Environmental Hearing Board

# Adjudications and Opinions


## 2008
## VOLUME I

**COMMONWEALTH OF PENNSYLVANIA**
**Thomas W. Renwand, Acting Chairman**

**JUDGES**

**OF THE**

**ENVIRONMENTAL HEARING BOARD**

**2008**

| | |
|---|---|
| Acting Chairman and Chief Judge | Thomas W. Renwand |
| Judge | George J. Miller |
| Judge | Michelle A. Coleman |
| Judge | Bernard A. Labuskes, Jr. |
| Secretary | William T. Phillipy [IV] |

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## FOREWORD

This volume contains all of the adjudications and opinions issued by the Environmental Hearing Board during the calendar year 2008.

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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| **WEBCRAFT, LLC** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2007-200-R** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION** | : | **Issued:** January 3, 2008 |

## OPINION AND ORDER ON SECOND MOTION TO DISMISS

**By Thomas W. Renwand, Acting Chairman and Chief Judge**

**Synopsis:**

The Pennsylvania Environmental Hearing Board denies the Pennsylvania Department of Environmental Protection's Second Motion to Dismiss where the Appellant was late in complying with two Board Orders to perfect its Appeal by filing an Amended Notice of Appeal and attaching the Department action under appeal.

The Board finds that although the filing was late it did not prejudice the Department to the extent justifying the dismissal of the Appeal as the original Notice of Appeal clearly identified the Title V permit Appellant was appealing. The Department had this permit in its possession as the issuing regulatory agency. Even though the original Notice of Appeal was not in the proper form as required by 25 Pa. Code Section 1021.51(e), it identified the issues appealed. Moreover, the Department failed to set forth how it was prejudiced. Therefore, although the Board certainly does not condone a party's failure to timely comply with Board

orders, the dismissal of Appellant's Appeal is too severe a sanction under the circumstances.

**OPINION**

Presently before the Pennsylvania Environmental Hearing Board (Board) is the Pennsylvania Department of Environmental Protection's (Department) Second Motion to Dismiss. On August 13, 2007, the Appellant, Webcraft, LLC (Webcraft), filed its Notice of Appeal. On August 17, 2007, the Board issued an Order to Perfect Appeal together with Pre-Hearing Order No. 1 and mailed it to the attorney listed in Appellant's Notice of Appeal. The original Pre-Hearing Order No. 1 and Order to Perfect were returned to the Board unopened, with the words "Return to Sender" "Not Here" hand-written on the envelope. In light of the fact that Appellant, despite our best efforts, was served with neither our Pre-Hearing Order No. 1 nor our Order to Perfect, we issued an Amended Order to Perfect on September 10, 2007 ordering Webcraft to file a copy of the Department action being appealed on or before September 28, 2007. This was served on Appellant's current counsel, who is Webcraft's Vice-President and Deputy General Counsel.

Meanwhile, on or about September 13, 2007, the Board received the Department's First Motion to Dismiss. The Department requested that we dismiss Webcraft's Appeal for failure to comply with our August 17, 2007 Order and for failing to set forth its objections in its Notice of Appeal in separate numbered paragraphs as required by our Rules. See 25 Pa. Code Section 1021.51(e). Instead, Webcraft had simply set forth in spread-sheet form its enumerated objections.

Since Webcraft never received our Order to Perfect issued on August 17, 2007, we denied without prejudice the Department's First Motion to Dismiss. However, in our Opinion and Order issued on September 13, 2007, we further directed Webcraft to perfect its Appeal on

or before September 28, 2007 by filing a copy of the Department action being appealed and by filing an Amended Notice of Appeal setting forth in separate numbered paragraphs its specific objections to the action of the Department.

When Webcraft did not respond to our Orders of September 10, 2007 and September 13, 2007, the Department filed its Second Motion to Dismiss. The Department contends that it "is greatly prejudiced by Webcraft's ongoing failure to provide a copy of the appealed-from action and a coherent, comprehensive list of its factual and legal objections to that action; it is, in fact, precluded from defending the appeal altogether."

On November 5, 2007, Webcraft filed its Amended Notice of Appeal and attached the 33 page Title V State Operating Permit which is the Department action it is appealing. In its Response to the Department's Second Motion to Dismiss, Webcraft admitted that its Amended Notice of Appeal was not filed in a timely manner pursuant to our earlier Orders. Although it attached no verifications or affidavits supporting its factual contentions, it indicated that "due to subsequent confusion and a lapse in communication at Webcraft, admittedly the appeal was not perfected by this latter date [September 28, 2007]."

Turning to the merits of the Department's argument, Webcraft contends that it does not routinely file appeals with the Board and it took some time for it to familiarize itself with Board procedures. Moreover, Webcraft contends that the Department, as the issuing regulatory agency, has had in its possession at all times a true and correct copy of the Title V Operating Permit which is the Department action it is appealing. Webcraft also argues that even though its original Notice of Appeal was not prepared or filed in the format called for in our Rules of Practice and Procedure, 25 Pa. Code Section 1021.51(e), it nevertheless was quite specific and provided the Department with notice of Webcraft's objections. Finally, Webcraft contends that

its Amended Notice of Appeal has corrected any earlier form problems with its original Notice of Appeal.

The Department chose not to file a Reply to Webcraft's Response (see 25 Pa. Code Section 1021.94(c), but instead filed by letter a request that the Board strike Webcraft's "untimely ...filings and dismiss this moribund appeal." [1]

Webcraft responded, also by letter, that the date of service of the Department's Second Motion to Dismiss was October 2, 2007. As service was effectuated by mail, our rule affords Webcraft an extra three days to respond to the Motion. Therefore, Webcraft contends that its filings in response to the Department's Second Motion to Dismiss are indeed timely.

The Pennsylvania Environmental Hearing Board reviews Motions to Dismiss in the light most favorable to the non-moving party. *Tapler v. DEP and Upper Milford Township*, 2006 EHB 421-422; *Solebury Township v. DEP*, 2004 EHB 23, 28; *Neville Chemical Co. v. DEP*, 2003 EHB 530-531. The Board treats Motions to Dismiss the same as Motions for Judgment on the Pleadings. That is, a Motion to Dismiss will only be granted where there are no material facts in dispute and the moving party is entitled to judgment as a matter of law. *Onyx Greentree Landfill, LLC, v. DEP*, 2006 EHB 404, 411; *Borough of Chambersburg v. DEP*, 1999 EHB 921, 925; *Smedley v. DEP*, 1998 EHB 1281-1282.

The dispositive issue is not whether Webcraft timely responded to the Department's Second Motion to Dismiss. It did. Rather, Webcraft ignored two Orders which clearly required responses from Webcraft by September 28, 2007. That is the important deadline—not

[1] Requests to strike filings and dismiss an appeal may only be made by Motion. Such motions should set forth in separate numbered paragraphs the relief requested and shall be accompanied by a proposed order. See 25 Pa. Code Section 1021.91. If all parties agree "to the relief requested the request may be embodied in a letter, provided the letter indicates the consent of the other parties." 25 Pa. Code Section 1021.92(d).

November 5, 2007. Our Orders required Webcraft to take action by September 28, 2007, and it did not.

It is within the Board's power and discretion to sanction Webcraft. Such sanctions may include the dismissal of Webcraft's Appeal. See 25 Pa. Code Section 1021.161. Our Rules of Practice and Procedure state that an "appeal shall set forth in separate numbered paragraphs the specific objections to the action of the Department. The objections may be factual or legal." 25 Pa. Code Section 1051(e). Moreover, the Orders of September 10, 2007 and September 13, 2007 specifically set forth the actions that Webcraft was required to take by September 28, 2007—file a copy of the Department action under appeal and amend its Notice of Appeal to comply with 25 Pa. Code Section 1051(e).

It is important to the integrity of the process before the Board that deadlines are viewed as meaningful and important. Parties have a right to rely on our Orders and the deadlines they impose. Moreover, we have a duty to uphold the integrity of the process by enforcing these deadlines. *See DEP v. Neville Chemical Company*, 2005 EHB 1, 4; *Petchulis v. DEP*, 2001 EHB 673, 678; and *Kleissler v. DEP and Pennsylvania General Energy Corp.*, 2002 EHB 617, 619. Nevertheless, a sanction that is too severe can be just as detrimental to the litigation process as allowing violations to go unsanctioned. *Groce v. DEP and Wellington Development*, 2006 EHB 81, 84.

We are not persuaded by the Department's Second Motion to Dismiss that the Department suffered any prejudice. Webcraft's original Notice of Appeal indicates quite clearly that it was appealing the "renewal of [its] Title V Permit." Although Webcraft, in contravention of our Rules of Practice and Procedure, did not attach to its Original Notice of Appeal this 33 page document, the Department has had the document in its possession since at least the date the

Department issued that permit. Although Webcraft's original Notice of Appeal set forth its objections in a somewhat cryptic fashion we are relatively confident that the Department's professional staff could understand these objections. In any event, Webcraft's Amended Notice of Appeal, although not timely filed, substantively satisfies the Board's Orders to Perfect. Consequently, we are not persuaded that the Department is "precluded from defending the appeal altogether."

We are mindful of our duty to decide cases on their merits and dismissing Webcraft's appeal is too severe a sanction under these particular facts. See also 25 Pa. Code Section 1021.4. We trust that Webcraft now understands the need to scrupulously follow our Rules of Practice and Procedure and strictly adhere to any deadlines set forth in our Orders. Any further violations of Board deadlines will not be dealt with in as generous a manner.

**COMMONWEALTH OF PENNSYLVANIA**
**ENVIRONMENTAL HEARING BOARD**

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|---|---|---|
| **WEBCRAFT, LLC** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2007-200-R** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION** | : | |

**ORDER**

AND NOW, this 3rd day of January, 2008, following review of the Pennsylvania Department of Environmental Protection's Second Motion to Dismiss and the Appellant Webcraft's Response, IT IS ORDERED as follows:

1) The Department's Second Motion to Dismiss is **denied**.

2) Counsel shall file a joint status report with the Board on or before **February 1, 2008**.

**ENVIRONMENTAL HEARING BOARD**

**THOMAS W. RENWAND**
**Acting Chairman and Chief Judge**

**DATE:** January 3, 2008

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

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|---|---|---|
| **JOE SORRENTINO** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2007-076-MG** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION** | : | **Issued: January 4, 2008** |

## OPINION AND ORDER ON MOTION TO DISMISS

**By George J. Miller, Judge**

**Synopsis**

The Board dismisses an appeal of a civil penalty assessment under the Storage Tank Act. The appellant failed to post an appeal bond as required by that statute or make a claim of an inability to pay.

## OPINION

Before the Board is a motion by the Department of Environmental Protection which seeks a rule to show cause requiring the Appellant, Joe Sorrentino, to make a claim of financial inability to pre-pay a civil penalty assessment and a motion to dismiss the Appellant's appeal for failure to pre-pay the penalty. We will grant the motion to dismiss.

The facts are as follows. In February 2007 the Department assessed a civil penalty in the amount of $ 4,500 against the Appellant, Accu-Tow, Inc. and Accu-Tow Automotive, Inc. for

various violations of the Storage Tank and Spill Prevention Act (Storage Tank Act).[1] The Appellant filed an appeal of that assessment, but to date has not pre-paid the penalty or posted an appeal bond. The Board held three conference calls related to this matter in September and November, 2007. Although the Appellant represented that he was engaged in bankruptcy proceedings, he never filed anything with the Board wherein he alleged an inability to pre-pay the penalty or post an appeal bond. On November 6, 2007 the Department filed the current motion. The Appellant failed to file any response to the Board in spite of being informed in the conference calls that his appeal might be dismissed.

Section 1307 of the Storage Tank Act is very clear, that within thirty days of a civil penalty assessment an appellant must either pre-pay the penalty or post an appeal bond. Failure to do so "shall result in a waiver of all legal rights to contest the violation or the amount of the penalty."[2] If an appellant can not pre-pay the penalty, he must make a claim of inability to pay within the thirty-day appeal period.[3]

The Appellant has had ample opportunity to make a proper claim of an inability to pre-pay the civil penalty assessment. Our rules of procedure require the filing of a "verified statement that he is unable to pay."[4] The Appellant has neither submitted such a statement, nor has he responded to the Department's motion to dismiss. Accordingly, we find that the Appellant has waived his appeal rights and dismiss his appeal.[5]

We therefore enter the following:

---

[1] Act of July 6, 1989, P.L. 169, *as amended*, 35 P.S. §§ 6021.101-6021.2104.
[2] 35 P.S. § 6021.1307(b). *See also She-Nat, Inc. v. DEP*, 1996 EHB 544.
[3] *Id.*
[4] 25 Pa. Code § 1021.51(f).
[5] In view of the fact that Mr. Sorrentino was made aware in conference calls that his appeal would be dismissed if he did not pre-pay the penalty, and his failure to answer the motion to dismiss, we find it unnecessary to issue a rule to show cause.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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|---|---|---|
| **JOE SORRENTINO** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2007-076-MG** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION** | : | |

## ORDER

AND NOW, this 4th day of January, 2008, the motion of the Department of Environmental Protection in the above-captioned matter is hereby **GRANTED**. The appeal of Joe Sorrentino is **DISMISSED**.

**ENVIRONMENTAL HEARING BOARD**

**THOMAS W. RENWAND**
**Acting Chairman and Chief Judge**

**GEORGE J. MILLER**
**Judge**

**MICHELLE A. COLEMAN**
**Judge**

**BERNARD A. LABUSKES, JR.**
**Judge**

**DATED: January 4, 2008**

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|---|---|---|
| **BOSTIK, INC.** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2007-147-MG** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION** | : | **Issued: January 23, 2008** |

**OPINION AND ORDER ON**
**MOTION TO QUASH**

**By George J. Miller, Judge**

**Synopsis**

This appeal is from an order of the Department under the Clean Streams Law and the Solid Waste Management Act, requiring the appellant to remediate contamination both on and off its industrial park property. The appellant issued a subpoena to a neighboring landowner in the industrial park seeking that non-party's records concerning its purchases of chemicals like those involved in the contamination found in the groundwater. The Board grants the motion by the neighboring landowner to quash the subpoena because the information sought would be burdensome to compile, is not relevant to the validity of the Department's order and is not likely to lead to the discovery of relevant evidence.

**BACKGROUND**

Before the Board is a motion by Sandvik, Inc., a non-party, to quash a subpoena issued by Bostik, Inc. (Appellant) in connection with the Appellant's appeal from a remediation order

issued by the Department to the Appellant. The subpoena seeks the deposition of Sandvik personnel and documentation concerning Sandvik's purchase of PCE[1] and TCE[2] used by Sandvik and related entities at its property located across the street from the Appellant's facility in the Ivy Industrial Park located in South Abington Township, Lackawanna County. Sandvik opposes the subpoena on the grounds that compiling the information would be burdensome and unlikely to lead to evidence relevant to the issues in the Appellant's appeal.

The Board held oral argument on the motion to quash, as well as a motion to stay the requirements of the subpoena pending the Board's resolution of the motion to quash. The Appellant did not oppose the motion to stay, which the Board granted. The Board additionally provided the Appellant with the opportunity to file a response and memorandum of law. Accordingly, our resolution of the motion to quash includes our consideration of both the oral argument as well as the motion, response of the Appellant and the reply of Sandvik.

***The Order and Appeal***

On May 25, 2007, the Department issued an Administrative Order to the Appellant which required, among other things, the completion of site characterization work relating to contamination of soil and groundwater both on and off the Appellant's property which the Department believes resulted from the Appellant's use of PCE as a cleaning agent in the Appellant's adhesive plant from 1997 through approximately 2003. The order was premised upon the results of a 2006 investigation by the Department which revealed, among other things, contamination of the soils of the Bostik facility by PCE and breakdown products of that chemical as well as in a private drinking water well down-slope of the Bostik facility.

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[1] Tetrachloroethylene.
[2] Trichloroethylene.

On June 12, 2007, the Appellant filed a notice of appeal with the Board challenging the factual premises of the order, and also argued that the actions ordered by the Department were not a proper exercise of the Department's authority. In part, it is the Appellant's contention that its use of PCE was minimal relative to the use of PCE by other entities in the area, therefore requiring the Appellant to take responsibility for off-site contamination of the groundwater is not reasonable.

***The Subpoena***

On November 6, 2007, the Appellant served Sandvik, Inc. with a non-party subpoena to appear for a deposition and to produce documents related to Sandvik's purchase of chemicals containing PCE and TCE used at the Sandvik facility across the street from the Appellant's adhesive plant. The subpoena sought "all documents relating to Sandvik's purchase of chemicals containing [PCE] and [TCE] that have been used at the Sandvik/PEXCO[3] plant at any time, including but not limited to purchase orders, shipping lists, inventory lists and any other documents reflecting Sandvik's use or purchase of such chemicals or products containing such chemicals." Sandvik argues that this subpoena is unlikely to lead to relevant evidence because Sandvik's purchase of PCE and TCE is irrelevant to the Appellant's responsibilities under the Department's order. Moreover, according to Sandvik, it is unduly burdensome to require Sandvik to pore over a large volume of documents when the information sought has no bearing on the issues in the Appellant's appeal.

In the Appellant's view, the information sought is relevant because the Department's order requires the Appellant to undertake study and remediation beyond the limits of its own property. According to the Appellant, it is seeking to demonstrate that the off-site contamination

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[3] PEXCO, Pennsylvania Extruded Tube Company, is a corporate entity of Sandvik.

is not due to the allegedly minimal amount of PCE used by the Appellant, but rather originates from Sandvik, and therefore it is unreasonable to require the Appellant to remediate off-site contamination for which it is not responsible. The Appellant argues that the discovery it seeks from Sandvik is necessary to prove the type of PCE purchased and used by Sandvik. The Appellant's argument is that the limited amount of PCE used by it could be found only at the upper levels of the groundwater, but it believes that the type of chemicals used by Sandvik would be found at the lower levels of the groundwater in large volumes. This would provide a basis for determining that the Department was unreasonable in requiring the Appellant to remediate the groundwater.

**OPINION**

Our review of this motion is guided by the discovery rules of the Pennsylvania Rules of Civil Procedure.[4] Accordingly, a party is entitled "to obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . ."[5] Information need not be admissible at a hearing provided "the information sought appears reasonably calculated to lead to the discovery of admissible evidence."[6] Additionally, no discovery is permitted which "would cause unreasonable annoyance, embarrassment, oppression, burden or expense to the deponent or any person or party" or "would require the making of an unreasonable investigation by the deponent or any party or witness."[7]

We find that the subpoena issued by the Appellant is overly broad, seeks information that is not likely to be relevant to the subject-matter of the appeal and is likely to cause unreasonable

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[4] 25 Pa. Code § 1021.102.
[5] Pa. R.C.P. No. 4003.1(a).
[6] Pa. R.C.P. No. 4003.1(b).
[7] Pa. R.C.P. No. 4011(b) and (e).

annoyance or require an unreasonable investigation by Sandvik. The Clean Streams Law expressly authorizes the Department to pursue any party relating to the discharge of substances into groundwater even if those waters are polluted from other sources.[8] We think it unlikely in this case that Sandvik's purchase records can overcome the evidence of releases on the Appellant's property. While the Appellant contends that its limited use of PCE could only have resulted in releases of a "few gallons", the Department's recent sampling results of groundwater beneath the Appellant's facility show concentrations of PCE and TCE at both shallow and deep levels well in excess of allowable concentrations.

