Environmental Hearing Board

Adjudications and Opinions

2010
VOLUME I

COMMONWEALTH OF PENNSYLVANIA

Thomas W. Renwand, Chairman and Chief Judge

JUDGES

OF THE

ENVIRONMENTAL HEARING BOARD

2010

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

Cite by Volume and Page of the
Environmental Hearing Board Reporter

Thus: 2010 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 2010.

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

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JEFFREY AND LISA RANKIN	:	
	:	
v.	:	**EHB Docket No. 2009-031-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: January 4, 2010**

OPINION AND ORDER
ON MOTION TO DISMISS

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board grants a motion to dismiss an appeal from a Department letter refusing to pursue enforcement action against a mining company in response to a citizen complaint because the letter is not an appealable action.

OPINION

Jeffrey and Lisa Rankin submitted a complaint to the Department of Environmental Protection's Cambria District Mining Office on November 13, 2008 alleging that blasting done by Ferlitch Construction, Inc. caused their well water quality to decline. After conducting an investigation, the Department in a letter dated February 10, 2009, informed the Rankins of its finding that energy produced by the blasting could not have caused any damage to their home or well. The letter informed the Rankins that the Department was closing the case and taking no

further action. The Rankins filed this appeal from the Department's letter objecting to the Department's finding.

The Department has filed a motion asking us to dismiss the Rankins' appeal of the Department's February 10, 2009 letter because it memorializes an exercise of the Department's enforcement discretion and is not an appealable Department action. The Rankins have not filed a response to the motion. We deem all properly pleaded facts admitted when an opposing party fails to respond to a motion to dismiss. *Burnside Township v. DEP*, 2002 EHB 700. For the reasons discussed in our recent Opinion and Order in *Ballas v. DEP*, EHB Docket No. 2009-007-L (December 29, 2009), we agree that the Department's letter reflects an unappealable exercise of the Department's enforcement discretion.

Accordingly, we issue the Order that follows.

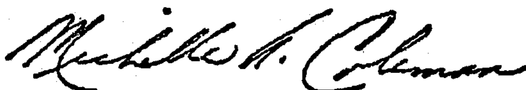
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

JEFFREY AND LISA RANKIN	:	
	:	
v.	:	**EHB Docket No. 2009-031-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

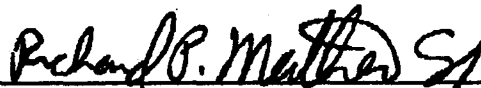
AND NOW, this 4th day of January, 2010, it is hereby ordered that the Department's motion to dismiss is **granted**. This appeal is dismissed.

ENVIRONMENTAL HEARING BOARD



MICHELLE A. COLEMAN
Judge

BERNARD A. LABUSKES, JR.
Judge



RICHARD P. MATHER, SR.
Judge

DATED: January 4, 2010

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

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

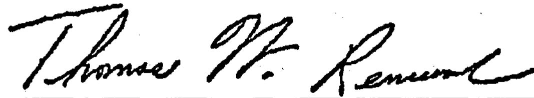
JEFFREY AND LISA RANKIN	:	
	:	
v.	:	**EHB Docket No. 2009-031-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

DISSENTING OPINION

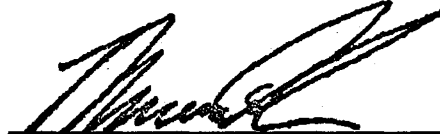
By Thomas W. Renwand, Chairman and Chief Judge
Joined in by Michael L. Krancer, Judge

We respectfully dissent to the Majority Opinion based on the same reasons set forth in our dissenting opinion in *Ballas v. Department of Environmental Protection*, EHB Docket No. 2009-007-L, slip op. at 7 (Opinion issued December 29, 2009).

ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Chairman and Chief Judge



MICHAEL L. KRANCER
Judge

DATED: January 4, 2010

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LOWER SALFORD TOWNSHIP AUTHORITY AND UPPER GWYNEDD-TOWAMENCIN MUNICIPAL AUTHORITY	:	
v.	:	**EHB Docket No. 2005-100-K**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: January 5, 2010**

OPINION AND ORDER ON PETITIONS FOR RECONSIDERATION

By Michael L. Krancer, Judge

Synopsis:

The Board denies two Petitions for Reconsideration of the Board's Opinion and Order dated December 15, 2009 which denied two applications for attorneys' fees and costs.

OPINION

This opinion and order deals with and denies the two petitions for reconsideration of this Board's opinion and order issued on December 15, 2009 which denied two applications for attorneys' fees and costs. *Lower Salford Township Authority v. DEP*, EHB Docket No. 2005-100-K (Opinion and Order issued December 15, 2009). The arguments made in the petitions for reconsideration are duplicative of the ones made in the original application for attorneys' fees, to which the Department responded, to which the applicants sur-replied, in a long series of back and forth filings. Indeed the filings on the attorneys' fees applications alone covers more than

thirty entries in our docket over a seven month period of time.

However, we do write about one procedural point raised in the petitions for reconsideration. Petitioners say that our opinion and order of December 15th was, in essence, the granting of summary judgment and that this was improper on the ground that no party had moved for summary judgment and the EHB cannot enter summary judgment on behalf of a party that did not move for summary judgment. The petitioners cite to the Board decision of *Exeter Township v. DEP*, 2000 EHB 630, and to the Supreme Court's decision of *Bensalem Township School District v. Commonwealth of Pennsylvania, et al.*, 544 A.2d 1318 (Pa. 1988).

While we agree that the petitioners' statement of the law on this is correct, we respectfully disagree that it applies here. Before us in the December 15th opinion and order were the parties' applications for attorneys' fees. They were not themselves causes of action nor were they appeals. The *Exeter Township* case involved the Board sustaining an appeal in the absence of a pending motion for summary judgment. The *Bensalem* case, similarly, involved a motion for summary judgment on the underlying case where the lower court granted summary judgment to the party defending the summary judgment motion.

We see the procedural point here differently than do the petitioners. As said, our opinion and order of December 15th was on the parties' applications for attorneys' fees. An application for attorneys' fees is not itself an independent or self-standing suit or appeal. It is necessarily subordinate to, appurtenant to and dependant upon an underlying suit, cause of action or, in our case, an appeal.

We, as do all courts, grant or deny applications or petitions or motions appurtenant to and part of underlying suits all the time without a summary judgment motion on the application or petition or motion. For example, we grant or deny petitions for sanctions and applications or motions on discovery without the need for a motion for summary judgment thereon. We also, of

course, grant or deny petitions for reconsideration without a motion for summary judgment thereon. Interestingly, if the petitioners' arguments here were correct, we could not grant the petition for reconsideration since there is no summary judgment motion pending thereon and, thus, doing so would run afoul of the very rule they assert. We would have a petition whose merit is precisely what precludes its being granted.

Our Rules on the disposition by the Board of attorneys' fees applications are in accord. *See* 25 Pa. Code §§ 1021.181 – 1021.184. Those rules set out the applicable procedure for the Board in deciding attorneys' fees applications such as the ones that were before us. These rules provide that the Board is to render the decision upon the application and response. The Board may allow for discovery and testimony to be taken under some circumstances. We outlined in detail in our December 15th opinion and order why the taking of testimony or discovery in this particular case is not called for or appropriate. As we said in our opinion and order of December 15th and we repeat here again, after seven months of fee application filings covering more than 30 plus docket entries, "[w]e think there is quite an adequate record to determine these applications without further litigation." *Lower Salford, supra, slip op.* at 9. The point is that our Rules demonstrate that petitioners are wrong when they say that we were not allowed to have decided these pending fee applications and our having done so ran afoul of the summary judgment rules and case law they cite. Applications for fees and costs were pending and those applications were ruled upon.

Perhaps at the core of the instant petitions for reconsideration is the notion that a court or the Board is absolutely mandated to hold a trial on every fees petition. The relief asked for by Upper Gwynedd and Lower Salford is that we vacate the opinion and order and permit the applicants to submit "any evidence" in support of the fee applications. We respectfully disagree that a fee petition automatically requires a trial. Section 307(a) of the Clean Streams law does

not so provide nor does the Supreme Court's opinion in *Solebury Township* so suggest. Our research has not revealed that there is a rule to that effect under any fee-shifting provision of state or federal law. Nor, apparently, has the petitioners' research since they posit no case, rule or law from anywhere that supports such an extreme position. In addition, our Rules on attorneys' fees applications clearly provide that a trial is permitted but is not required. *See* 25 Pa. Code §§ 1021.181 – 1021.184. We explained fully in our opinion and order of December 15th why no trial is called for or appropriate in this case. We maintain that view today. Accordingly, we enter the following Order:

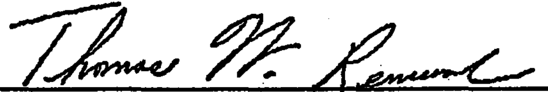
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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

ORDER

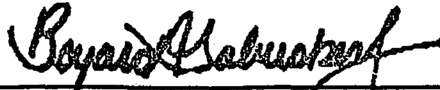
AND NOW, this 5th day of January, 2010, it is HEREBY ORDERED that the Petitions for Reconsideration of Upper Gwynedd Township Municipal Authority and Lower Salford Township Authority of the Board's Opinion and Order dated December 15, 2009 are **denied**.

ENVIRONMENTAL HEARING BOARD

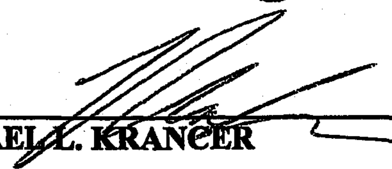


THOMAS W. RENWAND
Chairman and Chief Judge

MICHELLE A. COLEMAN
Judge



BERNARD A. LABUSKES, JR.
Judge



MICHAEL L. KRANCER
Judge

Judge Richard P. Mather, Sr. is recused and did not participate in this decision.

DATED: January 5, 2010

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HATFIELD TOWNSHIP MUNICIPAL AUTHORITY, et al.	:	
	:	**EHB Docket No. 2004-046-L**
v.	:	**(Consolidated with 2004-045-L) and 2004-112-L)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: January 8, 2010**

OPINION AND ORDER ON
<u>MOTIONS IN LIMINE</u>

By Bernard A. Labuskes, Jr., Judge

Synopsis

In denying motions in limine, the Board holds among other things that evidence regarding settlement discussions in an underlying appeal may be relevant at a hearing to address a petition for attorneys' fees.

OPINION

This matter concerns petitions for attorneys' fees and costs filed by the Appellants pursuant to Section 307(b) of the Clean Streams Law, 35 P.S. § 691.307(b). Section 307(b) authorizes the Board to order the payment of costs and attorneys' fees that it determines to have been reasonably incurred by a party in litigation pursuant to the Clean Streams Law.

Background

By way of background, on December 5, 2003, the Department of Environmental Protection (the "Department") submitted to the Environmental Protection Agency ("EPA") for

its review and approval a Total Maximum Daily Load ("TMDL") Assessment for the Neshaminy Creek Watershed.[1] On December 9, 2003, EPA approved the Neshaminy TMDL. On February 25, 2004, the Borough of Lansdale ("Lansdale") filed a notice of appeal to this Board of the TMDL, which was docketed at 2004-045-K. On February 25, 2004, Hatfield Township Municipal Authority, Horsham Water & Sewer Authority, Bucks County Water & Sewer Authority, Warrington Township Water & Sewer Department, and Warwick Township Water & Sewer Authority (collectively, "Hatfield") filed a notice of appeal of the TMDL with the Board, which was docketed at 2004-046-K. On March 15, 2004, Lansdale filed an amended notice of appeal. On March 17, 2004, Hatfield filed an amended notice of appeal.

Lansdale served initial discovery on April 13, 2004. On April 14, 2004, the Department, Hatfield, and Lansdale met to fulfill the Board's requirement that the parties meet within 45 days to discuss settlement. Hatfield served initial discovery on the Department on April 19, 2004. By Order dated April 14, 2004, the Lansdale and Hatfield appeals were consolidated at EHB Docket 2004-046-K.

On May 12, 2004, the Chalfont-New Britain Joint Sewage Authority ("Chalfont") filed an appeal of the TMDL, which was docketed at 2004-112-K. On May 12, 2004, the Department served discovery. During an early meeting with Lansdale and Hatfield, a representative of the Department stated that phosphorus reductions associated with the TMDL were likely to become more stringent in the future, either as a result of numeric nutrient water quality standards on which the Department was currently working, or as a result of modifications to the waste load allocations in a subsequent or revised TMDL if after implementation of the current TMDL it was determined that impairments in the watershed had not fully been addressed. By Order dated June 16, 2004, the Chalfont appeal was also consolidated at EHB Docket No. 2004-046-K.

[1] This factual recitation is adopted from the parties' joint stipulation of facts.

In late May 2004, in the course of responding to Lansdale and Hatfield's discovery, the Department determined that one of the variables in the model used in the TMDL, the K_7 value (i.e., the "k-rate"), had not been set appropriately. The "k-rate" was a variable and calibration parameter in the model that measured the phosphorus loss rate. On June 8, 2004, the Department met with Hatfield and Lansdale. Chalfont did not attend the meeting. The Department informed Hatfield and Lansdale of the modeling error involving the k-rate, and of the Department's intention to revise the TMDL to correct this error. The Department described what the Department believed would be the schedule for moving forward with the development of the revision to the TMDL, a process that the Department estimated would take approximately six months. On June 14, 2004, all parties except Chalfont participated in a conference call with Judge Krancer. The participating parties discussed a stay of the litigation until the TMDL revision process could be completed, which at the time was envisioned to conclude in January 2005. On July 6, 2004, the Board issued an Order which stated that "the Department and Appellants shall meet during this stay, and in advance of the issuance of the revised TMDL, to discuss the revision of the TMDL...and to make reasonable efforts to resolve disputed issues."

The Department, Lansdale, and Hatfield's technical and legal representatives met regarding the TMDL revision process and the model to be used for the revised TMDL on July 7, 2004. Those technical and legal representatives met again on September 15, 2004. On September 24, 2004, counsel for the Department sent an e-mail to counsel for Chalfont, which read in part: "The Department did a document production, in which I believe you were invited to participate, although you have not filed any discovery requests. Since then the consultants for the parties have exchanged information with respect to the model, first in a technical meeting on July 7, 2004, which you were invited to attend, and since that meeting, by telephone and by

e-mail, and the Department's consultants at Penn State have provided a revised version of the model. The parties who have been discussing these issues anticipate that there will be field date generated, as well as an additional revision to the model." On October 12, 2004, a conference call was held among the parties. On this call the Department informed the parties that the model's flows were in line but that the velocities and depths (used to calculate the flows) were in need of further refinement since the velocities affected the k-rate. The Department's contractor subsequently revised the slopes in the model based on map assessments. On October 22, 2004, the Department sent Appellants a revised model.

On October 25, 2004, counsel for the Department sent an e-mail to Appellants in which the Department offered the Appellants the opportunity to provide feedback on the current revision of the model and on any other issues set forth in the appeals prior to publication of a revised Neshaminy TMDL. On November 1, 2004, the Department sent Appellants, in response to their request for the model results and effluent concentrations, a table of different effluent concentrations and flow scenarios. On November 15, 2004, the Department informed the Board that the Department was ready to move forward with publication of a revised TMDL but was affording the Appellants an opportunity to meet prior to finalizing the revision. By e-mail dated November 19, 2004, the Department provided Appellants with the wasteload allocations that the Department anticipated would be proposed in the revised TMDL. There were effluent concentrations of 0.5 mg/L TP, which were more stringent than the original TMDL's levels of 0.8 mg/L TP. On November 22, 2004, Lansdale and Hatfield met with the Department to discuss the planned revision to the Neshaminy TMDL, at which Lansdale and Hatfield provided the Department with additional comments. On December 2 and December 8, 2004, the Department provided additional information to Appellants in response to questions raised at the November

22, 2004 meeting. On December 15, 2004, the Department informed the Board: "The Department now believes it is in a position to begin drafting the revised TMDL."

By letter dated February 3, 2005, the Department provided Hatfield and Lansdale with a draft settlement document. On February 8, 2005, Lansdale and Hatfield met with the Department. At this meeting, the Department reiterated the information and the offer of settlement from the February 3, 2005 letter. Appellants informed the Department that they preferred to seek a stay of the current litigation from the Board. An in-person status conference with Judge Krancer was requested by Hatfield and Lansdale. Although the Department did not agree with these appellants' approach, it did not oppose the request.

The conference occurred on April 15, 2005. At that conference, Appellants raised concerns with respect to administrative finality associated with Department's proposal, given what they characterized as the Department's unwillingness to withdraw the TMDL. The Department presented its position that it did not agree with these concerns and that it did not have the power unilaterally to withdraw the TMDL absent EPA's approval. Hatfield and Lansdale presented their position that the stay should continue. The Department opposed this position, arguing instead for a dismissal of the litigation without prejudice. The Board entered an Order on April 18, 2005 continuing the stay.

On December 15, 2005, the Department submitted a status report to the Board indicating that the data analysis from three rounds of sampling in the Neshaminy watershed over the summer of 2005 had been completed and the Department would be moving forward with the remaining steps leading to an amendment of the TMDL. The Department provided Appellants with that data analysis ("the Hunter Carrick report") on January 5, 2006. In a January 27, 2006 e-mail, the Department indicated that new model runs for the amended TMDL were in the

process of being completed and that the Department intended to share those results with the Appellants when they were ready. On February 1, 2006, Lansdale and Hatfield requested that the Department provide the raw data from the Hunter Carrick report, the new modeling data, and information about any additional work being conducted on the TMDL. On February 1, 2006, the Department provided Lansdale with the raw data. On February 3, 2006, the Department provided Hatfield with the raw data and provided the new modeling data to Hatfield and Lansdale. On April 11, 2006, Lansdale and Hatfield met with the Department and requested additional data, which the Department provided.

On June 15, 2006, the Department submitted a status report to the Board indicating that a draft Neshaminy TMDL amendment was circulating internally. On June 28, 2006, a status conference call was held with Judge Krancer. On June 29, 2006, the Board entered an Order vacating the stay and establishing a schedule for completing discovery, pre-hearing submissions, and setting a hearing date. Following the lifting of the stay, the parties had additional discussions regarding resolution of the matter. On August 11, 2006, another conference call was held with Judge Krancer, following which Judge Krancer stayed all proceedings in order to allow that TMDL revision and comment process to be completed.

The Department released the draft amendment to the Neshaminy TMDL for public comment on August 26, 2006. The public comment period ran until October 25, 2006. On August 18, 2007, the Department published a notice of proposed withdrawal of the nutrient portion of the Neshaminy TMDL, subject to EPA approval. By letter dated September 6, 2007, the Department submitted to EPA for its approval the Department's rationale document for the proposed withdrawal of the nutrient portion of the Neshaminy TMDL. On February 5, 2008, the

Department received written approval from EPA, dated January 31, 2008, of the proposed withdrawal of the nutrient portion of the Neshaminy TMDL.

On April 5, 2008, the Department published notice of its withdrawal of the nutrient portion of the Neshaminy TMDL. Subsequently, the parties negotiated the terms of a stipulation of settlement. On October 17, 2008, the parties submitted a stipulation of settlement to the Board. On October 20, 2008, the Board entered an order of dismissal.

On November 17, 2008, Lansdale filed an application for attorneys' fees and costs. On November 19, 2008, Hatfield filed its application for attorneys' fees and costs. The costs and fees incurred in the instant appeal of the TMDL by Lansdale and Hatfield prior to the filing of the instant fee petition are $287,245.27 and $239,243.00 respectively. The parties have not stipulated to costs and fees associated with filing and litigating their fee petitions.

To date, no replacement nutrient TMDL has been established.

After consideration of the parties' filings and a number of conference calls with all of the parties, the Board by Order dated June 18, 2009 demurred from ruling on the fee petitions pending a hearing to address factual issues raised by the Appellants' petitions. We strongly encouraged the parties to enter into as many factual stipulations as possible in order to save time and expense. The parties indicated a desire to conduct some discovery. After some extensions, the hearing is now set to begin on January 11, 2010. In our June 18 Order, now-retired Judge Miller directed the parties to focus upon the following issues:

1. Was each petitioner a prevailing party with respect to the standard for phosphorus used by the Department in developing the TMDL, leading the Department to decide to withdraw the challenged Neshaminy TMDL in May 2004?

2. Was the Department substantially justified in its opposition to the appeals of the TMDL, including the question of the ripeness or justiciability of the appeals?

3. Does the Department have any evidence that the Board should accept to challenge the amounts of costs and fees claimed by petitioners as being reasonably incurred by them before July 2004, when the Department offered to settle the appeals, including the claimed hourly rate for hourly-time devoted to the appeals?

The Standard for Awarding Fees

Section 307(b) of the Clean Streams Law, 35 P.S. § 691.307(b), authorizes this Board in its discretion to order the payment of costs and attorneys' fees that we determine to have been reasonably incurred by a party in proceedings pursuant to the act. The Board may award costs and attorneys' fees under Section 307(b) solely on the basis of a finding that is supported by the record of bad faith or vexatious conduct. *Solebury Township v. DEP*, 928 A.2d 990 (Pa. 2007).[2] In the absence of bad faith or vexatious conduct, in order to be eligible for an award of attorneys' fees under Section 307(b) a party must first satisfy three criteria:

1. The applicant must show that the Department provided some of the benefit sought in the appeal;

2. The applicant must show that the appeal stated a genuine claim, *i.e.*, one that was at least colorable, not frivolous, unreasonable or groundless; and

3. The applicant must show that its appeal was a substantial or significant cause of the Department's action providing relief.

See, Lower Salford Township Authority v. DEP, EHB Docket No. 2005-100-K, slip op. at 6 (December 15, 2009) ("*Lower Salford*"); *Solebury Township v. DEP*, 2008 EHB 658, *reconsideration denied*, 2008 EHB 718 ("*Solebury*").

Some of the principles that inform our application of these eligibility criteria are as follows:

[2] Beyond the requirement that the Department act in good faith and avoid vexatious conduct, we will not inquire further into whether the Department's defense was "substantially justified" in the context of reviewing the fee petitions.

1. A formal judgment, adjudication, or Board-approved settlement agreement is not a prerequisite to an award of fees. *Lower Salford*, slip op. at 6-7; *Solebury*, 2008 EHB at 672.

2. The Board is not required to hold a hearing on every fee petition. *Lower Salford* (Opinion and Order Denying Reconsideration, January 5, 2010). *Accord*, *UMCO Energy, Inc. v. DEP*, EHB Docket No. 2004-245-L (February 23, 2009).

3. Even in those cases where we determine that a hearing is necessary to resolve genuine, material issues of disputed fact, we will not hold mini-trials on the merits of the underlying appeal. *Lower Salford*, slip op. at 10-11; *Solebury*, 2008 EHB at 675. It is enough that the applicant's claim was colorable.

4. "The important point is that the agency changes its conduct at least in part as result of the appeal. The appeal caused the change, not necessarily the 'merits' of the appeal. Causation is the key; motive is not." *Solebury*, 2008 EHB at 675-76.

5. Fees incurred in successfully pursuing fees ("fees on fees") are generally recoverable. *Solebury*, 2008 EHB at 725.

The fact that a party is *eligible* to receive reimbursement of some of its fees will rarely end our inquiry. The Supreme Court in *Solebury Township v. DEP*, *supra*, repeatedly emphasized that the Board has "broad discretion" in awarding fees. 928 A.2d at 1003-05. We may decide that an award of fees is inappropriate even if a party satisfies the eligibility criteria. Or we may decide that particular fees should be disallowed, or that an across-the-board percentage reduction is appropriate. *See, e.g.*, *Solebury*; *Pine Creek Watershed Ass'n v. DEP*, 2008 EHB 237 and 2008 EHB 705. In determining the *amount* of fees to be awarded, we will consider such factors as the following:

1. The degree of success;

2. The extent to which the litigation brought about the favorable result;

3. The fee applicant's contribution in bringing about the favorable result;

4. The extent to which the favorable result matches the relief sought;

5. Whether the appeal involved multiple statutes;

6. Whether litigation fees overlap fees unrelated to the litigation itself;

7. How the parties conducted themselves in the litigation, including but not limited to whether reasonable settlement offers were made, accepted, or rejected;

8. The size, complexity, importance, and profile of the case;

9. The degree of responsibility incurred and risk undertaken; and

10. The reasonableness of the hours billed and rates charged.

Lower Salford, slip op. at 9; *Solebury*, 2008 EHB at 673-74; *Pine Creek*, *supra*. In the final analysis, any amount of fees that we award must be consistent with the aims and purposes of the Clean Streams Law. *Solebury*, 2008 EHB at 674-75 and 681.

With these criteria in mind, some key factual questions emerge in this matter. With regard to the eligibility criteria, there appears to be no dispute that there was a problem with the k-rate that was used in the TMDL, which rendered the TMDL defective.[3] The parties, however, dispute whether one or more of the Appellants' appeals caused the Department to conclude that there was a problem, with the Appellants arguing that the problem would not have been uncovered when it was uncovered but for their appeals and the Department countering that it discovered the problem independently. Therefore, a key question that must be resolved in this case is the extent to which any of the appeals in fact caused the Department to find that the k-rate was flawed. In other words, would the k-rate error have been found when it was found if the Appellants had not appealed the TMDL?

There also does not appear to be any dispute that the determination that the k-rate was flawed was the sole or primary cause for the withdrawal of the TMDL. If that is the case, and *if*

[3] Details regarding the reasons why the k-rate was flawed do not appear to be particularly relevant at this stage.

one or more of the appeals caused the k-rate to be invalidated in the first place, it would appear that the appeal(s) proximately caused the withdrawal of the TMDL. As noted in our Order of June 18, our resolution of the fee petitions could very well hinge on these causation issues.

Causation is not the only unresolved issue. Although there appears to be no dispute that one benefit that the Appellants sought by bringing their appeals was to be rid of the limits imposed by the TMDL, which is exactly what has occurred, the parties disagree about whether the appeals accomplished meaningful relief. Unfortunately, perhaps, years have gone by with no new TMDL, and predicting whether and/or when a TMDL will be issued and survive all challenges, and predicting what such a TMDL will contain in the way of limits would seem to be matters of pure speculation at this point.

The record suggests that parties tried to work out the details of a new TMDL in the context of the EHB appeals, but that effort obviously failed. As discussed below, we need to hear more about what happened after the spring and summer of 2004, but the fact that the parties may have worked hard and long on a possible revision of the TMDL could suggest that the Appellants' only goal might not have been a withdrawal of the defective TMDL and return to the days of no phosphorus waste load allocation as suggested by the Department. On the other hand, if the Appellants' only goal was to eliminate the TMDL, the work that followed that withdrawal might not support fees. We need to know what the Appellant's were trying to achieve so we can measure what if anything has been accomplished against those goals. These are but a few of the factual disputes awaiting our resolution.

Motions in Limine

Three motions in limine are currently before us. A party may obtain a ruling on evidentiary issues by filing a motion in limine. 25 Pa. Code § 1021.121. A motion in limine is

"an extremely useful device that enables the Board to consider important evidentiary questions in a setting more conducive to thoughtful analysis than that presented when an oral objection is raised in the midst of a hearing." *Dauphin Meadows, Inc. v. DEP*, 2002 EHB 235, 237. Evidence and related contentions that are irrelevant are properly subject to a motion in limine. *Groce v. DEP*, 2006 EHB 335, 336. However, a motion in limine is not an appropriate vehicle for deciding the substantive merits of the case. *See Dauphin Meadows*, 2002 EHB at 237. ("[A] motion in limine generally should only be used to challenge whether certain evidence relative to a given point is admissible, not whether the point itself is a valid one."); *see also Groce*, 2006 EHB at 338. ("[T]he Board has cautioned parties that a motion in limine should not be a thinly disguised motion for summary judgment ....").

In the first motion in limine, the Appellants jointly move to exclude any testimony from Thomas Henry, a former EPA employee, regarding EPA's current or future plans regarding the development of a Neshaminy TMDL. They point out that Mr. Henry has not been employed by EPA since July 2009, and therefore, he does have any personal knowledge concerning EPA's current or future plans.[4] In a letter response, the Department concedes that Mr. Henry cannot provide testimony as to EPA's current or future plans.[5] Therefore, it appears that there is no dispute regarding this particular limitation to Mr. Henry's testimony and the Appellants' motion is granted.

The second motion sets forth Chalfont's request, joined in by the other Appellants, that we exclude all evidence of the settlement negotiations between the Department and the Appellants during the course of the underlying litigation. Curiously, Chalfont goes on to

[4] Pa.R.Ev. 602 provides that "a witness may not testify to a matter unless evidence is introduced to support a finding that the witness has personal knowledge of the matter."

[5] The Department reserves the right to call Mr. Henry to testify about things that happened in the past during his tenure at EPA.

somewhat contradict itself by acknowledging that settlement offers in the underlying litigation may indeed be considered when addressing the reasonableness of attorneys' fees, citing *McMullen v. Kutz*, 925 A.2d 832 (Pa. Super. 2007), but it asks that we only consider the settlement discussions "*after* PaDEP's liability for [Chalfont's] attorneys' fees and costs has been decided." Finally, it argues that the Appellants' repeated rejections of the Department's settlement offers were entirely reasonable under the circumstances.

The Department disagrees on all points. In addition to its other arguments, the Department argues that now-retired Judge Miller has already effectively ruled in this case in his Order of June 18, 2009 that the Petitioners' entitlement to fees ended in May 2004 when the Department "decided to withdraw the TMDL", or at least by July 2004, when the Department offered to settle the appeals.

Chalfont's initial argument that we should exclude all evidence of settlement discussions in the underlying litigation is without merit. The argument is based upon Pa.R.Ev. 408, which reads as follows:

> **(a)** **Prohibited uses.** Evidence of the following is not admissible on behalf of any party, when offered to prove liability for, invalidity of, or amount of claim that was disputed as to validity or amount, or to impeach through a prior inconsistent statement or contradiction:
>
> (1) furnishing or offering or promising to furnishing–or accepting or offering or promising to accept—a valuable consideration in compromising or attempting to compromise the claim; and
>
> (2) conduct or statements made in compromise negotiations.
>
> **(b)** **Permitted uses.** This rule does not require exclusion if the evidence is offered for purposes not prohibited by subdivision (a). Examples of permissible purposes include proving a witness's bias or prejudice; negating a contention of undue delay; and proving an effort to obstruct a criminal

> investigation or prosecution. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations.

We addressed this very issue in *Lower Salford Township Authority v. DEP*, EHB Docket No. 2005-100-MG (June 26, 2009), where we held as follows:

> This last sentence of the rule, commonly referred to as the "other purpose exception", is controlling here. The evidence of compromise discussions is offered only in support of the Department's contention that some of the counsel fees and costs were not reasonably incurred because continued litigation after that settlement offer was unreasonable. It clearly was not offered to prove the invalidity of the Appellant's claims on the merits because that phase of the case has been resolved in a settlement.

Id., slip op. at 3. Furthermore, as we noted above, how the parties conduct themselves in the underlying litigation, including whether they make or how they react to reasonable settlement offers, is one of the factors that we consider in determining the amount of an award. "Continued litigation after an appropriate settlement offer has been made may well mean that the fees and costs incurred after rejection of that offer were not 'reasonably incurred'." *Id.* By the same token, the parties' settlement discussions may shed light on whether the Department acted vexatiously as claimed by the Appellants. We are not suggesting here one way or the other that the Department's offers were reasonable or unreasonable. We are aware that this Board maintained a close eye on the case throughout the discussions. In fact, this Board *ordered* the parties to discuss the revision of the TMDL and "make reasonable efforts to resolve disputed issues." (Order of July 6, 2004.) It is also not clear what effect withdrawing the appeals would have had on the Appellants' ability to negotiate the terms of a revised TMDL.

We are not sure what to make of Chalfont's second argument that we should only consider settlement negotiations *after* deciding whether any fees should be awarded. Chalfont is incorrect if it is arguing that settlement efforts do not relate to the eligibility criteria for fees, but

even assuming that to be true, we have no interest in bifurcating this proceeding. Chalfont's third argument – that it reasonably rejected the Department's settlement offers – does not support its motion to exclude the evidence or evidentiary grounds. Indeed, the argument only comes into play if the evidence is *not* excluded. Similarly, if the Department is correctly interpreting Judge Miller's Order to mean that a settlement offer was a key event in this proceeding, evidence regarding that settlement effort becomes more, not less, relevant. For these reasons, we will deny Chalfont's motion in limine.

The third motion in limine was filed by the Department. The Department first argues that "all evidence and testimony relating to issues beyond th[e] original TMDL and the modeling error should be precluded." This motion comes close to asking us to make a substantive ruling that all fees incurred after 2004 are not recoverable. We declined to so rule in resolving a discovery dispute in this case (Opinion and Order, November 18, 2009), and we decline to do so again here in resolving the Department's motion in limine. Although this means that we may end up receiving a lot of evidence that proves to be irrelevant when we get around to our final decision on the fee petitions, we think that possibility is highly unlikely. In addition to the fundamental question of whether the fees incurred after 2004 were "reasonably incurred," the post-2004 events certainly seem to relate to what has been accomplished here, i.e., the degree of the Appellants' success. Post-2004 evidence might help us in evaluating the causation issue, including the Appellants' contribution to bringing about the result, assuming we can identify exactly what that "result" is. The post-2004 developments might be said to be inextricably intertwined with the settlement negotiations, which the Department argues are highly relevant. Fees incurred in attempting to resolve a case would ordinarily seem to be reimbursable and the record might support a finding that all or much of the work performed after 2004 constituted an

effort to settle the case. Along the same lines, the post-2004 developments seem to relate to the issue of whether the Department acted vexatiously, or whether it was at least in part merely doing what this Board directed it to do. In short, we see no basis at this juncture for excluding all evidence regarding the post-2004 developments.

Although Judge Miller referred to the 2004 dates in his Order, it is not clear why. Of course the mere making of a settlement offer does not automatically cut off the right to fees, and defining when the Department "decided" to withdraw the appeal versus actually doing so may prove to be somewhat too metaphysical to pin down a date, even assuming an unrealized decision should be accorded legal significance. We acknowledge that there are a lot of "maybes" in our discussion, but our mission here is limited to addressing a motion in limine, not ruling on the merits of the fee petitions.

The Department raises several other points in its motion in limine. We address a few of these arguments briefly as follows:

- The Appellants' objectives in pursuing the litigation, probably through the withdrawal, are relevant. We must decide whether the Department provided "some of the benefit *sought in the appeal*." *Lower Salford, supra*. The Notices of Appeal are very limited documents that do not necessarily circumscribe the Appellants' evidence regarding its goals. The Department is the party that has actually put those motivations into play.

- The Department if it so chooses may describe the unavoidable prejudice it has suffered as a result of Chalfont's allegedly late billing information. Chalfont notes that the Department did not conduct any discovery on this issue.

- The Board will assess whether Ms. Fields's testimony is unnecessarily cumulative at the hearing.

- Any evidence and particularly any proferred expert testimony relating to the technical merits of the withdrawn

TMDL and any proposed future TMDL is likely to be precluded or severely limited.

- Both sides accuse the other side of dragging out the underlying litigation. The Department claims that it was prevented from withdrawing the TMDL sooner than it did by EPA. The Appellants are entitled to explore that issue.

In response to the Department's motion, Chalfont indicates that some of the evidence that is the subject of the Department's motion is "relevant as background as to why [Chalfont] contends the Neshaminy TMDL was flawed in the first instance." Hatfield's response says that it may need to present testimony regarding "flaws in the modeling, equations, and methodology used by the Department in developing the Neshaminy TMDL." These responses raise a red flag for us. We recognize that the parties are going to have an almost irresistible urge to inform us about the "background" of this case in general and the specific flaws in the TMDL in particular. The parties are cautioned, however, that we will have a low tolerance for admitting such "background" into the record. The parties should be prepared to explain with precision how such "background" relates to the specific criteria regarding fee awards listed above. As we have repeatedly stated, we will not permit the hearing on fees to morph into a trial on the merits of the underlying appeal. If there is some reason why we need to get into modeling issues, it is not immediately apparent to us now.

Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

HATFIELD TOWNSHIP MUNICIPAL AUTHORITY, et al.	:	
	:	**EHB Docket No. 2004-046-L**
v.	:	**(Consolidated with 2004-045-L) and 2004-112-L)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

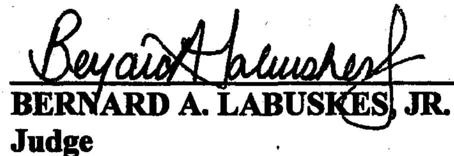
AND NOW, this 8th day of January, 2010, it is hereby **ORDERED** as follows:

1. The Appellants' motion to preclude Mr. Henry from testifying about EPA's current or future plans is granted.

2. Chalfont's motion to preclude evidence of settlement discussions is denied.

3. The Department's motion in limine is denied except as set forth in the foregoing Opinion.

ENVIRONMENTAL HEARING BOARD



BERNARD A. LABUSKES, JR.
Judge

DATED: January 8, 2010

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PARADISE WATCHDOGS–BAN THE QUARRY AND DAVID N. AND DAWNA EDDINGER	:	
v.	:	**EHB Docket No. 2009-122-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and GIBRALTAR ROCK, INC.	:	**Issued: January 12, 2010**

OPINION AND ORDER
ON MOTION TO DISMISS

By Michael L. Krancer, Judge

Synopsis

The Board denies the Appellants' amended petition for supersedeas and grants the Department and Permittee's motions to dismiss. The Appellants have failed to identify what action they are attempting to appeal.

OPINION

Paradise Watchdogs–Ban the Quarry, David N. Eddinger, and Dawna Eddinger ("Appellants") filed a notice of appeal on September 2, 2009 and a petition for supersedeas on September 4, 2009. The notice of appeal outlines complaints against the Noncoal Surface Mining Permit (SMP) issued to Gibraltar Rock on April 15, 2005 for its rock quarry located in New Hanover Township, Montgomery County.

Obviously, the appeal period for the SMP had long ago run and it was evident that Appellants were well aware of this fatal defect in their appeal as they studiously avoided naming

the permit, or anything else for that matter, as the action being appealed. The Board saw this as well since it promptly issued the "failure to perfect" order requiring Appellants to name and supply us with a copy of the Department action being appealed. The Appellants' filed an amended notice of appeal and amended petition for supersedeas. This continuing issue was discussed at some length during the conference call that we held to address the petition for supersedeas. Yet, after reviewing the amended notice of appeal and amended petition for supersedeas, we were and are still unable to ascertain what action the Appellants are attempting to appeal.

The Department and Permittee responded to the supersedeas petition and filed motions to dismiss the appeal arguing that the petition for supersedeas should be denied and the appeal should be dismissed because the Appellants had failed to identify a final, appealable Department action from which this appeal can be taken.[1] This Opinion is issued in support of our Order and in response to the motions to dismiss. We dismiss the matter on the grounds just noted, the Appellants have failed to identify the action from which they appeal.

An appeal cannot proceed unless an appellant clearly identifies a final, appealable Department action. *See* 35 P.S. § 7514(a); *Mon View Mining v. DEP*, 2005 EHB 937 (appeal dismissed for failure to provide Department action being appealed pursuant to 25 Pa. Code § 1021.51(d).) The Appellants' failure to do so, after being given two opportunities to do so, forces the dismissal of their appeal.

The Appellants' late references to two more recent letters in the Department's Gibraltar Rock file were and are obvious attempts to save a dead appeal by bringing up a couple of pieces

[1] We denied the petition for supersedeas by Order dated October 15, 2009. Supersedeas is an extraordinary remedy that will not be granted absent a clear demonstration of need. *Global Eco-Logical Services, Inc. v. DEP*, 2000 EHB 829. In deciding whether to grant a supersedeas the Board considers whether there is a threat of irreparable harm to the petitioner, the likelihood that the petitioner will prevail on the merits, and the likelihood of injury to the public. 25 Pa. Code § 1021.63(a).

of correspondence which are more close in time to filing of their appeal. We have held before that the law does not allow the use of more recent correspondence as a mechanism or vehicle to challenge an already final action. *See Northampton Township v. DEP*, 2008 473, 476. Moreover, we need not and more importantly should not opine about these letters and what, if any, impact on the case there might have been if those were the matters being appealed. The bottom line remains that the objections in the notice of appeal are all about the permit issued in 2005 and this case is about an attempt to file an appeal of a permit issued five years ago. Any discussion of the theoretical potential appealability or non-appealability or the status or legal impact of those letters would be unnecessary.

Accordingly, we enter the following Order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PARADISE WATCHDOGS–BAN THE QUARRY AND DAVID N. AND DAWNA EDDINGER	:	
v.	:	**EHB Docket No. 2009-122-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and GIBRALTAR ROCK, INC.	:	

ORDER

AND NOW, this 12th day of January, 2010, it is hereby ordered that this appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Chairman and Chief Judge

MICHELLE A. COLEMAN
Judge

MICHAEL L. KRANCER
Judge

DATED: January 12, 2010

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

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For Permittee:
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HARRIS AND HARRIS
P.O. Box 160
Warrington, PA 18976

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PARADISE WATCHDOGS–BAN THE QUARRY AND DAVID N. AND DAWNA EDDINGER	:	
v.	:	**EHB Docket No. 2009-122-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and GIBRALTAR ROCK, INC.	:	

CONCURRING OPINION

By Bernard A. Labuskes, Jr., Judge
Joined in by Richard P. Mather, Sr., Judge

After reviewing the notice of appeal and petition for supersedeas, it was not clear to us what Department action the Appellants were attempting to appeal and supersede. Therefore, we issued a failure-to-perfect order requiring the Appellants to provide us with a copy of the Department action being appealed. Following a conference call with the parties to discuss the petition for supersedeas in which the Appellants were unable to point to a specific Department action, we issued an order deeming the petition for supersedeas withdrawn without prejudice, which gave the Appellants an opportunity to re-file the petition once they complied with the Board's order to perfect their appeal.

The Appellants followed up with an amended notice of appeal and amended petition for supersedeas. The Department and Permittee filed separate responses to the supersedeas petition, as well as motions to dismiss the appeal. Both the Department and Permittee argued that the petition for supersedeas should be denied and the appeal should be dismissed because the Appellants have failed to identify a final, appealable Department action from which this appeal can be taken. We denied the amended petition for supersedeas by an Order dated October 15,

2009 because we believed that the Appellants are unlikely to prevail on the merits of their claim that the Department has taken a final, appealable action.[2] This Opinion is issued in support of our Order and in response to the motions to dismiss.

Our September 8, 2009 failure-to-perfect order required the Appellants to supply us with a copy of the Department action being appealed. This issue was discussed at some length during the conference call that we held to address the petition for supersedeas. Yet, after reviewing the amended notice of appeal and amended petition for supersedeas, we are still unable to ascertain what action the Appellants are attempting to appeal. An appeal cannot proceed unless an appellant clearly identifies a final, appealable Department action. *See* 35 P.S. § 7514(a); *Mon View Mining v. DEP*, 2005 EHB 937 (appeal dismissed for failure to provide Department action being appealed pursuant to 25 Pa. Code § 1021.51(d).) The Appellants' failure to do so after being given two opportunities to do so forces us to dismiss their appeal.

If we strain to uncover something that might be appealable, the only item that we can glean from the Appellants' paperwork as a possible appealable action is an August 24, 2009 letter. (It is obviously much too late to appeal the permit issued in 2005.) The August 24, 2009 letter was sent from the Department's Pottsville District Mining Office signed by Tom Callaghan, District Mining Manager, addressed to the New Hanover Township Solicitor, Paul Bauer. This letter was sent in response to the demand of both the New Hanover Township Solicitor and Appellants that the Department suspend and/or revoke Gibraltar Rock's Noncoal Surface Mining Permit. They argued that Gibraltar Rock was not in compliance with local

[2] Supersedeas is an extraordinary remedy that will not be granted absent a clear demonstration of need. *Global Eco-Logical Services, Inc. v. DEP*, 2000 EHB 829. In deciding whether to grant a supersedeas the Board considers whether there is a threat of irreparable harm to the petitioner, the likelihood that the petitioner will prevail on the merits, and the likelihood of injury to the public. 25 Pa. Code § 1021.63(a).

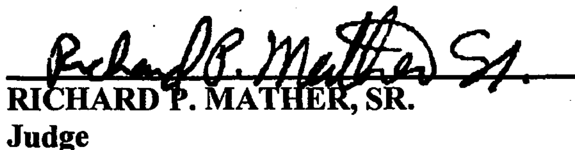
zoning requirements and it must be in compliance with zoning requirements prior to activating the mining permit. The August 24, 2009 Department letter provided:

> Earlier this year, you asked the Department about its position concerning Special Condition 3 of Surface Mining Permit No. 46030301, which the Department issued to Gibraltar Rock, Inc. on April 15, 2005. That special condition makes it the permittee's responsibility for complying with all local zoning ordinances.
>
> We believe that Gibraltar Rock has complied with the intent of the Department's regulatory requirements and with the terms of Special Condition 3. Accordingly, we do not intend to take any action one way or another with respect to enforcement of Special Condition 3.

The Department's letter does nothing more than memorialize the Department's decision not to pursue enforcement action against Gibraltar Rock. We are not in a position to order the Department to take such an enforcement action. *Ballas v. DEP*, EHB Docket No. 2009-007-L (Opinion and Order issued December 29, 2009); *see also DEP v. Schneiderwind*, 867 A.2d 724, 727 (Pa. Cmwlth. 2005); *Law v. DEP*, 2008 EHB 213, 216-18, *aff'd*, 1071 C.D. 2008 (Pa. Cmwlth., January 23, 2009); *Mystic Brooke Development v. DEP*, EHB Docket No. 2009-016-L, slip op. at 3 (Opinion and Order issued June 16, 2009). As a result, the August 24 letter cannot serve as the basis for this appeal.

ENVIRONMENTAL HEARING BOARD

BERNARD A. LABUSKES, JR.
Judge



RICHARD P. MATHER, SR.
Judge

DATED: January 12, 2010

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ROCKLAND NATURAL GAS COMPANY, INC., MARWELL, INC., AND RICHARD I. FRY	:	
v.	:	**EHB Docket No. 2009-125-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: January 26, 2010**

OPINION AND ORDER ON MOTION TO DEEM ADMISSIONS ADMITTED

By Bernard A. Labuskes, Jr., Judge

Synopsis:

The Board grants the Department's unopposed Motion to Deem Admitted Matters Set Forth in the Department's Request for Admissions where the Appellants failed to respond to the Department's discovery request or to the Department's motion.

OPINION

On August 6, 2009, the Department of Environmental Protection (the "Department") issued an order to Rockland Natural Gas Company, Inc., Marwell, Inc., and Richard I. Fry (the "Appellants") directing them to take all actions necessary to bring ten production wells located on the Neely Farm in Rockland Township, Venango County into compliance with applicable Pennsylvania environmental statutes. Specifically, the Appellants were ordered to plug each

well pursuant to 58 P.S. § 601.210. The Appellants appealed the Department's order to this Board. On October 29, 2009, the Department served the Appellants with requests for admissions by certified mail. Although the post office returned a signed certified mail return receipt showing that delivery was made on October 30, 2009, the Appellants have not responded to the Department's request for admissions. As a result, the Department has filed a motion asking us to deem the requests for admissions to have been admitted. The Appellants have not responded to the Department's motion.

The Board's rules provide that written requests for admissions are governed by Pennsylvania Rule of Civil Procedure 4014. 25 Pa. Code § 1021.102(a). Under Rule 4014(b), matters addressed in a request for admissions are deemed to be admitted if the request is not answered within 30 days of service. Specifically, Rule 4014(b) provides as follows:

> The matter is admitted unless, within thirty days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission an answer verified by the party or an objection, signed by the party or his attorney... .

Under this rule, admissions are deemed admitted automatically if no answers are provided before the expiration of the deadline. *See Kennedy v. DEP*, 2001 EHB 109, 110; *see also Lentz v. DEP*, 2001 EHB 838, 840-41. Here, the Appellants were required to respond to the requests for admissions on or before November 30, 2009. The Appellants have not only failed to respond to the requests, they have also failed to respond to Department's motion. Therefore, the matters addressed in the Department's request for admissions must be deemed admitted.

Accordingly, we issue the order that follows.

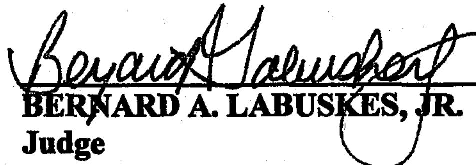
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ROCKLAND NATURAL GAS COMPANY, INC., MARWELL, INC., AND RICHARD I. FRY	:	
v.	:	**EHB Docket No. 2009-125-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 26th day of January, 2010, it is hereby ordered that the Department's unopposed Motion to Deem Admitted Matters Set Forth in the Department's Request for Admissions is **granted**.

ENVIRONMENTAL HEARING BOARD



BERNARD A. LABUSKES, JR.
Judge

DATED: January 26, 2010

c: **DEP Bureau of Litigation:**
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THEODORE E. KOCH, P.E., S.E.O.	:	
	:	
v.	:	**EHB Docket No. 2009-027-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and MORRIS TOWNSHIP SUPERVISORS, Permittee	:	**Issued: February 3, 2010**

OPINION AND ORDER ON MOTION FOR SUMMARY JUDGMENT

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board grants a motion for summary judgment where an appellant failed to file a response to the Department's motion for summary judgment and the Department's motion to compel, thereby evidencing an intent not to pursue his appeal.

OPINION

Before the Board is a motion for summary judgment filed by the Department of Environmental Protection (the "Department") on November 30, 2009. The Department's motion seeks to dismiss an appeal filed by Theodore E. Koch, P.E. ("Koch"), a sewer enforcement officer for Morris Township, Huntingdon County, brought in his individual capacity. Koch's appeal challenges portions of the Department's February 3, 2009 letter to Morris Township approving a planning module for land development.

The Department filed its motion for summary judgment on November 30, 2009. The

Department contends that Koch, as a contract employee of the Township, is not aggrieved in a substantial, direct, and immediate manner by the Department's action and, therefore, lacks standing to appeal. The Department also argues that its conditional requirements included in the approval of the planning module, which formed the bases of Koch's appeal, have since been removed, thereby rendering the appeal moot. Under our rules, Koch's response was due no later than January 4, 2010. We have not received either a response or an explanation for the lack of a response from Koch.

Summary judgment motions before this Board are governed by 25 Pa. Code § 1021.94a. In particular, our rules require a party opposing a motion for summary judgment to file within thirty days "a brief containing a responding statement either admitting or denying or disputing each of the facts in the movant's statement and a discussion of the legal argument in opposition to the motion." 25 Pa. Code 1021.94a(f). In the event that a party fails to respond to a motion for summary judgment within the time required, the rules of this Board state, and this Board has held, that summary judgment may be entered against that party. *Id.*; *see also J&D Holdings v. DEP*, 2009 EHB 15. The Commonwealth Court has held that this Board may grant summary judgment to a moving party based solely on an opposing party's failure to respond. *Kochems v. DEP*, 701 A.2d 281, 283 (Pa. Cmwlth. 1997).

Not only has Koch failed to respond to the motion for summary judgment, he also has failed to file a response to a motion to compel filed by the Department on December 23, 2009. Koch's failure to respond to these motions clearly evidences a lack of intent to pursue this appeal. We, therefore, grant the Department's motion for summary judgment and dismiss the Appellant's appeal.

Accordingly, we enter the following:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

THEODORE E. KOCH, P.E., S.E.O.	:	
	:	
v.	:	**EHB Docket No. 2009-027-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and MORRIS TOWNSHIP SUPERVISORS, Permittee	:	

ORDER

AND NOW, this 3rd day of February, 2010, the motion for summary judgment filed by the Department of Environmental Protection is hereby **granted** and the appeal of Theodore E. Koch is **dismissed**.

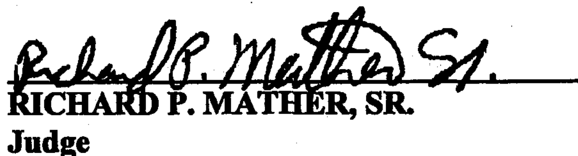
ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Chairman and Chief Judge

MICHELLE A. COLEMAN
Judge

BERNARD A. LABUSKES, JR.
Judge

MICHAEL L. KRANCER
Judge



RICHARD P. MATHER, SR.
Judge

DATED: February 3, 2010

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

NOELLE FISHER	:	
	:	
v.	:	**EHB Docket No. 2007-224-R**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION	:	**Issued: February 5, 2010**

OPINION AND ORDER ON DEPARTMENT'S MOTION IN LIMINE TO EXCLUDE EXPERT TESTIMONY AND EXCLUDE EVIDENCE RELATING TO THE COST TO REPAIR DAMAGE TO THE HOUSE

By Thomas W. Renwand, Chairman and Chief Judge

Synopsis:

The Board denies a Motion in Limine seeking to exclude a licensed civil engineer from testifying in support of an appellant's claim that damages to her home were caused by mine subsidence during the applicable policy period. The issues raised by the Department of Environmental Protection go to the eventual weight to be given to the testimony rather than its admissibility. The Board also denies the Department's request to prohibit any testimony regarding the costs of repair.

Background

This case involves a mine subsidence damage claim filed under Appellant Noelle Fisher's insurance policy issued by the Pennsylvania Department of Environmental Protection. Ms. Fisher purchased the Mine Subsidence Insurance Policy on April 16, 2007. Underground mining took place in the early 1900s and the mine beneath her property has long been abandoned. Ms. Fisher filed a mine subsidence damage claim with the Department on July 27, 2007 claiming that the damages occurred on July 8, 2007. After investigating the claim, the Department denied the claim contending that the damages identified by Ms. Fisher were not recent damages and occurred prior to her purchasing the insurance policy.

After two postponements, this appeal is scheduled for hearing on March 4-5, 2010 in Pittsburgh. Presently before the Board is the Department's Motion in Limine seeking to exclude the Appellant's expert and to also exclude evidence related to the cost of repairs to the house.

We agree with the Department that this case will benefit from expert testimony concerning the issues. Rule 702 of the Pennsylvania Rules of Evidence provides as follows:

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

Pennsylvania Rule of Evidence 702.

The Department contends that Appellant's expert, despite having both Bachelor's and Master's Degrees in Civil Engineering and being a licensed professional engineer, is not qualified to opine on issues of mine subsidence or mine engineering. We disagree. Appellant's expert, by both his education and professional licensure, surely meets the requirements set forth

in Rule 702 to testify before the Board. A review of his expert report shows he has more knowledge in this area than a layman and that his testimony could benefit the Board in deciding these issues. The Department's argument, at best, goes to the weight that should be given to Appellant's expert's testimony and not its admissibility.

The Department also seeks to exclude any testimony regarding damages. If we ultimately rule in favor of the Department then no damages will be awarded pursuant to the applicable insurance policy. However, if we rule in Appellant's favor and find that the damages were caused by mine subsidence and covered by the policy, the cost of repair damages are very relevant. Under the Department's view, Ms. Fisher would have to file a second appeal regarding the costs of repair. The Department cites no case law supporting its motion to bifurcate the issues in this trial. This would be a burden on Appellant and would waste our judicial resources for what at that point would likely be abbreviated evidence and testimony. The Department has denied coverage. As such it takes the risk that its denial is in error. If we rule in favor of Ms. Fisher regarding coverage, the Department should not benefit by what would then be an erroneous denial. Moreover, the Department has taken extensive discovery in this case. We see no prejudice to the Department if we also hear evidence regarding the costs of repair in this proceeding. It makes much more sense, to conserve this Board's limited resources, to address the costs of repair issue in this Appeal rather than force Ms. Fisher to file a second appeal in the event we find the Department liable under the insurance policy. We will issue an Order accordingly.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

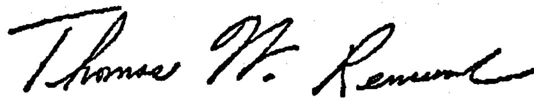
NOELLE FISHER	:	
	:	
	:	
v.	:	**EHB Docket No. 2007-224-R**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION	:	

ORDER

AND NOW, this 5th day of February, 2010, following review of the Department of Environmental Protection's Motion in Limine, it is ordered as follows:

1.) The Department's Motion in Limine is **DENIED**.

ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Chairman and Chief Judge

DATED: February 5, 2010

See following page for service listing

EHB Docket No. 2007-224-R

c: **DEP Bureau of Litigation**
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med

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MARYANNE WESDOCK, ESQUIRE
ACTING SECRETARY TO THE BOARD

HENRY A. AND BARBARA M. JORDAN :
:
:
v. : **EHB Docket No. 2009-046-C**
:
COMMONWEALTH OF PENNSYLVANIA, :
DEPARTMENT OF ENVIRONMENTAL : **Issued: February 5, 2010**
PROTECTION and WEST PIKELAND :
TOWNSHIP, Permittee :

OPINION AND ORDER
ON PETITION FOR SUPERSEDEAS

By Michelle A. Coleman, Judge

Synopsis:

The Board denies the Petitioners' request for a supersedeas where they fail to show irreparable harm will result to an HQ stream and wetland from the construction of a soccer field.

OPINION

The Petitioners, Henry and Barbara Jordan, ("Petitioners" or "Jordans") filed a petition for supersedeas on April 10, 2009 requesting that the Board supersede the Department's April 3, 2009 issuance of an NPDES Permit for Discharge of Stormwater Construction Activities Permit (Permit No. PAI011508070) to West Pikeland Township for the Pine Creek Soccer Field located in West Pikeland Township, Chester County, Pennsylvania.

The Board held a four day supersedeas hearing in April, 2009 and one day for closing arguments. At the conclusion of the hearing the parties requested that in lieu of a Board decision on supersedeas that they submit a joint proposed order to give the parties an opportunity to resolve the matter.[1] After receiving the proposed orders the Board issued the May 12, 2009 order allowing West Pikeland Township to complete the installation and addition of top soil and amended soils, bring the project to final grade, rake, seed and stabilize the project, make necessary repairs and allow for the discharge of stormwater in accordance with Permit. West Pikeland was ordered not to apply any fertilizer or nitrate/nitrogen containing substances to the site. The Order also provided a thirty day stay of the litigation to allow the parties an opportunity to resolve the matter. At the end of the thirty day stay the parties were unable to resolve the matter.

The discovery period in this appeal ended on October 6, 2009. The Board denied the Petitioners' request to extend the discovery period on October 7, 2009 and scheduled a conference call between the parties and the Board. During that conference call, the parties suggested listing this matter for mediation. The Board issued an order on October 14, 2009 giving the parties until October 19, 2009 to decide whether or not to list this matter for mediation. The parties did not seek mediation. In a later conference call held between the parties and the Board, the Board granted the parties an opportunity to file submissions with respect to the supersedeas on or before January 26, 2010.

Standard for Supersedeas

[1] The parties could not agree on the language of the proposed order and submitted separate proposed orders on May 11, 2009.

Supersedeas is an extraordinary remedy which the board will not grant absent a clear demonstration of need. *Oley Township v. DEP*, et al., 1996 EHB 1359. In order to obtain a supersedeas,

> [a petitioner] must prove by a preponderance of the evidence that (1) it is likely to prevail on the merits of its appeal; (2) there is little or no chance of injury to the public or other parties if the supersedeas is granted; and (3) it will suffer irreparable harm if the supersedeas is not granted.

Svonavec, Inc. v. DEP, 1998 EHB 417, 419-420 (citing *Indian Lake Borough v. DEP*, 1996 EHB 1372; 35 P.S. § 7514(d)(1); 25 Pa. Code § 1021.63(a)). The Board balances these factors and the interests of the parties and public, but will not grant a supersedeas where pollution or injury to the public health, safety or welfare exists or is threatened during the period when the supersedeas would be in effect. *UMCO Energy, Inc. v. DEP*, 2004 EHB 797; 35 P.S. § 7514(d)(2); 25 Pa. Code § 1021.63(b). In carrying its burden, a petitioner must credibly demonstrate each factor, but show strongly that it is likely to succeed on the merits of its appeal. *Pa. Mines Corp. v. DEP*, 1996 EHB 808, 810; *Lower Providence Township v. DER*, 1986 EHB 395, 397.

Discussion

The Jordans allege that they will suffer irreparable harm if the supersedeas is not granted because it will allow for the degradation of a high quality ("HQ") stream and the dewatering of wetlands adjacent to that stream in violation of the antidegradation regulations and Clean Streams Law. 25 Pa. Code §§ 93.4a, 93.4c. The Jordans' hydrology and water quality expert, Dr. Raymond Ferrara, opined that the nitrogen-nitrate levels in the HQ stream will triple under the current NPDES permit. April 27, 2009, N.T. 141. Ferrara uses the Department's Best

Management Practices Manual ("BMP Manual") to determine the nitrogen-nitrate loading to the HQ stream.[2]

In determining what the nitrogen-nitrate loading at Pine Creek Park is, without the construction of the soccer field, Dr. Ferrara uses the nitrogen-nitrate loading number for a meadow which is 0.3mg/l found in the BMP Manual, Table A-3. Dr. Ferrara then uses 1.01mg/l for the nitrate-nitrogen loading for a soccer field. April 27, 2009, N.T. 122, 137, 138. Dr. Ferrara classified Pine Creek Park as a meadow when determining his calculations for runoff pre-construction. He stated:

> A meadow is not evenly graded. It has depressions in it. The soil may be looser and so on. An athletic field is perfectly graded so that the water runs off, drains properly, you need that for grass health, et cetera. And it won't have these depressions and so on. So you get much more runoff from that developed situation than you would for the existing situation.

April 27, 2009, N.T. 125-26.

The Department's expert Domenic Rocco, Division Chief of the Permitting and Technical Services Division and helped develop the BMP Manual, points out that Dr. Ferrara erroneously used the classification of a "meadow" to refer to Pine Creek Park. The Department states that using the BMP Manual a classification of "Grass Athletic Fields" indicates that nitrogen-nitrate loading number would be 1.01 and that a park would also be characterized under this classification. April 30, 2009, N.T. 166. Thus, the Department credibly argues that "the nitrates release associated with the pre-existing condition in the park is exactly the same as the

---

[2] The BMP Manual is a guidance document used by the Department and has no force of law (*see United Refining Co. v. DEP*, 2006 EHB 846), however the Petitioners do not dispute that compliance with the document is appropriate. In fact, the Petitioners' own experts use the Manual.

nitrates that would be released from its post-construction condition according to the Department's reference manual for an athletic field." April 30, 2009, N.T. 166-67.

We agree with the Department that the classification of Pine Creek Park (pre-construction) is more closely characterized as an athletic field would be classified with respect to the land surface. A public park, like Pine Creek Park, does not appear to be a meadow, as Dr. Ferrara stated, in that a meadow is not evenly graded, soil is looser and it has depressions. The Board finds that the park is more closely characterized in the same manner a soccer field would be characterized, given that both are graded, mowed and manicured for public use.

Furthermore, the Department is requiring a soil amendment in the construction of the soccer field. The Department points out that the BMP Manual provides that one of the most effective ways to treat stormwater for infiltration is to pass stormwater through a layer of compost before allowing infiltration. April 30, 2009, N.T. 113. Passing stormwater through a compost layer results in the removal of 50% of nitrates. April 27, 2009, N.T. 169. The Petitioners' expert did not take this into account, nor was there anything offered to challenge that issue. Rather they argue that the soil amendment is 12 inches below the surface and would be subject to major compaction from the heavy equipment being used to construct the field. Petitioners suggest that there could potentially be two inches of compaction from the machinery. April 27, 2009, N.T. 162-66. The Department described the important design features it has in place to alleviate the effects of compaction, such as tilling the areas that have been compacted during construction. April 30, 2009, N.T. 113-14. Therefore, the Petitioners have not met the high burden of showing that there will be irreparable harm to the wetland or stream caused by nitrogen levels after the construction of the soccer field.

Petitioners' next contention is that there will be dewatering of the wetlands and tributary to Pine Creek. Dr. Ferrara asserts that the wetland and tributary will be deprived of enough water to cover an entire football field, six feet deep. April 27, 2009, N.T. 129. The Petitioners claim that this water will never get to the wetland, but will instead be channeled into drainage swales and discharged through a point source downgradient of the wetlands and stream. April 27, 2009, N.T. 129-30.

Both the Petitioners and Department use a curve number to estimate the amount of runoff for specific land surface during a given rainfall. The Department used a document from the United States Department of Agriculture's Technical Release 55, titled *Urban Hydrology for Small Watersheds* to gather the curve number associated with this project. The Petitioners did not dispute the use of this document. The document lists curve numbers ranging from 40 for pervious surfaces to 98 for impervious surfaces. April 27, 2009, N.T. 179-80. It also lists soil qualities as A, B, C, or D depending on the soils drainage ability, with an A soil quality as a well drained soil. April 30, 2009, N.T. 87. Dr. Ferrara used a curve number of 86 to determine the amount of runoff from the soccer field. This was the curve number used by West Pikeland Township's engineer and approved by the Department in the NPDES permit. April 27, 2009, N.T. 158.[3] The Department argues that the use of a curve number of 86 is extremely conservative for a soccer field with a B quality soil. April 30, 2009, N.T. 85-86. The Department's Mr. Rocco explains that the soil at the soccer field is Gladstone soil which is listed as a B grade soil and the soccer field is listed as an open space covered in greater than 75%

[3] The Department explained that the curve number between 86 and 89 is used for an athletic field project because the Department encourages a conservative approach. Some projects for athletic fields require fill to be brought to the site or can use the soil on site, therefore they use a curve number 86 as a default number for an athletic field project. April 30, 2009, N.T. 85-86.

grass. April 30, 2009, N.T. 87-89. The USDA document indicates that for this type of land surface the curve number is 61.

According to the USDA document a curve number of 61 indicates that for a rainfall event of 1.4 inches there will be zero runoff, a rainfall event of 2 inches shows 0.06 inches of runoff and a rain event of 3.2 inches (also considered as the two year storm) the runoff would be approximately 0.4 inches. Dr. Ferrara used the two year storm event and estimated that 60% of the rain would runoff from the field. April 27, 2009, N.T. 183, 190. Dr. Ferrara admitted that his calculations were based on a curve number of 86 and not on actual field conditions. April 27, 2009, N.T. 161-62, 166. Therefore, based on calculations by the Department that represent realistic field conditions at the project site, very little water from the soccer field will be diverted away from the wetlands.

The Petitioners' wetlands expert, Seth Bacon, claims that the wetlands are fed by sheet flow surface runoff from the area of the soccer field and that one hundred percent of the flow is being redirected away from the wetlands. April 29, 2009, N.T. 21-23. However, consistent with the Department's calculations above, the Department finds that very little runoff comes from the soccer field area. The Department points to the existing topography to support their position that sheet flow from Pine Creek Park is not the primary source of water feeding the wetlands and that the loss of sheet flow from the Park would not destroy the wetlands.

The Department's wetland expert, Mr. Todd Schiable, stated that the drainage area for the wetlands is approximately 70 acres. April 30, 2009, N.T. 49-50. Mr. Schiable points out that the only change from pre-construction to post-construction is that less than one acre of water would be converted from sheet flow off the field to a vegetated swale then into an infiltration basin.

April 30, 2009, N.T. 44, 47, 50. The Department asserts that the topography indicates that the wetland area is more directly fed by the stream channel coming from the high ground of the Jordan property than drainage from the area of the proposed soccer field. April 30, 2009, N.T. 52-53. Mr. Schiable opines this constitutes the primary source of hydrology to the wetlands. April 30, 2009, N.T. 52. In fact, the Petitoners' petition for supersedeas states that the wetlands in the park that envelope the tributary to Pine Creek also have their origin on the Jordans' land. Dr. Ferrara did not take into consideration to what extent the wetlands are fed from other areas than the area of the soccer field. April 27, 2009, N. T. 155. Therefore, we are unable to find that the Petitioners have met the burden of establishing that there will be irreparable harm of dewatering the wetland area when evidence exists indicating that the area is fed by water from 70 acres and that water from less than one acre is being diverted into an infiltration basin. The Board cannot accept the theory that the wetlands will be dewatered when the Petitioners did not take into consideration other sources that feed the wetland area.

Based on the evidence provided during the supersedeas hearing the Board cannot find that the Petitioners will suffer irreparable harm from the construction of the soccer field at the Pine Creek Park. It is essentially a grassland park being constructed into a grass soccer field. In conclusion, the Petitioners have not met their high burden of proving that the HQ stream and wetlands will be dewatered because of the construction of the soccer field, nor have they established that there will be excessive nitrate loading. The Board denies the supersedeas based on the Petitioners' failure to show that irreparable harm will result from the Pine Creek Park being constructed into a soccer field.

Accordingly, we enter the following Order.

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

HENRY A. AND BARBARA M. JORDAN	:	
	:	
	:	
v.	:	**EHB Docket No. 2009-046-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and WEST PIKELAND TOWNSHIP, Permittee	:	

ORDER

AND NOW, this 5th day of February, 2010, it is hereby ordered that Henry A. and Barbara M. Jordan's Petition for Supersedeas is **denied.**

ENVIRONMENTAL HEARING BOARD

MICHELLE A. COLEMAN
Judge

DATED: **February 5, 2010**

VIA FAX AND FIRST CLASS MAIL

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MARYANNE WESDOCK, ESQUIRE
ACTING SECRETARY TO THE BOARD

ROBERT and LYDIA THORNBERRY	:	
	:	
v.	:	**EHB Docket No. 2008-328-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and STATE INDUSTRIES, INC., Permittee	:	**Issued: February 9, 2010**

OPINION AND ORDER ON MOTION FOR SUMMARY JUDGMENT

By: Thomas W. Renwand, Chairman and Chief Judge

Synopsis:

The Pennsylvania Environmental Hearing Board grants a motion for summary judgment where the appellants failed to file a response to the mining company's motion for summary judgment, clearly evidencing intent not to pursue their appeal. Both the Pennsylvania Rules of Civil Procedure and the Board's own Rules provide that summary judgment may be entered against a party who fails to respond to a summary judgment motion.

OPINION

Appellants Robert and Lydia Thornberry filed a *pro se* appeal from a decision of the

Pennsylvania Department of Environmental Protection that blasting activities at State Industries' Mine 35 in Armstrong County did not cause a diminution or loss of water to the Thornberry's domestic water well. Presently before the Pennsylvania Environmental Hearing Board is a motion for summary judgment filed by the Permittee State Industries. The nature of the issues raised by Appellants involves complicated principles of geo-science and a knowledge of the impacts of blasting activities on water wells.

The Thornberrys in response to discovery requests have not produced expert reports supporting their theories of liability. Although they identified two Department officials as their experts the Department indicates that no expert reports or opinions have been provided. These Department officials are also the same two individuals who concluded that the mining companies' activities did not result in any water loss to the Thornberrys. Accordingly, the Appellants have not identified any expert evidence to support their claims.

On September 24, 2009 State Industries filed its motion for summary judgment. On October 22, 2009 the Pennsylvania Department of Environmental Protection filed a response supporting State Industries' position and urging the Pennsylvania Environmental Hearing Board to grant the motion for summary judgment. Appellants filed no response.

Summary judgment motions before the Board are governed both by the Pennsylavania Rules of Civil Procedure, Pa.C.P. Nos. 1035.1-1035.5, and our own Rules, 25 Pa. Code Section 1021.94a. As Judge Labuskes just recently pointed out in *Koch v. Department of Environmental Protection and Morris Township Supervisors*, EHB Docket No. 2009-027-L

(Opinion and Order issued February 3, 2010) *slip op.* at page 2, "our rules require a party opposing a motion for summary judgment to file within thirty days a brief containing a responding statement either admitting or denying or disputing each of the facts in the movant's statement and a discussion of the legal arguments in opposition to the motion." 25 Pa. Code Section 1021.94(f). If no response is filed within the applicable time required, summary judgment may be entered against that party under both the Pennsylvania Rules of Civil Procedure and our own Rules.

> Summary judgment may be entered against a party who does not respond.

Pa.R.C.P. 1035.3(d).

> Summary judgment may be entered against a party who fails to respond to a summary judgment motion.

25 Pa. Code Section 1021.94a(h).

In addition, Appellants have not met their burden of proof as they have not presented a *prima facie* case that the blasting damaged their water well. *Pekar v. Department of Environmental Protection*, 2007 EHB 291,297.

