for purposes of assigning liablity for clean-up. (N.T. Vol. 1, at 139)

100. DER's review of the Authority's change order requests was put on hold pending the results of an investigation by DER's BOI. The BOI's investigation was completed late in the summer of 1991. (N.T. Vol. 1, at 139-140)

101. Exhibit C-5 is a photocopy of a letter which was contained in the general information submitted to DER for Change Order No. 11. It is dated August 1, 1989, and is from the Paul A. Laurence Company to GDF. (N.T. Vol.1, at 103) Paul A. Laurence Company was the general contractor for the ESTP renovation. (N.T. Vol. 1, at 104) This August 1, 1989 letter states:

> Today a series of test holes were dug in the area of the proposed Aeration Tank. Debris including [sic] demolition materials and petroleum products were discovered down to a depth of 4' and 6'. ...
>
> The Authority confirmed today that this area was once a disposal site for demolition materials and waste oils from local industries. This is a differing site condition and excavation and removal of the material is not part of our contract.

(N.T. Vol. 1, at 104-105; C-5)

102. DER's policy provides as to differing site conditions:

> [W]here actual conditions were known or could reasonably have been determined by the grantee and/or the grantee's design engineer, a change order will generally be allowable to cover the costs of construction which would have been incurred had the conditions been accurately described in the bid documents. However, costs other than

> those described above; [sic] e.g., costs of re-design and costs of delay, will not be eligible for funding by change order.

(N.T. Vol. 1, at 150, 205-207; C-7)

103. Based on the information gathered by the BOI and the information submitted in support of the change order requests, DER determined that the waste lagoons could reasonably have been discovered prior to bidding and start of construction at the ESTP. (N.T. Vol. 1, at 150-153) In arriving at this determination, DER found significant the BOI's interviews with Altoona and/or Authority employees (including Filer, Burris, and Rhodes), and the deed draft showing Altoona's and the Authority's ownership of the property around the ESTP. (Exhibit A-5) DER also found significant the Altoona Mirror article and photographs (Exhibit C-3), and boring logs for bore holes nos. 3 and 4 contained in GDF's December 19, 1990 submission (Exhibit A-12). DER found it significant that the people interviewed by the BOI had personally observed dumping in the hazardous waste lagoons occurring during the 1950s, 1960s, and 1970s. (N.T. Vol. 1, at 141-150; A-15) DER also was aware of and considered that the only way to reach the lagoons was through the ESTP, and that the consulting engineer had been the consultant for Altoona for a long period of time, long enough to cover the period when the waste lagoons were in operation (N.T. Vol. 1, at 201-202) DER also was aware of and considered that the 1972 topographical map shows both waste pits. (A-15)

104. In a letter dated December 18, 1991, DER's Leon Oberdick, who was then the program manager for water management at DER's South Central Regional Office, wrote Andronic Pappas, Chairman of the Authority, to inform the

Authority that its delay impact Change Orders Nos. 11, 12, and 34 to Contract No. 118 and Change Order No. 8 to Contract No. 119 were considered unallowable for federal grant participation. (N.T. Vol. 1, at 140, 165, 171; A-15) Oberdick's letter explained that DER had concluded, on the basis of the investigation conducted by its BOI, that the Authority should have known of the existence of the hazardous waste pits or could reasonably have been expected to discover this condition during the design phase or pre-bid phase of its renovations. (A-15) Oberdick's letter further advised the Authority that it was DER's final decision, but the Authority could direct a challenge to DER's Central Office. (A-15)

105. On January 20, 1992, the Authority wrote DER, challenging Oberdick's letter. (A-16)

106. Stuart I. Gansell, is Chief of DER's Division of Municipal Planning and Finance within DER's Bureau of Water Quality Management. (N.T. Vol. 1, at 196, 199; A-16)

107. Gansell's June 10, 1992 letter reaffirmed DER's decision to deny the delay impact change order requests because Altoona, the Authority, or its consultants should have known of the existence of the hazardous waste lagoons or could reasonably have been expected to discover them during the project's design phase. (N.T. Vol. 1, at 201; A-16)

108. In its review of the Authority's change order requests, DER considered the provision contained in §202(a)(1) of the Clean Water Act, 33 U.S.C. §1282(a)(1), relating to grant funding for the Altoona wastewater treatment project. (N.T. Vol. 1, at 201-203) DER interpreted §202(a)(1) to

mean that DER was obligated to offer a construction grant to Altoona and that this grant would be eligible for 75% of the cost of construction of Altoona's wastewater treatment plant, as opposed to being at 55% of the construction cost. (N.T. Vol. 1, at 202-203)

109. Paragraph 3 of DER's June 10, 1992 letter states DER determined that the provision contained in §202(a)(1) of the Clean Water Act, 33 U.S.C. §1282(a)(1), did not eliminate the usual eligibility requirements for change order requests and that DER's guidance policy on eligibility applied, even to the Altoona project. (A-16)

110. The provision regarding the Altoona wastewater treatment plant project contained in §202(a)(1), 33 U.S.C. §1282 (a)(1), did not change DER's management of the ESTP renovation project, and DER did not give Altoona any special consideration in terms of allowability or eligibility of costs it might incur. (N.T. Vol. 1, at 203)

111. Paragraph 5 of DER's letter rejected the Authority's contention that the delay impact change order requests were allowable pursuant to the federal regulations at 40 C.F.R., Chapter 1, Part 35, Subpart I, Appendix A, §A.1(g)(2)(ii) as "costs of equitable adjustments" because DER determined that there was mismanagement in that the grantee knew or should have known that the hazardous waste lagoons existed. (N.T. Vol. 1 at 172, 206; A-16)

112. Paragraph 1 of DER's June 10, 1992 letter states that the location of the two impoundments used to deposit oil and other debris by the Penn Central Railroad, to which DER's February 13, 1973 inspection report refers, was different from the hazardous waste lagoons near the ESTP and that

DER is unaware of any DER inspections specific to lagoons at the ESTP site. (A-16)

DISCUSSION

As the Authority and DER both recognize, the burden of proof in this matter rests with the Authority, since it is asserting that DER's denial of its change order requests was improper. Franklin Township Municipal Sanitary Authority and Borough of Delmont v. DER, 1990 EHB 916 (FTMSA); 25 Pa. Code §21.101(a). To sustain this burden, the Authority must demonstrate that DER's action was an abuse of its discretion or an arbitrary exercise of its duties. Warren Sand & Gravel v. DER, 20 Pa. Cmwlth. 186, 341 A.2d 556 (1975). As we noted in Martin L.Bearer t/d/b/a/North Cambria Fuel Co. v. DER, et al., EHB Docket No. 83-091-G (Adjudication issued August 2, 1993), we often use the term abuse of discretion to denote our scope of review and we will do so here as well. The Board's review is *de novo*; thus, the Board may substitute its discretion for that of DER where we find DER has abused its discretion. Residents Opposed to Black Bridge Incinerator (ROBBI) v. DER, et al., EHB Docket No. 87-225-W (Adjudication issued May 18, 1993); Morcoal Co. v. DER, 74 Pa. Cmwlth. 108, 459 A.2d 1303 (1983).

As the parties have stipulated, DER administers the Federal Construction Grant Program for sewerage construction projects in Pennsylvania through its Bureau of Water Quality Management, Division of Municipal Facilities and Grants. This program is authorized by §201 of the Clean Water Act, 33 U.S.C. §1281, and the regulations promulgated pursuant thereto at 40 C.F.R., Part 30, Subchapter B. Pursuant to §205(g) of the Clean Water Act, 33

U.S.C. §1285(g), the Administrator of the EPA (Administrator) is authorized to grant any state the reasonable costs of administering the Construction Grants Program. As we acknowledged in FTMSA, *supra*, EPA and the Commonwealth of Pennsylvania entered into an agreement on June 29, 1979, captioned "Agreement For The Delegation of Certain Wastewater Treatment Construction Grant Functions Between The United States Environmental Protection Agency and The Commonwealth of Pennsylvania", which leaves final control over all Step 2 and 3 construction grants in EPA's hands. See FTMSA, at 952. On February 16, 1989, EPA and the Commonwealth of Pennsylvania entered into an agreement captioned, "Agreement For The Delegation of Certain Wastewater Treatment Construction Grant Functions" (Exhibit C-9), in which DER assures EPA that it will:

> execute all functions and responsibilities delegated to it by EPA in full and complete conformance with the intent and substance of all applicable Federal laws, regulations, orders, and policies, as interpreted by EPA, which are presently in effect or which may come into effect during the life of this AGREEMENT.
>
> (C-9)

The Authority is a grantee under the Federal Construction Grants Program and is to use its grant for the renovation and upgrading of the ESTP. The Authority received its Step 3 construction grant on September 23, 1988, and this Step 3 grant agreement (Exhibit C-8) details the nature of the grant, the amounts awarded, and sets forth special conditions under which the grantee is required to operate.

As we discussed in Upper Montgomery Joint Authority v. DER, EHB Docket No. 92-172-E (Opinion issued February 11, 1993), change orders cover circumstances where there is a need to modify an element of a sewerage project during construction from what was approved in the terms of the original grant and to the contracts' plans and specifications. DER reviews change order requests under a policy which was jointly developed by DER and EPA for DER's utilization. Under this policy, DER is first required to conduct an administrative completeness review of the change order requests and then proceed to a technical allowability and eligibility review. Since the Authority's change order requests at issue in this matter were non-routine, i.e., in excess of $100,000, DER conducted a detailed review of the Authority's submissions in conjunction with the Army Corps of Engineers.

DER denied the Authority's delay impact change order requests Nos. 11, 12, and 34 to Contract No. 118 and No. 8 to Contract No. 119 as unallowable for federal grant participation. In its review of Altoona's delay impact change order requests, DER considered the provision contained in §202(a)(1) of the Clean Water Act, 33 U.S.C. §1282(a)(1), relating to grant funding for the Altoona wastewater treatment plant project. DER determined that the Altoona provision in §202(a)(1) did not eliminate the usual eligibility requirements for change order requests and that DER's guidance policy on eligibility applied, even to the Altoona project. DER further determined that Altoona, the Authority, or its consultants should have known of the existence of the hazardous waste lagoons or could reasonably have been expected to discover them during the project's design phase, so the change

order requests were ineligible under DER's policy. DER also rejected the Authority's contention that the delay impact change order requests were allowable pursuant to the federal regulations at 40 C.F.R., Chapter 1, Part 35, Subpart I, Appendix A, §A.1.(g)(2)(ii) as "costs of equitable adjustments", because DER determined that there was grantee mismanagement in that the Authority knew or should have known that the hazardous waste lagoons existed. DER furuther rejected the Authority's assertion that DER had prior knowledge of the waste pits.

In its appeal, the Authority argues that §202(a)(1) contains a provision for the Altoona project which it says eliminates the usual change order eligibility requirements. Thus, it argues that DER's denial of the challenged requests was inappropriate. The Authority does not dispute that DER's determination is to be made in accordance with 40 C.F.R., Chapter 1, Part 35, Subpart I, Appendix A, §A.1.g. See Appellant's Reply Brief at p. 4.[4] The Authority urges, however, that there is no basis for finding mismanagement by the Authority here, and that the delay impact costs are allowable. Additionally, the Authority contends DER is estopped from denying the change order requests. We will address each of these issues in this Adjudication.

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4 As the parties agree that DER's regulation at 25 Pa. Code §103.14 was inapplicable to the Authority's change order requests that are the subject of this appeal, we need not address the arguments raised in appellant's initial post-hearing brief regarding the applicability of 25 Pa. Code §103.14 and that 25 Pa. Code §103.14 is invalid to the extent it is inconsistent with the federal regulations.

Was DER's Denial Improper In View Of 33 U.S.C. §1282(a)(1)?

In its post-hearing brief, the Authority contends §202(a)(1) of the Clean Water Act, 33 U.S.C. §1282(a)(1), expressly covers funding for a construction of the instant Altoona project and that this federal statutory provision extends to all construction costs, including the change orders, and eliminates the usual eligibility requirements. Inexplicably, DER's brief does not address this issue. While DER's argument on this point on its behalf is waived, see Lucky Strike, *supra*, we nevertheless must examine the issue as it has been raised by the appellant. There is no evidence in this matter of EPA's interpretation of §202(a)(1).[5] However, as DER made a determination as to the applicability of that provision which is challenged in the instant appeal, we will review DER's interpretation of §202(a)(1).

The federal Clean Water Act at §202(a)(1), provides in relevant part:

> (1) The amount of any grant for treatment works made under this chapter from funds authorized for any fiscal year beginning after June 30, 1971, and ending before October 1, 1984, shall be 75 per centum of the cost of construction thereof (as approved by the Administrator), and for any fiscal year beginning on or after October 1, 1984, shall be 55 per centum of the cost of construction thereof (as approved by the Administrator), unless modified to a lower percentage rate uniform through a State by the Governor of that State with the concurrence of the Administrator.
>
> . . .

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5 While there was testimony that DER contacted EPA to see whether EPA agreed as to DER's processing of the change order requests (N.T. Vol. 1, at 169), there is no evidence as to whether EPA commented on how to interpret 33 U.S.C. §1282(a)(1). Thus, EPA's interpretation of the statutory provision for the Altoona project is not part of the record.

> Notwithstanding the first sentence of this paragraph, in the case of the Wyoming Valley Sanitary Authority project mandated by judicial order under a proceeding begun prior to October 1, 1984, and a project for wastewater treatment for Altoona, Pennsylvania, such projects shall be eligible for grants at 75 percent of the cost of construction thereof.

33 U.S.C. §1282(a)(1) (emphasis added).

The Authority contends that the first sentence of §202(a)(1), "limits construction costs to those 'approved by the Administrator' of EPA which is the basis for usual eligibility requirements." The Authority then argues that the provision in §202(a)(1) for the Altoona project eliminates the usual eligibility requirements.

In denying the Authority's delay impact change order requests, DER interpreted §202(a)(1) as mandating approval of a construction grant for Altoona and mandating that the grant would be eligible for a 75% rate, as opposed to a 55% rate. (N.T. Vol. 1, at 202-203) According to DER's interpretation of §202(a)(1), this section does not eliminate the usual eligibility requirements for change order requests and DER's guidance policy on eligibility is still applicable to the Altoona project. We ordinarily defer to DER's interpretation of a statute it administers, unless DER's interpretation is clearly erroneous. Carlos R. Leffler, Inc. v. DER, EHB Docket No. 91-210-W (Consolidated Docket) (Adjudication issued June 23, 1993). We do not find DER's interpretation to be clearly erroneous here.

As the federal court of appeals for the Third Circuit has explained:

> [W]hen interpreting a statute, the starting point is of course the language of the statute itself. See American Tobacco Co. v. Patterson, 456 U.S. 63, 68, 102 S.Ct. 1534, 1537, 71 L.Ed.2d 748 (1982). If the language is clear and

> unambiguous, and there is no "clearly expressed legislative interpretation to the contrary, that language must ordinarily be regarded as conclusive". Consumer Product Safety Commission v. GTE Sylvania, Inc., 447 U.S. 102, 108, 100 S.Ct. 2051, 2056, 64 L.Ed.2d 766 (1980).

National Freight, Inc. v. Larson, 760 F.2d 499, 503 (3d Cir. 1985), *cert. denied*, 474 U.S. 902, 106 S.Ct. 228, 88 L.Ed.2d 227 (1985).

It is assumed that the legislative purpose is expressed by the ordinary meaning of the words used by Congress. American Tobacco Co. v. Patterson, 456 U.S. 63, 68, 102 S.Ct. 1534, 1537, 71 L.Ed.2d 748 (1982). "[A]bsent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive". Id. at 68, 102 S.Ct. at 1537, 71 L.Ed.2d at 755. A review of both the plain language and legislative history of the 1987 amendments to the Clean Water Act and §202(a)(1) does not support the Authority's position.