We must weigh the extremely limited possibility of success that the Appellant might have as a result of this discovery program against the burden that the program would impose on Sandvik. The Appellant's subpoena creates an unreasonable burden on Sandvik on several fronts. First, there is no temporal limitation. Accordingly, Sandvik, a non-party, would be required to pore through years of documentation and produce a witness to discuss these many years worth of documentation. Coupled with the likely lack of relevance of the information, this investigation strikes us as unreasonable and one that Sandvik should not be required to make. Second, information sought about off-site contamination can be derived from other, more direct sources. Surely the documentation accumulated by the Appellant in the course of its own site studies, well-monitoring, chemical purchasing records, and other studies that may be found in the files of the Department will provide the Appellant with sufficient information to support its defense to the requirements of the Department's order.

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[8] Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. 691.606; *see also Commonwealth v. Gilpin Twp.*, 415 A.2d 1002 (Pa. Cmwlth. 1980).

In conclusion, we will grant Sandvik's motion to quash the non-party subpoena issued by the Appellant. We therefore enter the following:

**COMMONWEALTH OF PENNSYLVANIA**
**ENVIRONMENTAL HEARING BOARD**

| | | |
|---|---|---|
| **BOSTIK, INC.** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2007-147-MG** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION** | : | |

## ORDER

AND NOW, this 23rd day of January, 2008, it is ordered that Sandvik, Inc.'s Motion to Quash Non-Party Subpoena, is **GRANTED**. The subpoena served by Bostik, Inc. on November 5, 2007 is **QUASHED**.

**ENVIRONMENTAL HEARING BOARD**

George J. Miller

**GEORGE J. MILLER**
**Judge**

**DATED:** **January 23, 2008**

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

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

| | | |
|---|---|---|
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION** | : | **EHB Docket No. 2007-255-CP-L** |
| **v.** | : | |
| **DENNIS S. SABOT, SR.** | : | **Issued: January 28, 2008** |

## OPINION AND ORDER ON MOTION FOR DEFAULT JUDGMENT

**By Bernard A. Labuskes, Jr., Judge**

**Synopsis:**

The Board grants the Department's unopposed motion for default judgment where the defendant failed to answer a complaint for civil penalties or file a response to the Department's motion. A hearing will be scheduled to determine the amount of the penalty to be assessed.

## OPINION

On November 8, 2007, the Department of Environmental Protection (the "Department") filed and served a complaint for civil penalties against Dennis S. Sabot, Sr. (Sabot) for alleged violations of the Dam Safety and Encroachments Act, 32 P. S. § 693.1 *et seq.* Sabot has not answered the complaint and in informal communication with the Board's staff has indicated that he does not intend to answer the complaint. On December 17, 2007, the Department moved for entry of a default adjudication. Sabot has not responded to that motion.

Our rules provide as follows:

> A defendant failing to file an answer within the prescribed time shall be deemed in default and, upon motion made, all relevant facts in the complaint may be deemed admitted. Further, the Board may impose any other sanctions for failure to file an answer in accordance with § 1021.161 (relating to sanctions).

25 Pa. Code § 1021.74. Section 1021.161 provides that the Board may impose sanctions upon a party for failure to abide by a Board order or rule of practice and procedure. The sanctions may include entering an adjudication against the offending party. 25 Pa. Code § 1021.161.

Our existing rules arguably would permit us to enter a default adjudication in this case against Sabot for the amount of civil penalties requested by the Department in its complaint. Any doubt regarding our authority in this regard will be eliminated if a proposed rule currently making its way through the Board's regulatory review process is finalized. That rule, if promulgated, will provide us with express authority to enter a default adjudication for the amount of penalties requested in the complaint. 25 Pa. Code § 1021.74(d)(proposed). Such an adjudication would have been appropriate here because Sabot has shown that he has no intention of answering the Department's complaint, and it appears certain that a hearing to address the amount of civil penalties will be a *pro forma* exercise. Due to the pendency of a rule change, however, we will limit our Order to our traditional practice of deeming all relevant facts admitted pursuant to 25 Pa. Code § 1021.74, and precluding Sabot from contesting liability pursuant to 25 Pa. Code § 1021.161. We will schedule a hearing to receive evidence regarding the amount of civil penalties to be assessed.

**COMMONWEALTH OF PENNSYLVANIA**
**ENVIRONMENTAL HEARING BOARD**

| | | |
|---|---|---|
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION** | : | |
| **v.** | : | **EHB Docket No. 2007-255-CP-L** |
| **DENNIS S. SABOT, SR.** | : | |

## ORDER

AND NOW, this 28th day of January, 2008, it is hereby ordered that the Department's unopposed motion for default judgment is granted. The relevant facts in the complaint are deemed admitted and liability is established. A hearing will be scheduled to receive evidence limited to the amount of civil penalties to be assessed.

**ENVIRONMENTAL HEARING BOARD**

**THOMAS W. RENWAND**
**Acting Chairman and Chief Judge**

**GEORGE J. MILLER**
**Judge**

**MICHELLE A. COLEMAN**
**Judge**

**BERNARD A. LABUSKES, JR.**
**Judge**

**DATED: January 28, 2008**

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

**For the Commonwealth, DEP:**
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Northwest Regional Counsel

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

| | | |
|---|---|---|
| **M & M STONE CO.** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2005-343-L** |
| | : | **(Consolidated with 2005-344-L,** |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and TELFORD BOROUGH AUTHORITY, Intervenor** | : | **2006-110-L, and 2007-098-L)** |
| | : | |
| | : | **Issued: January 31, 2008** |
| | : | |

# ADJUDICATION

**By Bernard A. Labuskes, Jr., Judge**

**Synopsis:**

In a consolidated appeal from Department orders suspending a noncoal surface mine operator's permit and ordering the operator to restore or replace lost water supplies, the Board holds that the orders were factually supported, in accordance with the law, and reasonable in all respects.

## FINDINGS OF FACT

**Parties**

1. The Department of Environmental Protection (the "Department") is the executive agency with the duty and authority to administer and enforce the Noncoal Surface Mining Conservation and Reclamation Act ("Noncoal Act"), 52 P.S. § 3301 *et seq.*, the Clean Streams Law, 35 P.S. § 691.1 *et seq.*, Section 1917-A of the Administrative Code of 1929, 71 P.S. § 510-

17, and the rules and regulations promulgated under those statutes.

2. M&M Stone Co. ("M&M") is a Pennsylvania corporation whose business includes the mining of noncoal minerals by the surface mining method. (Department Ex. No. ("DEP Ex.") 1.)

3. M&M operates a quarry in West Rockhill Township, Bucks County, known as the Telford Quarry (the "Quarry"). (DEP Ex. 1, 3.)

4. The Telford Borough Authority ("TBA") owns and operates several municipal drinking water supply wells, including a well known as TBA 4, which supply drinking water to approximately 2,761 customers (about 3,000 users). (T. (5/24) 64-65; DEP Ex. 1.)[1]

5. A quarry has been in operation at the site for decades. M&M obtained a permit to mine in 1977. (DEP Ex. 67.)

6. The Department started receiving water loss complaints in the vicinity of the Quarry in the early 1990s. (T. (5/31) 147; DEP Ex. 4, 67.)

7. The Department conducted an investigation that resulted in a March 1994 report, which concluded that pumping out the pit at the Quarry had dewatered private wells and had a minor impact on TBA 4. (DEP Ex. 67.)

8. The Department issued M&M a permit for a lateral expansion in 1994 after M&M committed to replace a water supply that had not yet been replaced. (T. (5/21) 106-110; M&M Ex. 40.)

9. The Department did not receive any additional water loss complaints until December 1998, when TBA complained that TBA 4 was experiencing difficulties. (T. (5/21) 111-13 (5/24) 76-77.)

[1] Unfortunately, the notes of transcript for this case were not numbered sequentially from start to finish. Therefore, we will cite the transcript by date and page number for that date, e.g., "T. (5/24) 64-65."

10. After an investigation the Department concluded that there was insufficient evidence to conclude that Quarry pumping caused TBA 4's decreased production. (DEP Ex. 21, 24.)

11. In 1999, M&M applied for permission to deepen the Quarry by 50 feet. (T. (5/21) 126-27.) At that time the pit floor was about 250 feet below ground surface, which equated to 100 feet mean sea level (MSL).

12. The Department issued a depth correction to M&M on February 22, 2002, authorizing M&M to go down another 50 feet as it had requested to 300 feet below ground surface, or 50 feet above sea level. (DEP Ex. 3.)

13. Due, however, to continuing suspicions regarding water losses (T. (5/21) 130-36), the Department included several conditions in the revised permit, including the following:

a. M&M was required to post an additional water-loss bond and submit additional liability insurance to cover the cost of restoring or replacing TBA 4 (T. (5/21) 137-38; DEP Ex. 3);

b. M&M was required to install an interconnection between the North Penn Water Authority and the TBA systems (T. (5/21) 139-40; DEP Ex. 3);

c. Special Condition 10 established a groundwater monitoring program (DEP Ex. 3);

d. Special Condition 11 stated that M&M "shall restore or replace the Telford Borough Authority (TBA) public water supply Well No. 4 ... provid[ed] that specific monitoring as outlined in Special Condition No. 12 supports the determination that the permittee has impacted this well by his mining activities." (DEP Ex. 3);

e. Special Condition 12 is of central importance in this appeal and must be quoted as length:

In order to provide a determination of a potential dewatering to the TBA's public water supply Well No. 4 the following is an outline for monitoring and a procedural plan to adequately restore or replace the water supply if dewatered by the permittee's mining activities.

a. If any weekly measured water levels under the below listed minimum after level for MW-1 (Pz3) & MW-2 (Pz4), the permittee shall, within one week of receipt of the measurement, commence daily measurements at the monitoring well, and immediately notify the Pottsville District Office of the change in monitoring frequency. The daily measurements of this Special Condition shall continue until:

1. Two consecutive daily measurements indicate that the measurement that triggered the daily sampling requirement has raised above the listed water level elevation(s), at such time weekly measurement shall resume; or

2. The permittee affirmatively established, to the satisfaction of the Department with TBA review that the low water level(s) is attributable to factors not related to the mining operation:

| Monitoring Wells | Minimum Water Levels (ft MSL) |
|---|---|
| MW-1 (Pz3) | 234.8* |
| MW-2 (Pz4) | 238.0* |

*minimum recorded water level from July 1991-Feb. 1996 and Aug. 1996-Dec. 2000

b. If all the following conditions occur, the permittee must immediately contact the Pottsville District Mining Office and Telford Borough Authority:

1. Daily static water level readings from either the MW-1 (Pz3) or MW-2 (Pz4) are below the above listed minimum water levels for fifteen (15) consecutive daily water levels and permittee has not affirmatively established another factor not related to mining operation.

2. The pumping rate from the West Pit sump has significantly increased due to increased

groundwater seepage. The pumping rate and total gallons of water discharged from the West Pit shall be compared to historical pumping records and/or visual inspection of the quarry in determining additional groundwater seepage.

3. TBA reports to the permittee and the Pottsville District Office that daily static water level measurements are less than 207 feet MSL.

If the Department determines through additional statistical analyses, where valid and applicable, of any data submitted pursuant to the monitoring requirements of this permit, or data submitted by TBA or any data collected by the Department personnel that the TBA Well No. 4 is adversely affected by the permittee's mining activities, the Department shall notify the permittee accordingly. In making the determination of adverse effects (i.e. significant decline of static water level or specific capacity or quality) pursuant to this paragraph, the Department shall make such determination through parametric or non-parametric statistical analyses of data from any water year (defined as October 1 through September 30) or statistical analyses of data from any relevant water year periods (e.g. October 1 through April 30, and May 1 through September 30). The permittee shall then commence the procedure(s) outlined in 12.c within thirty (30) days of receipt of the notice unless the permittee is able to affirmatively demonstrate that the dewatering to TBA Well No. 4 has been caused by factors not attributable to the mining operation. In attempting to make this an affirmative determination, the permittee may submit and the Department may consider additional statistical analysis of the data contained in Table 1 or the raw data compiled to make Table 1.

All costs for the above listed procedures shall be borne by the permittee. The Department reserves the right to determine the permittee's responsibility for restoring or replacing TBA's Well No. 4 if only one of the conditions set forth in Special Condition No. 12.b. is met, based on other supporting information that an affirmative determination can be made that mining activities impacted this water supply well.

Should the permittee fail to comply with the terms of this Special Condition, this permit will be suspended and mining operations will be ceased immediately and without prior notice to the permittee.

(DEP Ex. 3);

f. Special Condition 14 provides in relevant part:

The permittee shall also restore or replace any private water supply outside the 1500 foot area or north of the East Branch of the Perkiomen Creek which the

> Department determines to be affected as a result of the permittee's mining activities in accordance with the Noncoal Surface Mining Conservation and Reclamation Act (Act 219 of 1984), Section 11(g) and 25 PA Code Chapter 77.533 of the Department's rules and regulations. If the Department determines from groundwater monitoring that any water supply well will be significantly dewatered by development of the lowest lift, the Department may require the permittee to replace the well(s) that may be dewatered prior to actual interruption or diminution of the water supply(s)....Should the permittee fail to comply with the terms of this condition, this permit will be suspended and mining operations will be ceased immediately and without prior notice to the permittee.

(DEP Ex. 3); and

g. M&M agreed not to appeal the permit (DEP Ex. 3 (Special Condition 24)).[2]

14. M&M began drilling a blast pattern to go deeper in August 2002 and first reached the new permitted depth (50 feet MSL) in December 2002. (T. (5/22) 104-05, (5/30) 191, 224, (5/31) 60, (6/6) 193.)

15. However, M&M would not have removed rock to any significant degree in December 2002. (T. (5/21) 180-81, (5/21) 165-66 (5/30) 191.)

16. In response to its continuing concerns, TBA conducted an independent water loss investigation from 2002 until 2004 (T. (5/25) 78-87, (5/29) 20-23), which resulted in a complaint to the Department in September 2004 (DEP Ex. 27). The Department agreed to conduct an investigation. (T. (5/21) 172-88, 191-93, 200-01 (5/23) 61-62, 104-07, 203-04 (5/24) 82-83; DEP Ex. 29.)

17. M&M denied responsibility for causing TBA 4's difficulties. (DEP Ex. 28.)

18. All of the triggers described in Special Condition 12.b had not been met, so the Department conducted its investigation pursuant to Special Condition 12 ("additional statistical analyses"). (T. (5/21) 194-95.)

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[2] The permit was not appealed. The legality and appropriateness of these conditions are not at issue in this appeal.

19. The Department also received and investigated private water loss complaints for wells owned by Hawkins and Raffaele. (T. (5/21) 212.)

20. The Department notified M&M on February 2, 2005 that it believed that M&M's mining had adversely affected TBA 4. (DEP Ex. 30.) Meetings, discussions, and correspondence ensued. M&M refused to voluntarily restore or replace TBA 4. (T. (5/22) 8-9, 10-35 (5/23) 65-66, 108-114, 142-44; DEP Ex. 31-34, 46.)

21. The Department investigated additional water loss complaints from Andrew Shema, Heather Brunner, and Linda Jencson. (T. (5/24) 9-11.)

22. On November 15, 2005, the Department issued the first two of the three compliance orders that are the subject of this appeal. (DEP Ex. 1.)

23. The November 15, 2005 orders require M&M to cease pumping at the Quarry, to cease all mining activities at the Quarry, and to restore or replace the affected water supplies; namely, TBA 4, and the Raffaele, Shema, and Brunner wells. (DEP Ex. 1.)

24. The Department ordered M&M to commence restoration activities as spelled out in Permit Special Condition 12c. (DEP Ex. 1.)

25. The Department found M&M's failure to restore or replace TBA 4 to be a violation of Special Conditions 11 and 12 of M&M's permit, Section 11(g) of the Noncoal Act, 52 P.S. § 3311(g), and 25 Pa. Code § 77.533. (DEP Ex. 1.)

26. The Department also determined that M&M's failure to restore, replace or reimburse costs related to the affected water supplies at the Raffaele, Shema, and Brunner residences was a violation of Section 11(g) of the Noncoal Act, 52 P.S. § 3311(g), 25 Pa. Code § 77.533, and Noncoal Surface Mining Permit No. 7974SM4A1C5, specifically Special Condition 14.

27. The Department suspended M&M's permit and ordered it to immediately restore or replace TBA 4 to adequate quantity and quality for the purposes served, continue to provide bottled drinking water to the Brunner and Shema residences, if requested, the quality and quantity of which was to be equivalent to or better than the affected supplies; immediately reimburse TBA for all expenses it had incurred in lowering the pump in TBA 4, acquiring and installing a new pump in that well, and the video inspection of that well; and restore or replace the water supplies to the Raffaele, Shema and Brunner residences by providing a permanent source of water adequate in quantity and quality for the purposes served by the affected supplies. (DEP Ex. 1.)

28. M&M suspended quarry operations on November 15, 2005 in accordance with the order, at which point the pit began to fill up with water. (T. (5/31) 178-79.)

29. Subsequent to the Department's issuance of the two November 2005 orders regarding the Quarry's impact on TBA 4 and the Shema, Brunner, and Raffaele wells, the Department in December 2005 received a water loss complaint from Linda Jencson. (T. (5/23) 153, (5/24) 16; DEP Ex. 2.)

30. After investigation, the Department determined that the Quarry had also impacted the Jencson well. The Department generated a January 11, 2006 Addendum Report documenting the investigation, and issued an order on March 9, 2006 regarding the Jencson well loss. (The four private wells will sometimes hereafter be referred to as the "Private Wells.") (T. (5/24) 16-17, 22; DEP Ex. 5.)

31. M&M has declined responsibility for replacing the Jencson well. (T. (5/24) 154.)

32. At M&M's request, the Department informed the Delaware River Basin Commission (DRBC) of its investigation. The DRBC indicated that it had no desire to get

involved. (T. (5/23) 143, 167-69, 195-96.)

**TBA 4**

33. TBA 4 was drilled in 1966 and put into production in 1974. (T. (5/24) 71 (5/29) 102.)

34. The surface elevation of TBA 4 is about 325' MSL and it is about 524 feet deep. (DEP Ex. 4.)

35. TBA 4, as well as TBA's other wells, produce hard water. (T. (5/24 105-106 (5/25) 44.)

36. TBA 4 intercepts numerous bedding planes and dozens of fracture zones, most of which feed water into the well. The deeper fractures function under semiconfined conditions and tend to produce more groundwater than the shallower fractures. (T. (5/29) 113-115 (5/30) 48 (6/4) 51 (6/6) 279, 284; DEP Ex. 73.)

37. Many of the intercepted fractures are vertical fractures, which can help connect different water bearing zones from different bedding units. (T. (5/29) 40-41.)

38. TBA 4 was pumped on a split cycle in order to avoid burning out the pump due to the quick drawdown. (T. (5/24) 66-84.) A split cycle means the pump would be turned on for a while and then turned off for several hours to allow water levels to recover.