As we have often stated, the grant of summary judgment is warranted only in a clear case and the record must be viewed in a light most favorable to the non-moving party, resolving all doubts as the existence of material fact against the grant of summary judgment. *Young v. Department of Transportation*, 744 A.2d 1276, (Pa. 2000). The mining company meticulously sets forth in its motion for summary judgment various substantive reasons,

supported by uncontradicted expert opinion, that it is entitled to summary judgment on the merits of the Appellants' appeal. The Appellants, since they bear the burden of proof, are required at this point in the case to file a response that legally and factually disputes these contentions. In violation of our Rules and the Pennsylvania Rules of Civil Procedure, the Appellants failed to file a response to the motion for summary judgment. Therefore, pursuant to both Pennsylvania Rule of Civil Procedure 1035.3(d) and 25 Pa. Code Section 1021.94a(h) we can grant summary judgment in favor of the mining company and dismiss Appellants' appeal. *See Kochems v. Department of Environmental Protection*, 701 A.2d 281, 283 (Pa. Cmwlth. 1997); *Hamilton Brothers Coal, Inc. v. Department of Environmental Protection*, 2000 EHB 1262, 1263; *Concerned Carroll Citizens v. Department of Environmental Protection*, 1999 EHB 167; *Earthmovers Unlimited, Inc. v. Department of Environmental Protection*, 2004 EHB 165, 166; *J&D Holdings v. Department of Environmental Protection*, 2009 EHB 15; and *Koch, slip. op.* at 2.

We will issue an appropriate Order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ROBERT and LYDIA THORNBERRY	:	
	:	
v.	:	**EHB Docket No. 2008-328-R**
	:	
	:	
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION and STATE INDUSTRIES,	:	
INC., Permittee	:	

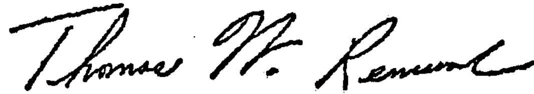
ORDER

AND NOW, this 9th day of February, 2010, it is ordered as follows:

1.) The motion for summary judgment filed by State Industries is **GRANTED**.

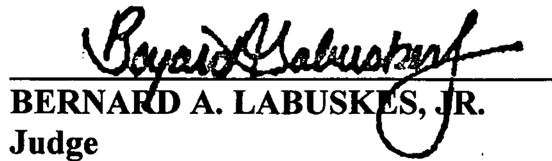
2.) The Appeal filed by Appellants is **DISMISSED**.

ENVIRONMENTAL HEARING BOARD

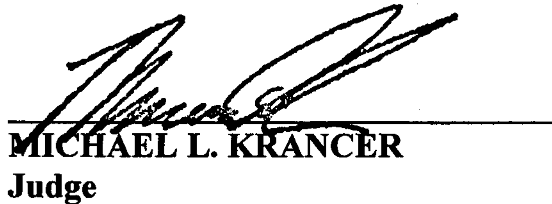


THOMAS W. RENWAND
Chairman and Chief Judge

MICHELLE A. COLEMAN
Judge



BERNARD A. LABUSKES, JR.
Judge



MICHAEL L. KRANCER
Judge

RICHARD P. MATHER, SR.
Judge

DATED: February 9, 2010

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MARYANNE WESDOCK, ESQUIRE
ACTING SECRETARY TO THE BOARD

CRUM CREEK NEIGHBORS	:	
	:	
v.	:	**EHB Docket No. 2007-287-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and PULTE HOMES OF PA, LP, Permittee	:	**Issued: February 12, 2010**

OPINION AND ORDER
SUSPENDING FEES PETITION

By Bernard A. Labuskes, Jr., Judge

Synopsis

A petition for an award of attorneys' fees must be filed within 30 days of a final order of the Board. The Pennsylvania Supreme Court's decision in *Solebury Twp. v. DEP*, 928 A.2d 990 (Pa. 2007) did not change that procedural requirement. The Board nevertheless suspends consideration of a timely filed petition because an appeal is pending from the Board's Adjudication before Commonwealth Court and because the Board's Adjudication remanded certain issues to the Department for further consideration.

OPINION

Crum Creek Neighbors ("CCN") filed an appeal from the Department of Environmental Protection's (the "Department's") issuance of a stormwater management NPDES permit to Pulte Homes of PA, L.P. ("Pulte") for a residential development in Marple Township, Delaware

County. After a hearing, we issued an Adjudication and Order on October 22, 2009 suspending Pulte's permit and remanding the matter for further fact-finding and analysis by the Department regarding the project's impact upon an Exceptional Value stream. On November 19, 2008, CCN filed an application seeking to recover $130,409 in fees and costs from the Department pursuant to Section 307(b) of the Clean Streams Law, 35 P.S. § 691.307(b). The Department has filed a response in opposition to the fee petition. On November 23, 2009, Pulte appealed the Board's Adjudication and Order to the Commonwealth Court. (Pulte Homes of PA, L.P. v. DEP, Docket No. 2296 C.D. 2009.)

In its response in opposition to CCN's application for fees the Department among other things argues that CCN's application is premature for two reasons. First, it argues that our Adjudication and Order is not a final order because we remanded certain issues to the Department for further consideration. Second, it suggests that it would be prudent for us to refrain from ruling on the application until the resolution of Pulte's appeal before the Commonwealth Court. It points out that the Commonwealth Court has specifically instructed the parties to brief their positions on whether the appeal to that Court is properly brought from a "final order" as that term is used in the Pennsylvania Rules of Appellate Procedure.

After reviewing the Department's response, we ordered CCN to file a position statement and/or brief limited to the Department's argument that the fee application is premature. CCN filed a timely response in accordance with our Order. It argues that a final order is not necessary for a fee award, and in any event, that the Board's Adjudication constitutes a final order for purposes of a fee application. It also argues that we should move forward on the application notwithstanding Pulte's appeal to the Commonwealth Court.

The Board's Rules of Practice and Procedure provide that "[a]n applicant shall file an application [for fees] with the Board within 30 days of the date of a *final order* of the Board." 25 Pa. Code § 1021.182(c)(emphasis added). Lest there be any confusion, nothing that transpired in the Pennsylvania Supreme Court's decision in *Solebury Township v. DEP*, 928 A.2d 990 (Pa. 2007), or since has changed the procedural requirement that the Board will not accept a fee petition until after it has entered a final order in an appeal. It is true that *Solebury* "eliminated the hard and fast requirement that the applicant for fees is required to have won a formal final judgment or consent decree in court." *Lower Salford Township Authority, et al. v. DEP*, EHB Docket No. 2005-100-K, slip op. at 6 (December 15, 2009). Thus, after *Solebury* it is no longer necessary that the order itself embody a victory, but it is still necessary from a procedural perspective that the litigation be completed before we will entertain a fee application. The requirement of a "final order" in our rules is procedural, not substantive, in nature. It is intended to avoid piecemeal applications. The final order may be as simple as our standard order acknowledging the withdrawal of an appeal and closing the docket, but a fee applicant must be able to point to something showing that our proceedings are at an end. We would not, for example, entertain a fee petition following a favorable ruling on a motion for partial summary judgment.[1]

The more difficult question in this appeal is whether our Adjudication and Order constitutes something other than a final order for purposes of processing a fee application because we remanded certain issues to the Department for further consideration. The Board's rules do not define "final order." We do not necessarily agree that a "final order" for purposes of a fee application is the same as a "final order" for purposes of appellate review, but to the extent

[1] The fact that our rule provides that "[a] copy of the order of the Board in the proceedings in which the applicant seeks costs and attorney fees" is to be included with a fee application, 25 Pa. Code § 1021.182(b)(1), does not indicate that anything less than a *final* order will suffice.

the appellate rules are useful as analogous authority, they define a final order as an order "that disposes of all claims and all parties." Pa.R.A.P. 341(b).

Our Order in this case contemplated further work by the Department but it does not contemplate further proceedings before the Board in CCN's appeal. Indeed, we expressly relinquished jurisdiction in the Order. If CCN, Pulte, or any other party is unhappy with any future action that the Department may take with respect to Pulte's suspended permit, then that party will need to file a new appeal. There is no rule authorizing us to reopen CCN's original appeal. There is no possible basis for us to reexamine or reconsider any aspect of our holding on the record generated in CCN's original appeal. That record is closed. Any review of a future Department action will not only require a new appeal, it will require a new record and a new analysis that focuses upon the Department's new action, not anything that was resolved in CCN's appeal. For example, we concluded in our Adjudication that the Department conducted an inadequate investigation before issuing the permit. Regardless of what the Department does on remand, our finding of an inadequate investigation before the permit was first issued will not change. If there is a new appeal, we may need to consider whether the Department's follow-up investigation was adequate and/or whether its conclusions are supportable, but a new appeal does not provide an occasion for reexamining the adequacy of the original investigation.

Our Adjudication disposed of all of CCN's claims regarding the permit. CCN has no continuing rights in the case or with respect to the remand for that matter. In short, our Adjudication may fairly be said to end the litigation, put the litigants out of court, and prevent the parties from presenting any further evidence on the merits of the original permit issuance. *Cf. Pittsburgh Bd. of Public Education v. PHRC*, 820 A.2d 838, 841 (Pa. Cmwlth. 2003) (interpreting analogous rule of appellate procedure).

If our Adjudication was not a final order for purposes of a fee petition, what is? Any number of things could happen at this point, not all of which would involve any further action by the Board. Speaking hypothetically, Pulte could decide not to pursue the matter. Or the Department may make revisions or findings that satisfy all parties' concerns. It cannot be assumed that the Board will need to have any further involvement by virtue of our suspension of the permit in CCN's original appeal. The duty to file a fee application should be tied to a clear action of the Board, not some unknown, undefined, possible future action of some other party. Notwithstanding the remand portion of our Adjudication, CCN acted correctly by filing its application within thirty days of the issuance of our Adjudication.

Having said all that, we do not wish to foreclose the *possibility* that the Department's actions on remand may, at least arguably, prove to be relevant in determining the amount of fees to be awarded. To date, CCN has achieved a reexamination of the project. What happens next remains to be seen. Barring unreasonable delay on the part of the Department on remand, prudence suggests that we table CCN's petition for now.

With regard to Pulte's pending appeal of our Adjudication to Commonwealth Court, the Department has not argued that the appeal *requires* us to dismiss or stay the fee application. Of course, as a general rule, an agency may not proceed further in an action once an appeal from its final order is taken. Pa.R.A.P. 1701(a). That limitation is jurisdictional. *Commonwealth v. Klein*, 781 A.2d 1133 (Pa. 2001). However, an agency may continue to handle some "ancillary matters." Pa.R.A.P. 1701(b)(1). We need not decide here whether a fee petition is such an ancillary matter because, regardless of whether we *can* address the merits of CCN's fee application during the pendency of Pulte's appeal, we believe that it would be better to wait, just as we did in *Blose v. DEP*, 2000 EHB 737 (staying a fee application pending appeal).

Given the uncertainty presented by Pulte's appeal to Commonwealth Court, it would be difficult or at least premature to assess CCN's fee application on its merits. We recently outlined the standards for awarding fees in *Hatfield Township Municipal Authority v. DEP*, EHB Docket No. 2004-046-L (January 8, 2010). We there held that, in the absence of bad faith or vexatious conduct, in order to be eligible for an award of attorneys' fees under Section 307(b) a party must first satisfy three criteria:

1. The applicant must show that the Department provided some of the benefit sought in the appeal;

2. The applicant must show that the appeal stated a genuine claim, *i.e.*, one that was at least colorable, not frivolous, unreasonable or groundless; and

3. The applicant must show that its appeal was a substantial or significant cause of the Department's action providing relief.

Hatfield, slip op. at 8 (*citing Lower Salford Township Authority v. DEP*, EHB Docket No. 2005-100-K, slip op. at 6 (December 15, 2009) and *Solebury Township v. DEP*, 2008 EHB 658, *reconsideration denied*, 2008 EHB 718). We explained that some of the principles that inform our application of these eligibility criteria are as follows:

1. A formal judgment, adjudication, or Board-approved settlement agreement is not a prerequisite to an award of fees. *Lower Salford*, slip op. at 6-7; *Solebury*, 2008 EHB at 672.

2. The Board is not required to hold a hearing on every fee petition. *Lower Salford* (Opinion and Order Denying Reconsideration, January 5, 2010). *Accord*, *UMCO Energy, Inc. v. DEP*, EHB Docket No. 2004-245-L (February 23, 2009).

3. Even in those cases where we determine that a hearing is necessary to resolve genuine, material issues of disputed fact, we will not hold mini-trials on the merits of the underlying appeal. *Lower Salford*, slip op. at 10-11; *Solebury*, 2008 EHB at 675. It is enough that the applicant's claim was colorable.

4. "The important point is that the agency changes its conduct at least in part as result of the appeal. The appeal caused the change, not necessarily the

> 'merits' of the appeal. Causation is the key; motive is not." *Solebury*, 2008 EHB at 675-76.
>
> 5. Fees incurred in successfully pursuing fees ("fees on fees") are generally recoverable. *Solebury*, 2008 EHB at 725.

Id., slip op. at 8-9. We went on to discuss criteria we may consider in calculating the amount of fees to be awarded as follows:

> The fact that a party is *eligible* to receive reimbursement of some of its fees will rarely end our inquiry. The Supreme Court in *Solebury Township v. DEP*, *supra*, repeatedly emphasized that the Board has "broad discretion" in awarding fees. 928 A.2d at 1003-05. We may decide that an award of fees is inappropriate even if a party satisfies the eligibility criteria. Or we may decide that particular fees should be disallowed, or that an across-the-board percentage reduction is appropriate. *See, e.g.*, *Solebury*; *Pine Creek Watershed Ass'n v. DEP*, 2008 EHB 237 and 2008 EHB 705. In determining the *amount* of fees to be awarded, we will consider such factors as the following:
>
> 1. The degree of success;
> 2. The extent to which the litigation brought about the favorable result;
> 3. The fee applicant's contribution in bringing about the favorable result;
> 4. The extent to which the favorable result matches the relief sought;
> 5. Whether the appeal involved multiple statutes;
> 6. Whether litigation fees overlap fees unrelated to the litigation itself;
> 7. How the parties conducted themselves in the litigation, including but not limited to whether reasonable settlement offers were made, accepted, or rejected;
> 8. The size, complexity, importance, and profile of the case;
> 9. The degree of responsibility incurred and risk undertaken; and
> 10. The reasonableness of the hours billed and rates charged.
>
> *Lower Salford*, slip op. at 9; *Solebury*, 2008 EHB at 673-74; *Pine Creek*, *supra*. In the final analysis, any amount of fees that we award must be consistent with the aims and purposes of the Clean Streams Law. *Solebury*, 2008 EHB at 674-75 and 681.

Hatfield, slip op. at 9-10.

Until Pulte's appeal is concluded, any analysis of, for example, the degree of CCN's success will be inconclusive. The extent to which CCN may be said to have prevailed remains unresolved. Furthermore, regardless of what the Commonwealth Court decides, any award that we would make now might need to be modified. If CCN is participating in the appeal and our Adjudication is affirmed, CCN's costs on appeal may be recoverable.[2] In the nearly unimaginable event that our erudite Adjudication is reversed, CCN might not be entitled to any fees. If our Adjudication is somehow modified, any predetermined fee award would likely need to be adjusted accordingly. In short, addressing CCN's fee application now would result in the very piecemeal approach that our rules and considerations of judicial economy militate against.

Accordingly, we issue the Order that follows.

[2] We are, of course, not deciding at this point that costs incurred on appeal in a case brought by a permittee are recoverable by a third party against the Department.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CRUM CREEK NEIGHBORS	:	
	:	
v.	:	**EHB Docket No. 2007-287-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and PULTE HOMES OF PA, LP, Permittee	:	

ORDER

AND NOW, this 12th day of February, 2010, it is hereby ordered that proceedings on CCN's application for fees are **stayed** pending further order of the Board. The parties shall keep the Board apprised of pertinent developments and, at a minimum, submit a status report on or before **June 1, 2010**.

ENVIRONMENTAL HEARING BOARD

BERNARD A. LABUSKES, JR.
Judge

DATED: February 12, 2010

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

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MARYANNE WESDOCK, ESQUIRE
ACTING SECRETARY TO THE BOARD

PA WASTE, LLC	:	
	:	
v.	:	**EHB Docket No. 2008-249-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and CLEARFIELD COUNTY, Intervenor	:	**Issued: February 16, 2010**

OPINION AND ORDER ON MOTION IN LIMINE

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board grants an unopposed motion in limine precluding the Appellant from calling Department counsel as a witness at a hearing.

OPINION

PA Waste, LLC ("PA Waste") filed this appeal from the Department of Environmental Protection's ("the Department's") denial of its permit application for a landfill in Boggs Township, Clearfield County. A hearing on the merits is scheduled to begin on June 14, 2010. PA Waste listed Richard Morrison, Esq., one of the Department's Assistant Counsel, in its pre-hearing memorandum as a witness that it intended to call at the hearing. This listing has prompted the Department to file a motion in limine requesting that the Board bar PA Waste from calling Morrison as a witness. The Department argues that Morrison provides legal counsel to the Department's Bureau of Waste Management, that he has provided and will continue to

provide advice specific to PA Waste's permit application, and that he has provided and will continue to provide support to the Department's litigation counsel in this appeal. It argues that he has not acted in any capacity other than his professional capacity as one of the Department's attorneys in connection with the matter. The Department argues that calling Morrison as a witness at the hearing will inevitably implicate privileged and confidential communications and attorney work product. The Department further argues that his testimony will be cumulative at best because any testimony sought regarding the denial of PA Waste's permit application can be obtained through other Department personnel who are listed in the pre-hearing memorandum.

PA Waste did not respond to the Department's motion. We deem a party's failure to respond to a motion to be an admission of all well-pleaded facts contained in the motion. 25 Pa. Code § 1021.91(e) and (f). It is fair to assume that a party who does not respond to a motion does not oppose the motion.

This is not the first time that the Board faced this issue. In an Order issued on June 19, 2009, we granted the Department's motion for a protective order and precluded the deposition of Morrison. (*Pa Waste, LLC v. DEP,* EHB Docket No. 2008-249-L, Opinion and Order issued June 19, 2009). There, the Department argued that the Board should preclude the deposition of Morrison for precisely the same reasons that it has raises again in its motion in limine. We noted that the Board will rarely allow a party to depose or otherwise interrogate another party's attorney. We said that, although there is no absolute prohibition against such a practice, the burden is upon the party who would depose or otherwise interrogate opposing counsel to explain why we should allow such an unusual event to occur. We noted that most internal communications between an attorney and his or her client will be privileged or protected by the work product doctrine.

By failing to respond to the Department's motion in limine, PA Waste has failed to explain why it should be permitted to call Morrison as a witness. Nor is the basis for calling Morrison self-evident. Here, as before, any testimony by Morrison regarding advice he may have proffered on the meaning or application of the Municipal Waste Planning, Recycling and Waste Reduction Act ("Act 101"), 53 P.S. §§ 4000.101-4000.1904, would undoubtedly constitute privileged communication and/or work product. Furthermore, it would seem that Morrison's testimony would be likely to be redundant. Still further, what Morrison personally believes Act 101 means is actually irrelevant to this case. *Rhodes v. DEP*, EHB Docket No. 2008-156-L (Opinion and Order, May 12, 2009). The bottom line is that the burden was upon PA Waste to explain why it needed to call the Department's attorney as a witness and it has failed to meet that burden. It is not for us to imagine or speculate how Morrison's testimony would add any value to these proceedings.

Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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

ORDER

AND NOW, this 16th day of February, 2010 it is hereby ordered that the Department's unopposed motion in limine is **granted**. PA Waste may not call Richard Morrison, Esq. as a witness.

ENVIRONMENTAL HEARING BOARD

BERNARD A. LABUSKES, JR.
Judge

DATED: February 16, 2010

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MARYANNE WESDOCK, ESQUIRE
ACTING SECRETARY TO THE BOARD

CMV SEWAGE COMPANY, INC

v.

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, and NORTH CODORUS TOWNSHIP and NORTH CODORUS TOWNSHIP SEWER AUTHORITY, Intervenors

EHB Docket No. 2009-105-L

Issued: February 17, 2010

OPINION ON PETITION TO INTERVENE

By Bernard A. Labuskes, Judge

Synopsis

A township and sewer authority's joint petition to intervene is granted in an appeal by a private sewage company of a Department order denying the reissuance of the company's NPDES permit.

OPINION

CMV Sewage Company, Inc. ("CMV") filed an appeal of the Department of Environmental Protection's (the "Department's") letter dated July 7, 2009 denying CMV's application for reissuance of its NPDES permit, which authorized it to provide sewage collection and treatment to the Colonial Crossings development in North Codorus Township, York County. The Department denied CMV's application because municipal sewer lines are now available to CMV's customers, CMV's treatment facility was only intended to serve as an interim facility

until the municipal sewer lines were available, and a recent biological survey indicated that the discharge from CMV's facility is having an adverse impact on the water quality of an unnamed tributary to the Codorus Creek.

North Codorus Township (the "Township") and the North Codorus Township Sewer Authority (the "Sewer Authority") have filed a joint petition to intervene. They argue that the Township adopted an Act 537 Plan in May 2002, approved by the Department, which called for the Colonial Crossings development to be connected to and treated by the municipal public sewer system upon its construction. The system has now been constructed and it is owned and is operated by the Authority. They say that failure of the development to connect to the municipal public sewer system would be contrary to the Township's Act 537 Plan, which would subject the Township to enforcement action by the Department. The Authority says that it issued and sold more than $15 million in municipal bonds to finance the system. As part of that financing, the Township apparently agreed to guarantee the payments of principal and interest on the bonds when they became due in the event the Authority is unable to do so. As part of its financing, the Authority says that it certified that it would be able to pay the principal and interest payments on the bonds from the revenues generated by tap-in fees and quarterly sewer rentals from the new customers of the system, including the Colonial Crossings development. The Colonial Crossings development plans call for 400 dwelling units in the development, all of which could and should in the petitioners' view be connected to the municipal public sewer system. The development currently has 340 occupied dwelling units, and has submitted a plan to develop the other 60 dwelling units. The Authority says that it stands to gain significant revenues from these tap-ins. The petitioners argue that the terms of CMV's NPDES permit state that that the development's sewage treatment system is temporary only, and it is to be abandoned and the system is to be

connected to the Township's (now the Authority's) system when it is completed, which condition has now been met. If those terms are upheld, CMV will be required to cease operating its treatment facility, and will be compelled to connect to the Authority's municipal public sewer system, as the developers originally agreed. Finally, the Township argues that the discharge from the facility could affect the Township's compliance with the mandates of the Chesapeake Bay Strategy.

On January 26, 2010, we granted the Township and Authority's petition to intervene. This Opinion is issued in support of that order.

"It does not take much to be able to intervene in Board proceedings." *TJS Mining v. DEP*, 2003 EHB 507, 508: Under the Environmental Hearing Board Act, 35 P.S. § 7514(e), "[a]ny interested party may intervene in any matter pending before the board." *See generally* 25 Pa. Code § 1021.81 (requirements for intervention). This standard is not so broad, however, as to allow any member of the public who cares to speak to do so. *TJS Mining* at 508. Rather, a petitioner's interests must be "substantial, direct and immediate." *Elser v. DEP*, 2007 EHB 771, 772; *Borough of Glendon* v. DEP, 603 A.2d 226, 233 (Pa. Cmwlth 1992). We will allow a party to intervene where "the person or entity seeking intervention will either gain or lose by direct operation of the Board's ultimate determination." *Sechan Limestone Indus., Inc. v. DEP*, 2003 EHB 810, 812 (citing *Browning-Ferris, Inc. v. DER*, 598 A.2d 1057, 1060-61 (Pa. Cmwlth. 1991)).

"Gaining or losing by direct operation of the board is just another way of saying that an intervenor must have standing." *Consol Pa. Coal Company v. DEP*, 2002 EHB 879, 890 (citing *Connors v. State Conservation Comm'n*, 1999 EHB 669, 670). Before 1980, this Board would only find that a municipality had standing in litigation where its municipal functions would be

affected by the decision of the Board, and not where the municipality sought only to protect the environment within its borders. *See Franklin Township v. DER*, 1980 EHB 465; *see also Strasburg Assoc. v. Newlin Township*, 415 A.2d 1014 (Pa. Cmwlth. 1980). However, in a firm reversal, the Pennsylvania Supreme Court found that a municipality has standing to participate in an appeal from a Department action regarding a facility in the municipality. *Franklin Township v. DER*, 452 A.2d 718, 723 (Pa. 1982). The Court reasoned as follows:

> The appellants, Franklin Township and Fayette County are legal persons in the sense that they exist as legal entities possessed of rights and responsibilities including the right and sometimes the duty to seek judicial or other legal relief. However, a township and a county are more than abstract entities; each is also a place populated by people. They can be identified by fixed and definable political and geographic boundaries. These boundaries encompass a certain natural existence—land, water, air, etc. collectively referred to as environment. *Whatever affects the natural environment within the borders of a township or county affects the very township or county itself.* Toxic wastes which are deposited in the land irrevocably alter the fundamental nature of the land which in turn irrevocably alter the physical nature of the municipality and county of which the land is a part. It is clear that when land is changed, a serious risk of change to all other components of the environment arises. Such changes and threat of changes ostensibly conflict with the obligations townships and counties have to nature and the quality of life. We believe that the interest of local government in protecting the environment, which is part of its physical existence, is "substantial" within the meaning of "substantial interest" as set forth in *Wm. Penn Parking Garage, supra.* Aesthetic and environmental well-being are important aspects of the quality of life in our society, and a key role of local government is to promote and protect life's quality for all of its inhabitants.
>
> * * *
>
> Changing the inherent character and quality of the environment by introduction of toxic wastes into the land, amply provides local government units with an interest which is direct in every meaningful sense. The same considerations which led us to the conclusion that the interest of local government in its physical attributes is substantial, apply in the determination that the interest is also direct. As we have noted, among the responsibilities of local government is the protection and enhancement of the quality of life of its citizens.
>
> * * *

> The direct and substantial interest of local government in the environment, and in the quality of life of its citizenry cannot be characterized as remote. We need not wait until an ecological emergency arises in order to find that the interest of the municipality and county faced with such a disaster is immediate.
>
> When a toxic waste disposal site is established, undoubtedly there is an instantaneous change in the land on which it is located, and an immediate risk to the surrounding environment and quality of life. These critical matters must be addressed by local government without delay. The environment which forms a part of the physical existence of the municipality or county has been altered and immediate attention must be given to the changed character if the local government is to properly discharge its duties and responsibilities. Furthermore, in the event of an environmental emergency, the local municipality and county would be the first line of containment and defense.

452 A.2d at 720-22 (emphasis added)(footnotes omitted).

Although *Franklin Township* related to a solid waste facility, the Court's reasoning and holding apply with equal force in this sewage facilities case. A municipality's responsibilities and concerns vis-à-vis sewage planning are at least as great as its responsibilities and concerns regarding a solid waste facility. *See, e.g.*, 35 P.S. § 750.5 (official sewage plans). Indeed, we relied upon *Franklin Township* in allowing a municipality to intervene in a sewage facilities planning matter in *Pennsburg Housing v. DEP*, 1999 EHB 1031, 1035. *See also Young v. DER*, 1991 EHB 1323, 1328.

Thus, we do not think that there can be any doubt whatsoever that the Township meets the requirements for intervention in this appeal. The CMV facility is in the Township and it continues to discharge into the unnamed tributary of the Codorus Creek within the Township. Whether the continued use of the CMV facility is consistent with the Township's Act 537 Plan is obviously of central importance in this case. The Township obviously has a strong interest in the implementation of its own plan. Still further, accepting the Township's allegations as true for purposes of reviewing its petition, the Township may also gain or lose as the guarantor of the

municipal bonds used to finance the municipal sewer system to which that the residents of the Colonial Crossings development will be required to hook up.

Similarly, the Sewer Authority's standing to intervene is also readily apparent. The Department's order has the likely effect of adding additional customers to the Authority's customer base. The Authority is interested in how many connections it has, which in turn and among many other things may at least arguably affect its ability to meet it bond obligations. The Authority as much or more than any other party stands to gain or lose by our action upholding, modifying, or reversing the Department's decision to deny CMV's application for reissuance of its permit.

CMV has indicated, consistent with well-established precedent, that it does not oppose the petitioners' participation in this appeal. CMV in its response to the petition to intervene, however, requests that the Board limit issues for consideration in the appeal to those directly related to the Department's denial of CMV's reissuance application and exclude from the appeal the "tangentially related financial issues" discussed by the Township and the Authority in their petition to intervene. It is true that a Board order permitting intervention "may specify the issues to which intervention is allowed," 25 Pa. Code § 1021.81(f), but CMV's request would have us attempt to decide whether evidence regarding a particular issue—financial issues related to the sewer systems—is relevant at this early stage of the proceedings. We have no basis for making an informed ruling on that relevance issue at this time. CMV also says that the Township has filed a civil complaint against CMV and other entities in the York County Court of Common Pleas, and that court would be "a more appropriate forum" for deciding those issues that are "extraneous to the present appeal." Again, at this juncture we have no way of deciding what issues are "extraneous." Furthermore, we will not hesitate to consider issues that prove to be

relevant in this appeal, simply because the same issues may also be relevant in a private action. For these reasons, we will not place any additional limitations on the Township and the Sewer Authority's participation in this appeal at this time.

A copy of our Order issued of January 26, 2010 is attached.

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CMV SEWAGE COMPANY, INC.	:	
	:	
v.	:	**EHB Docket No. 2009-105-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	: : :	

ORDER

AND NOW, this 26th day of January, 2010, in consideration of the petitions to intervene of North Codorus Township and the North Codorus Township Sewer Authority and the response of CMV Sewage Company requesting that the Board limit the Township and Authority's participation to certain issues pursuant to 25 Pa. Code § 1021.81(f), it is hereby ordered that the petitions are granted without limitation. The board will rule on the relevance of certain issues at the appropriate time.

The caption in this matter shall be revised as follows and shall appear on all future filings with the Board:

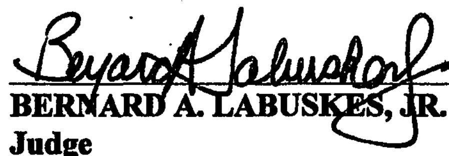
CMV SEWAGE COMPANY, INC.	:	
	:	
v.	:	**EHB Docket No. 2009-105-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, and NORTH CODORUS TOWNSHIP and NORTH CORDORUS TOWNSHIP SEWER AUTHORITY, Intervenors	: : : : : :	

It is further ordered pursuant to CMV's request that the deadlines set forth in Pre-Hearing Order No. 1 are modified as follows:

1. All discovery in this matter shall be completed by **April 5, 2010**, unless extended for good cause upon written motion.

2. All dispositive motions shall be filed by **May 5, 2010**. All other provisions of Pre-Hearing Order No. 1 remain unchanged.

ENVIRONMENTAL HEARING BOARD



BERNARD A. LABUSKES, JR.
Judge

DATED: January 26, 2010

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MARYANNE WESDOCK, ESQUIRE
ACTING SECRETARY TO THE BOARD

FRANK T. PERANO	:	
	:	
v.	:	**EHB Docket No. 2010-001-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: February 17, 2010**

OPINION AND ORDER ON
MOTION FOR AN EXPEDITED HEARING

By Bernard A. Labuskes, Jr., Judge

Synopsis

Based upon the factors set forth in our new rule regarding expedited hearings, the Board denies the Department's motion for an expedited hearing. The Board also finds that the motion failed to adhere to the content requirements regarding such motions.

OPINION

The Department of Environmental Protection ("the Department") has filed a motion for an expedited hearing. The Department states that it conducted two inspections at the Cedar Manor Mobile Home Park ("Cedar Manor") on December 3 and 9, 2009. Cedar Manor is owned and operated by Frank T. Perano. The Department asserts that the December 3 inspection revealed that the sewage treatment plant at Cedar Manor was malfunctioning in violation of its NPDES permit, which authorizes the discharge of treated effluent into an unnamed tributary to the Conewago Creek. Specifically, the Department asserts that:

> [t]he December 3, 2009 inspection documented that the equalization tank was leaking from nine areas and was discharging into the UNT Conewago Creek. The inspection also documented that grease and sewage related plastics were discharged into the UNT Conewago Creek. In addition, the inspection documented that the sand filters at the STP were bypassed and that the clarifiers were hydraulically overloaded.

The Department further states that the December 9 inspection revealed that "the oxidation ditch at the [sewage treatment plant] overflowed in several areas, constituting an unpermitted discharge of sewage" and also notes that grease and sewage related plastics were again being discharged into the creek. The December 9 inspection also revealed that the equalization tank and sand filters were bypassed and the clarifiers were hydraulically overloaded, according to the Department.

As a result of the inspections, the Department issued an order on December 10, 2009 requiring Perano to (1) cease all unauthorized discharges; (2) submit by December 15, 2009 a professional engineer's evaluation of the structural integrity of the equalization tank; (3) submit by December 15, 2009 an emergency flow management plan; (4) submit by December 15, 2009 an interim high flow management plan; (5) by December 15, 2009 remove all sewage solids, grease accumulations, and sewage related plastics from the UNT Conewago Creek; and (6) take a 24-hour proportioned composite effluent sample anytime the facility or a system of treatment or control is bypassed or partially bypassed. Perano appealed the order to this Board on January 4, 2010.

The Department contends that the conditions revealed during the December 3 and 9 inspections, and their potential for repetition, present an ongoing threat to the public health and environment and justify an expeditious ruling by the Board. Further, the Department notes that the ultimate issue, whether the Department acted unreasonably or abused its discretion when it

issued the order, is not a fact intensive inquiry so as to limit the need for extended discovery. Lastly, the Department argues that there is a strong public interest in resolving this issue expeditiously given the seriousness of the violations.

In opposing the Department's motion, Perano asserts that the conditions purportedly observed do not exist, or to the extent they do exist, are exaggerated. As a result of these factual discrepancies, Perano argues that extended discovery will be necessary and he would be prejudiced by an abbreviated discovery period. Perano also maintains that he has complied with the requirements set forth in the Department's order. He notes that the Department requested an expedited hearing on its petition to enforce its order before the Commonwealth Court, but the petition was subsequently withdrawn without explanation. Perano also notes that that the Department did not seek an expedited hearing until weeks after the appeal was filed.

The Board is quite receptive to requests for expedited proceedings, especially when both parties agree that there is a need for speed. In this case, however, Perano is opposed to expedition. The Board's recently adopted rule at 25 Pa. Code § 1021.96a sets forth a non-exclusive list of factors for consideration when an expedited hearing is requested.[1] Section 1021.96a provides:

> (a) A motion for an expedited hearing may be filed at any time in either an appeal or special action, or the Board may order an expedited hearing on its own motion.
>
> (b) The Board may issue an order for an expedited hearing notwithstanding the time requirements contained in a previous order of the Board, the Board's Rules of Practice and Procedure in § 1021.101 (relating to prehearing procedure), or Title 231 (relating to rules of civil procedure) relating to discovery.
>
> (c) In issuing such an order, the Board will be guided by relevant judicial and Board precedent. Among other factors to be considered:

[1] §1021.96a was adopted October 16, 2009, effective October 17, 2009.

> (1) Whether pollution or injury to the public health, safety or welfare exists or is threatened during the period ordinarily required to complete the proceedings.
>
> (2) Severity of prejudice to any party during the time period ordinarily required to complete the proceedings.
>
> (3) The status of discovery and the realistic need of the parties for extended discovery and for time to prepare for a hearing.
>
> (4) Whether the issuance of such an order would promote judicial economy or would otherwise be in the public interest.
>
> (5) The effect of expedited proceedings on the nonrequesting party.
>
> (d) The Board may direct that a prehearing conference be held to determine an appropriate schedule for the completion of prehearing proceedings as well as the time and place of the hearing.

25 Pa. Code § 1021.96a. In deciding whether or not to grant an expedited hearing, the Board will balance the interests of the parties while considering the practical benefits and difficulties of expedited proceeding. *See Groce v. DEP*, 2005 EHB 880, 886; *see also Pennsylvania Trout, Unlimited v. DEP*, 2002 EHB 968, 972-73. Balancing interests is, by its nature, unique to the facts and exigencies of each case and thus must proceed on a case by case basis.

After reviewing the parties' arguments, we conclude that the Department's request for an expedited hearing should be denied. Our primary reason for doing so is that, after filing its motion, the Department filed a complaint for assessment of civil penalty (see EHB Docket No. 2010-016-CP-L) based upon the same facts as this appeal. The Department's complaint seeks, *inter alia*, penalties for violation of the Departmental order under appeal here in the amount of $43,000, as well as penalties for violations of Perano's NPDES permit in the amount of $29,000. In total, the Department is seeking a civil penalty of $123,570. Because the two actions emanate

from in the same facts, the actions are likely to be consolidated. The potentially significant financial consequences to Perano weigh against granting an expedited hearing. Assuming the actions are consolidated, assessing a penalty tends to be a rather far-ranging inquiry. *See, e.g., DEP v. Angino*, 2007 EHB 175. Even if it is true, as the Departments says, that the facts relevant to the order are limited, that consideration would seem to have gone by the wayside when the Department filed its complaint.

Furthermore, the Department's claim that there is an ongoing threat to public health or the environment is belied by its withdrawal of its petition to enforce the order. The Department offers no explanation for that withdrawal. The pendency of an appeal before this Board does not act as a supersedeas. 35 P.S. § 7514(d); *Groce*, 2005 EHB at 885. Perano has not asked for a supersedeas, and in fact claims that he has voluntarily and without prejudice agreed to comply with the order. The fact that the Department waited weeks after the filing of the appeal to request an expedited hearing also calls into question the Department's claim of an ongoing threat. If a threat remains or is realized, the Department has a number of enforcement options available to it.

Lastly, the Department's motion fails to adhere to the content requirements set forth in 25 Pa. Code § 1021.96b. Section 1021.96b states:

> (a) A motion for an expedited hearing must state facts with particularity and be supported by one of the following:
>
> > (1) Affidavits based on personal knowledge or experience setting forth the facts supporting the issuance of an order for an expedited hearing.
> >
> > (2) An explanation of why affidavits have not accompanied the motion if no affidavits are submitted with the motion for an expedited hearing.

> (b) A motion for an expedited hearing shall be accompanied by a memorandum of law.
>
> (c) A motion may not be filed unless it contains a certification that the moving party has in good faith conferred or attempted to confer with the party against whom the motion is directed in an effort to secure an agreement on expediting the proceeding.

The Department's motion not only fails to attach affidavits of personal knowledge of relevant facts, it also fails to supply any explanation of why such affidavits do not accompany the motion. Moreover, the motion is not accompanied by a memorandum of law. Further, the motion fails to supply a certification stating that the Department made a good faith effort to confer with Perano to secure an agreement prior to the filing of the motion. The motion does state that the Department "requested that Perano concur with its request for an expedited hearing but has not received a response," but this statement falls somewhat short of satisfying the spirit if not the letter of Section 1021.96b(c). To say the least, the motion's content-related shortcomings have not helped the Department's cause.

In the final analysis, although the Board is receptive to expedited hearings, the burden is upon the party requesting such proceedings to show that expedition is appropriate when the request is opposed by the other party. Here, the Department has failed to satisfy that burden. By the same token, a party who would have us extend the prehearing schedule set forth in our rules and orders also bears the burden of convincing us that there is good cause to deviate from our standard practice if the request is opposed or if an appeal is dragging on with insufficient progress. We will be as sensitive to any request for extensions in this matter as we have been to the request for expedition.

Accordingly, we issue the Order that follows.

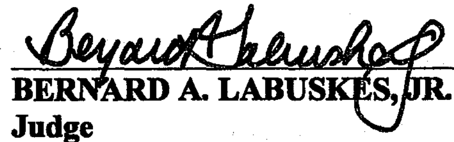
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

FRANK T. PERANO	:	
	:	
v.	:	**EHB Docket No. 2010-001-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 17th day of February, 2010, the Department's motion for an expedited hearing is **denied**.

ENVIRONMENTAL HEARING BOARD



BERNARD A. LABUSKES, JR.
Judge

DATED: February 17, 2010

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

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
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MARYANNE WESDOCK, ESQUIRE
ACTING SECRETARY TO THE BOARD

PA WASTE, LLC	:	
	:	
v.	:	**EHB Docket No. 2008-249-L**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION and CLEARFIELD COUNTY,	:	**Issued: February 22, 2010**
Intervenor	:	

OPINION AND ORDER
ON MOTION IN LIMINE

By Bernard A. Labuskes, Judge

Synopsis

In granting a motion in limine, the Board holds that a county's decision to exclude a proposed municipal waste facility from its Municipal Waste Management Plan is outside the scope of the Board's review in an appeal from the Department's decision to deny a permit application for the landfill.

OPINION

PA Waste, LLC ("PA Waste") filed this appeal from the Department of Environmental Protection's ("the Department's") denial of PA Waste's permit application for a landfill in Boggs Township, Clearfield County. A hearing on the merits was originally scheduled to begin on February 8, 2010, but was continued until June 14, 2010 at PA Waste's request. The Intervenor, Clearfield County, has filed a motion in limine arguing that the Board should not allow PA Waste to call the County's Commissioners as witnesses because the Board does not have

jurisdiction in this context to review the County's decision to exclude PA Waste from its Municipal Waste Management Plan ("County Plan" or "Plan"). Alternatively, the County argues that PA Waste has waived the issue regarding planning decisions made by the County because the issue was not raised in its notice of appeal.

PA Waste enumerates two legal issues in dispute in its pre-hearing memorandum. The first issue contends that "DEP's denial of Appellant's Permit Application, as set forth in its Denial Letter of July 11, 2008, was arbitrary, capricious, an abuse of discretion, contrary to law and violative of Appellant's rights...." This first issue is not the subject of the County's motion in limine. The second legal issue asserts that "the Clearfield County Commissioners engaged in invidious discrimination, acted contrary to law, and violated the rules, regulations, and standards promulgated by the DEP in denying on several different occasions – Appellant, PA Waste, LLC's request for admittance in the Clearfield County Municipal Waste Management Plan." The County argues that the Board lacks jurisdiction to resolve the second issue.

In its brief response, PA Waste concedes that the Environmental Hearing Board Act, 35 P.S. § 7511 *et seq.*, establishes the Board's authority to determine the appropriateness of actions of the Department, including the power and duty to hold hearings and issue adjudications on orders, permits, licenses, and decisions of the Department. 35 P.S. § 7514(a). It also acknowledges that Section 1711(b) of the Municipal Waste Planning, Recycling and Waste Reduction Act ("Act 101"), 53 P.S. § 4000.1711(b), provides that the Board has jurisdiction "over citizen suit actions brought under this section against the Department. Actions against any other persons under this section may be taken in a court of competent jurisdiction." It further concedes that the Board only has authority to review actions taken by the Department, and that the jurisdiction of local agency actions is generally vested with the court of common pleas. *See*

Consumer I. Fund v. Supervisors of Smithfield Township, 532 A.2d 543 (Pa. Cmwlth. 1987). Curiously, after making these concessions, PA Waste nonetheless asserts that "[t]he County's actions complained of, cited in Appellant's Notice of Appeal in addition to the Pre-Hearing Memorandum, establishes that their conduct, when viewed in light of the Department's decision to deny the permit application, should fall under the scrutiny of this tribunal." PA Waste does not cite any additional authority or sources indicating that we can review the County's actions in this matter. Its only argument for why the Board should consider the County's action is that the County voluntarily interjected itself into this appeal as an intervenor. Presumably, in PA Waste's view, the County's intervention means that we may review the County's actions.[1]

When a party questions the Board's scope of review, the first thing that we must do is precisely define the Departmental action that is being appealed. *Winegardner v. DEP*, 2002 EHB 790, 793. Our scope of review is limited to reviewing the propriety of *that action*. We may not use an appeal from one action as a vehicle for reviewing a different Departmental action. *Id.* Only issues relevant to the particular action being appealed are relevant. *Id.*

The action under review in this appeal is the Department's denial of PA Waste's permit application. The Department has not made any decision or taken any action with respect to the County's waste plan. There are detailed provisions in Act 101 regarding a county's obligation to adopt and revise a municipal waste management plan and provisions that prescribe the Department's review and approval of such new and revised plans, 53 P.S. §§ 4000.501.505, but the Department has taken no such action in this case. The Department has not reviewed the County's plan. Indeed, Clearfield County has not taken any planning action that would be

[1] The Department did not file anything on this important issue other than a letter indicating that it joined in the County's motion.

subject to the Department's review. There has been no county action for the Department to review, and therefore, no Department action regarding a county action for us to review.

PA Waste accuses the County of invidious discrimination and unlawful conduct. If the County engaged in such behavior in the course of adopting or revising its plan, and the Department took some action relating to the County's planning action, then we *might* have grounds for looking into the County's actions. But here, the Department's action related to PA Waste's permit application, not the County's plan.

The question, then, becomes whether the Department should have or could have used PA Waste's permit application as a vehicle for examining or perhaps even mandating changes to the County's plan, or for disregarding or otherwise looking behind the County's plan. If the Department's permit application review should have encompassed a review of the County's plan, then PA Waste's complaints regarding the County's planning behavior might arguably fall within the scope of our review as well.

We see nothing in Act 101 to suggest that the Department can or should reexamine a County's plan in the context of reviewing a permit application to build a solid waste facility. The Department's obligations under Act 101 regarding review of a permit application are spelled out in Section 507 of the Act as follows:

> (a) Limitation on permit issuance – After the date of submission to the department of all executed ordinances, contracts or other requirements under section 513, the department shall not issue any permit, or any permit that results in additional capacity, for a municipal waste landfill or resource recovery facility under the Solid Waste Management Act, in the county unless the applicant demonstrates to the department's satisfaction that the proposed facility:
> (1) is provided for in the plan for the county; or
> (2) meets all of the following requirements:
> i. The proposed facility will not interfere with implementation of the approved plan.

ii. The proposed facility will not interfere with municipal waste collection, storage, transportation, processing or disposal in the host county.

iii. The proposed location of the facility is at least as suitable as alternative locations giving consideration to environmental and economic factors.

iv. The governing body of the proposed host county has received written notice of the proposed facility from the applicant pursuant to section 504 of the Solid Waste Management Act and, within 60 days from such notification, the governing body of the proposed host county has not provided the department with written objections to the proposed facility. Should the governing body of the proposed host county file timely objections to the department, the department shall not approve the permit application, unless the department determines the proposed facility complies with the appropriate environmental, public health and safety requirements and is in compliance with this paragraph.

53 P.S. § 4000.507. There is nothing in Section 507 (or anything else in Act 101 for the matter) to suggest that the Department may use its review of a permit application to reexamine a county's solid waste plan. To the contrary, Section 507 sets up a two-step process. The Department's first step is to determine whether a proposed facility is provided for in the host county's plan. That's it. There is no procedure for looking behind or beyond the plan itself. A facility is either provided for in a plan or it is not. If it is, the Section 507 inquiry is at an end. If it is not, the Department must move on to the second step, which involves a detailed list of criteria that must be met. Those criteria do *not* include an examination of the propriety of the county's plan. Regardless of whether the first step or the second step comes into play, there is no provision for an examination of the County's plan beyond looking to see if the facility is in the plan. The Department does not move into the second step because there is something wrong

with the plan; it moves into the second step simply because, for whatever reason or no reason at all, a proposed facility is not named in the plan.[2]

Thus, the validity of a county's plan is not relevant in reviewing the Department's application of Section 507. If the plan's validity is not relevant, it follows that the question of whether a county acted unlawfully with respect to that plan is irrelevant in the context of a permit review. The County's motion to exclude evidence of the County's planning actions, although somewhat inaccurately framed as a question of jurisdiction, is nevertheless well taken because the County's planning actions are simply not relevant. The Department, and this Board, begin our inquiry with the undisputed fact that the PA Waste facility is not in the County Plan. Why it is not in the plan is irrelevant.

Under the Sewage Facilities Act, 35 P.S. § 750.1 *et seq.*, which includes a planning process for handling sewerage somewhat analogous to Act 101's waste planning process, the Department may order a municipality to revise its plan if a private party shows in accordance with certain specified procedures that the plan is inadequate 35 P.S. § 750.5. Section 507 of Act 101 contains no equivalent mechanism for a frustrated permit applicant. Instead, the Legislature devised a system whereby a county's plan may be bypassed to some extent pursuant to the procedures set forth in Section 507(a)(2), but there is no mechanism in that section for forcing a county to revise its plan to accommodate a particular applicant's facility. Again, the adequacy *vel non* of the plan does not come into play. How the county got to where it is in its planning process is even further removed from the realm of relevancy.[3]

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[2] If a proposed facility is not in a county's plan, it will undoubtedly be more difficult to obtain a permit, but it is not theoretically impossible. Counties have a great deal to do with whether a facility can be permitted within their boundaries, but their authority is not absolute.

[3] Because Section 507 does not authorize the Department to review the county's plan in the context of a permit application, there is no need to discuss the scope of the Department's review of planning decisions as set forth in the planning sections of the Act 101.

To the extent that PA Waste is attempting to have us directly review the County's actions and direct the County to do something, it would seem to go without saying that this Board does not directly review a county's actions. 35 P.S. § 7514(a)(Board reviews actions of the Department); *Consumer I. Fund, supra*, 532 A.2d at 545 (court of common pleas reviews local agency actions); *Angela Cres Trust v. DEP*, EHB Docket No. 2006-086-R (Adjudication, June 25, 2009) (no Board review of municipality's stormwater management plan in the context of an NPDES permit review). Indeed, PA Waste concedes as much. Although we might need to examine a county's actions if the Department itself had reviewed those actions in the course of approving or disapproving a plan or plan revision, as discussed at length above, this is not such a case.

PA Waste's argument that these basic limitations on the Board's scope of review are trumped by the County's intervention in the appeal has no merit. A third-party's intervention has no effect whatsoever on the fundamental powers of the Board or the issues that are relevant. Relevancy is defined by relation to the Department action under review, not the identity of the parties.[4]

The County argues that, because testimony regarding the decision by the County to deny PA Waste's request that the proposed landfill be included in its plan is irrelevant (or, in its words, outside of our jurisdiction), the testimony of all three County Commissioners who have been listed as witnesses in PA Waste's prehearing memorandum is unnecessary. The County

[4] Clearfield County argues alternatively that PA Waste has waived the issue regarding decisions made by Clearfield County because the issue was not raised in its notice of appeal. It argues that, although the notice of appeal discusses letters by the County and/or the County Solicitor regarding the County's decision not to consider the proposed landfill for admission into the county plan, PA Waste failed to specifically object to the County's decision or request any relief from the Board with regard to a determination of the propriety or legality of the County's action. This issue is moot as a result of our decision that the legality or propriety of the County's decision to exclude PA Waste from its plan is not relevant in this appeal.

proposes, alternatively, to designate one Commissioner to testify as to any relevant issues. PA Waste responds by arguing that every witness named in its pre-hearing memorandum has material and relevant testimony of actions complained of in the notice of appeal and, accordingly, all three Commissioners should be made available to testify. It does not explain why. Nevertheless, although the County's planning decisions are irrelevant in this appeal, we cannot at this juncture say that the county officials have no relevant testimony to offer regarding the criteria set forth in Section 507(a)(2), for example. The County's proposal to produce one commissioner and decide on the need to call the other commissioners after that testimony appears to be a fair approach. PA Waste at the hearing will be given the opportunity after such testimony to explain why testimony from other commissioners would add value.

Accordingly, we issue the Order that follows.

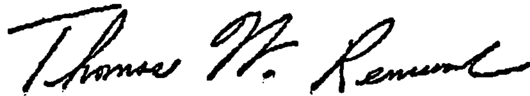
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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

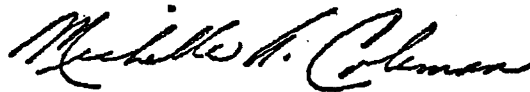
ORDER

AND NOW, this 22nd day of February, 2010, in consideration of Clearfield County's motion in limine, the Department's joinder therein, and the Appellant's response in opposition thereto, it is hereby ordered that the motion is granted. Legal Issue No. 2 in the Appellant's prehearing memorandum is stricken. The Appellant may call one designee of the current Board of the Clearfield County Commissioners of its choosing to testify as to any issues that are relevant to matters properly before the Board. The Appellant may call additional Commissioners upon order of the Board.

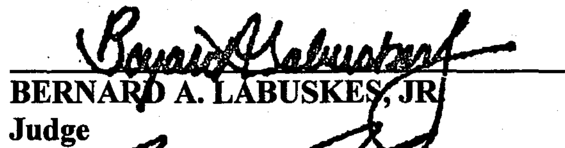
ENVIRONMENTAL HEARING BOARD



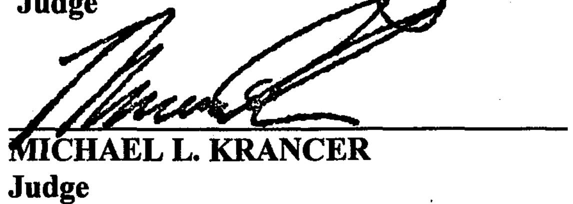
THOMAS W. RENWAND
Chairman and Chief Judge



MICHELLE A. COLEMAN
Judge



BERNARD A. LABUSKES, JR.
Judge



MICHAEL L. KRANCER
Judge

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

DATED: February 22, 2010

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

EMERALD COAL RESOURCES, L.P. and CUMBERLAND COAL RESOURCES, L.P.	:	
v.	:	**EHB Docket No. 2009-023-L (Consolidated with 2009-040-L)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: February 24, 2010**

OPINION AND ORDER ON MOTION FOR SUMMARY JUDGMENT

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board holds that the Department must act under the auspices of the Board of Coal Mine Safety established by the Bituminous Coal Mine Safety Act if it wishes to expand the definition of an "accident" that must be reported to the Department under the Act.

OPINION

Emerald Coal Resources, L.P. ("Emerald") owns and operates the Emerald underground bituminous coal mine in Wayne Township, Green County. Emerald scheduled a cut-through from the B-7 to the B-6 section of the mine during the afternoon shift on January 19, 2009. The plan that Emerald's mine foreman and section coordinator prepared for the cut-through provided that a mine examiner would be stationed in the B-6 area. Because the cut-through would result in an air connection, the mine examiner was instructed to close doors that had been installed to

maintain the planned, safe ventilation currents in the mine. The mine examiner went to the B-6 section but mistakenly left the area before the cut-through was made. As a result, the doors were not closed when they should have been. Although the parties dispute whether an actual air reversal occurred, there is no dispute that Emerald failed to follow its own plan for maintaining safe ventilation during the cut-through. The crew completed the cut-through and only then closed the doors. Although no actual harm occurred, Emerald does not dispute the Department's contention that the incident caused a potential threat to the health and safety of the miners.

Emerald did not notify the Department of Environmental Protection (the "Department") of the incident. The Department only found out about it later, at which point the Department issued the compliance order that is the subject of this appeal to Emerald. The order cited Emerald for violating Section 109(a)(1) of the Bituminous Coal Mine Safety Act, 52 P.S. § 690.109(a)(1)(the "Act"). The description of the violation reads:

> The operator failed to notify the Department of an unanticipated event that occurred in the B-7 section on the afternoon shift of 1/19/2009 in a timely manner.

Under the section of the order describing the corrective action to be performed, the Department wrote:

> Certified mine officials shall be instructed of the requirements of the law with regard to section 109(a)1. To terminate this order, the operator shall conduct an investigation of the event and develop a written report as required in section 109(a)4.

Cumberland Coal Resources, L.P. ("Cumberland") owns and operates the Cumberland underground bituminous coal mine in Waynesburg, Greene County. At about midnight on the night of February 11-12, 2009, an electrical storm knocked out the electricity supplied to the mine from Allegheny Power. As a result of the power outage, a ventilation fan at the No. 5 bleeder shaft stopped working. A back-up system powered by diesel was supposed to kick in

automatically but it failed to do so. A fan monitoring system alerted surface personnel of the stoppage, and an electrician hustled to the site and restarted the fan. The fan did not operate for 16 minutes and 40 seconds. Because the fan was out for more than fifteen minutes, Cumberland was legally required to, and in fact began, an evacuation of the mine. Although no one was harmed, there is no dispute that the loss of ventilation caused by the malfunctioning equipment posed a potential threat to the health and safety of miners, not only directly as a result of the disruption in air flow, but indirectly as a result of the need to commence an evacuation of numerous miners over long distances on foot.

Cumberland did not notify the Department of the extended fan outage. The Department only found out about it later. Cumberland had prominently posted instructions regarding when its personnel were to notify the Department of incidents at the mine, which included "[v]entilation interruptions requiring withdrawal of personnel from the entire mine." As a result of the incident, the Department issued the order that is the subject of this appeal to Cumberland. It cited the following as the condition or practice constituting a violation of law:

> The posted guidelines for inspector notification was not followed. The district mine inspector was not notified of a fan outage that occurred on 2/12/2009 at 12:20 AM, this outage lasted in excess of 15 minutes and resulted in the evacuation of the mine.

The order does not list a statutory section that had been violated. Instead, in the section marked "Violation of Section:" the order says "Posted Procedures". The Department mandated the following corrective action:

> Review of all guidelines concerning notification of the district mine inspector, regarding the accident and incident occurrences at the mine.

We consolidated Emerald and Cumberland's appeals from their respective orders. The Department has moved for summary judgment in both the Emerald and Cumberland appeals.[1] It argues that the events that occurred at the Emerald and Cumberland mines were "accidents" as that term is defined in the Act, and the operators were required to but did not notify the Department that those unanticipated events occurred. The Department argues that the term "accident" is not ambiguous, but even if it is, the Department's interpretation that it covers the events at issue here is reasonable. The Department in its view has the necessary authority under the Act to issue the orders. It has provided more than adequate notice about its expectations regarding the accident notice requirement, and the opportunity to appeal the order to this Board protects the operators' due process rights. The rules and regulations of Cumberland, posted at the mine, expressly required its employees to notify the Department immediately about the events that occurred at that mine. For all of these reasons, the Department contends that its issuance of the orders in question was reasonable and that the orders should be sustained.

Cumberland and Emerald respond that the events in question did not constitute "accidents." The events indisputedly do not fit within any of the fourteen specific examples of "accidents" set forth in the Act and the fact that the Act uses the word "including" before listing the fourteen events does not suggest that other incidents can qualify as accidents. The Department's interpretation is unreasonable and inconsistent with legislative intent. The Department has engaged in "unlawful stealth regulation." Finally, the operators assert that there

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[1] Summary judgment is appropriate when the record establishes that there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. 25 Pa. Code § 1021.94(b); Pa.R.C.P. 1035.2; *PDG Land Development v. DEP*, EHB Docket No. 2007-041-R, slip op. at 4 (Opinion and Order, May 21, 2009). The "record" for summary judgment purposes is defined as the pleadings, depositions, answers to interrogatories, admissions, affidavits, and certain expert reports. Pa.R.C.P. 1035.2; *Holbert v. DEP*, 2000 EHB 806-07, *citing County of Adams v. DEP*, 687 A.2d 1222, 1224 (Pa. Cmwlth. 1997). The Board must view the record in the light most favorable to the nonmoving party. *Holbert*, 2000 EHB at 808.

are disputed issues of fact, which might explain why they did not themselves move for summary judgment.

To take the last point first, we do not discern any genuine dispute of material fact here. The relatively straightforward facts as discussed above are not disputed and provide a sufficient foundation for our review of the Department's motion.

A second preliminary matter relates to the Cumberland order. That order on its face does not cite Section 109 of the Act. Rather, it only cites the operator for violating "Posted Procedures." The corrective action required is limited to reviewing those procedures. The obligations that would ordinarily come into play under Section 109 (notification, investigation, corrective action, reporting) are not required by the order. Nevertheless, both parties briefed the issues as if the order was based in part on a violation of Section 109. The issue of whether the Department can rely on a statutory violation not cited in the order is, therefore, not before us.

Section 109 of the Act, 52 P.S. § 690.109, provides among other things that the operator of a mine must notify the Department within fifteen minutes of its discovery of an "accident" at its mine.[2] Section 104 of the Act defines an "accident" as "an unanticipated event, including any of the following:

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[2] Section 109 reads as follows:

(a) **Duties of operator.**–In the event of an accident occurring at a mine, an operator shall do all of the following:
  (1) Notify the department no later than 15 minutes of discovery of the accident.
  (2) Take appropriate measures to prevent the destruction of evidence which would assist in investigating the cause of the accident. Unless granted permission by the department, no operator may alter an accident site or an accident-related area until completion of all investigations pertaining to the accident, except to rescue any individual and prevent destruction of mine equipment.
  (3) Obtain the approval of the department for any plan to recover an individual in the mine, to recover the coal mine or to return the affected areas of the mine to normal operations.
  (4) Conduct its own investigation of the accident and develop a written report of the investigation. The report shall include all of the following:
    (i) The date and hour of the accident.

1. A death of an individual at a mine.
2. An injury to an individual at a mine, which has a reasonable potential to cause death.
3. An entrapment of an individual at a mine which has a reasonable potential to cause death or serious injury.
4. An unplanned inundation of a mine by a liquid or gas.
5. An unplanned ignition or explosion of gas or dust.
6. An unplanned mine fire not extinguished within ten minutes of discovery.
7. An unplanned ignition or explosion of a blasting agent or explosive.
8. An unplanned roof fall at or above the anchorage zone in active workings where roof bolts are in use.
9. An unplanned roof or rib fall in active workings that impairs ventilation or impedes passage.
10. A coal or rock outburst that causes withdrawal of miners or which disrupts regular mining activity for more than one hour.
11. An unstable condition at an impoundment or refuse pile which does any of the following:
    (i) Requires emergency action to prevent failure.
    (ii) Causes individuals to evacuate an area.
12. Failure of an impoundment or refuse pile.
13. Damage to hoisting equipment in a shaft or slope which endangers an individual or which interferes with the use of the equipment for more than 30 minutes.
14. An event at a mine which causes death or bodily injury to an individual not at the mine at the time the event occurs."

(ii) The date the investigation began.
(iii) The names of the individuals participating in the investigation.
(iv) A description of the accident site.
(v) An explanation of the accident or injury, including a description of any equipment involved and relevant events before and after the accident.
(vi) An explanation of the cause of the accident.
(vii) An explanation of the cause of any injury sustained due to the accident.
(viii) The name, occupation and experience of any miner involved in the accident.
(ix) A sketch depicting the accident, including dimensions where pertinent.
(x) A description of steps taken to prevent a similar accident in the future.

(b) **Duties of department.**–In the event of an accident occurring at a mine, the department shall do all of the following:

(1) Take whatever action it deems appropriate, including the issuance of orders, to protect the life, health and safety of an individual, including coordinating and assisting rescue and recovery activities in the mine.
(2) Promptly decide whether to conduct an investigation of the accident and inform the operator and the representative of the miners of its decision.

(c) **Report.**–Each operator shall report to the department each accident and lost-time injury....

52 P.S. § 690.104.

Under the Department's interpretation of Section 104 of the Act, "accidents" are not limited to the fourteen listed unanticipated events. We agree, to a point. The statute on its face defines an accident as an unanticipated event, *including* the fourteen listed circumstances. As a general rule, the use of the term "including" signifies an intent on the part of the Legislature to enlarge, not limit. *PHRC v. Alto-Rest Park Cemetery Ass'n*, 306 A.2d 881, 885-86 (Pa. 1973); *Readinger v. WCAB*, 855 A.2d 952, 954-55 (Pa. Cmwlth. 2006). In addition, if the Legislature had intended to limit reportable "accidents" to the fourteen events listed, there would have been no need to state that an accident is an "unanticipated event." It would be impossible to predict and list every unanticipated event that might qualify as an accident, and it is reasonable to assume that the Legislature intended that there be some flexibility available in defining the boundaries and limits of the term.[3]

On the other hand, the Legislature did not need to list any examples. It could have simply defined "accident" as "any unanticipated event." The fact that it took the trouble to list fourteen examples suggests that events should only constitute reportable "accidents" if they are of the same general kind, class, or nature as those specifically mentioned examples. *See McClellan v. HMO*, 686 A.2d 801, 805 (Pa. 1996); *Velocity Express v. PHRC*, 853 A.2d 1182, 1186 (Pa. Cmwlth. 2004). Even with this limitation, however, we agree with the Department that the events that occurred at the Emerald and Cumberland mines appear to be of the same general kind and nature as the fourteen events specifically mentioned.

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[3] The fact that the Pennsylvania Legislature preceded the list of accidents with the phrase "an unanticipated event, including any of the following" signals that it did not intend the definition of "accident" to necessarily be identical to its federal equivalent, 30 C.F.R. § 50.2(h), which does not include such a phrase. *See also* 52 P.S. § 690.106 (Board of Coal Mine Safety may promulgate regulations if existing federal and state regulations do not adequately address a hazard).

Our difficulty here is not so much with the Department's interpretation of Section 104 as it is with the way that the Department has chosen to implement Sections 104 and 109 in this case. There is no dispute that the events at Emerald and Cumberland do not fall within the fourteen events listed in Section 104. What the Department has done here is attempt to expand that list by issuing compliance orders.

There is no doubt that the Act empowers the Department to issue orders to enforce the Act, effectuate the purposes of the Act, and protect the health and safety of those who work in underground mines. 52 P.S. §§ 690.105, 690.501. No one, including the Appellants, questions that basic authority.[4] Of course, the Department's orders must be supported by the facts, lawful, and reasonable to be upheld by this Board. *M & M Stone Co. v. DEP*, 2008 EHB 24, 57, *aff'd* 383 C.D. 2008 (Pa. Cmwlth. October 17, 2008).

There is also no doubt that "[a]n administrative agency has available two methods for formulating policy that will have the force of law. An agency may establish binding policy through rulemaking procedures by which it promulgates substantive rules, or through adjudications that constitute binding precedents." *PHRC v. Norristown Area School District*, 374 A.2d 671, 679 (Pa. 1977). Rulemakings and adjudications are not mutually exclusive options. The Department's choice to proceed under one, the other, or both courses, however, must be reasoned, fair, and consistent with the enabling statute's framework. *Id.*

We are unable to support the Department's attempt to make law by issuing orders (and an adjudication) in this case for several reasons. First, the course that the Department has chosen has the effect, whether intended or not, of avoiding the Legislature's carefully crafted mechanism for adding flesh to the statutory bones. Sections 104 and 109 of the Act should not

[4] The Department argues that it can issue orders even in the absence of a violation, but that issue does not arise in this case because both orders cite the operators for violations.

be viewed in isolation from the Act as a whole. When construing and applying a statute, we must give effect to all of its provisions. *Pinto v. State Civil Service Commission*, 912 A.2d 787 (Pa. 2006); *Warminster Fiberglass Co. v. Upper Southampton Twp.*, 939 A.2d 441 (Pa. Cmwlth. 2007). It is important to read statutory provisions not by themselves, but with reference to and in light of the statute as a whole. *Stivason v. Timberline Post and Beam Structures Co.*, 947 A.2d 1279 (Pa. Super. 2008); *Keystone Coal Mining Corp. v. WCAB*, 896 A.2d 691 (Pa. Cmwlth. 2006). The Act contains hundreds of provisions that completely and dramatically revamped the law of underground mine safety in Pennsylvania. For the first time in the history of mine safety law in Pennsylvania, the Act provides for rulemaking.

We believe that Sections 104 and 109 should be read in conjunction with the new rulemaking procedures set forth in Sections 106 and 106.1 of the Act, 52 P.S. §§ 690.106, 690.106.1. Section 106 of the Act creates the Board of Coal Mine Safety and directs that the Board shall develop all of the following:

> 1. Proposed amendments to the interim mandatory safety standards.
>
> 2. Additional regulations with respect to mine safety if the Board determines that existing Federal and State regulations do not adequately address a specific hazard.
>
> 3. Other regulations as specifically authorized under this act.

52 P.S. § 690.106(a). It is noteworthy that the composition of the Board is quite unique:

> The Board shall consist of the secretary [of DEP], who shall be the chairperson, and the following members appointed by the Governor:
>
> (1) Three members who represent the viewpoint of the coal mine operators in this Commonwealth.
>
> (2) Three members who represent the viewpoint of the working miners in this Commonwealth.

52 P.S. § 690.106(b). Members appointed under (b)(1) are to be selected from a list of nominees submitted by the major trade association representing coal mine operators in the Commonwealth, and members appointed under (b)(2) are selected from lists generated by the major labor organization representing coal miners in the Commonwealth. 52 P.S. § 690.106(d) and (e). Members may continue employment in the coal industry while serving on the Board. 52 P.S. § 690.106(f). The Act gives the Board of Coal Mine Safety detailed statutory instructions regarding the promulgation of regulations and safety standards. Among other things, regulations may address revisions to interim safety standards, hazards not addressed by existing standards, identification of positions not listed in the Act requiring a certificate of qualification, and fees. 52 P.S. § 690.106.1(f).[5]

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[5] Section 106.1 reads in part as follows:

(a) **Authority.**–The board shall have the authority to promulgate regulations that are necessary or appropriate to implement the requirements of this act and to protect the health, safety and welfare of miners and other individuals in and about mines.

(b) **Consideration.**–The board shall consider promulgating as regulations any Federal mine safety standards that are either:

   (1) Existing as of the effective date of this section and that are not included in interim mandatory safety standards.

   (2) New standards, except for standards concerning diesel equipment, promulgated after the effective date of this section.

(c) **Regulations.**–Within 250 days of the effective date of this section, the board shall begin to consider the standards under subsection (b)(1) for promulgation as regulations. If final regulations are not promulgated by the board within three years of the effective date of this section, the department may promulgate final regulations consistent with Federal standards.

(d) **New Standards.**–Within 70 days of the effective date of new mine safety standards under subsection (b)(2), the board shall begin to consider standards for promulgation as regulations. If the regulations are not promulgated as final by the board within three years of the effective date of the promulgation of the new standards, the department may promulgate final regulations consistent with Federal standards.

(e) **Justification for regulations.**–Regulations shall be based upon consideration of the latest scientific data in the field, the technical feasibility of standards, experience gained under this and other safety statutes, information submitted to the board in writing by any interested person or the recommendation of any member of the board, if the board determines that a regulation should be developed in order to serve the objectives of this act.

(f) **Topic.**–Without limiting the scope of the board's authority under this section, regulations may address any of the following:

It is obvious, then, that the Legislature took great care in crafting an innovative process for developing new standards and regulations that guarantees full participation by key stakeholders. We see this process as an important and forward-thinking feature of the new statute. The Board should not be turned into a paper tiger simply because it is more convenient for the Department to legislate by issuing orders. The stakeholders should not be denied their seat at the table and the process should be given a chance to work.

It is not our intention to necessarily and absolutely foreclose the possibility that unique circumstances in some future case may justify the issuance of an order requiring notification of an accident for an incident not clearly spelled out in Section 104. The problem with the Emerald and Cumberland orders, however, is that the Department is essentially attempting to create an across-the-board rule that uncontrolled cut-throughs not managed in accordance with a safe ventilation plan, as well as fan stoppages that result in the initiation of an evacuation, are by definition "accidents" that require fifteen-minute notice to the Department. It would be easy to pretend that the orders under appeal will only bind Emerald and Cumberland at their mines, but the reality is that the orders, coupled with an adjudication approving them from this Board that would have the force of *stare decisis* behind it, would combine to make the Department's position for all intents and purposes a binding, industry-wide rule.

> (1) Revisions to an interim mandatory safety standard to address a new technology or method of mining.
> (2) Hazards not addressed by existing safety standards.
> (3) The identification of positions not listed under this act requiring a certificate of qualification.
> (4) The establishment of fees for services in amounts sufficient to cover the department's costs of administering this act....
>
> (g) **Safety**.–No regulation promulgated by the board shall reduce or compromise the level of safety or protection afforded mine workers under this act. The department may disapprove a final regulation approved by the board which the department determines would reduce or compromise the level of safety or protection afforded mine workers under this act if the department describes the basis for the disapproval....

Administrative lawmaking by adjudication is best left to case-specific factual situations, and cases where the Department is interpreting and implementing existing requirements, not promulgating new ones. *See, e.g., Norristown, supra*, 374 A.2d at 677 (agency's decision to proceed by way of adjudications was reasonable because Legislature envisioned a case-by-case approach to the elimination of racial imbalance in the schools). *Cf. Borough of Bedford v. DEP*, 972 A.2d 53 (Pa. Cmwlth. 2009) (policies v. regulations); *Homebuilders Ass'n v. DEP*, 828 A.2d 446 (Pa. Cmwlth. 2003) (same). Here, the fact that the appeals are being litigated in the context of a summary judgment motion illustrates that the Department's position is not really limited to narrowly confined facts or facts that will vary materially from case to case, and the orders may fairly be said to expand, not interpret, the Section 104 list.

The Department is not merely attempting to expand the definition of "accident" to address an entirely new situation. As it turns out, the Department published guidance in 2005 interpreting the predecessor to the present Act. Just as under the new Act, the prior law required operators to notify the Department in the event of an "accident." *See* 52 P.S. § 701.401. The Department's guidance interpreted the law to require notice for all of the fourteen events specified in the present law and in two additional events: ventilation interruptions requiring withdrawal of personnel from the entire mine, and unplanned connections into abandoned working or boreholes. The events at Emerald and Cumberland bear a close resemblance to the pre-Act events that qualified as accidents. Had it desired to, the Legislature could have elected to expand the definition of the term "accident" in accordance with the Department's then existing interpretation as embodied in its guidance document. It did not. Instead, the Legislature listed fourteen events, allowed for some additional flexibility by adding the phrase "an unanticipated

event, including…", and created a new standard-setting, rulemaking board to fill in the details if necessary.