The Clean Water Act Amendments of 1987 added the last sentence to §202(a)(1) dealing with the Altoona wastewater project. The language of the first sentence of §202(a)(1) clearly provides that for any fiscal year beginning on or after October 1, 1984, the amount of any grant for treatment works shall be 55% of the cost of construction thereof (as approved by the Administrator). The requirement that the costs must be approved by the Administrator means that they must qualify as eligible under the applicable regulations. The last sentence of §202(a)(1) states that the Altoona wastewater treatment project shall be eligible for grants at 75% of the cost of construction thereof. This sentence does not state that the usual eligibility requirements of the applicable regulations do not apply to the

Altoona project, as the Authority contends, nor were we able to find anything in the legislative history of this provision to show that the Congress' purpose was as the Authority suggests.[6]

The provision for the Altoona wastewater project was added to §202(a)(1) by way of the Clean Water Act Amendments of 1987, Pub.L. No. 100-4, 101 Stat. 7 (1987). Section 202(c) of Pub.L. 100-4 amended "section 202(a)(1) of the Act to provide that the Wyoming Valley Sanitary Authority project mandated by judicial order under a proceeding begun prior to October 1, 1984, and a project for wastewater treatment for Altoona, Pennsylvania shall be eligible for grants at 75 per cent of the cost of construction thereof." 1987 U.S. Code Cong. & Admin. News 5.

The legislative history for Pub.L. 100-4, as cited at 101 Stat. 7, is found with H.R. 1 (S.1) (S.76). H.R. 1 was considered and passed in the House of Representatives on January 8, 1987 and was considered and passed in the Senate on January 14, 16, 20, and 21, 1987, but was vetoed by President Reagan. See 101 Stat. 7; 133 Cong. Rec. (daily ed. January 8, 14, 16, 20, and 21, 1987). The House overrode the President's veto on February 3, 1987, and the Senate overrode his veto on February 4, 1987. See 101 Stat. 7. H.R. 1 is virtually identical to S. 1128, which was adopted in the 99th Congress and pocket vetoed by the President on November 6, 1986. See 133 Cong. Rec. (daily ed. January 8, 1987). We could find nothing in the legislative history for

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6 Despite the failure of the parties' briefs to set forth any legislative history for §202(a)(1) regarding the Altoona wastewater treatment project, we have conducted extensive and exhaustive research on this issue.

either H.R. 1 or S.1128 (or any related proposal) which would amount to a clearly expressed legislative intention that the last sentence of §202(a)(1) is anything other than a provision for the Altoona wastewater treatment project to be eligible for grants at 75% of the cost of construction thereof rather than 55% of the cost of construction thereof. We found nothing to indicate Congress' purpose in enacting §202(c) of the Clean Water Act Amendments of 1987 was to remove the Altoona wastewater treatment project from complying with the usual eligibility requirements for change order requests. See generally, A Legislative History of the Water Quality Act of 1987 (1988).

We thus find no abuse of DER's discretion in its concluding that §202(a)(1) did not eliminate the usual eligibility requirements for change order requests and that DER's guidance policy on elegibility applied, even to the Altoona project.

Was DER's Denial Pursuant To Its Policy and the Federal Regulation Proper?

We next turn to a consideration of whether the Authority has proven that DER abused its discretion in determining its change order requests were ineligible for grant funding pursuant to 40 C.F.R., Chapter 1, Part 35, Subpart I, Appendix A, §A.1.g, and DER's policy on differing site conditions.

In its post-hearing brief, DER argues that the hazardous waste pits were a foreseeable condition which was not accounted for during the design phase of the ESTP renovation project because of grantee mismanagement. DER points to a number of matters in the evidence before us which it says indicate that management from the ESTP knew or should have known about the waste disposal activity and that the design engineers from GDF knew or should have

known about the waste pits during the time they served as consultants to the Authority and Altoona, or at least could have detected them long before construction of the renovations began.

To show that the Authority knew about the hazardous waste pits before the day when they were uncovered in August of 1989, DER points to Exhibit C-5, which is a letter dated August 1, 1989 to GDF from the Paul A. Laurence Company, the general contractor for the ESTP renovation. This letter was contained in the general information submitted to DER to support the Authority's change order request number 11. Exhibit C-5 was introduced by DER at the merits hearing and admitted, over the Authority's hearsay objection, because it had been submitted to DER in support of the Authority's change order request.

In its post-hearing reply brief, the Authority renews its objection to the admission of Exhibit C-5 on hearsay grounds.[7]

It is obvious that the Authority's concern as to this letter being admitted into evidence arises because in this letter, the representative of the Paul A. Laurence Company states that an Authority representative was able to confirm on the same day that the waste pits were discovered that the ESTP site had been used for disposal of demolition materials and waste oils from

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[7] As we explained in C&K Coal Company v. DER, 1992 EHB 1261, hearsay is a statement made by an out-of-court declarant offered for the truth of the assertion (citing Semieraro v. Com. Utility Equip. Corp., 518 Pa. 454, 544 A.2d 46 (1988)).

local industries, thus serving as a party admission and establishing prior knowledge of the waste areas on the part of the Authority. (See Findings of Fact No. 101)

Citing Durkin v. Equine Clinics, Inc., 376 Pa. Super. 557, 546 A.2d 665 (1988), the Authority contends that the exception to the hearsay rule for admissions made by a party's agent is not satisfied here because there is no evidence that the declarant of the statement in Exhibit C-5 was an agent of the Authority authorized to make the statement. While this might have been the case had the letter not been provided to DER, Exhibit C-5 was provided to DER as part of the submissions supporting the Authority's change order request. (N.T. Vol. 1, at 103, 211) The Authority, through its consulting engineers, provided information to DER in an attempt to receive DER's approval of its change order request. The Authority does not dispute that GDF was acting on its behalf and under its authority when it provided this information to DER. The Authority in this matter elected to apply for grant funding for its STP renovations, and it accordingly submitted information to DER in order to receive this grant funding. Had the Authority elected to renovate the ESTP without grant funding, it need not have submitted this information supporting the grant funding to DER. When the Authority submitted this information to DER including the statement in Exhibit C-5, it lost its ability to successfully raise a hearsay objection to the matters contained therein. Exhibit C-5 was provided to DER without any qualifications being placed on the truth of the challenged statement contained in Exhibit C-5. Thus, we will not disturb the admission of Exhibit C-5 into the record.

On the basis of Exhibit C-5, it is, thus, apparent that the Authority knew of the hazardous waste pits before they were uncovered, as it was able to confirm on the day the pits were uncovered that the ESTP site was once a disposal site for demolition materials and waste oils from local industries.

Moreover, the evidence in the record shows that the Authority should have known about the hazardous waste lagoons or could reasonably have determined that they existed at the ESTP site.

The evidence shows the Authority has been the record title holder of the real estate upon which the easterly lagoon and a portion of the westerly lagoon are located since 1950, when it took title to the property from Altoona (Exhibit A-5). The easterly and westerly lagoons were used throughout the 1950s and 1960s for disposal of hazardous and industrial waste. As the owner of the land when the disposal was occurring, the Authority could have discovered that the hazardous waste lagoons were located on its property simply by inspecting its property. See, e.g., Havens v. Strayer, 326 Pa. 563, 193 A.13 (1937) (possession of any kind of property carries with it an obligation to take every reasonable precaution to prevent people from being injured by such property). The Authority contends that since the ESTP was being operated by Altoona at the time the dumping occurred and the Authority was only a financing vehicle at that time, the Authority did not know what was occurring on the ESTP site which it owned. Such "voluntary blindness" does not absolve the Authority from knowing about the conditions on its land.

Additionally, as the property owner, the Authority is chargeable with constructive notice of a defective condition which exists for such a period of

time that in the normal course of events, it would have come to the property owner's attention. Green v. Prise, 404 Pa. 71, 170 A.2d 318 (1961). The evidence in this matter shows that the dumping openly occurred on the Authority's property for over two decades, and the existence of the waste pits was commonly known to workers at the ESTP.

According to the evidence, the chain link fence which surrounded the STP and separated the ESTP from the area where the hazardous waste pits were located did not obstruct the view of the hazardous waste lagoons from the plant. While the Authority contends in its post-hearing brief that the photographs which are Exhibits C-3 and A-1A, A-1B, A-1C, and A-1D show that greenhouses covering the plant's sludge drying beds would obstruct a view of the waste pits from the entire ESTP except for the area north of the greenhouses, the record lacks any testimony which would support the Authority's allegation.

The testimony of the former ESTP workers establishes that the people who worked at the ESTP were aware of the waste disposal acitivity when it ocurred. William Burris, who began working at the ESTP in 1951 and retired in 1982 (before the Authority took over operation of the ESTP in 1986) knew that the waste pits were located northeast of the ESTP, outside the fence, and he observed railroad exployees dumping wastes into the pits while he was employed in operation of the ESTP. Robert Filer, who began working at the ESTP in 1963 and worked there a short while before working at the westerly STP until his departure in 1991, observed a black truck with a tank on it dumping some unknown substance into the pit on the property outside the fence. Ralph

Moorehead, who began working at the ESTP in January of 1960 and worked there until July of 1979, observed tanker trucks which he believes had "PRR" indicated on them entering the ESTP site several times daily. Moorehead believes the existence of the waste lagoons was general knowledge among the ESTP employees. Milton Rhodes, who began working for the ESTP in 1957, was transferred to the westerly STP, where he worked until 1991. Rhodes observed tank trucks dumping wastes into the waste lagoons near the ESTP and he believed it was the PRR which was doing the dumping. Norman Schorner was formerly the superintendent for both the ESTP and the westerly STP; he began working for Altoona at the ESTP in 1953 and went on sick leave (and subsequently disability) on June 6, 1986, just before the Authority assumed operation of the ESTP. Schorner was aware of the waste pit on the other side of the fence from the ESTP. Burris, Moorehead, and Rhodes each observed water fowl become sick or die after being exposed to waste in the lagoons, and the odor emanating from the waste lagoons was so strong that it masked the odor of the dying water fowl. The Altoona Mirror, which was one of two newspapers local to Altoona, published an article with two acommpanying photographs on March 31, 1970 concerning water fowl landing in the lagoons and subsequently dying. (Exhibit C-3)

Additionally, the evidence shows that the hazardous waste lagoons were located outside of the locked fence which surrounded the ESTP. The railroad employees had to drive across the ESTP site in order to gain access to the waste lagoon area. ESTP employees would open and close the gate in this fence to allow the railroad employees to access the waste lagoons.

Altoona (which was operating the ESTP at the time) would have seen that trespassing charges were instituted against the railroad employees had they not first received permission to come onto the property to conduct their dumping activity. Altoona never caused any such charges to be instituted, however.

The Authority contends that it is a separate legal entity from Altoona, citing 53 P.S. §306, and Bristol Township v. Lower Bucks County Joint Municipal Authority, 130 Pa. Cmwlth. 240, 567 A.2d 1110 (1989), and that since it only became an operating authority for the ESTP in 1986, there is no basis for us to attribute to the Authority the actions of the former and retired Altoona employees, saying this is especially so "where the [Altoona] employees believed the disposal was taking place on railroad property".

We recognize that the Authority is a separate entity from Altoona, with its own Board, officers, and employees, and it is not the "child" of the incorporating municipality. See §306 of the Municipality Authorities Act of 1945, Act of May 2, 1945, P.L. 382, 53 P.S. §306; Bristol Township, *supra*. Nevertheless, there has been an overlap of employees between the time when Altoona was operating the ESTP and 1986, when the Authority assumed operation of the ESTP. Robert Filer and Milton Rhodes were employed at the ESTP (and later the westerly STP) by Altoona and subsequently became employees of the Authority.

We have 'previously' addressed the question of whether knowledge acquired by an agent prior to the agency relationship may be imputed to the agent's principal in Paradise Township Citizens Committee, Inc., et al. v. DER

and Paradise Township, Permittee, 1992 EHB 668. In that decision, we explained:

> [T]he Pennsylvania Supreme Court held in Houseman v. Girard Mutual Building & Loan Association, 81 Pa. 256, 2 W.N.C. 573, 33 L.I. 108 (1876), that notice to an agent received before the agency relationship existed will not be imputed to the principal. No Pennsylvania court appears to have addressed the question this century, however. The decisions from other jurisdictions conflict on the question of whether information obtained before a person became an officer or agent will be imputed to the corporation after he becomes an officer or agent:
>
> Generally, ... notice to, or knowledge of, corporate officers or agents, in order to be imputable to the corporation, must have been received or acquired during the existence of the agency and while acting in the particular transaction to which the notice or knowledge relates. However, according to the better rule and the decided weight of authority, knowledge "possessed" by an agent while he or she occupies that relation and is executing the authority conferred upon the agent, as to matters within the scope of his or her authority, is notice to the principal, although such knowledge was acquired before the agency was created....
>
> Fletcher Cyc. Corp. §797 (Perm Ed)
>
> The Second Restatement of Agency subscribes to the latter of the views outlined above, imputing knowledge of an agent to the principal even if it was received prior to the agency: "Except for knowledge acquired confidentially, the time, place, or manner in which knowledge is acquired by a servant or other agent is immaterial in determining the liability of his principal because of it." Second Restatement of Agency, §276. We agree that this is the better rule.
>
> Id., 1982 EHB at 677-678

Both Filer and Rhodes were aware of the dumping at the hazardous waste lagoons both when it occurred and later when they were employed by the Authority. While Filer and Rhodes believed the dumping of hazardous wastes

was occurring on property owned by the PRR, they were not entirely incorrect, since the railroad transferred title to a portion of the westerly waste lagoon to the Authority in 1978 and had held title to that property since 1928. There is no evidence as to whether these ESTP employees took any steps to confirm their assumptions that the railroad trucks were disposing of wastes on railroad-owned property. Thus, the knowledge on the part of Filer and Rhodes concerning the dumping in the hazardous waste pits can be imputed to the Authority.

Further, the existence of the hazardous waste pits should have come to the attention of Andronic Pappas in the normal course of events. Pappas, who is presently the chairman of the Authority, was the city council member in charge of Altoona's Bureau of Sewers between 1968 and 1971, during the years before the pits were covered. Pappas met with the ESTP's superintendent Schorner weekly while he was director of the Bureau of Sewers. Schorner's testimony establishes that he was aware of at least one of the hazardous waste pits while he worked at the ESTP. Pappas also periodically walked around the ESTP site. Pappas, however, is unaware of any activity by either the Authority or Altoona in 1970 (after the Altoona Mirror article was published) to discover what was taking place on the property adjacent to the ESTP. Pappas testified he was unaware of the waste pits until August of 1989, when he received a call from Executive Director Cochran informing him that the waste pit had been uncovered.

The Authority asserts that the Altoona Mirror article demonstrates why Pappas was unaware of the pits: the article indicates that Penn Central's

waste disposal stopped in 1966 (before Pappas became a member of city council), that the pits were located in Logan Township, not Altoona, and that Logan Township was taking care of the problem. This still does not explain why Pappas testified he never became aware of the waste pits during his periodic inspections of the ESTP site and weekly discussions with Schorner, especially when the testimony of the Authority's employees establishes that a distinctive odor was coming from the lagoons in 1970 while the pits were uncovered and while Pappas was serving as director of the Bureau of Sewers for Altoona. The existence of the hazardous waste pits existed on the Authority's property for an extremely long period of time, so that Pappas, who was chairman of the Authority at the time of the grant agreement for the ESTP renovation and DER's denial of that Authority's change order requests, should have become aware of their existence in the normal course of events, especially considering the length of his association with the ESTP site.

Further, the evidence shows GDF should have known about the waste pits. Louis Gwin, the founder of GDF, is a former city engineer for Altoona. Gwin was involved in construction of the ESTP in the 1940s. Gwin founded GDF in 1954 and became the consulting engineer of record for Altoona. Gwin and GDF have been the consulting engineers for Altoona (and later the Authority) with regard to the ESTP since the 1950s. GDF has performed consulting work for the ESTP during the 1960s and 1970s. GDF's Mr. Butler has performed work at the ESTP since 1968. Louis Gwin was active in GDF until 1971. In 1973, GDF conducted some preliminary studies for Altoona, in connection with renovation of the ESTP, and, in 1979, GDF began a facilities plan. The

Authority applied for and received DER's approval of its plan for the ESTP renovation between 1979 and 1985. After the Authroity received a construction grant in 1986, GDF initiated the design for the ESTP renovation.