39. The pump in TBA 4 was set at increasingly lower levels over the years to avoid the burnout problem. (T. (5/24) 74-76; DEP Ex. 26.)

40. There is no dispute that TBA 4 has suffered a material loss in production. (T. (5/29) 150, 157 (5/30) 200 (6/1) 157.) The only dispute is the cause thereof.

41. There are three possible explanations for TBA 4's decline in performance: (1) a regional water loss due to, e.g., drought, (2) there is something wrong with the well itself, and/or

(3) competing resources, e.g. a quarry or other wells. (T. (5/25) 133-34 (5/30 201 (5/31 99-100.)

**A. Regional Loss**

42. There has been no regional water loss coincident with TBA 4's water loss that is consistent with and would explain its declining performance. (T. (5/25) 87-97 (5/29) 150 (5/30) 201 (5/31) 100; DEP Ex. 19, 72.)

43. M&M expert hydrogeologist, Gary Kribbs, opined that TBA's water loss is due to either the Quarry or well fouling. (T. (5/29) 150-151.)

**B. There is nothing wrong with TBA 4 itself**

44. TBA 4's water loss cannot be explained by the condition of the well itself. (FOF 45-76.)

45. Multiple expert witnesses testified about the condition of TBA 4. Of those experts, David Fennimore of Earth Data Northeast has the most pertinent experience, he was the most convincing in presentation and substance, his opinions were based on the most thorough investigation, and his opinions best comported with the physical evidence. (T. (5/29) 176-194 (5/30) 7-10; DEP Ex. 69.)

46. TBA hired Fennimore to evaluate TBA 4 with respect to arsenic content after new regulatory standards were imposed regarding acceptable arsenic levels in drinking water. Specifically, Fennimore was asked to identify which water-producing zones were producing high arsenic concentrations in the well in the hope that discreet zones with higher arsenic levels could be isolated. (T. (5/30) 6.)

47. Fennimore was not originally retained as an expert witness in this litigation. Fennimore's initial focus was the arsenic investigation. (T. (5/30) 52-53.)

48. It was important for Fennimore to be very precise in identifying fracture zones in

TBA 4 in order to perform a competent and meaningful arsenic evaluation. (T. (5/30) 46-47, 51, 77.)

49. Fennimore's arsenic evaluation showed that groundwater with elevated arsenic levels is distributed throughout the well zones, so it will not be possible to block off one or more zones in order to meet new regulatory limits. (T. (5/30) 57-58.)

50. TBA 4 has been taken off line due to the arsenic levels. The arsenic can be treated, but TBA is awaiting the results of this litigation before making that investment. (T. (5/24) 95-96 (5/25) 41-43, 61-64 (5/30) 6.)

51. In the course of his arsenic investigation, Fennimore developed an opinion regarding the internal condition of the well. He performed a down-hole television survey, geophysical logging using a caliper log, and straddle packer testing. (T. (5/30) 8-11, 40.)

52. The television survey and geophysical logging enabled Fennimore to identify fracture zones as well as smooth portions in the well borehole that could be used in the straddle packer testing. (T. (5/30) 8.)

53. Fennimore's work confirmed that TBA 4 has a multitude of fracture zones distributed throughout the well. It is a highly fractured well. (T. (5/30) 42, 45-47, 57, 88.)

54. Fennimore's video revealed that TBA 4 has some water cascading in from a depth of about 60 feet, which is a common maintenance issue that needs to be addressed, but it is not resulting in any significant fouling or production problems. (T. (5/30) 42-43, 62-64, 92; DEP Ex. 73-74.)

55. Fennimore's video inspection using state-of-the-art equipment, performed correctly and in accordance with industry standards clearly (in the literal sense), shows that there is no significant fouling or clogging of water-producing fracture zones from mineral encrustation

or biofouling in TBA 4 that explains its decreased production over time. (T. (5/30) 13, 15, 35, 40-44, 61-76, 88; DEP Ex. 74, 86.)

56. Fennimore's video inspection was actually the second video inspection of TBA 4. The first inspection was performed by A.C. Shultes on June 15, 2005. (T. (5/22) 40-43; DEP Ex. 74.)

57. The Shultes video inspection has some limited value because it depicts numerous fracture zones, but it is vastly inferior to Fennimore's video inspection due to such problems as incorrect operator procedure and improper lighting. (T. (5/30) 12-16, 35, 41-42, 59-76; DEP Ex. 74, 86.)

58. Following the video inspection, Fennimore's caliper logging provided further confirmation that TBA 4 is a highly fractured well. The results of the caliper logging matched the visual evidence in the videos. (T. (5/30) 45-46, 64-77, 88.)

59. Fennimore then performed straddle packer testing, which enabled him to isolate discreet water-producing zones and measure hydraulic head within various formations. (T. (5/30) 10-11, 48-51.)

60. Fennimore's packer test was performed skillfully and carefully in conformance with industry standards. Although the test was not the equivalent of a long-term pumping test designed to assess the capacity of the well in total (T. (5/30) 139), the test showed that several zones within the well are producing high yields with high specific capacities (T. (5/30) 48-57, 71-72, 76-77, 88-89, 153; DEP Ex. 73.)

61. M&M's experts' criticisms of Fennimore's packer test, were, at best, weak and unconvincing. (Compare, e.g., (6/1) 190 with (5/30) 51.)

62. Fennimore credibly opined consistent with other testimony that there is some

mineralization in TBA 4, as would be expected in a well of that age. (T. (5/23) 116-17, 184-85, 205 (5/25) 110-118, 120-24; (5/29) 39-46, 122-26 151-52; M&M Ex. 99, 103, 106.)

63. There is, however, not enough mineral encrustation or biofouling of TBA 4 to account for its decreased production. (T. (5/30) 35, 43-44, 57-78, 83-84, 85-93, 141-42, 144; DEP Ex. 73, 74, 86; M&M Ex. 103, 106.)

64. Eric P. Grinrod of Spotts Stevens & McCoy is a qualified hydrogeologist expert in, among other things, public water supply wells. (T. (5/29) 4-19; DEP Ex. 10.)

65. Grinrod credibly testified that TBA 4 is not fouled or internally impaired to the point of explaining the well's diminished production. (T. (5/29) 28, 32-34, 37, 40-43, 55, 62-68, 76, 77-80, 118, 121, 145, 151-52, 155, 170; DEP Ex. 38.)

66. Grinrod credibly opined that the condition of the hardware pulled from TBA 4 before performing the video did not indicate that unusual mineralization was taking place in the well or that pump performance was the cause of TBA 4's declining output. (T. (5/29) 47-53, 128, 143-44; M&M Ex. 27.)

67. Grinrod credibly observed that TBA 4's specific capacity increased steadily once the Quarry ceased operations and stopped pumping, which is something that does not tend to happen on its own from a fouled well. (T. (5/29) 80, 170; DEP Ex. 16.)

68. Fennimore and Grinrod's credible opinions that TBA 4 is not materially impaired by fouling is supported by and consistent with the credible expert opinions of Michael Hill (T. (5/22) 44-51 (5/23) 32-33, 119-121 (5/29) 39) and Al Guiseppe (T. (5/25) 99, 110-133, 165-66, 193-94, 204-05; DEP Ex. 43) to the same effect.

69. M&M's expert witness, Gary Kribbs of Aeon Geoscience, Inc., is a well qualified hydrogeologist. (T. (6/1) 46-58; M&M Ex. 401.)

70. We do not credit Kribbs' opinion that TBA 4 is fouled (T. (6/1) 170; M&M Ex. 136), however, for several reasons, including the following:

a. His opinion is based in large part upon the poor-quality Shultes video. Tellingly, neither Kribbs (nor any other M&M expert) successfully challenged the Fennimore video (T. (6/1) 170-177);

b. Kribbs' opinion regarding the well was primarily the result of the process of elimination and his opinion (discussed below) that the Quarry was not causing the losses. Kribbs conducted limited investigation of the well itself. (T. (5/29) 150-151);

c. Kribbs has very limited experience in reviewing video surveys (T. (6/1) 53); waited a year before preparing a report of the video (M&M Ex. 136 (App. E.)); and

d. Kribbs's opinion was based in part on the amount of growth on hardware removed from the well to perform the Shultes video and the mistaken understanding that the growth accumulated in 2 ½ years. (T. (6/1) 179 (6/4) 34; M&M Ex. 27.) In fact, most of the hardware, including the pump, had been in the well for 15 years. (T. (6/6 230-237; DEP Ex. 35.)

71. Philip Getty of Boucher & James, Inc., is a qualified expert hydrogeologist. (T. (6/5) 24-28.)

72. We do not credit Getty's opinion that TBA 4 has localized fouling that is materially impeding its performance (T. (6/5) 47, 62, 70, 74, 174 (6/6) 18-19; DEP Ex. 45; M&M Ex. 399, 407-08, 411, 413), however, for several reasons, including the following:

a. Getty's investigation was not nearly as thorough as Fennimore's investigation. Getty is less experienced and seemed to rely heavily on the work of others (DEP Ex. 41, 45; M&M Ex. 134);

b. Getty gave us the impression that he set out from the outset of his involvement to

show that TBA 4 was fouled (T. (6/5) 28, 166; DEP Ex. 45);

c. Getty's own credibility suffered from his ineffectual attempt to attack Fennimore's credibility by reference to another Fennimore project that showed a leaf in the well water (T. (6/5) 97-98 (6/6) 14-15; M&M Ex. 409-10, 412); and

d. Getty placed too much emphasis on water chemistry when there was actual visual evidence of well conditions.

73. Michael Schnieders of Water Systems Engineering, Inc. is a qualified expert in well evaluation and rehabilitation. (T. (6/5) 158-63; M&M Ex. 145.)

74. Schnieders's opinion that TBA 4 has a *potential* for fouling through mineralization is credible. (T. (6/5) 166, 168, 175; DEP Ex. 45.)

75. We do not credit Schnieders's opinion that TBA 4 is in fact fouled for several reasons, however, including the following:

a. Schnieders tended to opine that the well was *actually*--as opposed to *potentially*--fouled only when prompted by counsel to do so. Absent prompting, Schnieders was more inclined to opine that he "suspected" the well *might* be fouled. (T. (6/5) 179-80, 191-92, (6/6) 7, 18, 21-22.) When prompted by counsel, Schnieders damaged his credibility by testifying that he tends to "run together" actual and potential fouling (T. (6/5) 192);

b. Schnieders's credibility suffered greatly from his willingness to attribute TBA 4's problems to fouling without having even considered other possible explanations, when numerous other hydrogeologists testifying on behalf of both parties indicated that multiple causes should be investigated and eliminated as part of a water loss investigation (T. (6/6) 26);

c. Schnieders, while sincere, came across as a salesman for what his firm does, namely, well rehabilitation. Schnieder's firm has a stake in the rehabilitation of TBA 4 (T.

(6/5) 182, 192-93 (6/6) 15-16; M&M Ex. 34);

d. Schnieders was willing to opine that the well has biological and physical fouling (in addition to mineralization) when there is no credible evidence to support any significant fouling from such mechanisms (T. (6/6) 22-22); and

e. Schnieders's opinion is inconsistent and cannot be reconciled with the more credible opinions of Fennimore and others who have a better first-hand knowledge of the actual condition of the well.

**C. Competing Resource: The Quarry is causing the water loss**

76. The Department's well qualified experts, Michael Hill and Keith Brady, credibly testified that the Quarry caused TBA 4's water loss. The bases for their credible opinions may be summarized as follows:

a. As discussed above, causes other than a competing resource have been ruled out (FOF 42-75);

b. The Quarry was pumping massive quantities of groundwater in relatively close proximity to TBA 4 (T. (5/21) 103 (5/30) 201, 221 (5/31) 100);[3]

c. After the Quarry was deepened its pumping increased by millions of gallons per month and the increase in pit water came largely from groundwater (T. (5/30) 196-97);

d. TBA 4 and the Private Wells are exactly where a water-loss impact would be expected to occur given the Quarry's proximate increased pumping and the geology of the

[3] We agree with Dr. Lutz's testimony that "simple explanations are usually preferable to complicated explanations." (T. (6/6) 146-47.) *See Bearer v. DER*, 1993 EHB 1028, 1097 ("The medieval rule of logical economy known as Ockham's razor, to the effect that a plurality of explanations should not be assumed without necessity, remains a valid principle of decision to this day.").

area (FOF 121, 123, 127, 156);

e. TBA 4 suffered its greatest water loss at about the same time as several other nearby wells and monitoring points experienced lower water levels, all of which occurred when the Quarry mined deeper and its pumping levels increased. M&M's effort to challenge isolated aspects of the data ignores the compelling fact that an overall pattern emerged in the study area that points to the Quarry as the cause of the water losses (FOF 70, 117, 119 - 132);

f. Since the Quarry ceased operations pursuant to the orders and stopped pumping, the wells have recovered (FOF 130); and

g. M&M's experts' theories that these events are a pure coincidence or a reflection of precipitation and nothing more are not credible (FOF 119 - 132).

**1. Quarry Pumping**

77. Before the Quarry was deepened, it pumped between about 10 and 20 million gallons per month. After deepening, it pumped between 20 and 35 million gallons per month. (T. (5/30) 190-97 (5/31) 60-61, 122 (6/6) 72, 278; DEP Ex. 4, 82, 88; M&M Ex. 135.)

78. It was revealed at the hearing that the amount pumped *out* of the Quarry at a given point in time is actually less than the seepage *into* the Quarry at that given point in time because M&M pumped inflow from one area of the Quarry to an inactive area. That internal pumping does not appear to be reflected in the Quarry's pumping records. (T. (6/6) 286-290.)

79. Although a minor portion of the increase in Quarry pumping can be explained by increased precipitation, the vast majority of the increase is due to increased groundwater seepage. (T. (5/30) 189-197 (5/31) 54; DEP Ex. 4, 82; M&M Ex. 136 (Ex. C).

80. The Quarry is the only groundwater pumper in the area that can explain the magnitude of the loss in TBA 4. (T. (5/30) 201-02, 222 (5/31) 100).

## 2. Hydrogeology

81. The area of the Quarry, TBA 4, and the Private Wells (the "study area") is characterized by the Lockatong and Brunswick geologic formations. (T. (5/21) 86 (6/1) 68.) This is relatively hard rock. (DEP Ex. 87; M&M Ex. 136.)

82. M&M mines shale and argillite from these formations, which are interbedded. (T. (5/21) 86.)

83. The bedding planes dip in a northwest direction at an angle roughly eleven degrees from the horizontal. Strike is perpendicular to dip. Other things being equal, groundwater in the study area moves preferentially along strike. (T. (5/21) 86-89 (5/29) 94-95 (6/1) 69; DEP Ex. 4.)

84. As a result, the zone of influence of a pumping source will have a tendency to extend along strike because groundwater is moving easier along strike than crossdip. (T. (5/21) 89.)

85. In the study area, zones of influence tend to reach out in elongated fashion toward the southwest. (T. (5/21) 90-91 (6/1) 105; DEP Ex. 4; M&M Ex. 136.)

86. TBA 4 is southwest and along strike with the Quarry. (DEP Ex. 87; M&M Ex. 136.)

87. There is no dispute among the experts that, from the perspective of strike and dip, the Quarry will tend to pull water from the direction of TBA 4. (T. (5/21) 97 (5/30) 237-38 (5/31) 93, 101, 133.)

88. TBA 4 is about 2,750 feet southwest of the Quarry. (DEP Ex. 4, 87.)

89. Other wells and monitoring points located to the southwest generally along strike include monitoring wells (MWs) 1, 2, 4, and possibly 5 (5 is somewhat updip (T. (6/1) 104), and

the wells designated as Shema, Jencson, Brunner, Raffaele, Heckler, and Leatherman. (T. (5/21) 87-88; DEP Ex. 87.)

90. Groundwater in the study area flows in fractures. There is very little primary porosity in the rock itself; rather, water flows due to secondary porosity in joints, voids, and fractures. (T. (5/30) 48 (5/31) 88 (6/1) 69 (6/4) 61-62; DEP Ex. 4.)

91. Much of the fracturing is vertical to bedding. (T. (5/21 94 (5/31) 40-41.)

92. Understanding the joint and fracture systems is equivalent to understanding the hydrogeology of the study area. (T. (6/1) 47.)

93. All experts agree the rock is heavily fractured. (T. (5/21) 94; DEP Ex. 4.)

94. M&M's experts, Gary Kribbs and Val Britton, view the fracturing as uniform and ubiquitous, like millions of bricks with no mortar between them. (T. (6/4) 90-91, 117, 152, 162.)

95. The Department's view as expressed by Hill and Brady is far more credible and consistent with the preponderance of the evidence. In their view, which we accept, the fractures are variable and irregular. (DEP Ex. 4.)

96. The hydrogeologic connection between two points in this type of geology is largely dependent upon whether the two points are connected by the irregular joints and fractures. (T. (5/30) 238-39; DEP Ex. 4.)

97. Whether one point (e.g. a well) will react to activity at another point (e.g. the Quarry) depends on the extent to which they both tap into interconnected fractures. (T. (6/1) 77, 81.)

98. It is extremely misleading and inaccurate to think of the geology in the study area as a layer cake or a sandbox. (T. (5/22) 70-71 (5/30) 210-211 (5/31) 63, 106, 133 (6/1) 66, 81; DEP Ex. 4.) Groundwater does not flow in a uniform pattern as if in a layer of cake in this area.

(DEP Ex. 4.)

99. Two points that on the surface appear to be close may or may not be hydrogeologically connected depending upon what fractures are present. By the same token, more distant points may be connected if they both hit the same or well-connected fractures. (T. (5/22 70-71.)

100. For example, MW1 Pz3 shows a clear response to TBA 5, which is 3,000 feet away, yet shows little response to TBA 4, which is much closer. (T. (6/1) 76.)

101. Over geologic time, the fractures in the study tended to close up or otherwise become less permeable in a zone that is very approximately 200 to 300 feet below ground surface. (T. (5/21) 98-100.) This has been referred to as the transition zone. The depth of the transition zone can vary significantly from one fractured area to another. (T. (5/21) 99-100 (5/22) 171 (5/30) 210-211 (5/31) 15, 63-64 (6/1) 66.)

102. The same fracture zone or well-connected fractures and voids may extend above, through, and below the transition zone. The transition is not an aquitard in the traditional sense where there is, e.g., a solid layer of relatively impermeable rock. Rather, it is a zone in which fractures tend to, but are not always, closed. It has been referred to as "leaky" because groundwater can and does transfer back and forth between zones. (T. (5/21) 82-84, 98-99 (6/1) 80-81; DEP Ex. 4.)

103. Water in fractures above the transition zone tends to be unconfined, which is to say it flows in response to gravity (in the absence of pumping). (DEP Ex. 4.)

104. Water in fractures below the transition zone is semiconfined, which is to say the relatively less permeable transition zone tends to hold the water at a lower depth than where it would like to go. The water is semi-artesian, or under pressure. The depth to which the water

would rise as a function of its hydraulic head in the absence of confinement is referred to as its potentiometric surface. (T. (5/21) 83-84 (5/30) 234 (6/1) 83.)