The Department attempts to minimize the import of the orders by promising that it does not seek to impose penalties or otherwise sanction the operators or mine officials involved: "Rather, the Orders in question simply direct the operators to notify the Department when accidents like those occur in their mines." The Department says that the only performance obligation that was imposed on the operators was to train their employees to notify the Department if such events occur in the future. Putting aside the fact that these descriptions are actually inaccurate (e.g., a plan is required under Section 109), the Department is in no way bound by these promises of restraint.

In point of fact, the orders carry with them very serious potential consequences. A failure to notify the Department as required by the Act exposes individuals to criminal liability. Section 505 of the Act makes it a felony of the second degree to fail to notify the Department as required. 52 P.S. § 690.505. Section 503(a)(6) provides for the assessment of civil penalties of up to $2,500 against mine officials and mine operators for the failure to notify the Department in violation of the Act. 52 P.S. § 690.503. Under Section 503(b)(2), the penalty assessed against a mine operator increases to between $10,000 and $200,000 where an operator is determined to have directed or condoned the failure to notify. 52 P.S. § 690.503. In addition, the individual who directed the operator's response may be removed from his position of authority. 52 P.S. § 690.503. The violations will remain on the operator's and the mine officials' records, if you will, and can conceivably form the basis of future permit or certification actions related to compliance history. *See* 52 P.S. §§ 690.509, 690.510. If we were to uphold these orders, there is nothing stopping this or a future Administration from pursuing one or more of these sanctions, at least so

long as the three-year statute of limitations has not passed. To cite these operators for violations of the law that subject them and their employees to severe criminal liability for failing to give the Department notice of events that are not described with any specificity whatsoever in either the statute or in any regulation strikes us as fundamentally unfair.

Section 109 requires action within fifteen minutes. There should be no room for doubt in a case where such quick action is required. Unlike the Department, we believe that operators should be able to tell in advance whether notice is required. The phrase "unanticipated event" is too vague by itself to provide meaningful guidance. Dozens of "unanticipated events" undoubtedly occur every day. Even the Department in its brief acknowledges the need to add the gloss, nowhere found in the statute, that only events that have already caused or have a reasonable potential to pose a threat to miners should be covered by the term "accident." Rather than make up the law on an ad hoc basis as we go along, it is far better to employ the deliberative standard-making expertise of the Safety Board as envisioned by the Act. *See Pa. State Bd. of Pharmacy v. Cohen*, 292 A.2d 277, 282 (Pa. 1972) (case-by-case definition of "grossly unprofessional conduct" in lieu of promulgating rules does not give proper advance notice of what constitutes prohibited conduct).

The Department suggests that the orders were necessary and appropriate for protecting the health and safety of miners. We fail to see why that is the case. It would seem that several other provisions of the Act could have been relied upon if the incidents created unsafe situations. Section 201 of the Act requires that "[a]ll work must be performed in a safe manner." 52 P.S. § 690.201(1). In addition, "[a]ll equipment must be maintained in a safe operating condition." 52 P.S. § 690.201(2). The mine foreman is responsible for ensuring that no individual works in an unsafe place. 52 P.S. § 690.212(a). The Act contains no less than eight sections devoted to

ventilation requirements. 52 P.S. §§ 690.211, 690.230-238. There are general requirements such as the obligation to provide and maintain ample means of ventilation sufficient to furnish a constant and adequate supply of pure air for the employees. 52 P.S. § 690.230(a). The mine operator must prepare and implement a detailed ventilation plan. 52 P.S. § 690.230(b). The Act contains several requirements related to fans used to provide ventilation. 52 P.S. § 690.237.

Pointedly, the Act also contains requirements that specifically relate to ventilation requirements associated with cut-throughs and fan stoppages. 52 P.S. § 690.211. The Act requires the mine foreman to notify the superintendent when the mine is becoming dangerous through lack of ample ventilation from any cause. The superintendent is then required to investigate the mine foreman's report and, if substantiated, order necessary work to be done to make the mine safe. Of particular interest here, "it shall be the duty of the superintendent to immediately notify the department of the condition." 52 P.S. § 690.211(5). Given this list of the statutory provisions potentially applicable to the events that occurred at the Emerald and Cumberland mines, we do not see that a ruling today interferes in any way with the Department's ability to issue orders that ensure that safe ventilation is maintained.[6]

Thus, we conclude that Sections 104 and 109 do not support the Department's issuance of the orders to Emerald and Cumberland. As previously mentioned, however, the order to Cumberland is actually based upon Section 201(5) of the Act, which reads:

> The operator and all mine officials shall comply with and follow all mining plans, approvals and orders issued by the department, *rules and regulations of the operator*, all provisions of law that are in harmony with this act and all other applicable laws. The

---

[6] The Department argues that immediate notice would have allowed the Department inspector and perhaps other Department officials to bring their experience and expertise to bear. Emerald and Cumberland argue that Peter should not cry "wolf" too often; "accidents" should be limited to serious events that require immediate marshalling of private and public resources. These are precisely the sort of arguments that should be presented to the Board of Coal Mine Safety. Our only point here is that the Department has failed to show in this case that the orders were necessary for the protection of the miners.

> operator is responsible for assuring that all activities in and around the mine, including those conducted by contractors, are conducted in compliance with this act, regulations promulgated under this act, approvals and orders issued by the Department and any safety conditions included in permits.

52 P.S. § 690.201(5). The Department argues that this provision authorizes it to cite the operator for a violation of the Act even if the only thing that the operator "violated" was it own "rule" or "regulation." We have no desire to get into what qualifies as a "rule" on "regulation" of an operator. Surely we have not so lost sight of our system of government based upon the rule of law that the Department can transmogrify an operator's bulletin board postings without any legislative or regulatory process into binding law with the simple expedient of a compliance order. We simply cannot support such an unprecedented extension of lawmaking. If technical guidance documents and policy statements of the Department do not have the force of law, i.e. are not binding, we reject the notion that any missive that an operator posts on its bulletin board automatically becomes a binding law, the violation of which subjects an operator and its mine officials to enforcement action by the Department.

Accordingly, we enter the Order that follows.

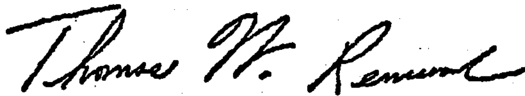
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

EMERALD COAL RESOURCES, L.P. and CUMBERLAND COAL RESOURCES, L.P.	:	
	:	
v.	:	**EHB Docket No. 2009-023-L**
	:	**(Consolidated with 2009-040-L)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 24th day of February, 2010, it is hereby ordered that the Department's motion for summary judgment is **denied**.

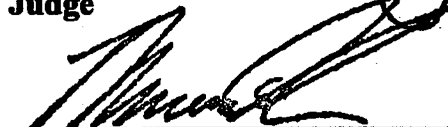
ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Chairman and Chief Judge

MICHELLE A. COLEMAN
Judge

BERNARD A. LABUSKES, JR.
Judge



MICHAEL L. KRANCER
Judge

Judge Michael L. Krancer's concurring opinion is attached.
Judge Richard P. Mather, Sr.'s concurring in part – dissenting in part opinion is attached.

DATED: February 24, 2010

c: **DEP Bureau of Litigation:**
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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

EMERALD COAL RESOURCES, L.P. and CUMBERLAND COAL RESOURCES, L.P.	:	
v.	:	**EHB Docket No. 2009-023-L (Consolidated with 2009-040-L)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

CONCURRING OPINION OF JUDGE MICHAEL L. KRANCER

I agree totally with and join in the very well reasoned majority opinion but feel it necessary to add a few particular words of my own, not because the majority opinion lacks anything, as it does not, but because I see the Department attempting a naked power grab and destruction of the recent Pennsylvania Bituminous Mine Safety Act of 2008, 52 P.S. §§ 690-101 – 690-708, which is inappropriate and offensive to the rule of law and the democratic process which simply must be called out in no uncertain terms. I was the presiding trial judge and author of *United Mine Workers v. DEP*, 2001 EHB 1040, which involved a two week trial including a visit deep into an active coal mine, so I am no stranger to mine safety and mine safety cases, but what the Department is suggesting it can do here is way off-base.

The new Bituminous Coal Mine Safety Act of 2008 (known as SB 949 before passage and also known as Act 55 of 2008) was signed into law in July, 2008. The law was the product of over five and a half years of fit and start, multi-level negotiating work by and among industry representatives, chief of which was the Pennsylvania Coal Association; workers, especially the United Mine Workers Union; and the Administration, mainly through DEP. The process started

in December 2003 in the aftermath of the 2002 Quecreek mine incident when Secretary McGinty convened a meeting between DEP, representatives of the coal industry and its workers. The parties agreed that the industry and worker groups would work together to try to come up with a collective labor/management initiative while, in the meantime, DEP would begin drafting its own amendments. The discussions between the industry and the workers' groups broke down in the spring of 2004. DEP then finished its own draft and shared it with both industry and the worker groups. Both industry and labor had serious concerns with DEP's version so those groups restarted the negotiations between themselves and with DEP. These negotiations went on for many years and, finally, in January 2008, SB 949 was introduced. The Bill had by then earned the backing of mine owners and operators, workers and the Administration. After some last changes, the final version of the Bill passed the Pennsylvania House of Representatives by a 203 to 0 vote and the Senate by a 50 to 0 vote. The Governor signed the Bill into law on July 7, 2008 in a very well attended public ceremony at the Robena Mine Memorial in Carmicheals, Greene County, Pennsylvania, where 37 miners died in an explosion at the mine in 1962.

In short, the Act represents the give and take between stakeholders, *i.e.*, labor, the mining industry and the Administration, which, by the end, culminated in a monumental work of bipartisan balance which was lauded by all. The Secretary of DEP has publicly called the Act "historic." This effort is really remarkable and all parties are to be congratulated and admired for hammering out the Act which enjoyed such blanket support. This is an object lesson to those who may be jaded that hard work and give and take by interested parties representing differing points of view can result in a positive legislative result even in the most challenging of areas. More importantly, the Act is the law of the Commonwealth.

One of the major highlights of SB 949, perhaps the major highlight of it, is the Mine Safety Board which Section 106 of the Act establishes. Indeed, the Governor's Press Release announcing his signing of the Bill into law says that this is the "most significant" part of Act. That portion of the Bill had been a serious bone of contention from day one with the coal industry and coal workers. However, by the time SB 949 was passed by the Senate the contention was laid to rest by the fact that the industry and the unions were assured that the Board would be balanced with membership to include three members who represent the viewpoint of coal mine operators and three members who represent the viewpoint of the working miners along with the DEP representative. That is the way the Board is constituted today under the Act. The rulemaking role and authority of the Board is outlined in Section 106.1 – 106.5 of the Act. 52 P.S. §§ 690-106.1 – 690-106.5. By the way, we just passed the first anniversary of the first meeting of the Mine Safety Board which met for the first time on January 7, 2009.

The essence of the Mine Safety Board, the reason we have it, is that before the Act the existing law was not agile or robust enough to provide the tools necessary to respond quickly to reflect rapid changes in technology. The Department had no authority on its own to write new mining regulations. Indeed, early in the process the Pennsylvania Coal Association was opposed to the Bill as originally drafted when the Mining Safety Board was composed of only three persons because the Mine Safety Board's "powers appear to be unprecedented—it can change the provisions of law by regulation and address areas not contemplated in the Act by rulemaking..." Testimony of George Ellis on Behalf of the Pennsylvania Coal Association before the Senate Environmental Resources & Energy Committee, January 31, 2006. As mentioned before, the early objections were overcome by a broadening of the Mine Safety Board membership. Again, to quote the Governor's office announcing his signing of the Act, "most

significantly, the law creates a seven-member Board of Coal Mining Safety that will be chaired by the Secretary of the Department of Environmental Protection, with equal representation among mine owners and mine workers. The Board will have the authority to write new mine safety regulations—something the department is unable to do through the existing statute."

I am quite surprised by the expression in the Concurring and Dissenting opinion that the Mine Safety Board regulatory process will take longer than even normal regulation-making. That is not a fair statement under the circumstances. The Mine Safety Board was specifically established to be robust and to act quickly. What makes the assertion of slowness in the Concurring and Dissenting opinion most perplexing is that the Administration in the person of the Governor and two Secretaries of DEP repeatedly and specifically told everyone, including the Senate, that the whole idea of the Mine Safety Board is that it would be able to act more quickly than the existing regulatory process and it repeated that view again after the Act was passed. To wit, the following:

- When the original version of the Bill was envisioned in 2004, the Administration said that the Mine Safety Board would have "the authority to promulgate regulations to keep pace with changing mine safety technology." It further said that "the board could act quickly to put in place necessary improvements and precautionary measures to keep miners safe as the industry continues to advance rapidly."
- When the Administration's version of the Bill was introduced in 2006, the Governor's Office said "the Governor's initiative includes the creation of the three-member Mine Safety Board with the authority to promulgate regulations to keep pace with changing mine safety technology. The board could act more quickly to put in place necessary improvements and precautionary measures…"

- In testimony given on January 31, 2006 to the Senate Environmental Resources & Energy Committee Secretary McGinty told the Senators that the Act would create the Mine Safety Board "with the authority to promulgate regulations to keep pace with mine safety technology. The board could act quickly to put in place necessary improvements and precautionary measures…."
- After the first meeting of the Mine Safety Board in January of 2009, Secretary Hanger commented publicly that "[b]oard members can act quickly to implement necessary improvements and precautionary measures…."

This belies any notion that, as stated by the Concurring and Dissenting opinion, "rulemaking procedures under the BCMSA will likely take longer to complete than the already normal lengthy rulemaking process."

We have in the Act a very carefully crafted, negotiated and consensual piece of legislation which provides as its centerpiece, its heart, the Mine Safety Board, made up of representatives of all the stakeholder groups, which can, and indeed whose central mission is to revise regulations on the fly—something the Department is unable to do. Here, in the face of all of that, the Department suggests it can unilaterally write regulations. The Department was never able to do that even before the Act. The bald attempt to do so now is nothing short of ignoring the Act, all that went into the Act, and an attempt to rip out its heart. DEP's position here is completely disrespectful of and antithetical to the Act. This is a totally inappropriate attempted power grab which is offensive to the Act and to the process which created it. The stakeholders, including this DEP, agreed to the Mine Safety Board as the mechanism to, in this case, expand on the fly, if appropriate to do so, the already extant statutory long list of items which constitutes an "accident" and thus requires immediate reporting. This is especially galling in light of the

fact that industry and labor were drawn in to support the Act only after their mutually shared concerns about the nature of the Mine Safety Board were addressed and they were assured that the Board would be representative. This power grab is the worst kind, a bait and switch, double-cross type. Whatever you call it, it is at the end of the day, illegal and it must not be allowed.

ENVIRONMENTAL HEARING BOARD

MICHAEL L. KRANCER
Judge

DATED: February 24, 2010

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

EMERALD COAL RESOURCES, L.P. and CUMBERLAND COAL RESOURCES, L.P.	:	
v.	:	**EHB Docket No. 2009-023-L (Consolidated with 2009-040-L)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

CONCURRING OPINION IN PART AND DISSENTING IN PART

By Richard P. Mather, Sr., Judge

I concur in part and dissent in part from the opinion of the Majority. I concur in the result to deny the Department's motion for summary judgment for the reasons set forth below. I dissent from that portion of the decision that holds as a matter of law that the Department must act under the auspices of the Board of Coal Mine Safety and proceed by rulemaking if it wishes to expand the definition of an "accident" beyond the fourteen unanticipated events listed in statutory definition of accident. I believe that the Department has the authority under the Act of July 7, 2008 (P.L. 654, No. 55) known as the Bituminous Coal Mine Safety Act, 52 P.S. §§ 690-101 *et seq.*, ("BCMSA") to give meaning to and identify additional unanticipated events at a particular mine that meet the statutory definition of "accident" in BCMSA on a case-by-case basis by issuing an order.

BCMSA

BCMSA was enacted by the General Assembly on July 7, 2008. BCMSA was the first major revision to Pennsylvania's mine safety law since 1965 and it became effective on January 3, 2009. There are several provisions in the recently enacted BCMSA that are applicable to the appeals before the Board.

BCMSA is based on the General Assembly's finding "that it is in the public interest to establish a comprehensive scheme to protect the lives, health and safety of those who work at mines in this Commonwealth." 52 P.S. § 690-103(a). One of the purposes of BCMSA is "to enable the Commonwealth to respond as necessary and appropriate to accidents and other emergencies at underground bituminous coal mines." 52 P.S. § 690-103(b)(6). Thus, the General Assembly recognized the imperative that the Department possesses the full capability to respond to accidents at underground bituminous coal mines in Pennsylvania.

Section 109, which is entitled "Accidents," establishes the duties of mine operators and the Department to respond to accidents. 52 P.S. § 690-109(a) and (b). The duties of the Department are set forth in subsection (b) which provides:

> (b) Duties of department.—In the event of an accident occurring at a mine, the department shall do all of the following:
>
> (1) Take whatever action it deems appropriate, including the issuance of orders, to protect the life, health or safety of an individual, including coordinating and assisting rescue and recovery activities in the mine.
>
> (2) Promptly decide whether to conduct an investigation of the accident and inform the operator and the representative of the miners of its decision.

52 P.S. § 690-109(b). Thus, Section 109 provides the Department with the express authority to "Take whatever action it deems appropriate, *including the issuance of orders* ..." to respond to an accident. (emphasis added).

The term "accident" is defined by BCMSA as an "unanticipated event including any ..." of fourteen listed events. 52 P.S. § 690-104. As the Board's opinion correctly decides, this list of unanticipated events is not exhaustive, and the use of the phrase "including" allows additional unanticipated events to be added thereby coming within the definition of "accident." Opinion at pages 7-10.

BCMSA provides the Department with broad authority to issue administrative orders in various contexts. Section 501 provides the general grant of authority to issue administrative orders and provides, in part:

> (a) Authority.—
>
> (1) The department may issue written orders to enforce this act, to effectuate the purposes of this act and to protect the health and safety of miners and individuals in and about mines.

52 P.S. § 690-501(a)(1). Although the Department has the authority to issue compliance or enforcement orders to correct violations under this language, this general grant of authority extends beyond this narrow class of administrative orders to authorize the Department to issue orders in other contexts. As previously discussed, Section 109 governs accidents and specifically provides the Department with the authority to take whatever action it deems appropriate, including the issuance of orders, to protect the life, health or safety of an individual. 52 P.S. § 690-109(b)(1). Under this language, the Department has extremely broad discretion to act in response to an accident, including the authority to issue orders.

Section 109(b)(1) lists some examples of the types of orders that are allowed, but the use of the language "including" provides that the statutory list is not exhaustive. In my opinion, an order that interprets or gives meaning to the "unanticipated event" language in connection with

events at a particular mine fits within the general grant of authority "to protect the life, health or safety of an individual."

A key component of the statutory requirements governing accidents are the post-accident requirements imposed on operators to conduct an investigation and prepare a written report. 52 P.S. § 690-109(a)(4). A key part of the report is a description of steps taken to prevent a similar accident in the future. 52 P.S. § 690-109(a)(4)(x). Thus, BCMSA recognizes the need for operators to investigate circumstances surrounding an accident and to learn from their investigation to prevent similar accidents in the future. The orders that the Department issued can be construed to direct the Appellants to conduct a post-accident investigation, to prepare a written report and to provide training. These steps are necessary to avoid similar accidents in the future and, by their nature, they are intended to protect the life, health or safety of an individual.

BCMSA establishes a Board of Coal Mine Safety and authorizes it to promulgate regulations for the Department, in the first instance. 52 P.S. §§ 690-106 and 690-106.1. Section 106.1 does not, however, provide an exclusive means for the Department to implement the provisions in Section 109 of the BCMSA. The new rulemaking Board consists of seven members: the Secretary of DEP, and "three members who represent the viewpoint of coal mine operators" and "three members who represent the viewpoint of the working miners." 52 P.S. § 690-106(b). Actions of the Board require a super-majority to be effective (at least 5 of 7 members). 52 P.S. § 690-106(m). If the Board fails to promulgate certain regulations within specified timeframes, the Department has residual rulemaking authority to promulgate the missing regulations without the Board.[7] 52 P.S. § 690-106.1(c) and (d). The creation of the new Board and the grant of rulemaking authority provide an effective means to update technical

[7] It is not clear whether the Department has any residual rulemaking authority if the Board failed to promulgate regulations further defining (or listing) "unanticipated" events meeting the definition of "accident."

safety standards, but the new unprecedented and untried rulemaking authority is neither timely nor effective as a means to address accidents under Section 109.[8]

My basic disagreement with the Board's decision is the legal conclusion that the enactment of the new rulemaking procedures set forth in Sections 106 and 106.1 of the Act, 52 P.S. §§ 690-106 and 690-106.1, limits or otherwise affects the Department's authority to issue orders including the orders under appeal in this matter. I disagree that the Department must act under the auspices of the Board of Coal Mine Safety if it wishes to expand the list of unexpected events that meet the definition of "accident" under BCMSA. Nothing in BCMSA, or in any other state law, prevents the Department from proceeding by way of adjudication rather than by rulemaking as it has done in this case by issuing the orders.

The legal conclusion that the mere existence of rulemaking authority prevents the Department from issuing orders is not supported by BCMSA and is in conflict with state and federal precedent. It is well-settled as a matter of state and federal administrative law that:

> An administrative agency has available two methods for formulating policy that will have the force of law. An agency may establish binding policy through rulemaking procedures by which it promulgates substantive rules, or through adjudications which constitute binding precedents.

Pennsylvania Human Relations Comm'n v. Norristown Area Sch. Dist., 374 A.2d 671, 679-680 (Pa. 1977) (*quoting Pacific Gas & Elec. v. Fed. Power Comm'n*, 506 F.2d 22, 41 (D.C. Cir 1974)); *Commonwealth, Dep't of Envtl. Res. v. Butler County Mushroom Farm*, 454 A.2d 1 (Pa. 1982); *UGI Utilities, Inc. v. Pennsylvania Pub. Util. Comm'n*, 677 A.2d 882 (Pa. Cmwlth. 1996); *Eastwood Nursing and Rehabilitation Ctr. v. Dep't of Pub. Welfare*, 910 A.2d 134 (Pa. Cmwlth. 2006). Moreover, in the absence of a statutory prohibition, nothing prevents an agency from

[8] Under established authority and procedures it normally takes more than a year to promulgate regulations under state law. *See* Commonwealth Documents Law. 45 P.S. §§ 1201 *et seq*. and Regulatory Review Act, 71 P.S. §§ 745.1 *et seq*. The new unprecedented and untried rulemaking procedures under BCMSA will likely take longer to complete than the already normal lengthy rulemaking process.

proceeding by way of adjudication rather than by rulemaking. *Pennsylvania Human Relations Comm'n*, 374 A.2d at 677.

In *Pennsylvania Human Relations Commission*, a school district challenged a Commission order directing it to develop and submit a plan to eliminate racial segregation in its school. The school district asserted that the Commission's order was based on a definition of segregated school that was an invalid regulation and therefore the order should be vacated.

The Commission asserted that its definition of a segregated school, which was contained in the document entitled "Recommended Elements of a School Desegregation Plan," was a general statement of policy and not an invalid regulation. The Pennsylvania Supreme Court agreed with the Commission that it had used the definition as a flexible guideline and not as a binding regulation.

On the issue of whether the Commission must proceed by means of rulemaking since it had rulemaking authority, the Pennsylvania Supreme Court concluded:

> The Administrative Agency Law envisions that administrative agencies may proceed by rule-making or adjudication. Compare 71 P.S. § 1710.21 (1962) with 71 P.S. § 1710.31 (1962). Under the PHRA, the Commission is authorized to promulgate rules and regulations, formulate policies and make recommendations to school districts to effectuate these policies, and file complaints and conduct public hearings if efforts at conciliation fail. Nothing in the Administrative Agency Law or the PHRA prevents the commission from proceeding by way of adjudication rather than by rule-making.

Pennsylvania Human Relations Comm'n, 374 A.2d at 677. Thus, an agency has the discretion to proceed by either rulemaking or adjudication unless a statute directs that the agency proceed by rulemaking. The simple fact that a statute authorizes rulemaking, in general, does not prevent an agency from proceeding by adjudication.

In *Commonwealth, Dep't of Environmental Resources v. Butler County Mushroom Farm*, 454 A.2d 1 (Pa. 1982), the Pennsylvania Supreme Court rejected the argument that regulations

must be promulgated before the Department could issue an order to implement an aspect of the regulatory program established under the General Safety Law, Act of May 18, 1937, P. L. 654, as amended, 43 P.S. § 25-1 *et seq.* The Pennsylvania Supreme Court again rejected the argument that regulations must first be promulgated because it "obviously ignores the well-recognized role of the adjudicative process as an implementing tool." *Butler County Mushroom Farm*, 454 A.2d at 7. The Pennsylvania Supreme Court explained:

> Moreover, the issuance of an order is not limited to the correction of a violation but also may be employed as a means to establish a standard of conduct in furtherance of the purposes of the Act. Whereas the delegated legislative aspect of the agency's power is generally used to establish standards of conduct, the agency also may utilize, in particular instances, the adjudicative aspect of the agency's power to further standards of conduct needed to meet specialized problems. *See, Securities and Exchange Com. v. Chenery Corp., et al., 332 U.S. 194, 67 S.Ct. 1575, 91 L.Ed 1995 (1946).* Because of the uniqueness of this situation, this is precisely the type of matter where case-by-case development of standards through the adjudicative process is most appropriate.

Butler County Mushroom Farm, 454 A.2d at 8. Thus, the Department is entitled to use the adjudicative aspect of its authority to develop standards of conduct to meet specialized problems.

The Majority is correct when it decided that "It would be impossible to predict and list every unanticipated event that might qualify as an accident...." Opinion at page 7. Having recognized that it is impossible to predict every event that could qualify as an accident, the Majority, nevertheless, decides to limit the Department's authority to issue orders and to direct that it must proceed by rulemaking. This direction is inconsistent with the *Pennsylvania Human Relations Commission* and *Butler County Mushroom Farm* decisions and deprives the Department of its authority to issue orders to identify unanticipated events that occurred at a particular mine that qualify as accidents. In these instances, the Department needs the authority to issue orders to establish standards of conduct to meet specialized problems.

In *Pennsylvania Human Relations Commission*, 374 A.2d 671 (Pa. 1977), our Supreme Court was persuaded by the reasoning in and favorably cited to the District of Columbia Court of Appeals' decision in *Pacific Gas & Elec. Co. v. Federal Power Comm'n*, 506 F.2d 33 (D.C. Cir. 1974). This longstanding reliance on federal reasoning in this area of the law supports consideration of the Court of Appeals for the Third Circuit's decision in *Beazer East, Inc. v. United States Environmental Protection Agency*, 963 F.2d 603 (3rd Cir. 1992). In *Beazer*, the United States Environmental Protection Agency (EPA) filed an administrative complaint against Beazer charging it with violations of the groundwater monitoring requirements of Subtitle C of the Resource Conservation and Recovery Act (RCRA) 42 U.S.C.A. §§ 6921-6939(b). The issue on appeal was whether Beazer's aeration basins were "tanks" or "surface impoundments" for the purpose of 40 C.F.R. § 260.10. If the basins were surface impoundments, then the groundwater monitoring requirements were applicable. This decision is based, in part, on the validity of EPA's interpretation of the phrase "provide structural support" in its regulation at 40 C.F.R. § 260.10.

Beazer contended that EPA must comply with rulemaking procedures to give meaning to the "provide structural support" language in its regulations. *Beazer*, 963 F.2d at 609. The Third Circuit Court of Appeals rejected this argument and recognized:

> But it is a basic tenet of administrative law that agencies have some discretion to chose between adjudication and rulemaking when interpreting statutes and regulations committed to their authority, *Bowen v Georgetown University Hospital, 488 U.S. 204, 109* SCt 468, 476-79, *102L. Ed. 2d 493 (1988)* (Scalia, concurring); *NRLB v Bell Aerospace, 416 U.S. 267, 94* SCt. 1757, 1772, *40 L.Ed. 2d 134 (1974)*, subject only to the limitations imposed by Congress. *Chemical Mfrs Ass'n*, 105 SCt at 1107; *Martin*, 111 SCt at 1177.

963 F.2d at 609. The court concluded:

> In conclusion, we will not question the EPA's choice to give meaning to the "structural support" language of § *260.10* though adjudication rather than

> rulemaking. As Justice Scalia has recently said, "where legal consequences hinge upon the interpretation of statutory requirements, and where no preexisting interpretive rule construing those requirements is in effect, nothing prevents the agency from acting retroactively through adjudication." *Bowen*, 109 SCt at 480 (Scalia, concurring). That is precisely the case here. Rather than amending a preexisting interpretation of § *260.10*, the EPA is developing its interpretation through adjudication. Beazer contends the EPA must comply with the notice and comment procedures applicable to agency rulemaking, i.e., advance notice published in the Federal Register. But no such notice is required where the agency proceeds by adjudication.

963 F.2d at 610. The Beazer decision further supports the legal conclusion that the Department has the authority to issue orders that give meaning to the "unanticipated event" language in the statutory definition of "accident" and is not limited to just proceed by rulemaking.

A review of BCMSA reveals that nothing in it prevents the Department from issuing orders that give meaning to the "unanticipated event" language beyond the list of fourteen examples that are already provided by statute. To the contrary, BCMSA provides the Department with clear authority and broad discretion to respond to accidents, including the express authority to issue an order in connection with accidents. Under the Majority's opinion, the Department can only proceed by rulemaking to give further meaning to the "unanticipated event" language. I believe that, under BCMSA and the basic tenets of administrative law, the Department may also proceed by adjudication (issuing an order) to give further meaning to the "unanticipated event" language.

I also disagree with the Board's *stare decisis* discussion which concludes with the proposition "that the Department is essentially attempting to create an across-the-board rule." Opinion at page 11. The two orders in question govern two particular sets of circumstances. They do not create binding rules beyond these particular circumstances. The fact that appeals have been filed and the fact that the Board may issue opinions that have precedential value do not alter the fundamental nature of the Department's orders that direct particular parties to take

certain prescribed action at particular mines. The Board's decision may have precedential value, but the Department is not responsible for this possibility. The Department does not issue orders hoping they are appealed so the Department has an opportunity to create an across-the-board rule if it prevails in the hoped-for appeal.

Notwithstanding my disagreement with one of the Majority's legal conclusions that BCMSA mandates that the Department can only use rulemaking to interpret or give meaning to the phrase "unanticipated event," I nevertheless concur with the Majority's decision to deny the Department's motion for summary judgment for the reason set forth below. In summary, having concluded that BCMSA authorizes the Department to proceed by adjudication, it is still necessary to examine whether the particular orders in question fit within the grant of authority I believe BMCSA provides, and whether, at this stage of the litigation, the Department has met its burden and is now entitled to summary judgment.

The two orders under appeal were issued on prepared forms that simply require the Department to fill-in certain blanks. These prepared forms are entitled "Compliance Orders." The use of the fill-in the blank Compliance Order forms adds a level of confusion to the Department's actions that could have been avoided if the Department had better described the nature of the orders it issued. The confusion over the nature of the orders that were issued continues during the pendency of this appeal. Are the orders under appeal true compliance orders based upon Emerald's and Cumberland's violations of their statutory obligations or do the orders establish new standards of conduct at particular mines by directing that unanticipated events that occurred at the mines constitute accidents? Under the second approach, the date of the order triggers the mine operator's legal duties to comply and the orders establish the applicable legal requirements. The events at the mines are not "accidents" under BCMSA until

the Department issues the orders that gives meaning to the "unanticipated event" language at a particular mine under particular circumstances. Under the first approach, the duty to comply began when the unanticipated events occurred and the violations for the failure to comply expose the mine operators to the full set of criminal and civil enforcement sanctions from the date of the events.

The Appellants view the orders under appeal under the first approach, and the concerns about possible civil and criminal penalties greatly influence the Board's decision. Opinion at page 13-15. The Department's use of the prepared fill-in the blank Compliance Order indicate it initially viewed the orders as compliance orders, however, the Department's view may have evolved during the pendency of the appeal. *See* Commonwealth's Brief at page 16; Commonwealth's Reply Brief at page 7; and Commonwealth's Response to Additional Brief at page 2. For the reasons set forth above, I believe that BCMSA authorizes the Department to issue orders under the second approach.

The facts surrounding the order issued at the Cumberland Mine are not in dispute. A storm caused electrical power to the mine to be disrupted on February 12, 2009. The disruption caused the fan that ventilates the mine to cease operation. An automatic backup electrical system, which is designed to power the ventilation system, failed to start, and efforts to manually start the backup system were unsuccessful before the mine had to be evacuated under state and federal law. The series of "unanticipated events" that culminated in the mandatory evacuation of the mine because the ventilation system was not operating as required provides the Department with a basis to issue an order at the Cumberland Mine.

The problem with the Cumberland Mine order is the actual language of the order that was issued. In addition to the use of the pre-printed fill-in the blank Compliance Order form, the

actual order references "posted procedures" in the "Violation of Section:" box and provides the following statement in the "Condition(s) or Practice(s) Constituting Violation(s):" box:

> The posted guideline for inspector notification was not followed. The district mine inspector was not notified of a fan outage that occurred on February 12, 2009 at 12:20 a.m., this outage lasted in excess of 15 minutes and resulted in the evacuation of the mine.

In the "Corrective Actions to be performed:" box the Department provided:

> "Review of all guidelines concerning notification of the district mine inspector, regarding accident and incident occurrences at the mine."

I agree with the Majority that the Department's argument that "Posted Procedures are Rules of the Operator... pursuant to Section 201..." is unpersuasive to justify the order issued to Cumberland. While the facts of the unanticipated event at the Cumberland Mine are not in dispute, I have questions about the order that was issued which preclude granting the Department's motion at this time.

Some of the facts surrounding the order issued at the Emerald Mine are in dispute. The Department agrees that some facts are in dispute, but asserts that these factual disputes are not material to the resolution of the appeals. While I agree that BCMSA allows the Department to issue orders such as the one issued at Emerald Mine, the Department is not entitled to summary judgment at this stage of the litigation if there are disputed issues of material fact. Because Emerald contests the fact that "Emerald did not anticipate that a cut through would occur with the doors open on the other side," the Department is not entitled to summary judgment on the record before the Board.[9]

The actual order that the Department issued at the Emerald Mine raises fewer concerns than the one issued at the Cumberland Mine, but it is also on the pre-printed fill-in the blank Compliance Order form that indicates it is a true compliance order based on an existing violation

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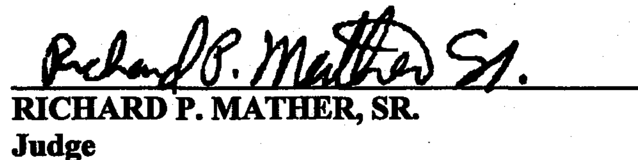
[9] Emerald also contests whether an air reversal occurred when the doors were left open.

rather than the type of order that gives meaning to ambiguous statutory language and establishes prospective standards of conduct for a particular circumstance.

Now that the Department's motion for summary judgment has been denied, the appeals will proceed towards resolution and possible hearing.[10] Under my legal approach, I would decide that the Department has the authority to proceed by adjudication to interpret or give meaning to the "unanticipated events" language in the context of actual events at a particular mine. The Board has the authority to modify the Department's orders, and I would, to the extent necessary, modify the orders to ensure that they clearly fit within the authority provided by BCMSA to give meaning to the "unanticipated event" statutory language and to establish prospective standards of conduct at a particular mine. Under this approach, the date of the order triggers the operator's legal obligations and they can avoid violations by complying with the order.

ENVIRONMENTAL HEARING BOARD



RICHARD P. MATHER, SR.
Judge

Dated: February 24, 2010

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[10] Under the Majority's legal position that the Department lacks the authority to issue orders in this context, and it must proceed by rulemaking, there is a question about the need for a hearing and the best way to resolve any remaining issues. Under the Majority's legal approach it appears as if the Appellants are entitled to judgment, but they did not file cross-motions for summary judgment.

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MARYANNE WESDOCK, ESQUIRE
ACTING SECRETARY TO THE BOARD

THEODORE E. KOCH, P.E., S.E.O.	:	
	:	
v.	:	**EHB Docket No. 2009-027-L**
	:	
	:	**Issued: March 1, 2010**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and MORRIS TOWNSHIP SUPERVISORS, Permittee	:	

OPINION AND ORDER ON PETITION FOR RECONSIDERATION

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board denies an untimely motion to reconsider an order granting summary judgment against an appellant who failed to respond to a motion for summary judgment.

OPINION

Before the Board is a motion to reconsider our order granting summary judgment and dismissing the appeal of Theodore E. Koch, P.E., S.E.O. On February 3, 2010, we granted the Department of Environmental Protection's (the "Department's") motion for summary judgment because Koch did not respond to the motion as required by our rules. *See* 25 Pa. Code § 1021.94a(k).[1] The Department's initial response in opposition to Koch's petition for reconsideration was stricken from the docket due to the Department's failure to file a certificate

[1] We noted that Koch had also failed to respond to a pending motion to compel.

of service along with its response as required by 25 Pa. Code § 1021.36(a). The Department thereafter refiled its response along with the required certificate.

Petitions to reconsider a final order of the Board must be filed within ten days of the date of the final order and must otherwise comply with our rules. 25 Pa. Code § 1021.152. We will only grant such a petition for "compelling and persuasive reasons." *Id.*; *Mountain Watershed Ass'n v. DEP*, 2005 EHB 592, 593-94; *Shaulis v. DEP*, 1998 EHB 503, 506. Compelling reasons may include a case where our order rests on a legal ground or factual finding which was not proposed by a party or where "crucial facts set forth in the petition are inconsistent with the findings of the Board, are such as would justify a reversal of the Board's decision, and could not have been presented earlier to the Board with the exercise of due diligence." *Shaulis*, 1998 EHB at 506.

Koch's petition was filed too late. The petition was due on or before February 16, the first business day after the tenth day following our order of February 3. The petition was not filed until February 17. This late filing continues Koch's pattern of disregard for our rules.

In any event, Koch has failed to satisfy the criteria for reconsideration. In fact, he makes no attempt to do so. Instead, his only argument on the point of reconsideration is that the Department's motion for summary judgment "was lengthy and required much research and review." As we found in our February 3, 2010 opinion and order, a party *must* respond to a motion for summary judgment filed against it or we may assume that he does not oppose the motion. *See* 25 Pa. Code § 1021.94a(f); *see also Kochems v. DEP*, 701 A.2d 281, 283 (Pa. Cmwlth. 1997); *J&D Holdings v. DEP*, 2009 EHB 15. When we issued our order, sixty-seven days had elapsed since the Department filed its motion and no response in any form had been presented to the Board. This is more than twice the maximum allowed number of days to respond to such a motion under our rules. *See* 25 Pa. Code § 1021.94a(f). Koch had also by that

point failed to respond to discovery and to a motion to compel. Contrary to Koch's characterization, the Department's motion was not lengthy or complex, but even if it had been and Koch truly needed more time to formulate a response, he could have communicated his need for such an accommodation. Quite simply, he could have filed a motion seeking more time to file a response. Our rules plainly demonstrate the procedure required for a party to seek more time for the filing of any document. 25 Pa. Code § 1021.12. Good faith, reasonable requests are not often denied.

Koch's motion to reconsider presents a number of factual averments that are difficult to follow but that appear to reiterate the same objections made in his notice of appeal. The averments do not raise crucial new facts that could not have been presented earlier and, therefore, they do not support reconsideration. They do not appear to address the Department's motion for summary judgment, but if that is their purpose, they fall far short of our requirements for a response to such a motion. *See* 25 Pa. Code § 1021.94a.

A party who files an appeal before this Board has an obligation to pursue the appeal with due diligence. *T&R Coal v. DER*, 1990 EHB 1073, 1074. Although we have historically been rather forgiving in cases where a party shows a good faith effort to comply with our rules, *see* 25 Pa. Code § 1021.4 (liberal construction of rules; Board may disregard procedural defects), we also will not hesitate to dismiss an appeal when a pattern of neglect emerges. It is simply not acceptable for a party to ignore a dispositive motion, wait in silence for the Board to grant the motion, and then file an untimely motion for reconsideration that itself does not comply with our rules, all without a legitimate excuse or explanation. Enabling such an approach to litigation is unfair to all of the other parties who litigate before us who strive to comply with our rules and orders.

Accordingly, we enter the order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

THEODORE E. KOCH, P.E., S.E.O.	:	
	:	
v.	:	**EHB Docket No. 2009-027-L**
	:	
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and MORRIS TOWNSHIP SUPERVISORS, Permittee	:	

ORDER

AND NOW, this 1st day of March, 2010, Theodore E. Koch's motion to reconsider is **denied**.

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Chairman and Chief Judge

MICHELLE A. COLEMAN
Judge

BERNARD A. LABUSKES, JR.
Judge

MICHAEL L. KRANCER
Judge

RICHARD P. MATHER, SR.
Judge

DATED: March 1, 2010

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

K H REAL ESTATE, LLC	:	
	:	
v.	:	**Docket No. 2009-004-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: March 4, 2010**

OPINION AND ORDER
ON MOTION FOR SANCTIONS
IN THE FORM OF DISMISSAL

By Thomas W. Renwand, Chairman and Chief Judge

Synopsis

The Board grants the Department's motion for sanctions because Appellant has failed to comply with two orders of the Board and has shown a lack of intent to pursue its appeal. The appeal is dismissed.

OPINION

The Appellant, K H Real Estate, LLC, appealed the Department of Environmental Protection's (Department) December 12, 2008 order for violations of the Pennsylvania Safe Drinking Water Act, Act of May 1, 1984, P.L. 206, *as amended,* 35 P.S. §§ 721.1 – 721.17, pertaining to a water system located at Shadyside Village in West Franklin Township, Armstrong County. Albert Krick, President and Treasurer of Appellant, filed an appeal of the Department's order on behalf of Appellant. On January 30, 2009, the Department counsel sent a letter to Appellant stating that, as per Board Rule 1021.21, Appellant was required to be represented by

an attorney in an appeal before this Board. Appellant did not respond to the Department's letter, nor did it retain counsel in this matter.

On June 29, 2009, the Board issued an order to Appellant directing Appellant to retain counsel on or before August 5, 2009 pursuant to Rule 1021.21 of the Environmental Hearing Board Rules of Practice and Procedure. Rule 1021.21 states that "[p]arties, except individuals appearing on their own behalf, *shall be represented by an attorney* at all stages of proceedings subsequent to the filing of the notice of appeal." 25 Pa. Code § 1021.21 (emphasis added). The Board stated that failure to follow the order would result in sanctions against Appellant, including the possible dismissal of the appeal.

Appellant did not respond to the order; nor was an entry of appearance by counsel filed on behalf of Appellant by the August 5, 2009 deadline. Therefore, on August 19, 2009 the Board again issued an order to Appellant directing that counsel be retained to represent Appellant in this matter, setting a deadline of September 3, 2009. The Board again stated that failure to follow the order would result in sanctions, including possible dismissal of the appeal. To date, Appellant has not retained counsel to represent it in this matter.

On September 22, 2009, the Department filed a motion for sanctions seeking dismissal of the appeal for failure to retain counsel pursuant to Board Rule 1021.21 and the Board's orders of June 29 and August 19, 2009. Appellant filed no response to the motion.

The Board has the power to impose sanctions, including dismissal of an appeal, for failure to comply with its orders. 25 Pa. Code § 1021.161; *Martin, et al. v. DEP*, 1997 EHB 158. A sanction resulting in dismissal is justified when a party to the case fails to comply with Board orders and shows a lack of intent to pursue its appeal. *Pearson v. DEP*, 2009 EHB 628, 629, *citing Bishop v. DEP,* 2009 EHB 259; *Miles v. DEP*, 2009 EHB 179, 181; *RJ Rhodes Transit,*

Inc., 2007 EHB 260; *Swistock v. DEP*, 2006 EHB 398; *Sri Venkateswara Temple v. DEP*, 2005 EHB 54.

Based on the Appellant's failure to comply with the Board's orders of June 29, 2009 and August 19, 2009, its failure to retain counsel pursuant to Board Rule 1021.21, and its failure to respond to the Department's motion, we find that the Department's motion should be granted and the appeal dismissed.

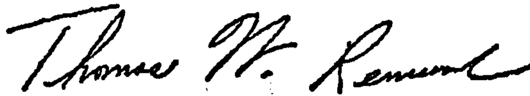
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

K H REAL ESTATE, LLC	:	
	:	
v.	:	**Docket No. 2009-004-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 4th day of March, 2010, it is hereby ordered that the Department of Environmental Protection's Motion for Sanctions in the Form of Dismissal is **granted.** This appeal is hereby dismissed.

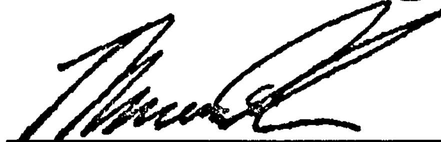
ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Chairman and Chief Judge

MICHELLE A. COLEMAN
Judge

BERNARD A. LABUSKES, JR.
Judge



MICHAEL L. KRANCER
Judge

RICHARD P. MATHER, SR.
Judge

DATED: **March 4, 2010**

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

ENVIRONMENTAL INTEGRITY PROJECT and CITIZENS COAL COUNCIL

v.

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and ALLEGHENY ENERGY SUPPLY COMPANY, Permittee

EHB Docket No. 2009-039-R
(Consolidated with 2009-006-R)

Issued: March 5, 2010

OPINION AND ORDER ON JOINT MOTION TO BIFURCATE PROCEEDINGS

By: Thomas W. Renwand, Chairman and Chief Judge

Synopsis:

The Pennsylvania Environmental Hearing Board denies a Joint Motion to Bifurcate Proceedings in a case that has already been pending more than a year. Such a bifurcated proceeding would result in piecemeal litigation, including likely multiple appeals, and would waste the Board's resources.

Discussion:

Presently before the Pennsylvania Environmental Hearing Board is the Joint Motion to Bifurcate Proceedings. The original appeal in this consolidated appeal was filed on January 5, 2009; more than a year ago. In their Joint Motion to Bifurcate Proceedings, the parties identify

identify the three main issues in the consolidated appeal. These are the same issues identified by the parties at a pre-hearing status conference conducted by the Board in April 2009. At that status conference, counsel requested, and the Board granted, lengthy extensions to pre-hearing deadlines including discovery and dispositive motions.

The parties have evidently been concentrating their efforts on bifurcating three issues in this consolidated appeal. Little or no discovery has taken place in the past year. Now the parties want to extend the pre-hearing deadlines again. Under the parties' plan dispositive motions would not even be filed for another year yet alone be fully briefed and decided.

Moreover, the parties have proposed to litigate the issues separately which will most likely result in multiple hearings and separate appeals for each issue. If the Board adopted the parties' proposal years of litigation would ensue at probably the same snail's pace that this litigation has proceeded this far.

We are not interested in seeing this case languish. *See B.P. Products v. Department of Environmental Protection*, 2009 EHB 73. The Board is charged with overseeing ongoing discovery between the parties and has wide discretion in this regard. *Northampton Township et. al. v. Department of Environmental Protection*, 2009 EHB 202, 205; *Department of Environmental Protection v. Neville Chemical Company*, 2005 EHB 1, 3-4. Although we have no interest in micro-managing this litigation we do have an obligation and duty to move this case toward a timely resolution. Over the years the Board, in close consultation with our Rules Committee, has lengthened the pre-hearing time periods, for both discovery and dispositive

dispositive motions. These general time determinations have been developed after extensive discussion and in the incubator of years of Board practice. *Angela Cres Trust of June 25, 1998 v. Department of Environmental Protection and Millcreek Township*, 2009 EHB 184, 186. In addition, we encourage counsel to fashion their own joint proposed case management orders and we usually grant these orders without modification. Nevertheless, we are charged with overseeing discovery and it is readily apparent to us that there is a danger in approving long discovery periods in complex cases if the parties appear to be progressing at a glacial pace.

We already had earlier approved the parties' joint request for extended pre-hearing discovery periods. Rather than concentrate on developing the issues in this consolidated appeal the parties appear to have narrowly focused their efforts on bifurcation. They still have substantial amounts of time to conduct ample discovery under the current pre-hearing deadlines. In addition, there is more than adequate time to prepare and file any dispositive motions. Therefore, we will not extend the pre-hearing deadlines already in place.

At the same time, we have scheduled this consolidated appeal for trial more than a year from now in March 2011. We believe that scheduling the case for trial at this time will allow the parties to properly focus on the important issues in this consolidated appeal so that a timely resolution may be achieved. The parties can expect timely oversight by the Board in the months ahead.

We will issue an Order accordingly.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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

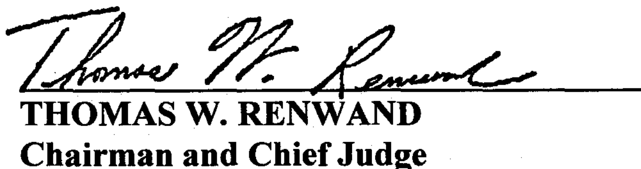
ORDER

AND NOW, this 5th day of March, 2010, following review of the Joint Motion to Bifurcate Proceedings, it is ordered as follows:

1.) The Joint Motion to Bifurcate Proceedings is **DENIED**.

2.) The Joint Motion to *extent pre-hearing deadlines* is **DENIED.**

ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Chairman and Chief Judge

DATED: March 5, 2010

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MARYANNE WESDOCK, ESQUIRE
ACTING SECRETARY TO THE BOARD

OTTO N. SCHIBERL	:	
	:	
v.	:	**EHB Docket No. 2008-275-L**
	:	
	:	**Issued: March 8, 2010**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ADJUDICATION

By Bernard A. Labuskes, Judge

Synopsis

The Board finds that a landowner is liable for two violations of the Solid Waste Management Act that occurred on his property and holds that he must pay the $4,824 civil penalty assessed by the Department.

Background

The Department of Environmental Protection (the "Department") assessed a $4,824 civil penalty against Otto N. Schiberl ("Schiberl") and Melvin G. Schiberl under the Solid Waste Management Act, 35 P.S. § 6018.101 *et seq*., for disposing and burning waste without a permit behind Schiberl's beer distributorship in Scrubgrass Township, Venango County. Only Otto Schiberl appealed the assessment. The Department thereafter filed a motion for partial summary judgment seeking a judgment on the issue of liability. When Schiberl did not contest the motion, we granted it. *Schiberl v. DEP*, EHB Docket No. 2008-275-L (Opinion and Order, March 6,

2009). We held that Schiberl's liability was established, but we scheduled a hearing for October 19, 2009 to address the amount of the penalty.

We held a pre-hearing conference on October 16, 2009. After much discussion, the parties agreed to have the Board adjudicate this appeal on a stipulated record in accordance with 25 Pa. Code § 1021.112. We memorialized the parties' agreement in an order that same day, which provided in part:

> 1. The Board will adjudicate this appeal on the stipulated record in accordance with the parties' agreement pursuant to 25 Pa. Code § 1021.112. The Appellant's challenge is limited to the reasonableness of the amount of the civil penalty. The stipulated record consists of the facts set forth in the Department's unopposed motion for partial summary judgment, which was granted by Opinion and Order dated March 6, 2009, and the exhibits attached to each party's pre-hearing memorandum.
>
> 2. The hearing previously scheduled to begin on October 19, 2009 is **cancelled.**

The parties have now submitted their post-hearing briefs and the matter is ripe for adjudication.

FINDINGS OF FACT

1. The Department is the agency with the duty and authority to administer and enforce the Solid Waste Management Act, 35 P.S. § 6018.101-6018.1003, Section 1917-A of the Administrative Code of 1929, 71 P.S. § 510-17, and the rules and regulations promulgated under those statutes. (Motion for Summary Judgment, Statement of Material Fact No. ("MSJ No.") 1.)

2. Schiberl is an individual who along with Melvin G. Schiberl owns a parcel of real estate located adjacent to State Route 208 in Scrubgrass Township, Venango County (the "Property"). (MSJ No. 2.)

3. Schiberl owned a beer distributorship known as Beer Busters, with a business address of P.O. Box 83, Emlenton, PA 16373. (MSJ No. 3.)

4. On March 20, 2008, one large pile and several smaller piles of waste, and several piles of ashes and burn residues were at the Property. (MSJ No. 4.)

5. Excess waste that was generated at Beer Busters and the adjacent buildings was taken to the Property for disposal. (MSJ No. 5.)

6. Schiberl does not have a permit issued by the Department to dispose of waste at the Property. (MSJ No. 6.)

7. Schiberl does not have a permit issued by the Department to operate a solid waste disposal facility at the Property. (MSJ No. 7.)

8. No person or entity has a permit issued by the Department to dispose of waste at the Property. (MSJ No. 8.)

9. No person or entity has a permit issued by the Department to operate a solid waste disposal facility at the Property. (MSJ No. 9.)

10. Schiberl received a March 31, 2008 Notice of Violation (the "NOV") from the Department for the violations that were later set forth in the assessment of civil penalty that is under appeal. (MSJ No. 10.)

11. The NOV cited Schiberl for dumping solid waste without a permit in violation of 35 P.S. § 6018.610(1) and burning solid waste without a permit in violation of 35 P.S. § 6018.610(3). (MSJ Exhibit No. ("MSJ Ex.") C.)

12. The Department reinspected the Property on April 18, 2008. The area where the waste had been located on the Property had been backfilled with shale. (MSJ No. 11; MSJ Ex. D, E.)

13. After Schiberl received the Department's March 31, 2008 NOV, he burned the wood waste and paper waste that was at the Property. (MSJ No. 12.)

14. No waste was visible on the site during the April 18 inspection. (MSJ Ex. D, E.)

15. Although Schiberl has entered into the record two receipts for waste disposal services totaling $969, there is no evidence that the work covered by those receipts related to a cleanup of the subject waste at the Property. (Schiberl Pre-Hearing Memorandum Exhibits ("SPHM Ex.") A, B.) Schiberl may actually have been paid $133.95 for scrap metal that he removed from the Property. (SPHM Ex. C.) There is no record of where the waste that was not burned or sent to a scrap yard was disposed of.

16. The Department assessed a civil penalty of $4,824 against Schiberl on August 5, 2008 for operating a solid waste disposal facility (burning and disposing of waste) without a permit on or about March 20 and April 18, 2008.

17. The Department calculated the penalty according to the Department's penalty matrix as follows:

a. Degree of Severity: Low	$ 1,000.00
b. Costs incurred by Commonwealth	
i. 6 hrs wages (Solid Waste Supervisor) at $35.29/hr.	$ 211.74
ii. 6 hrs wages (Solid Waste Specialist) at $27.10/hr.	$ 162.60
c. Savings to the violator	$ 450.00
d. Degree of willfulness	
i. Violation I: Negligent	$ 1,000.00
ii. Violation II: Negligent	$ 2,000.00

(MSJ Ex. F.)

18. The Department determined Schiberl's savings by calculating the costs of transporting and disposing of waste from one 30-yard roll-off container. (MSJ Ex. F.)

DISCUSSION

As previously noted, the only remaining issue in this appeal is whether the Department's penalty assessment was excessive. Schiberl argues that he cooperated in an expeditious manner with the Department's demand that he clean up the site. His admittedly unlawful conduct did not

result in any lasting damage to the environment. He argues that the Department lacks the authority to include its enforcement costs of $374.34 in the assessment. Finally, he argues that his alleged cleanup costs of $3,167.33 should be credited against the penalty. Based upon these arguments, he proposes that a penalty of $1,282.33 ($4,824 – 374.34 – 3,167.33 = $1,282.33) would be reasonable.

Under the Solid Waste Management Act, the Department's assessment of a civil penalty may be appealed to this Board. 35 P.S. § 6021.1307. On appeal, the Department bears the burden of proof. 25 Pa. Code § 1021.122(b)(1). To meet its burden in this case on the only issue in dispute, the Department must prove by a preponderance of the evidence that the amount of the penalty is reasonable. *Clearview Land Development Co. v. DEP*, 2003 EHB 398, 416-17; *Graves v. DEP*, 2002 EHB 537, 559.

The Department has met its burden in this case. We start with the observation that the Solid Waste Management Act authorizes a penalty of up to $25,000 per offense per day. 35 P.S. § 6018.605. Thus, the lawful maximum penalty that could have been assessed against Schiberl was $50,000 based on the two dates cited. Schiberl was assessed less than ten percent of that amount.

The statute requires that the Department look at certain "relevant factors" when determining what civil penalty should be assessed. 35 P.S. § 6018.605. The Department is to consider the willfulness of the violation, damage to the environment, cost of restoration and abatement, savings to the violator and other relevant factors. *Id.* The regulations describe the factors to be considered by the Department in more detail, to wit:

> (a) The Department will use the system described in this section and § 271.413 (relating to assessment of penalties—minimum penalties) to determine the amount of the penalty. Unless otherwise indicated in this

section, the penalty may be set at an amount up to the maximum amount specified in this section.

(b) Civil penalties shall be assessed as follows:

(1) Up to the statutory maximum shall be assessed based on the seriousness of the violation, including the following:

(i) Damage or injury to the land or waters of this Commonwealth or other natural resources or their uses.

(ii) Cost of restoration.

(iii) Hazards or potential hazards to the health or safety of the public.

(iv) Property damage.

(v) Interference with a person's right to the use or enjoyment of property.

(vi) Other relevant factors.

(2) A penalty of up to the statutory maximum may be assessed based on the costs expended by the Commonwealth as a result of the violation. The costs may include, without limitation:

(i) Administrative costs.

(ii) Costs of inspection.

(iii) Costs of the collection, transporation and analysis of samples.

(iv) Costs of abatement, remedial and preventive measures taken to prevent or lessen threat of damage or injury to property or waters of this Commonwealth or other natural resources or their uses or to a person.

(3) A penalty of up to the statutory maximum may be assessed by calculating the costs that the operator avoided by incurring the violation.

(4) A penalty of up to the statutory maximum may be assessed based on the willfulness of the violation.

(5) In determining a penalty for a violation, the Department will increase the civil penalty by 5% for each violation of the applicable laws for which the person or municipality has been found responsible in a prior adjudicated proceeding, agreement, consent order or decree which became final within the previous 5-year period. A violation will not be counted if it is the subject of pending administrative or judicial review, or if the time to request the review or to appeal the administrative or judicial decision of the previous violation has not expired.

(6) A civil penalty of up to the maximum amount may be assessed based on other relevant factors.

(c) Each day of continuing violation is considered a separate violation for purposes of this subchapter. The cumulative effect of a continuing violation will be considered in assessing the penalty for each day of the violation.

> (d) If the system described in this section would yield a penalty in excess of the statutory maximum for a violation, the maximum penalty will be imposed for that violation. Separate violations occurring on the same day may each be assessed a penalty of up to the maximum. If violations may be attributed to two or more persons or municipalities, a penalty of up to the statutory maximum may be assessed against each person or municipality.

25 Pa. Code § 271.412.

The Department's assessment against Schiberl fully comports with these statutory and regulatory provisions and is otherwise reasonable. With regard to Schiberl's argument that he cooperated with the Department, although it is true that he removed most or all of the waste from the site, it is also true that he burned waste after being specifically told not to do so by the Department. Schiberl's partial cooperation is entitled to some consideration, but it falls well short of convincing us that the Department's penalty is unreasonably high.

Schiberl's second basis for challenging the penalty amount is that he should receive a credit for the $3,167.33 he allegedly spent on cleaning up the site after he received the Department's NOV. Initially, there is no record evidence to support Schiberl's figure of $3,167.33. Schiberl has supplied a couple of receipts but no proof that those receipts relate to the cleanup of the site. The receipts do not add up to $3,167.33. It appears that Schiberl actually made money from the scrap metal on the site. In any event, Schiberl cites no authority to support the rather novel proposition that a person who has violated the law is entitled to a dollar-for-dollar credit against the penalty that would otherwise be imposed for the costs that he incurred to alleviate the violations. Nor are we independently aware of any authority that supports such an argument.

Schiberl's third challenge is that the Department may not incorporate $374.34 of the enforcement costs that it incurred in the penalty amount. This argument is, quite simply, wrong. Section 271.412(b)(2) specifically allows for such costs in calculating a penalty amount, 25 Pa.

Code § 2713.412(b)(2), and this Board has previously held that such costs form a legitimate part of a civil penalty, *B&W Disposal v. DEP*, 2003 EHB 456, 475-76; *Westinghouse Electric Corp. v. DEP*, 1999 EHB 98, 122. Schiberl has not attacked the specific amount of costs incurred.

We see nothing else to suggest that the Department's assessment amount is unreasonable. The Department determined that the severity of the violations was "low" because Schiberl's violations did not cause lasting harm to the environment, and it chose $1,000 as the portion of the penalty assessment based upon severity, which works out to $500 per violation. The Department's penalty matrix suggests that the portion of a fine for the degree of severity should be between $1,000 and $5,000 per violation when the degree of severity is "low," so the penalty imposed was actually lower than that provided for in the Department's matrix. The Department calculated the savings that Schiberl enjoyed by dumping the waste instead of having it hauled away by investigating the market price for the transportation and disposal of an appropriate receptacle for the waste. Schiberl has not challenged that portion of the assessment. The Department calculated a portion of the penalty for the willfulness of Schiberl's violations. The Department found that Schiberl's initial violation occurred due to his negligence and assessed a penalty of $1,000 which is near the minimum recommended range of the willfulness of a penalty under the Department's penalty matrix ($500 – $5,000). Despite having been directed not to burn waste as a method of disposal at the Property, during a second inspection the Department determined, and Schiberl admitted, that Schiberl burned additional waste. Consequently, the Department calculated a penalty of $2,000 based on negligence for the April violation date. Under the circumstances, the Department was probably being generous to characterize Schiberl's conduct as mere negligence. Finally, the penalty will hopefully serve as an effective deterrent to future dumping.

CONCLUSIONS OF LAW

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

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

3. The Department may assess a penalty of up to $25,000 per day per violation of any provision of the Solid Waste Management Act or the regulations promulgated thereunder. 35 P.S. § 6018.605.

4. In assessing a civil penalty, the Department is to consider the willfulness of the violation, damage to the environment, cost of restoration and abatement, savings resulting to the person as a result of the violation, and any other relevant factors. 35 P.S. § 6018.605; 25 Pa. Code § 271.412.

5. The Department's investigation and enforcement costs form a legitimate component of a civil penalty calculation.

6. The Department has met its burden of proving the reasonableness of the $4,824 civil penalty assessed against Schiberl.

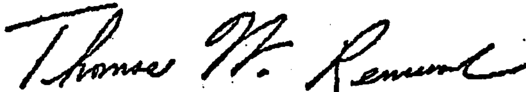
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

OTTO N. SCHIBERL	:	
	:	
v.	:	**EHB Docket No. 2008-275-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 8th day of March, 2010, it is hereby ordered that this appeal is **dismissed**.

ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Chairman and Chief Judge

MICHELLE A. COLEMAN
Judge

BERNARD A. LABUSKES, JR.
Judge

MICHAEL L. KRANCER
Judge

RICHARD P. MATHER, SR.
Judge

DATED: March 8, 2010

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MARYANNE WESDOCK, ESQUIRE
ACTING SECRETARY TO THE BOARD

CUMBERLAND COAL RESOURCES LP and AMFIRE MINING CO., LLC	:	**EHB Docket No. 2009-068-L (Consolidated with 2009-069-L, 2009-070-L, 2009-071-L, 2009-072-L, 2009-082-L, 2009-139-L, and 2009-140-L)**
v.	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: March 16, 2010**

OPINION AND ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Bituminous Coal Mine Safety Act requires that "locomotives" be equipped with fire extinguishers. The Board holds that a scoop is not a "locomotive." The Department does not have the authority to revise the Act by issuing orders that require fire extinguishers on scoops.

OPINION

Cumberland Coal Resources LP and Amfire Mining Co., LLC (hereinafter collectively referred to as "Cumberland") filed these consolidated appeals from six compliance orders and notices of violation (hereinafter "orders") issued by the Department of Environmental Protection (the "Department") citing them for violating Section 273(f) of the Bituminous Coal Mine Safety Act (the "Act"), 52 P.S. § 690.273(f), because they had not equipped their scoops with portable fire extinguishers.[1] The Department and Cumberland have filed cross motions for summary judgment that raise two issues for our consideration. The first issue is whether a scoop is a

[1] The Department has not alleged that the notices of violation are not appealable actions.

"locomotive" as that term is used in Section 273(f) of the Act. If a scoop is not a "locomotive," the Department's second argument is that it was lawful and reasonable to issue orders requiring Cumberland to equip the scoops with fire extinguishers because equipping scoops with fire extinguishers is a "very good idea."

Are Scoops "Locomotives"?

The Department cited Cumberland for violating Section 273(f) of the Act, which reads as follows:

> **(f) Transportation.**—Each track or off-track locomotive, self-propelled mantrip car or personnel carrier shall be equipped with one portable fire extinguisher.

52 P.S. § 690.273(f). The Department contends that a scoop is an "off-track locomotive." A photograph of a scoop is attached as Exhibit A. A scoop is a battery-powered, four-wheeled vehicle equipped with a bucket. Scoops are used in underground bituminous coal mines to transport tools, materials, and coal. Scoops are typically in use daily and may travel throughout the mine. The scoops in question have an electric engine that is powered by a large, powerful battery. There is only one seat, which is used by the operator. Scoops are not used to transport miners. They are not used to pull cars of supplies or coal.

We cannot agree that a scoop is a "locomotive." The Act does not define the term. Section 1903(a) of the Statutory Construction Act directs, in relevant part:

> Words and phrases shall be construed according to ... their common and approved usage; but technical words and phrases and such others as have acquired a peculiar and appropriate meaning ... shall be construed according to such peculiar and appropriate meaning and definition.

1 Pa.C.S. § 1903(a). The common usage of the word "locomotive" is "a self-propelled vehicle that runs on rails, utilizes any of several forms of energy for producing motion, and is used for moving railroad cars." WEBSTERS'S NEW COLLEGIATE DICTIONARY 670 (1980). The statutory

definition is broader than this dictionary definition because it appears to include "off-track" locomotives, but the essence of the definition is a self-propelled vehicle that is used to move nonpowered cars. A scoop is not used to move nonpowered cars.

To the extent it is necessary to assess whether the term "locomotive" has acquired a specialized meaning, *see generally RAG Cumberland Resources v. DEP*, 869 A.2d 1065 (Pa. Cmwlth. 2005), the mining industry's usage is not materially different than the term's common usage. Both the Department and Cumberland refer us to the U.S. BUREAU OF MINES, DICTIONARY OF MINING, MINERAL AND RELATED TERMS, which defines "locomotive" as follows:

> An electric engine, operating either from current supplied from trolley and track or from storage batteries carried on the locomotive. The locomotive may be powered by battery, diesel, compressed air, trolley, or some combination such as battery-trolley or trolley-cable reel. Used to move empty and loaded mine cars in and out of the mine.

Thus, as with the term's common usage, the defining characteristic of a locomotive in the mining industry is that it is a powered vehicle used to move nonpowered cars. A scoop does not have that defining characteristic.[2]

---

[2] A "scoop" is defined in the mining dictionary as follows:

> a. Diesel- or battery-powered equipment with a scoop attachment for cleaning up loose material, for loading mine cars or trucks, and hauling supplies.
> b. A large sized shovel with a scoopshaped blade.
> c. Coal miner's shovel; also sometimes used to refer to scraper.
> d. See: scraper bucket
> e. A device that gathers ore at feed end of ball mill and delivers it into the feed trunnion.

(Citations omitted.)

The existence of an engine is not enough in and of itself to qualify something as a "locomotive." Cumberland says, without contradiction from the Department, that many other pieces of mine equipment are powered by electric engines. Had the Legislature intended all self-propelled vehicles or pieces of equipment with engines to be equipped with fire extinguishers, it could have easily said so. Instead, it used a much narrower term: locomotive.

In short, we do not see the term "locomotive" as being ambiguous. Accordingly, we are not presented here with a case of two reasonable interpretations, one of which is advanced by the Department. There is no need to defer to the Department's unreasonable interpretation of the term. *See RAG, supra*, 869 A.2d at 1072. The Department erred by citing Cumberland for violating Section 273(f) of the Act.

Expansion of the Act by Order

Perhaps in partial recognition of the fact that a scoop cannot fairly be characterized as a "locomotive," the Department argues that, "[e]ven if the statute did not require that scoops be equipped with fire extinguishers, it is reasonable to do so by order." Having admitted for purposes of argument that the law does not require fire extinguishers on scoops, the Department posits that it can require them anyway by issuing compliance orders pursuant to its general statutory authority to issue orders to enhance safety and otherwise advance the purposes of the Act. Of course, the argument falls apart quickly because that is not what the Department did in this case. Rather, the orders under appeal are expressly based on violations of Section 273(f). But putting that aside, the Department's position raises all of the points that we recently addressed in *Emerald Coal Resources v. DEP*, EHB Docket No. 2009-023-L (Opinion and Order, February 24, 2010). Here, as there, the Department is not following the law; it is amending it on an *ad hoc* basis. The Department is not interpreting the Act; it is trying to rewrite it and expand it. It is attempting by fiat to achieve a result that it did not achieve in the hard

fought negotiations leading up to the Act. It is attempting to bypass the rulemaking process and the authority of the Board of Coal Mine Safety. It has cited the operator for violating the law when no such violation exists. As we discussed in detail in *Emerald*, the Department's approach here, even more than in that case, turns our system of the rule of law on its head.

We are particularly struck by the Department's argument that fire extinguishers on scoops would be "a very good idea." We are in no position to disagree. Having fire extinguishers on scoops (and presumably every other piece of moving or stationary equipment in a mine for that matter) might very well reduce the risk of fire and enhance safety. The problem is that neither the Act nor any regulation duly promulgated by the Mine Safety Board in accordance with the provisions of the Act requires fire extinguishers on scoops. Whether extinguishers would be a "very good idea" is beside the point. Whether the law should be changed or regulations should some day be promulgated to achieve the Department's goal is beside the point. The point here is that the Department may not simply disregard the law and impose entirely new legal requirements under threat of serious consequences for noncompliance simply because the Department thinks they would be a very good idea.

Promulgating new laws regarding mine safety in accordance with the Act is undoubtedly a time-consuming process, but that is not necessarily a bad thing. New requirements that have the force of law that will presumably bind an entire industry for decades to come *should* undergo a careful, transparent, deliberative review. In addition, mine operators should have a clear understanding of what the law requires and be able to plan for compliance in advance. If the Department were empowered to issue orders regardless of what the statute says every time it thinks something would be a very good idea, there would be no need for a highly detailed statute, no need for regulations, and no need for the Board of Coal Mine Safety. The Department is required to issue orders within the parameters of the law. As we discussed in the first part of our

Opinion, the Act as it is currently written and in the absence of implementing regulations does not require fire extinguishers on scoops. Therefore, the Department lacks the authority to require them by order.

Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CUMBERLAND COAL RESOURCES LP and AMFIRE MINING CO., LLC	:	**EHB Docket No. 2009-068-L (Consolidated with 2009-069-L, 2009-070-L, 2009-071-L, 2009-072-L, 2009-082-L, 2009-139-L, and 2009-140-L)**
v.	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

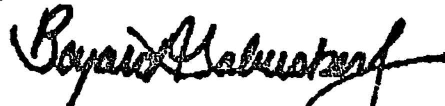
ORDER

AND NOW, this 16th day of March, 2010, it is hereby ordered that the Appellants' motion for summary judgment is **granted** and the Department's motion for summary judgment is **denied**. The orders under appeal are hereby rescinded.