Mark Glenn, who is a civil engineer, has been employed by GDF since 1977 and has been president of GDF since 1985. In connection with the ESTP renovation project, GDF's Mark Glenn relied on aerial photographs taken in 1986 and did not examine a 1967 aerial photograph in which the waste pits were visible. Glenn also attributed the two blue dots on a 1972 USGS topographical map (which were the hazardous waste pits) to Hurricane Agnes which occurred after the aerial photograph on which the map was based was taken, or to water-retention areas, without taking any steps to confirm or negate that assumption. Glenn testified that the areas where the waste pits were uncovered were high-mounded areas where the land was otherwise low-lying wetlands. He did not find it significant that in 1972, the area appeared to be retaining water and in 1986, the same area had a couple of earthen piles on it.

GDF caused Kimball to conduct a subsurface investigation of the ESTP site during the design phase of the renovation project to determine the soil and rock conditions at the site. Earth piles were indicated on the test boring location plan included in the contract documents for the renovation project under Glenn's engineering seal (Exhibit C-4); these piles were in the area where the waste pits were eventually uncovered. Kimball took a number of core boring samples according to a boring plan prepared by GDF. Borings numbers 3 and 4 were conducted in the area where the waste pits were

uncovered. See Exhibit C-1, C-2 and B-3. The sampling results for core hole number 4 indicate that ashes were present there in September of 1986. Ashes were also present in the sampling results for core hole 25, which was not near core holes numbers 3 and 4. In Glenn's experience, ashes are not a naturally present condition. Glenn had observed ash or cinder material at the ESTP site in areas other than where the two waste pits were uncovered, and he had observed this type of material on the side of the Little Juniata River opposite the ESTP site at the rail classification yard and at the easterly CSO facility one mile upstream along the railroad's mainline. No rail line has ever run through the ESTP site, however. Glenn did not investigate the presence of ashes near core hole number 4, nor did he investigate the presence of earth piles in the area where the waste pits were uncovered. Moreover, in connection with the design work for the ESTP renovation project, Glenn and other GDF employees spoke with the ESTP's then superintendent, Schorner, and could have spoken with any other employees who worked at the ESTP; clearly, Schorner, at least, knew about the waste pits. Had GDF performed a sufficient site investigation, it should have discovered the waste sites.

The Authority, citing Penn-Maryland Coals, Inc. v. DER, 1992 EHB 12, contends there is no basis for imputing GDF's knowledge to the Authority. Penn-Maryland involved a claim by DER that the appellant/mining company was or should have been in possession of facts relating to environmental damage taking place so that the burden of proof should be shifted from DER to the appellant/miner pursuant to 25 Pa. Code §21.101(d). Crucial to DER's argument in Penn-Maryland was DER's assertion that neither the key facts nor the person

ascertaining them changed with the transfer of the appellant's mine drainage permit to appellant from its predecessor because both businesses had the same superintendent. The Board held in Penn-Maryland that the superintendent was not employed by the appellant, but rather was an employee of the appellants' contract operator, and we thus decided we could not, under the circumstances, impute whatever knowledge the superintendent might have had to the appellant. That is not the situation here. GDF was the consulting engineering firm responsible for determining, on the Authority's behalf, whether the soils at the ESTP plant site were structurally sound for purposes of the renovation project. In that capacity, GDF's knowledge is imputable to the Authority. See Paradise Township Citizens Committee, *supra*.

Based on the evidence, we conclude that DER did not abuse its discretion in determining the Authroity's change order requests were ineligible for grant funding pursuant to DER's policy regarding differing site conditions.

DER's policy, as related to differing site conditions, provides that delay impact costs are not eligible if the conditions at the site were previously known to the grantee or could reasonably have been determined by the grantee or its consultant during the design or pre-bid phase of the project. (N.T. Vol. 1, at 150, 206; C-7) The evidence establishes both that the Authority previously knew of the existence of the hazardous waste pits (as demonstrated by Exhibit C-5) and the Authority or GDF could have reasonably

determined the existence of the pits during the design or pre-bid phase of the project. Thus, the Authority's change order requests were ineligible under DER's policy.

As we have noted in the past, where we find DER's denial is supported by one of the challenged bases in its denial letter, we need not proceed to consider any other reasons cited in DER's denial letter which are challenged in the appellant's appeal. Willowbrook Mining Company v. DER, 1992 EHB 303. Nevertheless, we will proceed to consider DER'd denial of the Authority's change order requests pursuant to the federal regulations.

DER asserts that the Authority's change order requests were ineligible under 40 C.F.R., Chapter 1, Part 35, Subpart I, Appendix A, §A.1.g. This regulation provides in pertinent part:

> Appendix A -- Determination of Allowable Costs
> a) Purpose. The information in this appendix represents Agency policies and procedures for determining the allowability of project costs based on the Clean Water Act, EPA policy, appropriate Federal cost principles under part 30 of this subchapter and reasonableness.
>
> . . .
>
> A. Costs Related to Subagreements
>
> 1. Allowable costs related to subagreements include:
>
> . . .
>
> g. Change orders and the costs of meritorious contractor claims for increased costs under subagreements as follows:
> 1) Change orders and the costs of meritorious contractor claims provided the costs are:
> i) Within the scope of the project;
> ii) Not caused by the grantee's mismanagement; and
> iii) Not caused by the grantee's vicarious liability for the improper actions of others.

2) Provided the requirements of paragraph g(1) are met, the following are examples of allowable change orders and contractor claim costs:

ii) Costs of equitable adjustments under Clause 4, Differing Site Conditions, of the model subagreement clauses required under §33.1030 of this Subchapter.

The Authority, on the other hand, contends the delay impact costs fall within sections (a)(1) and (2) of Clause 4 of the model subagreement clauses pertaining to Differing Site Conditions, and are allowable as equitable adjustments.[8]

DER contends the Authority's mismanagement of this project can be found in the evidence, which it says shows that the Authority's management and

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[8] In turn, Clause 4, Differing Site Conditions, of the model subagreement clauses provides in relevant part:

4. Differing Site Conditions
(*This clause is applicable only to construction subagreements.*)

a) The contractor shall promptly, and before such conditions are disturbed, notify the recipient in writing of:
1) subsurface or latent physical conditions at the site differing materially from those indicated in this subagreement, or
2) unknown physical conditions at the site, of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in this subagreement. The recipient shall promptly investigate the conditions, and if it finds that conditions materially differ and will cause an increase or decrease in the contractor's cost or the time required to perform any part of the work under this subagreement, whether or not changed as a result of such conditions, an equitable adjustable shall be made and the subagreement modified in writing. ...

its consulting engineers were detached from the day-to-day occurrences at the ESTP and the physical conditions at the site.

In response, the Authority argues there is no basis for DER to find mismanagement by the Authority in any way related to the construction work on the renovation project. The Authority contends that the mismanagement provision of the regulation applies only to the grantee's mismanagement of the construction project, not to any prior alleged mismanagement. In support of its argument, the Authority points to the testimony given by DER's Oberdick at the merits hearing that the special condition at section (b)(1) in the grant agreement (Exhibit C-8) relates to construction of the project as opposed to design and that the mismanagement to which that special condition refers is mismanagement of the construction, not the design. (N.T. Vol. 1, at 183-184)

The special condition at section (b)(1) of the grant agreement which pertains to the project schedule, provides:

> 1. Project Schedule
>
> EPA's policy requires that projects be initiated, constructed, and placed in operation in a timely manner. For that reason, the schedule shown below, which was developed in conjunction with your grant application, is included as a special condition. The grantee is expected to take all appropriate actions to ensure that this schedule is maintained. In the event that the project is delayed for reasons beyond the control of the grantee, this schedule may be revised. If the delay arises from mismanagement and could otherwise have been avoided, the schedule will not be revised, in which case EPA will be compelled to determine if ineligible incremental costs have been incurred as a result.

Exhibit C-8 (emphasis in original).

We do not agree that this special condition, which specifically pertains to the schedule for construction of the project, indicates that the mismanagement to which the federal regulation in question applies is limited to mismanagement occurring during the construction of the project, and not to the earlier phases of the project. The term mismanagement in the federal regulation is not specifically limited to mismanagement during construction.

Based on the evidence before us, we see no abuse of DER's discretion in determining that the Authority's change order requests were caused by the grantee's mismanagement, in that the Authority knew or through its consulting engineers should have known about the existence of the waste pits prior to uncovering them in 1989.

Is DER Estopped From Denying The Change Orders?

The Authority argues that DER should be equitably estopped from denying the Authority's change order requests. The Authority contends DER knew of the presence of the hazardous waste at the construction site in the early 1970s and permitted the railroad to cover the waste pits with construction debris in a manner which concealed them. The Authority then contends DER approved design and construction under the grant and failed to advise the Authority of the presence of the waste. The Authority also contends neither EPA nor DER suggested an environmental subsurface investigation for hazardous waste in the design stage.

DER, in response, contends that the issues of equitable estoppel and DER's prior knowledge of the hazardous waste pits at the ESTP site were previously decided in another matter before this Board (Altoona City Authority

v. DER, 1992 EHB 779 (Altoona I)). Alternatively, DER urges it should not be estopped from denying the Authority's change order requests.

We reject DER's argument regarding Altoona I because in that matter, we denied summary judgment on the issue of equitable estoppel since there were insufficient facts before the Board at that point in that litigation. Thus, we will address the issue here.

Equitable estoppel was recently explained by the Commonwealth Court as:

> a doctrine of fundamental fairness designed to preclude a party of depriving another of the fruits of a reasonable expectation when the party inducing the expectation knew, or should have known, that the other would rely. Equitable estoppel can be applied to a governmental agency. The doctrine of equitable estoppel prevents one from doing an act differently from the manner in which another one was induced by word or deed to expect.

Department of Commerce v. Casey, ___Pa. Cmwlth.___, 624 A.2d 247 (1993) (citations omitted). See also Martin L. Bearer, t/d/b/a North Cambria Fuel Company v. DER, et al., *supra*.

The evidence advanced by the Authority does not show that DER had prior knowledge of the waste pits. The May 27, 1970 Department of Health Sanitary Engineering Report (A-6 at No. 5), indicated that Penn Central was removing waste oil to a cinder landfill in Antis Township. We reject the Authority's suggestion that this is the same as those waste pits which are the subject of this appeal, which are located in Logan Township, near the Antis Township line. Likewise, the February 13, 1973 and February 18, 1973 DER Bureau of Water Quality Management Waste Discharge Inspection Reports (A-6 at

No. 6 and 7) make reference to two impoundments located southwest of the railroad bridge in Pinecroft, and there is no evidence to support the Authority's suggestion that these impoundments were the same as waste pits at issue in this appeal. Next, the Authority points to the May 3, 1973 letter from DER to Penn Central which directed Penn Central to remedy the situation caused by the two unlined impoundments located 1,000 feet southwest of the railroad bridge in Pinecroft (A-6 at No. 2) and to Penn Central's May 14, 1973 reply advising DER that the impoundments had been closed but had left a deep hole which had then been filled. (A-6 at No. 3) There is no evidence in the record to establish the Authority's speculation that this deep hole was apparently filled by Penn Central with the demolition waste from its Altoona test building and that the pits described in these two letters are the same as those which are involved in this appeal. The Authority also points to HSCA Site Status Reports for the ESTP site (A-6 at No. 1) for the period between November of 1989 and February of 1990 as evidence that DER has acknowledged that these 1973 DER inspection reports did refer to the waste pits which are the subject of the instant appeal. This is not clear from the record, however.

The HSCA Site Status Reports do not specify on which 1973 inspection report they are based. At most, they show that at the time the HSCA Site Status Reports were issued, someone at DER believed the pits described in an unidentified 1973 inspection report were the same as those involved in the HSCA site clean-up. This does not establish knowledge of the waste pits on the part of DER at the time it approved the Authority's design plans.

Moreover, the Authority has not shown that DER made an inducement to the Authority upon which DER knew or should have known that the Authority would rely. The only "inducement" by DER upon which the Authority claims to have relied is DER's approval of design and construction of the ESTP renovations to take place near the area of the covered waste pits, without requiring or recommending an environmental audit for hazardous waste as part of the design process for the improvements. The Authority further points to DER's (and EPA's) acceptance of the subsurface investigation submitted by its consulting engineer and claims it relied on DER's approval of its design plans to its detriment.

The evidence shows that only the results of GDF's subsurface investigation were indicated in the bid documents and contract documents for the renovation project which were submitted to DER, EPA, and the Army Corps of Engineers. The subsurface investigation was included only by reference, as were Kimball's test boring logs for the ESTP site. Thus, GDF had more knowledge than DER had available in giving its approval, and it is disingenuous for the Authority to argue that DER's failure to require a subsurface investigation was in inducement to the Authority. DER's approval of the Authority's design plan does not show any inducement on the part of DER. It was the Authority which sought DER's approval of the design plans it submitted to DER. Further, any reliance by the Authority on DER's approval was not reasonable, as we have previously found in this adjudication that the

Authority and its consulting engineers should have known about the hazardous waste pits. Thus, the Authority has failed to make out its equitable estoppel claim against DER.

We accordingly find no abuse of DER's discretion in denying the Authority's change order request. We therefore enter the following order dismissing the Authority's appeal.[9]

CONCLUSIONS OF LAW

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

2. The Authority has the burden of proving DER's denial of its change order requests was an arbitrary exercise of its duties or an abuse of its discretion. FTMSA, *supra*; 25 Pa. Code §21.101(a); Warren Sand and Gravel, *supra*.

3. The Board, in its *de novo* review, may substitute its discretion for that of DER where it finds DER has abused its discretion. ROBBI v. DER, *supra*; Morcoal v. DER, *supra*.

4. Exhibit C-5, which is a letter dated August 1, 1989 to GDF from the Paul A. Laurence Company was properly admitted into evidence under the exception to the hearsay rule for party admissions.

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9 We point out that as we explained in FTMSA, *supra*, EPA may disagree with DER on how to distribute the grant money, and we lack jurisdiction to resolve such a dispute. Our decision will bind DER but not EPA. The Authority will have to address any EPA decision in another forum because of the limited nature of our jurisdiction.

5. DER did not abuse its discretion in determining the provision contained in §202(a)(1) of the federal Clean Water Act, 33 U.S.C. §202(a)(1), regarding the Altoona project did not require DER to approve the Authority's change order requests, and that the eligibility requirements for change order requests contained in the federal regulations and DER's policy applied, even to the Altoona project.

6. DER did not abuse its discretion in concluding that the Authority, itself or through its consulting engineers, knew or should have known about the hazardous waste pits at the ESTP site.

7. DER did not abuse its discretion by concluding that there was grantee mismanagement within the meaning of 40 C.F.R. Chapter 1, Part 35, Subpart I, Appendix A, §A.1.g.

8. DER did not abuse its discretion in concluding that the Authority was ineligible for grant funding for its delay impact change order requests pursuant to 40 C.F.R. Chapter 1, Part 35, Subpart I, Appendix A, §A.1.g and DER's policy regarding unforeseen site conditions.

9. DER was not equitably estopped from denying the Authority's change order requests.

ORDER

AND NOW, this 8th day of December, 1993, it is ordered that the Altoona City Authority's appeal at EHB Docket No. 92-244-E is dismissed.

ENVIRONMENTAL HEARING BOARD

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Chairman

ROBERT D. MYERS
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: December 8, 1993

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JOHN HORNEZES	:	
	:	
v.	:	EHB Docket No. 93-215-E
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: December 15, 1993

OPINION AND ORDER
SUR MOTION TO DISMISS

By Richard S. Ehmann, Member

Synopsis

Where between the allegations in the Department of Environmental Resources' ("DER's") Motion to Dismiss, our docket and the *pro se* Appellant's response to the Motion, it is clear that the appeal was not timely filed, the appeal must be dismissed.

OPINION

On August 5, 1993 this Board received John Hornezes' ("Hornezes'") letter dated July 30, 1993 indicating that he desired to appeal DER's denial of his request for certification as to installing and inspecting underground storage tanks. As is our standard procedure we docketed this letter when received as a skeleton appeal under 25 Pa. Code §21.52(c) of our rules of procedure. The next day we sent Mr. Hornezes an Order dated August 6, 1993, which directed him to provide us his telephone number, specifications of his objections to DER's action, an indication of the date he received notice of DER's action and an indication of service of a copy of his appeal on the

appropriate persons. On September 1, 1993, because this information had not been received by August 23, 1993 as spelled out in our Order, we issued Mr. Hornezes a Rule to Show Cause why his appeal should not be dismissed for violation of that Order. On September 15, 1993 Mr. Hornezes timely complied with our Rule to Show Cause and made the required filing.