105. Given this geology, with its complex of highly variable fracturing, it cannot be assumed that one well (or quarry) penetrating to a certain depth will or will not be hydrogeologically connected to another well just because they are at the same depth or penetrate into the same level of strata. (T. (5/22) 70-71.)

106. Michael D. Hill of the Department is a qualified expert in hydrogeology, including hydrogeological statistical analysis. Hill has much more experience dealing with water loss issues than any of M&M's witnesses. (T. (5/21) 19-73.)

107. Keith Brady, chief of the surface mining permit section of the Department's Bureau of Mining and Reclamation, is a qualified and experienced expert hydrogeologist. Brady has far more experience dealing with water loss issues than any other expert in this case. (T. (5/30) 157-180; DEP Ex. 68.)

108. Hill and Brady credibly and convincingly opined that, as M&M's mining extended laterally at the new, deeper level, it intercepted additional water-bearing fracture zones in the semiconfined zone, which resulted in a material water loss in TBA 4. (T. (5/22) 111-112, 171-77 (5/23) 54-65 (5/30) 224-225, 241-44 (5/31) 16, 62, 69, 86, 110, 129, 133 (6/6) 253-64, 270, 276; DEP Ex. 82, 88-89.)

109. The Quarry's penetration of the semiconfined zone should not be viewed as the equivalent of a bomb going off on the side of a dam. Rather, mining would have gradually intercepted more and more deep fractures. Any one fracture would not be likely to cause geyser conditions, as M&M's experts seemed to expect. (T. (5/22) 171-77 (5/23) 54-65, 83-84.)

110. The deepening of the Quarry had some additional impact on fractures in the

shallow zone, which had already been affected by earlier mining, but an entirely new effect on groundwater flow in the lower semiconfined zone. It is the impact on fractures in the lower zone that had the greatest impact on TBA 4. (T. (5/30) 206-12, 231-33, 241-44 (5/31) 67-70, 126; DEP Ex. 82, 89.)

111. Once the Quarry reached the depth of 50 feet above sea level, it likely took a while until its mining started to hit the fractures that are, in fact, the water-bearing fractures that tap the confined aquifer connected to the wells. (T. (5/22) 171-77 (5/23) 54-65 (5/30) 224-25.)

112. We do not credit Kribbs's opinion that the Quarry and TBA 4 are not hydrogeologically connected for several reasons including the following:

a. Kribbs's vision is that the semiconfined aquifer functions as one giant cohesive unit. In this view, if the Quarry deepening intercepted that unit, massive amounts of groundwater would very quickly flood the Quarry and drain anything and everything else around it that had also penetrated that artesian unit. (T. (6/1) 90 (6/4) 22, 48, 149.) This view is not consistent with the irregular fracturing in the study area and it is not credible;

b. Thus, Kribbs relies on the fact that two small boreholes in the pit floor before deepening did not reveal artesian flow, but he seems to concede, correctly, that it is not surprising or meaningful that such holes might hit or miss the irregular, often vertical fractures (T. (6/4) 62);

c. Kribbs relies heavily on the limited effect seen in the closest shallow wells to the Quarry; namely, MW 3, 4, and 5. (T. (6/1) 104, 112-113, 150.) However, those wells *did* show some effect, all experts agreed that those shallow wells would have already been affected by earlier quarrying, those wells do not extend into the semiconfined zone (T. (6/1) 102), MW 5 does not appear to show much affect from *anything*, and the absence of a strong reaction in the

shallow wells is consistent with the Department's experts' opinion regarding irregular fracturing and the Quarry's interception of deep fractures (T. (6/1) 158);

d. Kribbs does not believe that TBA 4 static water levels could rebound to previous levels or that the nearly simultaneous reactions seen in two wells in the semiconfined zone would occur if the Quarry also penetrated the semiconfined zone and released all the pressure in the zone. (T. (6/1 86, 89-90, 93, 117-118, 149, 246, 260.) Fundamentally, Kribbs's theory is not consistent with the complex and irregular fracturing that controls groundwater flow in the study area. Some of the deep wells affected by the Quarry have in fact recovered somewhat slowly as the Quarry refilled, as would be expected. On the other hand, instantaneous reactions have been observed between deep and shallow points, which shows that both points do not need to be in the semiconfined zone to show such reactions. TBA 4's *performance* data (i.e. drawdown and specific capacity), are far more meaningful than its recovered *static* level because the well draws from its entire 500 feet length (T. (6/1) 161, 170 (6/6) 281);

e. Kribbs's transmissivity values used to support his conclusions are not well-supported (T. (6/4) 18-21; DEP Ex. 63, 90; M&M Ex. 136);

f. Kribbs speculated on the existence of a splay faulting system with no data to back it up (T. (6/1) 72-73 (6/4) 22-27; M&M Ex. 136);

g. Kribbs's various reports show varying depths of the semiconfined zone and depict it as a relatively unvarying line, except for a convenient dip right below the Quarry (T. (6/1) 117-118; M&M Ex. 136 (Figure 5), 405);

h. Kribbs's explanation that trends in precipitation explain much of what occurred in the study area conflicts with his own reports and is not supported by the facts (T. (6/4) 43); and

i. Given the irregular fracturing pattern, Kribbs places undue emphasis on pinpointing the depth of semiconfined conditions at the various data-gathering points.

113. Kribbs's data shows that there is a clear response at MW2Pz4 to pumping at TBA 4. (T. (6/1) 76, 86; M&M Ex. 136, 401, 418, *see also* (5/31) 74.) This is also one of the wells that declined coincident to increased Quarry pumping. (DEP Ex. 88.) If MW2Pz4 is connected to both the Quarry and TBA 4, all of which are along strike, it provides additional evidence of the existence of a link between the Quarry and TBA 4.

114. Val F. Britton, M&M's expert, is a qualified geologist. (T. (6/4) 64-72.)

115. Britton's opinion that active pumping at the Quarry is not responsible for the loss of water in the Private Wells or the decline in yield of TBA 4 is not credible primarily because his opinion is based upon computer modeling which is, in turn, premised upon the inaccurate assumption that the fractured bedrock in the study area reacts to pumping more like a uniform porous media than a system controlled by irregular and variable fractures. (T. (6/4) 162; M&M Ex. 133 p. 10.) This inaccurate premise is irreconcilable with the credible testimony of Hill, Brady, and others.

116. We also do not credit Britton's opinion and modeled results because he assumed (T. (6/4) 61-62, 139, 141; M&M Ex. 133 p. 14) without an adequate factual basis for doing so (T. (5/23) 54-55 (6/4) 62), that the Quarry did not penetrate any fractures in the transitional or semiconfined zones. Britton's model assumed the answer to the very issue in dispute, which renders his results relatively meaningless. (T. (6/6) 256.)

117. We do not credit Britton's opinion for several other reasons, including the following:

a. His modeled results (M&M Ex. 133) strain credulity by depicting such

things as a tiny cone of depression around the Quarry, which was pumping millions of gallons a month, and a huge cone of depression around TBA 4, which was pumping much less (T. (6/6) 247-48; DEP Ex. 92);

b. Britton's model in several key areas does not calibrate particularly well with observed results. (T. (6/4) 175; M&M Ex. 133 p. 14, Table 2, and Figures 9 and 10.) Britton explains the errors in part as being reasonable for a fractured bedrock system (T. (6/4) 90-91);

c. Britton's modeling relies in part on a questionable value for MP-F, which most of the other experts have discounted as a significant monitoring point because it is too variable to be meaningful (T. (5/31) 103-04 (6/1) 116 (6/4) 39, 182-84; M&M Ex. 133 Figure 3);

d. Britton shows too much water flowing in from the north and east walls of the Quarry (in order to explain his tight cone of depression) based upon inaccurate factual assumptions (T. (6/6) 239-44, 286-90);

e. Britton used a groundwater recharge rate (T. (6/4) 204-05) that is artificially low (T. (6/6) 247-49; DEP Ex. 93);

f. Britton inaccurately concluded (T. (6/4) 167-69; M&M Ex. 416) that the Quarry floor could not have been kept dry if the Quarry intercepted fracture zones interconnected with TBA 4 and/or the Private Wells in the semiconfined zone;[4] and

g. The values Britton used to characterize transmissivities are exaggerated (T. (6/6) 252-55).

118. Britton's opinions, although largely not credible because they are based upon computer modeling that we do not accept in this case, concedes the hydrogeologic connection

[4] It is not clear how much water M&M needed to pump in order to keep the working area of the pit floor dry. (T (6/6) 286-90.)

between the Quarry and TBA 4. (M&M Ex. 133, 398.) Another M&M expert, Timothy Lutz (discussed below) concedes that statistical analysis supports the existence of this connection. (T. (6/6) 102.)

**3. Monitoring Results**

119. TBA 4's performance, particularly as measured by drawdown, specific capacity, and pumping volume, all declined coincident with the increase in Quarry pumping. (T. (5/22) 66-73 (5/30) 200-04 (6/6) 278, 281; DEP Ex. 4, 82.)

120. TBA 4's static (nonpumping) water level decreased, but not as much as the other measured criteria decreased in absolute terms because the well draws water over its entire 500 foot length at rest. (T. (6/6) 281.)

121. The marked decline in TBA 4's performance was not an isolated event. To the contrary, and quite importantly, its performance tracked a decline at several other groundwater monitoring points in precisely those areas along strike and southwest of the Quarry that impacts would be expected to be detected based on the hydrogeologic characteristics of the area. (T. (5/21) 206-07 (5/22) 66-73 (6/6) 278; DEP Ex. 4, 71, 82, 88-89.)

122. This is not a case built upon one well exhibiting unusual, inconsistent, or erratic behavior. Rather, there are numerous wells all acting similarly before and after Quarry deepening. (T. (5/30) 228-29, 237-39 (5/31) 17-18; DEP Ex. 71, 88-89.)

123. The most dramatic declines were (aside from TBA 4) observed at MW2Pz2, MW2Pz3, Leatherman, and Heckler, which is what would be expected if the Quarry penetrated for the first time into multiple fractures in the semiconfined zone. (T. (5/22) 62-64 (5/30) 206 (5/31) 34, 42; DEP Ex. 4, 71, 81-82, 88-89.)

124. These data correlations provide strong evidence of causation given the

demonstrated existence of hydrogeologic conditions conducive to a link. (T. (5/30) 226, 229.)

125. Monitoring levels at points such as Hekler and Leatherman were going down even though precipitation was increasing at the time. (T. (5/21) 208-09 (5/22) 64, 73-76, 92, 194.) Similarly, wells have recovered out of proportion to precipitation. (T. (5/31) 8-15; DEP Ex. 4, 71, 82, 84.)

126. TBA 4 and 5 were either steady or declining in pumping levels throughout the period, which shows they were not the cause of the decreasing water levels at other monitoring points. (T. (5/22) 77-80, 85-89 (5/23) 75; DEP Ex. 4.)

127. After Quarry deepening, monitoring points measuring shallow groundwater conditions did not show the same pattern of decline in water levels as the deeper points showed, which is what would be expected if the Quarry deepening penetrated the semiconfined zone for the first time. (T. (5/22) 64-66, 182-83 (5/23) 35-36 (5/30) 235, 241-43; DEP Ex. 4, 71, 89.)

128. All the median values for six deep piezometers penetrating the semiconfined zone declined during Quarry deepening; four of the six declined significantly. (DEP Ex. 4, 89.)

129. We credit the Department's experts' well explained, clearly expressed, logical opinion that statistically significant correlations occurred between Quarry pumping and key monitoring wells. The Department experts demonstrated the existence of a clear overall pattern based on a holistic analysis of the data and trends over significant periods of time. (DEP Ex. 4, 89.)

130. Once the Quarry stopped pumping, there was a consistent, dramatic, nearly universal recovery in water levels, which provides additional evidence that the Quarry was affecting the water levels. (T. (5/22) 94-96, 102-06, 114-15 (5/23) 158-62 (5/24) 23-27 (5/30) 245-46 (5/31) 19; DEP Ex. 6-7, 71, 88-89.)

131. Some water levels in wells started rising shortly before the Quarry stopped pumping, which would be expected in the autumn due to seasonal recovery of groundwater levels, but that does not detract from the very obvious continuous recovery of the wells from the cessation of Quarry pumping onward. (T. (5/24) 51-53; DEP Ex. 71, 88.)

132. Water levels rebounded dramatically despite the fact that TBA 4 was still pumping at about the same levels, which shows that TBA 4 was not the source of the water loss. (T. (5/22) 111-13 (5/30) 247 (5/31) 23-24; DEP Ex. 88.)

133. Alfred Guiseppe of Spotts, Stevens and McCoy is a qualified hydrogeologist with considerable experience dealing with public water supply wells. (T. (5/25) 70-77; DEP Ex. 11.)

134. Guiseppe credibly testified that, from the time the Quarry ceased pumping on November 15, 2005, the static water level in TBA 4 had a rise of approximately 10 feet in the first 100 days and had a pumping water level rise of 23 feet. These rises are unusual for a well during the three months of winter. (T. (5/25) 100-01, 192; DEP Ex. 20.)

135. Guiseppe also noted similar rises after the Quarry stopped pumping in other wells he monitored, including the DMI Farm well and the Brunner well (later the Clemmer well). (T. (5/25) 101-04; DEP Ex. 72.)

136. Guiseppe looked at the specific capacity of TBA 4 over time on a monthly and daily basis: for the period from 1990 to 2002, the specific capacity of TBA 4 averaged 1.94 gpm/ft, with a range between 1.56 and 3.07 gpm/ft; beginning in early 2003, the specific capacity of TBA 4 exhibited a steady decline, decreasing at a rate of 0.22 gpm/ft per year, and dropped below the historic low value (1.56) in June 2005, continuing to drop until November 2005; after November 2005 when Quarry pumping stopped, specific capacity steadily increased at a rate of 0.31 gpm/ft per year. (T. (5/25) 106-09, 156-57, 161; DEP Ex. 390.)

137. Guiseppe isolated the period from July 2004 through July 2006, during which TBA 4 ran the same pumping schedule. The trend of daily specific capacity during that time showed a decreasing trend prior to November 2005 and an increasing trend after November 2005. (T. (5/25) 106-09, 151-53, 202-03; DEP Ex. 390.)

138. Guiseppe independently and credibly opined that the decline in performance of TBA 4 was due to influence from a competing resource. (T. (5/25) 133-34.)

139. Timothy M. Lutz, Ph.D, one of M&M's expert witnesses, is a highly qualified statistician. (T. (6/6) 36-41; M&M Ex. 142.)

140. Lutz admitted in his testimony that he cannot determine what caused the decline in performance of TBA 4 from his purely statistical approach. (T. (6/6) 91.) This admission is accurate, but it contradicts his report, where he asserts that TBA 4 is "internally deteriorated." (M&M Ex. 135 p. 17.)

141. Lutz by his own admission is not qualified to offer expert opinions regarding hydrogeology. He also has no prior experience with water loss investigations. (T. (6/6) 41-43, 162.)

142. Statistics is the science of collecting and analyzing numerical data. (T. (6/6) 43.)

143. Dr. Lutz's stated expertise is limited to collecting and analyzing numerical data. We do not credit Lutz's numerous opinions that went far beyond data analysis and incorporated hydrogeologic principles outside of his area of expertise, including the following:

a. The private well losses are likely related to the internal deterioration of TBA 4 (leading to additional stress on the unconfined or shallow aquifer) and/or increased withdrawals from TBA 5 (M&M Ex. 135 p. 17);[5]

[5] Lutz is entitled to rely on other experts' opinions but he cannot adopt them as his own without appropriate expertise. PA. R. EVID. 702; *see Groce v. DEP*, 2006 EHB 856, 926-27.

b. The cessation of Quarry pumping and rise of water in the Quarry "should have caused a rapid rebound" in well water levels (T. (6/6) 171-72; M&M Ex. 135 p. 13);

c. MWs 3, 4, and 5 would have shown if the Quarry had extended its influence on hydrogeology outward as a result of the deepening (T. (6/6) 35, 84, 122, 140-41; M&M Ex. 135);

d. TBA 4 is closer to some private wells and, therefore, the "likely origin of the changes in the aquifer system" (T. (6/6) 87);

e. "My idea is that those heavy precipitation events probably caused" groundwater to be "supercharged" (T. (6/6) 117);

f. A detailed hydrogeological explanation regarding the negative correlation between Quarry pumping and TBA 4's drawdown;

g. Describing various wells as penetrating the deep versus the shallow aquifer (e.g. (T. (6/6) 106-08, 200, 221); and

h. The proportional relationship between water level rises in the Quarry and wells (T. (6/6) 99, 216; M&M Ex. 400).

144. Lutz's propensity to speculate and offer opinions beyond his proffered area of expertise detracted from his credibility as an expert witness even in those areas where he was shown to be qualified.

145. In addition to lacking proper qualification, Lutz did not conduct an independent geological investigation, investigate the wells themselves, or factor such geologic characteristics such as bedding plane orientation into his analysis. (T. (6/6) 198, 222.)

146. Lutz relied upon Messrs. Kribbs and Britton for some of the hydrogeological underpinnings of his testimony (T. (6/6) 198-200), but we have found that large segments of

Kribbs's and Britton's opinions lack credibility.

147. One key basis for Lutz's opinion that there is no statistical evidence that the Quarry caused the water loss is that water losses in the wells were "sudden" but the Quarry's pumping level increases were "gradual." (T. (6/6) 86-87.) We do not credit these qualitative characterizations. (*See* DEP Ex. 88.)

148. Lutz's opinion to some extent turns in part on the precise timing of the Quarry's pumping volumes. According to M&M's principal, however, M&M pumped some pit water from one side of its operations to another: "That's not reflected anywhere in our pumping records because we only have to--our total discharge out of the quarry is what's measured." (T. (6/6) 288.) Therefore, pumping records may distort or not accurately reflect the total amount of water flowing *into* the Quarry from groundwater at a particular point in time. In contrast, the Department's opinions are based on long-term trends and do not turn on the lack of a "sudden" change in pumping levels. (E.g., T. (5/31) 59-60; DEP Ex. 88.)

149. To the extent that Lutz's opinions diverged from those of the Department's experts and were within his area of expertise, we find them to be materially less credible than the Department's experts' opinions. Lutz's only explanation for the overall pattern of events in the study area is changes in precipitation, but M&M's own hydrogeology experts concede that precipitation cannot explain all of the data trends. (T. (6/1) 46-58 (6/6) 152-54.)

150. Lutz acknowledges that statistical analysis shows that TBA 4 and the private wells suffered a water loss. (T. (6/6) 58-59.)

151. Lutz acknowledges that statistics support the conclusion that the Quarry and TBA 4 are hydrogeologically connected and that the Quarry pumping had an adverse affect on the well (albeit in Lutz's view by only about nine feet.) (T. (6/6) 102.)

152. Lutz's opinion is that the statistical evidence shows that there appears to have been a "big shift" in the aquifer system in the study area that occurred over the course of a few months centered on September to October 2003. (T. (6/6) 65, 69, 162, 213; M&M Ex. 135.) The big shift is reflected in an abrupt increase in drawdown and a sharp decline in pumped water level in TBA 4 (M&M Ex. 135 p. 7-10), as well as water levels in the Heckler well and MWZPz2. (T. (6/6) 213; M&M Ex. 135 p. 6.) Lutz's opinion is not inconsistent with the Department's experts' opinions that the Quarry caused the shift by intercepting fractures in the semiconfined zone.