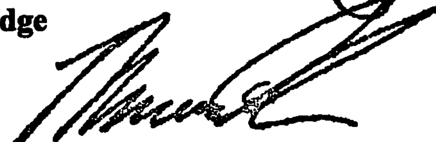
ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Chairman and Chief Judge

MICHELLE A. COLEMAN
Judge



BERNARD A. LABUSKES, JR.
Judge



MICHAEL L. KRANCER
Judge

DATED: March 16, 2010

c: **DEP Bureau of Litigation:**
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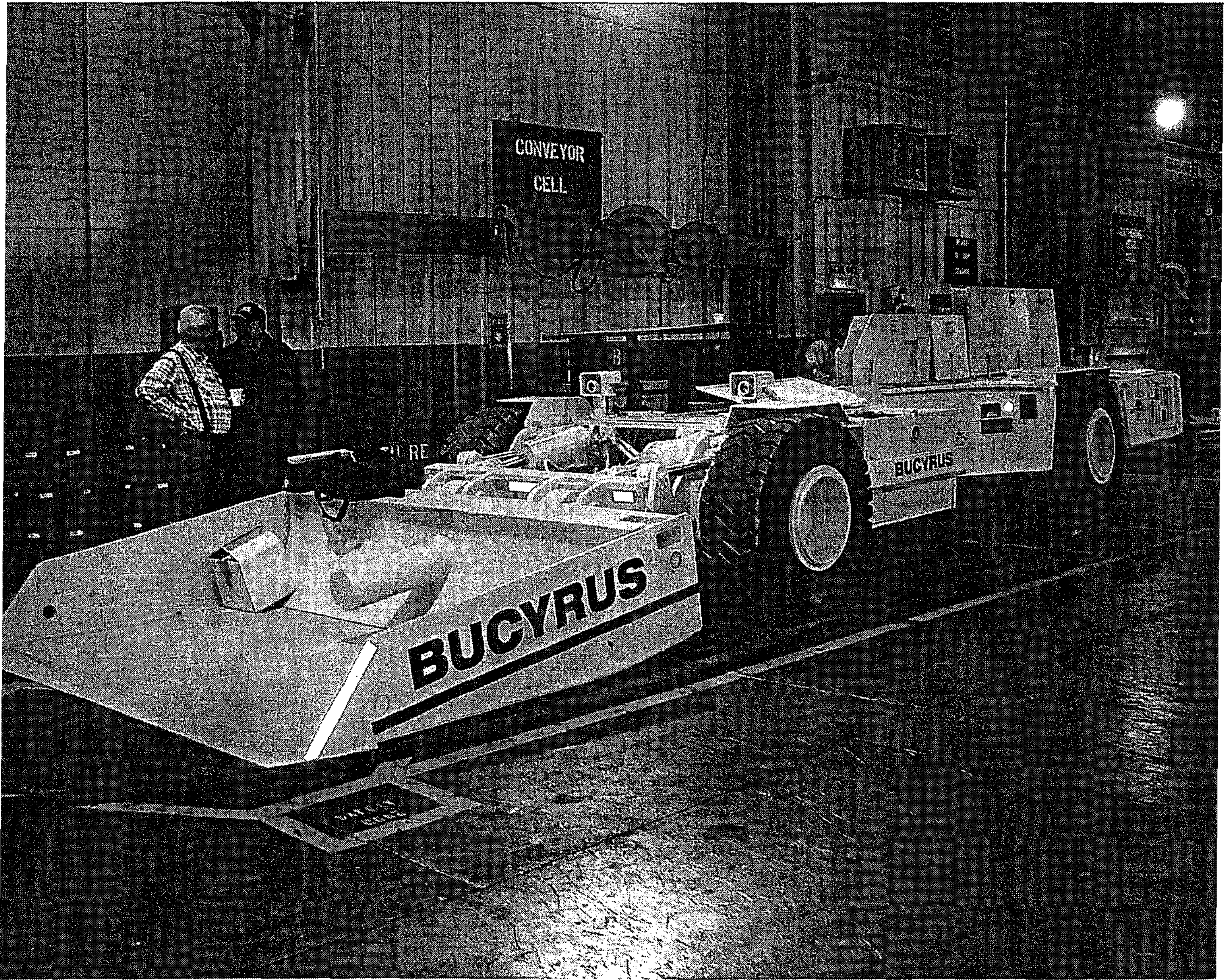

Exhibit A

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CUMBERLAND COAL RESOURCES LP and AMFIRE MINING CO., LLC	:	
v.	:	**EHB Docket No. 2009-068-L (Consolidated with 2009-069-L, 2009-070-L, 2009-071-L 2009-072-L, 2009-082-L 2009-139-L, and 2009-140-L)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

CONCURRING OPINION
IN PART AND DISSENTING IN PART

By Richard P. Mather, Sr., Judge

OPINION

I concur in part and dissent in part from the opinion of the Majority. I concur in that part of the decision that concludes that a scoop, which does not move other cars, is not an "off-track locomotive" as that term is used in Section 273(f) of the Act of July 7, 2008 (P.L. 654, No. 55) known as the Bituminous Coal Mine Safety Act ("BCMSA"), 52 P.S. § 690-273(f), although I support that part of the decision for slightly different reasons. I dissent fully from that part of the decision that mandates the Department promulgate regulations before it issues administrative orders to implement or enforce the BCMSA. I believe that the Department has broad authority under the BCMSA to issue orders to establish standards of conduct on a case-by-case basis in appropriate situations. Under the record before the Board, I would deny the Appellants' motion for summary judgment and grant the Department's motion for summary judgment.

Deference to Department's Interpretation of the term "off-track locomotive"

The Department contends that a "scoop" is an "off-track locomotive" as that term is used in Section 273(f) of BCMSA, 52 P.S. § 690-273(f), and that its interpretation of this statutory

term is entitled to deference. The Majority concludes that the statutory "off-track locomotive" language is unambiguous and decides not to defer to the Department's interpretation. Opinion at page 4. I disagree that the statutory language is unambiguous, however, under Pennsylvania caselaw and the facts of this case, I would not give deference to the Department's interpretation because I believe it is clearly erroneous.

It is well-settled as a matter of Pennsylvania law that an agency's interpretation of a statute that it is charged with implementing is entitled to substantial deference. *See, e.g., Eagle Envtl. II, L.P. v. DEP*, 884 A.2d 867, 878 (Pa. 2005); *Winslow-Quattlebaum v. Maryland Ins. Group*, 752 A.2d 878 (Pa. 2000); *Alpha Auto Sales v. Dep't of State*, 644 A.2d 153, 155 (Pa. 1994). When an agency's interpretation is inconsistent with the statute itself or when the statute's meaning is unambiguous, the agency's interpretation carries little weight. *See, e.g., Com., Office of Admin. v. Pennsylvania Labor Relations Bd.*, 916 A.2d 541 (Pa. 2007); *In re Nomination Petition of Timothy J. Carroll*, 896 A.2d 566, 581 (Pa. 2006); *Borough of Pottstown v. Pennsylvania Mun. Retirement Bd.*, 712 A.2d 741, 744 (Pa. 1998); *see* 1 Pa.C.S.A. § 1921(b) and (c).

While an interpretation of a statute by those charged with its administration and enforcement is entitled to deference, such consideration most appropriately pertains to circumstances in which the statutory provision is not explicit or is ambiguous.[3] *See, e.g., Tutt v. Cortes*, 851 A.2d 903, 906 (Pa. 2004).

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[3] The object of statutory interpretation is to determine the intent of the General Assembly. *Pa. Dep't of Transp., Bureau of Driver Licensing v. Weaver*, 912 A.2d 259, 264 (Pa. 2006) (citing 1 Pa.C.S. § 1921(a)). The touchstone of statutory interpretation is that where a statute is unambiguous, the judiciary may not ignore the plain language "under the pretext of pursuing its spirit," 1 Pa.C.S. § 1921(b), for the language of a statute is the best indication of legislative intent. *Weaver*, 912 A.2d at 264. Words and phrases should be construed in accordance with their common and approved usage. 1 Pa.C.S. § 1903(a). When the words of a stature are clear, there is no need to look beyond the plain meaning of a statute. *See, e.g., Commonwealth v. McClintic*, 909 A.2d 904, 909 (Pa. 2005) and *Rarnich v. Worker's Comp. Appeal Bd. (Schatz Elec., Inc.)*, 770 A.2d 318, 322 (Pa. 2001)). If a statute is deemed ambiguous, however,

It is also well-settled that a statutory interpretation by an agency charged with the administration of a particular law is normally afforded deference unless the interpretation is clearly erroneous. *See, e.g., Dep't of Educ. v. Empowerment Bd. of Control of Chester Upland Sch. Dist.*, 938 A.2d 1000, 1011 (Pa. 2007); *Winslow-Quattlebaum v. Maryland Ins. Group*, 752 A.2d 878, 881 (Pa. 2000). Under this approach, a reviewing court will not disturb the agency's interpretation absent fraud, bad faith, abuse of discretion or clearly arbitrary action. *Id.*

The Majority does not view the term "locomotive" as being ambiguous. I disagree and I believe that the term "off-track locomotive" is ambiguous for the reasons set forth below. Since it is an ambiguous term, in my opinion, the Department's interpretation is entitled to deference unless it is clearly erroneous. Because I find that the Department's interpretation of "off-track locomotive," as set forth in the orders under appeal, is clearly erroneous, I would not give the Department's interpretation "great deference."[4] I agree with the Majority that a scoop that does not move other mine cars is not an "off-track locomotive" as that term is used in Section 690-273(f). 52 P.S. § 690-273(f).

There are several reasons why I believe that the term "off-track locomotive" is ambiguous.[5] This term is not defined by BCMSA or in any secondary source examined by the Majority, and the common and approved usage of the term "locomotive" illustrates that the General Assembly's use of the term "locomotive" is ambiguous. As the Majority correctly states, the common usage of the word "locomotive is a self-propelled vehicle that runs on rails

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resorting to principles of statutory construction is appropriate. 1 Pa.C.S. § 1921(c); *Commonwealth v. Packer*, 798 A.2d 192, 196 (Pa. 2002).

[4] In *Malt Beverages Distributors Ass'n v. Pa. Liquor Control Bd.*, 974 A.2d 1144, 1154 (Pa. 2009), the Pennsylvania Supreme Court applied a rule that declined to give deference to an agency's interpretation developed in anticipation of litigation. While the Department's orders resulted in the litigation, the orders were not developed in anticipation of litigation. Since no party has raised this consideration, there is no reason for the Board to address it here.

[5] Section 273(f) uses the terms "track or off-track locomotive." 52 P.S. § 690-273(f). The scoops at issue in this appeal are off-track self-powered vehicles.

… and is used for moving railroad cars." Opinion at page 2. *See* 1 Pa.C.S.A. § 1903(a). This common usage is related to railroads and the "locomotives" under this common usage are "used for moving railroad cars." This common usage definition is useful in discerning the meaning of the term "off-track locomotive" in an underground coal mining context, but it does not support the view that the meaning of this term is unambiguous.

The Majority's use of the U.S. BUREAU OF MINES, DICTIONARY OF MINING, MINERAL AND RELATED TERMS is also very valuable in discerning the meaning of the term "off-track locomotive."[6] Opinion at page 3. This dictionary, which contains a more technical, specialized definition, also identifies the function of a locomotive as a powered vehicle "used to move empty and loaded mine cars in and out of a mine." Neither the common usage nor the specialized definitions of "locomotive," which relate to track or rail vehicle situations, address the issue present in Section 273(f) regarding "off-track" locomotives. In addition, neither definition addresses what type of rail or mine cars are moved by a locomotive: coal, supplies or other non-powered equipment or vehicles. There is ambiguity in the meaning of this term that the Department could properly interpret. Thus, I conclude that the term "off-track locomotive" is ambiguous and the Department's interpretation of this term is entitled to substantial deference unless it is clearly erroneous.

For the reasons set forth below, I believe that the Department's interpretation is clearly erroneous and is not entitled to substantial deference. The Department interprets the term "off-track locomotives" to include scoops like those in question in these consolidated appeals. The Department offers two reasons to support its interpretation. First, the Department states it relied on a portion of the definition of locomotive in the DICTIONARY OF MINING, MINERAL AND

[6] Under Section 1903(a), technical words and phrases shall be construed according to the peculiar and appropriate meaning they have acquired. 1 Pa.C.S.A. § 1903(a). Under Section 273(f) of BCMSA, "off-track locomotive" is a technical term as it is used in the underground coal mining industry.

RELATED TERMS. Second, the Department also relied on the fact that battery powered scoops present a fire hazard, have a fire suppression system, but they do not have a fire extinguisher. While the concern about fires associated with scoops is legitimate, it is not a relevant consideration when interpreting the term "off-track locomotive." In addition, the portion of the Bureau of Mines definition that the Department neglected to address regarding the function of locomotives to move mine cars supports a finding that the Department's definition is clearly erroneous. The Department's decision to include scoops within its interpretation of "off-track locomotive," based upon the fact that it is a self-powered electric vehicle, is an arbitrary decision in light of the uncontradicted assertion that there are many other pieces of mine equipment that are also powered by electric engines. I agree with the Majority that the "existence of an engine is not enough in and of itself to qualify something as a locomotive." Opinion at page 4. I would, however, reject the Department's interpretation because it is clearly erroneous. The Majority rejects it because it is unreasonable.[7] In conclusion, I agree that the term "off-track locomotive" means a powered vehicle that is used to move unpowered cars.[8]

The Majority also rejects the Department's alternative basis to support its orders to require fire extinguishers on the scoops at the Appellants' mines subject to the orders. Opinion at pages 4-6. For the reasons set forth in my Concurring Opinion In Part and Dissenting in Part

[7] In *Bethenergy Mines, Inc. v. DEP*, 676 A.2d 711, 716 (Pa. Cmwlth. 1996) the Commonwealth Court held that a statute is ambiguous if its language is subject to two or more reasonable interpretations. Where there are two reasonable readings of a statute, and one of the reasonable readings is the agency's, the Commonwealth Court decided it was obligated to "give great deference" to the agency's interpretation. Under my view, a statutory provision can be ambiguous, but the agency's interpretation is not entitled to deference if its interpretation is clearly erroneous. The existence of two reasonable interpretations means the statutory provision is ambiguous. A statutory provision can still be ambiguous even if the agency's interpretation is unreasonable or clearly erroneous.

[8] The Majority concludes that a "scoop" is not used to move nonpowered cars. Based on the record before the Board, I am not as certain that scoops are never used to move nonpowered cars. If a scoop is used for this purpose, it could fit within the definition of off-track locomotive. *See* Response in Opposition to Commonwealth's Brief in Support of its Motion for Summary Judgment and Cumberland's Cross Motion in Support of Summary Judgment at page 7. ("Unlike locomotives, scoops are not *merely* engines used for pulling." (emphasis added)).

in *Emerald Coal Resources v. DEP* (EHB Docket No. 2009-023-L, February 24, 2010 Opinion and Order), I dissent from the Majority's opinion. I believe BCMSA provides the Department with broad authority to issue orders to implement and enforce the BCMSA. 52 P.S. § 690-501(a). Beyond just enforcing the Act, the Department has expressed authority to effectuate the purposes of this Act and to protect the health and safety of miners and individuals in and about mines. *Id.* This authority includes the authority to issue orders to establish new standards of conduct at particular mines on a case-by-case basis.

The Majority characterizes the Department's orders as an attempt to rewrite or expand BCMSA without using the new rulemaking procedures in BCMSA that authorize the Mine Safety Board to promulgate regulations for the Department. I disagree and believe that you have to read Sections 105 and 501 and Sections 106 and 106.12 together. 52 P.S. §§ 609-105, 106, 106.1 and 501. There is no provision in BCMSA or in any tenent of administrative law to support the Majority's conclusion that the mere existence of rulemaking authority limits or otherwise affects the Department's authority to issue orders to establish standards of conduct on a case-by-case basis.[9] Orders that are properly issued pursuant to Section 105 and 501 do not rewrite or expand BCMSA. These orders are authorized by BCMSA and enable the Department to properly implement BCMSA.

Having concluded that the Department has broad authority to issue orders under BCMSA that establish standards of conduct on a case-by-case basis, it is still necessary to evaluate the orders in question to determine whether the Department has met its burden. 25 Pa. Code § 1021.122(b)(4). In my opinion, the Department has met its burden to support the issuance of the

[9] I agree that the Department would be required to follow rulemaking procedures if it wanted to create binding requirements that are applicable across the board. *See Pa. Human Relations Comm'n. v. Norristown Area Sch. Dist.*, 374 A.2d 671 (Pa. 1977). I do not view the Department's orders as attempts to do this since they are directed to certain scoops at particular mines.

orders in this case. The scoops in question are equipped with fire suppression systems, however the large batteries that power these scoops are not equipped with fire extinguishers. Affidavit of Joseph A. Sbaffoni, Director of Bureau of Deep Mine Safety ("Affidavit"), Paragraphs 14 and 15. Coal fines and other combustible material collect on the battery and electrical apparatus, and these materials are highly flammable and can be ignited by a spark from the batteries on the scoop. Affidavit, paragraphs 16 and 17. Fires are a significant danger in an underground coal mine, and a fire extinguisher, if it is used effectively and quickly, may extinguish a fire which could erupt on a scoop thereby preventing the fire from spreading. Affidavit, Paragraphs 18 and 19. Having a fire extinguisher on a scoop protects the health and safety of miners and individuals in and around mines. Affidavit, Paragraph 21. I would, based on these uncontested facts, grant the Department's motion for summary judgment and deny the appellant's motion for summary judgment.

ENVIRONMENTAL HEARING BOARD

RICHARD P. MATHER, SR.
Judge

DATED: March 16, 2010

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MARYANNE WESDOCK, ESQUIRE
ACTING SECRETARY TO THE BOARD

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
v.	:	**EHB Docket No. 2009-029-CP-K**
	:	**Issued: March 16, 2010**
STEVEN R. SIMMONS	:	

OPINION AND ORDER

By Michael L. Krancer, Judge

Synopsis:

The Board denies Defendant's request for an extension of time of unspecified duration to file its post-trial brief. However, the deadline is extended until Monday, March 22, 2010.

Opinion

There comes a time where one has to say "enough is enough" and the time for that here is probably well overdue. The Board finds in front of it Defendant's one sentence, no reason given request, filed by fax with the Board yesterday in the early morning, for an extension of unspecified time to file its post-trial brief which is due this Friday, March 19, 2010. Counsel for Defendant did not even bother to call the Department's counsel on the telephone to ask the Department's view of this request before he shot off the one-page request to the Board. The Department filed a letter opposing the request for this extension at the end of the day yesterday. Normally, of course, we are very liberal granting extensions but in this case such liberality is not warranted.

The Defendant in this case has demonstrated a pattern over time of disrespect for the Department, the Department's counsel, its witnesses and for the Board. This Defendant is about the worst schedule scofflaw I have ever seen in my time as a Judge on the Board. A look at our docket of this case demonstrates that, as counsel for the Department points out, "the Defendant and counsel have been unable or unwilling to comply with the Board's deadlines and procedures." The Defendant has failed to adhere to virtually any deadline set in this case. Twice the Board has actually imposed sanctions against the Defendant for failure to comply with our Rules, orders and procedures. The Defendant was on the brink of having default judgment entered on several occasions. Nonetheless, quarter was granted and we went to trial. Indeed, the Defendant failed to comply with one sanction which we had imposed at one of those moments when Defendant was on the brink of suffering default judgment which we said would be required for him to comply with in order for the trial to proceed. He did not comply but we basically threw up our hands, again, and let that one go by too.

Trial in this matter ended on January 14, 2010. On February 2, 2010, the date on which trial transcripts became available, we entered an order memorializing the due dates for post-trial briefs. The Order called for the Department to file its opening post-trial brief on March 4, 2010, defendant to file its post-trial brief, if it chose to do so, by Friday March 19, 2010 and for the Department to file its reply post-trial brief by Monday April 4, 2010. The Department filed its post-trial brief two days early, on March 2, 2010. The Department's post-trial brief is not huge, it is 32 pages with 62 findings of fact. So responding to it is not a huge task. And, in any event, Defendant could have been working on a post-trial brief any time after February 2, 2010. Now, predictably, at the last

minute again, Defendant says it will not comply with the deadline and asks for unspecified more time.

The Defendant has more than run afoul of the old adage that "your failure to plan does not create my emergency." Defendant has continually put everyone out in this case with its repeated occasions of passive-aggressive behavior, usually sprung at the last minute. As said already, enough - is enough. We will reluctantly extend the deadline for Defendant to file its post-trial brief, but only until Monday March 22, 2010. We will not extend this deadline again. Accordingly, we enter the Order which follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
v.	:	**EHB Docket No. 2009-029-CP-K**
STEVEN R. SIMMONS	:	

ORDER

AND NOW, this 16th day of March, 2010, the request of Defendant for an unspecified extension of time to file its post-trial brief is DENIED. The Defendant's time for filing its post-trial brief, however, is extended until **Monday March 22, 2010**. If the Department should require more time to file its reply post-trial brief, it shall request such extension.

ENVIRONMENTAL HEARING BOARD

MICHAEL L. KRANCER
Judge

DATED: March 16, 2010

c: **DEP Litigation Library:**
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PATRICIA A. WILSON **v.** **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, NEWTOWN TOWNSHIP, Permittee and BPG ENTITIES, THE ROUSE GROUP DEVELOPMENT COMPANY, LLC, and ASHFORD LAND COMPANY, L.P., Intervenors**	:	**EHB Docket No. 2009-024-L**
PAUL I. GUEST, JR. **v.** **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, NEWTOWN TOWNSHIP, Permittee and BPG ENTITIES, THE ROUSE GROUP DEVELOPMENT COMPANY, LLC, and ASHFORD LAND COMPANY, L.P., Intervenors**	:	**EHB Docket No. 2009-026-L**
LITTLE WASHINGTON WASTEWATER COMPANY, AQUA RESOURCES, INC., AND AQUA PENNSYLVANIA, INC. **v.** **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, NEWTOWN TOWNSHIP, et al., Permittees and BPG ENTITIES, THE ROUSE GROUP DEVELOPMENT COMPANY, LLC, and ASHFORD LAND COMPANY, L.P., Intervenors**	:	**EHB Docket No. 2009-033-L (Consolidated with 2009-034-L)** **Issued: March 16, 2010**

OPINION AND ORDER
<u>ON PETITION TO INTERVENE</u>

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board allows a landowner and a developer to intervene in three appeals from the Department's approval of an Act 537 plan for the municipality where the intervenors' proposed development is located. The intervenors have a substantial, direct, and immediate interest in the subject matter of the appeals. The Board places several limitations on the intervenors' ability to participate in the proceedings due to the very late filing of their petition.

OPINION

On February 16, 2010, the Rouse Group Development Company, LLC and Ashford Land Company, L.P. (collectively, "Rouse") petitioned to intervene in three appeals from the Department of Environmental Protection's (the "Department's") approval of an Act 537 Plan Update for Newtown Township, Delaware County. The Department's approval has been appealed by Patricia Wilson (Docket No. 2009-024-L), Paul Guest (Docket No. 2009-026-L), and Little Washington Wastewater Company, Aqua Resources, Inc. and Aqua Pennsylvania, Inc. (Docket No. 2009-033-L). All three appeals have been pending for some time. In fact, we already held a hearing in the Wilson appeal on February 18 and 19, 2010. A hearing in the Aqua appeal is scheduled to begin on April 26, 2010 and a hearing in the Guest appeal is scheduled to begin on May 10, 2010.

There is little doubt that, but for the fact that Rouse has petitioned to intervene very late in the proceedings, it would be entitled to intervene in the Wilson, Guest, and Aqua appeals. It appears based on the verified petition to intervene that Ashford is the equitable owner of approximately 432 acres of land in Newtown Township and that it holds preliminary approvals

for the construction of a 449-unit cluster residential development. Rouse claims to be an investor partner in Ashford and it is the anticipated developer of the proposed development. The development could generate 115,000 gallons per day of wastewater flow. The Plan Update under appeal provides that the Rouse development will be served by public sewers that do not currently exist. If Wilson, Guest, and/or Aqua are successful in their appeals, it presumably could put provision for the development's sewerage needs back into limbo. Rouse has an obvious interest in the continued viability of the sewage plan that provides for a system that will allow Rouse's development to go forward.

The only party that has opposed Rouse's intervention is the Department. Despite Rouse's obvious interest and the fact that Rouse seems to be generally supportive of the Department's position, the Department opposes the petition largely because it comes so late in the proceedings. Alternatively, it asks that we postpone the hearing and allow additional discovery if Rouse is permitted to intervene.

Notwithstanding the Department's objections, we will allow Rouse to intervene.[1] We start with the general proposition that a "Board appeal is ordinarily the only opportunity for a due process hearing addressing Departmental actions that affect people's rights. If there is only one opportunity to be heard, the Board should not rush to prevent interested persons from

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[1] "It does not take much to be able to intervene in Board proceedings." *TJS Mining v. DEP*, 2003 EHB 507, 508. Under the Environmental Hearing Board Act, 35 P.S. § 7514(e), "[a]ny interested party may intervene in any matter pending before the board." *See generally* 25 Pa. Code § 1021.81 (requirements for intervention). This standard is not so broad, however, as to allow any member of the public who cares to speak to do so. *TJS Mining,* 2003 EHB at 508. Rather, a petitioner's interests must be "substantial, direct and immediate." *Elser v. DEP*, 2007 EHB 771, 772; *Borough of Glendon* v. DEP, 603 A.2d 226, 233 (Pa. Cmwlth 1992). We will allow a party to intervene where "the person or entity seeking intervention will either gain or lose by direct operation of the Board's ultimate determination." *Sechan Limestone Indus., Inc. v. DEP*, 2003 EHB 810, 812 (citing *Browning-Ferris, Inc. v. DER*, 598 A.2d 1057, 1060-61 (Pa. Cmwlth. 1991)). "Gaining or losing by direct operation of the Board is just another way of saying that an intervenor must have standing." *Consol Pa. Coal Company v. DEP*, 2002 EHB 879, 890 (citing *Connors v. State Conservation Comm'n*, 1999 EHB 669, 670).

participating in that process." *Giordano v. DEP*, 2000 EHB 1154, 1158. As to the timing of intervention, the Board's rules specifically provide that "[a] person may petition the Board to intervene in any pending matter *prior to the initial presentation of evidence*." 25 Pa. Code § 1021.81(a)(emphasis added). Given the months of pre-hearing procedures described in other parts of our rules, our rule on intervention obviously contemplates that rather late interventions may be permitted in some cases if circumstances warrant, and we have so held. *Giordano, supra*. Of course, in considering a request to intervene, we also have a duty to protect all of the existing parties' right to a fair hearing. *Pennsylvania Trout v. DEP*, 2003 EHB 590, 594.

One way that we have balanced these competing concerns in the case of late interventions is to postpone the hearing and allow the parties to conduct additional discovery. *See, e.g., Giordano, supra*. Indeed, the Department has alternatively asked for just such relief in these appeals. However, we do not believe that that approach is ideal here. The hearing in the Wilson appeal has already been completed.[2] The Guest appeal is scheduled to begin on May 10. The Aqua appeal will commence even sooner – April 26. Although the parties never moved to consolidate the appeals, they all involve challenges from the same Department action. The Wilson and Guest appeals involve the same challenges and issues. Indeed, Mr. Guest serves as Ms. Wilson's counsel. Wilson and Guest have resisted multiple attempts on the part of the other parties to postpone and delay proceedings or render the proceeding moot through partial settlements, we believe for good cause. Although the parties made no effort to coordinate their litigation, we intend to coordinate our adjudication. Now that the Wilson hearing is completed and post-hearing briefing is underway, the best course is to also finish the Guest and Aqua hearings as quickly as possible in order to allow for a coordinated resolution of the parties'

[2] Rouse's petition was filed before the presentation of evidence, but there was not enough time to act on it prior to the hearing itself. Rouse's counsel attended the entire hearing.

challenges. Rather than allow additional discovery, further delay, and fracturing of the related appeals, we believe that the best way to balance Rouse's right to participate with the existing parties' right to fair hearings is to narrowly restrict Rouse's participation in several respects.

First, as always, an intervenor takes a case as it finds it: "An order granting intervention allows the intervenor to participate in the proceedings remaining at the time of the order granting intervention." 25 Pa. Code § 1021.81(f). Second, an order granting intervention "may specify the issues as to which intervention is allowed." *Id.* Here, it is too late for Rouse to present evidence in the Wilson appeal, but Rouse may present evidence and argument in the Guest and Aqua cases limited to its own sewerage needs and in support of the contention in its petition that the "grant of the Appeal(s) will prejudice the anticipated economical and efficient sewer service for the [Rouse] Development as the act 537 Plan Update was designed to address present and anticipated future needs."[3] Third, Rouse will be required to submit pre-hearing memoranda in short order. Fourth, absent a very specific showing of need, Rouse will not be permitted to call any witnesses to testify in its case-in-chief other than a party representative. Fifth, as we previously mentioned, no party, including Rouse, may take additional discovery absent agreement of all the parties. Sixth, we will be particularly sensitive to and will prevent any duplicative examination of the other parties' witnesses at the hearings. Generally speaking, we do not expect or anticipate that Rouse's participation will significantly lengthen or complicate the hearing. In fact, it is not clear at this point whether *any* new evidence is necessary in the Guest appeal given the two-day hearing in the Wilson appeal. Finally, the other parties retain the right to object at any time to specific evidence presented by Rouse based upon a supportable claim of unfair surprise or prejudice.

---

[3] The parties retain the right to challenge Rouse's standing.

Rouse's petition says that Rouse would like to demonstrate that implementation of a recently finalized consent order and agreement ("COA") between Newtown Township and the Department could adversely impact its development. The Department protests, quite correctly, that an appellant of one Department action may not use its appeal to attack a separate Department action. *See Winegardner v. DEP*, 2002 EHB 790, 793. Although this is true, a separate Department action may be *relevant* in our assessment of the validity of the action under appeal. Although the only action under appeal here is the Department's approval of the Township's 2009 Plan Update, the COA might shed probative light on whether the Update should have been approved in the first place and/or whether it should be sustained by this Board.[4] For example, Wilson argues that the Update should not have been approved because the Township lacked the ability or intent to implement the Plan. The COA might shed light on that issue. That said, we will not delve into the validity of the COA itself. The COA might have potential evidentiary value as it relates to the Department's approval of the Plan Update, but the COA is not subject to direct attack in these appeals. Rouse's ability to delve into the COA will be constrained accordingly.

If it is for these reasons that we granted Rouse's petition to intervene by Order dated March 12, 2010, a copy of which is attached.

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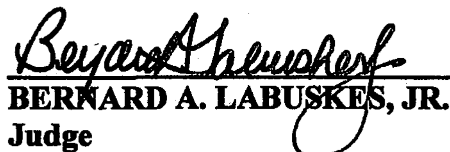

BERNARD A. LABUSKES, JR.
Judge

DATED: March 16, 2010

[4] We say it "might" shed light because, as we recently explained in *CMV Sewage Company v. DEP*, EHB Docket No. 2009-105-L (Opinion and Order, February 17, 2010), our ruling on a petition to intervene is not ordinarily the proper setting for resolving evidentiary issues.

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Attention: Brenda K. Morris, Library

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ACTING SECRETARY TO THE BOARD

PATRICIA A. WILSON **v.** **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, NEWTOWN TOWNSHIP, Permittee and BPG ENTITIES, Intervenor**	:	**EHB Docket No. 2009-024-L**
PAUL I. GUEST, JR. **v.** **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and NEWTOWN TOWNSHIP, Permittee and BPG ENTITIES, Intervenor**	:	**EHB Docket No. 2009-026-L**
LITTLE WASHINGTON WASTEWATER COMPANY, AQUA RESOURCES, INC., AND AQUA PENNSYLVANIA, INC. **v.** **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and NEWTOWN TOWNSHIP, et al., Permittees and BPG ENTITIES, Intervenor**	:	**EHB Docket No. 2009-033-L (Consolidated with 2009-034-L)**

ORDER

AND NOW, this 12th day of March, 2010, it is hereby ordered that the petition to intervene filed in the captioned appeals by The Rouse Group Development Company, LLC and Ashford Land Company, L.P. is hereby **granted**. An opinion in support of this order will follow.

The new captions, which should be reflected on all future filings with the Board, shall be as follows:

PATRICIA A. WILSON **v.** **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, NEWTOWN TOWNSHIP, Permittee and BPG ENTITIES, THE ROUSE GROUP DEVELOPMENT COMPANY, LLC, and ASHFORD LAND COMPANY, L.P., Intervenors**	**EHB Docket No. 2009-024-L**
PAUL I. GUEST, JR. **v.** **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, NEWTOWN TOWNSHIP, Permittee and BPG ENTITIES, THE ROUSE GROUP DEVELOPMENT COMPANY, LLC, and ASHFORD LAND COMPANY, L.P., Intervenors**	**EHB Docket No. 2009-026-L**
LITTLE WASHINGTON WASTEWATER COMPANY, AQUA RESOURCES, INC., AND AQUA PENNSYLVANIA, INC. **v.** **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, NEWTOWN TOWNSHIP, et al., Permittees and BPG ENTITIES, THE ROUSE GROUP DEVELOPMENT COMPANY, LLC, and ASHFORD LAND COMPANY, L.P., Intervenors**	**EHB Docket No. 2009-033-L (Consolidated with 2009-034-L)**

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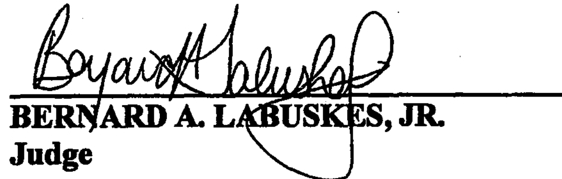

BERNARD A. LABUSKES, JR.
Judge

DATED: March 12, 2010

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MARYANNE WESDOCK, ESQUIRE
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FRANK T. PERANO	:	
	:	
v.	:	**EHB Docket No. 2010-025-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: March 17, 2010**

OPINION ON
PETITION FOR SUPERSEDEAS

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board denies a petition for a supersedeas of an order directing an NPDES permittee to furnish copies of its records to the Department at its own expense. The petitioner's reliance on certain regulations that do not appear to apply undercuts his likelihood of success on the merits. The petitioner's alleged harm of approximately $125 in copying costs is not the sort of irreparable harm justifying issuance of a supersedeas.

OPINION

Before the Board is a petition for a supersedeas filed by the Appellant, Frank T. Perano ("Perano"), the owner and operator of Cedar Manor Mobile Home Park ("Cedar Manor") in Londonderry Township, Dauphin County. The petition stems from Perano's appeal of a February 12, 2010 order from the Department of Environmental Protection (the "Department") requiring him to submit copies of documents related to the Cedar Manor sewage treatment plant. Specifically, the order requested that Perano submit:

a. Any and all records, receipts, and correspondence from the certified and non-certified operators at the sewage treatment plant.

b. Any and all flow measurement recordings including flow chart recordings at the sewage treatment plant.

c. Any and all daily log books and log sheets at the sewage treatment plant.

d. Any and all maintenance records and receipts at the sewage treatment plant.

e. Any and all sampling records including dates, person sampling, times, analyses, analyses results, and sampling locations at the sewage treatment plant.

f. Any and all sludge and wastewater removal records including sludge removed from a stream or treatment unit, wastewater removed from a stream or treatment unit, and disposal locations for sludge and wastewater removed. This information shall include the name of the hauler and a copy of all receipts.

Perano believes that relevant regulations demonstrate that the burden of photocopying the requested documents falls on the Department. He argues that the cost of photocopying documents constitutes an irreparable harm entitling him to a grant of supersedeas. In support, he claims that the order is broadly worded and could require him to copy "several hundred pages" at a cost of 25 cents per page.

The circumstances affecting the grant or denial of a supersedeas petition are described at 25 Pa. Code § 1021.63 as follows:

> (a) The Board, in granting or denying a supersedeas, will be guided by relevant judicial precedent and the Board's own precedent. Among the factors to be considered:
>
> > (1) Irreparable harm to the petitioner.
> > (2) The likelihood of the petitioner prevailing on the merits.
> > (3) The likelihood of injury to the public or other parties, such as the permittee in third party appeals.
>
> (b) A supersedeas will not be issued in cases where pollution or injury to the public health, safety or welfare exists or is threatened during the period when the supersedeas would be in effect.

25 Pa. Code § 1021.63.

A supersedeas is an extraordinary remedy which will not be granted absent a clear demonstration of appropriate need. *UMCO Energy, Inc. v. DEP*, 2004 EHB 797, 802; *Tinicum Township v. DEP*, 2002 EHB 882, 827; *Global Eco-Logical Servs. v. DEP*, 1999 EHB 649, 651. Where the mandatory prohibition against issuance of a supersedeas does not apply, the Board ordinarily requires that all three statutory criteria be satisfied. *UMCO Energy, Inc.*, 2004 EHB at 802; *Global Eco-Logical Servs.*, 1999 EHB at 651. The petitioner bears the burden of proof. *Pennsylvania Fish & Boat Comm'n v. DEP*, 2004 EHB 473, 475. "[I]n the final analysis, the issuance of a supersedeas is committed to the Board's discretion based upon a balancing of all the statutory criteria." *UMCO Energy Inc.*, 2004 EHB at 802. Applying these standards here, by Order dated March 12, 2010 we found that Perano failed to meet his burden and denied his petition. This Opinion is issued in support of that Order.

Perano has failed to meet the burden of demonstrating his likelihood of success on the merits. While it is true that a petitioner need not establish his claim absolutely, the likelihood of success must nonetheless be more than speculative. *Global Eco-Logical Servs. Inc. v. DEP*, 2000 EHB 829, 831. Simply put, the petitioner's chances of success on the merits must be likely, or probable.

We should be clear about the issue before us. There is no dispute that Perano has an obligation to provide the records that have been requested. Rather, the only issue raised in this petition is who has to pay the copying charges. Perano is somewhat vague on the number of pages involved, but assuming there are 500 pages, the amount in dispute is $125.

Perano's argument that the Department bears the burden of copying the requested documents and paying for associated costs is based on 25 Pa. Code § 92.51(3) and the nearly

identical language in 40 CFR § 122.41(i) which is incorporated by reference into the Department's regulations by 25 Pa. Code § 92.2(b)(11). Section 92.51(3) states:

> (3) That the permittee shall permit the Director or an authorized representative, upon presentation of that representative's credentials, to:
>
> (i) Enter upon permittee's premises in which an effluent source is located or in which records are required to be kept under terms and conditions of the permit.
>
> (ii) Have access to and copy records required to be kept under terms and conditions of the permit.
>
> (iii) Inspect monitoring equipment or method required in the permit.
>
> (iv) Sample a discharge of pollutants.

25 Pa. Code § 92.51(3). Perano also relies on EPA's Compliance Inspection Manual, which is referred to for usage in the Department's technical guidance document. Chapter two of the manual sets forth inspection procedures and subsection E relates specifically to documentation and states, in part:

> Written or printed records generally can be photocopied *onsite*. Portable photocopy machines may be available to inspectors through the Regional Office. When necessary, inspectors should get authorized in advance via procurement request, travel authorization, or phone call to the appropriate EPA authority. Each inspector should find who is their approval official. Authorization will allow the inspector to pay a facility a "reasonable" price for use of copying equipment. If the facility does not have a photocopier and a portable photocopier is not available, a photocopy machine is usually accessible at a nearby site.... However, inspectors must obtain permission from the permittee *prior to taking records offsite for copying*. (emphasis added).

Perano's reliance on these sections is likely to be misplaced because both pertain to the procurement of documents *during onsite inspections*. Indeed, although 40 CFR § 122.41(i) is nearly identical to 25 Pa. Code § 92.51(3), one minor deviation is the inclusion of the subheading "Inspection and entry" in the CFR. The EPA's guidance document, to the extent it is even appropriate for us to consider such a document, also clearly anticipates a situation where an inspector is on the permittee's premises as indicated by the emphasized language above. These sections do not appear to apply to instances where, as here, the appeal pertains to a Departmental

order requesting documents subsequent to an inspection. As best we can tell from the record, the last onsite inspection prior to the issuance of the order was on February 1, 2010, almost two weeks prior to the Department's February 12, 2010 order that is the subject of this appeal. Accordingly, the more relevant regulation appears to be 40 CFR § 122.41(h), incorporated by reference into the Department's regulations at 25 Pa. Code § 92.2(b), which states:

> (h) Duty to provide information. The permittee shall furnish to the Director, within a reasonable time, any information which the Director may request to determine whether cause exists for modifying, revoking and reissuing, or terminating this permit or to determine compliance with the permit. The permittee shall also furnish to the Director, upon request, copies of records required to be kept by this permit.

40 CFR § 122.41(h). Furthermore, Part B, section I, C of Perano's permit similarly provides:

> 1. The permittee shall furnish to DEP, within a reasonable time, any information which DEP may request to determine whether cause exists for modifying, revoking and reissuing, or terminating this permit, or to determine compliance with this permit.
>
> 2. The permittee shall furnish to DEP, upon request, copies of records required to be kept by this permit.

There is a clear dispute between the parties regarding the meaning of "furnish." Perano argues that "furnish" means to make the requested records available for inspection and copying by the Department. The Department disagrees and asserts that "furnish" indicates that the permittee must pay copying costs. The Department adds that Perano's permit requires him to furnish copies, not originals. Without the need to reconcile this interpretational disagreement, we can conclude at this point that Perano has not met his burden of showing a likelihood of success on the merits. His debatable reliance on the aforementioned regulations and guidance documents produces sufficient doubt as to Perano's chances of success on the merits.

We suspect at this early juncture, however, that the ultimate resolution of this case will not turn on the dissection and explanation of the word "furnish." When asked who *should* bear

the costs of copying documents, Perano or the Commonwealth's taxpayers, the answer would seem to be obvious. An NPDES permit, like any other permit, is a privilege, not a right. *See Tri-State Transfer Co., Inc. v. DEP*, 722 A.2d 1129, 1133, n.3 (Pa. Cmwlth. 1999); *Sedat, Inc. et al. v. DEP*, 2000 EHB 927, 934. Perano is benefiting from the privilege of discharging into the waters of the Commonwealth. There is no obvious benefit to the public at large such that it should subsidize Perano's cost of doing business. Perano accepted his permit, with all its conditions, including a clear obligation to furnish copies of records. *Cf.* 1 Pa. C.S.A. § 1922 (in ascertaining legislative intent, it is to be presumed that the General Assembly favors the public interest as against any private interest). Permittees must routinely supply a wide variety of documents to the Department, including discharge monitoring reports, notice of physical alterations of the facility, notice of anticipated noncompliance, and notice of bypasses, for example. Taken to its logical extreme, under Perano's argument, he would be relieved of these obligations if the Department refused to pay for copies of these submissions. The Department must administer hundreds of NPDES permits. When the choice comes down to requiring Perano to pay roughly $125 or creating a precedent that would require the citizens of the Commonwealth to subsidize hundreds of permittees' business expenses, we have little doubt that Perano's likelihood of success is, in any event, somewhat less than "likely."

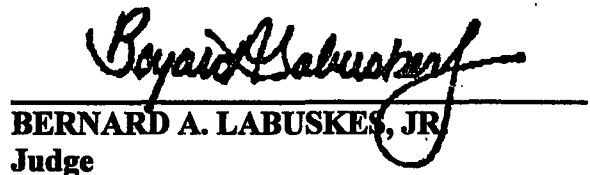
Nor are we convinced that Perano will suffer irreparable harm. We start by repeating that the amount in Perano's petition is approximately $125. Almost by definition it is difficult for us to conceive of this expenditure as rising to the level of "irreparable harm." Furthermore, "irreparable" by its plain meaning suggests in this context that Perano will have no avenues to seek recourse for his alleged harm, the payment of copying costs. This argument is belied by Perano's own petition which suggests that he may seek reimbursement from the Department in

the future. We have no reason to doubt Perano's belief that he may have avenues of relief available to recover his costs.

Lastly, Perano states in his petition without further explanation that "[t]he grant of supersedeas of the Order will not result in any injury to the public." While this may be true, this is merely a reiteration of that standard that Perano has the burden of proving. Although a simple explanation might be enough to satisfy the burden, no explanation at all will not.

Thus, Perano has failed to satisfy his burden of proving that the requirements necessary for a grant of a supersedeas have been met. A copy of our March 12, 2010 Order denying the petition is attached.

ENVIRONMENTAL HEARING BOARD



BERNARD A. LABUSKES, JR.
Judge

DATED: March 17, 2010

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FRANK T. PERANO	:	
	:	
v.	:	**EHB Docket No. 2010-025-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 12th day of March, 2010, in consideration of the Appellant's petition for supersedeas and the Department's motion to dismiss the petition, it is hereby ordered that the petition is **denied**. An opinion in support of this order will follow.

ENVIRONMENTAL HEARING BOARD

BERNARD A. LABUSKES, JR.
Judge

DATED: March 12, 2010

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PATRICIA A. WILSON

v. — **EHB Docket No. 2009-024-L**

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, NEWTOWN TOWNSHIP, Permittee and BPG ENTITIES, THE ROUSE GROUP DEVELOPMENT COMPANY, LLC, and ASHFORD LAND COMPANY, L.P., Intervenors

PAUL I. GUEST, JR.

v. — **EHB Docket No. 2009-026-L**

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, NEWTOWN TOWNSHIP, Permittee and BPG ENTITIES, THE ROUSE GROUP DEVELOPMENT COMPANY, LLC, and ASHFORD LAND COMPANY, L.P., Intervenors

Issued: March 23, 2010

OPINION AND ORDER ON MOTION TO DISMISS

By Bernard A. Labuskes, Judge

Synopsis

The Board denies the Department's motion to dismiss for mootness in two pending appeals of the Department's approval of an Act 537 plan update. The Department failed to show

that the execution of a consent order and agreement that requires the adoption of a new plan at a future date effectively withdrew its approval of the update rendering the appeal moot.

OPINION

The Department of Environmental Protection (the "Department") has filed a motion to dismiss as moot three appeals from the Department's 2009 approval of an Act 537 plan update for Newtown Township, Delaware County. The Department's approval was appealed by Patricia Wilson (Docket No. 2009-024-L), Paul Guest (Docket No. 2009-026-L), and Little Washington Wastewater Company, Aqua Resources, Inc. and Aqua Pennsylvania, Inc. (collectively "Aqua") (Docket No. 2009-033-L). Aqua has now withdrawn its appeal. A hearing in the Wilson appeal was held on February 18 and 19, 2010. A hearing in the Guest appeal is scheduled to begin on May 10, 2010.

We are receptive to a motion to dismiss where there are no material facts in dispute and the moving party is entitled to judgment as a matter of law. *Blue Marsh Labs., Inc. v. DEP*, 2008 EHB 306, 307; *Michael Butler v. DEP*, 2008 EHB 118, 119; *Borough of Chambersburg v. DEP*, 1999 EHB 921, 925; *Smedley v. DEP*, 1998 EHB 1281, 1281. Motions to dismiss will be granted only when a matter is free from doubt. *Northampton Township, et al. v. DEP*, 2008 EHB 563, 570; *Emerald Mine Resources, LP v. DEP*, 2007 EHB 611, 612; *Kennedy v. DEP*, 2007 EHB 511. The Board evaluates motions to dismiss in the light most favorable to the non-moving party. *Cooley, et al. v. DEP,* 2004 EHB 554, 558; *Neville Chem. Co. v. DEP*, 2003 EHB 530, 531.

A matter is moot when an event occurs that deprives the Board of the ability to grant effective relief or the appellant has been deprived a necessary stake in the outcome. *Horsehead Res. Dev. Co. v. DEP*, 780 A.2d 856, 858 (Pa. Cmwlth. 2001), *appeal denied*, 796 A.2d 987 (Pa.

2002); *Bensalem Township Police Benevolent Assoc., Inc. v. Bensalem Township*, 777 A.2d 1174, 1178 (Pa. Cmwlth. 2001); *Blue Marsh Labs.*, 2008 EHB at 307-08; *Solebury Township v. DEP*, 2004 EHB 23, 28-29. There are various exceptions to the mootness doctrine where the Board will not dismiss a case. These exceptions include instances where the conduct complained of is capable of repetition yet likely to evade review, where issues of great public importance are involved, or where a party will suffer a detriment without a decision. *Sierra Club v. Pennsylvania Pub. Util. Comm'n*, 702 A.2d 1131, 1134 (Pa. Cmwlth. 1997), *aff'd* 731 A.2d 133 (Pa. 1999); *Ehmann v. DEP*, 2008 EHB 386, 389; *Solebury Township*, 2004 EHB at 29.

The Department argues that this matter is moot because the Township's 2009 plan update is to be replaced by a new plan pursuant to a Consent Order and Agreement ("COA") between the Township and the Department. The Department believes that the COA deprives the Board of its ability to provide effective relief and the Appellants their stake in the outcome of any controversy regarding the update. The Department's argument relies on the critical assumption that the COA has the effect of "superseding the 2009 Plan approval ... [and] withdrawing approval of the 2009 Plan." The Department claims that the COA has the effect of withdrawing its approval of the 2009 Plan, in "a more nuanced manner" than a simple withdrawal letter because it sets forth milestones for the adoption of a new plan and penalties for failure to achieve those milestones. Thus, the Department concludes that the controversy has been resolved by the execution of the COA and the Appellants have no remaining legal cognizable interest in the outcome of any controversy over the update.

The Department's assumption that the COA withdraws its approval of the 2009 is shrouded in doubt. Strikingly, testimony at the Wilson hearing of Elizabeth Mahoney, the Department's sewage facilities planning supervisor, casts doubt on the Department's position

that its approval of the 2009 update has been withdrawn. At the hearing, Paul Guest, attorney for Patricia Wilson, cross-examined Ms. Mahoney regarding the Department's position. Mr. Guest first asked Ms. Mahoney to read the portion of the Department's memorandum of law in support of the motion to dismiss that states: "The consent order and agreement has the effect of superseding the 2009 Plan approval in a more nuanced manner than in *Cromwell Township*, yet has the same effect of withdrawing approval of the 2009 Plan." The following exchange then took place:

> Mr. Guest: Do you agree [with the Department's position] that the CO&A has the effect of withdrawing the approval of the 2009 plan?
>
> Ms. Mahoney: Personally, no, I don't agree that it does.

From this it appears the Department's own witness disagrees with the Department's position as set forth in its motion. Appellants Guest and Wilson (and before its withdrawal of appeal, Aqua) agree with Ms. Mahoney. They contend that the 2009 update has not been withdrawn or dismissed and, to the contrary, it remains in full force and effect. They further point out that the alleged future plan is unlikely to be approved until more than a year from now in accordance with the timeframe indicated by the COA's milestones and, in the meantime, the 2009 update remains in effect.

It is telling that the Department does not cite a passage or provision from the COA that specifically indicates that its 2009 approval has been withdrawn. A review of the COA reveals that no such provision exists. Based on the record as it now exists, it is impossible for us to conclusively determine that the execution of the COA effectively withdraws the Department's approval of the 2009 update thereby rendering this appeal moot. If anything, the weight of evidence at this point appears to tilt against the Department, suggesting that its assumption is

incorrect. Because we are unable to determine from the record that the 2009 Plan has been rescinded or its approval withdrawn, the Department's argument that the COA deprives the Board of the ability to grant effective relief, which is premised entirely upon the Department's supposed withdrawal of its approval of the update, falls apart. Our inability to determine whether the Department withdrew its approval precludes us from determining whether a withdrawal, had it occurred, would have rendered these appeals moot. It appears the Board might in fact be able to grant some meaningful relief to the Appellants by, e.g., reversing or modifying the Department's approval of the extent 2009 Plan, notwithstanding the COA, if we were to deem such action appropriate.

Further, the Department's reliance on case law is misplaced. In support of its argument, the Department cites *Cromwell Township v. DEP*, 2007 EHB 8, to demonstrate that this appeal is moot. In that case, however, the Department issued a letter affirmatively withdrawing its approval of an Act 537 plan that was the subject of the appeal and reinstating a prior version of the plan. Because the Department's approval was withdrawn, the Board found that the appellant achieved its desired result and the appeal was dismissed as moot. While it is true that in many instances an appeal will be moot where the subject of the appeal is withdrawn, the record here is devoid of any clear withdrawal of the Department's approval of the 2009 update. The Department also relies on other cases that can be similarly distinguished because in those cases the action that was the subject of the appeal was unquestionably withdrawn, rescinded, or otherwise invalidated, thereby rendering the appeal moot. *See Tinicum Township v. DEP*, 2003 EHB 493 (appeal dismissed as moot where a permittee *relinquished the permit* that was the subject of the appeal); *Broad Top Township v. DEP*, 2004 EHB 500 (appeal dismissed as moot where appellant sought rescission of a modification of a landfill permit and the modification was

completely invalidated by a subsequent modification restoring the *status quo ante*); *American Iron Oxide Company v. DEP*, 2005 EHB 748 (appeal dismissed as moot where consent order *expressly states that it supersedes* a prior compliance order that was the subject of the appeal); *Amber Energy, Inc. v. DEP*, 1998 EHB 1111 (appeal dismissed as moot where order that was the subject of the appeal was *specifically rescinded* by the Department); *Nazareth Borough Municipal Authority v. DER*, 1988 EHB 1148 (consent order *superseded* previous NPDES permit parameters and replaced with new, specific parameters rendering the appeal of the original permit moot); *Jeff Lipton, et al. v. DEP*, 2008 EHB 223 (landowner's appeal of the Department's approval of a sewage module for a residential land development was moot in light of the Department's *rescission of the approval*); *Marilyn Moriniere, et al. v. DER*, 1995 EHB 395 (holding that when the *Department rescinds its approval* of a planning module for sewering a real estate development that is the subject of the appeal, the appeal must be dismissed as moot); *Pequea Township, et al. v DER*, 1994 EHB 755 (appeal from a Department order rendered moot where the DER *has withdrawn its order by signed stipulation*); *see also Borough of Edinboro v. DEP*, 2000 EHB 1167 (appeal rendered moot where the Department *issued letter expressly withdrawing* previously-issued letter that formed the basis of the appeal).

The Department also relies heavily on *Stewart & Conti Dev. Co., Inc. v. DEP*, 2004 EHB 18, which it claims is "directly analogous" to these appeals. Not so. In that case, the appellants appealed the Department's disapproval of an Act 537 plan update. During the pendency of the appeal, the township revised its plan and the Department subsequently approved the revised plan. The Board found that the new plan supplanted the old plan under appeal. Hence, the new plan mooted out the old plan and, consequently, the appeal. In this case, there is no new plan in effect to supersede the 2009 update. Rather, we have a COA that requires the promulgation of a future

plan update that may or may not be approved and may or may not take effect until a year or more from now.

The Department asserts that the ongoing appeals jeopardize the available sewage disposal capacity for existing and planned development in the Township because they are hindering the Township's ability to convey sewage to the Central Delaware County Authority ("CDCA"). The Department contends that the appeals are negatively impacting the CDCA's ability to obtain bond insurance and may also jeopardize the $1 million H2O Grant the CDCA obtained from the Commonwealth Financing Authority. Even if any of this is true, these arguments do not advance the Department's theory on mootness in any way.

The last noteworthy argument made by the Department is that the relief sought by the appellants of overturning the 2009 update is drastic, not feasible, and quixotic. The Department argues that such relief would essentially replace the 2009 Plan with the 2002 Plan, which it claims is now outdated and incapable of meeting the sewering needs of the Township. We are not sure if that is the case, but if it is, we are left to wonder that, if approval of the 2009 Plan has already been withdrawn by the adoption of the COA as the Department argues, is the 2002 Plan already in effect? In that case, the 2002 Plan would be in effect by the Department and Township's own doing, not as a result of any relief sought in these appeals. At any rate, this argument does not advance the Department's theory on mootness and it is not a ground for dismissal of these appeals.

Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PATRICIA A. WILSON	:	
	:	
v.	:	**EHB Docket No. 2009-024-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, NEWTOWN TOWNSHIP, Permittee and BPG ENTITIES, THE ROUSE GROUP DEVELOPMENT COMPANY, LLC, and ASHFORD LAND COMPANY, L.P., Intervenors	:	

PAUL I. GUEST, JR.	:	
	:	
v.	:	**EHB Docket No. 2009-026-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, NEWTOWN TOWNSHIP, Permittee and BPG ENTITIES, THE ROUSE GROUP DEVELOPMENT COMPANY, LLC, and ASHFORD LAND COMPANY, L.P., Intervenors	:	

ORDER

AND NOW, this 23rd day of March, 2010, the Department's motion to dismiss is hereby **denied.**

ENVIRONMENTAL HEARING BOARD

BERNARD A. LABUSKES, JR.
Judge

DATED: March 23, 2010

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

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MARYANNE WESDOCK, ESQUIRE
ACTING SECRETARY TO THE BOARD

ASHTON INVESTMENT GROUP, LLC	:	
	:	
v.	:	**EHB Docket No. 2009-145-L**
	:	
	:	**Issued: March 26, 2010**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

OPINION AND ORDER
ON PETITION TO INTERVENE

By Bernard A. Labuskes, Judge

Synopsis

A township's petition to intervene is granted in an appeal by a developer of a Department order denying the developer's private request to order a revision of the township's Act 537 plan.

OPINION

Before the Board is a petition to intervene filed by Hellam Township, York County (the "Township") in the appeal by Ashton Investment Group, LLC ("Ashton") of the Department of Environmental Protection's (the "Department's") denial of Ashton's private request that the Department order a revision of the Township's Act 537 sewage facilities plan. Ashton filed the private request after Hellam Township withdrew a similar request for approval that it had previously made on Ashton's behalf. The Department's denial letter stated that Ashton's request was not approved in part because Ashton failed to show that the Township's current Act 537 plan is inadequate for Ashton's needs or that the Township is failing to implement its Act 537

plan. Further, the Department stated that the water sampling submitted by Ashton to support its request was unacceptable, particularly given the environmental concerns raised by the Township through its environmental consultant at the time that it withdrew the prior request. The Department said: "The information provided in the private request package fails to document that the subdivision, as proposed, will adequately protect the waters of the Commonwealth and will not cause Nitrate/Nitrogen pollution of the proposed and existing individual water supplies within this subdivision."

The Township has petitioned to intervene, claiming among other things that the outcome of the Board's decision will affect the Township's own feasibility report process, which in turn affects the determination of the amount and size of lots which would be necessary to support on-lot sewage disposal systems. Ashton opposes the Township's intervention, largely because the Township and the Department are on the same side of the issues and the Township's participation would add nothing of value to the proceeding.

The Board's governing statute and rules do not make it difficult to intervene in a pending matter. ("Any interested party may intervene in any matter before the board." 35 P.S. § 7514(e), and *see generally* 25 Pa. Code § 1021.81 (Board rules for intervention)). A person or entity seeking to intervene must have an interest that is "substantial, direct and immediate." *Elser v. DEP*, 2007 EHB 771, 772; *Borough of Glendon v. DEP*, 603 A.2d 226, 233 (Pa. Cmwlth. 1992). "We will allow a party to intervene where 'the person or entity seeking intervention will either gain or lose by direct operation of the Board's ultimate determination.'" *CMV Sewage Co. v. DEP*, EHB Docket No. 2009-105-L (Feb. 17, 2010); *Sechan Limestone Indus., Inc. v. DEP*, 2003 EHB 810, 812.

Although neither party mentions it, our rules require an appellant to serve a copy of its notice of appeal on a "recipient of the action" that is being appealed. 25 Pa. Code § 1021.151(g). "Recipient of the action" includes "[a]ny affected municipality . . . in appeals involving a decision under sections 5 or 7 of the Sewage Facilities Act (35 P.S. §§ 750.5 and 750.7)." 25 Pa. Code § 1021.151(h)(2). Section 5 of the Sewage Facilities Act relates, among other things, to private requests, such as the one involved in this case. As the recipient of an action as described in Section 1021.151(h)(2), the Township may intervene as of course simply by filing an entry of appearance within 30 days of service of the notice of appeal. 25 Pa. Code § 1021.151(j). Although the Township was not able to take advantage of this provision because it did not intervene within 30 days of Ashton's appeal, these rules show beyond any doubt that a Township has standing to intervene in appeals involving its 537 plan.

Even in the absence of these rules, the Township's interest is obvious. Ashton is seeking to have the Township's plan revised against the Township's wishes. It is hard to imagine that there is any person or entity that has an interest in the Township's plan that is greater than the interest of the Township. Furthermore, as we recently held in *CMV Sewage Co., supra,* "[w]hatever affects the natural environment within the borders of a township or county affects the very township or county itself." *Id.*, slip op. at 4 (quoting *Franklin Township v. DER*, 452 A.2d 718, 723 (Pa. 1982)).

Ashton does not question the Township's standing to intervene *per se*. Rather, it argues that the Township and the Department's interests are coextensive and the Township's participation will not add anything of value. We find these contentions hard to believe given the fact that no party is likely to be more familiar with the sewage disposal needs of the Township than the Township itself. The Township and the Department's roles and perspectives in

sewerage planning are very different, and we welcome the Township's input. In this as in any case we will be sensitive to the presentation of cumulative evidence, but the mere threat of such presentation is no basis in itself to preclude the Township from participating in the proceedings.

Accordingly, we enter the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

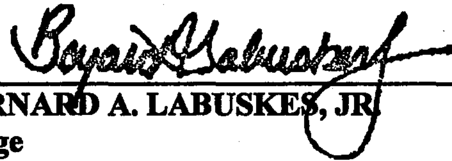
ASHTON INVESTMENT GROUP, LLC	:	
v.	:	**EHB Docket No. 2009-145-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 26th day of March, 2010, the petition to intervene of Hellam Township is hereby **granted.** All future filings with the Board in this appeal shall contain the following caption:

ASHTON INVESTMENT GROUP, LLC	:	
v.	:	**EHB Docket No. 2009-145-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, and HELLAM TOWNSHIP, Intervenor	:	

ENVIRONMENTAL HEARING BOARD



BERNARD A. LABUSKES, JR.
Judge

DATED: March 26, 2010

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

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MARYANNE WESDOCK, ESQUIRE
ACTING SECRETARY TO THE BOARD

M & M STONE CO.	:	
	:	
v.	:	**EHB Docket No. 2005-343-L**
	:	**(Consolidated with 2005-344-L,**
COMMONWEALTH OF PENNSYLVANIA,	:	**2006-110-L, and 2007-098-L)**
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION and TELFORD BOROUGH	:	**Issued: March 26, 2010**
AUTHORITY, Intervenor	:	

OPINION AND ORDER ON MOTION TO REOPEN THE RECORD AND RECONSIDER THE JANUARY 31, 2008 ADJUDICATION

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board denies a petition to reopen the record and reconsider a final order. The petition was filed late and does not meet the substantive criteria for granting a petition for reconsideration or to reopen the record under the Board's rules. The petition failed to introduce any facts or evidence that would justify a reversal of the prior adjudication or set forth any other compelling or persuasive reason for reconsideration.

OPINION

M & M Stone Co. ("M&M") has filed a petition entitled "Appellant M&M Stone Co.'s Petition To Reopen The Record And Reconsider The January 31, 2008 Adjudication Pursuant To The Supreme Court's December 8, 2009 Order." This matter originated when the Department of Environmental Protection (the "Department") issued a series of orders to M&M in connection with water loss complaints related to M&M's quarry operations in West Rockhill Township,

Bucks County. After a lengthy hearing, the Board dismissed M&M's challenges to those orders in an adjudication issued more than two years ago on January 31, 2008. We found in our 52-page adjudication that the preponderance of the evidence supported the Department's finding that certain water supply wells had been adversely affected by M&M's operations, including a well owned by the Telford Borough Authority ("TBA") known as TBA # 4. *M & M Stone Co. v. DEP*, 2008 EHB 24. M&M did not file a petition to reconsider our adjudication or to reopen the record in 2008. It did, however, file an appeal to the Commonwealth Court. The Commonwealth Court affirmed our decision in October 2008. *M & M Stone Co. v. DEP*, 383 C.D. 2008 (Pa. Cmwlth., October 17, 2008). In its unreported opinion, the Court held:

> After a thorough review of the evidence supporting the Board's findings and the law upon which their decision was based, we cannot agree with M&M that the Board committed errors of law in not finding that the Department's actions were unreasonable or outside its authority. Therefore, we agree with the Board's determination that the cessation orders were reasonable and in accordance with the law in all respects.

Id. M&M then filed an application for reargument/reconsideration or, in the alternative, en banc reargument, which was denied by the Commonwealth Court in December 2008. *M & M Stone Co. v. DEP*, 383 C.D. 2008 (Pa. Cmwlth., December 4, 2008). In January 2009, M&M filed a petition for allowance of appeal to the Pennsylvania Supreme Court. In July 2009, M&M filed an application to supplement its allocatur petition with newly discovered evidence. In a December 2009 order, the Pennsylvania Supreme Court denied both the allocatur petition and the application to supplement. The order reads as follows:

> **AND NOW**, this 8th day of December, 2009, Petitioner's Petition for Allowance of Appeal is **DENIED**, and Petitioner's Application to Supplement Petition for Allowance of Appeal with Newly Discovered Evidence is **DENIED**, both without prejudice to raise after-discovered evidence claims before the Environmental Hearing Board.

M & M Stone Co. v. DEP, 985 A.2d 973 (Pa. 2009). M&M filed its petition to reopen/reconsider

with us following the Supreme Court's order.

M&M's petition asks that we reopen the record, allow for discovery, and reconsider our adjudication. The petition does not, however, specify under which rule it is seeking relief. Instead, the petition asserts that the Supreme Court "specifically ordered the Board to consider after-discovered evidence in this matter." It says that we "must comply with the Supreme Court's Order, open the record in this appeal, allow discovery and reconsider [our] Adjudication."

We do not share M&M's interpretation of the Supreme Court's order. The Supreme Court's order does not *require* us to do anything. At the most basic level, the Court did not remand the matter to the Commonwealth Court or the Board. It specifically does not require us to "open the record in this appeal, allow discovery, and reconsider [our] Adjudication." Rather, the Court's order simply says that the order itself is "without prejudice" to whatever rights M&M otherwise has "to raise after-discovered evidence claims." The order itself neither creates nor overrides any rights or obligations. Any right on the part of M&M or obligation on the part of this Board must be premised upon some source independent of and distinct from the order. We do not see the order as preempting our rules, which of course have the force of regulations. 25 Pa. Code § 1021.1 *et seq*. The order did not suggest in any way that the record should or, in M&M's words, "must" be reopened or that our adjudication should or "must" be reconsidered.

We reject any implication that the Court's order reflects a determination that M&M's efforts to start from scratch have any merit. To the contrary, the Court's order is entirely neutral in that regard. We view that Court's order as nothing more than an acknowledgment of the reality that claims related to after-discovered evidence must be presented in the first instance to the trier of fact. An appellate court is not designed to deal with such matters without the benefit

of a preexisting factual record. It is up to us to address the claims at the trial level, and in our view, that exercise must be conducted in full conformance with the law as set forth in our rules.

We turn then to the applicable rules. Unfortunately, and perhaps tellingly, M&M does not direct us to any particular Board rule that would support its effort to reboot this case. Indeed, despite the fact that the Department in its response in opposition to the petition criticizes M&M for failing to identify a rule to support its petition, M&M does not address that problem in its reply brief. As a result, we are left to guess at the procedural basis for reopening a record that we closed more than two years ago.

It could be that M&M is seeking relief under Rule 1021.152 regarding reconsideration of final orders. That rule provides in part:

> (a) A petition for reconsideration of a final order shall be filed within 10 days of the date of the final order. A party may file a memorandum of law at the time the motion or response is filed. Reconsideration is within the discretion of the Board and will be granted only for compelling and persuasive reasons. These reasons may include the following:
>
> (1) The final order rests on a legal ground or a factual finding which has not been proposed by any party.
>
> (2) The crucial facts set forth in the petition:
>
> (i) Are inconsistent with the findings of the Board.
>
> (ii) Are such as would justify a reversal of the Board's decision.
>
> (iii) Could not have been presented earlier to the Board with the exercise of due diligence.

25 Pa. Code § 1021.152. Or, perhaps M&M is seeking relief under Rule 1021.133, which pertains to petitions to reopen the record prior to an adjudication and provides in part:

> (a) After the conclusion of the hearing on the merits of the matter pending before the Board and before the Board issues an adjudication, the Board, upon its own motion or upon a petition filed by a party, may reopen the record as provided in this section.

(b) The record may be reopened upon the basis of recently discovered evidence when all of the following circumstances are present:

(1) Evidence has been discovered which would conclusively establish a material fact of the case or would contradict a material fact which had been assumed or stipulated by the parties to be true.

(2) The evidence is discovered after the close of the record and could not have been discovered earlier with the exercise of due diligence.

(3) The evidence is not cumulative.

(c) The record may also be reopened to consider evidence which has become material as a result of a change in legal authority occurring after the close of the record. A petition to reopen the record on this basis shall specify the change in legal authority and demonstrate that it applies to the matter pending before the Board. Such a petition need not meet the requirements of subsection (d)(2) and (3).

(d) A petition seeking to reopen the record shall:

(1) Identify the evidence which the petitioner seeks to add to the record.

(2) Describe the efforts which the petitioner had made to discover the evidence prior to the close of the record.

(3) Explain how the evidence was discovered after the close of the record. A petition filed under subsection (b) shall be verified and all petitions shall contain a certification by counsel that the petition is being filed in good faith and not for the purpose of delay.

25 Pa. Code § 1021.133.

It is immediately apparent that there are fundamental problems with M&M's petition regardless of which rule applies. First is the timing of the petition. Under Rule 1021.152, a petition for reconsideration must be filed within 10 days of the date of a final order. 25 Pa. Code § 1021.152(a). A petition to reopen the record must be filed in the narrow window of time between the conclusion of the hearing on the merits and before the Board issues an adjudication. 25 Pa. Code § 1021.133. M&M is asking us to reopen a record that we closed in 2007. Alternatively, M&M is asking us to reconsider an adjudication that we issued in January 2008.

In either case, M&M's petition is much too late.[1] *See Koch v. DEP,* EHB Docket No. 2009-057-L (March 1, 2010) (petition rejected in part because it was one day late); *DEP v. Pecora*, 2007 EHB 156, 158 (strict compliance with time limits generally required); *Angela Cres Trust of June 25, 1998 v. DEP*, 2009 EHB 446, 448 (denying request to reopen record where request was made more than a year after the filing of the post-hearing brief).

M&M posits that it should be allowed to seek reconsideration/reopening (hereinafter "reconsideration") now because it did not discover the new evidence until after it appealed our adjudication to the Commonwealth Court, and that appeal deprived the Board of jurisdiction. We see the appeal and loss of jurisdiction, however, as beside the point. Even if M&M had not appealed, we would have been foreclosed from reconsideration by the very clear terms of our own rules. By the same token, the pendency of an appeal does not alter or supersede the rules regarding reconsideration. If it did, the time limits set forth in the rules would be illusory.

It is perhaps worth noting that, although the deadlines in our rules may seem tight from M&M's perspective, short deadlines are entirely appropriate when it comes to reconsideration. M&M's unprecedented petition is completely at odds with the notion of administrative finality. Unlike, say, criminal proceedings where claims of after-discovered evidence can be made years after a conviction to show that a defendant is innocent, *see generally* the Post Conviction Relief Act, 42 Pa.C.S § 9545, rules related to civil and administrative hearings do not allow for such reconsideration in perpetuity. *See, e.g.*, Pa.R.Civ.P. 227.1 (10 days); 1 Pa. Code § 35.241 (15 days). It must also be remembered that the Board's adjudications are usually only issued after

---

[1] M&M has not requested that we consider its petition *nunc pro tunc*. Therefore, it is not necessary for us to decide whether such relief is available. Even if it were theoretically available, it is ordinarily dependent upon preconditions not present here, such as a breakdown in the Board's procedures or where no party would suffer prejudice from the grant of such relief. *Cf.* 25 Pa. Code § 1021.53a (appeals *nunc pro tunc*); *Utica Mutual Ins. Co. v. Dep't of Labor and Industry*, 566 A.2d 911, 913 (Pa. Cmwlth. 1989), *aff'd*, 591 A.2d 1052 (Pa. 1991).

months or more often years of pre-hearing proceedings. Indeed, M&M's appeal was filed in 2005 and we issued our adjudication in 2008. What may seem fair to one party may very well be unfair to another party. In this case, for example, TBA's plans regarding TBA # 4 must presumably remain in limbo while M&M pursues its petition. Parties need to understand that they must present their best possible case *before* judgment is entered. *Gasbarro v. DEP*, 1998 EHB 688, 691. At some point, finality must prevail, not only for the good of the parties, but for the good of the system as a whole. *Exeter Citizens' Action Committee v. DEP*, 2004 EHB 179, 181 (allowing party "two bites at the proverbial apple" necessarily prejudices the other parties).

The second fundamental problem with M&M's petition in addition to its untimeliness is that it attempts to go well beyond the relief that is available upon reconsideration or reopening of the record. Even when reconsideration or reopening the record is permitted, nothing in the Board's rules allows a party to start from scratch as proposed by M&M. Rather, a party is permitted to identify *specific evidence* that might warrant a reopening of the record to receive *that* evidence, 25 Pa. Code § 1021.133(d)(1), or state *crucial facts* that might justify our reconsideration of a final order based upon *those* facts, 25 Pa. Code § 1021.152(a)(2). Nothing in the rules contemplates that the Board will issue a new pre-hearing order that re-starts a case from the beginning as demanded by M&M. To allow parties to make such a request would result in protracted, never-ending litigation.