Mr. Hornezes' Notice of Appeal recites that he received notice of DER's denial of his application for installer or inspector certification on June 15, 1993. It attaches a letter from DER's Cedric H. Karper dated June 15, 1993 and bearing an address in Harrisburg, Pennsylvania for Mr. Karper. Based on this statement and the fact that we did not receive Mr. Hornezes' skeleton appeal until August 5, 1993, DER filed a Motion to Dismiss this appeal. DER says it was untimely filed under 25 Pa. Code §21.52(a) and thus we lack jurisdiction over it.

On December 1, 1993 Mr. Hornezes filed his response to DER's Motion. In it Mr. Hornezes, who represents himself, indicated that he made an error on his Notice of Appeal when he said that he received DER's letter of June 15, 1993 on that same date. He goes on to indicate he received DER's denial on July 2, 1993.

It is as obvious to this Board as it is to Mr. Hornezes that he could not have received a DER letter mailed from Harrisburg on the same day it was dated. While the postal service in this country is much better than that in many foreign countries and is underappreciated, it does not deliver mail in the towns surrounding Pittsburgh--Wilkinsburg, where Mr. Hornezes lives, being one--on the same day it is mailed from Harrisburg. Accordingly, we accept his July 2, 1993 date for receipt of DER's letter as accurate.

25 Pa. Code §21.52(a) requires that appeals from DER's actions must be filed with this Board within 30 days of a potential appellant's receipt of

notice thereof. This is effectively a statute of limitations on appeals, because as the Commonwealth Court has stated in Rostosky v. Commonwealth, DER, 26 Pa. Cmwlth. 478, 364 A.2d 761 (1976) and Lebanon County Sewage Council v. Commonwealth, DER, 34 Pa. Cmwlth. 244, 382 A.2d 1310 (1978), this Board lacks jurisdiction over any appeal which is not timely filed. If we lack jurisdiction over it, we cannot hear an appellant's arguments in favor of his position on the merits, no matter how persuasive, but must dismiss it. See Wayne McClure v. DER, 1992 EHB 212.

Here Mr. Hornezes received DER's letter on July 2, 1993 and had 30 days to file his appeal from that date. This period expired on August 2, 1993. Mr. Hornezes' skeleton appeal was not received by the Board until August 5, 1993, which is 33 days after his receipt of DER's letter. As stated in 25 Pa. Code §21.11(a) the date of receipt of this appeal by the Board and not the date of its deposit in the mails is determinative. We note that DER's June 15, 1993 letter to Mr. Hornezes provides him notice of this fact by stating: "Appeals must be filed with the Environmental Hearing Board within thirty days of receipt of written notice of this action..." The appeal is thus untimely.

We cannot ignore this untimeliness issue. As pointed out by DER, the Commonwealth Court has made it clear that dismissal is mandatory if the appeal is untimely and may not be waived. See Rostosky, *supra*, and McClure, *supra*.

Accordingly we enter the following Order.

O R D E R

AND NOW, this 15th day of December, 1993, it is ordered that DER's Motion to Dismiss is granted and Mr. Hornezes' appeal is dismissed for lack of jurisdiction.

ENVIRONMENTAL HEARING BOARD

MAXINE WOELFLING
Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: December 15, 1993

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For the Commonwealth, DER:
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M. DIANE SMITH
SECRETARY TO THE BOARD

MICHAEL W. FARMER d/b/a M. W. FARMER & CO.	:	
v.	:	**EHB Docket No. 93-125-W**
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** December 20, 1993

OPINION AND ORDER SUR MOTION TO DISMISS

By Maxine Woelfling, Chairman

Synopsis:

The Department of Environmental Resources' (Department) motion to dismiss an appeal as moot is granted. When a person files a notice of appeal from a compliance order that the Department subsequently supersedes with a second compliance order to another person, that notice of appeal must be dismissed as moot. Furthermore, the Board will not allow a person to be substituted as the party to an appeal if that person is not a successor to any interest of the original party.

OPINION

Currently before the Board for disposition is the Department's motion to dismiss as moot an appeal filed by Michael W. Farmer d/b/a M. W. Farmer & Co. (Appellant). On April 19, 1993, the Department issued Appellant a compliance order under the Solid Waste Management Act, the Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 *et seq.*, concerning a facility at 13 Fleming Street, South Williamsport, Lycoming County (site). The order alleged that contaminated soil and approximately thirty 55 gallon drums were

located on the site, and required Appellant, as operator of the site, to remove any residual or hazardous waste from the site and stop accepting solid waste for processing, storage, or disposal there. Appellant filed the current notice of appeal on May 14, 1993, arguing primarily that M. W. Farmer Co., not Appellant, operated the site, and that M. W. Farmer Co. did not violate any applicable laws or regulations in doing so.

At some time before June 22, 1993, Appellant and his counsel met with Department staff to discuss whether Appellant or M. W. Farmer Co. operated the site, as well as their liability for the conditions there. During the meeting, Appellant requested that the Department substitute M. W. Farmer Co. for Appellant as operator of the site. On June 22, 1993, the Department issued a compliance order to M. W. Farmer Co., which restated the violations and corrective actions contained in the April 19 compliance order, and substituted M. W. Farmer Co. for Appellant as operator of the site. The June 22 compliance order further stated, in paragraph three:

> This order supersedes the order of 4-19-93 by modifying the operator name Mr. Michael W. Farmer d.b.a. M. W. Farmer & Co. to specify the operator as M. W. Farmer Co.

On June 24, 1993, in response to the June 22 compliance order, Appellant filed a motion to amend the caption of its appeal, in which Appellant requested that this appeal be amended to name M. W. Farmer Co. as appellant.[1] In a July 26, 1993, memorandum opinion and order, the Board denied Appellant's motion and ordered the parties to advise it whether this appeal was moot, since the Department's April 19 order had apparently been superseded. On September 24, 1993, the Department filed the current motion to

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[1] A review of our dockets indicates M. W. Farmer Co. did not appeal the June 22 compliance order.

dismiss. Appellant filed its response on November 10, 1993.

The Department contends this appeal is moot, and should be dismissed, because the April 19 compliance order, which is the basis for this appeal, has been superseded. The Board, therefore, can no longer grant any meaningful relief. Appellant argues that this appeal is not moot because the June 22 compliance order was not a new order superseding the earlier compliance order, but was instead issued merely to substitute M. W. Farmer Co. for appellant as the site's operator. Accordingly, Appellant claims, the April 19 compliance order remains in effect.

The Board will dismiss an appeal as moot when events occur that deprive the Board of the ability to grant effective relief. Carol Rannels v. DER, EHB Docket No. 90-110-W (opinion issued April 29, 1993). The Department contends the Board dismissed an appeal as moot under similar circumstances in Avery Coal Co., *et al.* v. DER, 1991 EHB 146. In Avery, the Department issued a compliance order to appellants Thompson Brothers Coal Company and Avery Coal Company, which both parties appealed to the Board. The Department then issued a second compliance order to both parties, which restated the violations contained in the previous order, extended the time for compliance, and expressly superseded the earlier order. 1991 EHB at 146-47. In granting a motion to dismiss the appeals from the first compliance order as moot, we stated

> Where an order of DER is superseded by a subsequent order which renders the earlier order null and void, any appeal taken from the earlier order must be dismissed as moot.

1991 EHB at 147. Under Avery, therefore, Appellant's appeal of the April 19 order, which has been superseded, must be dismissed as moot.

Appellant contends Avery is inapplicable here because the June 22

compliance order did not, despite its language, supersede the April 19 order. Appellant claims that the restrictions imposed by the April 19 compliance order remain in effect and the affected business, M. W. Farmer Co., remains the same. Appellant's argument is without merit. The June 22 compliance order, which contains the same violations and corrective actions as the April 19 order, was issued to and holds M. W. Farmer Co. liable for conditions at the site. The April 19 compliance order, on the other hand, was issued to and holds Appellant liable. Furthermore, the June 22 compliance order expressly supersedes the April 19 order and removes Appellant as the site's operator. Avery is fully applicable to this appeal.

Appellant also contends that this appeal is not moot because it is analogous to the situation in Al Hamilton Contracting Co. v. Cmwlth., Department of Environmental Resources, 90 Pa.Cmwlth. 228, 494 A.2d 516 (1985). In Al Hamilton, the court held that Hamilton's appeal of a compliance order was not moot, even though Hamilton had corrected the violation, because the Department's regulations required it to consider prior violations in assessing civil penalties. 90 Pa.Cmwlth. at ___, 494 A.2d at 518. Since the compliance order would be considered a prior violation in assessing future civil penalties, the court found that an adjudication on its validity was not moot. 90 Pa.Cmwlth. at ___, 494 A.2d at 518.

Appellant argues that because it could be subject to future civil penalties under 35 P.S. §6018.605, this appeal is not moot. We find, however, that this appeal bears no resemblance to the situation in Al Hamilton. The April 19 compliance order, which Appellant fears the Department will use against it in assessing future civil penalties, has been superseded. It has no legal effect and cannot be used as the basis for subsequent civil penalties. See, Avery, 1991 EHB at 147.

Appellant last contends that this appeal should not be dismissed as moot because M. W. Farmer Co. is a successor in interest to Appellant and, therefore, liable under the April 19 order. Appellant claims that since M. W. Farmer is liable under that order, the June 22 order merely restated, and did not supersede, it. Accordingly, this appeal of the April 19 order is not moot. We disagree.

A "successor" is "anyone who by operation of law, election or appointment has succeeded to the interest of a party to an action." Pa. R.C.P. 2351. The term includes "personal representatives, successor fiduciaries, successors in office, successors in interest of every kind." Tri-County Industries, Inc. v. DER, *et al.*, 1992 EHB 1139, 1150 (citing Goodrich Amram 2d §2352(a):1). Appellant claims M. W. Farmer Co. is its successor in interest by virtue of the June 22 compliance order, which substituted M. W. Farmer Co. for Appellant as operator of the site. The problem with this claim is that Appellant has no interest in the site to which M. W. Farmer Co. could succeed. Appellant admits in its affidavit that M. W. Farmer Co., not Appellant, is the site's operator. Appellant further admits, in its answer to the Department's motion, that it is not liable for the violations at the site, or for correcting them. Because M. W. Farmer Co. cannot be Appellant's successor in interest, it would be inappropriate to substitute it for Appellant as the party to this appeal. See, Tri-County Industries, 1992 EHB at 1151.[2]

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[2] In addition, Appellant did not provide us with "a statement of the material facts on which the right to substitution is based." Pa. R.C.P. 2352(a). Without such a statement, appellant has not shown how M. W. Farmer Co. is its successor in interest. Appellant, instead, chooses to rely on assertions in its unverified motion to amend caption and answer to the Department's motion to dismiss that M. W. Farmer Co. voluntarily agreed to footnote continued

Since the Board can no longer grant Appellant any effective relief regarding the April 19 compliance order, we must dismiss this appeal as moot.

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continued footnote
assume liability for the site, and the June 22 order merely reflects this agreement. Even accepting these assertions, Appellant still has not attempted to show how M. W. Farmer Co., as a result of this agreement, succeeds to its interest by operation of law. More common examples of such succession are: where an executor succeeds to the interest of a deceased party; where a corporation succeeds to the interest of its predecessor following a merger or other consolidation; and where a liquidator succeeds to the interest of a dissolved corporation or partnership. Goodrich-Amram 2d §2351:4. Without any proof, we fail to see how M. W. Farmer Co. is a successor in interest to Appellant by operation of law.

O R D E R

AND NOW, this 20th day of December, 1993, it is ordered that the Department's motion to dismiss is granted and Michael W. Farmer's appeal is dismissed as moot.

ENVIRONMENTAL HEARING BOARD

MAXINE WOELFLING
Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: December 20, 1993

cc: **DER Bureau of Litigation**
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M. DIANE SMITH
SECRETARY TO THE BOARD

CLARK R. INGRAM, GEORGE M. INGRAM, GARY C. INGRAM and GREGORY B. INGRAM	:	
v.	:	**EHB Docket No. 93-181-W**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued: December 21, 1993**

OPINION AND ORDER SUR
MOTION FOR JUDGMENT ON THE PLEADINGS
AND/OR TO DISMISS COMPLIANCE ORDER

By Maxine Woelfling, Chairman

Synopsis

A motion for judgment on the pleadings and/or to dismiss a compliance order is granted.

The Board will consider an appellant's motion for judgment on the pleadings where the basis for the motion is the alleged lack of authority for issuance of the compliance order and that issue is raised in the notice of appeal.

The Department of Environmental Resources (Department) cannot compel an appellant to comply with an order of the Commonwealth Court by means of the issuance of an administrative order. The Department must initiate a proceeding before the Commonwealth Court.

OPINION

This matter was initiated by the July 12, 1993, filing of a notice of

appeal at Docket No. 93-181-W by Clark R. Ingram, George M. Ingram, Gary C. Ingram, and Gregory B. Ingram (collectively, the Ingrams) challenging the Department's June 11, 1993, issuance of Compliance Order 934062 to the Ingrams and the personal representatives of Herman J. Israel's Estate--Henry L. Israel and Betty Ann Taylor. Compliance Order 934062 pertains to a surface mining site known as Ingram #6, Frenchville (the Frenchville site), in Girard Township, Clearfield County. The Frenchville site is the subject of on-going litigation before the Board and the Commonwealth Court; recitation of the history of that litigation is necessary in order to address the motion which is the subject of this opinion.

On June 29, 1988, the Department issued a compliance order (Compliance Order 88H057) to Ingram Coal Company (Ingram Coal) directing it, *inter alia*, to immediately provide adequate treatment to insure that all discharges from the site met the effluent limitations set forth at 25 Pa. Code §87.102. At the time this compliance order was issued Ingram Coal was owned and operated by Rockwood Energy and Minerals Corporation (Rockwood). Rockwood, d/b/a Ingram Coal, appealed the compliance order, arguing that the Department should not have cited it because it did not hold the mine drainage permit referred to in the compliance order. Originally, the Ingrams owned Ingram Coal and held the surface mining permit and mine drainage permit for the Frenchville site. After mining the site for several years, however, the Ingrams sold Ingram Coal to Herman J. Israel (Israel) who, in turn, sold the concern to Rockwood. Neither purchase involved the transfer of the mine drainage permit issued to the Ingrams.

On August 30, 1988, the Department amended the compliance order (1988 compliance order), adding the Ingrams and Israel as operators of the site. Rockwood, the Ingrams, and Israel appealed the amended compliance order

to the Board. The Board then granted the Department's motion for partial summary judgment and dismissed the appeals of Israel and the Ingrams. Ingram Coal Company *et al.* v. DER, 1990 EHB 395, aff'd, Ingram v. Department of Environmental Resources, 141 Pa. Cmwlth. 324, 595 A.2d 733 (1991), *allocatur denied*, 530 Pa. 648, 607 A.2d 257, cert. denied, ____ U.S. ___, 113 S.Ct. 329 (1992). Rockwood's appeal of the 1988 compliance order, however, is still pending.

In 1991,[1] the Department filed a petition with the Commonwealth Court to enforce the 1988 compliance order with respect to Ingrams and the personal representatives of Israel's estate.[2] On July 9, 1992, the Commonwealth Court issued an order directing Ingram and the representatives of Israel's estate to comply with the 1988 compliance order. On August 10, 1992, the Ingrams filed a petition for allowance of appeal of the Commonwealth Court's order with the Pennsylvania Supreme Court; the petition is still pending.

On June 11, 1993, the Department issued Compliance Order 934062 (1993 compliance order) which directed the Ingrams and the representatives of Israel's estate to comply with the 1988 compliance order and the Commonwealth Court's July 9, 1992, order. The 1993 compliance order is the subject of this appeal.

On September 1, 1993, the Ingrams filed a motion for judgment on the

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1 The precise date the Department filed the petition is not evident from the record in this appeal.