153. Lutz specifically reiterated that he is not a hydrogeologist and was unable to opine on what caused the shift. (T. (6/6) 162.)

**II. Private Wells**

154. The same general analysis that applies to TBA 4 applies to the Private Wells. (T. (5/22) 61-62 (5/31) 30-31; DEP Ex. 4.)

155. There is no dispute that the Private Wells suffered water losses.

156. The Private Wells are southwest along strike from the Quarry in exactly the area effects of Quarry pumping would be expected to be seen given the hydrogeology of the study area. (DEP Ex. 87.)

157. The Private Wells' water losses fall into a consistent pattern with each other, TBA 4, and the other monitoring points discussed above. (FOF 121, 125, 130; DEP Ex. 4, 89.)

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.

162. The Department acted reasonably by issuing the Orders.

163. Continued pumping of the Quarry would have resulted in continued water losses. (T. (5/22) 106-07.) M&M's refusal to voluntarily restore or replace the affected supplies with an alternate source of water adequate in quantity and quality for the purposes served by the supply rendered the Department's cessation order reasonable and necessary.

164. On December 11, 2006, during settlement negotiations, the Department granted M&M a temporary discharge approval that would have permitted M&M to discharge treated wastewater generated during M&M's proposed rehabilitation of TBA 4. (T. (5/24) 169 (6/05) 213; M&M Ex. 34; EHB Docket No. 2007-098-L, Notice of Appeal, Ex. D.)

165. The parties were never able to agree on a rehabilitation plan. Therefore, three months later, on March 8, 2007, the Department rescinded the temporary discharge approval. The rescission contained the following language:

> This is a follow-up to our December 11, 2006, letter approving a temporary discharge of treated wastewater that would be generated during the rehabilitation process of the Telford Borough Authority well No. 4. Upon further review and

> coordination with the Water Supply Program, we are rescinding the approval. *It is the Department's understanding that the proposal for rehabilitation of the well was a component of settlement negotiations, and those negotiations ultimately failed with no agreement reached on the rehabilitation proposal.*

((EHB Docket No. 2007-098-L, Exhibit A) (emphasis added).)

## DISCUSSION

The Noncoal Surface Mining Conservation and Reclamation Act, 52 P.S. § 3301 *et seq.* (the "Noncoal Surface Mining Act") provides that "[a]ny surface mining operator who affects a public or private water supply by contamination, interruption or diminution shall restore or replace the affected supply with an alternate source of water adequate in quantity and quality for the purposes served by the supply...." 52 P.S. § 3311(g). The Act also provides the Department with the authority to issue orders suspending permits and orders requiring persons to cease operations immediately as necessary to aid in the enforcement of the Act. 52 P.S. § 3311(b).

The Department bears the burden of proof in establishing that the two November 15, 2005 Orders along with the March 9, 2006 and March 8, 2007 Orders (collectively, the "Orders") were properly issued. 25 Pa. Code § 1021.122(b)(3)-(4). The Department must prove by a preponderance of the evidence (1) the facts necessary to support its Orders, (2) that the Orders were authorized by and otherwise in accordance with applicable law, and (3) that the Orders were a reasonable exercise of the Department's discretion. 25 Pa. Code 1021.122(a); *Schaffer v. DEP*, 2006 EHB 1013, 1021; *Rockwood Borough v. DEP*, 2005 EHB 376, 384. Establishing a preponderance of the evidence is done by presenting evidence that is sufficient to satisfy an unprejudiced mind as to the factual scenario sought to be established. *Alexander v. DEP*, 2006 EHB 306, 309; *Bethenergy Mines, Inc. v. DER*, 1994 EHB 925, 975; *Midway Sewerage Auth. v. DER*, 1991 EHB 1445, 1476. In more common terms, the Department needs to establish that it

is more probable than not that M&M's mining activities caused the water losses. *Al Hamilton Contracting Co. v. DER*, 659 A.2d 31, 39 (Pa. Cmwlth. 1995); *Goetz v. DEP*, 2002 EHB 886, 902; *Riddle v. DEP*, 2001 EHB 422, 425; *Bearer v. DER*, 1993 EHB 1028, 1096.[6] The Board discussed the Department's burden in establishing causation in *Bearer v. DER*, stating that:

> the Department doesn't have to offer direct evidence of a hydrogeologic connection between the Joiner site and the residential wells, nor does DER have to produce convincing hydrogeologic evidence that ground water actually can flow from the site to the residential wells along the [upper regional aquifer] and [lower regional aquifer]. The Department's only essential burden on the causation issue is to convince us that, based on all the evidence, it is more probable than not that North Cambria's mining activities resulted in the degradation of the residential wells.

1993 EHB at 1095-96.

**Factual Support for the Orders**

Although M&M has posited a series of arguments concerning the legality and reasonableness of the Orders, there is no serious doubt that the Orders under appeal are authorized by statute and otherwise lawful if supported by the facts. This case is very much a factual dispute. Indeed, M&M describes the Board's function in this case quite well: "The Board is challenged to decide between two dramatically different understandings or visions of the appropriate hydrogeologic reality" that most accurately describes the relationship between Quarry dewatering and the lowered water levels and reduced performance of TBA 4 and the Private Wells. (Brief p. 89.) After careful consideration of the opinions of the small army of experts that testified in this case, we find the opinions of the Department and TBA's expert

[6] Although the *Al Hamilton*, *Riddle*, and *Bearer* cases deal with provisions of the Surface Mining Conservation and Reclamation Act, 52 P.S. § 1396.1 *et seq.*, we have frequently stated that the coal and noncoal mining statutes can often be interpreted consistently. *See Lower Milford Twp. v. DEP*, EHB Docket No. 2006-109-L, slip op. at 4 (Opinion, June 26, 2007); *Holbert v. DEP*, 2000 EHB 796, 812.

witnesses[7] to be the most credible and we accept their explanation of the "hydrogeologic reality" in the study area. The Department has proven by a preponderance of the evidence that pumping out the Quarry adversely affected and would continue to adversely affect the wells, and that its Orders are, therefore, supported by the facts. We also find them to be reasonable in all respects.

In water loss cases, establishing causation is the key. *Plumstead Twp. v. DER*, 1995 EHB 741, 786-87; *Bearer v. DER*, 1993 EHB 1028, 1096; *W.P. Stahlman Coal Co., Inc. v. DER*, 1985 EHB 149. The element of causation comes directly from Section 11(g) of the Noncoal Surface Mining Act, in addition to the regulations promulgated under the Act. 52 P.S. § 3311(g); 25 Pa. Code § 77.533. The statute and regulation require a water supply to be replaced if it is "affected." There is no language in either the statute or regulation requiring a more restrictive causal nexus. Interestingly and, arguably dispositively, M&M concedes that the Quarry affected TBA 4. Lutz and Britton opined that the Quarry reduced the static water levels in the well by approximately nine feet. (FOF 118.) We could probably stop there. Given M&M's concession, the Department has proven beyond a preponderance of the evidence that M&M adversely affected TBA 4. Our review of the statutes, regulations, and applicable case law turn up no de minimis exception to the "affected" requirement of Section 11(g) of the Noncoal Surface Mining Act. Putting this concession aside, the Department clearly and credibly presented evidence linking M&M's Quarry to the vast majority of the water losses at TBA 4 and the Private Wells.

We credit the Department's experts' presentation of how M&M's operation at the Quarry caused the water losses at TBA 4 and the Private Wells. The Quarry pumps an enormous amount of water, most of which comes from the ground. The amount it pumps has increased dramatically over the course of its deepening. Given the strike and dip of the geologic strata, the

[7] Although a party, TBA did not put on a separate case. TBA's witnesses were examined by Department counsel. TBA has joined in all of the Department's filings and briefs.

wells that have suffered are in the exact location where water diminution would be expected. The highly but irregularly fractured condition of bedrock and the nature of the aquifers in the study area fully explain the hydrogeologic connection between the Quarry and the adversely affected wells. The well water losses have coincided in time with the increased Quarry pumping. *See Bearer v. DER*, 1993 EHB 1028, 1088. Very importantly in our minds, this is not a case of isolated events or aberrant, unusual behavior on the part of one well or isolated monitoring points. Rather, a very clear pattern emerged here that cannot be holistically explained by any cause other than the Quarry. And to the extent there was any doubt that the Quarry was the source of the losses, that doubt was eliminated by the recovery of the wells once the Quarry stopped pumping.

The Quarry deepening had a direct impact on the groundwater that TBA 4 and the Private Wells rely upon. Before the latest depth correction, the Quarry intercepted enough water-bearing fractures in the shallow flow zone to cause a limited impact on surrounding wells. As the Quarry deepened, however, M&M intercepted more and more fractures in the relatively more productive semiconfined zone. Intercepting those deeper fracture zones caused a loss in those wells that are also dependent on those fractures, either directly or indirectly, downstrike to the southwest exactly where geologic conditions would suggest there was the greatest risk of impact. Some of the shallower wells were either already impacted from the earlier mining or were not well connected to the newly intercepted fractures. As set forth in our findings of fact, the Department's experts credibly presented this scenario, supported by appropriate statistical and hydrogeological evidence.

M&M's hydrogeology experts concede that the Quarry had an impact on TBA 4, but assert that the impact was very limited. In support of this assertion, M&M relies upon the fact

that Monitoring Wells 3, 4 and 5, which are closer to the Quarry than TBA 4 or the Private Wells, did not show much of an impact. The Department's experts credibly explained this supposed "anomaly," which in reality is entirely consistent with the geologic conditions in the area. Due to the heavily fractured rock in the study area, whether an activity at one point has an impact on another depends on the extent to which both locations tap into interconnected fractures. In this geologic context, two points that are close on the surface may or may not be hydrogeologically connected depending on the interconnectedness of the fractures between them. (FOF 96.) By the same token, more distant points may be connected if they both hit the same or well-connected fractures. M&M's experts at times argued in effect that it is more appropriate to think of the geology in the study area as a veritable sandbox in which water flows in a uniform pattern between all points. (FOF 94.) This is misleading and inaccurate. Kribbs placed great stock on defining the depth of the line between the flow zones, when in fact, the line could easily vary from one fracture to the next. Again, the overwhelming weight of the evidence indicates that the rock is highly but irregularly fractured. This, in combination with the nature of the aquifers, fully explains the hydrogeologic connection between the Quarry and the adversely affected wells. Further, this is consistent with what we know about the rock surrounding TBA 4, which has been the subject of much study. Many of the water bearing zones that are pierced by TBA 4 are located in different bedding units. Vertical fractures between the bedding units help connect the water bearing zones. Given this, it is not surprising to see a few monitoring wells that did not respond dramatically to the Quarry pumping. The Department credibly explained how those wells rely upon different water bearing zones that are not interconnected to the zones affected by the Quarry. Finally, the evidence fully supports the conclusion that the pumping affected the Private Wells. The Private Wells exhibit a consistent pattern of water losses that

mirror TBA 4 and other monitoring points. (FOF 154-160.)

M&M argues that the increased Quarry pumping and the well losses are pure coincidence, or perhaps, can be explained by precipitation trends. Although M&M asserted through some of its expert testimony that precipitation could explain the pattern of water losses and recoveries in the study area, even its own experts' reports and testimony support a conclusion that precipitation played, at most, a very minor role in explaining some of the data. The overwhelming weight of the evidence, expert opinion and otherwise, is that trends in precipitation cannot account for either the increased Quarry pumping or the water losses and recoveries in the wells. We do not credit M&M's precipitation theory.

M&M presented the expert testimony of Timothy Lutz to support its coincidence/precipitation theories. Lutz testified that pure statistics do not necessarily prove causation. We acknowledge the point. There are all sorts of statistical correlations that mean absolutely nothing. For example, it would not be particularly shocking to find that there happens to be a statistical correlation between Quarry pumping and water levels in some wells in California. Of course, that correlation alone would be a coincidence and it would not prove causation.

However, as the Department's witnesses credibly opined, a statistical correlation is hardly irrelevant if hydrogeologic conditions point to a link. Lutz himself repeatedly referred to other statistical correlations. Here, when Quarry pumping went up, wells went down precisely where and when such a reaction would be expected given geologic conditions. No independent third causative actor has been credibly identified.

The fundamental problem we have with Dr. Lutz's testimony is that he argues (inaccurately) that the Department placed too much emphasis on statistics, and then proceeds to

do exactly that. He admittedly is not an expert in hydrogeology, and yet he attempted to reach expert conclusions regarding hydrogeology based upon his review of numbers on a page. As quoted by Lutz in his report, "Evidence for causation must come from outside the statistical analysis – from the knowledge of the process involved." (Quoting Helsel & Hirsch 1992). Unfortunately, Dr. Lutz has no expertise regarding the hydrogeological processes involved, so his ultimate conclusions have very little value.

We have no doubt that Dr. Lutz is a brilliant statistician, but he is by his own admission and M&M's proffer *not* a hydrogeologist. Time and time again, we find that the final step in his analysis of a particular set of data ends with a hydrogeological conclusion that he was not qualified to make. Furthermore, aside from his lack of qualification, he conducted no geological investigation in this case. He relied for some of the geological underpinnings of his theories on Messrs. Kribbs and Britton, whose opinions we have not found persuasive.

By way of example, Lutz "expected" that water levels in impacted wells would have recovered relatively quickly once the Quarry stopped pumping if that pumping had been the cause of the water loss in the first place. This is a *hydrogeological* conclusion. (We have on that note rejected Kribbs' theory that instantaneous reactions can be universally expected in this complex, fractured setting.) Lutz relies on the fact that the Quarry was only "gradually" increasing its pumping in the fall of 2003, and this gradual increase could not cause a "sudden" drop in water wells. (T. (6/6) 89.) Again, there is no credible basis in hydrogeologic science in our record to support this statement, even if we were to buy into Lutz's characterizations of suddenness.

Lutz's credibility is not helped by the fact that the depleted wells have, in fact, returned to approximate pre-Quarry deepening levels. It is also not helped by the fact that, while he

characterized the Quarry pumping increases as "gradual" during the period encompassing the big shift, the increases were huge, increasing by millions of gallons a month. As previously noted, groundwater flows into the Quarry may have been even larger than the reported figures. Still further, Lutz's theory and his speculation that "internal deterioration" in TBA 4 is at play in explaining his so-called "sudden" drop is completely inconsistent with the unanimous opinion of the well experts that fouling is a gradual process.

Lutz's propensity to diverge into areas in which he was not qualified as an expert pervades his entire testimony. He placed great stock on the behavior of MWs 3, 4, and 5 (*e.g.*, T. (6/6) 849), even when M&M's other experts seem to concede that not much effect from deepening would be expected in the off-strike MW 5, and as the Department has credibly explained, whatever effect mining had on shallow MWs 3 and 4 would likely have been seen before the deepening.

Lutz also presents a graph in support of his opinion that the Quarry is not taking water from TBA 4, which depicts a negative correlation between Quarry pumping and TBA 4 drawdown. (T. (6/6) 75-78; M&M Ex. 135 Figure 6B.) The figure shows that higher levels of Quarry pumping are correlated to lower drawdown at TBA 4. Lutz attributes this to a common third course; namely, precipitation. (T. (6/6) 74; M&M Ex. 135 pp. 12-13.) We are struck, however, by Figure 6B's graphic depiction of how the cluster of TBA 4's drawdown measurements dramatically and uniformly decreased after the fall of 2003, even at similar Quarry pumping levels. This aspect of the graph is consistent with the weight of the evidence that TBA 4's performance suffered after the Quarry was deepened. Even M&M's other experts agree that precipitation cannot explain all of the trends in this case.

Lutz relies on a cluster analysis of MW2Pz3 behavior vis-à-vis Quarry pumping to show

that the aquifer is behaving the same before and after deepening. (T. (6/6) 81-83; M&M Ex. 135 Figure 9B.) Again, what strikes us most from the figure is the 80-foot drop in water levels after October 2003. Aside from that, the data points follow a steady line consistent with the Department's theories that Lutz's cluster approach seems to attempt to obscure.

We do not wish to suggest that Dr. Lutz lacks all credibility. To the contrary, he strikes us as an extremely erudite scholar of statistics. We have spent more time and effort digesting his work product than we have spent on any other aspect of this case. But in the final analysis when we are forced to weigh the relative credibility of conflicting expert testimony, as this Board is so often called upon to do, *see UMCO Energy, Inc. v. DEP*, No. 724 C.D. 2007, slip op. at 5 (Pa. Cmwlth. Dec. 12, 2007); *Birdsboro v. DEP*, 795 A.2d 444, 447 (Pa. Cmwlth. 2002); *Walker v. DEP*, EHB Docket No. 2005-274-K, slip op. at 17 (Adjudication, February 8, 2007), we must give the nod to the Department's and TBA's experts. Lutz is not qualified in hydrogeology and he has no experience whatsoever with water loss investigations. His views and theories are necessarily circumscribed by what in his words is a "purely statistical approach."

Putting these difficulties aside, we observe that Lutz's version of events is not particularly inconsistent with the Department's view. Lutz's basic finding is that a dramatic water level displacement occurred in the fall of 2003. Although Quarry pumping was increasing by millions of gallons a month at that time, Lutz was impressed by the lack of any "events" at the Quarry. In fact, a major decline in the fall of 2003 is entirely consistent with the Department's theory that the Quarry was intercepting deep fracture zones as it expanded laterally at the newly permitted depth. Lutz's characterization would suggest that the fall of 2003 is about when the Quarry began to intercept the interconnecting fractures.

**TBA 4**

M&M's factual defense (beyond its sincere but failed effort to disprove a hydrogeologic connection) is that TBA 4's water loss can be explained by the condition of the well itself, and that the losses in the Private Wells can be explained by the pumping of TBA 4. Roughly half of the hearing was devoted to exploring this alternative explanation.

We do not credit the fouling theory. We credit David Fennimore's opinion that the well is not materially compromised by fouling. Fennimore has the most pertinent experience. His testimony was highly persuasive. His opinion is supported by the most thorough, state-of-the-art, comprehensive, and unbiased investigation. His well video, coupled with his explanation, provides essentially irrefutable proof that the well is in excellent condition. In comparison, M&M's effort to show that the well is in fact fouled (as opposed to having the *potential* some day to become fouled) is based on a limited, result-oriented investigation, a strained interpretation of water chemistry, a relatively poor video, opinions based in part on little or no experience, and a strong bias in favor of well rehabilitation. This effort fell far short of convincing us that there is anything wrong with TBA 4. We would add that Fennimore's view is also supported by the expert opinions of Hill, Grinrod, and Guiseppe, and it squares very well with *all* of the evidence and data generated in connection with this case. M&M asserts, and the Department does not dispute, that pumping of TBA 4 had an impact on some of the surrounding wells. However, that impact pales in comparison to the much greater impact of the Quarry. (T. (5/24) 65, 67; FOF 80.) TBA 4's pumping alone would not have necessitated replacement of the Private Wells. (FOF 158.)