A related shortcoming in the petition is that it fails to identify with specificity all of the facts or evidence upon which it bases its request for extraordinary relief, instead suggesting that reopened discovery could reveal new information. M&M's petition is replete with mysterious allusions to new but unidentified evidence that may or may not be revealed in future discovery. As one example, it cryptically says, "Additionally, there is reason to believe that there is

additional information still being improperly withheld by DEP and others in violation of M&M's due process rights." This is not proper. If we reopen a record at all, it will be to consider specific evidence that is identified with particularity and in accordance with the criteria set forth in our rules. We will not reopen a closed record based upon such imprecise supposition.

M&M's petition contains two vague references that "[t]here is also, *inter alia*, after-discovered evidence that TBA wells unquestionably impacted two private wells near TBA 4," and "M&M was not aware of the other two private wells TBA impacted until the fall of 2008." (¶¶ 12, 20.) M&M does not identify any specific evidence in support of these statements. The Department in its response speculates at length on what these references might mean, but we will not participate in that speculation. Pointedly, M&M made no attempt in its reply brief to answer the Department's detailed speculations, instead relying exclusively on a June 20, 2005 e-mail (to be discussed below). M&M attached lengthy exhibits to its petition but nowhere in the petition does it reference any support in the exhibits for its allegations. It would not be appropriate for us to attempt to piece through those exhibits in an independent effort to understand M&M's claims. We can go no further with these allegations.

Yet another deficiency in M&M's petition is that, to the extent it is relying upon Rule 1021.133, it has failed to comply with the mandatory requirement that the petition be verified and contain a certification of counsel that the petition is being filed in good faith and not for purpose of delay. 25 Pa. Code § 1021.133(d)(3). We do not view this requirement as a meaningless technicality. *Gasbarro v. DEP*, 1998 EHB 688, 692-93.

Finally, M&M incorrectly and repeatedly asserts that this Board *must* reopen the record. This is simply not true. As previously discussed, the Supreme Court's order does not require us to reopen the record. Aside from that, the language of our rules makes it very clear that

reconsideration and reopening are discretionary, even where all of the criteria of the rules are met. 25 Pa. Code §§ 1021.133 (Board *may* reopen the record) and 1021.152 (reconsideration within the discretion of the Board).

Thus, even if M&M had come forward with the most compelling of evidence "undermining our adjudication," we would not be in a position to grant its requested relief. Arguably, our discussion should stop there. Nevertheless, perhaps as much to satisfy our curiosity as anything else, we have examined the evidence put forth by M&M in support of its petition and we find that it falls well short of the criteria in our rules for granting the extraordinary relief that M&M is seeking.

There are only two items of evidence identified in M&M's petition. The first is a June 20, 2005 e-mail authored by Benjamin Greeley, a geologist with the Department's Southeast Regional Office, that was sent to John Fabian, Keith Pauley, Mark Johnson, and Gerard Centofanti, whose positions are unknown. The e-mail states in relevant part:

> A separate but similar issue concerns a domestic well near [TBA] Well # 4. Apparently the water level in the well has declined. Mike Hill, DMO-Pottsville, suspects that Telford Well #4 is affecting the domestic well because of the proximity and orientation of bedrock strike. It is less likely that the quarry is affecting the well, according to Mike.

M&M describes the second item of evidence, or "fact," if we can call it that, in Paragraph 11 of its petition as follows:

> The after-discovered evidence also includes, *inter alia*, new testimony of Mark Fournier, Manager of Intervenor TBA, obtained after the Commonwealth Court affirmed the Adjudication, in which Mr. Fournier directly contradicted his prior testimony before this Board. During the initial hearing before this Board, Mr. Fournier testified that TBA would place TBA Well No. 4 ("TBA 4") back into service. After the Commonwealth Court affirmed the Adjudication, Mr. Fournier changes his testimony and testified that TBA 4 may not be placed back into service "**ever again**." (Emphasis M&M's.)

It is not clear from the petition where this statement came from, but the Department in its

response identifies an October 27, 2008 deposition as the source, which appears to be correct.

Both Rule 1021.133 and Rule 1021.152 require a strong explanation of why the allegedly new facts could not have been presented earlier with the exercise of due diligence. 25 Pa. Code §§ 1021.133(a)(2)(iii), 1021.152(b)(2). *See also* 25 Pa. Code §§ 1021.133(d)(2) (requiring description of efforts that petitioner made to discover the evidence prior to the close of the record) and 1021.133(d)(3) (requiring description of how the evidence was discovered after the close of the record). The best albeit not exclusive way to show that evidence could not have been uncovered with the exercise of due diligence is to show that the evidence did not exist. The June 20, 2005 e-mail obviously existed years before our adjudication. Therefore, M&M is left to argue that the Department "hid" this e-mail until after our hearing. The Department responds that it produced thousands of pages of documents and it has no way of knowing whether the June 30, 2005 e-mail was contained among those thousands of pages. It denies that it made any attempt to hide the document.

M&M has not satisfied its burden of proving its due diligence. First, as previously noted, its petition is neither verified nor certified in accordance with our rules. Second, M&M's claim that a document was not included among thousands of other documents that were disclosed puts us in a he-said/she-said situation. M&M has not presented us with any cataloging, BATES stamping, or other basis to support its claim that the document was not turned over or made available. In fact, it appears that the Department turned the document over in the context of a federal civil rights action, which begs the question why the Department would "hide" the document in the EHB litigation but produce it in a federal lawsuit. M&M also provides no details on how the document was uncovered, which might have supported a claim that it had not been revealed earlier. As to the Fournier testimony, it appears to be true that the testimony was

elicited after our adjudication, but there is no showing, let alone proof, that the statement could not have been elicited earlier with directed questioning in Fournier's prior depositions and hearing testimony.

Aside from the due diligence problem, M&M's proffered evidence appears to be much ado about nothing. Both of our rules contain a requirement that the new evidence must be so important that it would contradict the Board's material factual findings. 25 Pa. Code §§ 1021.133(a)(2)(i) and 1021.152(b)(1). In the case of reconsideration, the new evidence must not only be contradictory, it must be so critical that it would "justify a reversal of the Board's decision." 25 Pa. Code § 1021.152(a)(2)(ii). Both the June 20, 2005 e-mail and Fournier's testimony fall well short of meeting these requirements.

M&M argues that the 2005 e-mail undermines the foundation of the Department's hydrogeological investigation by the Department's expert, Michael Hill, and undermines the basis for his expert opinion and, therefore, the Board's adjudication. M&M points specifically to Findings of Fact 158 through 161 as being undermined by this allegedly after-discovered evidence. Those findings state:

> 158. Although water levels in the Private Wells were affected by TBA 4, as well as precipitation, Hill and Brady, as well as Ignacy Nasilowski, another qualified hydrogeologist, credibly testified that the overwhelming cause of their water losses was the increase in pumping from the Quarry. (T. (5/22) 84 (5/23) 68-70, 74-75, 192-93 (5/24) 18-29, 34-35 (5/29) 90-92, 155-57 (5/30) 213-223, 232, 245 (5/31) 15, 24-37, 44-45, 67, 89, 98-99, 103-09; DEP Ex. 4-6, 71, 82, 84, 88; M&M Ex. 148-51.)
>
> 159. Guiseppe and Grinrod's opinions support the conclusion that the Private Wells were not suffering their major losses from TBA 4's pumping. (T. (5/29) 92-94, 156.)
>
> 160. The Department and TBA's experts are more convincing and credible than M&M's experts to the contrary regarding the Private Wells because of their more extensive experience in water loss investigations and because they better explain the overall pattern of events and trends in the study area.

161. M&M adversely affected public and private water supplies by diminution.

M & M Stone Co. v. DEP, 2008 EHB 24, 55-56. M&M also argues that this e-mail directly contradicts Hill's hearing testimony that "the dewatering of these water supplies in my opinion is not directly related to TBA-4's influence."

This e-mail is not inconsistent and is, in fact, entirely consistent with the findings of the Board. As both parties point out, we found that "*Although water levels in the Private Wells were affected by TBA 4*, as well as precipitation ... the overwhelming cause of their water losses was the increase in pumping from the Quarry." 2008 EHB at 55 (emphasis added). Further, we found that "[t]he Private Wells were not suffering their *major* losses from TBA 4's pumping." 2008 EHB at 56 (emphasis added). Both these findings suggest that the private wells were affected by both the quarry *and TBA # 4*. Greeley's e-mail regarding Hill's "suspicions" also suggests that the private wells were affected by both the quarry and TBA # 4. We found, after listening to the testimony and weighing all the evidence including, but far from limited to, the testimony of Mr. Hill that "M&M adversely affected ... private water supplies by diminution." *Id.* Nothing in the e-mail suggests that this is not the case.

Because we find no inconsistencies between the e-mail and our prior findings, it naturally follows that the newly found evidence would not compel or justify a reversal of our decision. The evidence is, at best, cumulative and, therefore, does not justify reconsideration. *Lang v. DEP*, 2006 EHB 7, 25-26 ("Our rule allows the record to be reopened to remedy mistakes, not simply to add more evidence."); *Noll v. DEP*, 2005 EHB 24, 31 ("To reopen a closed record to admit 'new' evidence to establish a point which is already established and that the opposition has conceded and stipulated to would be pointless."). In our adjudication, we held that the Department satisfied its burden of proving by a preponderance of the evidence that pumping at

the quarry adversely affected and would continue to adversely affect the wells, and its orders were, therefore, supported by the facts and were reasonable. Because the e-mail does not call into question any of our findings of fact that support this holding, it provides no basis for reconsidering our decision.

Finally, the e-mail has virtually no persuasive value in its own right. The e-mail reflects little more than one Department employee's impression of what he thought Michael Hill "suspected" about some unnamed private well. The author's statement reflects no personal knowledge of an important new fact. It does not identify a statement; it characterizes another individual's "suspicions." To the extent that M&M believes the e-mail somehow throws doubt on the credibility of Hill's expert testimony, we note that after-discovered evidence proffered for impeachment is a particularly inappropriate basis for reopening a record. *Commonwealth v. Dennis*, 950 A.2d 945, 951 (Pa. 2008); *Commonwealth v. McCracken*, 659 A.2d 541, 545 (Pa. 1995); *D'Emilio v. Bd. of Supervisors, Township of Bensalem*, 628 A.2d 1230, 1233 (Pa. Cmwlth. 1993).

With respect to Mark Fournier's latest deposition, M&M argues that Fournier directly contradicted his prior testimony before the Board when he testified that TBA # 4 may not be placed back into service "ever again." M&M, however, has not identified any finding of fact that is inconsistent with this purported new evidence. Even taking the evidence to be true and assuming its admissibility, it would not cause us to deviate from our key finding that "[t]he quarry deepening had a direct impact on the ground water that TBA # 4 and private wells had to rely upon," 2008 EHB at 60, which forms the basis for our affirming the Department's orders. 2008 EHB at 59.

In any event, we believe that Fournier's testimony throughout these proceedings,

including this latest deposition testimony, has been consistent. TBA # 4 has an arsenic problem. The problem can be treated, but given the ongoing uncertainty created by litigation, TBA has not decided what to do about it. TBA's position is illustrated in a broader quotation of the deposition M&M appears to be relying upon:

> Q. Are you planning on putting TBA 4 back in service?
> A. Possibly.
> Q. When?
> A. Once all these appeals are exhausted.
> Q. So if the appeals are exhausted, that's when you are going to put it back in service?
> A. Possibly.
> Q. What are the other possibilities?
> A. The – we don't use four ever again. We go to another location.
> Q. How likely is that?
> A. I don't know.
> Q. But given – I know you can't predict the future, but what's more likely, it goes back into service or doesn't go back into service?
> A. I think it is probably more likely that it does go into service.
> Q. When are you going to make that –
> A. I don't like to speculate.
> Q. Understood.
> When are you going to make that decision?
> A. When all these appeals are exhausted. I don't want to put good money into something that we need to do before we actually know whether it is going to – the quarry is going to stay closed and whether or not the quarry ever gets to go back into service.
> At this point, it doesn't look like that's going to happen unless something else changes.
> Q. The quarry is going to go back into service?
> A. Uh-huh. I don't know that's happening or not. Once those things shake themselves out, those decisions will be made.
> Q. How quickly after the exhaustion of the appeals will the decision be made?
> A. First of all, I won't be the only person making that decision.
> Q. Understood.

(DEP response Ex. A.) In any event, the details of M&M's restore-or-replacement plan were not

the subject of M&M's appeal of the Department's order requiring that a plan be submitted.

Accordingly, we issue the Order that follows.

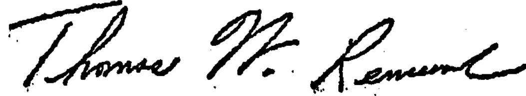
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

M & M STONE CO.	:	
	:	
v.	:	**EHB Docket No. 2005-343-L**
	:	**(Consolidated with 2005-344-L,**
COMMONWEALTH OF PENNSYLVANIA,	:	**2006-110-L, and 2007-098-L)**
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION and TELFORD BOROUGH	:	
AUTHORITY, Intervenor	:	

ORDER

AND NOW, this 26th day of March, 2010, it is hereby ordered that M & M Stone Co.'s Petition to Reopen the Record and Reconsider the January 31, 2008 Adjudication is **denied.**

ENVIRONMENTAL HEARING BOARD

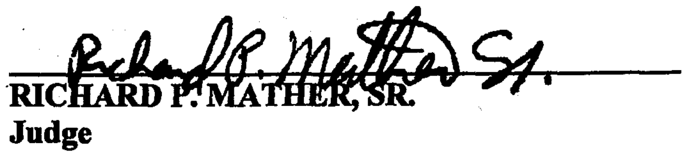


THOMAS W. RENWAND
Chairman and Chief Judge

MICHELLE A. COLEMAN
Judge

BERNARD A. LABUSKES, JR.
Judge

MICHAEL L. KRANCER
Judge



RICHARD P. MATHER, SR.
Judge

DATED: March 26, 2010

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

SALVATORE PILEGGI	:	
	:	
v.	:	**EHB Docket No. 2009-044-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: March 26, 2010**

OPINION AND ORDER
ON CROSS MOTIONS FOR SUMMARY JUDGMENT

By Michelle A. Coleman, Judge

Synopsis:

The Board denies cross motions for summary judgment. A dispute of material facts and judgment of credibility must be determined at a hearing on the merits, not on paper.

OPINION

The Board denies cross motions for summary judgment because there is a dispute of material facts warranting a hearing on the merits. This appeal involves the Department of Environmental Protection's (Department or DEP) denial of Salvatore Pileggi's (Pileggi or Appellant) proposed plan revision to the official sewage facilities plan of Newton Township, Lackawana County. At issue in this appeal is whether the Department acted properly on March 6, 2009 when it denied Pileggi's planning module requesting Newton Township to revise its official plan. The Department denied the proposed planning module for failure to provide proof of opportunity for comment by the appropriate planning agencies of the municipality and proof

of public notice of the planning module submitted for municipal review.

On October 31, 2008, Pileggi submitted the proposed plan revision to Newton Township's official sewage facilities plan. His plan proposed construction of a sewage treatment facility on his tract of land. On November 12, 2008, Newton Township sent a letter to Pileggi stating that he owed outstanding fees for a previously submitted and reviewed plan. The letter concluded by stating, "The Board of Supervisors is also requesting an additional $1,450.00 to be put into escrow for the review of the plans you have recently submitted before they can be reviewed . . . ." Letter dated November 12, 2008 from Newton Township Treasurer to Pileggi. Pileggi admits to receiving this letter and sent a response on November 14, 2008 stating that he denies he has outstanding fees to be paid.

A meeting was held on January 16, 2009 between Pileggi, the Department and representatives of the Township. At the meeting the Department informed Pileggi that his planning module was incomplete and not deemed approved since the Township did not conduct a review of his submission due to outstanding fees owed to the Township. Subsequently, on February 12, 2009 the Department sent a letter to Pileggi stating:

> At this time DEP has not determined that your planning module has in fact been deemed approved by the municipality. Such a determination would be made in the context of a formal review through our regular process. If you believe the module to be deemed approved by the municipality, DEP will process a submission in accordance with our regulations. In order to start this process, please submit two (2) copies of the sewage facilities planning module and any other information that supports your contention that your planning module has been deemed approved.

Letter dated February 12, 2009 from the Department to Pileggi. On February 23, 2009 representatives from the Department met with Pileggi, at which time he submitted his planning module to the Department for its review. Pileggi contends that his planning module was deemed

approved by Newton Township because it had not acted within a timely manner.

On March 6, 2009, the Department denied Pileggi's submission because the planning module was not complete in accordance with Department regulations, specifically 25 Pa. Code Section 71.53(d)(2) (relating to comments by the official planning agency) and Section 71.53(d)(6) (relating to public notice). On March 27, 2009, Pileggi sent a letter to Newton Township informing the Township that he was publishing notice in the Abington Journal noticing that Newton Township's failure to act on his sewage planning application resulted in an approval pursuant to Section 71.53(d)(2). The Township then submitted a public notice in the Abington Journal indicating that Newton Township denies any such approval occurred with respect to Pilieggi's sewage planning application. On April 2, 2009 Pileggi filed this appeal.

Discussion

We will only grant a motion for summary judgment when the record, defined as the pleadings, depositions, answers to interrogatories, admissions, affidavits, and certain expert reports, shows that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See Young v. Department of Transportation*, 744 A.2d 1276 (2000); *County of Adams v. DEP*, 687 A.2d 1222 (Pa. Cmwlth. 1997); *Holbert v. DEP*, 2000 EHB 796, 807-09; *see also* Pa.R.C.P. 1035.2. The Board views the record in a light most favorable to the non-moving party and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. *Holbert*, 2000 EHB at 808.

In order for the Department to approve a proposed plan revision for a new land development, the planning module must be complete in accordance with 25 Pa. Code § 71.53(d). The Department alleges that Pileggi's proposed plan revision submitted to the Department on February 23, 2009 did not contain proof of public notice and proof of comments from the

appropriate planning agencies of Newton Township.

With respect to comments from municipal planning agencies, Section 71.53(d)(2) provides:

> Comments by appropriate official planning agencies of a municipality, including a planning agency with area-wide jurisdiction if one exists, under the Pennsylvania Municipalities Planning Code (53 P.S. §§ 10101 – 11202) and the existing county or joint county department of health. Evidence that the sewage facilities planning module has been before these agencies for 60 days without comment shall be sufficient to satisfy this paragraph.

25 Pa. Code § 71.53(d)(2). Section 71.53(d)(2) requires comments by the local planning agencies to be submitted to the Department. This section can also be satisfied by submitting evidence indicating that the local planning agencies did not act on the planning module within 60 days thereby deeming the planning module approved. Pileggi contends that he has deemed his plan approved by Newton Township because the Township failed to act within 60 days. However, it appears that Pileggi did not provide the Department with evidence supporting that allegation. The Department argues that there was no deemed approval because of outstanding fees Pileggi owed to the Township, as embodied in the Township's November 12, 2008 letter sent to Pileggi. Pileggi denies that there are outstanding fees owed to the Township.

Clearly a genuine issue of whether Section 71.53(d)(2) has been satisfied remains in dispute. The Appellant bears the burden in this appeal and must provide the Board with a more developed record of evidence with respect to the alleged deemed approval. If there was no deemed approval, then comments from the local planning agencies needed to be provided to the Department when it was conducting its review. If no evidence of deemed approval can be shown by the Appellant, then the Appellant will be hard pressed to establish that the Department erred when it denied his planning module. Section 71.53(d)(2) requires that comments from local planning agencies be provided, and since this information is missing, the Department has the

discretion to deny the planning module.

With respect to notice, Section 71.53(d)(6) provides:

> Evidence documenting newspaper publication. The newspaper publication may be provided by the applicant or the applicant's agent, the municipality or the local agency by publication in a newspaper of general circulation within the municipality affected. When an applicant or an applicant's agent provides the required notice for publication, the applicant or applicant's agent shall notify the municipality or local agency and the municipality and local agency will be relieved of the obligation to publish. The newspaper notice shall notify the public where the plan is available for review and indicate that all comments regarding the proposal shall be sent to the municipality within which the new land development is proposed.

25 Pa. Code § 71.53(d)(6). Section 71.53(d)(6) requires publication in a newspaper of general circulation providing notice of the planning module submitted to the Township allowing the public to provide comments to the Township. The Department denied Pileggi's planning module because there was no evidence of notice given to the public of the planning module submitted to Newton Township. The Department contends that Pileggi did not provide proof of this public notice. Rather, the Department claims that a month after denying his planning module, Pileggi published a notice of deemed approval by the Township in the Abington Journal on April 1, 2009. This notice, the Department claims, is not the notice required by Section 71.53(d)(6). The notice that the Department needed was proof of public notice as stated in Section 71.53(d)(6) and that should have been published when he made his submission of the planning module to the Township for review. Pileggi's publication of deemed approval is not the notice required under Section 71.53(d)(6). Again, Pileggi has the burden of proof in this matter and must establish that such notice was appropriate under Section 71.53(d)(6) and occurred at the correct time, otherwise he will have difficulty establishing that the Department erred when it denied his planning module.

At this point, without a hearing on the merits the Board is unable to find that either party is entitled to judgment in its favor; therefore, both motions must be dismissed. In reviewing the record before the Board, both parties are clearly in dispute of the material facts thereby making the record unclear. Since there remains a genuine issue with respect to the material facts, as well as issues of credibility, neither party is entitled to judgment as a matter of law at this stage in the litigation. A hearing on the merits is the only manner in which to make the record clear. The Board will not conduct a trial on paper. *See Defense Logistics Agency v. DEP*, 2001 EHB 1215 (Where resolution of the case requires the Board to consider disputed facts and to make judgments concerning the credibility of witnesses, summary judgment is inappropriate.) The cross motions for summary judgment are denied.

Therefore, we enter the following order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

SALVATORE PILEGGI	:	
	:	
v.	:	**EHB Docket No. 2009-044-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

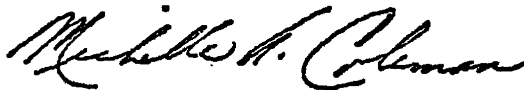
AND NOW, this 26th day of March, 2010, it is HEREBY ORDERED that the Department's Motion for Summary Judgment and the Appellant's Motion for Summary Judgment are **denied**.

It is further ordered that Newton Township shall be added as a party to the proceedings and the following caption shall be reflected on all future filings with the Board:

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

A hearing on the merits will be scheduled in the above-captioned appeal.

ENVIRONMENTAL HEARING BOARD



MICHELLE A. COLEMAN
Judge

DATED: March 26, 2010

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

RALPH H. JONES, JR. and ALBERTA R. JONES	:	
	:	
v.	:	**EHB Docket No. 2009-150-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: March 30, 2010**

OPINION AND ORDER ON
<u>PETITION TO INTERVENE</u>

By: Thomas W. Renwand, Chairman and Chief Judge

Synopsis:

The Pennsylvania Environmental Hearing Board grants a petition to intervene filed by a coal mining company in an appeal challenging the Pennsylvania Department of Environmental Protection's determination that Appellants' private water supply loss is not covered by the Bituminous Mine Subsidence Land Conservation Act (Mine Subsidence Act). The coal mining company's interests in the proceeding are substantial, direct, and immediate. If the Board would reverse the Department's determination, there would be a direct and substantial cost to the coal mining company.

OPINION

Discussion

Presently before the Pennsylvania Environmental Hearing Board is the Petition to

Intervene filed by a coal company, Consolidation Coal Company (Consolidation Coal). The Appellants, Mr. and Mrs. Ralph Jones, contend that they have suffered a water loss caused by the actions of Consolidated Coal and that they are entitled to a replacement water supply under the provisions of the Mine Subsidence Act and the implementing regulations.

Consolidation Coal seeks to intervene as a party. It contends that its interests in this matter are "substantial, direct and immediate" and that it is thus entitled to intervene as a party in this Appeal. *See* 35 P.S. Section 7514(e); 25 Pa. Code Section 1021.81 and *Borough of Glendon v. Department of Environmental Resources*, 603 A.2d 226, 233 (Pa. Cmwlth. 1992). Consolidation Coal is correct and they are entitled to intervene as a party.

In addition, the Board has revised its applicable Rule regarding intervention. 25 Pa. Code Section 1021.51(h)(3) and (j) now permit a coal mining company in the same position as Consolidation Coal to become a party by having its attorney enter his or her appearance within thirty days of the service of the notice of appeal.

> (h) For purposes of this section, the term "recipient of the action" includes the following:
>
> > (3) A mining company, well operator or owner or operator of a storage tank in appeals involving a claim of subsidence damage, water loss or contamination.
>
> (j) Other recipients of an action under subsection (h)(2)(3) or (4), may intervene as of course in the appeal by filing an entry of appearance *within 30 days of service of the notice of appeal* in accordance with Sections 1021.21 and 1021.22, *without the necessity of filing a petition for leave to intervene under Section 1021.81.*

In this case, it appears that the Appellants served Consolidation Coal in November 2009 with a copy of their Notice of Appeal. Since Consolidation Coal waited until March 16, 2010 to seek to intervene it was procedurally correct to file a formal Petition to Intervene. Nevertheless, under the statutes and regulations and Board precedent Consolidation Coal is clearly entitled to

be a party in this Appeal.

We will enter an appropriate Order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

RALPH H. JONES and ALBERTA R. JONES	:	
v.	:	**EHB Docket No. 2009-150-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 30th day of March, 2010, following review of the Petition to Intervene and Supporting Brief, and the Department's letter supporting the Petition to Intervene, it is ordered as follows:

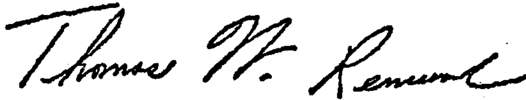
1.) The Petition to Intervene is **GRANTED.**

2.) Consolidation Coal Company is added as an Intervenor.

3.) The caption is amended as follows:

RALPH H. JONES and ALBERTA R. JONES	:	
v.	:	**EHB Docket No. 2009-150-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and CONSOLIDATION COAL COMPANY, Intervenor	:	

ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Chairman and Chief Judge

DATED: March 30, 2010

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

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MARYANNE WESDOCK, ESQUIRE
ACTING SECRETARY TO THE BOARD

PAUL I. GUEST, JR.	:	
	:	
v.	:	**EHB Docket No. 2009-026-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, NEWTOWN TOWNSHIP, Permittee and BPG ENTITIES, THE ROUSE GROUP DEVELOPMENT COMPANY, LLC, and ASHFORD LAND COMPANY, L.P., Intervenors	:	**Issued: April 1, 2010**

OPINION AND ORDER ON RENEWED MOTION FOR SUMMARY JUDGMENT

By Bernard A. Labuskes, Judge

Synopsis

The Board denies a motion for summary judgment where there are still unresolved issues of material fact regarding a township's ability and intent to implement a 2009 update to its Act 537 plan.

OPINION

Paul I. Guest, Jr. filed this appeal from the Department of Environmental Protection's approval of an update to Newtown Township's sewage facilities plan. Guest filed a motion for summary judgment on July 24, 2009, which we denied on November 29, 2009, saying that: "[t]here are genuine issues of fact in this case whether Newtown Township is able and committed to implement the plan under appeal." On January 28, 2010, the Department and

Township entered into a consent order and agreement ("COA"). The COA requires the Township to adopt a plan to replace its 2009 updated plan in accordance with specified implementation dates. Guest has filed a "renewed motion for summary judgment," arguing that the COA conclusively demonstrates that the Township has no intention of implementing the 2009 update. This argument is based on the fact that the COA says on its face that "[t]he Township does not intend to fully implement its 2009 Plan...." (COA ¶ JJ.) This, Guest argues, shows that the Department should not have approved the 2009 update and this Board should countermand that approval. The Department and the Intervenor, BPG Entities, filed responses in opposition to the motion.

Guest initially argues that the COA "has the effect of withdrawing the Department's approval of the 2009 Plan." We recently rejected this characterization, at least based on the existing record, concluding instead that the current record would suggest that the 2009 update remains in place and defines the Township's sewage plan for the time being, at least until a new plan is adopted and approved pursuant to the COA. *Wilson v. DEP*, EHB Docket No. 2009-024-L (March 23, 2010). Furthermore, the COA also seems to suggest that significant parts of the 2009 update will remain intact even under a new plan.

Guest's more pointed argument is that the COA provides irrefutable proof that the Department erred when it concluded that the Township was committed to implementing the 2009 update. The pertinent regulation, 25 Pa. Code § 71.32(d)(4), provides that, in approving or disapproving an official plan or official plan revision, "the Department will consider...(4) [w]hether the official plan or official plan revision is able to be implemented". Also, 25 Pa. Code § 71.31(f) specifies that: "[t]he municipality shall adopt the official plan by resolution, with specific reference to the alternatives of choice and a commitment to implement the plan within

the time limits established in an implementation schedule." These provisions taken together suggest that the Department should not approve a make-believe plan. Rather, its approval depends upon a showing that the municipality is in fact *able* and *committed* to implementing its plan update.

We do not agree that the COA on its face demonstrates that the Department acted contrary to 25 Pa. Code §§ 71.31 and 71.32. In fact, Guest's motion raises many unanswered questions. Among others, does the COA indicate only that the Township does not intend to implement the 2009 Update *now*, or does it, in combination with other evidence, suggest that the Township *never* intended to implement the update? If the latter, it would seem to bode well for Guest's appeal. If the former, it raises interesting but unanswered legal and practical questions that we will need to address in our adjudications. In either event, Guest's appeal cannot stand on the COA alone, and his summary judgment must be denied.

Furthermore, all parties agree that the COA only contemplates that the Township will revise portions of the 2009 update. Depending upon who you ask, large portions of the 2009 update might survive the revision process that is spelled out in the COA, assuming they survive review by this Board. Again, the COA falls short of clinching a Guest victory by way of summary judgment.

Accordingly, we issue the Order that follows.

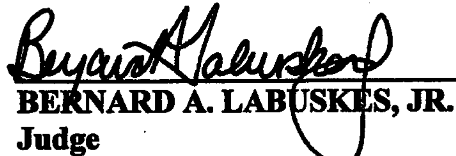
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PAUL I. GUEST, JR.	:	
	:	
v.	:	**EHB Docket No. 2009-026-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, NEWTOWN TOWNSHIP, Permittee and BPG ENTITIES, THE ROUSE GROUP DEVELOPMENT COMPANY, LLC, and ASHFORD LAND COMPANY, L.P., Intervenors	:	

ORDER

AND NOW, this 1st day of April, 2010, Paul I. Guest's renewed motion for summary judgment is **denied**.

ENVIRONMENTAL HEARING BOARD



BERNARD A. LABUSKES, JR.
Judge

DATED: April 1, 2010

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

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION

v.

STEVEN R. SIMMONS

EHB Docket No. 2009-029-CP-K

Issued: April 6, 2010

ADJUDICATION

By Michael L. Krancer, Judge

Synopsis:

The Board assesses a civil penalty of $21,000 for violations of the Clean Streams Law, plus $920 in costs. The Defendant conducted earth moving activities and failed to develop an Erosion and Sedimentation Control Plan, maintain Erosion and Sedimentation Best Management Practices and stabilize the disturbed area leading to the potential for pollution to a waterway of the Commonwealth.

INTRODUCTION

This is a complaint for civil penalties filed by the Department of Environmental Protection on March 10, 2009 against Steven Simmons for ongoing violations of the Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §§ 691.1-691.1001, and the regulations thereunder. A trial was held for two days on January 13 and 14, 2010 before the Honorable Michael L. Krancer. Following the trial, the parties submitted post trial briefs. After a full and complete review of the record and briefs, we make the following:

FINDINGS OF FACT

1. The Plaintiff is the Commonwealth of Pennsylvania, Department of Environmental Protection, 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"); Section 1917-A of the Administrative Code of 1929, P.L. 177, *as amended*, 71 P.S. § 510-17A ("Administrative Code"); and the rules and regulations promulgated under these statutes, including, but not limited to, Chapter 102 of Title 25 of the Pennsylvania Code, 25 Pa. Code §§ 102.1 – 102.43 ("E&S Control regulations"). Joint Stipulation ("Stip.").[1]

2. The Defendant is Steven R. Simmons ("Defendant" or "Simmons"), an individual whose primary residence is located at 4139 Mechanicsville Road, Doylestown, PA, County of Bucks, Buckingham Township, identified as Bucks County Tax Assessor's Parcel Number as 06-010-021("Site"). Stip.

3. The Defendant is a realtor and has had much personal experience in construction and building (commercial and residential), development and earth disturbance activities and applying for permits or approvals from Bucks County Conservation District over the last ten years. Stip.

4. The Bucks County Conservation District ("BCCD") is an agency of the Commonwealth, as authorized by Section 5 of the Conservation District Law, the Act of May 15, 1945, P.L. 547, 3 P.S. §§ 849 – 864, as amended, 3 P.S. § 853. Stip.

5. The BCCD is a Level 3 local Conservation District and has all of the authority

[1] The parties entered joint stipulations on the record to the facts presented in the Department's Prehearing Memorandum, excluding any facts related to the scope of the earth disturbance, the size of the earth disturbance, the purpose for such activity and what, if any, E&S and BMP controls were in place and when. *See* Notations of the transcript, p. 13.

and responsibilities associated with fulfilling the duties provided to a Level 3 delegated agency, including, but not limited to, issuing notices of violation, scheduling and conducting administrative enforcement conferences, and seeking civil penalties through consent assessments related to the E&S Pollution Control Program and the National Pollutant Discharge Elimination System ("NPDES") Permitting Program for Discharge of Stormwater Associated with Construction Activities. Stip.; N.T. 193-95; Commonwealth Exhibit ("C. Ex.") 36, 37.

6. An unnamed tributary to Watson Creek, a water of the Commonwealth, is situated on the Site. Stip.

7. Watson Creek is a cold water fishery and a fourth order tributary to the Delaware River Basin. N.T. 243-44; *see also* 25 Pa. Code § 93.9e.

8. Richard Meyers has been the Zoning Officer for Buckingham Township since April, 2008. Prior to becoming the Zoning Officer he had been the Township Watershed Specialist since November, 2004. Both positions require that he inspect erosion and sedimentation controls at development sites. Stip.; N.T. 22-23, 67.

9. Myers visited the Site on July 8, 2008, at which time he observed an estimated 1,000 square feet of earth disturbance at the Site which included fill that had been pushed down steep slopes towards a stream channel, no evidence of E&S Best Management Practice ("BMP") Controls installed at the Site, and heavy machinery that had been operated across a flowing unnamed tributary to Watson Creek in close proximity to wetlands. N.T. 24-29, 35-36; C. Exs. 3, 5a-5f.

10. Myers documented his July 8, 2008 inspection with photographs and a verbal and written complaint to Lisa Dziuban, Environmental Protection Specialist for BCCD. Stip.; N.T. 25, 28, 27-32, 83; C. Exs. 3-5a-5f.

11. Myers continued to observe that the Defendant was continuing tree removal, excavation and other signs of further earth disturbance at the Site without implementing E&S BMP controls on subsequent visits on July 15, 2008, July 30, 2008, October 22, 2008, November 12, 2008, December 12, 2008, December 18, 2008 and July 16, 2009. N.T. 37-58; C. Exs. 6, 8a, 8b, 9, 11a -11d, 15a -15h, 17a-17d.

12. Myers estimated that the area of disturbance at the tree landing portion of the Site grew by at least another one or two thousand square feet from July 7, 2008 to December 18, 2008 and continued to expand through January 6, 2009. N.T. 54-57. He estimated that the Defendant pushed the dirt and trees into a four foot pile at the tree landing area, creating a 45% downslope and in proximity to the stream channel. N.T. 56-58; C. Exs. 17a -17b.

13. The distance between the edge of the earth disturbance stockpile at the tree landing and the unnamed tributary to Watson creek was thirty to fifty feet. Stip.; N.T. 46, 51-52, 57-58, 101.

14. Myers was unable to locate any silt fences at the Site prior to January 9, 2009. N.T. 69.

15. Between November, 2008, and January, 2009, there were muddy truck tire tracks on Mill Road leaving the Site, and the Defendant never installed a tire cleaner, an appropriate E&S BMP control, at the Mill Road entrance cutout, despite his indication that he would do so. N.T. 32, 42-43, 71, 92, 120, 124, 150, 154-55, 159, 166.

16. Lisa Dziuban, Environmental Protection Specialist for BCCD, inspected the Site six times for BCCD on July 25, 2008, September 30, 2008, December 11, 2008, twice on January 7, 2009 and January 9, 2009. C. Ex. 19, 20, 21, 26, 31 and 32.

17. Dziuban has had a 24-year career with BCCD and has inspected about 9,600

construction/earth moving sites and reviewed over 200 E & S Control Plans in her professional capacity with BCCD. The Board qualified Dziuban, without objection from the Defendant, as an expert in erosion and sedimentation controls, best management practices (BMPs) to reduce erosion and sedimentation and earth disturbance and construction activities with regard to erosion and sedimentation. N.T. 78-83.

18. The Defendant was present for half of Dziuban's inspections on July 25, 2008, January 7, 2009 (on the second visit) and January 9, 2009. N.T. 84-87, 112, 114; C. Exs. 19, 31, 32.

19. On July 25, 2008, the Defendant had conducted earthmoving activities, including in a stream and/or wetlands area, without first preparing an E&S Control Plan and without implementing any E&S BMP controls. N.T. 85-86, 91-92, 130.

20. Dziuban specifically observed by July 25, 2008 that the Defendant had not installed any silt fence or tire cleaner, had failed to stabilize the earth disturbance (*i.e.* no seeding or mulching) and was causing a potential for pollution to an unnamed tributary to Watson Creek. Stip.; N.T. 85, 91-92; C. Ex. 19.

21. Dziuban instructed the Defendant in person on July 25, 2008, and through her inspection report dated December 28, 2008, to immediately apply mulch and seed to all disturbed areas at the Site and to prepare and provide an E&S Control Plan to BCCD for its approval. Stip.; N.T. 85-89; C. Ex. 19.

22. Dziuban determined on July 25, 2008 that the Defendant needed to get an approved E&S Control Plan for the earth disturbance he was conducting at the Site. Stip.; N.T. 131, 278; C. Ex. 19.

23. Dziuban inspected the Site on September 30, 2008 and observed an area of 100

feet long and 50 feet wide (5,000 square feet) of disturbance and had not installed E&S BMP controls, including no silt fence, no seeding, no mulching, nor any other stabilization. N.T. 93-95; C. Ex. 20.

24. After her September 30, 2008 inspection, Dziuban instructed the Defendant through her inspection report dated October 7, 2008 to immediately apply mulch and seed to all disturbed areas at the Site and to provide E&S Control Plan to BCCD for its approval. Stip.; N.T. 93-96; C. Ex. 20.

25. The October 7, 2008 inspection report requested the Defendant to respond to the report in writing detailing when the violations would be corrected. N.T. 93, 95; C. Ex. 20.

26. On December 11, 2008 and during the two inspections on January 7, 2009, Dziuban observed that the Defendant was continuing to conduct earthmoving activities with heavy machinery, had still not implemented any E&S BMP controls and still failed to stabilize the earth disturbance. N.T. 96-102, 107-09; C. Exs. 21, 23a -23c, 26, 28a -28d, 31.

27. Dziuban conducted two inspections on January 7, 2009 because, after conducting her first inspection in the morning her District Manager, Gretchen Schatschneider, called the Defendant and then asked Dziuban to go back to the Site to meet the Defendant. N.T. 105-08, 112, 196-97. [2]

28. On January 7, 2009 the Defendant had an E&S Control Plan at the Site, but it was inadequate and unapproved, as BCCD previously informed the Defendant on January 2, 2009. N.T. 179-81; C. Exs. 25, 31.

29. Dziuban instructed the Defendant in person on January 7, 2009 and through her inspection reports to cease all work at the Site, apply mulch and seed to all disturbed areas,

[2] Dziuban incorrectly dated her first inspection on January 7, 2009 as "January 5, 2009". She clarified that both inspections were on January 7, 2009. N.T. 106, 112.

provide an adequate E&S Control Plan to BCCD for its approval, and correct all noted violations. N.T. 112-13; C. Exs. 26, 31.

30. In the first inspection report of January 7, 2009 Dziuban noted that the Defendant failed to respond to the December 11, 2008 notice of violation and that BCCD was going to send him a Consent Assessment of Civil Penalty. C. Ex. 26.

31. From the time period of July 8, 2008 through January 7, 2009, the Defendant never sowed any grass seed on disturbed areas and never installed any E&S BMP controls at the Site. N.T. 38-39, 41-42, 45-46, 52, 69, 91-92, 94, 102, 106-07, 158.

32. By December 11, 2008 the disturbed area at the Site had increased beyond the 5,000 square feet that Dziuban estimated had occurred by September 30, 2008. N.T. 98-99.

33. On December 11, 2008 muddy, standing water was visible at the Site collected in puddles and machinery tracks, some of it at the edge of the tree landing closer to the stream channel. C. Ex. 23a – 23c; N.T. 99, 316-18.

34. On December 15, 2008 Gretchen Schatschneider, District Manager for the BCCD, sent the Defendant a written Notice of Violation by Certified U.S. Mail identifying violations that he committed at the Site between July 25, 2008 and December 11, 2008. N.T. 102, 191-92.

35. The Notice of Violation also requested the Defendant to attend an administrative enforcement conference with representatives from BCCD and the Department on January 7, 2009. Stip.; N.T. 103; C. Ex. 38.

36. The Defendant submitted an Application/General Information Form with an E&S Control Plan to the BCCD on December 17, 2008, however it was incomplete and inadequate. Stip.; C. Exs. 20, 21, 24; N.T. 97, 169-74.

37. Eric Wightman, Environmental Protection Specialist for the BCCD reviewed the

Defendant's E&S Application/General Information Form, initially received by the BCCD on December 17, 2008, and notified the Defendant that the application was incomplete because the Defendant was applying for an approval for a timber harvesting operation and had only submitted an E&S Control Plan application. Stip.; N.T. 169-70, 172-74.

38. Even in the Defendant's initial December 17, 2008 submission of the E&S Control Plan the Defendant indicated on the proposed E&S Control Plan that his area of disturbance would be 25,000 square feet (100' x 250'). C. Ex. 24, p. 20.

39. On December 31, 2008 the Defendant resubmitted an E&S Application/General Information Form for Timber Harvesting Operations with a fifty dollar payment ($50.00). Stip.; N.T. 176; C. Ex. 24.

40. In the Defendant's Timber Harvesting Operation Plan submitted on December 31, 2008 he proposed to disturb a half acre (21,780 square feet) on his hand drawn map. N.T. 176, 178; C. Ex. 24, p. 12.

41. Based on the Defendant's original submission on December 17, 2008 and the hand drawn map of proposed earth disturbance area on December 31, 2008, Wightman concluded that the Defendant intended to disturb at least half an acre of soil on the Site. N.T. 176.

42. The Defendant indicated in his Timber Harvesting Operation Plan, submitted on December 31, 2008, that he would complete his project by the end of January, 2009. C-24; N.T. 178.

43. Wightman informed the Defendant by letter dated January 2, 2009 that the E&S Application/E&S Control Plan for Timber Harvesting Operations was inadequate for the following reasons:

(a.) The Defendant failed to provide soil map symbols and soil series;

(b.) The Defendant failed to indicate the names of receiving waters and their designated/existing use;

(c.) The Defendant failed to provide a topographical map; and

(d.) The Defendant failed to provide a soil map.

Stip.; N.T. 179-81; C. Ex. 25.

44. After Wightman discussed with Dziuban the work the Defendant was doing at the Site he decided he could not approve the E&S Control Plan for Timber Harvest Operation at the Site. N.T. 182.

45. The scope and manner of the earth moving activity that the Defendant was performing at the Site from July 25, 2008 through December 31, 2008 was not indicative of timber harvest operations. N.T. 161, 181.

46. An E&S Control Plan for Timber Harvest Operations does not contain all of the elements and information needed for an E&S Control Plan for earth moving activities related to construction. N.T. 161, 179-81, 185.

47. BCCD contacted the Defendant and told him that his E&S Control Plan for Timber Harvest Operations was inadequate and inappropriate for the work that he was doing and explained to the Defendant that he would need to submit an E&S Control Plan for earth disturbance associated with construction activities. Stip.; N.T. 184-85.

48. As BCCD had advised the Defendant in its December 15, 2008 Notice of Violation letter, the agency convened an administrative enforcement conference at its offices located at 1456 Ferry Road, Doylestown, PA 18901 on January 7, 2009 at 9:30 a.m. to discuss the Defendant's violations, however the Defendant did not appear at the conference. Stip.; N.T.

69, 105; C. Ex. 29.

49. In attendance at the conference were Myers, Schatschneider, Dziuban, Wightman, Frank DeFrancesco, Environmental Protection Compliance Specialist PADEP, Linda Mackey, Conservation District Field Representative, PADEP. Stip.; N.T. 69, 105; C. Ex. 29.

50. Defendant did not show up at the conference. *Id.*

51. The Defendant did not contact anyone at BCCD or the Department before the conference to notify anyone that he was not coming to the administrative enforcement conference on January 7, 2009. N.T. 105, 195-97, 308.

52. Although there was some snow or frozen precipitation on the morning of January 7, 2009, everyone but the Defendant arrived at the BCCD offices by 9:30 a.m. N.T. 105, 161-62, 183, 196; C. Ex. 29.

53. The official weather records of January 7, 2009 for Doylestown area do not identify measurable snow accumulation for that morning. C. Ex. 44.

54. Photographs taken at the Site by Dziuban later in the morning on January 7, 2009 do not show any accumulation of snow on the ground at the Site or on Mill Road. C. Exs. 28a – 28d.

55. Dziuban recalls that there had been some snow or sleet on the morning of January 7, 2009, but that it had melted by the time she went to the Site on that morning. N.T. 144, 161.

56. Schatschneider called the Defendant on the morning of January 7, 2009 to ask him why he did not attend the administrative enforcement conference and the Defendant's only excuse was that he was clearing snow from his rental properties. N.T. 143, 196, 204, 210, 212, 308, 355.

57. Sometime after the BCCD inspection on January 7, 2009 and by January 9, 2009,

the Defendant seeded and mulched the disturbed areas on the Site and installed a silt fence downslope. N.T. 114, 137, 146-49, 156-57; C. Ex. 32.

58. The Defendant's silt fence installation and the seeding and mulching at the Site were compliant with E&S BMP requirements on that day. N.T. 114-16, 165.

59. On January 9, 2009 the Defendant resubmitted to the BCCD an E&S Application/E&S Control Plan using the standard E&S Control Plan Development Guide. N.T. 113; C. Ex. 33.

60. The Defendant's January 9, 2009 E&S Control Plan indicated his scope of earth disturbance to be half an acre. N.T. 118-20, C. Ex. 33.

61. On January 22, 2009 Dziuban sent a letter to the Defendant informing him that the E&S Application/E&S Control Plan was adequate with comments. N.T. 121; C. Ex. 34.

62. The Defendant did not comply with BCCD inspection reports asking for an E&S Control Plan from July 25, 2008 through January 7, 2009, nor respond in writing when asked to do so in the September 30, 2009 inspection report informing the BCCD of when and by whom the violations will be corrected at the Site. N.T. 95-96, 199; C. Exs. 19, 20, 21, 26, 31, 32.

63. By the Spring of 2009 the Site had fallen into noncompliance again. All the straw mulch that had been present during the winter was blown away, moved away or pushed away. There was no fresh straw mulch or any seed germination. The silt fence was knocked over. N.T. 122-24.

64. When both Dziuban and Schatschneider attempted to inspect the Site on January 12, 2010 the Defendant obstructed their inspection. N.T. 123, 125-26.

65. The inspectors truncated their inspection because as Dziuban testified, "I didn't feel comfortable." N.T. 125.

66. This is because the Defendant took his vehicle and blocked their exit and then departed leaving the vehicle still obstructing their exit. N.T. 125.

67. The Defendant moved the vehicle only after the inspectors called the police and the police officer instructed the Defendant to remove the vehicle from obstructing the inspectors' exit. N.T. 125.

68. When the Defendant failed to appear at the informal administrative conference scheduled for January 7, 2009, failed to address the Clean Streams Law and E&S Control regulations violations committed by the Defendant between July 25, 2008 and January 7, 2009, and failed to resolve his liability, the BCCD referred the violations to the Department for further enforcement. N.T. 198-201, 207-08, 232-35.

69. Frank DeFrancesco, Environmental Protection Compliance Specialist for PADEP, SERO, Watersheds Management, Permitting and Technical Services, reviewed all of the inspection reports, photographs and the December 15, 2008 Notice of Violation, talked to Dziuban about her observations, used the penalty matrix worksheet, consulted Department guidance for calculating civil penalties and considered all factors required by the Clean Streams Law and E&S Control violations when calculating the civil penalty for the Defendant's violations. Stip.; N.T. 228, 231-76; C. Exs. 40, 41, 42, 43.

70. Francesco calculated a civil penalty of $21,000.00 for violations committed by the Defendant between July 25, 2008 and January 7, 2009 in the following manner:

(a.) Four Thousand Dollars ($4,000.00) for failure to develop and have available at the Site on four occasions (July 25, 2008, September 30, 2008, December 12, 2008 and January 7, 2008) a written E&S Control Plan in violation of 25 Pa. Code § 102.4(b), and unlawful conduct pursuant to Section 611 of the Clean

Streams Law, 35 P.S. § 691.611.

(b.) Ten Thousand Dollars ($10,000.00) for the Defendant's failure to implement erosion and sediment control BMPs at the Site on four occasions (July 25, 2008, September 30, 2008, December 12, 2008 and January 7, 2008) in violation of 25 Pa. Code §§ 102.2 and 102.4(b), and unlawful conduct pursuant to Section 611 of the Clean Streams Law, 35 P.S. § 691.611.

(c.) Three Thousand Dollars ($3,000.00) for the Defendant's failure to immediately seed, mulch or otherwise protect the Site from accelerated erosion and sedimentation on three occasions (September 30, 2008, December 12, 2008 and January 7, 2009) in violation of 25 Pa. Code § 102.22(a), and unlawful conduct pursuant to Section 611 of the Clean Streams Law, 35 P.S. § 691.611.

(d.) Four Thousand Dollars ($4,000.00) for the Defendant causing the potential for pollution to a water of the Commonwealth on four occasions (July 25, 2008, September 30, 2008, December 12, 2008 and January 7, 2008) in violation of Section 402 of the Clean Streams Law, 35 P.S. § 691.402, and unlawful conduct pursuant to Section 611 of the Clean Streams Law, 35 P.S. 691.611.

Stip.; N.T. 228, 245-76; C. Exs. 40, 41, 42.

71. Based on the number of inspections, the amount of time it took between BCCD's first inspection on July 25, 2008 and the time the Defendant took to come into compliance on January 9, 2009, his recklessness in light of the Defendant's knowledge as a realtor and developer, his notice of violations since July 25, 2008 and the proximity of the tributary to Watson Creek to the uncontrolled and unstabilized earth disturbance, DeFrancesco relied on the Civil Penalty Matrix for Erosion to place all of the violations in the Major category of the

Matrix. N.T. 237-45; C. Exs. 2, 42.

72. The great potential for pollution placed the violations in the high end of the Major category. N.T. 256-57, 262, C. Ex. 41, 42.

73. Although there was evidence that the Defendant's commission of violations had started by at least July, 2008, and the violations observed by the BCCD spanned a length of time of at least 167 days or more, the Department calculated a civil penalty for violations only between January 25, 2008 and January 7, 2009. N.T. 237-38; C. Exs. 40, 41.

74. Although the Department could have adjusted the civil penalties upward under the Matrix by 40% for willfulness, it did not. N.T. 269-72; C. Exs. 41, 42.

75. Although the Department could have adjusted the civil penalties upward under the Matrix by 30% for potential environmental damage to the stream, it did not. N.T. 262; C. Exs. 41, 42.

76. Even though the BCCD noted on its inspection report of January 9, 2009 that the Defendant still did not have an approved E&S Control Plan by that date, which was a violation, the Department did not assess a civil penalty for that violation on that date. N.T. 251, C. Exs. 32, 40.

77. The BCCD has incurred $920.00 in costs as a result of its enforcement activities related to the Site from July 25, 2008 through January 9, 2009. Stip.; N.T. 127-28; C. Ex. 30.

78. Defendant has continued to violate the Clean Streams Law and the E&S Control regulations after the BCCD approved his E&S Control Plan by failing to implement and maintain approved BMPs. The BCCD inspected the Site on January 5, 2010 and observed that disturbed earth at the Site remains unstable, the silt fence that he installed on January 9, 2009 has not been maintained and is ineffective, he has not seeded, there is no mulch on the disturbed areas and the

Defendant has failed to install a tire cleaner at the Site entrance per the approved E&S Control Plan. N.T. 123-24.

79. The Complaint filed by the Department on March 10, 2009 against the Defendant requested that the Board award the Department civil penalties in the amount of $21,000.00, plus additional monies to disgorge any economic benefit of noncompliance, and $920.00 in BCCD's costs. *See* Complaint.

80. A two day trial was held by the Honorable Michael L. Krancer beginning on January 13, 2010 in the Norristown offices of the Board.

DISCUSSION

The Board's role in a civil penalty complaint case under the Clean Streams Law, 35 P.S. § 691.1, *et. seq.*, is to make an independent determination of the appropriate penalty amount. *DEP v. Pecora*, 2008 EHB 14; *DEP v. Kennedy*, 2007 EHB 15; *DEP v. Leeward Construction, Inc.*, 2001 EHB 870, *aff'd* 821 A.2d 145 (Pa. Cmwlth), *app. denied*, 827 A.2d 431 (Pa. 2003). The Department suggests an amount in the complaint, but that suggestion is purely advisory. *DEP v. Strubinger*, 2006 EHB 740; *Westinghouse v. DEP*, 705 A.2d 1349 (Pa. Cmwlth. 1998).

Before we can assess the civil penalty we must determine whether the Department, which bears the burden of proof, has established by a preponderance of the evidence that Simmons violated the Clean Streams Law warranting a civil penalty. 25 Pa. Code § 1021.122(b)(1). The Department's complaint alleges that Simmons violated the Clean Streams Law by failing to install erosion and sedimentation best management practices, failing to develop an erosion and sedimentation plan and failing to stabilize the Site thereby creating the threat of pollution to a waterway of the Commonwealth. We begin with a discussion of whether the Department met its burden of proving Simmons violated the Clean Streams Law.

Best Management Practices and Site Stabilization

The Department is seeking civil penalties for violations that occurred at the Site from July 25, 2008 through January 7, 2009. The Department asserts that during this period of time Simmons failed to implement Best Management Practices[3] ("BMPs") and to stabilize the area of earth disturbance. The Erosion and Sediment Control regulations, Chapter 102, provide:

> (a) This chapter requires a person proposing or conducting earth disturbance activities to develop, implement and maintain BMPs to minimize the potential for accelerated erosion and sedimentation.
>
> (b) The BMPs shall be undertaken to protect, maintain, reclaim and restore water quality and the existing and designated uses of waters of this Commonwealth.

25 Pa. Code §§ 102.2(a) and (b). Chapter 102 requires a person to install erosion and sedimentation ("E&S") BMP controls "to minimize the potential for accelerated erosion and sedimentation." 25 Pa. Code § 1024(b)(1), *Blue Mountain Preservation Association v. DEP,* 2006 EHB 589. BMPs are essentially aimed at keeping the soil on the Site and preventing sedimentation runoff pollution. *Blue Mountain Preservation Association,* 2006 EHB at 600.

During the trial, Dziuban testified that she visited the Site on five occasions during the period of July, 2008, through January, 2009, and never saw any BMPs, such as a silt fence, tire cleaner, straw or mulch. N.T. 78-79. In her capacity at BCCD she has inspected thousands of construction and other earth disturbance sites and is familiar with BMPs and the need for certain BMPs at varying sites. N.T. 78-79. Additionally, Myers, the Township Zoning Officer, had visited the Site on at least eight occasions separate from Dziuban's visits and has corroborated her testimony that there were no BMPs at the Site during that time period. N.T. 24-29, 35-58.

The only testimony offered by the Defendant to rebut the above testimony is the

[3] Best management practices are defined as "Activities, facilities, measures, or procedures used to minimize accelerated erosion and sedimentation to protect, maintain, reclaim and restore the quality of waters and

testimony of Simmons himself. He testified that he installed the first silt fence in July, 2008, and the second silt fence in December, 2008. N.T. 339-40. He further testified that he seeded the Site in July, 2008, and put straw mulch down at the Site in July, October and December. N.T. 339.

The Department entered numerous photographs taken by Dziuban and Myers at the Site during their site inspections. *See* C. Exs. 5a-f; 8a-b; 11a-d; 15a-h; 17a-d; 23a-c; 28a-d. These photographs taken by Dziuban and Myers do not show any BMPs installed at the Site. In fact, some of these photographs were taken in July, October and December, 2008, which are the times Simmons testified he had installed BMPs. N.T. 339-40; *See* C. Exs. 5a-f; 8a-b; 11a-d; 15a-h; 17a-d; 23a-c. Simmons used the Department's exhibit to argue that he did install a silt fence. He pointed to an area in the photograph and testified that it was a silt fence. *See* C. Ex. 15e. The Board was unable to locate any silt fence in the photograph even with the Defendant's help. C. Exs. 15e; N.T. 326; 345-47. Additionally, Simmons claimed that some of the Department's photographs showed grass growing indicating he stabilized the Site. Again, the Board was not able to spot any grass growing except in areas that were not disturbed by the Defendant. C. Exs. 11c; 23c; 28a; N.T. 292-93; 302-03; 345-46.

We credit the testimony of Dziuban and Myers on these topics and reject Simmons's testimony thereon as not credible. The Department has met its burden of proving there were no E&S BMPs installed during July, 2008, and January, 2009, in violation of Chapter 102 and any assertions by Simmons to the contrary are not credible. Simmons's failure to comply with Chapter 102 is unlawful conduct under the Clean Streams Law, 35 P.S. § 691.611.

Erosion and Sedimentation Control Plan

The Department also alleges in its complaint that the Defendant failed to have an E&S Control Plan for the earth disturbance activities at the Site. The regulation requires an E&S

---

the existing and designated uses of water within this Commonwealth." 25 Pa. Code § 1021.1.

Control Plan on Site if the area to be disturbed is 5,000 square feet or more, or "upon complaint or site inspection, the Department or county conservation district may require that the Plan be submitted for review and approval to ensure compliance with this chapter." 25 Pa. Code § 102.4(b)(2)(i); 25 Pa. Code § 102.4(b)(8).

During the trial there was much discussion about the size of the earth disturbance at the Site. N.T. 16-22; 24-38; 93-95. The Chapter 102 regulations, as cited above, grant authority to the Department or county conservation district to require an E&S Plan be submitted, regardless of when the earth disturbance actually reached the 5,000 square feet threshold.

Dziuban testified that she was at the Site on July 25, 2008 and observed that the Defendant had conducted earthmoving activities, including in a stream and/or wetlands area without implementing any E&S BMP controls. N.T. 85-86, 91-92, 130. She specifically observed on that date that the Defendant had not installed any silt fence or tire cleaner and had failed to stabilize the earth. Stip.; N.T. 85, 91-92; C. Ex. 19. Dziuban instructed the Defendant in person on July 25, 2008, and through her inspection report dated July 25, 2008, to immediately apply mulch and seed to all disturbed areas at the Site and to prepare and provide an E&S Control Plan to BCCD for its approval. Stip.; N.T. 85-89; C. Ex. 19.

Both Myers and Dziuban testified that during their inspections in July, 2008, the activities at the Site warranted an E&S Plan. N.T. 24-27. The Defendant does not offer any evidence to the contrary, except for his testimony that he hired a surveyor to inform him when he hit 5,000 square feet of disturbed area, however he did not call the surveyor as a witness. N.T. 322-23. Simmons also testified that he had a survey map with the square footage of the earth disturbance, but likewise did not offer any such map as evidence at the trial. *Id.*

Regardless of the size of the earth disturbance at the Site on July 25, 2008, both Dziuban

and Myers testified that the activities being conducted at the Site on July 25, 2008 triggered the need for an E&S Plan. We agree. Based on our review of the testimony and exhibits at the trial with respect to the type of earth moving activities being conducted both in close proximity to the unnamed tributary to Watson Creek, as well machinery being run through the tributary, we find that by July 25, 2008 an E&S Plan was required for the activities being conducted at the Site.

The failure of the Defendant to have an E&S Plan on July 25, 2008 through January 7, 2009 is in violation of Chapter 102 regulations and unlawful conduct pursuant to the Clean Streams Law, Section 611.

Potential for Pollution

The Department also alleged in its complaint that the Defendant created a potential for pollution at the Site. Under Section 402 of the Clean Streams Law:

> . . . it shall be unlawful for a person or municipality to conduct activity regulated except pursuant to a permit issued by the department. Conducting such activity without a permit, or contrary to the terms or conditions of a permit or conducting an activity contrary to the rules and regulations of the department or conducting an activity contrary to an order issued by the department, is hereby declared to be a nuisance.

35 P.S. § 691.402(b). "The Department, however, has the authority to issue an order to a person if it finds that that person's activity has created a *danger* of pollution of the waters of the Commonwealth." *ADK Development Corp. v. DEP*, 2009 EHB 251, 255, *citing* 35 P.S. § 691.402(a); *Milco Industries Inc. v. DEP*, 2002 EHB at 725; *Leeward Construction v. DEP*, 2000 EHB 742, 764, aff'd, 821 A.2d 145 (Pa. Cmwlth. 2003); *DEP v. Silberstein,* 1996 EHB 619, 635-36.

The Defendant's earth disturbance activities at the Site without the proper E&S controls, no site stabilization and failure to have an E&S Plan created a danger for pollution to the

unnamed tributary to Watson Creek. Stip.; N.T. 85, 91-92; C. Ex. 19. The earth disturbance was conducted thirty to fifty feet on a downward slope to the tributary. Stip.; N.T. 46, 51-52, 57-58, 101. Chapter 102 is designed to minimize the potential for accelerated erosion and sedimentation, a potential pollution from earth disturbance sites. *See* 25 Pa. Code Chapter 102; *DEP v. Angino*, 2007 EHB 175, 192, *citing O'Reilly v. DEP*, 2001 EHB 19, 33. Under the circumstances of this case, where the Defendant operated heavy machinery on the Site and across the tributary, created stockpiles of fill, pushed fill down slopes toward the tributary, harvested timber without stabilizing the Site or installing any E&S BMPs created the danger for pollution entering the waterway, resulting in unlawful conduct pursuant to Section 402 and 611 of the Cleans Streams Law.

Civil Penalty

The Department has met its burden of establishing that Simmons violated the Clean Streams Law and applicable regulations, we now assess the civil penalty for Simmons's violations. Under the Clean Streams Law our responsibility is to assess a penalty based on the statutory and regulatory criteria, as well as Board precedent. *DEP v. Hostetler*, 2006 EHB 359; *DEP v. Leeward Construction, Co.* 2001 EHB 870, 913. The Board may assess a civil penalty under the Clean Streams Law for up to $10,000 per day for each violation. 35 P.S. § 691.605; *DEP v. Leeward Construction, Inc.*, 2001 EHB 870, 885-886; DEP *v. Carbon Construction Corp.*, 1997 EHB 1204, 1227.

Our assessment of the civil penalty is based on the Department's recommended civil penalty and the evidence presented at the trial. The Department is seeking a civil penalty in the amount of $21,000 for the violations of the Clean Streams Law during July 25, 2008 through January 7, 2009, plus $920 in costs to the BCCD. The penalty does not include inspections that

were conducted prior to July 25, 2008, specifically those inspections by the Township Zoning Officer, nor does the Department's assessment include the ongoing violations at the Site today.

The Department's witness, Frank DeFrancesco, assessed the penalty in this matter. He testified that he spoke with Dziuban, reviewed all the inspection reports, the photographs and the notice of violation issued on December 15, 2008. The breakdown of the penalty is as follows. For failing to implement E&S BMPs, DeFrancesco assessed a penalty of $10,000 and for failing to stabilize the Site he assessed a penalty of $3,000. He also determined that Simmons's failure to develop and have on Site an approved E&S Plan resulted in a $4,000 penalty. Lastly, DeFrancesco determined that the danger of pollution to the waterways of the Commonwealth from the activities at the Site without the proper controls should be a penalty of $4,000.

DeFrancesco testified that he relied on the Department's penalty matrix, an internal guidance document, to determine the civil penalty for Simmons's violations. Stip.; N.T. 228, 231-76; C. Exs. 40, 41, 42, 43; C. Exs. 41; 42. This document does provide a standardized procedure for a Department compliance specialist to determine the amount of penalty and it encourages the consideration of various factors to be considered when assessing a civil penalty under the Clean Streams Law. However, this document is not binding on the Department, and certainly not on the Board. *United Refining Co. v. DEP*, 2006 EHB 846; *Dauphin Meadows v. DEP*, 2001 EHB 521.

Section 605 of the Clean Streams Law provides that in determining the penalty amount the Board considers the willfulness of the violations, damage or injury to the waters of the Commonwealth, costs of restoration and other relevant factors. 35 P.S. § 691.605(a); *DEP v. Hostetler*, 2006 EHB 359; *DEP v. Leeward Construction, Co.* 2001 EHB 870, 886.

In determining Simmons's willfulness of the violations DeFrancesco determined that

Simmons's behavior was reckless. N.T. 239. Simmons testified that he has knowledge of the requirement of E&S controls because of his experience as a realtor. N.T. 299, 240-42, 308. In fact he has applied and received approval for E&S Plans from BCCD in the past. N.T. 300. Simmons was aware on July 25, 2008 what was required for his activities at the Site. With being told what he needed to do, as well as his previous experience with E&S controls, he consciously chose to disregard the law for over five months.

With respect to damage to the waters of the Commonwealth, DeFrancesco classified the violations as major violations. The Department's guidance document classifies violations as minor, major and severe. C. Ex. 42. He reasoned that the there were numerous violations that continued for 167 days, despite being told to correct the violations, and there were four inspections conducted at the Site which all indicated there was no attempt to comply with the Clean Streams Law. N.T. 239-41. Accordingly, the Department's guidance document includes failing to have an E&S Plan and controls and failing to maintain BMPs at the Site as major violations. C. Ex. 42.

We find DeFancesco's testimony to be credible and his approach reasonable. During the trial and in post hearing briefs, the Defendant offered nothing to suggest the contrary other than the conclusory statement that the assessment is unreasonable.

Simmons blatantly disregarded the BCCD's repeated request for his compliance with the Clean Streams Law for a period of over five months. This disregard of the law posed a threat of pollution to the unnamed tributary to Watson Creek, a cold water fishery. The Board finds a penalty of $21,000 to be quite reasonable under all the facts and circumstances of this case. Arguably, the penalty could have been, maybe should have been, assessed higher as Mr. DeFranceso's testimony demonstrates. Additionally, BCCD has incurred $920 in costs as a result

of its enforcement activities related to the Site from July 25, 2008 through January 9, 2009. Based on the record in this matter we assess a civil penalty in the amount $21,000, and allow recovery of $920 in costs to BCCD.

CONCLUSIONS OF LAW

1. The Board has the jurisdiction over this matter pursuant to Section 605 of the Clean Streams Law, 35 P.S. § 691.605, and Section 4 of the Environmental Hearing Board Act, 35 P.S. § 7514.

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

3. The Defendant's actions in failing to implement E&S Controls for earth moving activities to minimize the potential for accelerated erosion and sedimentation constitute unlawful conduct under the Clean Streams Law, 35 P.S. § 691.611, and the Erosion and Sediment Control Regulations at 25 Pa. Code §§ 102.2 and 102.4. Complaint, ¶ 12, 13, 14, 16, 32.

4. The Defendant's actions in failing to stabilize the earth disturbance with seed and mulch constitute unlawful conduct under the Clean Streams Law, 35 P.S. § 691.611, and the Erosion and Sediment Control Regulations at 25 Pa. Code § 102.22. Complaint, ¶ 13, 14, 16, 37, 38.

5. The Defendant's actions in failing to develop an E&S Control Plan for earth moving activities and timely submit it to the Bucks County Conservation District for its approval constitute unlawful conduct under the Clean Streams Law, 35 P.S. § 691.611, and the Erosion and Sediment Control Regulations at 25 Pa. Code § 102.4. Complaint, ¶ 12, 13, 14, 16, 25, 26.

6. The Defendant's actions in conducting earth moving activities without implementing E&S BMP Controls, failing to stabilize disturbed soils in proximity to a water of the

Commonwealth, and failing to develop and E&S Control Plan constitute potential pollution and unlawful conduct pursuant to Section 402 and 611 of the Cleans Streams Law, 35 P.S. §§ 691.402 and 691.611. Complaint, ¶ 12, 13, 14, 16, 42.

7. The Board sets the amount of civil penalties up to $10,000.00 per day for each violation, pursuant to Section 605 of the Clean Streams Law, 35 P.S. § 691.605.

8. The Board sets the civil penalty amount pursuant to Section 605 of the Clean Streams Law, 35 P.S. § 691.605, by considering the willfulness of the violations, damage or injury to the waters of the Commonwealth or their uses, the cost of restoration of the waters and enforcement of the provisions of the Act, savings to the person as a result of the noncompliance, deterrence and any other relevant factors.

9. The Board assesses a civil penalty of $21,000, and awards $920 in costs.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
v.	:	
	:	**EHB Docket No. 2009-029-CP-K**
STEVEN R. SIMMONS	:	

ORDER

AND NOW, this 6th day of April, 2010, IT IS HEREBY ORDERED that civil penalties are assessed against Steven R. Simmons in the amount of $21,000, plus $920 in costs.

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Chairman and Chief Judge

MICHELLE A. COLEMAN
Judge

BERNARD A. LABUSKES, JR.
Judge

MICHAEL L. KRANCER
Judge

RICHARD P. MATHER, SR.
Judge

DATED: April 6, 2010

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

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MARYANNE WESDOCK, ESQUIRE
ACTING SECRETARY TO THE BOARD

BRUCE C. JACKSON	:	
	:	
v.	:	**EHB Docket No. 2009-073-M**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	**Issued: April 6, 2010**
PROTECTION	:	

OPINION AND ORDER
ON MOTION TO DISMISS

By Richard P. Mather, Sr., Judge

Synopsis

The Board grants the Department's motion to dismiss the appeal. The Appellant seeks to compel the Department to conduct, or to contract with a qualified independent company to conduct, a survey of residents living near a quarry to better determine the level of citizen complaints concerning quarry operations. The Department's decision to decline to conduct such a survey is not an appealable action.

OPINION

The Department of Environmental Protection (the "Department") has filed a motion to dismiss the appeal filed by Bruce Jackson (the "Appellant") from a letter the Department sent to the Appellant dated April 21, 2009. The letter responds to an earlier contact by the Appellant concerning a permitted noncoal mining operation in Marlborough Township, Montgomery County (SMP #80735M1, Highway Materials, Inc).

The Board is receptive to a motion to dismiss where there are no material facts in dispute and the moving party is entitled to judgment as a matter of law. *Blue Marsh Labs., Inc. v. DEP*, 2008 EHB 306, 307; *Michael Butler v. DEP*, 2008 EHB 118, 119; *Borough of Chambersburg v. DEP*, 1999 EHB 921, 925; *Smedley v. DEP*, 1998 EHB 1281, 1281. The Board will only grant motions to dismiss when a matter is free from doubt. *Northampton Township, et al. v. DEP*, 2008 EHB 563, 570; *Emerald Mine Resources, LP v. DEP*, 2007 EHB 611, 612; *Kennedy v. DEP*, 2007 EHB 511. The Board evaluates motions to dismiss in the light most favorable to the non-moving party. *Cooley, et al. v. DEP*, 2004 EHB 554, 558; *Neville Chem. Co. v. DEP*, 2003 EHB 530, 531.

There is some confusion regarding the substance of Appellant's initial contact,[1] the nature of the Department's response and the reasons for Appellant's appeal. To evaluate the Department's motion to dismiss, it is useful to closely review the circumstances that give rise to the appeal. According to the Department's April 21, 2009 letter to the Appellant, the Appellant contacted the Department "concerning water loss pollution, dust and blasting issues" at the noncoal quarry in question on February 23, 2009. In its letter, the Department indicated that the Department conducted a compliance investigation at the quarry from February 24, 2009 to April 2, 2009. The Department did not observe any violations during its investigation, and the Department stated that it considered the matter closed and "will take no further action."

While the Department was conducting its compliance investigation and before it sent its April 21, 2009 letter, the Department received a written communication from the Appellant concerning Service Request No. 261201 dated February 28, 2009. This communication highlights the confusion in this appeal because the written communication construes the earlier

[1] It appears that the Department maintains a tracking system for citizen complaints concerning mining operations. Appellant's initial February 23, 2009 contact was assigned Service Request No. 261201.