2 Israel died in 1989. The Board substituted the representatives of his estate when it dismissed Israel's appeal. See Ingram Coal Company *et al.* v. DER, *supra*.

pleadings and/or to dismiss the compliance order.[3] Although not abundantly clear in the motion, the Ingrams, in essence, argue that the Department had no authority to issue the order because it was impermissibly attempting to enforce the 1988 compliance order and the 1992 Commonwealth Court order through the issuance of an administrative order, and, therefore, the Ingrams' appeal should be sustained. The Ingrams' other assertion - that the Board has no authority to compel compliance with the 1988 compliance order and the 1992 Commonwealth Court order in its review of the 1993 compliance order - is susceptible to two interpretations. The first is that because the Department had no power to issue such an order, the Ingrams' appeal should be sustained. The second is that, despite the filing of an appeal by the Ingrams, the Board has no jurisdiction in this matter.

The Department never filed an answer to the Ingrams' motion, but it did file a memorandum in opposition on September 17, 1993. In that memorandum, the Department argued that judgment on the pleadings is inappropriate here since the only "pleading" before the Board is the movants' notice of appeal and that it had a mandatory duty under 25 Pa. Code §86.212(a)(3) to issue the compliance order when the Ingrams failed to comply with the previous compliance order. The Department also requested that the Board dismiss the Ingrams' appeal because: 1) the compliance order here simply required the Ingrams to comply with the previous compliance order; 2) the Board sustained the issuance of the previous compliance order when the Ingrams appealed that action; 3) the Ingrams never averred in their notice of appeal that they have complied with the previous compliance order; and, 4) any other challenges the Ingrams might make to the issuance of the compliance

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[3] The motion was not verified, but that defect is not fatal, for the disposition of the motion turns entirely on legal issues.

order here are barred by the doctrine of *res judicata*.

With regard to whether a motion for judgment on the pleadings is an appropriate vehicle to raise the Ingrams' claims, the Department, citing North American Oil and Drilling Co., Inc. v. DER, 1991 EHB 22, contends that it is not. While that opinion sets forth the general proposition that a motion for judgment on the pleadings - i.e. on the notice of appeal - by an appellant is a questionable procedural vehicle because of the nature of practice before the Board, it does not foreclose the use of such motions. Indeed, it recognizes their filing in circumstances such as this where the appeal could be decided solely by ruling on a legal issue in the notice of appeal. Such instances may be rare, but one does present itself here with the allegation in the Ingrams' notice of appeal that the Department lacked the power to issue an order compelling compliance with a previous Department order and a Commonwealth Court order.

Turning now to the issue of whether the Department possessed the authority to issue the 1993 compliance order, we must examine the language of the 1993 compliance order. The violations described in the 1993 compliance order are:

> Failure to comply with: a) Compliance Order No. 884057, as amended on August 30, 1988; and b) The Order of the Commonwealth Court of Pennsylvania (Silvestri, J.) dated July 9, 1992 at No. 254 Misc. Dkt. 1991.

The 1993 compliance order also contains the following narrative under the heading "Corrective Action Required or Activity to be Ceased."

> All of the parties listed on EXHIBIT A to this Compliance Order immediately shall cease the ongoing violation of Compliance Order No. 884057 (as amended on August 30, 1981 and the Order of the Commonwealth Court of Pennsylvania (Silvestri, J.) dated July 9, 1992 at No. 254 Misc. Dkt. 1991. The corrective action necessary to come into compliance with those orders is set

forth in the Commonwealth Court's July 9, 1992 Order, a copy of which is attached to this Compliance Order as EXHIBIT B.

(emphasis added)

The issue, then, is whether this order falls within the Department's authority to issue orders under the Surface Mining Conservation and Reclamation Act, the Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1 *et seq.*

The 1993 compliance order is a type of cessation order, and the Department certainly has authority to issue such an order under 52 P.S. §1396.4c. In addition, 25 Pa. Code §86.212 empowers the Department to issue a cessation order where a violation exists that has not been abated within the time specified in a Department order, Black Fox Mining and Development Corporation v. DER, 1985 EHB 172, 188. Where cessation does not result in abatement of the violation, the Department may impose other obligations in the cessation order.

While the Board would ordinarily be loathe to limit a broad grant of authority such as that in 52 P.S. §1396.4c, the language in the corrective action portion of the 1993 compliance order leads us to conclude that it is an order by the Department directing the Ingrams to comply with the Commonwealth Court's 1992 order. In other words, it is an attempt by the Department to enforce compliance with the Commonwealth Court's order through the issuance of an administrative order. If the Ingrams have failed to comply with the Commonwealth Court's 1992 order, the Department's proper remedy is to initiate a contempt proceeding in the Commonwealth Court. See, e.g., Department of Environmental Resources v. Pennsylvania Power Company, 461 Pa. 675, 337 A.2d 823 (1975). Therefore, the Ingrams' motion will be granted, and their appeal sustained.

ORDER

AND NOW, this 21st day of December, 1993, it is ordered that the Ingrams' motion for judgment on the pleadings is granted and their appeal is sustained.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Richard S. Ehmann

RICHARD S. EHMANN
Administrative Law Judge
Member

Joseph N. Mack

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: December 21, 1993

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M. DIANE SMITH
SECRETARY TO THE BOARD

HARMAR TOWNSHIP,	:	
Appellant	:	
and BAUERHARMAR COAL CORP.,	:	
Intervenor	:	
v.	:	**EHB Docket No. 90-003-MJ**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
Appellee	:	
and MINERALS TECHNOLOGY, INC.,	:	
Permittee	:	**Issued:** December 30, 1993

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

By Joseph N. Mack, Member

Synopsis

In determining whether the Department properly issued the permit in question, we must review the Department's action against the regulations which were in effect at the time of the permit issuance. Where MTI's permit application failed to contain certain information required by former 25 Pa. Code §75.37, it was an abuse of discretion for the Department to have approved the permit, and the appeal of Harmar Township is sustained.

Procedural History

This appeal was filed by the Township of Harmar ("Harmar Township") on January 4, 1990, challenging the December 6, 1989 issuance of Surface

Mining Permit No. 02860201(C2)[1] by the Department of Environmental Resources ("the Department") to Minerals Technology, Inc. ("MTI"), pursuant to the Surface Mining Conservation and Reclamation Act ("SMCRA"), Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1 *et. seq.* Notice of the permit issuance appeared in the Pennsylvania Bulletin on December 30, 1989. The permit authorizes MTI to dispose of fly ash and bottom ash as fill in its reclamation of a coal refuse site in Harmar Township which MTI had mined pursuant to an earlier surface mining permit issued by the Department.

On February 7, 1990, BauerHarmar Coal Corporation ("BauerHarmar") filed a petition to intervene in the proceeding. The Board granted the petition in an Opinion and Order issued on March 23, 1990, but limited Bauer-Harmar's intervention to those aspects involving air, water, noise, and nuisance which were peculiar to BauerHarmar's proximity to the ash disposal site as an adjoining property owner. Harmar Township v. DER, 1990 EHB 301.

A hearing on this matter was held on February 25, 1991 through February 28, 1991. No representative of BauerHarmar attended the hearing, nor did it file a post-hearing brief. Therefore, any issues which BauerHarmar sought to raise in this appeal are deemed to be waived. Lucky Strike Coal Company and Lewis J. Beltrami v. Commonwealth, DER, 119 Pa. Cmwlth. 440, 547 A.2d 447, 449 (1988). In addition, a number of issues raised by Harmar Township in its notice of appeal were not addressed in its post-hearing brief and, therefore, they, too, are deemed waived. *Id.*

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[1] On the first page of the permit, there is apparently a typographical error referring to the permit as "No. 0286020<u>2</u>(C2)" (emphasis added). However, all other references within the permit are to "No. 0286020<u>1</u>(C2)" (emphasis added).

Post-hearing briefs were filed by MTI on May 26, 1992 and by Harmar Township on June 1, 1992. The Department did not file a brief. A reply brief was filed by MTI on July 17, 1992.

After a full and complete review of the record, we make the following findings of fact:

FINDINGS OF FACT

1. The appellant is Harmar Township, a second class township whose existence and authority is derived from the Second Class Township Code, the Act of May 1, 1933, P.L. 103, as amended, 53 P.S. §65100 *et seq.* (J.S., p. 22)[2]

2. The Department is the agency of the Commonwealth authorized to administer the provisions of SMCRA, 52 P.S. §1396.1 *et seq.*; the Clean Streams Law ("CSL"), Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 *et seq.*; the Solid Waste Management Act ("SWMA"), Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 *et seq.*; and the rules and regulations promulgated thereunder. (J.S., p. 22)

3. The permittee is Minerals Technology, Inc. ("MTI") a corporation organized and existing under the laws of the Commonwealth of Pennsylvania. (J.S., p. 22)

4. The intervenor is BauerHarmar Coal Corporation, a corporation organized and existing under the laws of the Commonwealth of Pennsylvania. (J.S., p. 22)

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[2] "J.S." refers to the Joint Stipulation submitted by the parties on February 19, 1991, while "T." refers to a page in the transcript. Harmar Township's exhibits are identified as "Ex. A-", and those of Minerals Technology, Inc. as "Ex. P-".

Background

5. On September 26, 1986, the Department issued to MTI Surface Mining Permit ("SMP") 02860201 for a coal refuse processing operation at a coal refuse site located on 155 acres in Harmar Township, Allegheny County on land formerly owned by the Harmar Coal Company and leased to MTI ("the Harmar site"). (J.S., p. 23, 24)

6. Deep mining had occurred in this area beginning in 1918. (T. 481)

7. The area covered by SMP 02860201 was used as a coal refuse disposal area by Harmar Coal Company from 1948 to 1980. Harmar Coal also operated a coal refuse slurry impoundment on the site. (J.S., p. 25; T. 481)

8. On or about January 28, 1987, the Department issued to MTI SMP 02860201(C), which amended SMP 02860201 by adding 1.6 acres and some haul roads to the permitted area. (J.S., p. 25)

9. In 1988, MTI submitted a Module 25 application for the disposal of fly ash and bottom ash at the Harmar site ("ash disposal application"). (T. 482)

10. On December 6, 1989, the Department issued to MTI SMP 02860201(C2), which further amended SMP 02860201 and which authorizes the disposal of fly ash and bottom ash as backfill in MTI's reclamation of the Harmar site. SMP 02860201(C2) is the subject of this appeal. (Notice of Appeal; J.S., p. 27)[3]

11. The area of land encompassed by SMP 02860201(C2) lies entirely within the geographic boundaries of Harmar Township. (J.S., p. 23)

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[3] All references herein to the "permit" are to SMP 02860201(C2). SMP 02860201 will be referred to herein as the "coal refuse processing permit".

12. Bauerharmar owns property immediately adjacent to the property covered by SMP 02860201(C2). (J.S., p. 27)

13. The topography of the Harmar site slopes from north to south. (T. 106)

14. There is a collection pond located in the southwest corner of the site. (T. 106)

15. A sedimentation pond is located in the south central area of the site. (T. 106)

16. A coal refuse slurry impoundment is located in the northern end of the site. (T. 105-106)

17. The proposed ash disposal area consists of approximately 13 acres in the northern-most end of the entire permit area of MTI's coal refuse operation. (T. 600) The slurry impoundment is currently located on this portion of the site. (T. 562; Ex. A-199, p. 59)

18. The slurry impoundment is to be removed prior to disposal of the ash. (T. 427-428)

19. Drainage of the water in the slurry impoundment is anticipated to take approximately six months, but could vary depending on weather conditions. (T. 565)

20. When the ash arrives at the site it will be mixed with water from the sedimentation pond. (T. 568)

21. As coal is removed, it will be replaced by the ash. (T. 568-569)

Review of Permit Application

22. Because MTI already held a coal refuse processing permit for the Harmar site, its application for ash disposal was treated as an amendment to its existing permit or as a "corrected" permit. (T. 422)

23. The various modules submitted with the 1986 coal refuse processing application also applied to the ash disposal application. (Ex. A-199, p. 39-40) These modules were admitted into evidence as Exhibit A-41. (T. 457-458)

24. MTI's application was assigned to the Bureau of Mining and Reclamation because it involved the disposal of fly ash and bottom ash at an active coal refuse processing site.

25. The Bureau of Mining and Reclamation only handles ash disposal applications which are in some way related to mining, such as an application for ash disposal at an active mine site or coal refuse processing operation. (T. 419); Ex. A-184) All other ash disposal applications are handled by the Bureau of Waste Management. (T. 419)

26. In order to determine whether the Bureau of Mining and Reclamation may handle an application for ash disposal, the Department first obtains samples of the ash and the ash leachate and analyzes the samples for their toxicity and potential to pollute. (T. 441-442)

27. If analyses of the ash or ash leachate indicate that the ash is potentially hazardous, the Bureau of Mining and Reclamation transfers the application to the Bureau of Waste Management which then conducts the review. (T. 442) In that case, the ash could not be deposited at a site for which the Bureau of Mining and Reclamation is responsible. (T. 442)

28. According to the permit application, the ash to be disposed of at the site will produce leachate. (T. 154)

29. In the process of reviewing MTI's permit application, the Department obtained from MTI analyses of the ash to be deposited at the site as well as analyses of leachate from the ash. (T. 441)

30. Based on the analyses, the Department determined that the ash and leachate were not hazardous according to federal and state definitions, and MTI's application was accepted by the Bureau of Mining and Reclamation for review. (T. 442, 468)

31. According to the Bureau of Mining and Reclamation's Program Guidance Manual for ash disposal which was in effect at the time of the Department's review of MTI's application, permits for ash disposal at active mining operations were to be issued in accordance with the Solid Waste Management Act, Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 *et seq.*, and the regulations promulgated thereunder at 25 Pa. Code, Chapter 75. (Ex. A-184)

32. At the time MTI submitted its permit application to the Department, Jay Hawkins was employed as a hydrogeologist II in the Department's Bureau of Mining and Reclamation. (T. 411-412, 418)

33. Mr. Hawkins was assigned to be the lead reviewer of MTI's permit application. (T. 416)

34. Mr. Hawkins also had been the lead reviewer on MTI's initial permit application for coal refuse processing. (T. 420)

35. Mr. Hawkins was aware of nothing proposed in MTI's ash disposal application which would cause pollution or environmental degradation. (T. 470)

36. Following Mr. Hawkins' departure from the Department, Scott Roberts became the lead permit reviewer for MTI's ash disposal application.' (T. 336, 484)

37. Mr. Roberts is a hydrogeologist in the Department's Bureau of Mining and Reclamation. (T. 334, 480)

38. Mr. Roberts became lead reviewer in October 1989 and the permit was issued in December 1989. (T. 352) Little work remained to be done on the MTI ash disposal application when Mr. Roberts became lead reviewer. (T. 353)

39. The review of MTI's application was Mr. Roberts' first as a lead permit reviewer. (T. 337)

40. Mr. Roberts did not review the permit application against the requirements of the Department's regulations governing ash disposal. (T. 339)

41. Mr. Roberts used the Department's Program Guidance Manual in conjunction with his review of MTI's application. (T. 339)

Soils Description

42. MTI's soils information is contained in Modules 16 and 17 of the coal refuse processing permit application. (Ex. A-41, p. 724-725; Ex. A-199, p. 39-40)

43. Modules 16 and 17 consist solely of a list entitled "List of Mapping Units that Qualify as Prime Farmland" and a map labeled "Prime Farmland Soils". (Ex. A-41, p. 724-725)

44. In addition, Module 18 discusses how the proposed operation will handle topsoil and subsoil. (T. 486-487)

45. Prior to becoming lead reviewer on the MTI permit application, Scott Roberts held the position of forester in the Permit Review Section. (T.

485) In this capacity, he reviewed the portions of MTI's application dealing with soil. (T. 486)

46. Mr. Roberts found the soils information contained in MTI's application to be sufficient to evaluate MTI's ability to reclaim and revegetate the site and to determine that prime farmland would not be affected by the proposed disposal. (T. 487-488, 490)

47. Mr. Roberts did not review the soil information for any other purpose. (T. 494)

48. In a deposition taken by counsel for Harmar Township, when asked why a physical and agricultural description of soils was required by the regulations, Mr. Roberts stated that he did not know. (Ex. A-199, p. 44)[4]

49. Dr. Donald L. Streib was admitted as an expert in geology, hydrology, and geochemistry. (T. 98)

50. Dr. Streib's work in geochemistry has concentrated primarily on coal and coal refuse and, to a lesser degree, coal ash analysis. (T. 81)

51. Of the approximately 350 hydrologic investigations which Dr. Streib had conducted at the time of the hearing, approximately 30 to 40 of those investigations were associated with coal refuse piles. (T. 81, 82-83)

52. Dr. Streib spent approximately two hours at the MTI site. (T. 101-102)

53. He has never visited any ash disposal sites in Pennsylvania other than the one in this case. (T. 97) Nor has he done work obtaining an ash disposal permit in Pennsylvania. (T. 97-98)

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[4] Mr. Roberts' deposition was admitted into evidence as Exhibit A-199.