In sum, M&M has been unsuccessful in challenging the Department's conclusions and it has not shown that the water losses were attributable to some source other than the Quarry. *See*

*Bearer v. DER*, 1993 EHB 1028, 1067; *Kerry Coal Co. v. DER*, 1990 EHB 226. M&M adversely affected TBA 4 and the Private Wells, and therefore, it must restore or replace them. The Department has carried its burden of proof in support of its Orders.

**M&M's Rehabilitation Proposal**

M&M proposed to "rehabilitate" TBA 4 by flushing out its clogs with chemicals. To the extent M&M argues that its rehabilitation proposal constituted adequate compliance with the Department's Orders, the issue is more properly made in the context of an enforcement proceeding in Commonwealth Court. Our role is to assess the validity and content of an order, not the recipient's efforts to comply with an order. *Ramey Borough v. DER*, 351 A.2d 613, 615 (Pa. 1976); *Starr v. DEP*, 2003 EHB 360, 373; *Whitemarsh Disposal Corp. v. DEP*, 2000 EHB 300, 331; *Pickelner v. DER*, 1995 EHB 359, 363. In this proceeding, we are tasked with determining whether the Department's Order requiring TBA 4 to be replaced or restored was supported by the facts and was lawful and reasonable. Whether M&M's efforts constituted adequate compliance is an issue not currently before us.

M&M also argues, however, that the orders themselves cannot stand because M&M was denied the opportunity to prove with the best possible evidence that the well is fouled. We have found as a factual matter that Fennimore's investigation provided more than enough evidence to show that TBA 4 is not impaired. People in the environmental field sometimes forget that, at some point, study must end and action must begin. The Department is not required to prove its case by perfect, unassailable evidence. If it were, it would be in trouble because there is no such thing as a perfect case. Our function is not to assess whether the Department has presented what, in M&M's words, is "the most probative evidence," whatever that means. Our function is to weigh all of the evidence and decide whether the Department has proven its case by a

preponderance thereof. The Department must make its case out by a preponderance of the evidence, and it has clearly satisfied that burden here. In any event, we are compelled to add that rehabilitation would not have provided the "best evidence" of well performance because measuring the well's performance following rehabilitation would have been meaningless unless the Quarry was entirely pumped out and pumping was maintained at operational levels before and after the rehabilitation for meaningful periods of time, all of which would have required prolonged and involved study and none of which was practical or, we think, appropriate under the circumstances. (T. (5/30) 148-150.)

**Cessation**

M&M argues that the Department went too far by ceasing operations. It argues that cessation was penal, unnecessary, and unreasonable. This is particularly true in M&M's view because TBA 4 is currently not being used due to background arsenic levels in the groundwater. Once again, the facts do not support M&M's argument. The Quarry could not operate without pumping water out of the pit. The record shows that the Quarry's ongoing pumping was having a continuing adverse effect on the wells, and M&M refused to voluntarily restore the wells. Given M&M's initial refusal to replace the lost water supplies, there was no less restrictive means to restore and replace the lost water supplies caused by M&M's pumping. Therefore, the Department had no choice but to cease the operation. There is nothing unreasonable about this. In fact, without cessation, the orders would have been meaningless. Cessation was necessary and appropriately tailored toward stopping the ongoing water losses in light of M&M's refusal to restore those losses. Furthermore, the permit revision itself contemplated cessation. M&M agreed in the unappealed permit revision that its failure to comply with Special Condition 12 would result in a cessation order. (FOF 13.)

It is true that TBA 4 subsequently became unusable without treatment due to naturally occurring arsenic levels and new regulatory limits. However, the arsenic can be treated (FOF 50), and neither the Department nor TBA has suggested that M&M is responsible for the cost of that treatment. M&M is only responsible for its effect on the *quantity* of water produced. TBA has reasonably explained that it does not want to invest in arsenic treatment until M&M restores or replaces the well's production. (FOF 50.)

**DRBC**

M&M asserts that the Department "willfully avoided seeking an objective second opinion" from the Delaware River Basin Commission. M&M is not arguing that the Department was *required* to involve the DRBC. Rather, it argues that the Department acted unreasonably under the circumstances by not involving the DRBC. M&M is correct in asserting that a Departmental order must be supported by the facts, lawful, *and* reasonable. *Rockwood Borough v. DEP*, 2005 EHB 376, 384. These are three distinct requirements and all three must be met. M&M is incorrect, however, in asserting that the Department acted unreasonably in this case. There is no factual support for this argument. The Department did, in fact, consult with the DRBC, which indicated it had no interest in the matter. (FOF 32.) If DRBC had wished to participate in the investigation or this litigation, it would have been free to do so. We do not know what more the Department could have done. But more to the point, the Department has the greater expertise when it comes to water loss investigations involving mining. DRBC's participation would have been superfluous and added another level of complication and bureaucracy to an already complicated situation. By way of illustration, no less than ten experts testified in this case. We doubt that DRBC's involvement would have added much incremental value.

**Bias**

M&M asserts without factual support that the Department acted out of bias against it. M&M rehashes its factual arguments to support this contention but, as we have already discussed, the Department carried its burden in this case. There is no evidence of bias. If anything, the record suggests to us that the Department bent over backwards to allow M&M to deepen its Quarry in the face of mounting evidence that mine dewatering was causing water losses in the area.

**Failure to Apportion Responsibility**

M&M argues that the Department erred or at least acted unreasonably by failing to "apportion" responsibility for the water losses. It is not clear among whom or how M&M would have us apportion responsibility. Presumably, M&M suggests shared liability between it and TBA. It does argue that apportionment should take into consideration the fact that M&M has a greater right under common law to use the groundwater in the study area than TBA.

Again, M&M's argument fails as a factual matter because there is no evidence that anything other than Quarry pumping has contributed materially to the water loss of TBA 4, and TBA 4 has, at most, had an exceedingly minor effect on the Private Wells. M&M's argument also fails as a matter of law. The parties' rights and obligations are defined by the Noncoal Surface Mining Act, and that Act is not a Superfund statute. The Noncoal Act unambiguously provides that an operator that adversely affects a water supply shall restore or replace it. 52 P.S. § 3311(g). The regulations are to the same effect. 25 Pa. Code § 77.533. The Act expresses a strong policy in favor of protecting the public from the hardships occasioned by water losses resulting from mining. 52 P.S. § 3302. *Cf. Carlson Mining Co. v. DER*, 639 A.2d 1332, 1335 (Pa. Cmwlth. 1994) (referring to similar provisions in the coal mining statute). There is no

requirement in the statute or the regulation that mining be the *sole* cause of a water loss. *Schneiderwind v. DEP*, 2003 EHB 274, 287, *rev'd on other grounds*, 867 A.2d 724 (Pa. Cmwlth. 2005). All that is required is that it be shown to have had an adverse effect, *id.*, and that causal nexus has been convincingly demonstrated here. (FOF 151.) *See also Solebury Twp. v. DEP*, 2004 EHB 95, 120 (operator responsible for replacing water supplies that it affected); *Svonavec, Inc. v. DEP*, 1998 EHB 234, 239; *Kerry Coal Co. v. DER*, 1990 EHB 226; *Ambrosia Coal and Construction Co. v. DER*, 1986 EHB 333.

To the extent that this result seems harsh, it should be remembered that the Legislature has afforded operators the privilege of mining in the Commonwealth so long as they understand that replacing unexpectedly disrupted water supplies is a cost of doing business. Nearby residents should not be required to bear that particular consequence of mining. Furthermore, an operator is not required to replace a Chevy with a Cadillac. It is only required to restore or replace the affected water supply with an alternate source of water adequate in quantity and quality for the purposes served by the supply. *Lang v. DEP*, 2006 EHB 7, *aff'd*, 693 C.D. 2006 (October 16, 2006) 52 P.S. § 3311(g). What constitutes an adequate restoration or replacement in this case is not before us in this consolidated appeal.

**Special Condition 12**

M&M argues that "the Department's abandonment of M&M's permit as the source of regulatory authority compels the Department, if it is to sustain its orders, to credibly and independently establish another reasonable basis for its orders (capital letters omitted)." (Brief p. 76.) It complains that the Department "abandoned its permit-based logic," and that it "abandoned its statistical approach." "When the Department was forced to abandon its bogus statistics, it moved further away from the 'ruler' it established in the 2002 Permit and had no

permit-based reason for issuing the Orders under review." M&M urges us to use the Permit Special Condition 12 as the "'ruler' to measure the integrity of the opposing claims."

Yet again, the facts do not support M&M's argument. The Department did not "abandon" its statistical analysis. See DEP Ex. 29, 33. The Department's case before us was built in part on the very same statistical analyses that it used at the beginning of its water loss investigation. M&M seems to misunderstand the Department's case. The Department's position has *never* been based upon an analysis of raw numerical data in a vacuum. M&M's own expert, Dr. Lutz, acknowledged that pure statistics do not in isolation prove or disprove anything. Rather, any analysis of statistics, which includes a study of trends, patterns, and correlations, must be conducted within its proper hydrogeological context. Special Condition 12 does not require otherwise. The Department did not do otherwise. Indeed, M&M's hydrogeology experts did not do otherwise.

Special Condition 12 defined the pre-Order relationship between M&M and the Department. It is not entirely clear to what extent that process trumps the normal burden of proof required in Board proceedings. 25 Pa. Code § 1021.122.[8] Fortunately, the issue is purely academic because the Department prevails in this case based upon our review of the factual record even if we follow the construct outlined in Special Condition 12. The Department clearly and credibly determined "through additional statistical analyses" of monitoring data that M&M's pumping adversely affected TBA 4. As such, Special Condition 12 gave M&M an opportunity to "affirmatively demonstrate ... that the dewatering to [TBA 4] has been caused by factors not attributable to the mining operation." (DEP Ex. 3.) M&M failed to do so.

M&M notes that only two of the three triggers for a stipulated obligation to restore or

[8] *See Solebury Twp. v. DEP*, 2004 EHB 95, 120 (law requires operator to replace water supplies affected by mining regardless of any agreement operator may have with the Department).

replace TBA 4 in Special Condition 12 were met. M&M suggests that the absence of the third trigger shows that it is clear that the Quarry did *not* affect TBA 4. We do not read the Special Condition that way. To the contrary, if all three triggers had been met, M&M's obligation would have been virtually automatic and stipulated. Hitting two of the triggers suggests that, while not enough by themselves to show a *stipulated* adverse effect, they nevertheless constitute significant evidence of an adverse effect.

**March 8, 2007 Appeal**

On December 11, 2006, during settlement negotiations, the Department granted M&M a temporary discharge approval that would have permitted M&M to discharge treated wastewater generated during M&M's proposed rehabilitation of TBA 4. (T. (5/24) 169 (6/05) 213; M&M Ex. 34; EHB Docket No. 2007-098-L, Notice of Appeal, Ex. D.) The parties were never able to agree on a rehabilitation plan. Therefore, three months later, on March 8, 2007, the Department rescinded the temporary discharge approval. The rescission contained the following language:

> This is a follow-up to our December 11, 2006, letter approving a temporary discharge of treated wastewater that would be generated during the rehabilitation process of the Telford Borough Authority well No. 4. Upon further review and coordination with the Water Supply Program, we are rescinding the approval. *It is the Department's understanding that the proposal for rehabilitation of the well was a component of settlement negotiations, and those negotiations ultimately failed with no agreement reached on the rehabilitation proposal.*

(EHB Docket No. 2007-098-L, Exhibit A) (emphasis added). M&M appealed this rescission letter, which we consolidated with the other appeals on June 5, 2007 over M&M's objection. In its post-hearing brief, M&M preserves its previously made argument that the Board erred in consolidating this appeal with the others before allowing the parties to conduct discovery. Although we suspect that the rescission is essentially a moot point, we will allow M&M to

proceed with prehearing procedures on that appeal in accordance with its request.

**Takings**

M&M in passing suggests that the Department's Orders constituted an unconstitutional taking[9] because M&M has a right to a reasonable use of groundwater. (M&M Brief at 107.) M&M makes the statement in the context of its contention that the Department should have "apportioned" responsibility, which we have rejected. M&M does not develop the argument further, and it presented no evidence in support of such a claim. A party who would prove an unconstitutional taking has a heavy burden to develop the necessary facts and law to support such a claim, and a passing assertion in a post-hearing brief falls well short.

## CONCLUSIONS OF LAW

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

2. Proceedings before the Board are *de novo*. *Warren Sand & Gravel Co., Inc. v. DER*, 341 A.2d 556 (Pa. Cmwlth. 1975).

3. In an appeal from an order, the Department bears the burden of proving by a preponderance of the evidence that (1) the facts support the order, (2) the order is authorized by and otherwise in accordance with the law, and (3) the order constitutes a reasonable exercise of the Department's discretion.

4. The Department may issue such orders as are necessary to aid in the enforcement of the provisions of the Noncoal Surface Mining Conservation and Reclamation Act, including orders suspending permits and orders to restore or replace water supplies. 52 P.S. § 3311.

5. The Department must prove that all aspects of its order are reasonable, including

[9] The Board has jurisdiction over appeals which raise constitutional challenges to a Department order based upon a takings claim. The Board is empowered to adjudicate the lawfulness of those orders and to set them aside if they amount to an unconstitutional taking. *Domiano v. DER*, 713 A.2d 713, 715 (Pa. Cmwlth. 1998), *citing Beltrami Enterprises, Inc. v. DER*, 632 A.2d 989, 993 (Pa. Cmwlth. 1993).

the remedial action being ordered. *Schaffer v. DEP*, 2006 EHB 1013; *Strubinger v. DEP*, 2003 EHB 247, 252-53.

6. The Department has satisfied its burden of proving that the two November 15, 2005 Orders and the March 9, 2006 Order were reasonable and in accordance with the law in all respects.

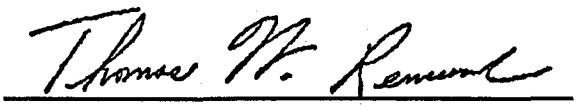
**COMMONWEALTH OF PENNSYLVANIA**
**ENVIRONMENTAL HEARING BOARD**

| | | |
|---|---|---|
| **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** | : | |

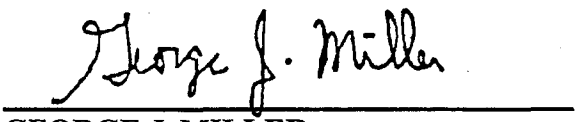
## ORDER

AND NOW, this 31st day of January, 2008, it is hereby ordered that M&M Stone Co.'s appeals docketed at 2005-343-L, 2005-344-L, and 2006-110-L are dismissed. The appeal docketed at 2007-098-L is unconsolidated and a separate order setting forth prehearing deadlines will be issued shortly.

**ENVIRONMENTAL HEARING BOARD**

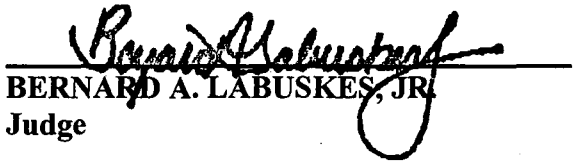


**THOMAS W. RENWAND**
**Acting Chairman and Chief Judge**



**GEORGE J. MILLER**
**Judge**

**MICHELLE A. COLEMAN**
**Judge**



**BERNARD A. LABUSKES, JR.**
**Judge**

**DATED: January 31, 2008**

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

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| **CHARLES C. PERRIN** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2007-118-R** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and PITTSFIELD TOWNSHIP and BROKENSTRAW VALLEY AREA AUTHORITY** | : | **Issued: February 5, 2008** |

## OPINION AND ORDER ON MOTION TO DISMISS

**By Thomas W. Renwand, Acting Chairman and Chief Judge**

**Synopsis:**

The Pennsylvania Environmental Hearing Board grants a Motion to Dismiss for failure to comply with Board Rules and Orders. Despite ample and multiple opportunities to do so, Appellant has failed to file a legally cognizable Notice of Appeal setting forth his specific objections to the action of the Department in separate numbered paragraphs as required by 25 Pa. Code Section 1021.51(e).

## OPINION

This is a *pro se* hand written appeal filed by Charles C. Perrin (Appellant or Mr. Perrin) to the Pennsylvania Department of Environmental Protection's (Department) approval of the updated Act 537 Plan for Pittsfield Township, Pennsylvania. The Pittsfield Township's Act 537 Plan Update dated February 22, 2007 was approved by the Department on April 6, 2007.

Appellant evidently believes that the Act 537 Plan is flawed and that he should not have to connect to the centralized sewage collection system recommended by Pittsfield Township and operated by Brokenstraw Valley Area Authority (Appellees).

We say "evidently" because although Appellant has filed loads of documents with the Pennsylvania Environmental Hearing Board (Board), including rambling hand written statements, letters, newspaper articles, meeting minutes, sign-in sheets from public meetings, and various other documents, Mr. Perrin still has not filed a legally sufficient Notice of Appeal as required by 25 Pa. Code Section 1021.51(e).

The requirements of this section are straight forward and clear.

> The appeal shall set forth in separate numbered paragraphs the specific objections to the action of the Department. The objections may be factual or legal.

25 Pa. Code Section 1021.51(e).

What the Board docketed as Mr. Perrin's Notice of Appeal was a letter the Board received on May 8, 2007. In this letter he set forth the date of the Department's action (which is the wrong date, by the way) and requested "the package of appeals." Following receipt of the Appellant's letter on May 8, 2007, the Board ordered Mr. Perrin to perfect his appeal in seven areas, including setting forth his objections to the Department's action. At the same time, we forwarded to him a copy of the form Notice of Appeal together with a copy of the Board's Rules of Practice and Procedure. Mr. Perrin responded to our Order of May 8, 2007 by providing the Department's letter approving the Plan 537 Update together with some other documents. He requested more time to complete the other ordered tasks such as setting forth his objections to the Department's action. We granted him more time as our Order of June 4, 2007 ordered Mr. Perrin to again perfect his appeal, including setting forth his objections to the Department's

action. However, months later, Mr. Perrin never has filed a Notice of Appeal setting forth his objections to the Department's actions in separate numbered paragraphs.

Presently before the Board is the Motion to Dismiss filed by Pittsfield Township, Brokenstraw, and the Department. The Department also has filed a Motion for Sanctions for the Appellant's failure to comply with our earlier Order granting the Department's Motion to Compel Mr. Perrin to answer and respond to the Department's discovery requests pursuant to the Pennsylvania Rules of Civil Procedure. We agree with the Department that Mr. Perrin's answers are incomplete and in many instances unintelligible.

Mr. Perrin has not responded to the Motion to Dismiss as required by our Rules of Practice and Procedure. Our Rules are crystal clear in this regard. First, 25 Pa. Code Section 1021.91(e) requires Mr. Perrin to file his Response to the Motion to Dismiss that "shall set forth in correspondingly-numbered paragraphs all factual disputes and the reason the opposing party objects to the motion." Second, Mr. Perrin was required to file a supporting memorandum of law with his Response to the Motion to Dismiss. He ignored these requirements and simply indicated that we should do the right thing and deny the Motion to Dismiss while at the same time rule in his favor based on the packets of documents that he has filed with the Board.