February 23, 2009 contact as a request to conduct a survey of citizens living near the quarry in question. The Appellant's February 28, 2009 communication describes, in some detail, the benefits of a survey, especially if performed by a qualified independent company. The survey would, in the Appellant's view, provide a more accurate view of citizen complaints to the quarry and would overcome public resistance to the submission of complaints through the Department's formal process for citizens to file complaints with the Department.

The Department responded to the Appellant's February 23, 2009 contact in its letter dated April 21, 2009. The Department's response treats the February 23, 2009 contact as a citizen complaint and, after conducting an investigation and finding no violations, the Department's letter states that it closed the file on the citizen complaint. The Department's April 21, 2009 letter does not address or even mention the Appellant's February 28, 2008 written communication concerning Service Request No. 261201 in which the Appellant clearly indicated that he was asking the Department to conduct, or cause to be conducted, a survey of citizens living near the quarry.

The Appellant filed an appeal from the Department's April 21, 2009 letter. The Notice of Appeal stated that the Department's letter did not address the request for a survey that Appellant raised in his initial contact. The Notice of Appeal raised objections to the Department's decision not to conduct a survey of citizens living near the quarry in question.

The Department filed a motion to dismiss the appeal of the Department's April 21, 2009 letter. The Department's letter informed the Appellant that the Department conducted an investigation, that the Department did not find any violations and that the Department would not take any further action. Based on these statements, the Department's motion to dismiss asserts that the letter was an exercise of prosecutorial discretion and is not appealable.

In its motion, the Department stated that it was aware that Appellant had requested a survey, and it indicated that the Department had declined to conduct the requested survey.[2] Rather than conduct a survey, the Department decided instead to conduct a compliance investigation at the quarry from February 24 to April 2, 2009. The Department's April 21, 2009 letter to the Appellant addressed the compliance investigation that it undertook in response to the Appellant's request for a survey.

The Appellant filed a Memorandum in Response to Commonwealth of Pennsylvania, Department of Environmental Protection's Motion to Dismiss on March 23, 2010. The Response makes clear that Appellant's objections to the Department's letter under appeal concern the "Department's refusal to conduct a survey in accordance with Service Request 261201..." which the letter did not directly address.

The Appellant's objection to the Department's April 21, 2009 letter and the basis for this appeal is the Department's refusal to conduct a survey that the Appellant had requested. The confusion in this appeal arises because the Department's letter, triggering this appeal, does not address or even mention the request for a survey.[3] The Department declined to conduct the requested survey and instead conducted a compliance investigation. The Department's April 21, 2009 letter describes the results of its investigation and concludes that no further action will be taken and that it considers the matter closed. To evaluate the Department's motion to dismiss, the Board needs to consider both aspects of the appeal: (1) Appellant's request to conduct a survey of citizens living near a particular quarry; and (2) the compliance investigation conducted by the Department.

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[2] The Department's decision to "decline to perform the survey" is, at best, implicit in its April 21, 2009 letter since the letter does not address or even mention Appellant's request for a survey.

[3] The Department could have reduced or eliminated the confusion if it had directly addressed Appellant's request for a survey in the letter.

Request to Conduct Survey of Citizens Living near a Particular Quarry.

The Appellant has invoked the jurisdiction of the Board to review the Department's refusal to conduct a survey of residents who live near a particular quarry to better determine whether the residents have any complaints concerning the quarry's operations. The Appellant believes that the Department's more formal complaint procedures, for citizens to file complaints, deters citizens from voicing their complaints. The Appellant believes that a survey of citizens who live near the quarry would provide a more accurate view of the number of citizen complaints concerning the operation of the quarry.[4] For the reasons set forth below, the Board lacks the authority to consider such an appeal because the Department's decision to decline to conduct the requested survey is not an appealable action of the Board.

The extent of the Board's jurisdiction is set forth in the Environmental Hearing Board Act, Act of January 13, 1988, P.L. 530, as amended, 35 P.S. §§ 7511 *et seq.* (the EHB Act). Pursuant to the EHB Act "The Board has the power and duty to hold hearings and issue adjudications under [the provisions of the Administrative Agency Law relating to practice and procedure of Commonwealth agencies, 2 Pa.C.S. § 501 *et seq.*] on orders, permits, licenses or decisions of [DEP]." 35 P.S. § 7514(a). The EHB Act also provides that "no action of the [DEP] adversely affecting a person shall be final as to that person until the person has had the opportunity to appeal the action to the board...." 35 P.S. § 7514(c). The Board's regulations implementing the EHB Act define "action" to mean: "An order, decree, decision, determination or ruling by the Department affecting personal or property rights, privileges, immunities, duties, liabilities or obligations of a person including, but not limited to, a permit, license, approval or certification." 25 Pa. Code § 1021.2(a). Thus, the EHB Act expressly grants the Board

[4] It appears the Appellant wants the survey to counter public Department statements that there are relatively few formal complaints received concerning operations at the quarry in question.

jurisdiction over the Department's "orders, permits, licenses or decisions," 35 P.S. § 7514(a), as well as any Department action "adversely affecting" a person's "personal or property rights, privileges, immunities, duties, liabilities or obligations." 35 P.S. § 7514(c); 25 Pa. Code § 1021.2(a).

A review of the caselaw reveals certain principles which guide the determination of whether a particular Department action is appealable. Although formulation of a strict rule is not possible and the "determination must be made on a case-by-case basis," *Borough of Kutztown v. DEP*, 2001 EHB 1115, 1121, the Board has articulated certain factors which should be considered. These include: the specific wording of the communication; its purpose and intent; the practical impact of the communication; its apparent finality; the regulatory context; and, the relief which the Board can provide. *See Borough of Kutztown*, 2001 EHB at 1121-24; *Donny Beaver v. DEP*, 2002 EHB 666, 672-73.

Applying these factors to the Department's communication at issue in this appeal, it is clear that the Department's April 21, 2009 letter is not appealable. The Department's April 21, 2009 letter implicitly denies Appellant's request for a survey. The specific wording of the letter addresses the compliance investigation the Department undertook instead of the requested survey. The purpose of the letter was to inform the Appellant of the results of the compliance investigation and of the Department's intentions to consider the matter closed.

It is significant that the letter does not direct the Appellant to do anything. The letter has no practical effect on Appellant's conduct or actions, and it is merely descriptive of the Department's plans and is not prescriptive in the context of Appellant's actions or conduct. These factors strongly support a finding that the letter is not appealable.

The regulatory context of the Appellant's request to conduct a survey and the Department's refusal to grant the request are the crucial factors in the analysis of the April 21, 2009 letter. There is, in fact, no regulatory context for such a request. The Department has a formal process to handle citizen complaints regarding noncoal operations under its noncoal regulations and applicable statutes. *See* 25 Pa. Code § 77.352; Act of December 19, 1984 (P.L. 1093, No. 219), 52 P.S. § 3320; Act of June 22, 1937 (P.L. 1987, art. VI), 52 P.S. § 691.604. A citizen initiates these procedures by filing a compliant with the Department regarding violations of applicable noncoal laws at a particular quarry. The Appellant wants to bypass these regulatory required procedures and instead requests that the Department initiate a survey of citizens living near a particular quarry, since the Appellant believes the more formal regulatory driven procedures are underutilized. There is therefore no basis in law for Appellant's request for a survey that is intended to supplant the citizen complaint driven procedures that are well established by laws.[5]

In addition, the lack of legal authority for the requested survey prevents the Board from providing the Appellant with any meaningful relief. The Board has no authority to compel the Department to conduct the requested survey that is not required or even authorized by state law.

One last consideration regarding the Department's decision to include an appeal paragraph in the April 21, 2009 letter should be mentioned briefly. Inserting appeal language in a communication that the Department later asserts is not appealable is probably confusing to a *pro se* Appellant. However, under the Board's caselaw, inclusion of an appeal paragraph in a letter does not in itself make a non-appealable communication appealable. *See, e.g., Onyx*

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[5] The Board takes no position on the benefits of the requested survey or whether the legally authorized complaint driven procedures are underutilized.

Landfill, LLC, v. DEP, 2006 EHB 404; *Elgen Corp. v. DEP*, 2005 EHB 919. The Department's implicit refusal to conduct the requested survey is not an appealable action.

Compliance Investigation Conducted by the Department

Although the Appellant never requested that the Department conduct a compliance investigation, the Department undertook such an investigation instead of conducting the requested survey. From the perspective of "no good deed goes unpunished," the Appellant filed his appeal from the Department's April 21, 2009 letter that describes the results of the Department's investigation and concludes that the Department will take no further action. As previously discussed, the Appellant views this communication as a refusal to conduct the requested survey.

In its motion to dismiss and supporting memorandum, the Department argues that its April 21, 2009 letter constitutes an exercise of the Department's prosecutorial discretion, which is not appealable to the Board. In support of its position the Department relies on two Commonwealth Court decisions. *DEP v. Schneiderwind*, 867 A.2d 724 (Pa. Cmwlth. 2005); *DEP v. Law*, (Pa. Cmwlth. LEXIS 829 (Pa. Cmwlth. Jan. 23, 2009) (An unreported decision that relies heavily on the *Schneiderwind* decision.) In addition, the Department relies upon two recent Board decisions to support its motion to dismiss the appeal because the Department's decision that is set forth in its April 21, 2009 letter is an exercise of prosecutorial discretion and is not reviewable by the Board. *Edward Ballas v. DEP*, 2009 EHB 652; *Jeffrey and Lisa Rankin v. DEP*, EHB Docket No. 2009-031- L (January 4, 2010).

Although the Department is correct that, as a general rule,[6] the Board will not review a Department decision that constitutes an exercise of the Department's prosecutorial discretion, the

[6] There are exceptions to this general rule that do not need to be discussed here since the Board is not reaching this argument to grant the Department's motion to dismiss.

Appellant is not seeking to compel the Department to take enforcement action. The Appellant has not identified any specific violations of law that would support an enforcement action. The Appellant is simply seeking review of the Department's implicit decision to decline to survey residents living near a quarry concerning their complaints about quarry operations.

If the Appellant had identified any specific violations that it wanted the Department to address, the Board would then need to decide whether to apply the prosecutorial discretion caselaw in this case. Since the Board granted the Department's motion to dismiss for other reasons, it is not necessary to decide whether to apply the prosecutorial discretion caselaw in this case where there are no allegations of specific violations of law or requests for specific Department enforcement action.

Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BRUCE C. JACKSON	:	
	:	
v.	:	**EHB Docket No. 2009-073-M**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 6th day of April, 2010, it is hereby **ORDERED** that the Department's Motion to Dismiss is **granted.**

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Chairman and Chief Judge

MICHELLE A. COLEMAN
Judge

BERNARD A. LABUSKES, JR.
Judge

MICHAEL L. KRANCER
Judge

RICHARD P. MATHER, SR.
Judge

DATED: April 6, 2010

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

TAYLOR LAND CLEARING, INC. and ROBERT TAYLOR	:	
	:	
v.	:	**EHB Docket No. 2007-188-R (Consolidated with 2008-039-R 2009-089-R and 2010-017-R)**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: April 8, 2010**

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

By Thomas W. Renwand, Chairman and Chief Judge

Synopsis:

Partial summary judgment is granted to the Department of Environmental Protection on the issue of liability. The Appellant does not deny transporting wood from a demolished building and depositing it on land without a permit. A hearing will be held to determine the reasonableness of the civil penalty amount assessed by the Department and any other issues related to the Department's order.

OPINION

These appeals were filed by Taylor Land Clearing, Inc. and Robert Taylor (collectively "Taylor"), challenging two orders and civil penalty assessments issued by the Department of Environmental Protection (Department) for alleged violations of the Solid Waste Management

Act.[1] The orders charge Taylor with disposing of construction or demolition waste without a permit.

On February 23, 2010, the Department filed a motion for partial summary judgment on the issue of Taylor's liability for violating the Solid Waste Management Act and the Department's waste regulations. The motion avers that Taylor caused wood from a demolished building to be transported to and deposited on land that did not have a permit to accept solid waste. Both the Solid Waste Management Act and the Department's regulations make it unlawful to transport solid waste to or dispose of it on property that does not have a permit. 35 P.S. §§ 6018.610(1), (4), (6) and (9); 25 Pa. Code § 271.101. It is also unlawful to operate or use land as a solid waste disposal area without obtaining a permit from the Department. 35 P.S. §§ 6018.501(a), § 6018.610(2). Wood from a demolished building constitutes "construction waste" or "demolition waste" as defined in 25 Pa. Code § 271.1.

According to the Department's motion, in answers to interrogatories and deposition testimony, Taylor admitted to directing a subcontractor to transport wood from a demolished building and dispose of it on property without a permit. (Department's Brief in Support of Its Motion, citing Answers to Interrogatories and Deposition Transcript) According to the Department, the wood was transported to and disposed of on property known as the "Soterin Property" owned by Taylor's daughter. (Id.) Further according to the Department's motion, Taylor contends that he did not violate the Solid Waste Management because in his view wood from a demolished wooden building is not a construction/demolition waste or solid waste. (Id.)

Taylor did not file a response denying the allegations set forth in the Department's

[1] Appeals of the June 26, 2007 and May 27, 2009 orders and the 2007 civil penalty assessment have been consolidated at Docket No. 2007-188-R. The appeal of the 2010 civil penalty is docketed separately at Docket No. 2010-017-R.

motion for partial summary judgment. In a Joint Stipulation filed by the parties, Taylor acknowledges that he directed a subcontractor to transport wood from the demolished wooden building to the Soterin Property owned by Taylor's daughter and that the Soterin Property did not hold a permit to accept solid waste. (Second Joint Stipulation)

The Department asks the Board to grant partial summary judgment on the issue of Taylor's liability for violating the Solid Waste Management Act.

According to the Board's Rules of Practice and Procedure:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading or its notice of appeal, but the adverse party's response, by affidavits or as otherwise provided by this rule, must set forth specific facts showing there is a genuine issue for hearing. If the adverse party does not so respond, summary judgment may be entered against the adverse party. Summary judgment may be entered against a party who fails to respond to a summary judgment motion.

25 Pa. Code § 1021.94a(k).

Taylor does not deny that he caused wood from a demolished building to be transported to and deposited on land that does not have a permit to accept solid waste. Because wood from a demolished building constitutes construction/demolition waste, which is a solid waste, 25 Pa. Code § 271.1, we find that Taylor has caused solid waste to be transported to and disposed of on land without a permit in violation of Section 6018.610 of the Solid Waste Management Act. Partial summary judgment is granted to the Department on the sole issue of Taylor's liability for violations of the Solid Waste Management Act for the transport and disposal of wood from a demolished building to property without a permit.

The amount of the civil penalties and any other issues pertaining to the Department's

orders[2] shall be addressed at the hearing to be held in Pittsburgh at the Environmental Hearing Board's new court facility in Piatt Place.[3]

---

[2] The Department also alleges that Taylor caused other forms of solid waste to be disposed on the Soterin Property. Those allegations are not addressed in this Opinion and Order.

[3] The hearing that was originally scheduled for April 14-15, 2010 is being rescheduled to a later date.

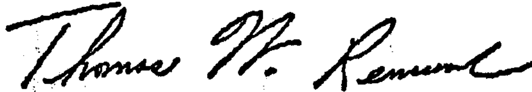
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

TAYLOR LAND CLEARING, INC. and ROBERT TAYLOR	:	
v.	:	**EHB Docket No. 2007-188-R (Consolidated with 2008-039-R 2009-089-R and 2010-017-R)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

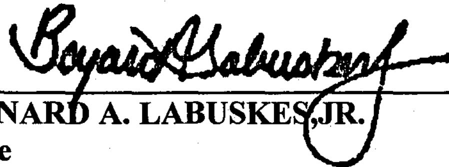
AND NOW, this 8th day of April, 2010, partial summary judgment is granted to the Department on the issue of Taylor's liability for violations of the Solid Waste Management Act in connection with Taylor's transport and disposal of wood from a demolished building to property without a permit.

ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Chairman and Chief Judge

MICHELLE A. COLEMAN
Judge



BERNARD A. LABUSKES, JR.
Judge

MICHAEL L. KRANCER
Judge

RICHARD P. MATHER, SR.
Judge

DATE: April 8, 2010

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

GEC ENTERPRISES, INC., AND SANDRA M. COOPER	:	
v.	:	**EHB Docket No. 2009-171-M**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: April 13, 2010**

OPINION AND ORDER
ON MOTION TO DISMISS

By Richard P. Mather, Sr., Judge

Synopsis

The Board grants the Department's unopposed motion to dismiss the appeal of a civil penalty assessment where the appeal was filed more than 30 days after the Appellants received the assessment.

OPINION

This matter involves an appeal of a civil penalty assessment issued by the Department of Environmental Protection (the "Department") to GEC Enterprises, Inc. ("GEC") and Sandra M. Cooper (collectively "Appellants") for violations of the Solid Waste Management Act, 35 P.S. §§ 6018.101-1003. Before the Board is an unopposed motion to dismiss filed by the Department. The Department seeks to dismiss this appeal for a lack of jurisdiction because the appeal was filed more than 30 days after the assessment was received by the Appellants by hand delivery.

According to the civil penalty assessment, on March 17, 2009 the Department conducted a complaint investigation of the property owned by Sandra Cooper. Ms. Cooper is the President of GEC. GEC operates a facility on the property known as The Sign Shop. The Sign Shop manufactures various types of signs. Following the investigation, the Department sent The Sign Shop a Notice of Violation listing several violations including the disposal of hazardous waste at a facility that is not permitted to dispose of hazardous waste in violation of 35 P.S. § 6018.401(a), failure to label a container used to store hazardous waste in violation of 35 P.S. § 6018.403(b)(2), and burning solid waste without a permit in violation of 35 P.S. § 6018.610(3). The Department conducted follow-up inspections on April 14, May 7, and June 23, 2009. During the June 23, 2009 inspection, the Department did not observe any remaining violations. The civil penalty assessment that is the subject of this appeal was issued on November 18, 2009. The Department assessed a penalty of $15,000 against GEC and Sandra Cooper, jointly and severally.

In its motion to dismiss, the Department argues that the appeal is untimely because it was filed after the expiration of the 30 day period for such appeals. The Department claims that the assessment was hand delivered to Sandra Cooper and GEC by Anthony L. Martinelli, an employee of the Department, on November 18, 2009. The affidavit of Mr. Martinelli affirming the hand delivery of the assessment on that date is attached to the Department's motion as Exhibit D. A copy of the assessment and two cover letters addressed to Sandra Cooper and GEC and dated November 18, 2009 are attached to the Department's motion as Exhibits A, B and C, respectively. The assessment contains a Notice of Appeal that states, in part: "IF YOU WANT TO CHALLENGE THIS ACTION, YOUR APPEAL MUST REACH THE BOARD WITHIN 30 DAYS. YOU DO NOT NEED A LAWYER TO FILE AN APPEAL WITH THE BOARD."

(emphasis in original). The Department claims that a courtesy copy of the assessment was sent to counsel for GEC and Cooper the next day. Attached as Exhibit E to the Department's motion is an email from Amy Ershler, assistant counsel with the Department, to David Morgan, counsel for GEC and Sandra Cooper, dated November 19, 2009 and stating "Attached is a courtesy copy of the Civil Penalty Assessment that was hand delivered yesterday to the Sign Shop for GEC and for Sandra Cooper." The Department argues in their motion that, having been hand delivered to the Appellants on November 18, 2009, any appeal from the assessment must have been filed on or before December 18, 2009. The Department claims that the Appellants did not file an appeal of the assessment with the Board until December 21, 2009 and the appeal is therefore untimely and should be dismissed. The Appellants did not file any response to the Department's motion to dismiss. For the reasons set forth below, we grant the Department's motion.

We are receptive to a motion to dismiss where there are no material facts in dispute and the moving party is entitled to judgment as a matter of law. *Blue Marsh Labs., Inc. v. DEP*, 2008 EHB 306, 307; *Michael Butler v. DEP*, 2008 EHB 118, 119; *Borough of Chambersburg v. DEP*, 1999 EHB 921, 925; *Smedley v. DEP*, 1998 EHB 1281, 1281. Motions to dismiss will be granted only when a matter is free from doubt. *Northampton Township, et al. v. DEP*, 2008 EHB 563, 570; *Emerald Mine Resources, LP v. DEP*, 2007 EHB 611, 612; *Kennedy v. DEP*, 2007 EHB 511. The Board evaluates motions to dismiss in the light most favorable to the non-moving party. *Cooley, et al. v. DEP*, 2004 EHB 554, 558; *Neville Chem. Co. v. DEP*, 2003 EHB 530, 531. Because the Appellants failed to respond to the Department's motion to dismiss within 30 days of service, and have yet to file any response as of the date of this Opinion, the Board deems all properly pleaded and supported facts in the Department's motion to be true. 25 Pa. Code § 1021.91(f); *Tanner v. DEP*, 2006 EHB 468, 469; *Gary Berkley Trucking, Inc. v. DEP*, 2006 EHB

330, 332.

Based on the facts in its uncontested motion, the Department is entitled to have its motion granted. The Department assessed civil penalties against the Appellants. Both Appellants received the civil penalty assessment, by hand delivery, on November 18, 2009. The Board received the Appellants' Notice of Appeal on December 21, 2009 which is more than 30 days from the date the Appellants received the civil penalty assessment.

The Board's rule is clear that the recipient of Departmental action has 30 days to file an appeal with the Board. 25 Pa. Code § 1021.52 (a)(1); *Greenridge Reclamation LLC v. DEP*, 2005 EHB 390, 391; *Martz v. DEP*, 2005 EHB 349, 350; *Pikitus v. DEP*, 2005 EHB 354, 357. The Solid Waste Management Act contains a nearly identical provision allowing 30 days for the filing of an appeal. 35 P.S. § 6018.605 ("The person charged with the penalty shall then have 30 days to pay the proposed penalty in full or, if the person wishes to contest either the amount of the penalty or the fact of the violation, the person shall within such 30 day period file an appeal with [the Board]. Failure to appeal within 30 days shall result in a waiver of all legal rights to contest the violation or the amount of the penalty."). If an appeal is filed beyond the 30 day deadline, the Board ordinarily is deprived jurisdiction to hear the appeal. *Rostosky v. DER*, 364 A.2d 761, 763 (Pa. Cmwlth. 1976); *Pikitus*, 2005 EHB at 357; *Burnside Township v. DEP*, 2002 EHB 700, 702; *Sweeney v. DER*, 1995 EHB 544, 546.[1] The assessment was hand delivered to Appellants on November 18, 2009, and they were in possession of the assessment as of that day.

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[1] Under certain exceptional circumstances, the Board's rules provide that an appeal may be filed *nunc pro tunc* beyond the normal 30 day appeal period. 25 Pa. Code § 1021.53a. It is well established that, in administrative actions, appeals *nunc pro tunc* will be permitted only where there is a showing of fraud, breakdown in the administrative process, or unique and compelling factual circumstances establishing a non-negligent failure to file a timely appeal. *See, e.g., Grimaund v. DER*, 638 A.2d 299, 303-04 (Pa. Cmwlth. 1994); *Weaver*, 2002 EHB at 279; *Ziccardi v. DEP*, 1997 EHB 1, 6-8. Because the Appellants failed to respond to the Department's motion, it follows that the Appellants have not asserted any grounds for a *nunc pro tunc* appeal and the Board will not consider this issue further.

Therefore, the 30 day period for the filing of an appeal began running that day.

The uncontested record before the Board presents two issues that should be mentioned as we evaluate the Department's motion to dismiss "in the light most favorable to the non-moving party." First, the Notice of Appeal states that the Appellants received notice on "November 18/19, 2009."[2] Second, the Proof of Service attached to Appellants' Notice of Appeal is dated December 18, 2008. Neither of these facts alters the conclusion that the Appellants' Notice of Appeal was not timely filed.

As previously mentioned, the Appellants received a copy of the assessment by hand delivery on November 18, 2009, and the Department sent a courtesy copy of the assessment to Appellants' attorney on November 19, 2009. The Department's action to deliver a courtesy copy of the assessment to the Appellants has no effect on the date the Appellants received the assessment that began the 30 day appeal period. The fact that the Department delivered a courtesy copy to Appellants' counsel via email the next day with a note that states the assessment was hand delivered to the Appellants the previous day does not support the view that the Appellants received the assessment on November 19, 2009. The note on the courtesy copy that was delivered on November 19, 2009 reinforces the Department's position that November 18, 2009 is the proper date to begin the 30 day appeal period.

Similarly, any argument that the appeal is timely because the attached Proof of Service was dated December 18, 2009 would also fail. The Board's rule is unequivocal that the date of filing shall be the *date the document is received* by the Board. 25 Pa. Code § 1021.32(b). In a similar case, we previously held that:

> Obviously, it is the date on which the Board records receipt of the appeal which controls rather than the date written on a Fax Cover Sheet by an Appellant.... To

[2] The Appellants' identification of "November 18/19, 2009" as the date of receipt is imprecise and confusing, but it raises a question about the date when Appellants received notice.

> hold otherwise would not only require us to ignore the plain language of this rule but also would mean there would never be any future untimely appeals because the Appellants in those appeals would be free to select any filing date and we would be bound thereby.

Westtown Sewer Co. v. DER, 1992 EHB 637, 639-40. The same reasoning applies here. To find the date on the Proof of Service to be controlling would ignore the plain language of 25 Pa. Code § 1021.32(b) and would allow parties to select any filing date of their choosing. *See also Pikitus*, 2005 EHB at 357 (The Notice of Appeal must be received by the Board at its offices in Harrisburg within the 30 day appeal period); *Weaver v. DEP*, 2002 EHB 273, 278 (An appeal must be received by the Board within the thirty-day limitation period, not merely mailed within that time frame); *State Farm Mut. Auto. Ins. Co. v. Schultz*, 421 A.2d 1224, 1227 (Pa. Super. 1980) ("Timely means filing at the designated place within the designated time"); *Taylor v. DER*, 1992 EHB 257, 259; *McClure v. DER*, 1992 EHB 212, 215. Here, the Appellants' Notice of Appeal was time-stamped "received" by the Board on December 21, 2009 and was entered onto the docket that same day. Thus, the appeal was filed with the Board on December 21, 2009.

The Board computes time in accordance with the general rules of administrative practice and procedure. 1 Pa. Code § 31.1; 1 Pa. Code § 31.12. In doing so, time shall be computed to exclude the first day but include the last. 1 Pa. Code § 31.12 ; *York Resources Corp. v. DER*, 1985 EHB 899, 901. Whenever the last day falls on a Saturday, Sunday or legal holiday, such day shall be omitted from the computation. *Id.* Here, the evidence demonstrates, and it is not disputed, that the Appellants received the civil penalty assessment on November 18, 2009. Thirty days from November 18, 2009 was Friday, December 18, 2009. Unfortunately for the Appellants, the evidence demonstrates that the appeal was filed with the Board on Monday, December 21, 2009. The 30 day deadline for filing an appeal expired on Friday, December 18, 2009, and therefore the appeal is untimely.

Pennsylvania courts have long held that the failure to timely appeal an administrative agency's action is a jurisdictional defect which mandates the quashing of the appeal. *See Falcon Oil Co., Inc. v. DER*, 609 A.2d 876, 878 (Pa. Cmwlth 1992); *Cadogan Township Board of Supervisors v. DER*, 549 A.2d 1363, 1364 (Pa. Cmwlth. 1988); *Pennsylvania Game Comm'n v. DER*, 509 A.2d 877, 886 (Pa. Cmwlth. 1986), *aff'd,* 555 A.2d 812 (Pa. 1989); *Weaver*, 2002 EHB at 276; *Dellinger v. DEP*, 2000 EHB 976, 980. Untimely appeals are granted very little leniency by the court. *See Bass v. Commonwealth,* 401 A.2d 1133, 1135 (Pa. 1979) ("[T]he time for taking an appeal cannot be extended as a matter of grace or mere indulgence."); *Rostosky*, 364 A.2d at 763 ("Where a statute has a fixed time within which an appeal may be taken, we cannot extend such time as a matter of indulgence.") Moreover, the Board is not permitted to disregard such a defect and grant an extension of time "in the interests of justice." *See West Caln Township v. DER*, 595 A.2d 702, 705-06 (Pa. Cmwlth. 1991); *Weaver*, 2002 EHB at 277. Accordingly, the untimeliness of the appeal, although only slightly overdue, deprives the Board of jurisdiction over the appeal and operates as a waiver of all legal rights to contest the violation or the penalty amount. *See, e.g., Spencer v. DEP*, 2008 EHB 573, 575 (appeal dismissed because it was filed one day too late); *Pedler v. DEP*, 2004 EHB 852, 854 (same); *Tanner*, 2006 EHB at 469 (dismissing an appeal of a compliance order where the appeal was filed 32 days after receipt of the order); *Martz*, 2005 EHB at 349-50 (dismissing an appeal of an enforcement order where the appeal was filed 41 days after the issuance of the order); *Weaver*, 2002 EHB at 279 (dismissing appeal where Notice of Appeal was filed 41 days after the delivery of a civil penalty assessment to the appellant's residence); 35 P.S. § 6018.605 (failure to appeal in 30 days shall result in a waiver of all rights).

Accordingly, we issue the Order that follows.

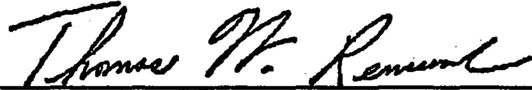
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

GEC ENTERPRISES, INC., AND SANDRA M. COOPER	:	
	:	
v.	:	**EHB Docket No. 2009-171-M**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

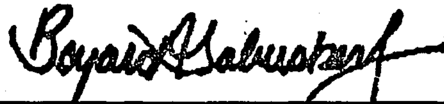
AND NOW, this 13th day of April, 2010 the Motion to Dismiss of the Department Environmental Protection is hereby **GRANTED.** The appeal is **DISMISSED.**

ENVIRONMENTAL HEARING BOARD

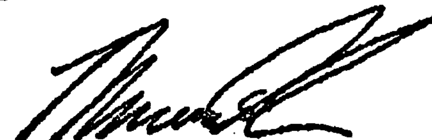


THOMAS W. RENWAND
Chairman and Chief Judge

MICHELLE A. COLEMAN
Judge



BERNARD A. LABUSKES, JR.
Judge



MICHAEL L. KRANCER
Judge

RICHARD P. MATHER, SR.
Judge

DATED: April 13, 2010

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

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MARYANNE WESDOCK, ESQUIRE
ACTING SECRETARY TO THE BOARD

SUNOCO LOGISTICS PARTNERS, L.P. :
:
v. : EHB Docket No. 2009-093-R
:
COMMONWEALTH OF PENNSYLVANIA, :
DEPARTMENT OF ENVIRONMENTAL :
PROTECTION : Issued: April 13, 2010

OPINION AND ORDER ON APPELLANT'S MOTION TO COMPEL

By: Thomas W. Renwand, Chairman and Chief Judge

Synopsis:

The Pennsylvania Environmental Hearing Board allows the Appellant petroleum company to proceed with the deposition of a designee of the Pennsylvania Department of Environmental Protection where the Department had unilaterally refused to proceed with the deposition and had not obtained a protective order from the Board. The proper procedure is to obtain a protective order from the Board.

After carefully reviewing all of the various Motions filed, the Board believes that following the deposition of the Department designee, the record at that stage of the litigation will be sufficient to decide the jurisdictional issues raised in the Department's Motion for

Summary Judgment. Following the Board's ruling on the merits of the Department's Motion for Summary Judgment, the Board, if appropriate, will decide the additional discovery issues raised by Sunoco.

OPINION

Background

Presently before the Pennsylvania Environmental Hearing Board is the Pennsylvania Department of Environmental Protection's (Department) Motion for Stay, the Department's Motion for Summary Judgment, the Appellant Sunoco Logistics Partners, L.P.'s (Sunoco) answer in Opposition to the Motion to Stay, Sunoco's Omnibus Motion to Compel, the Department's Reply to Sunoco's Objection to Motion to Stay, and the Department's Answer to Sunoco's Motion to Compel.

As we understand the facts on November 25, 2008 a valve on a pipeline owned by Sunoco failed in Murrysville, Westmoreland County, Pennsylvania. The resulting spillage of petroleum product eventually entered the waters of Turtle Creek. The Department claims that "since that time, slugs of gasoline have been discharging from the site into Turtle Creek." Department's Brief in Support of its Motion for Summary Judgment, page 1.

On December 18, 2008, shortly after receiving Sunoco's Draft Proposed Site Development and Site Characterization Activity outline, the Department issued an Administrative Order. The Administrative Order, among other things, required Sunoco to cease discharging gasoline into Turtle Creek and to provide the Department with regular and

comprehensive reports regarding the site. Sunoco did not appeal the Administrative Order.

On June 1, 2009 the Department sent Sunoco a detailed letter. The Department advised Sunoco "that it has not complied with Paragraph 2 of the [Administrative] Order, and that the approach outlined in the Draft Site Characterization Activities has proved to be inadequate for that purpose." The letter goes on to state:

> Paragraph 4 of the Administrative Order allows the Department to direct Sunoco to modify its cleanup and remediation activities at this site. This letter conveys a request, under Paragraph 4, for modification of the proposal to provide for design, permitting, installation, operation and maintenance of a system by which Sunoco Logistics will pump and treat groundwater at the site...

The next paragraph reminds Sunoco that the Department is calculating a civil penalty for not only any violation of the Clean Streams Law of Pennsylvania but also for its failure to comply with the Department's Administrative Order and that a pump and treat system is necessary to contain and limit the environmental damage caused by the spill.

The Department has taken the position that Sunoco's appeal is time barred because it never appealed the Administrative Order. Nevertheless, the Department waited eight months after the appeal was filed before filing its Motion to Stay and Summary Judgment Motion. During this time Sunoco filed extensive and comprehensive discovery requests. Although Sunoco claims the Department responses fall far short of what is required by this Board's Rules of Procedure which also incorporate the broad discovery provisions of the Pennsylvania Rules of Civil Procedure, our initial review of the Department's Responses lead

us to conclude that the Department has supplied a great deal of information and at the same time filed what it considered as valid good faith objections based on its jurisdictional argument.

Sunoco noticed the deposition of a Department employee or employees pursuant to the discovery rules set forth in the Pennsylvania Rules of Civil Procedure and adopted by this Board. The Department, rather than seeking a protective order from the Board, pursuant to Pennsylvania Rule of Civil Procedure 4012, the Department unilaterally advised counsel for Sunoco that the deposition would not take place and unilaterally cancelled it. This is not permissible under our Rules.

In the Department's Reply to Sunoco's Objection to Motion to Stay, the Department cites our recent decision of *PDG Land Development Inc. v. Department of Environmental Protection and Citizens for Pennsylvania's Future*, 2009 EHB 268, in support of its position.

> In PDG, the parties had spent many years in the permit application process, and many, many more months in the discovery process of the appeal before the Board. After all of that time, and after all of those resources had been expended, the Board granted the Commonwealth's Motion for Summary Judgment, on the basis of a regulation which prohibited conducting mining activity within 100 feet of a stream. In granting the Motion, the Board properly chided the Department in a foot note for failing to pursue this foundational legal issue much earlier in the process, because doing so would have spared all of the parties and the Board the senseless investment of time and resources.

However, instead of filing an immediate dispositive motion in this case the

Department waited eight months. This has allowed Sunoco to raise a host of discovery issues which may or may not have merit. The delay has resulted in a Gordian Knot of legal issues swirling around these discovery questions which could have been avoided by a more timely resolution of this jurisdictional issue. Therefore, rather than deciding these other legal issues involving discovery at this time, we will allow Sunoco to take the deposition of the Department designee which it noticed pursuant to Pa.R.C. P. 4007.1(e) on February 25, 2010. This deposition will take place commencing at 10:00 on Thursday, May 6, 2010 at the Board's Pittsburgh Office and Court Facility located at Piatt Place, 301 Fifth Avenue, Suite 310, Pittsburgh, Pennsylvania. The deposition will take place in Conference Room 3019 before a court reporter retained by Sunoco. The Board is scheduling this deposition at its facility so that it will be immediately available to address any objections that might arise.[1]

After carefully studying the Department's Motion for Summary Judgment, we believe that this issue may be decided following the completion of the Department deposition on May 6, 2010. Therefore, Sunoco shall file its responding brief to the Department's Motion for Summary Judgment on or before June 25, 2010. The Department may file a concise reply brief on or before July 16, 2010. Following the Board's ruling on the merits of the Department's Motion for Summary Judgment, the Board, if appropriate, will decide the additional discovery issues raised by Sunoco.

---

1 The Board wants it to be clear to all parties that no single party, not even the Commonwealth, can unilaterally refuse to attend a valid deposition properly noticed. The proper procedure, which was not followed here, is to obtain a protective order from the Board.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

SUNOCO LOGISTICS PARTNERS, L.P. :
:
v. : **EHB Docket No. 2009-093-R**
:
COMMONWEALTH OF PENNSYLVANIA,:
DEPARTMENT OF ENVIRONMENTAL :
PROTECTION :

ORDER

AND NOW, this 13th day of April, 2010, following review of the various Motions pending before the Board, it is ordered as follows:

1.) Sunoco's Omnibus Motion to Compel is ***granted in part***.

2.) The Department shall produce a witness designee for a deposition on the subjects identified in the Notice of Deposition served by Sunoco on February 25, 2010.

3.) This deposition will take place in the Board's Pittsburgh Office and Court Facility commencing at **10:00** on **Thursday, May 6, 2010**.

4.) The deposition will take place at Piatt Place, 301 Fifth Avenue, Pittsburgh, Pennsylvania, in ***Conference Room* 3019** before a court

reporter retained by Sunoco.

5.) Sunoco shall file its ***Responding Brief*** to the Department's Motion for Summary Judgment on or before **June 25, 2010.**

6.) The Department may file a concise ***Reply Brief*** on or before **July 16, 2010.**

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Chairman and Chief Judge

DATED: April 13, 2010

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

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MARYANNE WESDOCK, ESQUIRE
ACTING SECRETARY TO THE BOARD

RURAL AREA CONCERNED CITIZENS	:	
	:	
v.	:	**EHB Docket No. 2008-327-R**
	:	
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and BULLSKIN STONE & LIME, LLC, Permittee	:	**Issued: April 14, 2010**

OPINION AND ORDER ON PERMITTEE'S MOTION IN LIMINE TO EXCLUDE EXHIBITS 3 – 6 OF APPELLANT'S PRE HEARING MEMORANDUM

By Thomas W. Renwand, Chairman and Chief Judge

Synopsis:

The Permittee's motion in limine to exclude certain exhibits filed with the Appellant's pre hearing memorandum is denied. The exhibits are admissible as official records of the Department. Although the probative value of the exhibits is questionable since they relate to a permit application for the same mine site filed nearly 30 years ago, that goes to the weight of the evidence and will be evaluated by the trier of fact.

OPINION

This matter involves the appeal of a permit issued by the Department of Environmental Protection (Department) to Bullskin Stone & Lime, LLC (Bullskin) for the operation of a small non-coal mine in Bullskin Township, Fayette County. The permit was appealed by Rural Area Concerned Citizens (the Appellant), who argue that the permit application did not contain

sufficient information for the Department to determine whether environmental harm or a public nuisance was likely to occur at the proposed mine.

The Appellant filed its pre hearing memorandum on March 25, 2010. Bullskin has filed a motion in limine seeking to exclude Exhibits 3 through 6 of the pre hearing memorandum. The exhibits consist of various documents relating to a mine drainage permit application submitted in the early 1980's by Soberdash Coal Company (Soberdash). Exhibit 3 is a series of letters from December 1983 to March 1984 relating to the permit application. Exhibit 4 is the permit application itself, which was submitted in March 1982 for a proposed 97 acre strip and auger mine. Exhibit 5 is a letter from the Department's Bureau of Mining and Reclamation to the Permit Review and Technical Services Section relating to the application. Exhibit 6 is a map related to the application with the handwritten notations "Denied" and "Proposed Site." They are collectively referred to as "the Soberdash documents."

Bullskin argues that the Soberdash documents should be excluded from trial because they cannot be authenticated, because they constitute hearsay and, finally, because they are irrelevant. The Department concurs with and joins in Bullskin's motion, and also argues that the documents should be excluded because only one of the documents was identified in response to Bullskin's request for discovery.

In response, the Appellant argues that the proposed exhibits relate to an application for a mining permit on the same site filed in 1982. It is the Appellant's contention that the Department denied the application because the applicant failed to demonstrate that pollution to surface water and groundwater was not likely to occur. The Appellant intends to introduce the Soberdash documents at trial to challenge the assertion that mining at the site is unlikely to cause pollution.

In response to Bullskin's argument that the documents cannot be authenticated and constitute inadmissible hearsay, the Appellant points to 42 Pa.C.S.A. §§ 6103 and 6104. Section 6104 states as follows:

> § 6104. Effect of official records generally
>
> (a) GENERAL RULE. – A copy of a record of governmental action or inaction authenticated as provided in section 6103 (relating to proof of official records) shall be admissible as evidence that the governmental action or inaction disclosed therein was in fact taken or omitted.
>
> (b) EXISTENCE OF FACTS. – A copy of a record authenticated as provided in section 6103 disclosing the existence or nonexistence of facts which have been recorded pursuant to an official duty or would have been so recorded had the facts existed shall be admissible as evidence of the existence or nonexistence of such facts, unless the sources of information or other circumstances indicate lack of trustworthiness.

Section 6103 states that official records "may be evidenced by an official publication thereof or by a copy attested by the officer having the legal custody of the record, or by that officer's deputy, and accompanied by a certificate that the officer has the custody." 42 Pa. C.S.A. § 6103.

The Appellant points out that the Soberdash documents are public records of the Department which the Appellant intends to subpoena for the trial. Additionally, the Appellant notes that it has identified H. Scott Horrell as a witness and that Mr. Horrell was the permit review and technical services chief for the Department at the time the Soberdash permit was denied.

The Department argues that the documents should be excluded because the Appellant identified only one of them in response to Bullskin's discovery. When asked in discovery which documents it was relying upon, the Appellant stated "Soberdash denial letter." The Department

argues that this description relates only to Exhibit 3, which is a series of letters pertaining to the denial of the Soberdash permit application. While the Department may be technically correct, we find that each of the proposed exhibits relates to the denial of the Soberdash permit application and that the Appellant's listing of the "Soberdash denial letter" provided notice to the Department and Bullskin that the Soberdash permit application could be raised by the Appellant. Of course, the better course would have been for the Appellant to clearly identify each of these documents. Nevertheless, we see no prejudice to either the Department or Bullskin by the less than expansive description supplied by the Appellant.

The final argument is that the proposed exhibits have no relevance to the present case. The Appellant argues that the documents are relevant because they demonstrate that the Department has previously determined that the mining on the site is likely to cause pollution and groundwater contamination.

We do question the probative value of documents containing findings made by the Department nearly 30 years ago. We presume that in the last two and a half decades technology relating to the process involved in this appeal has improved and that the Department's ability to evaluate information in this field has become more sophisticated. Furthermore, there is nothing to indicate that the previous applicant provided the same information in its application as did Bullskin. Nonetheless, these are evidentiary issues which must be weighed by the trier of fact, and the questions we raise relate to the weight to be given to the evidence.

Therefore, the motion in limine to exclude Appellant's proposed Exhibits 3 through 6 is denied.[1]

[1] Various other motions have also been filed in this case, and they will be addressed in separate opinions.

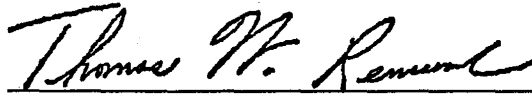
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

RURAL AREA CONCERNED CITIZENS	:	
	:	
v.	:	**EHB Docket No. 2008-327-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and BULLSKIN STONE & LIME, LLC, Permittee	:	

ORDER

AND NOW, this 14th day of April 2010, the Permittee's motion in limine to exclude Exhibits 3 – 6 of Appellant's pre hearing memorandum is ***denied.***

ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Chairman and Chief Judge

DATE: April 14, 2010

See following page for service listing

EHB Docket No. 2008-327-R

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ACTING SECRETARY TO THE BOARD

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
v.	:	**EHB Docket No. 2010-016-CP-L**
FRANK T. PERANO	:	**Issued: April 16, 2010**

OPINION AND ORDER
ON MOTION TO STRIKE

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board grants a motion to strike a motion for partial dismissal of a complaint. The motion for partial dismissal of the complaint in substance and purpose constitutes a set of preliminary objections in some particulars, and a motion for summary judgment in others. In either case, the motion is inconsistent with the Board's rules.

OPINION

The Department of Environmental Protection (the "Department") has filed a complaint for assessment of civil penalties against Frank T. Perano ("Perano") for alleged violations that occurred in connection with a waste water treatment facility owned and operated by Perano at his Cedar Manor Mobile Home Park in Dauphin County. Perano filed a timely answer to the complaint, but he has also filed a motion for partial dismissal of the complaint. Perano has asked us to dismiss four of the six counts in the Department's complaint.

The Department has moved to strike Perano's motion because it is, in the Department's words, a motion for summary judgment masquerading as a motion to dismiss. Among other things, the motion relies on facts outside of those stated in the complaint. The motion does not challenge the Board's jurisdiction, which the Department argues is the primary use for an early motion to dismiss. Since the motion does not comply with our rules regarding summary judgment, the Department asks that it be stricken. Perano responds that the Department has elevated form over substance. He notes that all of the required components of a summary judgment package are contained in his motion, if not precisely in the format contemplated by our rules. *See* 25 Pa. Code § 1021.94a. He argues that no interest would be served by striking the motion and requiring it to be slightly revised and refiled as a summary judgment motion.[1]

We agree with the Department to the extent that it has argued that Perano's motion for partial dismissal is inconsistent with the approach to pleadings practice that is embodied in our rules. The Board's rules prescribe highly steamlined procedures in the pleadings stage of a special action, i.e., an action typically commenced by the filing of a complaint. "Answers to complaints shall set forth any legal objections as well as any denial of facts, in a single pleading." 25 Pa. Code § 1021.74(b). "No new matter or preliminary objections shall be filed." 25 Pa. Code § 1021.74(e).

Although Perano styles his submittal as a motion for partial dismissal of the complaint, in reality it is in several key respects a set of preliminary objections. Perano concedes as much in his response. Preliminary objections challenge a pleading because the pleading, e.g., fails to conform to law or rule, contains scandalous matter, is insufficiently specific, or is legally insufficient. *See* Pa.R.Civ.P. 1028. Perano alleges repeatedly that the Department's complaint

---

[1] Perano also argues that the Department's motion does not itself comply with our rules because it is not supported by a memorandum of law as required by 25 Pa. Code § 1021.95(d). The Department's motion, however, was in fact supported by such a memorandum. (See Docket Entry 8.)

lacks specificity. He at one point concedes that his motion is the equivalent of a motion for judgment on the pleadings "in the nature of a demurrer." He avers that the complaint fails to set forth adequate legal authority, and that the facts set forth therein fail to give rise to a cause of action. All of these assaults on the complaint smack of preliminary objections and are not permitted under our rules. 25 Pa. Code § 1021.74(c).

Alternatively, Perano's motion gets into heavily fact-dependent defenses regarding, for example, the Department's compliance with appropriate laboratory protocols and whether and when Perano is entitled to operate his wastewater treatment plant pursuant to something he refers to as the "Interium High Flow Management Plan." These sorts of allegations rely almost entirely upon facts outside of the Department's complaint. We normally will not entertain the equivalent of a motion for judgment on the pleadings that requires us to resolve legitimate, material factual disputes unless there is credible challenge to the Board's jurisdiction. *Felix Dam Preservation Ass'n v. DEP*, 2000 EHB 409; *Florence Township v. DEP*, 1996 EHB 282. Jurisdiction is not at issue here. By arguing that he could simply refile his motion as a summary judgment motion, Perano essentially concedes the Department's more basic criticism that the motion is in some respects really just a summary judgment motion. It is far too early in the process for us to resolve the factual and legal disputes that go to the heart of this matter and form the basis for Perano's motion.

For these reasons, we will grant the Department's motion to strike Perano's motion. We hasten to add that our ruling is without prejudice to Perano's right to pursue his various defenses and objections in the proper context, and we express no opinion whatsoever on the merits thereof at this time.

Our Order follows.

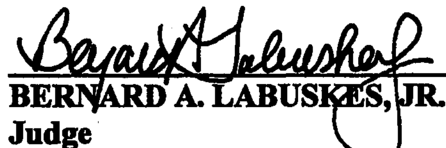
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
v.	:	**EHB Docket No. 2010-016-CP-L**
FRANK T. PERANO	:	

O R D E R

AND NOW, this 16th day of April, 2010, the Department's motion to strike Perano's motion for partial dismissal of complaint is **granted**. Perano's motion for partial dismissal of complaint is stricken without prejudice.

ENVIRONMENTAL HEARING BOARD



BERNARD A. LABUSKES, JR.
Judge

DATED: April 16, 2010

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MARYANNE WESDOCK, ESQUIRE
ACTING SECRETARY TO THE BOARD

SUSAN FOX and JEFF VAN VOORHIS, et al	:	**Docket No. 2007-280-C**
	:	**(Cons. w/ 2007-283-C, 2007-284-C,**
vs.	:	**2007-289-C, 2007. 2008-003-C,**
	:	**2008-013-C, 2008-015-C,**
COMMONWEALTH OF PENNSYVANIA	:	**2008-023-C, 2008-031-C, and**
DEPARTMENT OF ENVIRONMENTAL	:	**2008-032-C)**
PROTECTION and SYNAGRO	:	
MID-ATLANTIC, INC., Permittee	:	**Issued: April 23, 2010**

OPINION AND ORDER ON MOTION IN LIMINE

By Michelle A. Coleman, Judge

Synopsis:

The Board grants in part and denies in part the Department and Permittee's motion in limine. The Board will not allow the Appellants to challenge the General Permit for Beneficial Use of Biosolids by Land Application (PAG-08) which was published in the *Pennsylvania Bulletin* on April 3, 2004, nor to challenge the suitability of the Phillips Farm to receive biosolids which was published in the *Pennsylvania Bulletin* on December 10, 2005. The Board will allow the Appellants to appeal the Permitttee's notice of the two newly permitted sources of biosolids they received notice of pursuant to 25 Pa. Code § 271.913(g).

OPINION

Before the Board is a Motion in Limine filed by the Department of Environmental Protection (Department) and Synagro Mid-Atlantic, Inc. (Synagro) seeking to limit the issues of this appeal. Recently, the Board issued an Opinion and Order denying Synagro's Motion to

Dismiss to ensure that the Appellants were afforded an opportunity to be heard. *Susan Fox, et al. v. DEP and Synagro Mid-Atlantic, Inc.*, 2008 EHB 515. We will not reiterate the facts set forth in that opinion, rather only the facts that pertain to the motion at hand.

The Department issued a General Permit for Beneficial Use of Biosolids by Land Application (PAG-08) which was published in the *Pennsylvania Bulletin* on April 3, 2004. At various times throughout 2005 the Department approved twenty nine sources of biosolids to be used at the Phillips Farm. On November 23, 2005, the Department determined that the Phillips Farm was suitable for the application of these biosolids and published this determination in the *Pennsylvania Bulletin* on December 10, 2005.

The Appellants in this consolidated appeal are citizens residing in Shrewsberry Township, York County, adjacent to the Phillips Farm. During the time frame of December, 2007 through January, 2008, the Appellants started receiving written notices from Synagro regarding the use of two additional sources of sewage sludge from New Oxford Municipal Authority and New Freedom Borough Authority permitted to be applied at the Phillips Farm. After receiving these notices the Appellants filed individual appeals with the Board which were subsequently consolidated into this appeal.

According to 25 Pa. Code § 271.913(g) Synagro is required to provide at least thirty days notice to the Department, the County Conservation District and the adjacent landowners prior to applying the sewage sludge to the farm. The Appellants contend their first notice came in 2007 notifying them of two additional sources to be used at the Phillips Farm. The Appellants claim that was the first time they became aware of the Department's approval of the PAG-08 and the determination that the Phillips Farm was suitable to receive biosolids.

Although the Appellants claim the notice in 2007 was the first they learned of the

Department's approval of the PAG-08 and site suitability, we cannot allow the Appellants to challenge those issues. The Department conducted a site suitability determination and published the suitability of the Phillips Farm in the *Pennsylvania Bulletin* in December, 2005. At that point the Appellants in this matter were on notice of the general permit and the location of where biosolids would be applied.[1] Within thirty days of that publication, Appellants had the opportunity to appeal the granting of the general permit, the specific twenty nine sources and the location of the Phillips Farm as the place where the biosolids would be applied. They did not. What the Appellants were unable to appeal at that time were the two additional sources not identified until 2007.

For the reasons stated above, we will allow the Appellants to pursue their appeal in so far as it relates to the two new sources of biosolids, as well as challenge the general permit as it relates to the two newly permitted sources. Previously, the Appellants in *Stevens v. DEP*, 2000 EHB 438, 440, were permitted to pursue an appeal because section 271.913(g) notice was the first notice those Appellants had that biosolids were going to be spread in an adjacent area. Prior to that notice, the publications in the *Pennsylvania Bulletin* did not specifically provide where the biosolids would be applied, nor was there a site suitability determination made by the Department.[2] Thus, the Stevenses were unaware that biosolids would be applied in an area adjacent to their residence.[3]

The Department and Synagro argue that the 2007 notice was not a Department action and

---

[1] Board rules and caselaw recognize the *Pennsylvania Bulletin* as sufficient notice. *See* 25 Pa. Code §1021.52(a); *Lower Allen Citizens Action Group, Inc. v. DER*, 546 A.2d 1330 (Pa. Cmwlth. 1988); *Barra v. DEP*, 2004 EHB 276.

[2] Site suitability determinations for general permits PAG-08 are not required under 25 Pa. Code § 271.902(e), this is unlike NPDES permits which require site specific review and approvals.

[3] This is unlike the case at hand because here the Department conducted a site suitability determination and published their findings in the *Pennsylvania Bulletin*. There was no site suitability determination in *Stevens*, so it was not until the section 271.913(g) notice that the Stevenses were aware of the PAG-08.

the Board is deprived of jurisdiction to hear the consolidated appeal. We disagree. As in *Stevens*, Judge Labuskes stated that:

> The only notification that is certain is the 30-day notice mandated by 25 Pa. Code § 271.913(g). The Stevenses cannot count upon receiving anything else. Unless the Stevenses can appeal from the general permit coverage when they received their 30-day notice, they could very well be left with no other opportunity to appeal. That would be inconsistent with the statutory provisions that guarantee them a right to be heard. We, therefore, conclude that we have jurisdiction to proceed with the Stevens' appeal.
>
> Normally, a notification requirement such as that set forth in 25 Pa. Code § 271.913(g) is intended to alert interested person to ongoing or future regulatory developments that may be of concern. Here, however, the notice relates to past actions(the coverage determination), and there may be no further regulatory actions. Thus, this appeal has forced us to analyze a very unusual regulatory framework that does not square well with the principles of an administrative process, review and finality that we might typically apply.

Stevens v. DEP, 2000 EHB at 444-45

As stated above, this is a situation where the Appellants would have been unaware of the two additional sources if it were not for Synagro's required 271.913(g) notice. If we do not allow them to be heard now, then their right to be heard on these two sources will be lost. Therefore, we conclude that we will limit the appeal to allow the challenge of the two additional sources as it relates to the general permit and the suitability of the Phillips Farm, but will not allow challenges to the approval of the PAG-08, the coverage determination of the twenty nine prior sources, or the site suitability determination as it relates to the twenty nine sources approved throughout 2005. Those challenges should have been brought within thirty days after the publication in the *Pennsylvania Bulletin*.

Accordingly, we enter the following order:

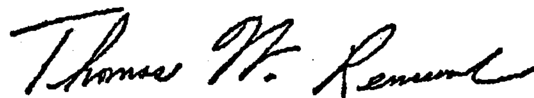
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

SUSAN FOX and JEFF VAN VOORHIS, et al.	:	
	:	**Docket No. 2007-280-C**
v.	:	**(Cons. w/ 2007-283-C, 2007-284-C,**
	:	**2007-289-C, 2007. 2008-003-C,**
COMMONWEALTH OF PENNSYLVANIA,	:	**2008-013-C, 2008-015-C,**
DEPARTMENT OF ENVIRONMENTAL	:	**2008-023-C, 2008-031-C, and**
PROTECTION and SYNAGRO	:	**2008-032-C),**
MID-ATLANTIC, INC., Permittee	:	

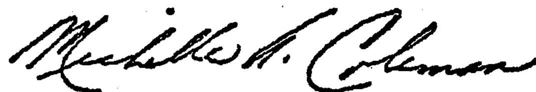
ORDER

AND NOW, this 23rd day of April, 2010, it is HEREBY ORDERED that the Department & Synagro's Motion in Limine is **granted in part**, and **denied in part.** The issues in the appeal are limited to challenges of the two newly permitted sources of New Oxford Municipal Authority and New Freedom Borough Authority, as well as any challenges of the PAG-08 and suitability of the Phillips Farm in relation to these two new sources.

ENVIRONMENTAL HEARING BOARD

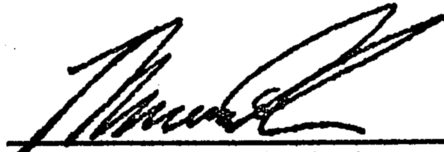


THOMAS W. RENWAND
Chief Judge and Chairman

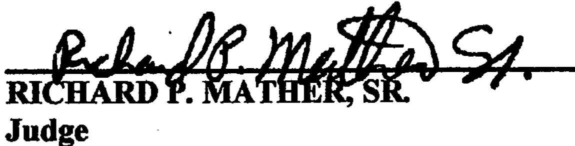


MICHELLE A. COLEMAN
Judge

BERNARD A. LABUSKES, JR.
Judge



MICHAEL L. KRANCER
Judge



RICHARD P. MATHER, SR.
Judge

DATED: April 23, 2010

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RURAL AREA CONCERNED CITIZENS	:	
v.	:	**EHB Docket No. 2008-327-R**
	:	
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION and BULLSKIN STONE &	:	**Issued: April 27, 2010**
LIME LLC., Permittee	:	

OPINION AND ORDER ON MOTION IN LIMINE TO EXCLUDE APPELLANT'S EXPERT TESTIMONY

By Thomas W. Renwand, Chairman and Chief Judge

Synopsis:

When expert discovery is served, the receiving party is required to respond to the discovery within 30 days in accordance with the Pennsylvania Rules of Civil Procedure. A party may not wait until the filing of its pre-hearing memorandum to identify experts or produce expert reports. If this information is not available at the time expert interrogatories are served, a party has a duty to supplement its answers in a timely manner. Simply because an individual submitted written comments during the review of a permit application does not mean that the Department and permit recipient should have been aware that the individual would testify as an expert at trial. Rather than strike the expert testimony, we will extend the discovery period for the Department and Permittee so they will not be prejudiced by the Appellant's failure to produce this information earlier.

OPINION

This matter involves the appeal of a permit for a small non-coal mine issued to Bullskin Stone & Lime LLC (Bullskin) by the Department of Environmental Protection (Department). The appeal was filed by Rural Area Concerned Citizens (Appellant), who argue that the permit application did not contain sufficient information for the Department to determine whether environmental harm or a public nuisance was likely to occur at the proposed mine. A trial in this matter has been scheduled for the first week in May 2010.

Bullskin has filed a motion in limine to exclude Appellant's expert testimony on the basis that the Appellant did not identify its experts or provide expert reports until the filing of its pre-hearing memorandum. Bullskin asserts that the date on the expert reports indicates they were prepared eight to twelve months ago and, therefore, this information should have been provided to Bullskin and the Department in response to expert interrogatories served on the Appellant earlier in this proceeding. Bullskin also argues that by providing this information in their pre-hearing memorandum, filed by the Appellants approximately one month before the trial in this matter, unfairly prejudices Bullskin and the Department in their ability to prepare their case. The Department joins in Bullskin's motion.

In response, the Appellant argues that there is no prejudice to Bullskin or the Department on the basis that two of the proposed expert witnesses submitted comments during the written comment period prior to issuance of the permit. The Appellant argues that Bullskin and the Department have had this information available to them for at least two years following the submission of the written comments and should have been aware that these individuals were likely to testify at trial. The Appellant points to decisions by the Board stating that "[t]he preclusion of expert testimony is a drastic sanction" and sanctions "are generally not imposed

until there has been a refusal to comply with a Board Order compelling compliance." *Carnarvon Township Supervisors v. DEP*, 1997 EHB 601, 605. The Appellant also points to cases where the Board allowed expert testimony even though there may have been a technical violation of the rules of pre-hearing disclosure where there was no prejudice to the other parties. *Groce v. DEP*, 2006 EHB 322; *DEP v. Angino*, 2006 EHB 278.

We agree with Bullskin and the Department that the Appellant has not properly disclosed the three proposed experts listed in its pre-hearing memorandum and this information should have been provided to Bullskin and the Department in the Appellant's response to expert interrogatories. If the Appellant had not yet selected its experts at the time it was served with expert interrogatories, it nonetheless had a duty to supplement its answers as soon as it was aware of this information. As the Department correctly notes in its response, "this Board has consistently held that expert witnesses, along with their qualifications, opinions and bases for the opinions, must be provided in response to discovery inquiries."[1] Bullskin also correctly points to one of the Board's recent decisions addressing the need to supplement answers to discovery: In *Rhodes and Valley Run Water Co. v. DEP*, 2009 EHB 237, the Board held as follows:

> The duty to supplement answers is particularly important regarding proposed witnesses, so important that the Rules provide that a witness whose identity has not been revealed as provided in this chapter shall not be permitted to testify on behalf of the defaulting party at the trial of the action.

Id. at 244.

We disagree with the Appellant's argument that the Department and Bullskin should have been aware that two of the individuals were likely to testify as experts at trial because they submitted written comments during the public comment period. First and foremost, Board

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[1] Citing *Midway Sewerage Authority v. DER*, 1991 EHB 1445, and *Chernicky Coal Co. v. DER*,

proceedings are separate administrative matters from Department public hearings. Simply because someone spoke at a Department hearing does not put the Department or Permittee on notice that those individuals will be witnesses in a Board proceeding. That is why the Board has its own Rules of Practice and Procedure. Moreover, depending on the action under review, it is quite possible that the Department could receive a very large volume of comments during the public comment period. Even in the case of a small non-coal permit, such as that involved here, any number of comments could be received. Neither the Department nor the Permittee can be expected to assume that any or all of the commenters could be a potential witness. Nor should they be expected to guess who may testify at trial – particularly with regard to expert testimony, which is obviously a critical part of the case. This is the very reason we have rules requiring parties to disclose who their expert witnesses will be at trial and the bases for the experts' opinions. As the Board explained in *Maddock v. DEP*, 2001 EHB 834:

> The nature of proceedings before this Board, more often than not, turns on conflicting expert testimony offered by opposing parties. To allow a party to produce such an expert, with the merits hearing approaching, when it could have hired the expert and produced his report sooner, unnecessarily precludes or severely limits an opposing party's ability to prepare for that expert testimony.

Id. at 835.

If this information were available eight months to one year ago as Bullskin states, it should have been provided in discovery and not one month before trial in the pre-hearing memorandum. While we understand the Appellant's argument that "[t]his is not a complex mining case in a complicated hydrogeologic setting," the rules apply equally in less complex matters as they do in cases involving hundreds of public comments and highly technical data. Regardless of the size or complexity of the case, a party should not be required to guess who

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1985 EHB 360.

might be testifying at trial simply on the basis of who attended a public hearing or submitted comments. If the situation were reversed and Bullskin had waited until its pre-hearing memorandum to reveal who its expert witnesses would be and the bases for their opinions, the Appellant would no doubt be seeking to preclude their testimony for the very same reasons.

The same can be said of the third expert witness identified for the first time in the Appellant's pre-hearing memorandum. The Appellant identifies this individual as an employee of Damariscotta, Inc. who has previously testified before the Environmental Hearing Board and who would testify as to his view and observations of the site. The Appellant argues that this information was available at the site and, therefore, is not prejudicial to Bullskin and the Department. Again, the Department and Bullskin should not have to guess at who might testify or what that testimony might entail. Simply because representatives of the Department and Bullskin can go to the site and make their own observations does not mean they can predict what the Appellant's expert will say. More importantly, they should not *have* to guess or predict. As stated in *Maddock*, "A fundamental purpose of the discovery rules is to prevent surprise and unfairness and to allow a fair trial on the merits." *Id.*

We would also like to take this opportunity to clear up any misconceptions about Board Rule 1021.101(a) dealing with pre-hearing procedure. That rule reads in relevant part as follows:

> Upon the filing of an appeal, the Board will issue a prehearing order providing among other things, that:
>
> (1) **All** discovery shall be completed no later than 180 days from the date of the prehearing order.
>
> (2) The service of a report of an expert together with a statement of qualifications may be substituted for an answer to expert interrogatories.

25 Pa. Code § 1021.101(a)(1) and (2) (emphasis added).

Under a prior version of the rule, discovery was segregated into fact discovery and expert discovery. The discovery period ran for 90 days and during this timeframe all requests for discovery – both expert and non-expert – were to be served. However, the response times differed depending on whether the request was for expert or non-expert discovery. *Non-expert discovery* followed the Pennsylvania Rules of Civil Procedure and required answers to be served within 30 days of service of the discovery request. Responses to *expert discovery* were not required to be served until 150 days after issuance of Pre-Hearing Order No. 1.

The rule was revised in 2005 to require that answers to *all* forms of discovery – both expert and non-expert – would be due 30 days after service of the discovery request; in other words, there is no longer a special timeframe for responding to expert discovery. The revision to the rule was adopted in response to complaints from appellants that they have been unable to obtain information regarding the basis for the Department's action in the early stages of discovery because it often fell into the category of expert discovery and, therefore, did not have to be produced until after the close of the discovery period. The new rule allows parties to obtain expert information earlier in the discovery process. *Preamble to EHB Proposed Rulemaking 106-8,* 35 Pa.B. 2107 *et seq.* Counsel for the Appellant was one of the practitioners who brought this problem to the Board's attention which eventually resulted in the rule change.

The Board still sees a number of cases where parties believe that they do not have to provide answers to expert discovery until the filing of the pre-hearing memorandum. Let us be perfectly clear: Answers to expert discovery, which may include expert reports or answers to expert interrogatories, are due 30 days after service of the discovery request unless extended by the Board. Waiting to provide this information until the filing of the pre-hearing memorandum is a violation of the Board's Rules of Practice and Procedure and the Pennsylvania Rules of Civil

Procedure on discovery.

We understand that the Appellant, like a number of practitioners, may not have been aware of this change in the Board's procedure. Given that fact, we conclude that exclusion of the Appellant's expert testimony is a draconian sanction. We find that any prejudice to the Department and Bullskin from the late identification of the Appellant's experts and late production of its expert reports can be cured by extending the time of discovery and rescheduling the start of the trial. The Department and Bullskin may also have until August 2, 2010 to conduct any discovery permissible under Pennsylvania Rule of Civil Procedure 4003.5 in order to cure any prejudice caused by these late disclosures.

Therefore, we enter the following order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

RURAL AREA CONCERNED CITIZENS	:	
v.	:	**EHB Docket No. 2008-327-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and BULLSKIN STONE & LIMESTONE LLC	:	

ORDER

AND NOW, this 27th day of April 2010, it is ordered as follows:

1) The trial in this matter scheduled for *May 4 and 5, 2010* is **postponed** and will be rescheduled by separate order.

2) The Board will conduct a ***settlement conference*** in its Pittsburgh office on **Wednesday**, ***May 5, 2010*** beginning at **1:30 p.m**. Counsel should attend together with one of their clients who has settlement authority.

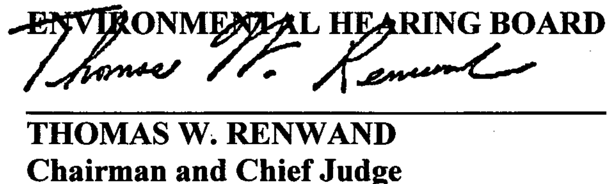
3) Discovery is extended to ***August 2, 2010***.

4) The Department and Bullskin may conduct discovery permissible under Pennsylvania Rule of Civil Procedure 4003.5 in order to cure any prejudice.

5) On or before ***May 5, 2010***, the parties shall advise the Board's Acting Secretary of their availability for trial in September or October 2010. The parties should be advised that the Board is not available for trial on September 17, 22, 23 and 24, 2010.

6) The Department and Bullskin shall file their ***pre-hearing memoranda*** on or before ***June 10, 2010***.

ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Chairman and Chief Judge

DATE: April 27, 2010

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MARYANNE WESDOCK, ESQUIRE
ACTING SECRETARY TO THE BOARD

GREGG MCQUEEN and MARY MCQUEEN	:	
	:	
v.	:	**EHB Docket No. 2008-291-R**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION and MCVILLE MINING	:	
COMPANY and ROSEBUD MINING	:	**Issued: April 28, 2010**
COMPANY, Permittees	:	

**OPINION AND ORDER ON
APPELLANT'S MOTION REQUESTING PAYMENT
OF INTERIM REPAIR COSTS**

By: Thomas W. Renwand, Chairman and Chief Judge

Synopsis:

The Pennsylvania Environmental Hearing Board denies the Appellants' Motion Requesting Payment of Interim Repair Costs because of the sharp disagreement between the parties of the costs necessary to fully repair the mine subsidence damage to the McQueens' home.

Introduction

Presently before the Pennsylvania Environmental Hearing Board is the Motion Requesting Payment of Interim Repair Costs filed by the Appellants, Greg McQueen and Mary McQueen. The McQueens filed a mine subsidence claim regarding damage allegedly

stemming from mining performed by the Permittee, Rosebud Mining Company. The Pennsylvania Department of Environmental Protection investigated the claim and concluded that Rosebud Mining Company's mining operations resulted in mine subsidence damage to Mr. and Mrs. McQueen's home.

The Department developed a Scope of Work, listing the damages that must be repaired, and asked both Rosebud Mining and the McQueens to submit cost estimates for the repairs listed in the Department's Scope of Work. The McQueens submitted repair estimates totaling $202,188.72 while Rosebud Mining submitted a repair figure of $48,714.66. The Department determined that the cost to repair the McQueen house was the lower figure submitted by Rosebud Mining.

The McQueens strongly disagreed with the action of the Department, and filed a timely appeal with the Pennsylvania Environmental Hearing Board. Thereafter, the McQueens notified the Department and Rosebud Mining of additional mine subsidence damage. Following an inspection of the McQueen house, the Department concluded that additional mine subsidence damage had occurred to the basement wall. In June 2009, the Department issued an Addendum to its original report and prepared a revised Scope of Work document. The McQueens' cost estimate called for the installation of 17 piers to support the basement wall instead of the 8 piers proposed by the Department. The McQueens also advocated a different method of installation.

Discussion

The parties are deeply divided as to how best to repair mine subsidence damage to the McQueens' home. According to the Department and Rosebud Mining, there is outstanding discovery directed to the McQueens requesting an explanation for the new estimates submitted. Moreover, discovery is not yet over. Our Order dated January 8, 2010 directed that all discovery be completed by June 11, 2010.

The McQueens are correct that Rosebud Mining did not appeal the Department's Order. However, that begs the question. Given the sharp dispute about the facts and what would adequately repair the damage suffered by the McQueens, we see no basis to simply order Rosebud Mining to pay the McQueens $48,000 at this juncture. This is the amount the Department has indicated would repair all of the original damage while the McQueens' figure is four times that much. In addition, this is even before the latest damage is factored into the equation. What the McQueens are calling "interim repair costs" the Permittee and Department argue would be the "total repair costs" to repair the original mine subsidence damage.

We agree that it would be premature for us to order this payment based on the record before us. Before doing so, it would be necessary for us to hold an evidentiary hearing. The parties can develop this record in discovery and if the McQueens still feel they are entitled to this relief as a matter of law and there are no material factual disputes, they can file a dispositive motion once the record is complete.

Moreover, and most importantly, this matter is scheduled for trial in the Fall. The merits hearing is likely the best place to resolve this issue. We sympathize with the McQueens and their desire to begin repairs on their house. However, we are also aware that they sought a stay of the matter earlier in this litigation so they could claim these new damages and have this issue resolved in this proceeding.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

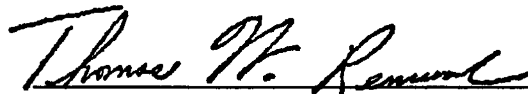
GREGG MCQUEEN and MARY MCQUEEN	:	
	:	
v.	:	**EHB Docket No. 2008-291-R**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION and MCVILLE MINING	:	
COMPANY and ROSEBUD MINING	:	
COMPANY, Permittees	:	

ORDER

AND NOW, this 28th day of April, 2010, following review of the Appellants' Motion Requesting Payment of Interim Repair Costs, it is ordered as follows:

1.) Appellants' Motion is **DENIED**.

ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Chairman and Chief Judge

DATED: April 28, 2010

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MARYANNE WESDOCK, ESQUIRE
ACTING SECRETARY TO THE BOARD

ERIC JOSEPH EPSTEIN :
:
v. : **EHB Docket No. 2008-319-L**
:
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and RUSSELL STANDARD CORPORATION : **Issued: April 30, 2010**

ADJUDICATION

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board dismisses an unsubstantiated appeal from the Department's approval of a Final Report submitted pursuant to Act 2.

FINDINGS OF FACT

Stipulated Facts[1]

1. The Department of Environmental Protection (the "Department") is the agency with the duty and authority to administer and oversee the implementation of the Land Recycling and Environmental Remediation Standards Act, 35 P.S. §§ 6026.101 *et seq.* ("Act 2"), and the rules and regulations promulgated thereunder. (Joint Stipulation paragraph ("Stip.") 1.)

[1] The stipulated facts are taken from the joint stipulation of facts and exhibits of the Department and Epstein. The recipient of the Department's approval, Russell Standard Corporation, did not participate in this appeal.

2. Eric Joseph Epstein resides at 4100 Hillsdale Road, Harrisburg, PA 17112. (Stip. 2.)

3. The property that is the subject of this appeal is located at 4010 McIntosh Road, Lower Paxton Township, Harrisburg, Dauphin County. (Stip. 3.)

4. The property is owned by Russell Standard Corporation ("Russell"). (Stip. 4.)

5. On November 29, 2005, Russell submitted a Notice of Intent to Remediate ("NIR") pursuant to Act 2 for the property. Russell proposed meeting Act 2 Statewide Health Standards for soils on a portion of the property. (Stip. 5.)

6. Notice of receipt of the 2005 NIR was published in the *Patriot News* on November 23, 2005. (Stip. 6.)

7. Notice of receipt of the 2005 NIR was published in the *Pennsylvania Bulletin* on December 17, 2005. (Stip. 7.)

8. On March 13, 2006, Russell submitted a Final Report pursuant to Act 2 for a portion of the property. (Stip. 8.)

9. Notice of receipt of the Final Report was published in the *Patriot News* on February 8, 2006. (Stip. 9.)

10. Notice of receipt of the Final Report was published in the *Pennsylvania Bulletin* on April 1, 2006. (Stip. 10.)

11. Following receipt of comments on the Final Report from the Department, Russell withdrew the Final Report on May 11, 2006. (Stip. 11.)

12. On April 15, 2008, Russell submitted a new NIR. (Stip. 12.)

13. Notice of the 2008 NIR was published in the *Pennsylvania Bulletin* on May 24, 2008. (Stip. 13.)

14. On September 2, 2008, Russell submitted a new Final Report pursuant to Act 2 for a portion of the property. (Stip. 14.)

15. Through its Final Report, Russell sought only a release of liability under Act 2 for soils on a portion of the property. Russell did not seek a release of liability under Act 2 for groundwater. (Stip. 15.)

16. The entire property consists of approximately four acres. The portion of the property for which Russell sought a release of liability for soils is approximately 0.9 acres. (Stip. 16.)

17. On October 17, 2008, the Department approved the Final Report. (Stip. 17.)

18. On November 14, 2008, Epstein appealed the Department's approval of the Final Report. (Stip. 18.)

19. Epstein communicated to the Department his concerns regarding potential releases of regulated substances at the property throughout the time period that the Department was reviewing submissions by Russell pursuant to Act 2. In addition, Epstein requested that the Department interview former employees from the site, as well as neighbors and public officials who had knowledge of the site. (Stip. 19.)

20. The release of liability obtained by Russell as a result of the Department's approval of the Final Report applies only to soils at the property for the specific substances identified in the Final Report. (Stip. 20.)

Additional Findings of Fact

21. The Department adequately reviewed, considered, and responded to comments submitted to it regarding the Final Report including those provided by Epstein. (Notes of Transcript page ("T.") 26, 44-46, 58, 71-80; Joint Exhibit Numbers ("Ex.") 4-8.)

22. The narrative summary of the Final Report provides in part as follows:

> On behalf of the property owner, Russell Standard Corporation, CMX has prepared a Final Report for the 4-acre property located at 4010 McIntosh Road, Lower Paxton Township, Dauphin County, Pennsylvania.... The property was historically used as a paving company since the 1950s. Soil has been impacted by petroleum-related constituents that are associated with the petroleum products, such as asphalt emulsions, that were historically used and stored by the paving company. The petroleum products were likely used as part of the generation and handling of asphalt paving materials at the property. This Final Report demonstrates that soil in the characterized and remediated areas at the former paving company portion of the property attains a combination of residential and nonresidential Act 2 Statewide Health Standards. Act 2 liability relief for groundwater at the property is not being pursued at the time.... The operational footprint of the former paving company, which is located in the larger, northern portion of the property, is the portion of the property where Act 2 liability relief is being pursued, and will be herein referred to as the "Site". This Site area is generally where the two main building strips and the paved areas of the former paving company are still present at the property.... CMX characterized the Site during several phases of investigation since 2004. Site characterization activities consisted of 38 test borings, six (6) test pits, four (4) soil gas sampling points, and two (2) groundwater samples.... Petroleum-related constituents, including both volatile organic compounds (VOCs) and semivolatile organic compounds (SVOCSs), were detected in some of the soil samples.... Staining, odors and photoionization detector (PID) readings also indicated petroleum-related impacts in Site soil. In general, three impacted areas were identified which included 1) a hot spot area within a concrete stall where benzene and dibenzofuran were detected above Statewide Health Standards in soil, herein referred to as the Stall Area, 2) the Central Paved Area where somewhat ubiquitous petroleum impacts were detected at generally shallow depths at concentrations below nonresidential Statewide Health Standards, and 3) the Slope Area between the northern building strip and the upper level of Site where petroleum impacts were detected below nonresidential Statewide Health Standards. These three general impacted areas of the Site encompass approximately 0.9 acres.... The Stall Area was the only analyzed area where detected soil constituents were at concentrations above nonresidential Statewide Health Standards. At boring B-22 (sample S-17) in this area, benzene was detected at a concentration of 1.08 milligrams/Kilogram (mg/Kg) and dibenzofuran was detected at 1.57 mg/Kg, which both exceeded

> their similar nonresidential and residential Medium Specific Concentrations (MSC) of 0.5 mg/Kg. The source of release in this area was likely associated with the former above-ground tanks that were historically present above and near this area. The Benzene Exceedance Area soil was remediated by over-excavating the impacted soil and disposing it off-site. In July 2007, 107 tons of impacted soil were excavated, stockpiled, and later transported off-site for disposal at a soil treatment facility. Immediately following the soil excavation, post-excavation attainment soil samples were collected. The results of these attainment soil samples show that concentrations in the remaining soil was well below residential.... With the exception of the Stall Area, the site characterization data shows that the other investigated Site areas attain a combination of residential and nonresidential Statewide Health Standards. The analyzed soil samples collected in these other Site areas were all below nonresidential MSCs. Of these samples, benzo(a)pyrene was the only constituent to exceed its residential MSC (but it was below its nonresidential MSC). A deed acknowledgement is proposed to document where benzo(a)pyrene exceeds its residential MSC at the sampling locations UST-1, B-14, B-15, and TP-4. This Final Report also shows that the potential ecological impact associated with the identified Site impacts is acceptable in accordance with the Ecological Screening Process under the Act 2 Statewide Health Standard. This Final Report also shows that the risk of vapor intrusion under a nonresidential scenario is also acceptable based on soil gas sampling data and evaluation in accordance with Act 2 vapor intrusion guidance.

(Ex. 1.)

23. The Department, using well-qualified professionals, conducted an investigation sufficient to support its conclusion that the Final Report should be approved. (T. 37, 42-46, 67-68, 71-80; Ex. 6.)

24. The release from liability given by the Department to Russell as part of the Department's approval of the Final Report only applies to "the substances identified and remediated to an Act 2 standard within the site(s) specified." (Ex. 3.)

25. Because Russell's cleanup only attained a Non-Residential Statewide Health Standard for two substances (benzo(a)pryrene (soil), benzene (soil gas sampling)), the

Department required Russell to execute and record an environmental covenant in accordance with the Uniform Environmental Covenants Act, 27 Pa.C.S. § 6501 *et seq*. ("UECA"). (Ex. 3.)

26. The Department in its approval letter cautioned Russell as follows:

> Although remediation under Act 2 is now complete for this site, you are advised that any future earth disturbance or development may require either approvals or permits from the appropriate county soil conservation district. Therefore, you should contact the conservation district before engaging in any such activities. In addition, soil from this site should not be used on residential properties unless it meets the Department's Management of Fill policy.

(Ex. 3.)

27. Russell has not by virtue of the approval of the Final Report been released from liability for any surface water or groundwater contamination, for any soil contamination not specifically identified in the Final Report, or for any area of the site that was not actually included in the site study and remediation. (T. 35, 39-41, 44; Ex. 1, 3.)

28. Epstein does not contend that Russell's sampling results are wrong or that Act 2 standards have not been attained in accordance with the representations set forth in the Final Report. (T. 32.)

29. The Department's approval of the Final Report was performed in compliance with all applicable requirements and was lawful and reasonable. (T. 43, 79-80.)

DISCUSSION

Mr. Epstein does not challenge the Final Report as far as it goes. He specifically acknowledged that he has no basis for questioning the sampling in the report or the attainment of the Act 2 standards as described in the report. (Finding of Fact ("FOF") 28.) Instead of challenging the report per se, Epstein's basic position is that Russell's investigation and possibly its cleanup did not go far enough. Thus, he argues that there might be more surface water or

groundwater contamination on or near the site. He argues that soil contamination might go beyond the portion of the site covered by the Final Report. He thinks that other contaminants might be present. He contends that the Department's review of the Final Report was inadequate because it was conducted by two Licensed Professional Geologists, neither of whom is a "forensic anthropologist." In his view, the Department should have conducted a public meeting and sought out people who formerly worked on the site or other people with historical knowledge.

Epstein goes on to posit several arguments that relate to his concern that residential development is or will take place in the vicinity of the site. He argues that the Department should not have allowed Russell to clean up benzene and benzo(a)pyrene to meet only a nonresidential standard. The Department in his view should reopen the liability release afforded by the letter approving the Final Report because of the residential development. At a minimum, the Department should "actively monitor" the site after approving the Final Report to see if residential development occurs. Due presumably to the purported residential development, Epstein sees the Department's approval as inconsistent with the UECA and the Pennsylvania Municipal Planning Code, 53 P.S. § 10101 *et seq.*

None of Epstein's arguments have any merit. We start by pointing out that Epstein has not presented *any* evidence of *actual* contamination beyond that which was identified in the Final Report. Epstein's case is built upon unfounded speculation and conjecture. A party who challenges the Department's approval of a final report submitted pursuant to Act 2 bears the burden of proof. 25 Pa. Code § 1021.122(c). The appellant must show by a preponderance of the evidence that the Department erred in approving the report. *See Schiberl v. DEP*, EHB Docket No. 2008-275-L, slip op. at 5 (Adjudication, March 8, 2010). Epstein presented no

evidence of a technical or substantive nature. His case consisted of reading a prepared statement of his own into the record and brief cross-examination of two Department witnesses, which focused on process-type questions that gave no inkling that there are any actual problems at the site. In contrast to Epstein's lack of evidence, expert or otherwise, the Department presented the credible testimony of two experienced Licensed Professional Geologists that Russell conducted a thorough and competent review, and the record demonstrates that the Department's regulatory oversight was equally thorough and competent as well. There is simply no basis for believing that there is anything wrong with the Final Report or the Department's approval thereof.

The Department's role when it receives a final report is to verify that all Act 2 requirements have been satisfied and that the report adequately demonstrates attainment with Act 2 standards. 35 P.S. §§ 6026.304(h)(3), 6026.501. The Department's role is not to conduct an independent site investigation when a party submits a final report. To the extent Epstein's arguments can be interpreted as an attack on the sufficiency of the investigation precedent to the approval of the Final Report, there is simply no evidence to back up the charge.

Act 2 establishes a wholly voluntary cleanup program. 35 P.S. § 6026.301. A party is given wide latitude in picking the scope of the liability release that it wishes to obtain. By the same token, the release from future cleanup liability that accompanies the Department's approval of a final report only extends to the area, media, and contaminants that the remediating party selects and that are identified in the report. 35 P.S. § 6026.501(a). If Epstein's fears of unknown problems are ever realized, the approval of the report will not insulate any party from any

liability that may be associated with areas, media, or contaminants that were not identified in the report. *Id.*[2]

Epstein's driving concern[3] seems to be that the site is not suitable for residential development that may take place on or near the site. We have no credible record evidence regarding this alleged development, but assuming it is occurring or will occur, the approval of a final report under Act 2 does not in and of itself "authorize" any development, residential or otherwise. A liability release based upon a non-residential standard does not release liability associated with residential use.[4] An Act 2 release does not preempt, supersede, or nullify any land development requirements. 35 P.S. § 6026.306. The Final Report in no way "subverts and usurps" the local municipality's ability to enforce zoning regulations and control land use. Furthermore, Epstein has not provided us with any support for his conclusory allegations that the Department's approval of Russell's Final Report somehow violated the "letter and spirit" of the UECA[5] or the Municipal Planning Code, 53 P.S. § 10101 *et seq.*, as amended by Acts 67 and 68.[6]

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[2] Of course, if the Department learns of a situation that needs to be addressed at the site in the course of its oversight of an Act 2 cleanup that is outside the scope of the cleanup, the Department can refer a site to another program and that program may take further action pursuant to other statutes, 35 P.S. § 6026.905, but that would transpire outside of the Act 2 process.

[3] Epstein's personal interest in this matter has never been explained. He frames his arguments in relation to the residents of any future development in the area but he has no apparent connection to such a development. Nevertheless, the Department has not challenged Epstein's standing.

[4] The Department may approve a future request to change the land use of a site to residential if the site is shown to meet all applicable cleanup standards for residential use of the property. 35 P.S. § 6026.903.

[5] The UECA, 27 Pa.C.S. § 6501 *et seq.*, was signed into law on December 18, 2007. The UECA was based on a national model act developed by the National Conference of Commissioners on Uniform State Laws. The UECA provides for the creation of environmental covenants to ensure the long-term stewardship of activity and use limitations on property remediated under Act 2 or the Storage Tank and Spill Prevention Act, 35 P.S. § 6021.101 *et seq.* These limitations are restrictions on the use of the remediated property or the maintenance of a structure needed to control the movement of regulated substances through the environment. The environmental covenant is a property interest with a holder and is capable of being transferred and may be enforced by multiple parties, including the Department. The environmental covenant is recorded with the county recorder of deeds where the property is located, giving future landowners and developers notice of the activity and use limitations. *See generally,*

Epstein argues that the Department should now reopen the liability release and that it should order Russell to take further action because of the allegedly pending residential development. It is true that Section 505 of Act 2 allows the Department to reopen a final report approval and require a person to undertake additional remediation actions in limited and defined circumstances, including a case where there are substantial changes in exposure conditions at a site. 35 P.S. § 6026.505. However, as previously mentioned, Epstein has not shown that there are or will be any such change. Furthermore, the Board's role in reviewing a Department action is necessarily circumscribed by the Department action that has been appealed. *Winegardner v. DEP*, 2002 EHB 790. The Department action being appealed here is its approval of the Final Report, not an alleged decision by the Department after that approval not to conduct additional site investigations or to invoke Act 2 reopeners.

Preamble, 25 Pa. Code Chapter 253 (proposed), 40 Pa. B. 1379 (March 6, 2010). There is no basis in the record to support Epstein's argument that the Department's action was in any way inconsistent with the UECA. To the contrary, the Department specifically required Russell to prepare and record a covenant pursuant to the Act. (FOF 25.)

[6] "The Municipalities Planning Code was amended in June of 2000 to include provisions which require state agencies after August 22, 2000 to give consideration to local land use controls when undertaking certain actions such as permitting:

> State agencies shall consider and may rely upon comprehensive plans and zoning ordinances when reviewing applications for the funding or permitting of infrastructure or facilities.

This amendment is commonly referred to as 'Act 67/68.' Prior to the enactment of Acts 67 and 68, the Department had no authority to base a permitting action upon local land use regulation. The legislation was part of an initiative by the Commonwealth to be more sensitive to local decision-making relative to land use and zoning." *County of Berks v. DEP*, 2005 EHB 233, 268-69. Epstein again fails to give us any reason to believe that Acts 67 and 68 apply to the approval of final reports under Act 2, and if so, how or why the Department's action in this case was inconsistent with those statutory amendments.

CONCLUSIONS OF LAW

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

2. Epstein has the burden of proof in this appeal.

3. To sustain the burden of proof, Epstein must show by a preponderance of the evidence that the Department abused its discretion because its action was not reasonable, supported by the facts, or in accordance with law.

4. The approval of a final report submitted pursuant to Act 2 does not insulate a party from any liability associated with areas, media, or contaminants that are not identified in the final report.

5. The Department acted reasonably and lawfully in approving Russell's Final Report.

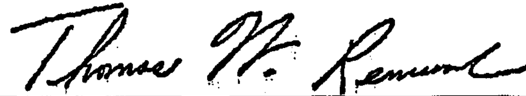
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ERIC JOSEPH EPSTEIN	:	
	:	
v.	:	**EHB Docket No. 2008-319-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and RUSSELL STANDARD CORPORATION	:	

ORDER

AND NOW, this 30th day of April, 2010, it is hereby ordered that Epstein's appeal is **dismissed**.

ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Chairman and Chief Judge

MICHELLE A. COLEMAN
Judge

BERNARD A. LABUSKES, JR.
Judge

MICHAEL L. KRANCER
Judge

RICHARD P. MATHER, SR.
Judge

DATED: April 30, 2010

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

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MARYANNE WESDOCK, ESQUIRE
ACTING SECRETARY TO THE BOARD

RURAL AREA CONCERNED CITIZENS	:	
	:	
v.	:	**EHB Docket No. 2008-327-R**
	:	
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and BULLSKIN STONE & LIME, LLC	:	**Issued: April 30, 2010**

OPINION AND ORDER
ON PRE-HEARING MOTIONS

By Thomas W. Renwand, Chairman and Chief Judge

Synopsis:

The Appellant's Motions for Leave to Amend its pre-hearing memorandum to include additional photographs and wind data are granted. An extension of the discovery period and postponement of trial cures any prejudice the Department and Permittee may have suffered by not receiving this information sooner. The Department's Motion for Sanctions is also granted in part, and the Appellant is ordered to resubmit its pre-hearing memorandum in a format that complies with Board Rule 1021.104(a) and Pre-Hearing Order No. 2. The Appellant is also ordered to provide further information regarding the proposed wind data in its pre-hearing memorandum.

OPINION

This matter involves a small non-coal mine permit issued by the Department of

Environmental Protection (Department) to Bullskin Stone & Lime, LLC (Bullskin). An appeal was filed by Rural Area Concerned Citizens (Appellant) who assert that the permit application did not contain sufficient information for the Department to determine whether environmental harm or a public nuisance was likely to occur at the proposed mine.

This opinion addresses three pre-trial motions filed by the parties.[1] Each of the motions concerns the Appellant's pre-hearing memorandum. First, the Department has filed a Motion for Sanctions seeking either dismissal of the appeal or, in the alternative, an order striking the Appellant's pre-hearing memorandum for failure to comply with the Board's Rules of Practice and Procedure and Pre-Hearing Order No. 2. The Department argues that the Appellant's pre-hearing memorandum is deficient as follows: 1) failure to set forth any facts upon which the parties disagree, as required by 25 Pa. Code § 1021.104(a)(1), and listing only one fact upon which the parties may agree; and 2) failure to identify certain exhibits. The Department argues that the Board should dismiss the appeal for failure to comply with the Board's rules and pre-hearing order or, in the alternative, strike the Appellant's pre-hearing memorandum and require it to file one that conforms to the Board's rules.

The Appellant has also filed two motions seeking leave to amend its pre-hearing memorandum. The first motion seeks to add photographs that were not included with the pre-hearing memorandum. The second motion seeks to include information concerning prevailing wind directions generated from April 3, 2010 through April 18, 2010, after the filing of the pre-

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[1] Other pre-trial motions filed by Bullskin have been addressed in separate opinions issued by the Board. *See, Rural Area Concerned Citizens v. DEP and Bullskin Stone & Lime, LLC,* EHB Docket No. 2008-327-R (Opinion and Order on Permittee's Motion in Limine to Exclude Exhibits 3-6 of Appellant's Pre-Hearing Memorandum issued April 14, 2010); *Rural Area Concerned Citizens v. DEP and Bullskin Stone & Lime, LLC,* EHB Docket No. 2008-327-R (Opinion and Order on Permittee's Motion in Limine to Exclude Appellant's Expert Testimony issued April 27, 2010)

hearing memorandum. The Department ardently opposes both motions on the basis that neither the photographs nor the prevailing wind information was produced in discovery. Furthermore, as to the prevailing wind data, the Department argues that the interpretation and application of this data requires expert testimony, and no expert has been identified by the Appellant nor has an expert report been produced pertaining to this information.

In our Opinion and Order in this matter issued on April 27, 2010, we extended the discovery period to August 2, 2010 and postponed the trial originally scheduled to begin May 4, 2010 to the Fall.[2] *Rural Area Concerned Citizens v. DEP and Bullskin Stone & Lime, LLC*, EHB Docket No. 2008-327-R (Opinion and Order on Permittee's Motion in Limine to Exclude Appellant's Expert Testimony issued April 27, 2010). In light of the extension of the discovery period and the rescheduling of the trial, we find that the prejudice suffered by the Department and Bullskin by the Appellant's failure to produce the photographs and wind data at an earlier date can be cured. Therefore, we will permit the Appellant to amend its pre-hearing memorandum to include this information. We shall also require the Appellant to resubmit its pre-hearing memorandum in a format that complies with all of the requirements of Board Rule 1021.104(a) and Pre-Hearing Order No. 2. As to the Department's argument that the wind data submitted by the Appellant requires expert testimony, it is unclear to us from the Appellant's motion as to how it intends to introduce this information and what the data represents. These matters should be addressed by the Appellant in its pre-hearing memorandum.

[2] The exact hearing dates have not yet been set, but the trial is likely to take place in October 2010.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

RURAL AREA CONCERNED CITIZENS	:	
	:	
v.	:	**EHB Docket No. 2008-327-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and BULLSKIN STONE & LIME, LLC	:	

ORDER

AND NOW, this 30th day of April 2010, it is ordered as follows:

1) The Department's Motion for Sanctions is *granted in part.* The Appellant shall file a pre-hearing memorandum that complies with Board Rule 1021.104(a) and Pre-Hearing Order No. 2 on or before **May 20, 2010.**

2) The Appellant's first and second Motions to Amend Pre-Hearing Memorandum are *granted.*

3) The Appellant is ordered to provide additional information in its pre-hearing memorandum regarding the wind data it intends to introduce at trial, including the manner in which the information will be introduced and information on what the data represents and where and how it was collected.

4) The deadline for the Department and Bullskin to file their pre-hearing memoranda is *extended* to **June 17, 2010,** and supplemental pre-hearing memoranda may be filed within 20 days after discovery has concluded.

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Chairman and Chief Judge

DATED: April 30, 2010

c: **Attention: Connie E. Luckadoo,**
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CHRISTOPHER R. THEBES, DOUGLAS THEBES, FRED D. THEBES & SONS, INC., FREDERICK THEBES AND DYNAMITE DISPOSAL, INC.	:	
v.	:	**EHB Docket No. 2007-144-L (Consolidated with 2007-243-L and 2007-245-L)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: May 13, 2010**

ADJUDICATION

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board upholds an assessment of a $5,731,448 civil penalty under the Solid Waste Management Act against three men and their associated corporations for violations related to their operation of an unpermitted landfill over the course of ten years.

Introduction

This appeal is very unusual because, despite a penalty assessment of $5,731,448, surely one of the largest ever assessed by the Department of Environmental Protection (the "Department"), the Appellants have mounted extremely limited defenses. With only a few minor exceptions, which will be discussed below, the Appellants have not contested any of the

Department's proposed findings of fact.[1] There has been no challenge of any kind to the Department order under appeal at EHB Docket No. 2007-144-L. The Appellants offered no testimony or exhibits. They stipulated to the admission of all of the Department's exhibits. Christopher Thebes, Douglas Thebes, and Fred D. Thebes and Sons, Inc. did not file pre-hearing memoranda or post-hearing briefs. Accordingly, they have waived all of their objections to the Department's actions. 25 Pa. Code §§ 1021.104 and 1021.131; *Citizen Advocates United to Safeguard the Environment, Inc. v. DEP*, 2007 EHB 632, 677; *DEP v. Kennedy*, 2007 EHB 15, 29; *County of Berks v. DEP*, 2005 EHB 233, 275, n. 49. Frederick D. Thebes and Dynamite Disposal, Inc. filed a joint post-hearing brief that is limited to the sole issue of whether the *amount* of the penalty is reasonable. Therefore, this Adjudication is limited to addressing that issue only. We conclude that the Department has met its burden of proving that the penalty that it assessed, while large, is reasonable. The Appellants have simply not given us any basis for concluding otherwise.

FINDINGS OF FACT[2]

1. The Department of Environmental Protection (the "Department") is the agency with the duty and authority to administer and enforce the Solid Waste Management Act ("SWMA"), Act of July 7, 1980, P.L. 380, *as amended*, 35 P.S. §§ 6018.101-6018.1003; the Land Recycling and Environmental Remediation Standards Act ("Act 2"), P.L. 4, No. 2, 35 P.S.

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[1] It is unlikely that many of the facts would have been open to dispute as a practical matter. All or nearly all of the facts have already formed a basis for, among other things, a consent order and agreement, an unappealed order, a consent decree, a stipulation of proposed facts before the Commonwealth Court, and guilty pleas to criminal charges.

[2] As previously mentioned, Christopher and Douglas Thebes and Frederick D. Thebes and Sons, Inc. did not submit a post-hearing brief. Frederick D. Thebes and Dynamite Disposal, Inc. state in their brief that they "do not contest the factual allegations that are set forth in the Department's post-hearing brief at paragraphs 1-356, with the exception of any claim inferred of environmental contamination in the neighboring water supply as well as the propriety of establishing such an extraordinary and unreasonable financial civil penalty." (Post-Hearing Brief at 6-7.) Accordingly, our findings are pulled from the Department's brief, all of which we have also confirmed find support in the record.

§§ 6026.101-6026.908; the Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §§ 691.1-691.1001; and Section 1917-A of the Administrative Code of 1929 (the "Administrative Code"), Act of April 9, 1929, P.L. 177, *as amended*, 71 P.S. § 510-17, and the rules and regulations promulgated under those statutes. (Department's Post-Hearing Brief Paragraph ("D.P.H.B. ¶") 1.)

2. Frederick Thebes, Christopher Thebes, and Douglas Thebes (a.k.a. "Harv") own approximately 58 acres at 3435 Cold Storage Road, New Bloomfield, Pennsylvania (the "Thebes Business Compound"). (D.P.H.B. ¶ 2.)

3. Frederick Thebes is the owner of an adjacent parcel of approximately 93 acres. The 58-acre Thebes Business Compound and the adjacent 93-acre parcel are referred to as the "Thebes site." (D.P.H.B. ¶ 3.)

4. Frederick Thebes is an adult individual who owned and operated a garbage collection business, Dynamite Disposal, Inc. ("Dynamite Disposal"). (D.P.H.B. ¶ 4.)

5. Dynamite Disposal engaged in the collection, transportation and disposal of municipal waste from various residential and commercial customers. Dynamite Disposal maintains a business address of 3435 Cold Storage Road, New Bloomfield, Pennsylvania 17068. (D.P.H.B. ¶ 5.)

6. Christopher R. Thebes and Douglas Thebes are adult sons of Frederick Thebes who worked for Dynamite Disposal. They previously worked for, were shareholders of, and are now the sole principals and stockholders of Fred D. Thebes and Sons, Inc., a construction and excavation business, also with a business address of 3435 Cold Storage Road, New Bloomfield, Pennsylvania. (D.P.H.B. ¶ 6.)

7. Fred D. Thebes and Sons, Inc. owned bulldozers and other equipment. The company did hauling, roadwork and demolition work. The company also has a mining permit for a three-acre sandstone quarry located on the Thebes Business Compound. (D.P.H.B. ¶ 7.)

8. Fred D. Thebes and Sons, Inc. owned two trucks (1988 Mack and a 1992 Mack) and Dynamite Disposal owned two trucks (1996 Peterbilt and a 1994 Mack) with authorization under the Waste Transportation Safety Act ("Act 90") (27 Pa. C.S. §§ 6201-6209) to transport municipal and residual waste to a permitted facility.[3] In 2005, Dynamite Disposal applied for a municipal waste license in Perry County, identifying its trucks and the Fred D. Thebes and Sons, Inc.'s 1992 truck as the vehicles which it would use to collect garbage in Perry County in 2006. (D.P.H.B. ¶ 8.)

9. The Thebes Business Compound includes a business office, equipment storage garage, pads where roll-offs were stored, a quarry, a cornfield and Douglas Thebes's house. (D.P.H.B. ¶ 11.)

10. There is an access road which leads from the Thebes Business Compound to the adjacent 93-acre parcel of land. (D.P.H.B. ¶ 12.)

11. This 93-acre parcel includes an old, permitted landfill, a hunting preserve, a hunting lodge ("chalet") associated with a wildlife game hunting business, a cell tower, and a power line area. (D.P.H.B. ¶ 13.)

12. Until April 10, 1990, Frederick Thebes operated a permitted municipal waste landfill ("permitted landfill") on a portion of the 93-acre parcel. (D.P.H.B. ¶ 14.)

[3] Act 90 is the authorization under the Waste Transportation Safety Act that allows a person who hauls trash to take that material to a permitted facility in Pennsylvania. *See* 27 Pa. C.S. §§ 6201-6209.

13. The business office for the permitted landfill was located on the 58-acre Thebes Business Compound, and the actual landfill disposal area was on the 93-acre parcel. (D.P.H.B. ¶ 15.)

14. After the old, permitted landfill closed, Frederick, Douglas, and Christopher Thebes each directly participated in the unpermitted disposal or allowed the unpermitted disposal of waste on both parcels of the Thebes site no less than 41 times. (D.P.H.B. ¶ 16.)

15. Dynamite Disposal was the primary waste hauler in Perry County until December 31, 2006. Dynamite Disposal residential customers bought trash bags, initially blue and later orange, in which they would place their garbage and leave the bags outside for pickup by Dynamite Disposal or Fred D. Thebes and Sons, Inc.'s waste disposal trucks. (D.P.H.B. ¶ 17.)

16. From April 10, 1990 until May 2006, garbage was collected five days a week. The Thebeses used two trucks to pick up the garbage. As part of the daily routine, the truck drivers and garbage throwers would show up at the business office on the Thebes Business Compound, punch in their time cards, pick up their trucks in the garage, and make their rounds. Frederick, Christopher, or Douglas Thebes would instruct the drivers and throwers where to dispose of the waste. (D.P.H.B. ¶ 18.)

17. At times, the truck drivers were instructed to bring the full trucks onto the Thebes Business Compound, fuel the trucks, park the trucks near the office and garage, and punch out their time cards. Frederick Thebes, Christopher Thebes, Douglas Thebes or employees operating under their direction would drive the loaded trucks and dump the waste into an open trench on either tract of the parcel. At times, the truck drivers would be directed to immediately dump the waste in an open trench located on the Thebes Business Compound or the 93-acre parcel. Truck drivers instructed to dispose of the waste on the 93-acre parcel generally would first stop at the

business office on the Thebes Business Compound to do paperwork and drop off the garbage thrower. (D.P.H.B. ¶ 19.)

18. If a Dynamite Disposal employee did not show up to work, Christopher or Douglas Thebes would often do the work themselves. (D.P.H.B. ¶ 20.)

19. The area near the business office at the Thebes Business Compound also served as a place to sort through the waste. Waste was brought back to the office from homes being cleaned out. Metal was placed in a metal pile. Items like mattresses were burned in the quarry. The material that could not be burned was disposed of on the 93 acres. (D.P.H.B. ¶ 21.)

20. The Thebes Business Compound also has a three-acre sandstone quarry. The quarry has a Department permit issued to Fred D. Thebes and Sons, Inc. Christopher Thebes, Douglas Thebes, and Frederick Thebes are the persons with overall management responsibilities for the quarry. (D.P.H.B. ¶ 22.)

21. The Thebes Business Compound also has a garage that housed the Dynamite Disposal garbage trucks used in the waste collection and disposal activities. The Fred D. Thebes and Sons, Inc.'s bulldozers and other equipment used to bury and cover the waste were parked in the garage or at the parking lot next to the garage. (D.P.H.B. ¶ 23.)

22. On November 5, 2008, Frederick Thebes pled guilty before the Perry County Court of Common Pleas to unlawful operation of an unpermitted processing or disposal facility on the 58-acre Thebes Business Compound, disposal or allowing the disposal of solid waste on the 58-acre parcel, unlawful transportation of waste to the 58-acre parcel, and unlawful burning activities on the 58-acre parcel. (D.P.H.B. ¶ 26.)

23. On November 5, 2008, Frederick Thebes also pled guilty to unlawful operation of an unpermitted processing or disposal facility on the 93-acre parcel, disposal or allowing the

disposal of waste on the 93 acres, unlawful transportation of waste to the 93 acres, and unlawful burning activities. He also pled guilty to one count of a violation under the Clean Streams Law for groundwater pollution. (D.P.H.B. ¶ 44.)

24. On March 23, 2009, Christopher Thebes and Douglas Thebes entered guilty pleas to counts alleging unlawful operation/utilization of an unpermitted processing or disposal facility on the 58-acre Thebes Business Compound, disposal or allowing the disposal of waste on the 58 acres, unlawful transportation of waste to the 58 acres, and unlawful burning activities on the 58 acres. (D.P.H.B. ¶ 27.)

25. Christopher Thebes drove a garbage truck to the quarry to dump waste. He further admitted that he drove or operated a bulldozer to assist in the disposal of solid waste at the 58 acres. He stated that he gave directions to others for the dumping of garbage into the quarry trenches. (D.P.H.B. ¶ 29.)

26. Douglas Thebes drove a garbage truck to the quarry to dump garbage. He placed solid waste onto the ground. He drove or operated a bulldozer to assist in the disposal of solid waste at the 58-acre tract. (D.P.H.B. ¶ 30.)

27. The quarry area behind the business office was frequently used to bury waste. One employee regularly observed this dumping activity two days a week. (D.P.H.B. ¶ 31.)

28. Frederick Thebes told one of the employees, Dale Zaring, to dump waste into a trench by the quarry. Zaring estimated that the trench was 100 feet long, 2-3 trucks wide and much deeper than a garbage truck. (D.P.H.B. ¶ 32.)

29. Dale Zaring estimated that he dumped hundreds of loads of waste into the trenches on each side of the road in the area of the quarry. Zaring said that other drivers dumped similar quantities in these trenches. (D.P.H.B. ¶ 33.)

30. Frederick Thebes, Christopher Thebes, and Douglas Thebes over many years were all engaged in the unpermitted burial of garbage on the Thebes Business Compound, both personally and by directing their employees to dump or bury waste. (D.P.H.B. ¶ 34.)

31. The Thebes Spring, an emergency backup public water supply source for the Borough of New Bloomfield, is located approximately 950 feet from trenches on the Thebes site containing waste. (D.P.H.B. ¶ 38.)

32. A Karns grocery store, a permitted water supply source, is located approximately 1500 feet from the quarry on the Thebes site. A school is located approximately 1500 feet from the quarry on the Thebes site. (D.P.H.B. ¶ 39.)

33. None of the Appellants took any measures to prevent harm to the environment from unpermitted disposal of waste on their property. (D.P.H.B. ¶ 40.)

34. Frederick Thebes, Christopher Thebes, and Douglas Thebes decided that the tipping fees for taking the garbage to a permitted landfill were too high and, therefore, they decided to dump the collected garbage on the 93-acre parcel. (D.P.H.B. ¶ 50.)

35. The Thebeses decided to dispose of waste on the 93-acre parcel first because the old, permitted landfill was located on the 93-acre parcel. (D.P.H.B. ¶ 51.)

36. Christopher Thebes drove a truck containing waste back to the 93-acre property. He also provided directions to others to dispose of waste on the 93-acre tract. (D.P.H.B. ¶ 52.)

37. Douglas Thebes operated a bulldozer to dig holes to bury the trash and to drive a truck and place garbage in the holes. (D.P.H.B. ¶ 53.)

38. Frederick D. Thebes and Sons, Inc. demolished old buildings and, after demolition, transported the construction and demolition waste to the Thebes site for disposal. (D.P.H.B. ¶ 54.)

39. One employee, Scott Thebes, saw between 20 and 30 truckloads of construction and demolition waste dumped in the area behind the Chalet on the 93-acre tract, which was intermittently covered. (D.P.H.B. ¶ 55.)

40. Domestic water wells for nearby residences are located less than a quarter mile from the illegally disposed waste on the power line section of the 93-acre tract. The 93-acre tract is located approximately 2083 feet from the Carson Long Military Institute well. (D.P.H.B. ¶ 57.)

41. The Thebeses undertook no measures of any kind to prevent harm to the environment resulting from disposal of waste on the 93 acres. (D.P.H.B. ¶ 58.)

42. Based upon a complaint regarding open burning and a report from PP&L that someone was dumping trash into a trench under its power lines, Department employees went to the Thebes site on May 17, 2006 where Frederick Thebes led the Department representatives to the quarry area behind the business office. He stated that he had been burning construction and demolition waste, and that he had taken the ashes up to the power line area to be buried. (D.P.H.B. ¶ 66.)

43. While walking in the power line area on the 93 acres, as a Department employee approached an open trench, she smelled decomposing trash. It looked like there had been fresh work done in the trench. (D.P.H.B. ¶ 67-68.)

44. Another Department representative observed waste on the ground in the area of the mid-line trench. Also, he observed in this area a liquid that was reddish in appearance and staining the ground. Frederick Thebes denied that waste was buried there. (D.P.H.B. ¶ 69-70.)

45. The Department representatives asked Frederick and Christopher, both of whom were present, not to disturb the area because the Department planned to return for another inspection. (D.P.H.B. ¶ 71-72.)

46. Department representatives arranged a flight to get an aerial view of the property on the next day. They observed two front-end loaders in the trenches and a dump truck. It appeared that people were excavating the waste from the trench and loading it in the tri-axle dump truck. (D.P.H.B. ¶ 73-74.)

47. When the persons on the site noticed the helicopter flying over the area, they jumped off the equipment and ran into the woods. Frederick Thebes later acknowledged that both he and Christopher Thebes told the employees to remove the waste from the trenches. (D.P.H.B. ¶ 75.)

48. On May 23, 2006, the Department filed a complaint in equity in Perry County alleging that Frederick Thebes, Christopher Thebes, and Dynamite Disposal unlawfully transported and disposed of municipal waste in three trenches on the Thebes site. The Department also filed an application for preliminary injunction and an application for special relief. On May 26, 2006, Frederick Thebes, Dynamite Disposal and Christopher Thebes agreed to a preliminary injunction. (D.P.H.B. ¶ 77.)

49. Department representatives thereafter inspected and dug test pits in three waste disposal trenches on the 93 acres. There were puddles of leachate on the surface of the ground, blue trash bags and other pieces of household waste poking out of the ground. The Department observed blue Dynamite Disposal bags and items from 1996 and 1997 and water flowing through the decomposing waste. (D.P.H.B. ¶ 78, 80.)

50. In September, 2006, the Department entered into a Consent Order and Agreement ("CO&A") with Fred D. Thebes and Sons, Inc., Dynamite Disposal, and Frederick Thebes. The CO&A provided among other things for the revocation of the Thebeses' vehicles' Act 90 authorizations on the grounds that the vehicles had been used for the unlawful transportation of waste to three waste disposal trenches on the 93-acre parcel. The parties agreed the garbage trucks could continue to transport solid waste until December 31, 2006, at which time their Act 90 authorization was revoked. The parties also entered into a Consent Decree, which addressed the cleanup of the three trenches on the 93-acre parcel. In the Consent Decree, Christopher Thebes and Frederick Thebes admitted they were operators of the unpermitted landfill at the 93-acre parcel and agreed that they would not challenge the accuracy or validity of this finding in any manner or proceeding involving the Department. (D.P.H.B. ¶ 82, 83.)

51. On November 15, 2006, pursuant to a search warrant, the Department and the Office of Attorney General investigated the 93-acre parcel. The search warrant investigation focused on an area approximately 548 feet long by 70 feet wide near the cell tower on the 93-acre parcel ("Cell Tower Area A"). (D.P.H.B. ¶ 88, 89.)

52. The inspection team excavated a pile of waste that ranged from six to twelve feet high. (D.P.H.B. ¶ 92.)

53. One test pit excavated by the inspection team was 16-20 feet deep, with layers of waste separated by layers of soil. There was water in the pit. (D.P.H.B. ¶ 93.)

54. The inspection revealed a trench, which was denominated Trench A1, which was approximately 50 feet long by 4 feet wide to a depth of approximately 7 feet. The trench had Dynamite Disposal bags filled with municipal waste, burned municipal waste, and newspapers from 2003. Saturated soils were observed above the compacted trash. (D.P.H.B. ¶ 97.)

55. Trench A2 was approximately 17 feet long by 4 feet wide by 8 feet deep. In the trench was a newspaper from 2002 at a depth of approximately 2.5 feet. (D.P.H.B. ¶ 98.)

56. Trench A3 was approximately 186 feet long. The inspectors found approximately 36 feet of trash. A newspaper from 2003 was observed. (D.P.H.B. ¶ 99.)

57. Trench A4 contained municipal waste including Dynamite Disposal bags. (D.P.H.B. ¶ 100.)

58. In Trench A5, excavation was limited to several backhoe buckets to a depth of approximately 2 feet where municipal waste including Dynamite Disposal bags and a newspaper from 2003 were uncovered. (D.P.H.B. ¶ 101.)

59. In Trench A6, the excavation was limited to several backhoe buckets. Municipal waste, including Dynamite Disposal bags, was found at a depth of approximately 4 feet. (D.P.H.B. ¶ 102.)

60. In Trench A7, municipal waste was found at approximately 4 feet. The trench had approximately six layers of alternating compacted trash and soils. The waste observed included newspapers dated from 2003 and Dynamite Disposal bags. Digging continued to a depth of approximately 18-20 feet. Items removed at 18 feet included a newspaper from 2003. The length of the pit was 21 feet. (D.P.H.B. ¶ 103.)

61. Trench B1 was 16 feet long by 10 feet deep. Four to five feet of waste was observed, with two feet of soil. Items found included a newspaper and documents from 2003. (D.P.H.B. ¶ 106.)

62. Trench B2 had dimensions of 16 feet long by 12.5 feet deep, with at least four layers of waste. Each layer of waste was covered by about one foot of soil. There were newspapers and other documents from 2003. (D.P.H.B. ¶ 107.)

63. Trench B3 was 18.5 feet long by 11 feet deep to bedrock with at least five layers of waste. Each layer of waste was covered by about one foot of soil. The inspectors observed items dated January 2002, July 5, 2003, and June 10, 2003. (D.P.H.B. ¶ 108.)

64. Trench B4 had dimensions of 14.5 feet long by 11.5 feet deep, to bedrock (hit shale layer). Five layers of waste were observed. Each layer of waste was covered by about one foot of soil. There was seeping water and a newspaper from 2003. (D.P.H.B. ¶ 109.)

65. Trench B5 had dimensions of 41 feet long by 4 feet wide by 11 feet deep, with at least four layers of waste. Each layer of waste was covered with less than one foot of soil. There was school lunch waste, construction and demolition waste, license plates, and newspapers from 2003. (D.P.H.B. ¶ 110.)

66. Trench B8 was 77 feet long by 11 feet deep. There were at least six layers of waste. Each layer of waste was covered with less than one foot of soil. (D.P.H.B. ¶ 111.)

67. Trench B9 was 23.5 feet long by 6 feet deep. Two feet of waste was found covered by three feet of soil. (D.P.H.B. ¶ 112.)

68. In a ravine near the trenches, leachate seeps were evident on the surface of the ground, as was partially exposed waste including shoes, coat hangers, rusted metal and portions of blue Dynamite Disposal bags. The surface area appeared to be freshly seeded. The vegetation exhibited minimal growth and appeared drilled (planted) in approximately 6-inch rows. Four excavations were made. The team found Dynamite Disposal bags, newspapers from 2006, construction and demolition waste including roofing tiles, carpet, burned wood, a kitchen sink, a lawn mower, and newspapers. (D.P.H.B. ¶ 113.)

69. The excavation team found municipal solid waste (including household garbage in blue Dynamite Disposal bags and construction and demolition waste), which had been

dumped or deposited at the site. The dates on some of the waste materials ranged from January 2002 through March 2006. (D.P.H.B. ¶ 118.)

70. Due to the amount of waste encountered, the size of the area in which the excavations encountered waste, the limited area covered by the warrant, the fact that waste was buried deeper than the trackhoe could excavate, and time limitations, a full delineation of the waste buried has not been performed. (D.P.H.B. ¶ 119.)

71. A bedrock outcrop, running approximately north-south lies in the center of Cell Tower Area A. An access road meets the outcrop. The excavating team dug a series of trenches on each side of the outcrop, most of which ran parallel to the direction of the formation. (D.P.H.B. ¶ 120.)

72. In each instance where the excavations were conducted in this area, after removing a layer of soil, the trackhoe uncovered large amounts of waste. Where the trackhoe could reach the bottom of the waste, the waste extended to the bedrock. Where the trackhoe could not reach the bottom of the waste (because of equipment limitations in many instances, or inadequate time in others), the waste extended beyond the reach of the trackhoe. (D.P.H.B. ¶ 121.)

73. There were layers of waste protruding from the soil on the sides of the excavations; each layer of waste was separated by a layer of soil. (D.P.H.B. ¶ 122.)

74. Increasing layers of waste appeared in excavations further away from the outcrop. Waste excavated near the outcrop did not extend as far below the surface as waste excavated further from the outcrop, because the bedrock is higher near the outcrop than elsewhere. (D.P.H.B. ¶ 124.)

75. There was water in the test pits. (D.P.H.B. ¶ 126.)

76. In areas of Cell Tower Area A, the waste was buried so that it was out of the line of sight of neighbors. (D.P.H.B. ¶ 128.)

77. The Thebeses conducted a full-scale landfill operation in Cell Tower Area A. Waste underlies all or virtually all of Cell Tower Area A, except where the bedrock itself is at the surface. (D.P.H.B. ¶ 131.)

78. On March 15, 2007, pursuant to a search warrant, the Department, with the Office of Attorney General, participated in multiple excavations of buried waste on the Thebes site. (D.P.H.B. ¶ 148.)

79. Department personnel observed that waste, including Dynamite Disposal garbage bags, had been dumped or deposited on several locations. On the Thebes Business Compound, there were waste pits in the quarry, adjacent to the garage, and underneath a cornfield. On the 93 acres, there were waste pits near a cell tower, behind the Chalet, underneath a power line area, and in a wooded area. (D.P.H.B. ¶ 148.)

80. The waste contained items with dates from May 1993 through September 2005. (D.P.H.B. ¶ 148.)

81. The excavation team discovered waste in every pit that it dug in a backfilled portion of quarry area. (D.P.H.B. ¶ 157.)

82. The waste consisted of a mix of municipal waste, commercial and demolition materials, industrial "bag house" waste and school documents from 2002, Dynamite Disposal bags filled with waste, burned municipal waste, a newspaper from 2005 and a store catalog dated December 27, 2005. The waste observed in the pits is not the full extent of the waste buried in the backfilled portion of the quarry. Waste lies buried in all or virtually all of the backfilled area of the quarry. (D.P.H.B. ¶ 158, 161, 162, 167.)

83. Leachate was flowing from the down slope side of the backfilled area. (D.P.H.B. ¶ 163.)

84. Another trench in the quarry area was 64 feet long by 11 feet wide by 4 feet deep, had five layers of alternating compacted trash and soil, with the municipal waste including Dynamite Disposal bags, newspapers dated January 4, 2004, January 11, 2004, January 16, 2004 and January 19, 2004, large quantities of brown/black plastic sheeting, and food containers. (D.P.H.B. ¶ 168.)

85. Excavation Q5, in the quarry area, was done in leap-frog fashion consisting of 3 holes. The first hole, Q5A, approximately 10 feet long by 4 feet wide by 20 feet deep, had a minimum of six layers of alternating compacted trash and soil. Waste found in the first hole included Dynamite Disposal bags containing municipal waste, quantities of school records and paperwork from 2002, newspapers, and other documents from 2002. The second hole, approximately 16 feet long by 4 feet wide by 11.5 feet deep, had 5 to 6 layers of alternating compacted municipal waste and soil, with 4 feet of soil cover. Waste found in the second hole included Dynamite Disposal bags and burned ash. The third hole was approximately 12 feet long by 4 feet wide by 12 feet deep. The trench had 5 feet of soil cover, with approximately 5 to 6 layers of alternating compacted trash and soil, with municipal waste including Dynamite Disposal bags, various school records, and newspapers from 2002. (D.P.H.B. ¶ 169.)

86. There is a cornfield located across from the quarry where garbage sticking up through the topsoil, including blue garbage bags, soda bottles, and plastic bags, was observed. (D.P.H.B. ¶ 170.)

87. The excavation team dug pits in this cornfield. The excavation team did not dig in all areas where waste was observed on the cornfield. The objective for the search was not to

define the limits of the waste trenches, but to identify areas where there was buried waste. (D.P.H.B. ¶ 171, 173.)

88. Trench QF7 was a trench with dimensions approximately 12 feet long by 4 feet wide by 16 feet deep. Municipal waste was found approximately 1 foot below the surface. Waste included Dynamite Disposal bags full of trash and newspapers/circulars dated 2000 and 2001. (D.P.H.B. ¶ 177.)

89. Trench QF8 was a trench with dimensions approximately 16 feet by 4 feet by 16 feet deep. Waste was discovered including Dynamite Disposal bags containing trash, newspapers and magazines dated 2000 and 2001. (D.P.H.B. ¶ 178.)

90. The excavation team saw waste protruding from the surface of the ground, extending from the cornfield to an adjacent parking lot (the "quarry field"). (D.P.H.B. ¶ 179.)

91. The Department found construction and demolition waste, Dynamite's blue bags, burnt material, oil filters, part of a transmission and a part from a motor. (D.P.H.B. ¶ 180.)

92. Waste including blue Dynamite Disposal bags and newspapers from 2003 protruded from the ground. Due to time limitations, the excavation team merely dug in the area to confirm the presence of waste. The team did not reach the full depth or extent of the buried waste. (D.P.H.B. ¶ 182.)

93. The excavation team also dug test pits in an area on the 93 acres near the cell tower and the closed old, permitted landfill, which it referred to as Cell Tower Area B. (D.P.H.B. ¶ 187.)

94. There was old, decomposing waste in some of these pits. The waste from these pits was dated 1993. No waste was dated prior to 1990. (D.P.H.B. ¶ 188.)

95. Due to the decomposed state of the waste, and time limitations, the excavation team was not able to fully delineate the amount of waste buried in Cell Tower Area B. Waste found in the area included materials dated 1992 and 1993. (D.P.H.B. ¶ 193.)

96. The excavation team also dug exploratory pits in the power line area of the 93 acres that were not the same trenches covered by the Perry County Consent Decree. These pits contained municipal waste in layers including Dynamite Disposal bags. The waste also included red bag waste, construction/demolition materials, burned debris, and newspapers and other documents with dates from 1999 to 2006. (D.P.H.B. ¶ 195, 197, 205-212.)

97. The buried waste at the Thebes site poses a danger to groundwater because, among other things, no attenuating soil layer separates much of the waste from the bedrock below. In many instances when the exploratory pits were dug and the excavation team reached the full depth of the waste, there was no attenuating solid layer present between the waste and bedrock. (Stipulated Department Exhibit No. ("DEP Ex.") 87; D.P.H.B. ¶ 213.)

98. In addition to the waste itself, significant amounts of soil will need to be disposed to remediate the site. (DEP Ex. 87; D.P.H.B. ¶ 215.)

99. Any of the soil that has been in contact with the waste has been contaminated and, therefore, such soil must be removed and disposed of at a permitted facility. The excavation and removal of the buried waste will need to include removal of the layers of soil found between the layers of waste. The excavation and removal also may need to include removal and disposal of the top layer of soil between the surface and the layers of waste. It may also need to include removal and disposal of soil below the layers of waste, if any soil separates the bottom layer of waste from the bedrock. (DEP Ex. 87; D.P.H.B. ¶ 216.)

100. The outcrop in the sandstone quarry on the 58-acre tract is most likely the Ridgeley Sandstone, the uppermost member of the Old Port Formation. The Ridgeley Sandstone in this area is known to have high-yield water wells and may be quite friable since its quartz clasts tend to be cemented with calcite, rather than silica. Leaching of the calcite cement by groundwater leads to this friability and the ability to transmit relatively large amounts of groundwater. Even though the Ridgeley Sandstone outcrops on the 58-acre tract, it readily transmits water and directly overlies the limestones and shaley limestones/limey shales of the lower Old Port Formation which are also prone to dissolution, and readily transmit groundwater. The waste was buried in areas topographically higher than nearby private and public water supplies. For these reasons, the illegally disposed waste on the 58 acres poses a threat of pollution to waters of the Commonwealth. (DEP Ex. 86; D.P.H.B. ¶ 224.)

101. The unlawfully disposed waste poses a risk to down-gradient water sources, such as the Thebes Spring and Karns water supply source. (DEP Ex. 86; D.P.H.B. ¶ 225.)

102. On March 15, 2007, the Department collected samples of groundwater from trenches located in the cell tower area on the 93 acres. Laboratory analyses of the samples collected exhibit a variety of inorganic compounds consistent with decomposing waste, as well as the presence of volatile and semi-volatile compounds. This liquid is leachate. (DEP Ex. 86; D.P.H.B. ¶ 226-228.)

103. As precipitation falls on the ground surface and infiltrates through the soil cover, the water will react with the municipal solid waste and leachate will form. Any water downgradient of the illegally disposed waste has the potential to become contaminated by this leachate, especially where, as here, limestone bedrock underlies the area. (DEP Ex. 86; D.P.H.B. ¶ 230.)

104. There is a leachate-impacted spring located immediately down slope of the three-trench area under the power line. A sample shows the presence of large amounts of total iron and manganese, plus elevated levels of chloride, ammonia-nitrogen, COD, TOC, alkalinity and specific conductance. (DEP Ex. 86; F. Thebes Pre-hearing Memo Answers, ¶ 60 Admitted; D.P.H.B. ¶ 236.)

105. There is a credible danger of leachate contamination of domestic water wells that are less than a quarter mile from disposal areas. Groundwater contamination is already occurring, as evidenced by a leachate-impacted spring located immediately down slope of the three-trench area under the power line. (DEP Ex. 86; D.P.H.B. ¶ 239.)

106. Pollutants and contaminants from the dumped or deposited waste present a danger of pollution to waters of the Commonwealth. (DEP Ex. 86; D.P.H.B. ¶ 240.)

107. If the illegally disposed waste is allowed to remain as it is, groundwater contamination is virtually certain to increase; the only questions are when and to what degree. (DEP Ex. 86; D.P.H.B. ¶ 243.)

108. On May 4, 2007, the Department issued an order to Frederick Thebes, Christopher Thebes, Douglas Thebes, Dynamite Disposal and Fred D. Thebes and Sons, Inc. directing the parties to submit a waste characterization report identifying the location, nature and extent of the buried waste at the Thebes site, with a map identifying the location of the buried waste. The order also required them to excavate and remove solid waste identified in the order, excavate, remove and properly dispose of at least 750 tons of waste from the site per month, have a consultant submit a monthly status report, remove all of the waste in the roll-off containers on site, submit for approval a work plan for investigating, characterizing and assessing the nature and extent of groundwater pollution, and provide the Department access to

and entry upon the site. The order excluded from its scope the three trenches located under the power lines which are addressed in the September 2006 Consent Decree. (D.P.H.B. ¶ 232.)

109. Only Christopher Thebes, Douglas Thebes and Fred D. Thebes and Sons, Inc. appealed the May 4, 2007 administrative order. (EHB Docket Number 2007-144-L). Frederick D. Thebes and Dynamite Disposal, Inc. did not file an appeal from the order. (D.P.H.B. ¶ 244, 245.)

110. In June 2007, Department employees visited the Thebes site to monitor compliance with the order. The Department was denied access even though the order requires the Thebeses to provide the Department with access to the site. (D.P.H.B. ¶ 249-252.)

111. The Department obtained a search warrant and returned to the site. No waste had been excavated from the site. (D.P.H.B. ¶ 253-255.)

112. When the Thebeses failed to comply with the order, the Department filed a petition to enforce the administrative order in Commonwealth Court. On October 10, 2007 the Court issued an order enforcing the administrative order. The parties signed a Stipulation of Proposed Facts on March 10, 2008, which the Court entered as approved. (D.P.H.B. ¶ 256.)

113. On October 2, 2007, the Department attempted to inspect the Thebes site. The Department was only given access to the area of the roll-off containers on site. (D.P.H.B. ¶ 267.)

114. On February 11, 2008, inspectors observed a small pool of rust-red leachate along the access road on the 93 acres. (D.P.H.B. ¶ 269.)

115. In May and June of 2008, the Department hired a contractor, Chambers, to remove waste buried in the three trenches under the power line area on the 93 acres. The Department initially offered to pay the contractor $25,000 from the money which was paid through the Perry County Consent Decree. (D.P.H.B. ¶ 257.)

116. During the excavation and removal of the waste, layering of waste was observed. Slabs of concrete were found. There was water running through the trench. Containers labeled asbestos were discovered. Testing on the contents of the bags confirmed that the bags contained friable asbestos. Two samples collected had 50 percent chryostile and are considered asbestos-containing building material. (D.P.H.B. ¶ 259, 260, 262.)

117. During the dig on June 23, 2008, a diesel fuel, oil or gasoline odor emanated from the waste. (DEP Ex. 63, p. 1; D.P.H.B. ¶ 263.)

118. The Department used an additional $100,000 to continue the cleanup of the trenches in the power line area. There was more waste than the Department expected. The waste was mixed with soil and water, which doubled the weight per cubic yard of the waste. (D.P.H.B. ¶ 264.)

119. The Thebeses buried the waste in a systematic and calculated manner characteristic of a landfill, which has the objective of optimizing available space. (Expert Report of Edward Galovich, p. 7; D.P.H.B. ¶ 265.)

120. On May 27, 2009, Department personnel attempted to inspect the site. After access was denied, the Department was required to obtain a search warrant. After securing a search warrant, Department personnel saw no sign of a cleanup. Department personnel observed leachate seeps. (D.P.H.B. ¶ 272-273.)

121. Frederick Thebes, Christopher Thebes, Douglas Thebes, Dynamite Disposal and Fred D. Thebes and Sons, Inc. have not complied with the requirements of the Department administrative order. (D.P.H.B. ¶ 274.)

122. The Appellants have not complied with the requirement in the order that they submit a report to the Department identifying the location, nature, and extent of all solid waste deposited or stored on the Thebes site. (D.P.H.B. ¶ 275.)

123. Investigations have revealed that significantly more Dynamite Disposal waste is buried at the Thebes site than was identified in the Department's order. (D.P.H.B. ¶ 277.)

124. Although the order required that within 30 days of the date of the order, excavation and removal of all waste was to commence, the Thebeses have not complied with this requirement, except for removing a small amount of buried waste. (D.P.H.B. ¶ 278-279.)

125. The Appellants have not complied with the order's requirement that they excavate and dispose of at least 750 tons of buried waste per month. (D.P.H.B. ¶ 280.)

126. The order required submission of an approved detailed work plan for investigating, characterizing and assessing groundwater. The Thebeses have not complied with this requirement. (D.P.H.B. ¶ 281.)

127. Pollutants and contaminants from the buried waste present a continuing danger of pollution to waters of the Commonwealth. (D.P.H.B. ¶ 282.)

128. The waste poses more of a danger at the Thebes site than it would in a natural renovation landfill. During the November 15, 2006 and March 15, 2007 searches, Department personnel saw that in those exploratory trenches where the Department observed bedrock, there was no attenuating soil layer present between the waste and bedrock. (DEP Ex. 87; D.P.H.B. ¶ 283.)

129. The Department inspected more than ten years of Cumberland County Landfill records which revealed that the amount of waste that Dynamite Disposal brought to the landfill varied dramatically, including periods of time where Dynamite Disposal brought no waste to the

landfill at all. There is no record evidence that the Thebeses used any other permitted facilities. (DEP Ex. 92-102; D.P.H.B. ¶ 285, 287-289.)

130. The Department calculated a civil penalty for the Thebes site under the Solid Waste Management Act using the matrix in its civil penalties guidance document. (D.P.H.B. ¶ 290-292.)

131. For the unlawful dumping or depositing of waste or allowing waste to be dumped or deposited at the Thebes site at least 41 times, the Department viewed the violations as "severe." There are massive quantities of waste. No attenuating soil layer separates much of the waste from the bedrock below. All of the exploratory trenches had water seeping through them. As a result of the calculated manner in which the waste was deposited at the site, extensive remediation will be required. (D.P.H.B. ¶ 293-298.)

132. In considering the willfulness of the violations, the Department accurately treated the dumping as an intentional and deliberate attempt to avoid compliance with the law. The dumping was a deliberate, premeditated action. The Thebeses were aware that they were violating the Solid Waste Management Act and the regulations promulgated thereunder. (D.P.H.B. ¶ 300-301.)

133. The Department used the statutory maximum of $25,000 for 41 days. (D.P.H.B. ¶ 299.)

134. Although the Thebeses operated their unpermitted landfill for years, the Department calculated its penalty based upon a number of "incidents." The Department examined the evidence that it had collected during the exploratory digs. The Department looked at newspapers, magazines, credit cards and school papers. After collecting all of the dates, since disposal typically occurs once every seven days for a resident, if the date fell into a seven-day

window, it was counted as one incident. Then the dates found on the trash were cross-referenced and compared to those dates with the Cumberland County Landfill records to see if the dates correlated with the weeks where Dynamite Disposal took a smaller load, or no load, to the landfill. (D.P.H.B. ¶ 303.)

135. The dates on items found in a trench would usually closely match throughout a trench, but anomalies were apparent and were ignored for the purpose of dating the trench. When magazines were found stacked together, bundled up, and in containers, they could have dates ranging a span of many years. As part of the cataloguing process, the employees would ask the equipment operator to stop digging, and they would pick through what the operator unearthed before the equipment operator would bring out the next scoop of waste. If there were multiple pieces of dated waste dated around the same date, one would be kept as a representative of that date. (D.P.H.B. ¶ 304.)

136. The Department credibly and conservatively calculated 41 incidents of dumping. At $25,000 per incident, it arrived at a total of $1,025,000. (Notes of Transcript page ("T.") 174, 189; DEP Ex. 15, 34, 41, 79, 90B, 92-104; D.P.H.B. ¶ 308.)

137. The Department calculated a civil penalty based on ownership and operation of a solid waste processing, storage, treatment or disposal facility (the 58 and 93 acres collectively) without a permit from the Department. (D.P.H.B. ¶ 308.)

138. Again using its civil penalties guidance, the Department classified the violations as severe because of the large quantities of waste buried, contamination of groundwater, and the fact that the continued operation has created a disposal site which will require extensive remediation. (D.P.H.B. ¶ 312, 313.)

139. Only small excavations to confirm the presence of trash were performed in several areas. Although there is a massive amount of known waste, not all of the buried waste at the site has been uncovered. In particular, there is known to be more waste buried in the Cell Tower Area A, the quarry, the cornfield, and the power line area. The known waste is estimated to be between 9,586 and 32,199 tons. (DEP Ex. 90C; D.P.H.B. ¶ 314.)

140. Of the known waste, the costs of remediation will be higher than the corresponding costs associated with a typical dump site. The Department observed the excavation and removal of waste buried in the three trenches under the power line. The waste was buried in a calculated manner characteristic of a municipal waste landfill (and not a typical illegal dump site). The waste was layered and compressed to achieve optimal use of land. Significant amounts of soil will have to be disposed to remediate the site. The excavation and removal of buried waste will have to include soil found between and surrounding layers of waste. The compaction, water content of the waste, and the amount of soil contaminated by waste will all drive up the costs of remediation of the site. (DEP Ex. 87; D.P.H.B. ¶ 315.)

141. The Thebes operation was deliberate and premeditated. The waste was buried in layers and it was buried outside of a line of sight. The disposal activities ceased at a point that the activities could be observed by others. (D.P.H.B. ¶ 316.)

142. The Department did not consider how much money the Thebeses saved by illegally disposing of the waste instead of taking it to a permitted landfill in calculating a civil penalty. (D.P.H.B. ¶ 317.)

143. In calculating a penalty amount, the Department only used the time period between March 16, 1997 and May 17, 2006, because that was the time period after the Department officially closed the previously permitted landfill on the Thebes site until the date of

the Department's first inspection, or 474 weeks, which is known to be less than the period of actual unpermitted operation, which extended back to at least 1993. (D.P.H.B. ¶ 321; FOF 80, 94, 95.)

144. The Department assessed a penalty amount of $6,250 per week, which resulted in a penalty amount of $2,900,000 for ownership and operation of an unpermitted facility. (D.P.H.B. ¶ 323, 324.)

145. The Department calculated a civil penalty based on the Appellants' transportation or assistance in transportation of solid waste to the Thebes site, which the Department credibly determined to have occurred at least 41 times. There is no record of haulers other than Thebes transporting waste to the site. (D.P.H.B. ¶ 326.)

146. The Department classified the seriousness of the violations as severe, basing this judgment on the large quantities of waste transported and the threat of groundwater pollution that the unlawful transportation has created. (D.P.H.B. ¶ 327.)

147. The transport of solid waste to an unpermitted facility was intentional and deliberate conduct and knowingly in violation of the law. (D.P.H.B. ¶ 328.)

148. Using the guidance, the Department calculated a civil penalty of 41 incidents of unlawful transportation, at $25,000 per incident, for a total of $1,025,000 for the violations. (D.P.H.B. ¶ 329.)

149. The Department also calculated a civil penalty based on failure to comply with the Department's order. (D.P.H.B. ¶ 330.)

150. At the time the assessment was issued, the Thebeses had not complied with the order. As of the date of the evidentiary hearing, they were still in noncompliance. (D.P.H.B. ¶ 331.)

151. There were multiple deadlines in the order. The only one that the Department considered for the purposes of calculating the penalty was the removal and excavation of the waste within 30 days after issuance of the order. (D.P.H.B. ¶ 332.)

152. For purposes of calculating the civil penalty, the Department calculated the civil penalty starting from June 4, 2007 to October 2, 2007, or 120 days, because that was the period of time between the date that the Thebeses were first required to start excavating waste until the day before the civil penalty assessment was issued. The actual period of noncompliance is much longer than 120 days and continued until the time of the hearing. (D.P.H.B. ¶ 333.)

153. The Department credibly classified the violation as severe and willful for the reasons previously discussed. (D.P.H.B. ¶ 334.)

154. The Department calculated a penalty based on $6,250 per day, and multiplying the daily amount by 120 days, arrived at $750,000. (D.P.H.B. ¶ 335.)

155. The Department also incurred and, therefore, assessed administration and inspection costs of $31,448. (D.P.H.B. ¶ 336.)

156. Department employees fill out time sheets for their work activities. The Department looked at the work hours for inspection and testing at the Thebes site and multiplied the hours by each individual's separate hourly rate. The total amount was $31,448. (D.P.H.B. ¶ 337.)

157. The Department issued its assessment on October 3, 2007 against the Appellants. (D.P.H.B. ¶ 342.)

158. All of the Appellants filed an appeal of the assessment. (EHB Docket Nos. 2007-243-L and 2007-245-L)

159. The assessed penalty amounts are reasonable. (FOF 1-158.)

DISCUSSION

At the outset, we must reemphasize the limited nature of our review of the Department's action in this appeal. As previously mentioned, the only issue before us is the reasonableness of the *amount* of the civil penalty assessment appealed at EHB Docket Nos. 2007-243-L and 2007-245-L. Although the Department normally must prove that its assessment is based on violations that in fact occurred and that it is lawful and reasonable, *Rhodes v. DEP*, 2009 EHB 237, 242, here, liability is also not at issue, the underlying facts are uncontested, and there is no dispute that the penalty is well within the amounts authorized under the Solid Waste Management Act, which authorizes the Department to assess a civil penalty of $25,000 per offense per day. 35 P.S. § 6018.605.

When reviewing a civil penalty assessment, "we do not start from scratch by selecting what penalty we might independently believe to be appropriate. Rather we review the Department's predetermined amount for reasonableness." *DEP v. Angino*, 2007 EHB 175, 202, (citing *Stine Farms and Recycling, Inc. v. DEP*, 2001 EHB 796, 812), *aff'd*, 664 C.D. 2007 (Pa. Cmwlth., June 26, 2008). To conduct such a review, we must determine whether there is a reasonable fit between each violation and the amount of the penalty assessed. *F.R. & S., Inc. v. DEP*, 761 A.2d 634, 639 (Pa. Cmwlth. 2000); *Frisch v. DER*, 1994 EHB 1226; *Eureka Stone Quarry v. DEP*, 2007 EHB 419, 449, *aff'd*, 1656 C.D. 2007 (Pa. Cmwlth., September 12, 2008).

The Department assessed civil penalties against the Appellants jointly and severally for violating (1) Section 610(1) of the SWMA (unlawful disposal of waste), (2) Section 610(4) of the Act and 25 Pa. Code § 285.215(b) (transportation of waste to an unpermitted facility), (3) Sections 201(a), 501(a), and 610(2) and (9) of the Act and 25 Pa. Code § 271.101 (operating an

unpermitted facility), and (4) Sections 603 and 610(9) of the Act (failure to comply with a Department order). The Department assessed the following amounts:

Unlawful disposal	$ 1,025,000
Unlawful transport	$ 1,025,000
Operating an unpermitted facility	$ 2,900,000
Failure to comply with order	$ 750,000
Costs	$ 31,448
	$ 5,731,448

The Department arrived at those amounts as follows:

Unlawful disposal – $25,000 x 41 violations
Unlawful transport – $25,000 x 41 violations
Unpermitted facility – 474 weeks from March 16, 1997 (date of approval of closure of old landfill) through May 17, 2006 (date of first DEP inspection) x $6,250 per week
Order noncompliance – 120 days from June 4, 2007 (date excavations were supposed to start) through October 2, 2007 (day before the assessment) x $6,250 per day

All that we have to go on to understand why Frederick D. Thebes and Dynamite Disposal, Inc. (for purposes of this Discussion section, collectively referred to as "Thebes") contend that the penalty assessment is unreasonable is a short post-hearing brief.[4] A generous reading of that brief reveals the following bases in support of Thebes's argument that the assessment amount is unreasonable:

1. Thebes's activities have not as of yet resulted in contamination of any water supplies.

2. Thebes has already paid substantial fines as a result of guilty pleas in criminal cases.

[4] As we have already discussed, Appellants Christopher Thebes, Douglas Thebes and Frederick D. Thebes & Sons, Inc. have not filed post-hearing briefs.

3. Thebes is the subject of past and ongoing enforcement actions in Commonwealth Court.

4. The Department used a matrix that could have resulted in a penalty of $189 million, so an assessment that is "off by $180,000,000 . . . is clearly invalid."

5. The penalties are repetitive penalties for what are essentially the same actions.

6. The Department's method of using 41 days of violations resulted in an excessive penalty. The Department should have instead assessed $25,000 for each of the four counts, plus costs, for a total penalty of $131,448.

7. The penalty amounts will not be applied to remediation costs at the site.

8. Thebes cannot pay such a high penalty.

9. The penalty amount shocks the conscience.

Thebes provides no legal authority to support any of his objections, acknowledging instead that he "could find very few cases that deal with the propriety of a 'civil penalty,' especially in a case where the defendant offered no testimony or evidence that it had not violated the law by operating an unpermitted landfill as alleged by the Department." Thebes does, however, refer us to *Westinghouse Electric Corp. v. DEP*, 745 A.2d 1277 (Pa. Cmwlth. 2000), where the Commonwealth Court upheld a $3,296,515 penalty against Westinghouse, but he says that "[t]he three members of the Thebes family are not Westinghouse." Notwithstanding the lack of any legal support for Thebes's challenges, given the seriousness of the matter we will address them in turn.