54. In the course of his work as a geologist and geochemist, Dr. Streib has been involved in examining physical descriptions of soils on numerous occasions. (T. 118) The evaluation of physical descriptions of soil is an area in which Dr. Streib has been trained and is a procedure that Dr. Streib routinely performs as a geologist. (T. 119)

55. A "physical description of soil" involves the following factors: type of soil, clay content, sand content, saturation potential, size distribution, content of organic matter, mineral content, and permeability. (T. 118, 133)

56. The soils portion of MTI's permit does not contain a physical description of the soils. (T. 134)

Hydrogeologic Description

57. The northern end of the permit area is upgradient. (T. 638) Groundwater flow is to the south. (T. 637)

58. Hydrogeologic information for the Harmar site is contained in section 25.11 of the ash disposal application. (Ex. A-28, p. 439-443; T. 635-636)

59. The hydrogeologic portion of the application was prepared by Dr. James King. (T. 635) Dr. King is employed by Pollution Control Systems, Inc. as manager of the Environmental Studies and Compliance Group and as a senior hydrogeologist. (T. 632, 634) Prior to that, he was employed by GAI Consultants as a hydrogeologist. (T. 633)

60. The Board allowed Dr. King to testify as an expert witness in the field of hydrogeology. (T. 635)

61. A recharge area is where water enters the groundwater system. A discharge area is where water is discharged from the system. (T. 637)

62. The slurry impoundment acts as a recharge area for the site; the site discharges to streams and rivers located to the south of the site. (T. 637)

63. Because the slurry impoundment is a recharge area for groundwater, removing the slurry impoundment is likely to result in a corresponding decrease in the rate of discharges to surface water. (T. 639)

64. The permit application did not identify groundwater in the form of seeps and springs on the area where ash will be disposed. (T. 178) Because the area is covered with slurry, there is no way to determine whether seeps or springs are located there. (T. 178)

65. Because the topography of the area slopes from north to south and the strata are relatively horizontal, there is less of a likelihood for seeps and springs to exist in the area of ash disposal, which is at the northern end of the site. (Ex. A-199, p. 87)

66. Item 6 in the permit states, "All newly-formed seeps and discharges shall be transported to proper treatment facilities and tested." (T. 586-587)

67. After removal of the slurry, weather conditions, such as an extremely wet or dry season, could interfere with the immediate detection of seeps or springs which may exist in the area designated for ash disposal. (T. 238)

68. If ash is deposited on top of seeps or springs, water which exits the ground will work its way through the ash and will either come out downslope of the pile of material as surface water or infiltrate back into the

ground and become groundwater again. (T. 183) The presence of seeps or springs under the disposal area will increase the volume of leachate produced by the ash. (T. 184)

69. The Bureau of Mining and Reclamation Program Guidance Manual on ash disposal requires that a groundwater monitoring system be established at the proposed ash disposal site. The monitoring system must include a minimum of one downgradient monitoring point in each dominant direction of groundwater movement and one monitoring point upgradient of the site. (Ex. A-184)

70. The Harmar permit application provides for the following groundwater monitoring wells: GW-1, GW-3, GW-5, and GW-6. (T. 264)

71. The locations of the groundwater monitoring wells are as follows: GW-1 is at approximately the northernmost point of the permit area. GW-3 is downslope on the eastern side of the permit area. GW-6 is further downslope on the eastern side. GW-5 is on the western side of the permit area approximately halfway between GW-3 and GW-6. (T. 244-245)

72. Monitoring wells GW-3, GW-5, and GW-6 are downgradient wells. SW-6, a surface monitoring well located at the toe of the coal refuse embankment in the southern portion of the permit area, serves as a groundwater monitoring well for the southern portion of the site because there is a surficial discharge of groundwater at that point. (T. 187, 436, 437) All of the groundwater monitoring wells described in MTI's permit application were drilled except for the well labeled GW-3. (T. 491)

73. Based on its upgradient location, GW-1 is intended to serve as an upgradient monitoring well. (T. 638-639) The function of an upgradient monitoring well is to monitor water before it enters an affected area. (T. 249)

74. Topographic constraints imposed by valley ridges and walls make it difficult to go further north than GW-1 to establish an upgradient monitoring well. (T. 642)

75. The hydrogeologic material prepared by Dr. King in the permit application states that "[groundwater monitoring] [w]ells placed anywhere within 500 feet of [the] permit area may be hydraulically downgradient of [the] refuse pile."[5] (T. 641)

76. Well GW-1 is located within 500 feet of the disposal area. (T. 641)

77. Dr. King's statement was based on the assumption that a groundwater mound could develop in the vicinity of the slurry impoundment due to its recharge function. (T. 641)

78. Once the slurry impoundment is removed, any groundwater mound associated with it would be eliminated correspondingly over a certain length of time, which would eliminate any concern that wells located within 500 feet of the disposal area could be downgradient. (T. 641-642, 644-645)

79. After the slurry impoundment is removed, GW-1 will function as an upgradient monitoring well. (T. 641-642)

80. At the time of the hearing, Dr. King could not state with certainty that GW-1 was functioning as an upgradient monitoring well. (T. 642-643)

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[5] Dr. King used the terms "slurry impoundment" and "refuse pile" interchangeably throughout his testimony. In addition, although Dr. King referred to wells within 500 feet of the "permit area", we understand this to mean the "disposal area" and not the entire site covered by MTI's coal refuse processing permit.

97. Nor does Exhibit A-39 show the stratigraphic correlation between the foundation material covered by the report and the foundation material underlying the ash disposal area. (T. 600-601)

98. In preparing MTI's permit application, Mr. Gray did not review the Department's regulations on ash disposal to determine whether the application met the requirements thereof. (T. 611)

99. The Department's permit reviewer, Scott Roberts, stated that the geologic information contained in Module 7 of the coal refuse processing permit application provides a physical description of the geologic foundation materials at the site but does not provide a physical analysis thereof. (Ex. A-199, p. 82-83)

100. Mr. Roberts did not make a determination as to whether the geologic information submitted by MTI met the requirements of the Department's regulations governing ash disposal. (Ex. A-199, p. 83)

101. Mr. Roberts did not know the purpose for which the regulations required geologic information. (Ex. A-199, p. 83)

Surface Water Management

102. Joel Koricich is a senior civil engineer with the Department's Bureau of Mining and Reclamation. (T. 496-497) At the time of the hearing, he had held this position for ten years. (T. 497)

103. Mr. Koricich was involved in the review of MTI's permit application. (T. 498) His areas of review included the surface erosion and sedimentation facilities that would be utilized for the ash disposal, the general mining operations with respect to removal of the coal fine slurry and replacement with ash disposal, and the configuration of the ash disposal pile. (T. 498-499)

104. The layout of the site in relation to erosion and sedimentation control includes a sedimentation pond which handles runoff directed to it by a collection ditch running along the side of the haul road which leads to the top of the embankment of the coal refuse pile. (T. 502)

105. MTI's surface water management plan in the ash disposal application calls for the establishment of drainage controls around the periphery of the disposal area. (T. 569)

106. The drainage controls consist of placing a berm on the edge of the ash disposal area which will be higher than the layer of ash being deposited. (T. 569-570)

107. Because the area in question is wooded and vegetated, it is likely to produce less runoff. (T. 273-274, 578)

108. Under MTI's coal refuse processing permit, drainage from the south was directed to the sedimentation pond and drainage from the north to the slurry pond. (T. 504-505)

109. The interim plan during removal of the slurry impoundment and replacement with ash is that the slurry impoundment is to be dewatered and then temporarily pumped when it accumulates in the diversion ditch running alongside the eastern portion of the coal refuse disposal area. (T. 510)

110. The final plan is to eliminate the slurry impoundment altogether and to have a flat grade on the ash disposal area after reclamation. (T. 510)

111. During the interim, runoff will enter the slurry impoundment area. (T. 515)

112. After elimination of the slurry impoundment, surface water will run in a sheet flow manner across the ash disposal area in a southern direction. (T. 505)

113. MTI has no method for diverting runoff water from entering the ash disposal area, and, therefore, some runoff will travel through the immediate area of ash disposal. (T. 505, 514)

114. When runoff water comes into contact with the ash, some of the water is likely to soak into the ash and some is likely to evaporate. (T. 507) The remainder is likely to continue in a direction perpendicular to the contour of the ash pile, which is a flat surface. (T. 507-508)

115. The runoff will contribute to weathering and erosion of the ash to a small degree. (T. 519)

116. Neither a diversion ditch nor drainage ditch would be effective around the disposal area because there is no natural drainage area around it into which the water may be diverted. (T. 508)

117. Constructing a trench around the disposal area would not be effective because the disposal area is at the top of the drainage basin where the slurry impoundment is located. (T. 515)

118. MTI's 1986 permit application for coal refuse processing stated that it was not economically feasible for the company to install erosion and sedimentation controls and diversion ditches. (T. 512-513)

119. In reviewing MTI's permit application, Mr. Koricich did not evaluate the data contained therein to determine whether it met the criteria set forth in the Department's regulations on ash disposal. (T. 511)

Noise

120. Harmar Township's specific concern with noise involved the amount of noise which would be caused by trucks and rail heads involved in MTI's operation. (T. 68)

121. To determine the potential effect of noise on the surrounding community as a result of the proposed operation, Mr. Roberts read the narrative in the permit application, reviewed the type of equipment to be used, and discussed the matter with Tom Whitcomb in the Bureau of Mining and Reclamation's Permit Section "who was reported to have some knowledge of noise problems from mining equipment." (T. 341)

122. Mr. Whitcomb was not able to provide information for the type of equipment listed in the permit application narrative. (T. 342)

123. Mr. Roberts did nothing else to determine the level of noise which would be generated from operation of the equipment listed in the permit application. (T. 343) He did not know whether anyone else in the Department involved in the permit review obtained information in regard to noise. (T. 344)

124. Neither the Township nor the citizens thereof have done any studies on noise. (T. 71-72)

125. The ash disposal permit contains a special condition which reads as follows:

> 20. Equipment constructed, maintained, and/or used in conjunction with fly ash/bottom ash disposal activities shall be muffled, or in some manner prevented from causing noise levels to reach public nuisance levels.
>
> (Ex. A-25)

Potential for Pollution

126. Acid mine drainage had existed and continued to exist at the Harmar site at the time of the hearing. (T. 474, 652)

127. Acid mine drainage results from iron pyrites associated with coal; coal mining exposes the pyritic material to air and water, which results in acid mine drainage. (T. 654, 655)

128. Acid mine drainage is characterized by high acidity and a very low pH level. (T. 655)

129. Because it is an acid solution, it dissolves constituents out of the surrounding strata, including manganese, aluminum, cadmium, and lead. (T. 655)

130. Removing the slurry impoundment will help to decrease the amount of acid mine drainage being produced because it eliminates a source of one of the components needed for acid mine drainage, which is water. (T. 660) Removal of the slurry impoundment, however, will not entirely eliminate acid mine drainage from being produced at the site because it will not eliminate all sources of groundwater recharge. (T. 660)

131. In order to neutralize the acidity, an alkaline material is required. (T. 655-656)

132. The ash to be disposed of by MTI is extremely alkaline with a high pH level. (T. 654)

133. The ash to be disposed at the site will have a neutralizing effect on the acid water. (T. 659)[6]

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[6] The testimony of Charles Ford on the bottom of p. 659 of the transcript reads:
footnote continued

134. Lead and cadmium appear in the groundwater at the Harmar site because they are leached from the surrounding strata by the acidic water. (T. 664)

135. At the time of the hearing, prior to any ash disposal, the levels of lead and cadmium at the Harmar site exceeded federal drinking water standards. (T. 451)

136. By reducing the source of acid mine drainage, that will also reduce the amount of lead and cadmium being leached into the groundwater. (T. 664)

137. The ash to be deposited at the site contains concentrations of lead and cadmium. (Ex. A-28, p. 388-402)

138. Based on the level of lead and cadmium found in leachate analyses of the bed ash and fly ash to be deposited at the Harmer site, Dr. Streib predicted that the leachate which will be produced from the ash will contain a lead concentration of .17 mg/l to .26 mg/l and a cadmium concentration of .02 mg/l to .05 mg/l. (T. 199-200)

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continued footnote

> ...There is absolutely no doubt in my mind that removing the source of the water and replacing it with an alkaline material which is, in fact, the start of the neutralization system, will do absolutely nothing to improve the quality of the water, for a couple of reasons.

However, Mr. Ford then goes on to explain how removal of the source of the water and replacement with the alkaline ash <u>will</u> improve the quality of the water. Based on the remainder of Mr. Ford's explanation and the presiding Board Member's memory of this testimony, we find that the sentence above contains a transcription error and that Mr. Ford's answer was meant to read that he believed that replacement of the slurry impoundment with the alkaline ash "will do absolutely <u>everything</u> to improve the quality of the water..."

139. SW-6 and SW-8 are surface water monitoring points. SW-6 is located at the toe of the coal refuse embankment, on the south side of the permit area above the collection pond. SW-8 is at the sedimentation pond. (T. 187)

140. Based on monitoring data from SW-6 and SW-8, Dr. Streib predicted that, after the ash is disposed, the levels in the sedimentation pond will exceed the current lead level of .05 and the current cadmium level of .03. (T. 202-203)

141. Dr. Streib predicted that, based on the amount of lead and cadmium in the ash to be deposited at the site, the leachate produced from the ash will cause levels of lead and cadmium in the sedimentation pond to increase. (T. 203)

142. Assuming the current treatment plan is in place, Dr. Streib predicts that water discharged from the sedimentation pond will exceed .05 mg/l of lead and .03 mg/l of cadmium. (T. 206)

143. The treatment plan in place at the time of the hearing involved the dispensing of caustic soda and a recirculation pump. (T. 206)

144. Dr. Streib concluded, to a reasonable degree of scientific certainty, that the lead levels in the leachate produced from the ash will reach .17 to .26 mg/l and that cadmium levels will reach .02 to .05 mg/l. (T. 239-241)

145. Dr. Streib could not form an opinion as to the level of lead and cadmium which would be present in the groundwater if it were infiltrated by leachate produced from the ash. (T. 243)

146. Dr. Streib undertook no testing or analysis work in reaching his conclusions. His conclusions were based on a review of the permit application documents and his visit to the site. (T. 257)

147. Dr. Streib did not review the Department's permit file for Harmar Coal Company. (T. 258-259)

148. Dr. Streib did not review the Department's permit file for the disposal of coal refuse at the Harmar site. (T. 260)

149. Dr. Streib did not take any samples of the coal refuse at the site to analyze it for lead and cadmium content. (T. 291)

150. Dr. Streib did not perform a leachate test on the coal refuse. (T. 292)

151. Dr. Streib did not know whether the leaching ability of the existing coal refuse might be lowered if it were in contact with the ash, but admitted that it might be possible. (T. 292-293) He also admitted that it was possible that lead and cadmium concentrations in the sedimentation pond could decrease after the fly ash is placed on the site. (T. 293)

152. Dr. Streib admitted that, if the volume of acid water decreased and the concentrations of lead and cadmium decreased as a result of placement of the ash, it would be possible that the concentrations of lead and cadmium in the impoundment might be lower <u>after</u> the ash is in place. (T. 293)

153. It is Dr. Streib's opinion that the leachate from the ash to be disposed at the site will be at such a high pH level that it will cause the lead and cadmium to solubilize, which means that it will not precipitate out of the solution. (T. 295-296) However, Dr. Streib could not state whether lead and cadmium become more or less soluble as pH level rises. (T. 289-290)

154. Charles Ford was allowed by the Board to testify as an expert witness in the field of chemistry. (T. 652) Mr. Ford is employed as Manager of Laboratory Services by GAI Consultants. (T. 646) He has done extensive work in the field of chemistry and with respect to acid mine drainage. (T. 648-652)

155. Extremely alkaline leachate will not solubilize lead. It can solubilize cadmium, but only at a pH level of at least 11. (T. 669, 672)

156. Because of the acidic conditions existing at the site, the pH level at the site will not reach 11 even after disposal of the ash. (T. 671)

DISCUSSION

The burden of proof in this appeal lies with Harmar Township to prove by a preponderance of the evidence that the Department abused its discretion or acted in contravention of the law by issuing the permit in question to MTI. 25 Pa. Code §21.101(c)(3). Concerned Residents of the Yough, Inc. v. DER, EHB Docket No. 86-513-MJ (Adjudication issued February 1, 1993).