We have often warned parties of the pitfalls in proceeding before the Board without the benefit of being represented by counsel. As Chief Judge Krancer stated in *Dellinger v. DEP*, 2000 EHB 976, "The Board is a legal forum which follows legal procedure and precedent, that the Board is governed by legal doctrines and proscriptions which can be difficult for persons not trained in the law. [Therefore], competent and experienced legal counsel is highly recommended." 2000 EHB at 977 n. 1.

The Pennsylvania Commonwealth Court has also provided the following wisdom with

respect to litigants who decide to proceed *pro se*:

> The fact that Green decided to be her own lawyer does not excuse her from failing to follow the rules of civil and/or appellate procedure. "The right of self-representation is not a license...not to comply with relevant rules of procedure and substantive law." *Faretta v. California*, 422 U.S. 806, 834 n. 6 (1975).

*Green v. Harmony House North 15 Street Housing Association, Inc.*, 684 A.2d 1112, 1114-1115 (Pa. Cmwlth. 1996).

In accordance with this guidance from the Commonwealth Court, we have warned in numerous cases that an appellant proceeding without counsel will not receive any special consideration. *Kleissler v. DEP*, 2002 EHB 737, 739. We have also observed that although individuals have a constitutional right to proceed *pro se*, they still must comply with the same legal requirements that govern proceedings involving parties represented by counsel. Proceeding without counsel often is the legal equivalent of performing a medical operation on yourself.

We realize Mr. Perrin has been unsuccessful in his attempts to retain counsel. He has also been unsuccessful in obtaining *pro bono* counsel through the Pennsylvania Bar Association. However, neither this Board, the Pennsylvania Bar Association, nor anyone else is required to provide counsel to anyone in cases before the Board. The retention of counsel is an individual responsibility. Although the Board sympathizes with Mr. Perrin in his inability to obtain counsel, we can not delay this matter to wait for counsel to enter an appearance; especially when Mr. Perrin might never retain counsel. This is even more true where Mr. Perrin is pressing the Board to simply decide the appeal in his favor.

The Board evaluates Motions to Dismiss in the light most favorable to the non-moving party; in this case Mr. Perrin. *Onyx Greentree Landfill, LLC v. DEP*, 2006 EHB 404, 411. The Board treats motions to dismiss in the same manner as motions for judgment on the pleadings. *Tapler v. DEP and Upper Milford Township*, 2006 EHB 421, 423. A motion to dismiss will only

be granted where there are no material facts in dispute and the moving party is entitled to judgment as a matter of law. *Neville Chemical Co. v. DEP*, 2003 EHB 530, 531; *Borough of Chambersburg v. DEP*, 1996 EHB 921, 925; *Smedley v. DEP*, 1998 EHB 1281, 1282.

A party is only required to follow a few simple steps to perfect his appeal. These steps are necessary to insure that the due process rights of the opposing parties, here the Department, Pittsfield Township, and Brokenstraw, are protected. *Mon View Mining Corp. v. DEP*, 2005 937, 938. They are entitled, as a matter of law, to know "what the specific objections to the action of the Department" are in this Appeal. 25 Pa. Code Section 1051(e). Here we are, months after Mr. Perrin has filed his Appeal, and he has not complied with the simplest and most basic requirements. When this is combined with his totally inadequate response to the Motion to Dismiss together with his absolute failure to answer discovery we are left with no choice but to dismiss Mr. Perrin's appeal.

We hasten to add that we are dismissing this case only after giving Mr. Perrin ample opportunity to comply with our Board's Rules of Practice and Procedure. We have no doubt that he has tried to comply but he has been singularly unsuccessful. Although we often have said that *pro se* parties will be given no special consideration, as we in fact did earlier in this very Opinion, in many (if not most or all cases) this simply is not true. A review of this case shows that time after time after time Mr. Perrin was given the benefit of the doubt. We would not condone such filings if made by counsel. Moreover, lately Mr. Perrin's filings have become increasingly disrespectful to the parties, their counsel, and this Board. Mr. Perrin's latest letter to the Board evidences his complete lack of understanding of the litigation process and basic procedures before this Board.

When a party such as Mr. Perrin files an appeal with the Pennsylvania Environmental

Hearing Board he voluntarily initiates a legal process which is governed by various statutes, the Board's Rules of Practice and Procedure, the Pennsylvania Rules of Evidence, and the Pennsylvania Rules of Civil Procedure. An appeal before the Board is not similar to a public meeting where an appellant addresses the Department and raises his concerns to the issue under consideration. Instead, proceedings before the Board are adversarial in nature, which are conducted, both in the prehearing phase and the hearing phase, in accordance with rules. Mr. Perrin has the burden of proof to prove that the action of the Department was in error.

Mr. Perrin has not set forth any reason whatsoever, either factual or legal, as to why the Department's action in approving the Act 537 Update was in error. As Judge Miller so eloquently stated in *Swistock v. DEP and Amfire Mining Co.*, 2006 EHB 398, 401:

> The integrity of the appeal process before the Board is dependent upon the willingness of the parties to follow the rules of procedure and the orders of the Board. Because of his repeated failure to abide by those rules this Board will dismiss his appeal as a sanction for that failure.

It is unfair to the other parties to allow this Appeal to continue where a proper Notice of Appeal setting forth the basic information in the case has not even been filed. We will issue an Order accordingly.

**COMMONWEALTH OF PENNSYLVANIA**
**ENVIRONMENTAL HEARING BOARD**

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| **CHARLES C. PERRIN** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2007-118-R** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and PITTSFIELD TOWNSHIP and BROKENSTRAW VALLEY AREA AUTHORITY** | : | |

## ORDER

AND NOW, this 5th day of February, 2008, after review of the Motion to Dismiss, and Appellant's Response, IT IS ORDERED as follows:

1) The Motion to Dismiss is **granted**.

2) The Appeal is **dismissed**.

**ENVIRONMENTAL HEARING BOARD**

Thomas W. Renwand

**THOMAS W. RENWAND**
**Acting Chairman and Chief Judge**

George J. Miller

**GEORGE J. MILLER**
**Judge**

**MICHELLE A. COLEMAN**
**Judge**

**BERNARD A. LABUSKES, JR.**
**Judge**

**DATED:** February 5, 2008

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

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

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|---|---|---|
| **BEAR CREEK TOWNSHIP BOARD OF SUPERVISORS** | : | |
| **v.** | : | **EHB Docket No. 2006-222-MG** |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION** | : | **Issued: February 7, 2008** |

## OPINION AND ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT

**By George J. Miller, Judge**

**Synopsis**

The Board denies a municipality's motion for summary judgment and grants the Department's motion for summary judgment in an appeal by a municipality from an order requiring the municipality to develop and adopt a sewage facilities plan, since there are no genuine issues of disputed material fact and the Department is clearly entitled to judgment in its favor. The municipality was already required to develop an updated sewage facilities plan under the terms of the Sewage Facilities Act and a prior order of the Department and an order of the Board. Further the municipality, in its own motion for summary judgment, presents no facts or legal argument which support a defense to the order upon which the Board could base judgment in the municipality's favor. The Sewage Facilities Act places responsibility for the development

of a suitable plan solely upon the municipality. The Department has no obligation to specify what alternate treatment systems it might approve to help the municipality achieve compliance with the Act. Accordingly the Board grants the Department's motion and dismisses the municipality's appeal.

## BACKGROUND

Before the Board are motions for summary judgment filed by the Department of Environmental Protection and Bear Creek Township Board of Supervisors in this appeal from a September 2006 Administrative Order issued by the Department. That order chronicles the Department's efforts since 1987 to require the Township to update its 1973 sewage facilities plan in order to meet the sewage disposal needs of the Township and to remedy malfunctioning on-lot septic systems throughout the Township. The order culminates by, among other things, requiring the Township to submit an official plan update revision within 120 days of the order, and to adopt an alternative which provides for the installation of a central sewage collection system for the Llewellyn Corners, Forest Park, Trailwood and Country Club Estates areas of the Township. The order also requires a schedule of implementation which calls for the initiation of operation of the project by September 30, 2009.

The Township filed an appeal on October 19, 2006. The Township objected to the order based on the belief that an agreement with the Department existed which provided an opportunity for the Township sewage enforcement officer to conduct a study of the affected areas; that the Department's order is predicated on the outdated 1973 plan which contemplated a central sewage collection and treatment system in the Township; and that there is no basis for the Department to conclude that the Township is in violation of a 1987 order of the Department because the Township has hired an engineer and has been studying the situation.

Both the Department and the Township have moved for summary judgment. The Department's motion is amply supported by evidence of the record including prior decisions of this Board. The Department's Statement of Material Facts details the Department's efforts since 1987 to require the Township to implement a plan for a centralized sewage system to meet the Township's sewage needs and remedy malfunctioning on-lot sewage systems in the Township. Despite those efforts, the Township has failed to adopt an ordinance amending its Act 537 Plan required by the Department's orders and the Sewage Facilities Act.[1] The Department further argues that there is no cognizable claim raised in the Township's notice of appeal and that the Township can not prevail at hearing.

The Township, while not responding to the Department's motion, alleges in its own motion that the Department was estopped from issuing the September Order because the Department has been working with the Township and agreed to permit the Township to study the affected areas and explore the possibility of alternate technologies for on-lot sewage disposal systems rather than a central sewage system. The Township claims, however, that the Department has never told the Township what alternate technology on-lot systems the Department would approve, so the Department has frustrated the Township's efforts to comply with the Department's order. The Township's motion specifically claims that without the specific standard guidelines and direction from the Department, the Township cannot conduct the studies the Department requires.[2] In addition, the Township claims that the issuance of the Department's order was in breach of an agreement it had with the Department to enable the Township to continue to explore alternate treatment technology. The Department disputes both

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[1] Department's Brief, pp. 2-3 and supporting exhibits from the record.
[2] Township Motion, pp. 4-8.

points by affidavits attached to the Department's response to the Township's motion. As we explain more fully below, we agree with the Department that there is no support for the Township's claims upon which this Board could find in the Township's favor. We will therefore grant the Department's motion and dismiss the Township's appeal. In our view, there are no *genuine* issues of disputed *material* fact as to any element of the Township's cause of action or defense which require resolution.[3]

**OPINION**

The lengthy history of the Department's efforts to obtain an adequate sewage facilities plan for the Township suggests that the Township's current efforts to resist the Department's order present no genuine issues for decision. In 1987 the Township appealed an order of the Department similar to the September order, which directed the Township to submit an adequate sewage facilities plan which would address widespread malfunctioning of on-lot sewage systems. The Township objected to the 1987 order on the basis that the Department failed to show that there was a need to provide a revised plan. The Board disagreed and found in favor of the Department after finding that the Township had failed to implement an official plan which it had adopted in 1973 and that there was widespread sewage disposal malfunctioning which created a threat of pollution.[4] Specifically, the Board found that the Township had not completed studies as to existing sewage problems as required by the Department's approval of the 1973 Plan. Further the Township had not constructed central sewers in Llewellyn Corners, Forest Park or Trailwood as called for in the 1973 Plan.

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[3] Pa. R.C.P. No. 1035.2.
[4] *Bear Creek Township v. DEP*, 1990 EHB 1432.

In December of 1973, the Department had issued a notice of violation to the Township because of malfunctioning on-lot sewer systems in Trailwood, Forest Park and Country Club Estates. The Township employed engineers to prepare a sewage feasibility study, and based on that study, those engineers recommended central sewers to serve Llewellyn Corners, Trailwood, Country Club Estates, Forest Park and three other areas of the Township (Chester Engineers Report). After reviewing the study, the Department advised that the Township adopt the recommendation of the study. The Township did not adopt the central sewer alternative, or any other alternative discussed in the feasibility study, but rather, in 1977, hired another engineering firm to evaluate the Chester Engineers Report. The second engineering firm, Smith and Miller, drafted a proposed facilities plan in 1983 which noted malfunctioning on-lot systems in the study area. Smith and Miller also developed alternatives to address the sewage malfunctions including construction of a sewage collection system which would transport sewage from areas not suitable for on-lot sewage disposal. That plan was rejected by the Township Supervisors in 1983.[5]

The Department informed the Township that it would thereafter limit the Township's ability to issue permits for on-lot sewage systems. In 1985 the Township hired yet another engineering firm. That firm performed a third study which included walking from home to home to identify malfunctioning on-lot sewage systems. The resulting study also recommended an alternative which included the construction of central sewers in the more densely populated areas of the Township where high rates of on-lot system malfunction were identified. Those areas included Trailwood, Forest Park, Country Club Estates and Llewellyn Corners.[6] The Township did not adopt this plan but proposed to systematically upgrade the on-lot sewage systems. On

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[5] *Bear Creek Township v. DEP*, 1990 EHB 1432, 1434-36.

[6] The September Order at issue in this appeal requires that the Township's updated plan provide for a centralized sewage collection system for these areas.

September 1, 1987, the Department issued an order requiring the Township to properly update its official plan to address the sewage needs of the Township. Based on these facts, the Board affirmed the Department's order and dismissed the Township's appeal.[7] Specifically, the Board concluded that the Department was justified in issuing the order since there was evidence of wide-spread malfunctioning of on-lot septic systems resulting in the discharge of untreated or partially treated sewage into the environment.[8]

In the latter part of 1991, the Township did submit a draft sewage facilities plan to the Department. However, the Department found that there were deficiencies in the draft. The Township never responded to the Department's comments, nor did the Township officially adopt the 1991 draft. In the ensuing years, the Township submitted various task activity reports, and remarkably, commissioned further studies. Finally, on January 11, 2005 the Township submitted another draft sewage facilities plan, which purported to implement an on-lot sewage management plan. Apparently, the Department found the proposal unacceptable and the Township never adopted the draft as a sewage facilities plan. The Township and the Department met in June 2005 in an attempt to resolve the Township's sewage problems. Although the Department and the Township exchanged further correspondence, on September 20, 2006, the Department issued an administrative order requiring the Township to adopt a sewage facilities plan that adequately provides for the sewage treatment needs in Llewellyn Corners, Forest Park, Trailwood and Country Club Estates areas by installation of a centralized sewage collection system.

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[7] *Bear Creek Township*, 1990 EHB at 1436-38.
[8] *Id.* at 1441 and 1445.

The Township appealed the September Order on the grounds that the Department erred in issuing the order because the Department knew that the Township sewage enforcement officer was performing a study and that the Department had agreed to allow the Township to gather further data; that the 1973 Plan was relied upon by the Department, which is out-of-date and does not reflect the growth which has actually occurred in the Township; and it is erroneous for the Department to simultaneously claim that the Township is in violation of the 1987 Order while at the same time agreeing to allow the Township sewage enforcement officer to conduct further studies.

We conclude that the Department is entitled to summary judgment because the evidentiary materials which support the Department's motion demonstrate that there are no *genuine* issues of *material* fact and that it is entitled to judgment as a matter of law.[9] By contrast, even if we accept the factual allegations of the Township as true, there are no *relevant* facts which justify granting the Township's motion.

The Township has failed to provide any evidence from the record nor has the Township cited any legal provision which would form a basis upon which the Board could grant the Township relief from the Department's order. The Township does not challenge the necessity of developing a new sewage facilities plan. Not only did the Board find that an update to the 1973 Plan was a necessity in the 1990 adjudication,[10] but the Township itself acknowledges that the 1973 Plan is out-of-date and unsuitable for conditions in the Township in the 2007 notice of appeal. The Township's claim that the Department is precluded from ordering the Township to

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[9] *E.g., Scalice v. Pennsylvania Benefits Trust Fund,* 883 A.2d 429 (Pa. 2005); *Jones v. SEPTA*, 772 A.2d 435 (Pa. 2001); *Global Ecological Services, Inc. v. Department of Environmental Protection,* 789 A.2d 789 (Pa. Cmwlth. 2001); *Barra v. DEP*, EHB Docket No. 2003-038-L (Opinion issued April 24, 2006).

[10] *Bear Creek Township*, 1990 EHB at 1441.

submit a revised sewage facilities plan because the Township had been working diligently to develop an on-lot management program to submit to the Department for approval presents no material facts that would preclude the entry of judgment against it. The Department's knowledge that the Township desires to avoid the expense of a centralized sewage collection system but has not provided the Township with guidelines describing what alternate on-lot systems the Department might approve is irrelevant to the Township's duty to develop and implement a sewage facilities plan.[11]

There is no debate that the responsibility for developing and adopting an appropriate sewage facilities plan falls squarely on the Township, and not upon the Department:

> Each municipality shall submit to the department an officially adopted plan for sewage services for areas within its jurisdiction within such reasonable period as the department may prescribe, and shall from time to time submit revisions to any such plan as may be required by rules and regulations adopted hereunder or by order of the department . . . .[12]

Also, the Board in 1990 also found that the Township was required to develop and adopt a revised sewage facilities plan when it affirmed the Department's 1987 Order. The Township has pointed to nothing which would provide a legal basis for it to avoid this responsibility or shift responsibility to the Department. The Sewage Facilities Act places no obligation upon the Department to tell the Township how to develop an appropriate sewage facilities plan.

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[11] In the 1990 adjudication, the Board expressed the view that an on-lot disposal alternative was unlikely to resolve the Township's problems by quoting a Department witness who testified that a plan which contains on-lot disposal is "like putting a Band-Aid on a cancer sore." 1990 EHB at 1444 n.5. The Department's view has not changed. See Ex. B to Appellant's motion.

[12] Section 5 of the Sewage Facilities Act, Act of January 24, 1966, P.L. (1965) 1535, *as amended*, 35 P.S. § 750.5.

Further, we can not find that the Township has been working "diligently" to develop a sewage facilities plan when the Board affirmed a Department order requiring the development of such a plan 18 years ago. Remarkably, little has changed since 1990. Although there has been some activity by the Township in the last few years, that activity is disturbingly similar to the cycle of conduct outlined by the Board in 1990. Rather than making a real effort to remedy the serious sewage disposal problems in the municipality, the Township continues to avoid its responsibility under the Sewage Facilities Act and the orders of the Department by financing further study. The recent efforts to work with the Department fail to justify over a decade of inactivity on the part of the Township. The Township has provided no evidence that the conditions observed by the Board in the 1990 adjudication have changed in any way, such that its challenge to the Department's most recent order can prevail. Moreover, the fact that central sewers may be economically undesirable from the Township's perspective, does not mean that the Department's 2006 Order was not appropriate.[13]

Nor can we find that any of the actions of the Department -- as described by the Township – estop the Department from issuing the 2006 Order.[14] First, the Township has not adduced any evidence from the record which proves that the Department agreed to refrain from enforcement action to allow the Township to pursue further study. Although Kate Crowley's June 1, 2006 letter references a meeting,[15] there is nothing in that letter which even suggests any agreement between the Department and the Township. The fact that the Department met with

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[13] *See Whitemarsh Disposal Corp. v. DEP*, 2000 EHB 300, and the cases cited therein holding that a financial inability to comply with an order of the Department is not relevant to a challenge to the merits of that order.

[14] The Department disputes the existence of any "agreement" concerning further study of on-lot systems in the Township, but argues that even if there were, the Township can not prevail.

[15] Ex. B. Kate Crowley serves as the Water Program Manager in the Department's Northeast Regional Office.

the Township does not preclude the Department from later ordering the Township to do what it should have done in 1987. There is no debate that the Township has had nearly 20 years to develop and adopt a sewage facilities plan and that it has not done so.