Thebes is correct that the record does not support a finding that his activities have so far actually contaminated any water supplies. This, however, does not provide a basis for concluding that the Department's assessment is unreasonable. There is no dispute that the illegal landfill has

caused groundwater contamination. Indeed, Thebes pled guilty to one count of felony groundwater pollution. (Finding of Fact ("FOF") 23.) In the power line area, there is a leachate-impacted spring. (FOF 104.) Furthermore, there is no dispute that the existing contamination poses a serious *threat* to nearby water supplies which rely on groundwater. (FOF 31, 32, 100, 101, 103-107.) The fact that the worst-case scenario has not yet been realized with respect to nearby water supplies does not support Thebes's contention that the penalty is too high.

With respect to Thebes's assertion that the civil penalties assessed by the Department are "duplicative in light of other penalties and criminal fines assessed," "it is well settled law that criminal proceedings do not bar subsequent civil proceedings for the same underlying misconduct." *DEP v. Clarke*, 1998 EHB 1117, 1118 (citing *Pennsylvania State Police v. Swaydis*, 470 A.2d 107 (Pa. 1983); *Dep't of Transp. v. Crawford*, 550 A.2d 1053 (Pa. Cmwlth. 1988)). The SWMA provides for a series of legal options for enforcing of the Act through both civil remedies and criminal enforcement. *See* 35 P.S. §§ 6018.601-607. Here, like in *Clarke*, the penalty proceeding before us is a civil, not criminal, matter and "therefore the Department is not estopped from pursuing civil penalties by the prior criminal complaint." *Id.* at 1119. To the extent that Thebes is suggesting that the criminal fines should be credited against the civil penalty assessment, he provides us with no support for such a proposition. *Cf. Westinghouse, supra*, 745 A.2d at 1281 ("Remediation costs that a violator would be required to expend in any event may not be used to offset penalties properly assessed."); *Schiberl v. DEP*, EHB Docket No. 2008-275-L, slip op. at 7 (Adjudication issued March 8, 2010) (finding no support for a claim that remediation costs should offset a civil penalty assessed for violations of the SWMA).

Nor is the Department precluded from pursuing civil penalties while concurrently proceeding against the Appellants in Commonwealth Court. Such action is not duplicative of

this civil penalty proceeding. The Department's activities before the Commonwealth Court have included seeking abatement of public nuisance under 35 P.S. § 6018.601, enforcing the Department's administrative order under 35 P.S. § 6018.603 and pursuing an action under the Uniform Fraudulent Transfers Act, 12 Pa.C.S.A. § 5104 *et. seq*. Section 605 of the SWMA specifically provides: "*In addition to proceeding under any other remedy available at law or in equity* for a violation of any provision of this act . . . the department may assess a civil penalty upon a person for such violation." 35 P.S. § 6018.605 (emphasis added). Further, Section 607 of the SWMA specifically authorizes the Department to pursue cumulative remedies and provides:

> Nothing in this act shall be construed as estopping the Commonwealth, or any district attorney or solicitor of a municipality, from proceeding in courts of law or equity to abate pollution forbidden under this act, or abate nuisances under existing law. It is hereby declared to be the purposes of this act to provide *additional and cumulative remedies* to control the collection, storage, transportation, processing, treatment, and disposal of solid waste within the Commonwealth, and nothing contained in this act shall in any way abridge or alter rights of action or remedies now or hereafter existing in equity, or under the common law or statutory law, criminal or civil, nor shall any provision in this act, or the granting of any permit under this act, or any act done by virtue of this act, be construed as estopping the Commonwealth, persons or municipalities, in the exercise of their rights under the common law or decisional law or in equity, from proceeding in courts of law or equity to suppress nuisances, or to abate any pollution now or hereafter existing, or to enforce common law or statutory rights. No courts of this Commonwealth having jurisdiction to abate public or private nuisances shall be deprived of such jurisdiction in any action to abate any private or public nuisance instituted by any person for the reasons that such nuisance constitutes air or water pollution.

35 P.S. § 6018.607 (emphasis added). Courts have cited to similar language in other statutes in upholding the Department's pursuit of concurrent remedies. *Cf. DEP v. Pennsylvania Power Co.*, 1976 EHB 147 (finding nearly identical language in the Air Pollution Control Act to be a

"clear indication of legislative policy" to allow for cumulative remedies and rejecting appellant's argument that the Department be estopped from pursuing civil penalties because of a previously issued injunction against the appellant), *aff'd in part, rev'd in part on other grounds*, 384 A.2d 273 (Pa. Cmwlth. 1978), *rev'd on other grounds*, 416 A.2d 995 (Pa. 1980); *DEP v. Coward*, 414 A.2d 91 (Pa. 1980) (citing to nearly identical language in the Clean Streams Law and holding that not only was the Department not precluded from filing an independent equity action to enforce prior orders, but that the Department had a right, if not a pressing duty, to enforce its prior order abating harmful pollution by appellants.) Thebes cites no authority suggesting that the Commonwealth is barred from pursuing multiple avenues for enforcement and relief under the SWMA, and we are not independently aware of support for this proposition.

In a somewhat related argument, Thebes complains that the penalties collected by the Department through this civil penalty assessment will not be used for the cleanup of the Thebes site. We do not see how it follows that the penalty amount is, therefore, unreasonable. In any event, Section 701 of the SWMA states:

> All . . . penalties . . . collected under the provisions of this act shall be paid into the Treasury of the Commonwealth into a special fund to be known as the "Solid Waste Abatement Fund" . . . [it] shall be administered by the department for abatement or elimination of present or potential hazards to human health or to the environment from the improper treatment, transportation, storage, processing, or disposal of solid wastes.

35 P.S. § 6018.701. We do not see the Commonwealth's administration of the Solid Waste Abatement Fund pursuant to this section as properly at issue here.

Thebes next argues that the four counts of violations assessed by the Department "are examples of repetitive civil penalties for the same action." We are not sure whether Thebes is arguing that the four counts of violations are inherently repetitive (e.g. disposing of waste,

operating a landfill) used, or the offenses calculated under each count are repetitive (e.g. 41 instances of disposal). In his brief, Thebes suggests the latter by proposing an alternative penalty based on each of the four counts in the complaint. ("The calculation of a penalty (a maximum of $25,000 per offense) could be $100,000 for the *four counts*, plus costs.") In other words, he in effect recognizes that it is not unreasonable to assess separate penalties for operating an unpermitted landfill, illegally disposing of waste in that landfill, transporting waste to that landfill, and violating a Department order. Indeed, Pennsylvania courts have upheld penalties for multiple violations of the SWMA. *See, e.g., Booher v. DER*, 612 A.2d 1098 (Pa. Cmwlth. 1992) (finding separate civil penalties were properly assessed for violations of the SWMA including Section 610(1), unlawful disposal of waste, and Section 610(2), operating a disposal facility.) Rather, Thebes's basic argument appears to be that using 41 days of violations for illegal dumping and transportation results in too high of a calculation.

To the extent Thebes is suggesting that there were not in fact at least 41 days of illegal transportation and disposal, the argument is inconsistent with Thebes's stipulation to all of the Department's findings, including the use of 41 days in arriving at a penalty assessment. (Thebes's Post-Hearing Brief p. 6-7.) Thebes did not put on any evidence to contradict the Department's evidence or otherwise provide us with any basis for questioning the Department's case. *See Goetz v. DEP*, 2002 EHB 886, 902 (a party's failure to testify in a civil case raises an inference adverse to its position). The Department presented plenty of factual evidence to support its use of 41 days. Indeed, the record would support a penalty based upon far more than 41 incidents. The Thebeses operated their unpermitted landfill at least from 1993 through 2006. There are at least 49 different trenches containing waste on the Thebes site. Among the trenches that Commonwealth personnel have so far excavated, the Department documented the existence

of at least 93 layers of waste. Dynamite Disposal collected trash five days a week during the entire period that the Thebeses were operating an unpermitted landfill, and yet a brief perusal through the records of how many tons of municipal waste were taken to the Cumberland County Landfill, the permitted facility used by Thebes when such a facility was used, shows frequent periods where Dynamite Disposal took notably little trash to the landfill, including many days where Dynamite Disposal took no waste at all, sometimes for periods of up to a month. During the Attorney General's investigation, Office of Attorney General ("OAG") employee Paul Zimmer conducted several interviews of the Thebeses' employees who explained a multitude of instances of dumping, including one employee, Dale Zaring, who estimated that he had dumped "hundreds of loads of waste" into trenches near the quarry, and explained that other employees would have done so as well.

The Department also presented evidence that these incidents occurred over many years. During the Commonwealth's multiple inspections and searches, Commonwealth personnel operated excavation equipment to identify locations across both parcels of land associated with the Thebes site, as well as to index individual pieces of waste found within the disposal locations according to the dates of periodicals and other documents found therein. When they found numerous pieces of waste from the same period of dates, they would keep one item as a representative sample of that time period at that location. OAG employees entered 76 dated items into inventories of seized properties (Department Exhibit Nos. ("DEP Ex.") 15, 34), and OAG and Department employees noted dozens of additional dated pieces of waste which have also been memorialized and entered into evidence in this proceeding (DEP Ex. 41, 35). These articles of waste carry dates spanning from 1993 to 2006.

With regard to the 41 offenses for illegal transportation, the Department testified, again without contradiction, that there would have been at least one transportation incident for each dumping incident. The waste had to arrive at the Thebes site somehow and there has never been a showing that anyone other than the Thebeses transported waste to the site. Thebes has not challenged this methodology. The Thebeses held themselves out to the public as legitimate waste haulers when in fact they were taking much of the waste to an illegal facility for years. They enjoyed an enormous competitive advantage over their competitors who complied with the law.

To the extent Thebes questions assessing penalties on a daily basis, the SWMA clearly contemplates such an assessment. Section 605 provides:

> The maximum civil penalty which may be assessed pursuant to this section is $25,000 per offense. Each violation for each separate day and each violation of any provision of this act, any rule or regulation under this act, any order of the Department, or any term or condition of a permit shall constitute a separate and distinct offense under this section.

35 P.S. § 6018.605. It is true that calculating a penalty based upon every day of a multi-year violation could theoretically result in excessive penalties, but as we have just discussed, the Department only penalized Thebes for 41 incidents each of dumping and transport. The Department calculated the penalty for the unlawful operation of a landfill on a weekly basis beginning with the mandated closure of the old landfill, rather than for each day of violation. And the penalty for violating the order, although computed on a daily basis, only covers a fraction of the total period of actual noncompliance.

Turning to Thebes's argument that the Thebeses cannot afford to pay the assessment, a party's ability to pay is not a relevant factor in assessing a civil penalty under the SWMA. *See* 35 P.S. § 6018.605 (listing relevant factors); 25 Pa. Code § 271.412 (same). *Cf. Ramey Borough*

v. DEP, 351 A.2d 613, 615 (Pa. 1976) (finding that an appellant's inability to comply with a court order, for financial or other reasons, might be relevant in an enforcement proceeding, but not in an appeal where the sole issue is the validity of the order); *Commonwealth v. Borough of Reynoldsville*, 395 A.2d 333, 336 (Pa. Cmwlth. 1978) (following the reasoning in *Ramey* in an equity action and finding that financial inability to comply is a relevant factor only in court's enforcement proceedings); *Kidder Twp. v. DEP*, 399 A.2d 799 (Pa. Cmwlth. 1979) (financial inability to comply with order not relevant in Board proceedings). In reviewing or imposing penalties, this Board has always focused on the violations, not the resources of the violator. *See, e.g., Westinghouse, supra*. The extent to which the Commonwealth will be able to collect on the assessment is not this Board's concern in reviewing the merits of the assessment.

Thebes next appears to question the Department's use of the guidance matrix in calculating the penalty. In support, Thebes notes that the Department could have assessed a penalty of $180 million, but instead assessed a penalty of $5,731,448. As a result of this substantial reduction, Thebes states "[i]t is submitted if this calculation is off by over $180,000,000, then the assessment is clearly invalid." We do not see how it can be said that there is anything inherently flawed in the Department's calculation simply because its nonbinding guidance document *could* have resulted in a much higher penalty. If anything, Thebes's argument would suggest that the Department was too lenient in only assessing three percent of what could lawfully have been assessed under the SWMA. In any event, our task is not to review the Department's civil penalty matrix. The matrix is a guidance document which may be a useful tool to Department personnel, but it is not binding on the Department or the Board. *DEP v. Kennedy*, 2007 EHB 15, 25; *DEP v. Hostetler*, 2006 EHB 359. Instead, the SWMA requires that the Department and this Board consider the factors set out in the statute and

its regulations, including "the willfulness of the violation, damage to the environment, cost of restoration and abatement, savings to the violator and other relevant factors." *Schiberl v. DEP*, *supra*, (*citing* 35 P.S. § 6018.605). *See also*, 25 Pa. Code § 271.412 (listing factors). The Department has clearly done so in this case.

We turn finally to the heart of the matter: whether the penalty assessed by the Department is, in the final analysis, just too high given Thebes' violations. Although the Department obviously assessed a very large amount, we nevertheless find that the amount reasonably fits the violations. Without consideration of the environmental legacy left behind, the Thebeses systematically deposited and hid a staggering quantity of municipal, medical, asbestos, and construction waste on their property in close proximity to neighboring homes, schools, and public water supplies. They betrayed the trust of the public who purchased Dynamite Disposal bags to do their part to ensure the proper management of their waste. Each of the Appellants participated both directly and through their agents in the entirety of the unlawful process over the course of many years. There has never been any doubt that the Thebeses were fully aware they were violating the law and they purposely worked to conceal those violations. The damage to the environment is severe and lasting. Remediation of the Thebes site will require great commitments of resources and time, not only to remove and relocate the waste, but also the layering soil as well, which has become, in essence, waste itself, a perhaps ironic consequence of the Thebes's practice of secretly running their old natural renovation landfill operation as if it had never closed. In addition, serious groundwater contamination and the looming threat of water supply impacts remain. Having admitted their liability, the Thebeses nevertheless have failed to comply with the Department's order to clean up the site. We have not been made aware of any mitigating factors. As the Court in *Westinghouse* found,

> [T]he penalties imposed by the Board are linked to the number, seriousness and duration of the violations involved here. The protracted failure to comply with duties to provide notice and to take remedial measures vastly increased the danger to nearby families. . . . Here the penalty of $3,200,000 does reasonably fit the sheer scale and duration of the violations.

Westinghouse Electric Corp. v. DEP, 745 A.2d at 1281. Here too we find that a penalty of $5,731,448 reasonably fits the sheer scale and duration of the Thebeses' willful violations.

CONCLUSIONS OF LAW

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

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

3. The Department may assess a penalty of up to $25,000 per day per violation of any provision of the Solid Waste Management Act or its regulations. 35 P.S. § 6018.605.

4. In assessing a civil penalty, the Department must consider the willfulness of the violation, severity of the violation, damage to the environment, cost of restoration and abatement, and other relevant factors. 35 P.S. § 6018.605; 25 Pa. Code § 271.412.

5. The reasonableness of a penalty assessment is determined according to the factors in the statute and the regulations promulgated thereunder, not by the violator's ability to pay.

6. The Department carried its burden of proving that the civil penalty assessment of $5,731,448 is reasonable.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CHRISTOPHER R. THEBES, DOUGLAS THEBES, FRED D. THEBES & SONS, INC., FREDERICK THEBES AND DYNAMITE DISPOSAL, INC.	:	
v.	:	**EHB Docket No. 2007-144-L (Consolidated with 2007-243-L and 2007-245-L)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

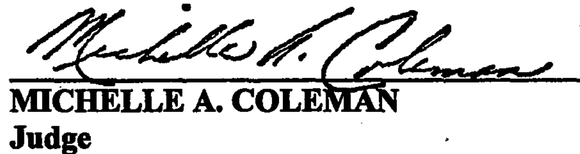
AND NOW, this 13th day of May, 2010, it is hereby ordered as follows:

1. The Department's assessment of a civil penalty of $5,731,448 is upheld as lawful and reasonable; and

2. This consolidated appeal is **dismissed.**

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Chairman and Chief Judge



MICHELLE A. COLEMAN
Judge

BERNARD A. LABUSKES, JR.
Judge

MICHAEL L. KRANCER
Judge

RICHARD P. MATHER, SR.
Judge

DATED: May 13, 2010

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

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MARYANNE WESDOCK, ESQUIRE
ACTING SECRETARY TO THE BOARD

THE PINES AT WEST PENN, LLC	:	
	:	
v.	:	**EHB Docket No. 2008-267-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: May 14, 2010**

ADJUDICATION

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board reduces a civil penalty assessment of $11,689 for violations of the Clean Streams Law by one hundred dollars because the Department failed to sustain its burden of proving that the submission of a discharge monitoring report was untimely. The assessment is in all other respects upheld. Penalties ranging from $1,000 to $1,163 for eleven monthly-average discharge violations and penalties of $100 each for three daily-maximum violations of an NPDES permit are reasonable.

FINDINGS OF FACT

1. The Commonwealth of Pennsylvania, Department of Environmental Protection, ("the Department") is the agency with the duty and authority to administer and enforce the Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §§ 691.1-691.1001 ("Clean Streams Law"); Section 1917-A of the Administrative Code of 1929, P.L. 177, *as amended*, 71

P.S. § 510-17A ("Administrative Code"); and the rules and regulations promulgated under those statutes.

2. The Appellant, The Pines at West Penn, LLC ("The Pines") is a mobile home park in New Ringgold, Pennsylvania . (Notes of Transcript page ("T.")121-22.)

3. There are approximately 200 homes located at The Pines. (T. 122.)

4. There is an on-site sewage treatment plant that services The Pines. (T. 122.)

5. On February 17, 2004, the Department issued National Pollutant Discharge Elimination System ("NPDES") Permit No. PA0063827 to James and Judy Saunders authorizing the discharge of treated sewage from the sewage treatment plant at The Pines into an unnamed tributary to the Lizard Creek in accordance with effluent limitations, monitoring requirements, and other terms and conditions. (Commonwealth Exhibit ("C. Ex.") 1.)

6. The NPDES permit was transferred from James and Judy Saunders to The Pines on July 15, 2005 as a result of a permit transfer application dated May 24, 2005. (C. Ex. 5, T. 15-16.)

7. The NPDES permit requires that a properly completed Discharge Monitoring Report ("DMR") be received by the Department within 28 days after the end of each monthly report period. (C. Ex. 5.)

8. The Department received a DMR from The Pines on June 16, 2005 for the monitoring period of May 2005 reporting a discharge of 16.3 mg/L of total suspended solids in excess of the effluent limit of 10 mg/L and a discharge of 12.28 mg/L of total nitrogen in excess of the effluent limit of 10 mg/L. (C. Ex. 18.)

9. The Department received a DMR from The Pines on July 22, 2005 for the monitoring period of June 2005 reporting a discharge of 10.8 mg/L of carbonaceous biochemical

oxygen demand in excess of the effluent limit of 10 mg/L. (C. Ex. 19.)

10. The Department received a DMR from The Pines on August 19, 2005 for the monitoring period of July 2005 reporting a discharge of 47.04 mg/L of total nitrogen in excess of the effluent limit of 10 mg/L. (C. Ex. 20.)

11. The Department received a DMR from The Pines on October 24, 2005 for the monitoring period of September 2005 reporting a discharge of 41.96 mg/L of total nitrogen in excess of the effluent limit of 10 mg/L. (C. Ex. 21.)

12. The Department received a DMR from The Pines on November 18, 2005 for the monitoring period of October 2005 reporting a discharge of 15.37 mg/L of total nitrogen in excess of the effluent limit of 10 mg/L. (C. Ex. 22.)

13. The Department received a DMR from The Pines on December 19, 2005 for the monitoring period of November 2005 reporting a discharge of 3,995/100 mL of fecal coliform in excess of the effluent limit of 2,000/100 mL. (C. Ex. 23.)

14. The Department time-stamped a DMR from The Pines on January 30, 2006 for the monitoring period of December 2005. (C. Ex. 24.)

15. Under the terms of the NPDES permit, a DMR for the monitoring period of December 2005 would normally have been due on January 28, 2006, but that day was a Saturday. (C. Ex. 5, p. 6 of permit; T. 93-94.)

16. The Department received a DMR from The Pines on February 17, 2006 for the monitoring period of January 2006 reporting a discharge of 10.1 mg/L of ammonia in excess of the effluent limit of 9.0 mg/L and a discharge of 12.59 mg/L of total nitrogen in excess of the effluent limit of 10 mg/L. (C. Ex. 25.)

17. The Department received a DMR from The Pines on August 11, 2006 for the

monitoring period of July 2006 reporting a discharge of 20,000/100 mL of fecal coliform in excess of the effluent limit of 1,000/100 mL. (C. Ex. 26.)

18. The Department received a DMR from The Pines on August 9, 2007 for the monitoring period of July 2007 reporting a discharge of 5.2 mg/L of ammonia in excess of the effluent limit of 3.0 mg/L and a discharge of 2,400/100 mL of fecal coliform in excess of the effluent limit of 1,000/100 mL. (C. Ex. 27.)

19. The Department received a DMR from The Pines on January 22, 2008 for the monitoring period of December 2007 reporting a discharge of 13.1 mg/L of ammonia in excess of the effluent limit of 9 mg/L. (C. Ex. 28.)

20. On September 13, 2005, a Department representative inspected The Pines's sewage treatment plant and took effluent samples. The total nitrogen was measured at 40.41 mg/L in excess of the daily-maximum limit of 10.0 mg/L. (C. Ex. 16; T. 44-47.)

21. On February 8, 2006, the Department issued a Notice of Violation ("NOV") to The Pines that cited some of the exceedances listed above. Specifically, the NOV cited: (1) monthly average violations for May, July, September, October, and November 2005; (2) a daily-maximum violation pursuant to the September 13, 2005 inspection; and (3) violations of the terms of the NPDES as a result of untimely DMRs for June and December 2005. (C. Ex. 6; T. 24-25.)

22. On April 4, 2006, the Department and representatives of The Pines participated in an enforcement conference to discuss the effluent violations and standard operating procedures at the sewage treatment plant. (T. 25, 57.)

23. During the enforcement conference, it was discussed that a certified operator was not visiting the sewage treatment plant frequently enough, which was the likely cause of the

violations. As a result, the Department requested that The Pines submit Standard Operating Procedures in accordance with the Operator Certification Act. (C. Ex. 8; T. 26, 30-31, 38-39, 57, 99.)

24. The Pines ultimately submitted Standard Operation Procedures that were acceptable to the Department. (T. 39; Appellant Ex. A-2.)

25. On October 27, 2006, the Department issued a second NOV to The Pines regarding the July 2006 DMR, which reported that an effluent sample had a fecal coliform concentration of 20,000 colonies per 100 mL. (C. Ex. 9; T. 34-35.)

26. The Pines received a Notice of Final Assessment from the Department dated August 1, 2008, assessing a penalty of $11,689. The Notice demanded payment of the penalty within thirty days of receipt of the notice. (C. Ex. 14; T. 80.)

27. The Pines filed a timely appeal from the Notice of Final Assessment.

28. The Department's civil penalty assessed against The Pines was calculated by Stephen Brokenshire in his role as a compliance specialist in the Northeast Region Water Management Program. (T. 56.)

29. In calculating the assessed penalty, Brokenshire used the Department's guidance document "Civil Penalty Calculations for Effluent Violations" and an associated Microsoft Excel computer program ("the matrix") and determined there to be a total civil penalty of $11,689. (C. Ex. 31, 33; T. 61, 66, 68-69, 83.)

30. The matrix specified certain minimum penalties. For monthly violations, the minimum penalty is $1,000. For weekly violations, the minimum penalty is $250. For daily violations, the minimum penalty is $100. (C. Ex. 31, 33; T. 69.)

31. In calculating the assessed penalty, Brokenshire considered, *inter alia*, willfulness

of the violation, damage to the receiving resource, and volume of the discharge. (C. Ex. 31; T. 70-75.)

32. Brokenshire considered the violations negligent rather than accidental because they were not one-time events but rather were recurring violations associated with the lack of adequate plant supervision. (T. 70-71.)

33. The matrix considers a violation to be "accidental" if the cause of the violation was "due to an unpreventable accident that was not foreseen by the permittee." (C. Ex. 33; T. 96.)

34. In considering damage, Brokenshire considered the violations as being in the "low" category. (C. Ex 31; T. 73.)

35. In considering stream class, Brokenshire noted that the receiving stream is an unnamed tributary to the Lizard Creek, which is classified as "Trout Stocked." (C. Ex. 31; T. 73-74.)

36. Brokenshire also considered the size of the discharge as being in the range of 0.0 to 0.1 million gallons per day and compared it to the flow of the receiving stream. (C. Ex. 31, 33; T. 74-75.)

37. The Department calculated the following penalties for the monthly-average violations:

Month/Parameter	Permit Limit	DMR Reported	Penalty $
5/05 / TSS	10	16.3	$ 1,000
5/05 / NO2 + NO3	10	12.28	$ 1,000
6/05 / CBOD5	10	10.8	$ 1,000
7/05 / NO2+NO3	10	47.04	$ 1,163
9/05 / NO2+NO3	10	41.96	$ 1,125
10/05 / NO2+NO3	10	15.37	$ 1,000
11/05 FC	2000	3955	$ 1,000
1/06 NH3-N	9	10.1	$ 1,000
1/06 NO2+NO3	10	12.59	$ 1,000

7/07 NH3-N	3	5.2	$ 1,000
12/07 NH3-N	9	13.1	$ 1,000
		Monthly total:	$11,289

(C. Ex. 31.)

38. In all but two instances, the Department assessed the minimum $1,000 monthly penalty specified in the Department's guidance matrix. (C. Ex. 31; T. 76.)

39. The two instances where the violations exceeded $1,000 were for total nitrogen exceedances reported in the DMRs for July and September 2005 that were in excess of four times the permit limit. (C. Ex. 20, 21, 31; T. 76.)

40. The Department also assessed the minimum $100 penalty under the Department's guidance matrix for the following daily violations:

Date/Parameter	Permit Limit	DMR Reported	Penalty $
9/13/05 / NO2+NO3	10	40.41	$100
7/06 / FC	1000	20000	$100
7/07 / FC	1000	2400	$100
		Daily total:	$300

(C. Ex. 31; T. 77.)

41. Finally, the Department assessed a $100 penalty for the December 2005 DMR that was reportedly received by the Department on January 30, 2005, two days beyond the January 28 deadline. (C. Ex. 31; T. 93.)

42. The total assessed penalty including the monthly average violations, the daily maximum violations, and the late DMR from January 2005 is $11,689. (C. Ex. 31.)

43. With the exception of the $100 assessed for the allegedly untimely submission of the December 2005 DMR, the penalty amounts assessed are lawful and reasonable. (FOF 1-42).

DISCUSSION

In an appeal from a civil penalty assessment, the role of the Board is to first determine whether the underlying violations that gave rise to the assessment occurred. *Most Health Services, Inc. v. DEP*, 2008 EHB 174, 179; *B & W Disposal, Inc. v. DEP*, 2003 EHB 456, 467-68; *Stine Farms and Recycling, Inc. et al., v. DEP*, 2001 EHB 796, 812; *Farmer v. DEP*, 2001 EHB 271, 283. The Department bears the burden of proof and therefore must prove by a preponderance of evidence that the violations occurred. 25 Pa. Code § 1021.122(b)(1); *Most Health Servs.*, 2008 EHB at 179. Next, we must review the penalty assessment to ensure that the Department has met its burden of proving that the penalty is lawful. *B & W Disposal,* 2003 EHB at 468; *Stine Farms and Recycling*, 2001 EHB at 812. The third and final step in our review of the civil penalty is to determine whether the amount is reasonable and appropriate. *Id.* We will uphold the Department's penalty assessment if we find there is a reasonable fit between the violations and the amount of the penalty. *Eureka Stone Quarry, Inc. v. DEP,* 2007 EHB 419, 449.

Although our review is *de novo*, when reviewing an appeal from a civil penalty assessment, we do not start from scratch by selecting what penalty we might independently believe to be appropriate.[1] *DEP v. Kennedy*, 2007 EHB 15, 24; *DEP v. Leeward Construction, Inc.*, 2001 EHB 870, 885, *aff'd* 821 A.2d 145 (Pa. Cmwlth. 2003), *app. denied*, 827 A.2d 431

[1] As we have noted before, the Board's role in an appeal from the Department's assessment of a civil penalty under the Clean Streams law is different from our role where the Department has filed a complaint for penalties. In an appeal from a civil penalty assessment, we determine whether the underlying violations occurred, and then decide whether the amount assessed is lawful, reasonable, and appropriate. In contrast, in a complaint action, the Board must make an independent determination of the appropriate penalty amount. The Department suggests an amount in the complaint, but the suggestion is purely advisory. *DEP v. Kennedy*, 2007 EHB 15, 24; *Farmer v. DEP*, 2001 EHB 271, 283; *DEP v. Leeward Construction,* 2001 EHB 870, 885, *aff'd* 821 A.2d 145 (Pa. Cmwlth. 2003), *app. denied* 827 A.2d 431 (Pa. 2003); *Westinghouse v. DEP*, 705 A.2d 1349, 1353 (Pa. Cmwlth. 1998); *DEP v. Whitemarsh Disposal Corp.,* 2000 EHB 300, 346, *aff'd* 745 A.2d 1277 (Pa. Cmwlth. 2000).

(Pa. 2003). Where the Department has erred in its application of the statutory criteria, or has assessed an unreasonable penalty amount, the Board may substitute its discretion and modify the penalty. *B & W Disposal,* 2003 EHB at 468.

The Department's $11,689 penalty against The Pines consists of an $11,289 penalty for eleven separate violations of the monthly-average discharges, a $100 penalty for each of three separate daily-maximum violations, and a $100 penalty for the late submission of the December 2005 DMR. The Department arrived at this penalty by using the guidance document entitled "Civil Penalty Calculations for Effluent Violations" and the associated matrix. (Finding of Fact ("FOF") 29.) For nine of the eleven monthly violations, the Department assessed the minimum $1,000 penalty specified in the Department's guidance. (FOF 38.) In the two instances where the penalty exceeded the minimum $1,000 assessment, exceedances of more than four times the permissible limit of total nitrogen had occurred. (FOF 39.) In those instances, the Department assessed a penalty of $1,163 and $1,125. The Department also assessed the minimum $100 penalty specified in the Department's guidance for each of three daily-maximum violations. (FOF 40.)

In this appeal, The Pines does not challenge the fact of most of the violations. Indeed, all of the monthly violations, which constitute the bulk of the total penalty, and two of the three daily violations, were self-reported by The Pines through the submission of DMRs. (FOF 8-13; 16-19.) The Pines does, however, contest the violation for the purportedly untimely December 2005 DMR.

Under the terms of the NPDES permit, a DMR for the monitoring period of December 2005 was due on January 28, 2006, which was a Saturday. By virtue of a date-stamp on the DMR, the Department claims that it did not actually receive the DMR until Monday, January 30.

It points to an internal procedure whereby any mail received on Monday morning is usually stamped as having been received on Saturday and any mail received on Monday afternoon is stamped as being received on Monday. Thus, according to the Department, if the DMR was submitted on Saturday, it would be received Monday morning and be date-stamped as if it had been received on Saturday. In the Department's view, because the DMR was stamped as received on Monday, January 30, 2006, the DMR was untimely. It argues, incorrectly, that The Pines have the burden of proving that the DMR was actually received on Saturday. The Pines responds that, as a matter of law, if a deadline falls on a Saturday, it is automatically continued until the next work day.

It is true that general rules of administrative practice and procedure normally provide that time is computed by excluding the first day but including the last. Whenever the last day falls on a Saturday, Sunday, or legal holiday, that day is omitted from the computation. 1 Pa. Code § 31.11; *York Resources Corp. v. DER,* 1985 EHB 899, 901. Whether the Pines is correct that these rules apply to Department operations at the regional level as a matter of law, we have difficulty accepting the Department's argument that a document can be "received" on a weekend day when the Department is not even open for business. Furthermore, even assuming *arguendo* that it makes sense to insist that parties file reports on a Saturday when there is nobody there to receive them, the Department's limited evidence on this issue about a date stamp with no time of day and vague testimony about the Department's routine practice fails to satisfy its burden of proof. Accordingly, we will reduce the penalty assessment by the $100 that was assessed for this violation. Regarding all other violations, the fact of the violations is uncontested by The Pines.

The second step in our review of a penalty assessment is to assure that the penalty is lawful. The Clean Streams Law authorizes the Department to assess a civil penalty of up to

$10,000 per day for any violation of a provision of the act, rule, regulation, order of the Department, or a condition of any permit issued pursuant to the act. 35 P.S. § 691.605. Here, the assessed penalties are obviously a small fraction of the maximum permissible penalties. Therefore, the penalty amounts are consistent with the law.

Lastly, the Board must determine whether the civil penalty assessed by the Department is reasonable and appropriate under the circumstances. The Pines does not contend that no penalty should be assessed. Rather, it suggests that the penalty should be $100 per violation.[2] That happens to be the amount that the Department assessed for the three daily-maximum violations, so there is no dispute regarding that portion of the penalty.

With respect to the eleven monthly-average violations, the Department arrived at the $1,000 assessment for nine of the violations by using the minimum penalty allowed for monthly-average violations under its guidance document. It assessed the minimum amount primarily based on its conclusion that The Pines's violations resulted from negligence, as opposed to something more serious, and they resulted in "low" damage to the environment. The Department tacked on another $163 and $125 for the two monthly-average violations where the parameter was exceeded by greater than four times the permit limit.

While neither the Department nor the Board is bound by the suggested minimum penalty in the Department's guidance, *see DEP v. Simmons*, EHB Docket No. 2009-029-K, slip op. at 21 (Adjudication issued April 6, 2010); *Kennedy*, 2007 EHB at 25; *United Refining Co. v. DEP*, 2006 EHB 846, 852; *Dauphin Meadows v. DEP*, 2000 EHB 521, we nevertheless conclude that the $1,000, $1,163, and $1,125 assessments reasonably fit the violations under the circumstances of this case. The Clean Streams Law directs us to consider the willfulness of the violation,

[2] The Pines's use of $100 is based on an erroneous reliance on Section 602 of the Clean Streams Law, which imposes a *criminal* fine of not less than $100 for non-negligent violations of the act. 35 P.S. § 691.602. There actually is no statutory minimum *civil* penalty.

damage or injuries to waters of the Commonwealth or their uses, the cost of restoration, and other relevant factors. 35 P.S. § 691.605; *DEP v. Angino*, 2007 EHB 175, 206 (citing *DEP v. Strubinger*, 2006 EHB 740), *aff'd*, 664 C.D. 2007 (Pa. Cmwlth., June 26, 2008). "Other relevant factors" include the deterrent effect of a penalty on the violator and others similarly situated. *DEP v. Leeward Construction,* 821 A.2d 145 (Pa. Cmwlth. 2003); *Westinghouse Electric Corp. v. DEP*, 745 A.2d 1277, 1280-81 (Pa. Cmwlth. 2000). We also look to cost savings enjoyed by the violator, the size of the discharging facility, the volume of the discharge, the classification of the receiving stream, and the degree to which the discharge exceeds the permit limits. *Kennedy*, 2007 EHB at 26.

Here, anything less than the amounts that were assessed by the Department for monthly-average violations would not have the necessary general or specific deterrent effect. Secondly, the Department's characterization of The Pines's behavior as negligent is supported by the record. The Board has recognized that "[n]egligent conduct is conduct which results in a violation which reasonably could have been foreseen and prevented through the exercise of reasonable care." *Angino*, 2007 EHB at 206 (quoting *DEP v. Whitemarsh Disposal Corp.,* 2000 EHB 300, 349), *aff'd*, 664 C.D. 2007 (Pa. Cmwlth., June 26, 2008). We are unmoved by The Pines's contention that all of the violations were accidental because they resulted from unforeseen malfunctions or breakage of treatment components. The Pines did not credibly tie specific malfunctions to specific exceedances. At the hearing, both Patrick Musinski, a water quality specialist with the Department, and Stephen Brokenshire credibly testified that a primary reason for the violations was that the certified operator was not on site often enough. Moreover, there are simply too many repeat violations here to conclude that they were unpreventable and unforeseeable.

As to damage or injury to waters of the Commonwealth and the seriousness of the violations in general, we reject The Pines's contention that the discharges were harmless. The receiving waters are classified as "trout stocking." According to The Pines's NPDES permit, the stream at the point of discharge has low or even no flow, which eliminates the benefits of dilution and requires that care be taken to meet the effluent limits. Monthly limits were violated for more than half of the year in 2005. Discharges significantly exceeded the effluent limits in some (albeit not all) cases. (E.g., November 2005 – 3,995/100 ml fecal coliform reported versus the 2,000/100 ml permit limit). Repeated discharges of excess fecal coliforms, total suspended solids, ammonia, nitrogen, and biochemical oxygen demand cannot be considered harmless. Finally, it must be remembered that The Pines's exceedances that resulted in penalties of $1,000 represent violations of *monthly* limits. And, of course, there were eleven of them.

In conclusion, we find that the Department has met its burden of proving that the penalty amounts reasonably fit the violations for the eleven monthly-average violations and the three daily-maximum violations.[3] We view this case as a relatively straightforward appeal involving relatively low, or in the case of the daily violations, extremely low penalties for admitted violations of NPDES permit limits. The parties in their briefs engage in a rather strong and unnecessary debate about a long list of issues, which we consider irrelevant. These issues include but are not limited to The Pines's compliance history, post-assessment DMRs, alleged discovery violations in this proceeding, alleged reporting and certification violations, settlement discussions, the delays, meetings, and informal proceedings leading up to the assessment, and an allegation that the Department assessed penalties to somehow pressure an allegedly related, Perano-owned company to accede to the Department's demands at another mobile home park.

[3] The Department employed an elaborate model to calculate penalty amounts but then applied the minimum amounts set forth in its guidance anyway. Therefore, the Department's modeling exercise proved to be largely academic and there is no need to get into it here.

None of these issues, even if they were supported by the record, would give us cause to increase or reduce the penalties or would otherwise impact our conclusion that the penalties reasonably fit the permit violations.

CONCLUSIONS OF LAW

1. The Board has the jurisdiction over this matter pursuant to Section 605 of the Clean Streams Law, 35 P.S. § 691.605, and Section 4 of the Environmental Hearing Board Act, 35 P.S. § 7514.

2. The Department has the burden of proof in an appeal of the assessment of a civil penalty. 25 Pa. Code § 1021.122(b)(1).

3. With regard to the civil penalty, the Department must prove by a preponderance of the evidence that the Appellants violated the law and the penalty assessed was lawful, reasonable and appropriate. *See Most Health Services, Inc. v. DEP*, 2008 EHB 174, 179; *B & W Disposal, Inc. v. DEP*, 2003 EHB 456, 467-68; *Stine Farms and Recycling, Inc. et al., v. DEP*, 2001 EHB 796, 812; *Farmer v. DEP*, 2001 EHB 271, 283.

4. The Board's review is *de novo*. *DEP v. Kennedy*, 2007 EHB 15, 24 (citing *DEP v. Leeward Construction, Inc.*, 2001 EHB 870, 885, *aff'd* 821 A.2d 145 (Pa. Cmwlth. 2003), *app. denied*, 827 A.2d 431 (Pa. 2003)).

5. In assessing the amount of a civil penalty, the Department, and this Board in conducting its review, must consider the willfulness of the violation, damage or injuries to waters of the Commonwealth or their uses, the cost of restoration, and other relevant factors, which includes the deterrent effect of the penalty. 35 P.S. § 691.605; *DEP v. Leeward Construction, Inc.*, 821 A.2d 145 (Pa. Cmwlth. 2003).

6. The Department failed to sustain its burden of proving that the December 2005 DMR was submitted late.

7. The Department sustained its burden of proving that the eleven monthly violations and three daily violations occurred.

8. The Department's assessment of $11,289 for the eleven monthly NPDES permit violations was lawful and reasonable.

9. The Department's assessment of $300 for three separate daily NPDES permit violations was lawful and reasonable.

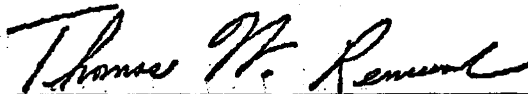
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

THE PINES AT WEST PENN, LLC	:	
	:	
v.	:	**EHB Docket No. 2008-267-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

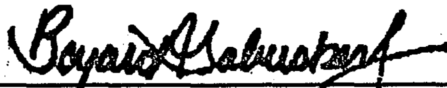
AND NOW, this 14th day of May, 2010, it is hereby ordered that this appeal is **sustained** in part consistent with the foregoing adjudication. The Pines at West Penn, LLC shall pay a civil penalty of $11,589, which constitutes a $100 reduction from the Department's $11,689 assessment. The appeal is dismissed in all other aspects.

ENVIRONMENTAL HEARING BOARD

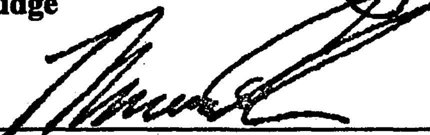


THOMAS W. RENWAND
Chairman and Chief Judge

MICHELLE A. COLEMAN
Judge



BERNARD A. LABUSKES, JR.
Judge



MICHAEL L. KRANCER
Judge

RICHARD P. MATHER, SR.
Judge

DATED: May 14, 2010

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MARYANNE WESDOCK, ESQUIRE
ACTING SECRETARY TO THE BOARD

ROCKLAND NATURAL GAS COMPANY, INC., MARWELL, INC., AND RICHARD I. FRY	:	
v.	:	**EHB Docket No. 2009-125-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: May 17, 2010**

OPINION AND ORDER ON MOTION FOR SUMMARY JUDGMENT

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board pursuant to 25 Pa. Code § 1021.94a grants summary judgment against parties who failed to respond to a summary judgment motion.

OPINION

This is an appeal from an administrative order issued by the Department of Environmental Protection (the "Department") on August 6, 2009 pursuant to the Oil and Gas Act, 58 P.S. § 601.101 *et seq.*, to Rockland Natural Gas Company, Inc., Marwell, Inc., and Richard I. Fry ordering them to plug ten abandoned oil and gas wells. The Department previously served the Appellants with extensive requests for admissions. When the Appellants did not answer the requests, the Department filed a motion to deem the admissions admitted.

The Appellants did not respond to the motion. We granted the Department's motion by an Opinion and Order dated January 26, 2010.

The Department filed a motion for summary judgment on March 29, 2010, arguing in light of the deemed admissions that there are no disputed material facts and it is entitled to judgment as a matter of law based upon those undisputed facts. The Appellants have again failed to respond to the Department's motion. Our rules provide that "[s]ummary judgment may be entered against a party who fails to respond to a summary judgment motion." 25 Pa. Code § 1021.94a(k). We have not hesitated to grant judgment pursuant to this rule where, as here, the appellants have evinced no serious intention to prosecute their appeal. *Thornberry v. DEP*, EHB Docket No. 2008-328-R (Opinion and Order, February 9, 2010); *Koch v. DEP*, EHB Docket No. 2009-027-L (Opinion and Order, February 3, 2010).

Accordingly, we issue the Order that follows.

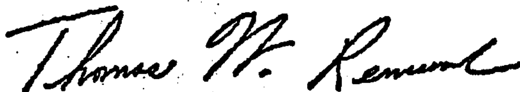
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ROCKLAND NATURAL GAS COMPANY, INC., MARWELL, INC., AND RICHARD I. FRY	:	
v.	:	**EHB Docket No. 2009-125-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

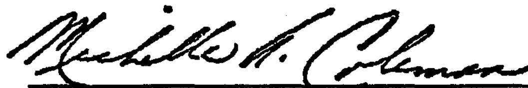
ORDER

AND NOW, this 17th day of May, 2010, it is hereby ordered that summary judgment is entered in favor of the Department and this appeal is **dismissed**.

ENVIRONMENTAL HEARING BOARD

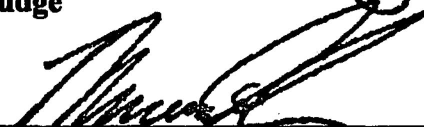


THOMAS W. RENWAND
Chairman and Chief Judge

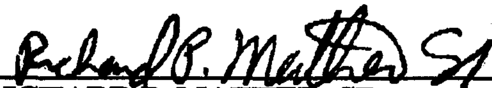


MICHELLE A. COLEMAN
Judge

BERNARD A. LABUSKES, JR.
Judge



MICHAEL L. KRANCER
Judge



RICHARD P. MATHER, SR.
Judge

DATED: May 17, 2010

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

SALVATORE PILEGGI	:	
	:	
v.	:	**EHB Docket No. 2009-044-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and NEWTON TOWNSHIP, Permittee	:	**Issued: May 24, 2010**

OPINION AND ORDER ON PETITION TO INTERVENE

By Michelle A. Coleman, Judge

Synopsis:

The Board grants a petition to intervene by a joint owner of the property subject to the appeal who has a substantial, direct and immediate interest in the outcome of the appeal. However, the Board limits the Intervenor's participation in the proceedings due to the petition being filed three weeks prior to the hearing on the merits.

OPINION

On May 17, 2010 Susan Pileggi ("Ms. Pileggi") petitioned to intervene in this appeal from the Department of Environmental Protection's ("Department") denial of an Act 537 Plan Update for Newton Township ("Township"). A hearing in this appeal is scheduled to begin June 14, 2010. The Appellant in this matter, Salvatore Pileggi ("Appellant" or "Mr. Pileggi"), is the husband of Ms. Pileggi. She petitions to intervene arguing that she is a joint owner of the site

subject to this appeal and seeks to have her interests protected.

The Department and the Township object to her intervention on the grounds that Ms. Pileggi's interest as co-owner of the property with the Appellant will provide that her interests will be adequately protected by the Appellant. They further argue that Ms. Pileggi has petitioned to intervene very late in this proceeding which will cause undue delay in the proceeding and prejudice to the Department and Township.

The general principles regarding intervention have been addressed in *Connors v. State Conservation Commission*, as follows:

> Section 4(e) of the Environmental Hearing Board Act, 35 P.S. § 7514(e), provides that "any interested party may intervene in any matter pending before the Board." The Commonwealth Court has explained that, in the context of intervention, the phrase "any interested party" actually means "any person or entity interested, i.e., concerned, in the proceedings before the Board." *Browning Ferris, Inc. v. DER, 598 A.2d 1057, 1060 (Pa. Cmwlth. 1991) ("BFI").* The interest required must be more than a general interest in the proceedings; it must be such that the person or entity seeking intervention will gain or lose by direct operation of the Board's ultimate determination. *Jefferson County v. DEP*, 703 A.2d 1063, 1065 n. 2 (Pa. Cmwlth. 1997); *Wheelabrator Pottstown, Inc. v. DER*, 607 A.2d 874, 876 (Pa. Cmwlth. 1992); *BFI*, 598 A.2d at 1060-61; *Wurth v. DEP*, 1998 EHB 1319, 1322-23.
>
> Gaining or losing by direct operation of the Board's determination is just another way of saying that an intervenor must have standing.
>
> Stating the Commonwealth Court's holdings another way, a party who has standing must be permitted to intervene. *Fointaine v. DEP*, 1996 EHB 1333, 1346. Considerations concerning whether the intervenor's rights will be adequately protected by existing parties and whether the intervenor will add anything new to the proceedings are irrelevant. *General Glass Industries Corp. v. DER*, 1995 EHB 353,355 n.2.

1999 EHB 669, 670-71; *see also Brunner v. DEP*, 2003 EHB 186; *Consol Pennsylvania Coal Co. v. DEP*, 2002 EHB 879; *Pennsylvania Game Commission v. DEP*, 2000 EHB 823; *Anjar Trust v.*

DEP, 2000 EHB 75.

Ms. Pileggi, without a doubt, has a substantial, direct and immediate interest in this appeal as the co-owner of the property subject to this appeal, and therefore has standing. The Department and Township's arguments that her interests will be adequately protected by Mr. Pileggi is irrelevant. *See General Class Industries Corp v. DER*, 1995 EHB 353. We must allow Ms. Pileggi to intervene in this appeal.

The Board's Rules provide that "[a] person may petition the Board to intervene in any pending matter prior to the initial presentation of evidence." 25 Pa. Code § 1021.81(a). The Department and Township argue that the petition comes too late in this proceeding. In considering a petition to intervene we have a duty to protect all existing parties' rights to a fair hearing. *Pennsylvania Trout v. DEP*, 2003 EHB 590, 594. Our Rules are clear that "[i]f the Board grants the petition, the order may specify the issues as to which intervention is allowed. An order granting intervention allows the intervenor to participate in the proceedings remaining at the time of the order granting intervention." 25 Pa. Code § 1021.81(f). As Judge Labuskes recently stated, "[r]ather than allow discovery, [and] further delay . . . we believe that the best way to balance the [intervenor's] right to participate with the existing parties' right to fair hearings is to narrowly restrict [intervenor's] participation . . . ." *Patricia Wilson v. DEP*, Docket No. 2009-024-L (Opinion and Order issued March 16, 2010), slip op. at 4.

Ms. Pileggi filed this petition to intervene three weeks before the scheduled hearing with the Appellant's pre-hearing memorandum already filed and both the Department and Township pre-hearing memoranda due to be filed shortly. We will not allow this proceeding to be delayed by her petition. Therefore, we will restrict her participation by not allowing any additional discovery to be taken, unless by agreement of all the parties. Secondly, Ms. Pileggi will have to

file her pre-hearing memorandum in a prompt manner. Lastly, she will not be allowed to call any witnesses in her case-in-chief other than party representatives.

Therefore, we enter the following order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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

ORDER

And now, this 24th day of May, 2010, it is HEREBY ORDERED that Susan Pileggi's Petition to Intervene is hereby **granted**. The new caption, which should be reflected on all future filings with the Board, shall be as follows:

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

It is further ordered that her participation in the proceeding is limited in accordance with the following:

1. No additional discovery shall be conducted, unless by agreement of all the parties.
2. The Intervenor's Pre-hearing Memorandum shall be filed on or before **May 28, 2010**, if the memorandum is filed any later than that date the Intervenor's case-in-chief will be further restricted.

3. Intervenor is not permitted to call any witnesses to testify in its case-in-chief other than party representatives.

ENVIRONMENTAL HEARING BOARD

MICHELLE A. COLEMAN
Judge

DATED: May 24, 2010

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MARYANNE WESDOCK
ACTING SECRETARY TO THE BOARD

FRANK T. PERANO :
:
v. : **EHB Docket No. 2009-119-L**
:
COMMONWEALTH OF PENNSYLVANIA, :
DEPARTMENT OF ENVIRONMENTAL :
PROTECTION : **Issued: May 26, 2010**

OPINION AND ORDER
ON MOTION TO DISMISS

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board denies the Department's motion to dismiss for lack of jurisdiction in an appeal of a letter from the Department that denied a letter request from a permittee for an extension of a compliance schedule established in an NPDES permit. The Board is unable to determine at this point in the proceedings that the letter is not a final, appealable action.

OPINION

This matter involves an appeal of a letter dated August 3, 2009 from the Department of Environmental Protection (the "Department") denying a request from the Appellant, Frank T. Perano, for a one year extension to complete remediation work required by NPDES Permit No. PA 0080721, issued to Perano on September 12, 2006. The permit included a compliance schedule that required Perano to (1) submit an inflow and infiltration ("I&I") study by December 31, 2006; (2) submit a scope of work for remediation by April 30, 2007; and (3) complete

remediation by December 31, 2009. Perano did not appeal the issuance of the NPDES permit. Perano complied with the permit requirements to submit an I&I study and a remediation work plan. Perano then sent a letter dated May 21, 2009 to Lee McDonnell, the Department's Water Management Program Manager, requesting a one year extension to complete the remediation work required by the permit. Perano's letter, in which he explained the reasons for his request, reads in part as follows:

> I am writing to request an extension of the Compliance Schedule in Part C of the above referenced NPDES Permit. I previously written the Department's counsel Mike Sokolow, Esq. ... explaining the need for the extension, and thought I would formalize the request to you.
>
> * * *
>
> The I/I study and the remediation plan/scope of work were submitted in a timely fashion. The Department reviewed both without response or comment, and we proceeded to execute our remediation plan. By June of 2008, we completed all proposed work at the wastewater treatment plant, and the first phases of collection system repairs. This work was minimally invasive from the resident's perspective, and was therefore addressed first. In June of 2008, we started bidding the final phases of the project. This included repiping the 6 runs of sewer main and connecting laterals identified in the remediation plan, and additional repairs exceeding the scope of work originally proposed. The bid price for the work in the remediation plan was $53,000 and had been scheduled. The additional repairs were in the bid process and were expected to price out at roughly the same amount.
>
> The stated objective of the compliance schedule is "reducing I/I relative to plant capacity and available flow equalization." It was our intention to complete all work in September and October of 2008. We would then evaluate the impact of repairs during the wet season and have an additional calendar year to effect additional repairs if necessary to achieve compliance with the permit objective. We take compliance seriously, and intentionally paced the project to allow sufficient time for additional work (if necessary) to meet the permit objective.
>
> Unfortunately, all work came to a halt in August of 2008, when I received a draft of a proposed consent order from the Department which was not consistent with what the Department had agreed to in the NPDES Permit special conditions. The proposed Order called for us to repipe Cedar Manor completely. This would force us in a different direction and negate all the work accomplished under the remediation plan. Further, the proposed Order exceeds the reach of the Special Conditions. The proposed Order effectively eliminates I/I, while the Special

Conditions impose an obligation to reduce I/I relative to treatment capacity and available flow equalization. I told Mr. Sokolow that Special Conditions bind me to specific action, but should also protect us *from* specific action. I therefore believe this Order is inappropriate.

After conferring with counsel, I was forced to suspend all work. Due to this new Proposed Order, I simply could not risk an investment of this magnitude, when the Department may deem the work unacceptable. The '08 construction season was lost, and the work remains on hold.

It is my understanding is that the Department's staff drafted the Proposed Order. It is further my understanding that the Department is open to an extension, but that a consent order should be in place to address what to do next, should the work not achieve the desired results. This is impractical and premature. Until the work is completed and the results measured, we cannot determine or anticipate an appropriate next step. Since the Department is free to negotiate consent orders at any time, there is nothing lost by granting the extension, and addressing a potential order in the future, should the need arise.

I therefore formally request a one-year extension of the Compliance Schedule, extending the deadline for remediation to December 31, 2010. By granting this request, you afford me the '09 construction season to complete the work and evaluate the results, leaving an additional year for further repairs if needed. This is exactly where I was last summer when the Department inserted the proposed Order into the Compliance Schedule.

Work cannot resume until a decision is made on the extension. I therefore respectfully request a decision within 30 days, given we have made previous requests on this matter with no formal response. To minimize the length of the extension, it is important that a decision be made quickly. If the decision-making process is protracted, it will impact the '09 construction season and mandate further extensions. It is my sincere desire to complete the work we committed to by December 31, 2010. I am simply requesting the full benefit of the time line initially approved by the Department. Thank you for you consideration to this request.

Following receipt of this letter, the Department called Perano's office to request a meeting to discuss the extension request. The Department indicated that it was willing to consider Perano's request, but not without first meeting with Perano. Perano declined the Department's invitation to discuss his request for an extension in a letter from Perano's counsel dated June 26, 2009 addressed to the Department's counsel, Martin Sokolow, Jr., Esq. That

letter reads, in part:

> On specific issues, with respect to Cedar Manor, my client directed a letter to the Department requesting the Department to respond within thirty (30) days as to whether my client would be afforded additional time for work to be performed under a present NPDES permit (which contained a schedule). In large part, the basis for the request was due to the Department's proposed Consent Order to my client late last summer which required other work be performed other than what was set forth in the NPDES permit as approved by the Department. The corrective action proposed by the Department would have rendered worthless the corrective action my client had already undertaken, and further work he had scheduled, in compliance with the permit. Simply, my client desires to perform the work proposed under the permit, but the delay has created a need due to construction season and availability of contractors. My client had a contractor lined up last fall but since the Department intended to require other work to be performed under a proposed consent agreement, it was not prudent for my client to perform the work if ultimately the Department was going to issue an enforcement order for something completely different than the permit requirements. In any event, I understand the response from your client is they desire a meeting at Cedar Manor. Unfortunately, based on my client's view that the request should have been honored given the circumstances without the necessity of a meeting, my client is not willing to meet at Cedar Manor at this time. My client has requested a response whether it is in the affirmative or otherwise within a reasonable timeframe. I have been directed to pursue another course to attempt to obtain a determination from the Department on the request if a written determination on the extension is not immediately forthcoming.

The Department did not initially act on Perano's request, but requested in a July 2, 2009 letter from Martin Sokolow that Perano reconsider his decision not to meet with the Department. That letter, addressed to Jonathan Hugg, Esq. and G. Brian Salzmann, Esq., counsel for Perano, stated in part:

> As a general matter, the Department continues to believe it can work cooperatively with GSP Management to resolve any outstanding compliance issues at the company's various facilities. However, that will require face to face discussions with the parties, not just the lawyers. Mr. McDonnell remains open to meeting with Mr. Perano about the request for additional time at Cedar Manor and the results of the inspections that he participated in on May 19 and 20, 2009. If Mr. Perano is willing to attend such a meeting, please have him contact Mr. McDonnell ... no later than July 18, 2009. If he is not willing to do so, we must agree with Mr. Salzmann's conclusion that matters cannot be mutually resolved at this point and we will proceed with whatever actions are appropriate.

Shortly thereafter, on July 24, 2009, Perano filed an Action in Mandamus with the Commonwealth Court asking the court to direct the Department "to respond and/or approve Petitioner's request for an extension of time to December 31, 2010 or further extension as may be warranted, to complete the remediation work set forth in the scope of work." In response, the Department issued the August 3, 2009 letter denying the request, which is the subject of this appeal. That letter reads:

> This letter is in response to your May 21, 2009 letter to me in which you requested an extension of time to conduct certain activities required under the above referenced NPDES permit.
>
> * * *
>
> Following receipt of your letter, I called your office and left a message that, before acting on your request for an extension of time, the Department would like to meet with you to discuss the request, as well as any other issues that you would like to raise with the Department. I believe you and your attorneys clearly understood that the Department was very willing to consider a reasonable extension, but felt it would be beneficial for all parties to meet to discuss the specifics related to your proposal. Therefore, the Department did not believe it was prudent for the Department to take a position on your request until such time that the proposed meeting occurred.
>
> By letter dated June 26, 2009 from your attorney Mr. Bryan Salzmann to Mr. Martin Sokolow of the Department, Mr. Salzmann informed the Department that you were unwilling to meet with the Department to discuss your own request. I must say that I was somewhat baffled that a party would request that the Department extend legally enforceable deadlines contained in a NPDES permit, but yet be unwilling to meet with the Department to discuss the request. I am sure you believe you have your own reasons for rebuking the Department's good faith efforts to respond to your request, but they are unknown to me.
>
> Following Mr. Salzmann's June 26, 2009 letter, the Department has continued to encourage you to accept the Department's offer to meet to discuss your own request. For example, by letter dated July 2, 2009 from Mr. Sokolow to your attorneys Mr. Salzmann and Mr. Jonathan Hugg, Mr. Sokolow stated that I remained open to meet with you to discuss your extension request. Mr. Sokolow requested that you contact me by July 18, 2009 if you were willing to reconsider your rejection of the Department's efforts to address your concerns.
>
> To the Department's surprise, its request to meet with you was not met with an acceptance, but rather a mandamus action filed in Commonwealth Court on July 23, 2009 asking the Court, among other things, to require the Department

> to act upon your request. This action was filed a little more than two months following your formal request for an extension of time and despite the Department's efforts to address your concerns in a substantive and constructive manner.
>
> The Department remains willing, as it has been, to meet with you to discuss your request with you and to attempt to address your legitimate concerns in a substantive way. Nonetheless, you have elected to pursue baseless litigation instead. While you may think this is the preferable path to take, the Department does not.
>
> Accordingly, in order to avoid the wasteful expenditure of time and resources by the parties and the Court on this needless litigation, I inform you that at this time, the Department is unwilling to reconsider the legally enforceable schedule included in the Cedar Manor NPDES permit. Failure to comply with that schedule may lead to appropriate action in the future.
>
> By declining to concur with the time extension that you requested, the Department is acting in a manner consistent with the relief you requested in your lawsuit before Commonwealth Court. Therefore, the Department requests that you immediately withdraw that lawsuit. Your failure to withdraw an action that is now clearly moot would demonstrate the frivolous nature of the action and will lead the Department to consider seeking appropriate sanctions from the Court.
>
> The Department is willing to reconsider its position on your extension request at such time that you meet with it to discuss your proposal.

The Department has filed a motion to dismiss this appeal. It argues that the Board does not have jurisdiction to review the August 3, 2009 letter because it is not a final, appealable action. It argues among other things that the Department was not responding to "a formal application to amend the NPDES permit." Although this argument appears somewhat inconsistent with the letter itself, which characterizes Perano's letter as a "formal request for an extension of time," Perano did not directly respond to it. Perano contends that the Department's rejection of his one year extension request constitutes a final action upon which the Board has jurisdiction.

When it comes to deciding whether a letter of the Department is appealable, it is impossible to draw any bright lines. *Langeloth Metallurgical Co. v. DEP*, 2007 EHB 373, 376;

Solebury Township v. DEP, 2005 EHB 898, 902. Certainly, a letter must constitute an "action," as defined by 25 Pa. Code § 1021.2(a),[1] or an "adjudication," as defined by 2 Pa.C.S.A. § 101,[2] but deciding which letters constitute "actions" or "adjudications" is no simple matter. The determination of whether a particular Department action is reviewable must be done on a case-by-case basis. *Jackson v. DEP*, EHB Docket No. 2009-073-M, slip op. at 6 (Opinion and Order issued April 6, 2010); *Langeloth Metallurgical Co.*, 2007 EHB at 376; *Borough of Kutztown v. DEP*, 2001 EHB 1115, 1121; *Ford City v. DER*, 1991 EHB 169, 172. To determine whether a certain action is appealable, we will consider the specific wording of the communication, its purpose and intent, the practical impact of the communication, its apparent finality, the regulatory context, and the relief which the Board can provide. *Jackson*, EHB Docket No. 2009-073-M, slip op. at 6; *Langeloth Metallurgical Co.*, 2007 EHB at 376; *Borough of Kutztown*, 2001 EHB at 1121-24.

The factor that piques our interest in this case is the statutory and regulatory context of the matter. If a regulatory process exists for requesting a Department action, we certainly expect that that process will normally be utilized. If a person wants an NPDES permit, the person needs to apply for one in accordance with applicable regulations. It is not enough for the person to send the Department a letter saying, "I want a permit." A negative response from the Department to such a letter would not be something that this Board would be likely to review.

Perano's letter in this case essentially embodies a request for an NPDES permit

---

[1] An "action" is an "order, decree, decision, determination or ruling by the Department affecting personal or property rights, privileges, immunities, duties, liabilities or obligations of a person including, but not limited to, a permit, license, approval or certification."

[2] An "adjudication" is any "final order, decree, decision, determination or ruling by an agency affecting personal or property rights, privileges, immunities, duties, liabilities or obligations of any or all of the parties to the proceeding in which the adjudication is made. The term does not include any order based upon a proceeding before a court or which involves the seizure or forfeiture of property, paroles, pardons or releases from mental institutions."

modification. It would seem that some modification requests may be done by letter while others must conform to more formal procedures. *See* 25 Pa. Code § 92.2, incorporating 40 CFR §§ 122.61-.64. *See also* NPDES Permit No. PA 0080721, Part B, I, B, 2 (requiring that all modifications be handled in accordance with 25 Pa. Code Chapter 92) (DEP Ex. 1). The Department very much in passing argues that Perano's request did not constitute a "formal application to amend," but as previously mentioned, the letter in question seems to suggest otherwise. In addition, the Department's correspondence shows that the Department was ready to work with Perano based upon his "formal request." Still further, the Department denied Perano's request, not because of procedural shortcomings, but simply in an attempt to render the Commonwealth Court action moot.

Neither party has provided us with any particularly helpful insight on this important aspect of the question. The facts must be viewed in the light most favorable to the non-moving party (Perano) when reviewing a motion to dismiss. *Wilson v. DEP*, EHB Docket No. 2009-024-L, slip op. at 2 (Opinion and Order issued March 23, 2010); *Jackson v. DEP*, EHB Docket No. 2009-073-M, slip op. at 2 (Opinion and Order issued April 6, 2010); *Cooley, et al. v. DEP*, 2004 EHB 554, 558. Accordingly, we are in no position at this point to grant the Department's motion to dismiss.

The Department argues that "Perano should not be allowed to challenge an administratively final schedule simply by requesting that the Department grant an extension of that schedule." We think this argument goes more to the scope of our review than our jurisdiction. If the Department's letter proves to be reviewable based upon our consideration of a more developed record, it does not follow that the original, unappealable schedule is open to review. Rather, our review is strictly limited to the action under appeal. *Winegardner v. DEP*,

2002 EHB 790, 793. In this case, our review would be limited to the modification denial, not the Department's prior unappealable decisions.

Accordingly, we issue the Order that follows.

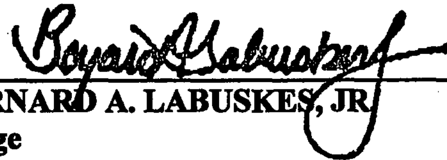
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

FRANK T. PERANO	:	
	:	
v.	:	**EHB Docket No. 2009-119-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 26th day of May, 2010, the Department's motion to dismiss is **denied.**

ENVIRONMENTAL HEARING BOARD



BERNARD A. LABUSKES, JR.
Judge

DATED: May 26, 2010

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MARYANNE WESDOCK
ACTING SECRETARY TO THE BOARD

FRANK T. PERANO	:	
	:	
v.	:	**EHB Docket No. 2009-067-L**
	:	**(Consolidated with 2010-033-L)**
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION and TILDEN TOWNSHIP,	:	
Permittee	:	**Issued: May 27, 2010**

OPINION AND ORDER ON MOTION TO DISMISS

By Bernard A. Labuskes, Jr., Judge

Synopsis

The Board denies the Department's motion to dismiss the appeal for mootness. The Department failed to sustain its burden of showing that the order that is the subject of the appeal was unequivocally and effectively rescinded by the Department.

OPINION

On February 5, 2008, the Department of Environmental Protection (the "Department") informed Frank T. Perano by letter that it will not renew the NPDES permit authorizing him to operate a waste water treatment plant serving the Pleasant Hills Mobile Home Park located in Tilden Township, Berks County. The permit is due to expire on August 31, 2010. As a result of the Department's decision not to renew Perano's permit, the Department issued an order to Tilden Township on March 27, 2008 directing the Township to plan to provide sewer service to Pleasant Hills. The Township appealed that order to this Board and Perano was permitted to

intervene. The order, however, was thereafter rescinded and we subsequently closed the appeal.

The Department issued a new order to the Township on April 15, 2009 that differed from the March 27, 2008 order in that the April 15, 2009 order did not specify how the Township must address the disposal needs of the mobile home park once Perano's NPDES permit expires. Instead, it left it to the Township to decide in the first instance how the mobile home park's future needs will be met. Both the Township and Perano appealed the April 15, 2009 order.

On March 9, 2010, the Department and the Township entered into a consent order and agreement ("COA") resolving the Township's appeal of the Department's order. Perano appealed the COA at EHB Docket No. 2010-033-L. The Township withdrew its appeal of the April 15 order on March 10, 2010. Also on March 10, 2010, the Department issued a letter addressed to the Tilden Township supervisors stating, in part, that "the Department hereby rescinds its April 15, 2009 Order issued by the Department to Tilden Township." Because of the overlap between the issues raised in the appeals from the April 15, 2009 order and the March 9, 2010 COA, the Board consolidated these appeals *sua sponte* by order dated May 14, 2010. Before the Board is the Department's motion to dismiss the appeal of the April 15 order.

In its motion, the Department argues that the Department's rescission of the April 15 order renders Perano's appeal of that order moot. In his response, Perano counters that his appeal is not moot for several reasons. First, Perano asserts that the April 15 order was not effectively withdrawn by the Department and it is, to the contrary, still in effect because it was incorporated into the COA which, in turn, merely reiterates of the terms of the order. Second, Perano contends that he was not only appealing the April 15 order that directed Tilden Township to revise its 537 Plan, but he was also appealing the underlying decision made by the Department not to renew the NPDES permit for the Pleasant Hills Mobile Home Park. Perano believes that

that decision is still an active issue notwithstanding the COA and the rescission of the April 15 order. Lastly, Perano argues alternatively that, should we find his appeal to be moot, we should nevertheless deny the Department's motion under the general exception to the mootness doctrine because the Department's action is capable of repetition yet likely to evade review. We deny the Department's motion for the reasons set forth below.

As the moving party, the Department has the difficult burden of showing there are no material facts in dispute, that the matter is otherwise free from doubt, and it is entitled to judgment as a matter of law. *Blue Marsh Labs., Inc. v. DEP*, 2008 EHB 306, 307; *Michael Butler v. DEP*, 2008 EHB 118, 119; *Borough of Chambersburg v. DEP*, 1999 EHB 921, 925; *Smedley v. DEP*, 1998 EHB 1281, 1281; *Northampton Township, et al. v. DEP*, 2008 EHB 563, 570; *Emerald Mine Resources, LP v. DEP*, 2007 EHB 611, 612; *Kennedy v. DEP*, 2007 EHB 511. For the purposes of this motion, any questions or unresolved issues should be resolved in favor of the non-moving party (Perano). *Cooley, et al. v. DEP*, 2004 EHB 554, 558; *Neville Chem. Co. v. DEP*, 2003 EHB 530, 531.

A matter is moot when an event occurs that deprives the Board of the ability to grant effective relief or the appellant has been deprived a necessary stake in the outcome. *Horsehead Res. Dev. Co. v. DEP*, 780 A.2d 856, 858 (Pa. Cmwlth. 2001), *appeal denied*, 796 A.2d 987 (Pa. 2002); *Bensalem Township Police Benevolent Assoc., Inc. v. Bensalem Township*, 777 A.2d 1174, 1178 (Pa. Cmwlth. 2001); *Blue Marsh Labs.*, 2008 EHB at 307-08; *Solebury Township v. DEP*, 2004 EHB 23, 28-29. There are various exceptions to the mootness doctrine where the Board will not dismiss a case. These exceptions include instances where the conduct complained of is capable of repetition yet likely to evade review, where issues of great public importance are involved, or where a party will suffer a detriment without a decision. *Sierra Club v.*

Pennsylvania Pub. Util. Comm'n, 702 A.2d 1131, 1134 (Pa. Cmwlth. 1997), *aff'd* 731 A.2d 133 (Pa. 1999); *Ehmann v. DEP*, 2008 EHB 386, 389; *Solebury Township*, 2004 EHB at 29.

Normally, the Department's rescission of an action renders an appeal from that action moot. *See Lipton, et al. v. DEP*, 2008 EHB 223; *Cromwell Township v. DEP*, 2007 EHB 8; *Borough of Edinboro v. DEP*, 2000 EHB 1167. Here, however, Perano's argument that the April 15 order was not effectively withdrawn by the COA or the Department's March 10, 2010 letter is not without merit. Although the Department's March 10 letter states that it rescinds the April 15 order, it is somewhat less clear whether the *terms* of the order were actually rescinded. The COA appears to be, with the exception of an extension of time granted to the Township, nothing more than an agreement to abide by the terms of the April 15 order. The effect of the attachment and incorporation of the order to the COA also raises questions regarding whether the order has continued life. The COA states "A copy of the order is attached hereto and is incorporated as Exhibit 1." Here, the COA not only "attached" and "incorporated" the April 15 order, it also appears to encompass the terms of the order. For instance, the April 15 order directs the Township to revise its official Act 537 Plan in light of the future sewage disposal needs at the Pleasant Hills Mobile Home Park. Likewise, the COA directs the Township to "submit to the Department an officially adopted Minor Act 537 Plan Update Revision to provide public sewer service to the needs area identified in the Department's April 15, 2009 Order." Thus, the terms of the order are apparently embodied and reaffirmed by the COA suggesting that the April 15 order, or at least the terms thereof, are not in fact fully rescinded. Without determining the legal effect of attaching and incorporating a document, it is apparent that there are still unresolved issues at this point in the proceedings regarding whether the COA and the subsequent March 10, 2010 letter *actually* rescinded the April 15 order.

As a practical matter, the Department's motion is essentially rendered irrelevant by the consolidation of the appeals from the April 15 order and the COA. The Department has not moved for the dismissal of the appeal of the COA; nor is it claiming that any issues in that appeal are now moot. The dismissal of one appeal but not the other makes little sense because, according to Perano's notices of appeal, the April 15 order and the COA affect him in virtually identical ways and raise the very same issues. Thus, the dismissal of the appeal of the April 15 order would have little if any practical effect because the issues raised in that appeal would still be before the Board in the appeal of the COA.

Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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

ORDER

AND NOW, this 27th day of May, 2010, it is hereby ordered that the Department's motion to dismiss is **denied**.

ENVIRONMENTAL HEARING BOARD

BERNARD A. LABUSKES, JR.
Judge

DATED: May 27, 2010

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

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