Issue Preclusion

Before turning to a discussion of the issues involved in this appeal, we must first address the contention made by MTI in its reply brief that one of the issues which Harmar Township raises in its post-hearing brief is precluded by virtue of the fact that it was not raised in the notice of appeal or in Harmar Township's pre-hearing memorandum. The particular issue to which MTI objects is Harmar Township's contention that the reclamation plan approved by the Department fails to require that the site be reclaimed to approximate original contour.

It is well established that a party's failure to raise an issue in its notice of appeal precludes that party from attempting to raise that issue

at a later date, unless good cause can be shown. Commonwealth, Pennsylvania Game Commission v. Commonwealth, DER, 97 Pa. Cmwlth. 78, 509 A.2d 877 (1986), aff'd on other grounds, 521 Pa. 121, 555 A.2d 812 (1989); NGK Metals Corp. v. DER, 1990 EHB 376. Good cause has been limited to a showing of fraud or breakdown in the Board's operation. *Id.*

Harmar Township's notice of appeal contains no allegation that the Department failed to require reclamation to approximate original contour. The closest which Harmar Township comes to making this argument is to allege that the permit application failed to demonstrate compliance with Chapters 75, 86, and 87 of the regulations at 25 Pa. Code and the Department's Program Guidance Manual with respect to fourteen general areas, including the "reclamation plan".[7] The notice of appeal provides no further detail as to Harmar Township's objections to the reclamation plan and clearly makes no mention of the plan's alleged failure to require reclamation to approximate original contour. Nor do Harmar Township's pre-hearing memorandum or amended pre-hearing memorandum indicate that there is an issue concerning reclamation to approximate original contour. The first specific mention of this particular issue comes in Harmar Township's post-hearing brief.

Although we are mindful of the Commonwealth Court's holding in Croner, Inc. v. Commonwealth, DER, 139 Pa. Cmwlth. 43, 589 A.2d 1183 (1991), with respect to issues raised in general terms in the notice of appeal, we find that Harmar Township has not properly preserved the issue of reclamation

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[7] The regulations at 25 Pa. Code, Chapter 87 contain requirements for reclamation. See, *e.g.*, 25 Pa. Code §§87.68, 87.141, 87.142, 87.144, 87.145. In addition, Section II, Part 02, Subpart 06 of the Bureau of Mining and Reclamation's Program Guidance Manual contains instructions with respect to reclamation involving the disposal of fly ash.

contour. We can read from Harmar Township's notice of appeal the general allegation that the reclamation plan submitted by MTI fails to comply with the requirements of Chapter 87 of the regulations. However, Harmar Township never expands on this general allegation in its pre-hearing memorandum or its amended pre-hearing memorandum and, therefore, has abandoned it. Lawrence Blumenthal v. DER, EHB Docket No. 91-161-E (Adjudication issued November 2, 1993), p. 16-17; Max Funk v. DER, 1988 EHB 1242. The first notice given to MTI, the Department, and the Board, for that matter, that Harmar Township had any objections to the reclamation contour was in Harmar Township's post-hearing brief. It is no wonder, then, that Harmar Township can argue, "The record is devoid of any evidence or showing that MTI qualified for or DER found the necessary elements for an exemption from approximate original contour backfilling." (Post-hearing Brief, p. 23) Because MTI and the Department were not given any advance notice of Harmar Township's specific objection with respect to contouring, they were not provided an opportunity to refute this allegation at the hearing. Moreover, Harmar Township made no attempt to respond to MTI's argument in its reply brief that the reclamation contour issue was precluded.

Because we find that Harmar Township failed to put MTI and the Department on sufficient notice of the fact that it intended to challenge the contour requirements of the reclamation plan and did not specifically raise this issue until its post-hearing brief, Harmar Township is precluded from challenging the reclamation contouring of the site. Blumenthal, *supra*.[8]

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[8] Blumenthal involved a similar situation where the Department waited until its post-hearing brief to advance a new theory of liability against the footnote continued

The remaining arguments in Harmar Township's post-hearing brief are (1) that MTI's permit application failed to contain certain information required by the regulations governing ash disposal or that the information contained in the application was inadequate, (2) that MTI's permit application failed to demonstrate that groundwater pollution would not occur, and (3) that MTI's permit application failed to demonstrate that noise pollution would not occur. Because of these alleged deficiencies in MTI's permit application, Harmar Township argues that it was an abuse of discretion for the Department to have issued the permit in question.

The permit in question is both an amendment to MTI's original coal refuse processing permit as well as a permit for the disposal of residual waste, in the form of fly ash and bottom ash. MTI's coal refuse processing permit, SMP 02860201, authorized a coal refuse processing operation on land located in Harmar Township, referred to herein as the Harmar site. The permit at issue in this appeal, SMP 02860201(C2), is in the form of an amendment to SMP 02860201, and authorizes MTI to dispose of fly ash and bottom ash as backfill in MTI's reclamation of the Harmar site.

Although the Department's Bureau of Waste Management normally handles applications for residual waste disposal permits, this is not necessarily the case when the application is in some way related to mining. Applications for the disposal of ash at an active mine site or coal refuse processing site are handled by the Bureau of Mining and Reclamation except where analyses of the ash or ash leachate demonstrate that the ash is potentially hazardous. (F.F.

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continued footnote
appellant. The Board refused to entertain the Department's argument at such a late stage of the proceedings, noting that Pre-Hearing Order No. 1 warns that a party "may be deemed to have abandoned all contentions of law...not set forth in its Pre-Hearing Memorandum." Slip op. at 15-16.

25, 27) In that case, the application is transferred to the Bureau of Waste Management, and the ash cannot be deposited at a site for which the Bureau of Mining and Reclamation is responsible. (F.F. 27)

In the present case, analyses of the ash to be deposited at the Harmar site, as well as analyses of leachate from the ash, demonstrated that the ash and leachate were not hazardous, and the application was assigned to the Bureau of Mining and Reclamation for review since it involved the disposal of ash at a coal refuse processing site. (F.F. 24, 30) MTI's application consisted of a Module 25 application for fly ash/bottom ash disposal. (F.F. 9) It also incorporated the modules submitted with its earlier application for the coal refuse processing permit. (F.F. 23)

In accordance with the Bureau of Mining and Reclamation's Program Guidance Manual on ash disposal at mine sites, the application was to be reviewed in accordance with the Solid Waste Management Act, 35 P.S. §6018.101 *et seq.*, and the regulations promulgated thereunder at 25 Pa. Code, Chapter 75. (F.F. 31) At the time of the Department's review of MTI's permit application, the standards governing the disposal of fly ash and bottom ash were contained at 25 Pa. Code §75.37. The parties' post-hearing briefs address the question of whether these standards were met by MTI's application. Shortly after submission of the parties' post-hearing briefs, however, the Environmental Quality Board promulgated a comprehensive revision of the regulations dealing with residual waste management. This new regulatory scheme became effective on July 4, 1992 and was published at 22 Pennsylvania Bulletin 3389. One of the amendments was the deletion of Subchapter C of 25 Pa. Code, Chapter 75, which included §75.37. Our review of this matter focuses on whether MTI's application complied with the requirements of 25 Pa.

Code §75.37 which were in effect at the time of the Department's approval. Concerned Residents of the Yough, Inc. v. DER, EHB Docket No. 89-133-MJ (Adjudication issued July 19, 1993), p. 29; Fiore v. DER, 1986 EHB 744, 752-753 (In the context of reviewing the propriety of a Department permitting action, the regulations which were in effect at the time the Department took its action are applicable.) Therefore, all references herein to §75.37 are to the former section, under which MTI's permit was approved.

Section 75.37 required that an application for ash disposal provide certain information including, but not limited to, the following: soils description, hydrogeologic description, physical description and analysis of geologic foundation materials, and information regarding surface water management. Harmar Township contends that MTI's application is lacking in each of these areas.

Soils Description

Former §75.37(b)(1) of 25 Pa. Code required an application for an ash disposal permit to include "information and data in a format approved by the Department" pertaining to "physical and agricultural descriptions of soils" at the site designated for disposal.

MTI's soils information was contained in Modules 16 and 17 of its coal refuse processing permit application which were incorporated into its ash disposal application. The information consists solely of a table labeled "List of Mapping Units that Qualify as Prime Farmland" and a map attached thereto which is labeled "Prime Farmland Soils". (F.F. 43)

It is Harmar Township's contention that, although the permit application contained an agricultural description of the soils at the permit site, it failed to contain a physical description. This contention is based

on the testimony of Harmar Township's expert witness, Dr. Donald Streib, who received formal training in the physical description of soils and has had extensive experience in this field. Dr. Streib testified that a "physical description" of soils should include the following information: size distribution, clay versus organic content, mineral matter, permeability, and percolation capacity. According to Dr. Streib, the purpose of a physical description is to evaluate the capacity of the soil to retard the migration of leachate. MTI's application contained none of these factors.

Section 75.37(b)(1) did not define what is required for a physical description of soils, nor is this defined elsewhere in the regulations. Scott Roberts, the individual within the Department who evaluated the soil information contained in MTI's permit application, testified that he relied on the Bureau of Mining and Reclamation's Program Guidance Manual to determine that the application provided a sufficient physical and agricultural description of soils at the proposed disposal site. He conducted this review in his position as a forester with the Department prior to becoming the lead reviewer on MTI's permit application. Mr. Roberts used the soils information to ensure that disposal of ash at the site would not affect prime farmland and to evaluate MTI's ability to reclaim and revegetate the site; he did not evaluate the soils information for any other purpose, such as to determine its capacity to retard leachate as described by Dr. Streib. (F.F. 46, 47)

Generally, the Department's interpretation of the regulations it is charged with enforcing is entitled to deference unless clearly erroneous. Manor Mining & Contracting Corp. v. DER, 1992 EHB 327, 335. However, the Bureau of Mining and Reclamation's Program Guidance Manual on fly and bottom

ash disposal,[9] on which Mr. Roberts stated he relied in reviewing the soils information in MTI's permit application, lacks any guidelines with respect to what information is required for a physical description of soils or for what purpose such information is required. In fact, the Program Guidance Manual makes absolutely no reference to soils descriptions. Nor does it appear that any instruction is contained in the permit application itself. Moreover, when asked why §75.37(b)(1) required a physical and agricultural soils description, Mr. Roberts admitted that, although he was the person charged with reviewing this information, he did not know the purpose for which the information was required. (F.F. 48)

MTI argues in its post-hearing brief that Harmar Township's expert, Dr. Streib, is not an expert on agricultural descriptions of soils. He clearly, however, is knowledgeable of physical descriptions of soils, routinely performing evaluations of physical soils descriptions in his work as a geologist. (F.F. 54) We find Dr. Streib's testimony regarding what constitutes a physical description of soil to be knowledgeable and authoritative.

However, even if the regulations cannot be read to require all of the data described by Dr. Streib as constituting a physical description of soils, at the least they require some physical description of the soil. This is clearly set forth in the language of §75.37(b)(1) which indicates that two sets of information were required with respect to soil at the proposed site: an agricultural description and a physical description. The soils information contained in MTI's permit application consisted solely of information

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[9] The Bureau of Mining and Reclamation's Program Guidance Manual on fly and bottom ash disposal at a mining site was admitted into evidence as Exhibit A-184.

regarding prime farmland. Even if this can be said to meet that part of §75.37(b)(1) requiring an "agricultural" description, it certainly cannot fulfill the requirement of a "physical" description.

Although not applicable to this appeal, the current regulations governing applications for the disposal of residual waste provide some guidance. Under the current regulations, applications must contain a soils description consisting of the following:

> (1) A description of the soils within the proposed permit area and adjacent area down to the bedrock, including for each soil horizon, depth, matrix color, texture, structure, consistency, degree of mottling, mottling colors and laboratory particle size analyses.
>
> (2) A description of the soils to be used for daily, intermediate and final cover, attenuating soil base, liner system and facility construction, including for each onsite and offsite borrow area, texture, laboratory particle size analyses, quantity and cross section of the borrow pits within the proposed permit area.
>
> 25 Pa. Code §288.124(a)(1) and (2)

Nowhere in MTI's permit application do we find a description of soils containing the information required by §288.124(a)(1). Even if the primary purpose of the soils information is to evaluate MTI's ability to reclaim the site, as described by permit reviewer Scott Roberts, and not to determine its ability to retard leachate, as contended by Dr. Streib, there does not appear to be sufficient information in the permit application to make even this evaluation. Based on the lack of information in the permit application, Dr. Streib's testimony, and the language of §75.37(b)(1), we find that MTI's permit application failed to contain a physical description of soils as required by §75.37(b)(1).

Hydrogeologic Description and Groundwater Management

Former 25 Pa. Code §75.37(b)(2) required applications for ash disposal permits to provide "detailed hydrogeologic descriptions of site characteristics." In addition, former 25 Pa. Code §75.37(f) contained requirements to ensure that groundwater was protected from contaminants of fly ash, bottom ash, and leachate, as set forth below:

> (f) Groundwater management. Groundwater shall be protected from contaminants of the fly ash, bottom ash,...and leachate or any of the constituents thereof.
>
> (1) Soil seeps, springs and other waters on the surface of the site shall be collected and removed from underneath the fill...
>
> (3) Groundwater quality monitoring points shall be proposed for Department approval.

The hydrogeologic information contained in MTI's permit application was prepared by Dr. James King, who testified at the hearing as an expert in hydrogeology. The groundwater monitoring system proposed for the Harmar site consists of three downgradient monitoring wells and one well, GW-1, which is intended to serve as an upgradient monitoring well. The northern portion of the Harmar site is upgradient, and GW-1 is located at approximately the northernmost point of the site. Dr. King testified that, because of constraints imposed by the topography of the site, it was difficult to establish an upgradient monitoring well at any location further north of GW-1. However, much discussion at the hearing centered on whether GW-1's location is, in fact, upgradient based upon a statement in the hydrogeologic material prepared by Dr. King for the permit application. In the material, Dr. King states that groundwater monitoring wells placed anywhere within 500 feet of the slurry impoundment/disposal area risk being hydraulically downgradient

thereof, based on the assumption that a groundwater mound could develop in the vicinity of the slurry impoundment due to its recharge ability. Well GW-1 is within 500 feet of the disposal area, and because the slurry impoundment was still in place at the time of the hearing, Dr. King could not state with certainty that GW-1 was functioning as an upgradient monitoring well at that time. However, Dr. King further stated that even if this condition were to occur, it would be eliminated once the slurry impoundment is removed, as it will be as ash disposal begins, and he was confident that GW-1 would, indeed, serve as an upgradient well once ash disposal began. (F.F. 78, 79)

While Dr. King's testimony demonstrates that well GW-1 will clearly function as an upgradient well at some point after removal of the slurry impoundment and the commencement of ash disposal, two questions remain unanswered: Is GW-1 currently operating as an upgradient well prior to removal of the slurry impoundment and commencement of ash disposal? If not, at what point after removal of the slurry impoundment and commencement of ash disposal will GW-1 begin to function as an upgradient well? Based on Dr. King's own testimony, there is no way to determine whether GW-1 is hydraulically upgradient of the existing slurry impoundment. Therefore, if a background monitoring well is required <u>before</u> ash disposal begins, GW-1 cannot serve this function. Secondly, if GW-1 is not currently functioning as an upgradient well, there is no evidence that it will begin to do so <u>immediately</u> upon removal of the slurry impoundment. Despite this, no waiting period was proposed between dewatering of the slurry impoundment and placement of the ash. (F.F. 81) Nor is there any evidence that the commencement of ash disposal will instantaneously change the chemical character of water migrating downward to the aquifer and, therefore, any contamination in the aquifer will

continue until purged. Accordingly, wells in the aquifer will continue to be "downgradient" for some period.

The Bureau of Mining and Reclamation's own Program Guidance Manual on ash disposal requires that an application for ash disposal include the location of proposed groundwater monitoring points for the site, including at least one upgradient point. (F.F. 69) Because it is not clear at what point GW-1 will begin to function as an upgradient monitoring well, we cannot find that MTI has met this requirement.

Apart from groundwater monitoring at the site, Harmar Township also contends that MTI's permit application failed to contain "detailed" hydrogeologic information, as required by §75.37(b)(2), because it failed to identify whether seeps or springs are present on the area designated for ash disposal. Section 75.37(f)(1) required that seeps or springs be collected and removed from underneath the fill. There is no dispute that MTI's permit application does not identify whether seeps or springs exist on the area designated for ash disposal. (F.F. 64) Because the area designated for ash disposal is covered by the slurry impoundment, any identification of the presence of seeps or springs at the time MTI submitted its permit application was impossible. (F.F. 64) The only evidence presented on this matter was the deposition testimony of Department hydrogeologist, Scott Roberts, who determined that the topography of the site, which slopes from north to south, and the relatively horizontal strata make the presence of seeps or springs in the area proposed for ash disposal, at the northern end of the site, unlikely.

In addition, MTI's permit addresses the matter of seeps or springs which might occur at the site. Item 6 in the permit states, "All newly-formed seeps and discharges shall be transported to proper treatment facilities and

tested." (F.F. 66) Therefore, any seeps or springs which occur at the site will be treated if necessary, in compliance with the requirement of §75.37(f)(1). Harmar Township argues, however, that a waiting period of at least one year is necessary between removal of the slurry and disposal of the ash in order to determine the existence of any seeps or springs thereon. This is based on Dr. Streib's testimony that weather conditions, such as an extremely wet or dry season, will interfere with the ability to detect seeps or springs, and that it is preferable to wait four seasons in order to make a definitive determination.

However, former §75.37(f)(1) required only that springs and seeps underneath the fill be collected and treated. There is no requirement of a waiting period of one year or longer to see whether any seeps or springs may develop at some point in the future. Should any seeps or springs develop, they are to be collected and transported to a treatment facility, as per Item 6 of the permit, and in compliance with §75.37(f)(1). On that basis, we find that Harmar Township has not demonstrated that MTI's permit application failed to comply with §75.37(b)(2).

Geologic Foundation and Stability

Former 25 Pa. Code §75.37(b)(3) required an ash disposal application to contain a "[p]hysical analysis and description of geologic foundation materials." In addition, former §75.37(c) required that "[t]he geology foundation materials [of the site designated for ash disposal] shall have a minimum bearing capacity one and one-half times greater than the total applied load in pounds per square foot." Harmar Township contends that MTI's application is devoid of information pertaining to geologic foundation materials and minimum bearing capacity.

Module 7 of MTI's coal refuse processing application contained information on the geology of the site. This, along with the other modules submitted with the coal refuse processing application, was incorporated into the ash disposal application. In addition, the ash disposal application contains information pertaining to the drilling of monitoring wells GW-5 and GW-6, including a description of the lithology encountered during the drilling of the wells, as well as thickness of the strata and depth of the surface.

Harmar Township first takes issue with the fact that the ash disposal application contains no calculation of the load-bearing capacity of the ash disposal area. MTI does not dispute this. However, MTI points to the testimony of Thomas Gray, engineering manager for GAI Consultants. Mr. Gray acted as the project engineer for MTI's ash disposal application and it was under his direction that the ash disposal operation was designed. Mr. Gray calculated the bearing capacity of the geologic foundation material of the ash disposal area as exceeding the weight of the ash by more than one and one-half times (F.F. 94) in accordance with the requirement of §75.37(c). Mr. Gray admitted, however, that he did not calculate the bearing capacity of the disposal area prior to submission of the permit application but, rather, only performed this calculation just prior to the hearing. (F.F. 93)

We certainly do not sanction MTI's method of ensuring that its permit application met the requirements of the regulations after submitting the application for Department approval and only after the permit was challenged in this appeal. However, because our adjudication of this matter is *de novo*, we must examine all of the evidence put before us, Warren Sand and Gravel Co., Inc. v. Commonwealth, DER, 20 Pa. Cmwlth. 186, 341 A.2d 556 (1975), including evidence which may not have been made available to the Department at the time

of its action. Willowbrook Mining Co. v. DER, 1992 EHB 303, 316; Township of Middle Paxton v. DER, 1981 EHB 315, 331. Mr. Gray's calculations, albeit belated, show the bearing capacity of the ash disposal area to exceed the weight of the ash by greater than one and one-half times, in compliance with the standard set forth in §75.37(c). Harmar Township has offered nothing to dispute this finding. Nor does it appear that Harmar Township challenges the substance of Mr. Gray's calculations, but, rather, only the timing thereof. Therefore, based on the evidence before us, we find that the bearing capacity of the ash disposal area complies with the regulatory requirement and that the deficiency in MTI's permit application is corrected by the evidence herein.

Secondly, however, Harmar Township argues that MTI's application failed to comply with §75.37(b)(3)'s requirement of a "physical analysis and description of the geologic foundation materials." This is based primarily on Dr. Streib's review of the geologic information submitted by MTI with both its ash disposal application and its earlier application for the coal refuse processing permit. Dr. Streib testified that the information contained in the applications fails to provide a physical description and analysis.

MTI provides little in the way of any evidence on this matter, other than to assert that the Module 7 and relevant portions of the ash disposal application do contain a description and analysis of the geologic foundation material. In analyzing the material submitted by MTI, the Department's permit reviewer, Scott Roberts, concluded that it did include a physical description of the geologic foundation material at the disposal area. However, he admitted that the material did not contain a physical analysis. (F.F. 99) Mr.

Roberts further admitted that he did not review the geologic information against the requirement of §75.37(b)(3); nor did he know the purpose for which §75.37(b)(3) required this information. (F.F. 100, 101)

A review of Module 7 and the relevant provisions of the ash disposal application indicates that, while they contain descriptive information about the geology of the Harmar site, they clearly do not contain a physical analysis thereof. Nor is the information broken down in such a way as to apply it specifically to the area designated for ash disposal. Based on our review of the geologic information submitted by MTI, the admission of Mr. Roberts, and the testimony of Dr. Streib, we must conclude that MTI failed to supply the information required by §75.37(b)(3).

Finally, Harmar Township argues that MTI failed to comply with §75.37(c)(i), which required the following:

> (c) Stability ... Special design factors and implementation of such shall be required for any of the following geological characteristics:
>
> (i) The presence of clay horizons or unstable units in the strata...

Harmar Township argues that, by failing to provide a physical soils description, as discussed earlier herein, MTI failed to identify whether clay horizons are present under the disposal site. Other than eliciting from Mr. Gray that he had no knowledge as to whether clay horizons were present underneath the disposal area, Harmar Township provided little else on this subject. To meet its burden of proof, Harmar Township must demonstrate either that MTI failed to make a determination as to whether clay horizons were present below the disposal area or that MTI determined that clay horizons are present, but failed to implement any special design factors in response

thereto. Although Mr. Gray testified that he had no knowledge as to whether clay horizons were present beneath the area of disposal, this by itself does not provide sufficient evidence for us to conclude that Harmar Township has met its burden of proving that no determination was made by MTI as to the presence of clay horizons. Moreover, if, as Harmar Township asserts, this information should have been set forth in the physical soils description which MTI failed to provide in its permit application, this matter has already been addressed herein, and we have concluded that MTI failed to provide a physical soils description as required by the applicable regulation. In light of this finding, we need not further address this matter.

Surface Water Management

Former 25 Pa. Code §75.37(e)(1) required the following with respect to surface water management:

> (e) Surface water management. Surface water runoff from the disposal area and adjacent areas shall be managed so as to assure compliance with the [Clean Streams Law] and the regulations pursuant thereto.
>
> (1) Runoff from adjacent areas shall be diverted away from the fly ash, bottom ash or slag pile.

Harmar Township asserts that MTI's ash disposal application made no provision for controlling runoff onto the ash disposal area.

MTI points out in its post-hearing brief that erosion and sedimentation controls exist on the site pursuant to the original coal refuse processing permit, and, in addition, the ash disposal application calls for the establishment of drainage controls around the periphery of the ash disposal area. As the ash is disposed, a berm will be created around the edge at a higher level than the area of ash disposal so as to divert stormwater

runoff from the ash pile. In addition, because the area surrounding the site is wooded, less runoff is likely to be produced. (F.F. 107) MTI argues that the drainage controls, coupled with the cementitious nature of the ash, is sufficient to divert the minimal amount of runoff which will be produced and to prevent free discharge of the runoff onto the ash disposal pile.

Senior civil engineer, Joel Koricich, is the individual within the Department who reviewed those portions of MTI's application dealing with surface water management and erosion control. Although Mr. Koricich approved the surface water management portions of the application, he admitted that he did not evaluate the information contained in the application to determine whether it satisfied the regulatory requirements. (F.F. 119) Moreover, Mr. Koricich testified that, after removal of the slurry impoundment, surface water from the north will run in a sheet flow across the ash disposal area. He admitted that MTI has no method for diverting runoff from entering the ash disposal area, and, therefore, some runoff will travel through the immediate area of ash disposal. (F.F. 112, 113) When the water comes into contact with the ash, some is likely to soak into the ash, and the runoff will contribute to weathering and erosion of the ash to a small degree. (F.F. 114, 115)

Much testimony centered on the question of whether diversion ditches would provide an effective solution to the runoff problem. MTI's coal refuse processing application had stated that it would not be economically feasible for the company to install diversion ditches at the site. Regardless of cost or economic feasibility, the Department's Mr. Koricich testified that neither diversion ditches nor drainage ditches would be effective since there is no natural drainage around the ash disposal site into which water may be diverted. (F.F. 116)

One thing, however, remains clear: Despite the implementation of drainage controls around the periphery of the disposal area, MTI's application did not provide a means of preventing surface water runoff from coming into contact with the ash, as required by §75.37(e)(1). Simply because a diversion or drainage ditch will not provide an effective solution, MTI cannot avoid having to comply with the requirement of §75.37(e)(1), and the testimony of Mr. Koricich indicates that there has not been compliance.

In a Format Approved by the Department

Before concluding, we must address the language of §75.37(b) which required that the information set forth therein was to be supplied "in a format approved by the Department". This raises the following question: If the Department concluded that the information submitted by MTI was sufficient to make a determination as to whether ash disposal should be permitted at the Harmar site, does that satisfy the requirements of §75.37(b)?

Section 75.37(b) required specific information to be submitted in every application for an ash disposal permit. Although the Department was free to determine the format in which the information was to be submitted, in this case consisting of a Module 25 application supplemented with certain other modules from the coal refuse processing application, the Department was not free to ignore the language of §75.37(b) in determining what information was required from the applicant. Although the Department is entitled to certain deference in the interpretation of its regulations, it cannot disregard the language thereof. County of Schuylkill v. DER, 1989 EHB 1241, 1267 (citing Delaney v. State Horse Racing Commission, 112 Pa. Cmwlth. 407, 535 A.2d 719 (1988).)

In the present case, Harmar Township has demonstrated that the permit application did not contain certain data required by the regulations. MTI produced nothing to refute this. In fact, Departmental witnesses admitted that certain data required by §75.37 was not in the permit application and that, in their review of the application, they had not scrutinized it against the criteria of the regulations.

MTI may not point to the fact that the Department approved its permit application as proof that it complied with §75.37. Where the Department approves a permit application which lacks specific information required by the regulations, it abuses its discretion, and the permit applicant cannot then point to the Department's approval as proof that it complied with the regulations.

We find that the information required by §75.37, as discussed herein, was not supplied "in a format approved by the Department" nor in any format at all. Rather, we find that MTI's permit application failed to supply much of the data required by §75.37.

Conclusion

We note that substantial evidence was presented by MTI as to the beneficial effect the disposal of the ash, which is highly alkaline, will have on conditions at the Harmar site, which is plagued by acid mine drainage. This evidence was presented in response to Harmar Township's argument that the permit application failed to demonstrate that there was no presumptive evidence of potential pollution to waters of the Commonwealth, as required by

25 Pa. Code §86.37(a)(3).[10] The evidence strongly supports MTI's position, had we reached this question.

However, despite the beneficial result which might have been achieved by the ash disposal operation, we cannot ignore the fact that basic information required by the regulations was not submitted by MTI, nor was this gap filled by the evidence produced at the hearing, with the exception of the minimum bearing capacity. It may well be that this information would not have altered the Department's decision to issue the permit in question. However, without this information, we cannot make that assumption.

More importantly, we are troubled by the actions of the Department personnel who were charged with reviewing the permit application and who, by their own admission, made no attempt to ensure that the application complied with the requirements of the regulations. Where the Department grants its approval for a certain action, but, in doing so, fails to ensure that the requirements of the applicable regulations have been fully complied with, its action amounts to an abuse of discretion and cannot be sustained. See Baney Road Association v. DER, 1992 EHB 441. (Department failed to conduct an independent review of townships' land development module to determine its compliance with 25 Pa. Code §71.21(a)(5)(2).) In light of the failure of MTI's permit application to supply all of the information required by the regulations in effect at the time of its review, we find that the Department's approval thereof amounted to an abuse of discretion. Rather than remanding this matter to the Department to order MTI to supply information which was

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[10] Because MTI's ash disposal permit was issued as an amendment to its coal refuse processing permit, pursuant to SMCRA, 52 P.S. §1396.1 *et seq.*, it is subject to the coal mining regulations, of which §86.37(a)(3) is a part.

required under former 25 Pa. Code §75.37 and to evaluate MTI's application in accordance with the former regulations, we shall sustain the appeal. A remand to the Department would be inappropriate where the record demonstrates substantial failure by MTI and the Department to adhere to §75.37 and where the regulation has been deleted. MTI is free to reapply under the requirements of the current regulations governing the disposal of ash at a coal refuse site.

Because of our finding that the Department abused its discretion in issuing the permit, we need not reach the remaining issues dealing with noise and presumptive evidence of potential pollution.

CONCLUSIONS OF LAW

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

2. The burden of proof is on the appellant, Harmar Township, to demonstrate that the Department abused its discretion or acted in contravention of the law in issuing the permit in question. 25 Pa. code §21.101(c)(3).

3. A party's failure to raise an issue in its notice of appeal renders that issue waived unless good cause can be shown for raising it at a later date. Game Commission, *supra*.

4. Harmar Township failed to raise the issue of reclamation to approximate original contour in its notice of appeal.

5. In reviewing the propriety of a Department permitting action, we must examine the Department's action in the context of the regulations which were applicable at the time of the Department's action. Fiore, *supra*.

6. The Board's adjudication of this matter is *de novo*, and, as such, we may hear evidence not presented to the Department. Warren Sand & Gravel, *supra*; Willowbrook Mining, *supra*.

7. MTI's permit application failed to contain a physical description of soils as required by former 25 Pa. Code §75.37(b)(1).

8. MTI's permit application complied with former 25 Pa. Code §75.37(b)(2) pertaining to hydrogeologic information, but failed to comply with former §75.37(f) regarding groundwater monitoring points.

9. MTI's application failed to contain a physical analysis and description of geologic foundation materials as required by former 25 Pa. Code §75.37(b)(3).

10. MTI's permit application failed to comply with former 25 Pa. Code §75.37(e)(1) with respect to the diversion of surface water runoff from the ash disposal.

11. Although the Department's interpretation of its regulations is entitled to deference, it may not ignore the language of the regulations. County of Schuylkill, *supra*.

12. Where the Department approves a permit application which fails to supply all of the information required by the applicable regulations, that approval amounts to an abuse of discretion.

O R D E R

AND NOW, this 30th day of December, 1993, the Board having determined that the Department abused its discretion in issuing the permit in question, it is hereby ordered that the appeal of Harmar Township at EHB Docket No. 90-003-MJ is sustained.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Richard S. Ehmann

RICHARD S. EHMANN
Administrative Law Judge
Member

Joseph N. Mack

JOSEPH N. MACK
Administrative Law Judge
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DATED: December 30, 1993

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