Regardless as to the dispute as to the existence of an agreement, the dispute is not a dispute of material fact which would defeat the Department's motion. A "material" fact must be relevant to a claim or defense raised in an appeal. Since the Township was already obligated to develop a sewage facilities plan, and has been obligated for the last 20 years, any agreement from the Department concerning further studies has no impact upon that obligation. Therefore, we will grant the Department's motion and dismiss the Township's appeal. We enter the following:

**COMMONWEALTH OF PENNSYLVANIA**
**ENVIRONMENTAL HEARING BOARD**

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| **BEAR CREEK TOWNSHIP BOARD OF SUPERVISORS** | : | |
| **v.** | : | **EHB Docket No. 2006-222-MG** |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION** | : | |

## ORDER

AND NOW, this 7th day of February, 2008, it is hereby ordered that the motion for summary judgment by the Bear Creek Township Board of Supervisors is hereby **DENIED**. It is further ordered that the motion for summary judgment by the Department of Environmental Protection is hereby **GRANTED** and the appeal of Bear Creek Township Board of Supervisors in the above-captioned matter is hereby **DISMISSED**.

**ENVIRONMENTAL HEARING BOARD**

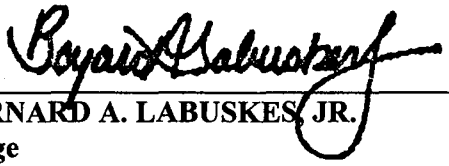
Thomas W. Renwand

**THOMAS W. RENWAND**
**Acting Chairman and Chief Judge**

George J. Miller

**GEORGE J. MILLER**
**Judge**

**MICHELLE A. COLEMAN**
**Judge**



**BERNARD A. LABUSKES, JR.**
**Judge**

**DATED: February 7, 2008**

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

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| **FRED W. LANG, JR., JOYCE E. SCHUPING, DELORES HELQUIST and SHERRY L. WISSMAN** | : | |
| **v.** | : | **EHB Docket No. 2003-145-R (Consolidated with 2004-090-R and 2004-093-R)** |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and MAPLE CREEK MINING, INC.** | : | **Issued: February 19, 2008** |

**OPINION AND ORDER ON**
**MOTION FOR APPROVAL OF**
**ALTERNATE FINANCIAL MECHANISM FOR PAYMENT**
**OF INCREASED OPERATION AND MAINTENANCE COSTS**

**By Thomas W. Renwand, Acting Chairman and Chief Judge**

**Synopsis:**

A mining company's motion for approval of an alternate financial vehicle for compensating landowners for the increased cost of operating and maintaining their pond which was affected by subsidence is denied. The mining company is ordered to pay the landowners the present value of the increased operating and maintenance costs.

## O P I N I O N

***Background and History*:**

This matter involves the restoration of a pond (the Lang pond) located on property owned by Fred W. Lang, Jr. and his sisters, Joyce E. Schuping, Delores Helquist and Sherry L.

Wissman (hereinafter the Landowners)in Washington County, Pennsylvania. In an adjudication issued on January 12, 2006, this Board upheld the finding of the Department of Environmental Protection (Department) that the Lang pond had been adversely affected by subsidence resulting from mining operations conducted by Maple Creek Mining, Inc. (Maple Creek). *Lang v. DEP and Maple Creek Mining, Inc.*, 2006 EHB 7. In accordance with Sections 5.1 and 5.2 of the Bituminous Mine Subsidence and Land Conservation Act (Mine Subsidence Act), Act of April 27, 1966, P.L. 31, *as amended*, 52 P.S. §§ 1406.1 – 1406.21, at §§ 1406.5a and 1406.5b, and 25 Pa. Code § 86.145a(f)(1)(v), we ordered Maple Creek to restore the pond and to provide for the permanent payment of the increased operating and maintenance costs associated with the pond's restoration. Based on the evidence presented at trial, we calculated the present value of the cost of operating and maintaining the replacement water supply in perpetuity to be $406,125.36. Our order required Maple Creek either to make a one-time lump sum payment to the Landowners in that amount or to "develop a financial vehicle, acceptable to the Board, that will compensate the Landowners for the increased yearly operation and maintenance costs of the Lang pond, adjusted for inflation, on a permanent basis" in accordance with the findings of our Adjudication. The order required compliance by February 13, 2006. *Lang*, 2006 EHB at 45-46.

Maple Creek appealed the Board's Adjudication to the Commonwealth Court and sought a stay of the Board's order while the case was pending before the court. The stay was granted on March 31, 2006. *Lang v. DEP and Maple Creek Mining, Inc.*, 2006 EHB 116, 119. The Landowners also appealed. Following briefing and oral argument, the Commonwealth Court denied both appeals and upheld the Board's Adjudication in an unpublished Memorandum Opinion dated December 28, 2006.[1] The court subsequently denied Maple Creek's Application

[1] Maple Creek's appeal was docketed at 329 C.D. 2006.

for Reconsideration/Reargument on February 21, 2007. Maple Creek then filed a Petition for Review with the Pennsylvania Supreme Court which was denied on November 28, 2007.

On December 28, 2007, Maple Creek filed with the Board a Motion for Approval of a Financial Mechanism for Payment of Annual Increased Operation and Maintenance Costs on a Permanent Basis. In its motion, Maple Creek states it is seeking to comply with the Board's Adjudication by establishing a financial vehicle that will compensate the Landowners for the increased yearly operation and maintenance costs associated with the replacement water supply for the Lang pond on a permanent basis, as opposed to a lump sum payment of the present value. This opinion addresses that motion.

***Discussion*:**

In its motion, Maple Creek proposes to continue paying the increased maintenance costs and posting a bond to ensure the continued payment of the costs in the event Maple Creek is not able to meet its obligation in the future. Maple Creek contends that this proposal is in accordance with the Technical Guidance Document on Increased Operation and Maintenance Costs of Replacement Water Supplies (Technical Guidance Document) adopted by the Department after the Board's ruling in *Lang*. The Technical Guidance Document sets forth the Department's process, effective December 2, 2006, for determining "the bond amount needed to assure permanent payment of increased operation and maintenance costs for replacement water supplies and to describe the alternative settlement/release." (Exhibit B to Motion)

In its response to the motion, the Department agrees that this is one approach for providing for permanent water replacement costs but denies Maple Creek's claim that the Department's policy precludes the payment of a lump sum to the owners of replaced water supplies. Additionally, both the Department and the Landowners contend that Maple Creek's

submission of the financial mechanism is untimely and should have been done after the Board's Adjudication was affirmed by the Commonwealth Court. It is the position of both the Department and the Landowners that Maple Creek is obligated to pay the lump sum payment set forth in the Board's Adjudication and Order.

At the *Lang* trial, a significant amount of testimony was presented on the calculation of the present value of the increased cost of operating and maintaining the Lang pond in perpetuity, and a considerable amount of analysis and discussion was given to this topic by the Board in its Adjudication. Based on evidence presented at trial, the Board determined that a multiplier of 72 was appropriate in this instance for calculating the present value of the increased operation and maintenance costs. The Board's Adjudication and findings were upheld by the Commonwealth Court.

The bond that has been proposed by Maple Creek in its motion would be calculated in accordance with the procedure set forth in the Department's Technical Guidance Document. According to an affidavit by Joel Koricich, Senior Civil Engineer Supervisor with the Department, after the *Lang* decision the Department rescinded the portion of its earlier 1999 guidance document dealing with operation and maintenance cost calculation and replaced it with the 2006 Technical Guidance Document. (Exhibit C to Motion) There is no indication that the document was developed in accordance with the calculations in the *Lang* case, and, in fact, the multiplier developed by the Department in the Technical Guidance Document is 47.01, considerably lower than the multiplier of 72 found to be appropriate in the *Lang* case. The question of whether the 2006 Technical Guidance Document is appropriate for water replacement cases other than *Lang* is not before us at this time. However, it is not applicable to *Lang* which has already been adjudicated. To allow Maple Creek to follow the procedure set forth in the

Technical Guidance Document would be to set aside the findings of our Adjudication. Therefore, we reject Maple Creek's motion to post a bond in accordance with the Department's 2006 Technical Guidance Document as an alternate financial vehicle to compensate the Landowners for the increased yearly operation and maintenance costs of their pond.

In accordance with our Adjudication and Order of January 12, 2006, Maple Creek is ordered to pay the Landowners the present value of the annualized increased operation and maintenance costs of the Lang pond in the amount of $406,125.36.

**COMMONWEALTH OF PENNSYLVANIA**
**ENVIRONMENTAL HEARING BOARD**

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|---|---|---|
| **FRED W. LANG, JR., JOYCE E. SCHUPING, DELORES HELQUIST and SHERRY L. WISSMAN** | : | |
| **v.** | : | **EHB Docket No. 2003-145-R (Consolidated with 2004-090-R and 2004-093-R)** |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and MAPLE CREEK MINING, INC.** | : | |

## ORDER

AND NOW, this 19th day of February 2008, in accordance with our Adjudication and Order of January 12, 2006, *Lang v. Department of Environmental Protection and Maple Creek Mining, Inc.*, 2006 EHB 7, *aff'd,* 329 C.D. 2006 (December 28, 2006), *petition for review denied*, 146 W.A.L 2007 (March 23, 2007), Maple Creek Mining, Inc. is ordered to pay the Landowners the sum of $406,125.36, representing the present value of the increased operating and maintenance costs for the Lang pond. *This amount shall be paid to the Landowners* ***within 20 days of the date of this order.***

**ENVIRONMENTAL HEARING BOARD**

**THOMAS W. RENWAND**
**Acting Chairman and Chief Judge**

**GEORGE J. MILLER**
**Judge**

**MICHELLE A. COLEMAN**
**Judge**

**BERNARD A. LABUSKES, JR.**
**Judge**

**DATE: February 19, 2008**

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

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| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION** | : | **EHB Docket No. 2007-169-CP-L** |
| **v.** | : | **Issued: February 20, 2008** |
| **FURNLEY H. FRISCH** | : | |

## OPINION AND ORDER ON MOTION FOR STAY

**By Bernard A. Labuskes, Jr., Judge**

**Synopsis:**

An appellant's motion for stay is denied despite his filing for bankruptcy. The Bankruptcy Code's automatic stay does not apply to the Board's adjudication of a complaint for civil penalties.

## OPINION

On July 3, 2007, the Department of Environmental Protection (the "Department") filed a complaint for civil penalties against Furnley Frisch under both the Clean Streams Law, 35 P.S. §§ 691.1 *et seq.*, and Dam Safety and Encroachments Act, 32 P.S. §§ 693.1 *et seq.* On December 13, 2007, in light of his filing for bankruptcy, Frisch filed a motion to stay the proceedings before this Board pursuant to Section 362 of the Bankruptcy Code, 11 U.S.C. § 362. Frisch argues that the Department's complaint equates to enforcement of a judgment for money damages, and thus, must be stayed pending resolution of his bankruptcy case. The Department

counters that the complaint is a valid exercise of its police and regulatory powers, and is thus exempt from the automatic stay under Section 362(b)(4) of the Bankruptcy Code, 11 U.S.C. § 362(b)(4).[1]

It has been almost ten years--and the Bankruptcy Code has been amended twice--since the Board last addressed the issue presented in this appeal, so a brief review of the pertinent sections of the Bankruptcy Code is helpful. Section 362 of the Bankruptcy Code "operates as a stay, applicable to all entities" of

> the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title ....

11 U.S.C. § 362(a)(1). The automatic stay generally acts to halt the commencement or continuation of any legal proceedings, by all entities, against a debtor while a bankruptcy administration is proceeding. 11 U.S.C. § 362; *U.S. v. Nicolet, Inc.*; 857 F.2d 202, 207 (3d Cir. 1988); *Penn Terra Ltd. v. DER*, 733 F.2d 267, 269 (3d Cir. 1984); *Torbert v. DER*, 1988 EHB 400, 401. The general policy behind the automatic stay is to grant the debtor complete and immediate, albeit temporary, relief from creditors while preventing the dissipation of the debtor's assets before an orderly distribution can take place. *Penn Terra*, 733 F.2d at 271.

There are, however, exceptions to the automatic stay. At issue here, Section 362(b)(4) of the Bankruptcy Code provides that the stay does not apply to

> the commencement or continuation of an action or proceeding by a governmental unit ... to enforce such governmental unit's ... police and regulatory power, including the enforcement of a judgment other than a money judgment, obtained in an action or proceeding by the governmental unit to enforce such governmental

[1] We have jurisdiction to determine whether proceedings pending before the Board are subject to the automatic stay. *See DER v. Ingram*, 658 A.2d 435, 437 (Pa. Cmwlth. 1995).

unit's ... police or regulatory power ....

11 U.S.C. § 362(b)(4). In essence, the automatic stay does not apply to an action or proceeding in which a governmental unit is exercising its police or regulatory powers, unless the government is trying to enforce a money judgment. The police and regulatory powers exception, as it is often referred, protects against the risk of bankruptcy courts becoming a sanctuary for those who violate environmental laws. *Nicolet*, 857 F.2d at 207.

It is now clear and well established that the Board's adjudication of a Department complaint for civil penalties is covered by the police and regulatory powers exception, is not an action to enforce a money judgment, and is not stayed under the Bankruptcy Code. *See Penn Terra*,[2] 733 F.2d at 275; *U.S. v. LTV Steel Co.*, 269 B.R. 576, 582 (Bankr. W.D. Pa. 2001); *U.S. v. Sugarhouse Realty, Inc.*, 162 B.R. 113, 115 (E.D. Pa. 1993); *White Glove, Inc. v. DEP*, 1998 EHB 372, 378; *Lykens v. DEP*, 1997 EHB 383, 386; *Roswel Coal Co. v. DER*, 1989 EHB 224, 226; *DER v. Marileno Corp.*, 1989 EHB 206, 210-11. "[C]ivil penalties, insofar as they tend to force compliance, play an integral role in environmental enforcement actions." *U.S. v. Sugarhouse Realty, Inc.*, 162 B.R. 113, 116 (E.D. Pa. 1993). The pursuit of civil penalties falls squarely within the ordinary meaning of police and regulatory powers. *LTV Steel Co.*, 269 B.R. at 582. It is their deterrent value, among other considerations, that places them within the realm of the Department's police and regulatory powers. *See U.S. v. LTV Steel Co.*, 269 B.R. 576, 582-83 (W.D. Pa. 2001); *In re Poule*, 91 B.R. 83, 87 (B.A.P. 9th Cir. 1988).

Furthermore, the limitation embodied in Section 362(b)(4) of the Bankruptcy Code only

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[2] *Penn Terra*, along with other pre-1998 decisions, rely on Section 362(b)(5) in their analyses. Section 362(b)(5) was deleted in the 1998 amendments to the Bankruptcy Code. However, the 1998 amendments incorporated the content of Section 362(b)(5) into the current Section 362(b)(4). The incorporation did not create a significant change in the police and regulatory powers exception. Case law interpreting the exception prior to the 1998 amendments still applies. *U.S. v. LTV Steel Co.*, 269 B.R. 576, 581 n.5 (W.D. Pa. 2001).

applies to the Department's ability to *enforce* a money judgment. *See LTV Steel Co.*, 269 B.R. at 582. The Department's authority to seek *entry* of a civil penalty judgment for violations of the Clean Streams Law and Dam Safety and Encroachments Act is not precluded. *See id.*; *Sugarhouse Realty, Inc.*, 162 B.R. at 115; *Lykens*, 1997 EHB at 386. This Board's role is limited to assessing civil penalty liability. We have no power to enforce our adjudication. Absent voluntary payment, the Department typically will institute measures with the prothonotary of a court of common pleas to convert our adjudication into a judgment. The Board's adjudicatory process is one step removed. Whether the Section 362 stay applies to the Department's efforts to actually collect on a judgment flowing from our adjudication is a question that is outside our bailiwick. In short, Frisch is incorrect in arguing that the Board's assessment of civil penalties amounts to the enforcement of a money judgment.[3] *See U.S. v. Nicolet*, 857 F.2d 202, 209 (3d Cir. 1988); *Roswel Coal Co. v. DER*, 1989 EHB 224, 226. Therefore, the stay does not apply.

Accordingly, we issue the following Order.

[3] Frisch relies on *Ohio v. Kovacs*, 469 U.S. 274 (1985), which plainly and on its face does not apply to a proceeding, such as this, to determine whether a governmental action falls within the police and regulatory powers exception. 469 U.S. at 283 n.11. *Kovacs* addressed whether a money judgment was subject to discharge, not whether the adjudication of civil penalties is subject to the automatic stay.

**COMMONWEALTH OF PENNSYLVANIA**
**ENVIRONMENTAL HEARING BOARD**

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|---|---|---|
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION** | : | **EHB Docket No. 2007-169-CP-L** |
| **v.** | : | |
| **FURNLEY H. FRISCH** | : | |

## ORDER

AND NOW, this 20th day of February, 2008, Frisch's motion for a stay is denied.

**ENVIRONMENTAL HEARING BOARD**

**BERNARD A. LABUSKES, JR.**
**Judge**

**DATED: February 20, 2008**

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

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Southcentral Region

**For Defendant:**
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Harrisburg, PA 17101-2121

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

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|---|---|---|
| **JON C. GARDNER** | : | |
| | : | |
| **v.** | : | |
| | : | **EHB Docket No. 2007-204-L** |
| **COMMONWEALTH OF PENNSYLVANIA, CUMBERLAND COUNTY CONSERVATION DISTRICT and SOLID WASTE AUTHORITY OF CUMBERLAND COUNTY, Permittee** | : | **Issued: February 25, 2008** |

## OPINION AND ORDER ON MOTION TO DISMISS AS MOOT

**By Bernard A. Labuskes, Jr., Judge**

**Synopsis:**

The Board dismisses as moot an appeal from an authorization to operate under a general permit because the authorization has been rescinded.

## OPINION

By letter dated July 23, 2007, the Cumberland County Conservation District, under a delegation from the Department of Environmental Protection (the "Department"), issued an authorization to the Solid Waste Authority of Cumberland County to operate under the General Permit for Stormwater Discharges Associated with Construction Activity and assigned a permit number of PAG2-0021-07-030. Jon C. Gardner filed this appeal from the authorization. By letter dated October 16, 2007, the Cumberland County Solid Waste Authority indicated that the authority did not intend to pursue the project and surrendered the authorization to operate under

the permit to the Cumberland County Conservation District. On December 10, 2007, the Department rescinded the authorization.

The Department has filed a motion to dismiss this appeal as moot. Gardner did not respond to the motion. We will grant the Department's motion. Absent unusual circumstances not present here, the Department's rescission of an action under appeal renders the appeal moot. *Blue Marsh Laboratories v. DEP*, EHB Docket No. 2006-266-C slip op. at 9-10 (December 8, 2007); *Cromwell Township v. DEP*, EHB Docket No. 2006-058-MG, slip op. at 3-4 (January 19, 2007); *Morris Township v. DEP*, 2006 EHB 55, 56; *Solebury Township v. DEP*, 2003 EHB 208; *Kilmer v. DEP*, 1999 EHB 846, 849.

Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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| **JON C. GARDNER** | : | |
| | : | |
| **v.** | : | |
| | : | **EHB Docket No. 2007-204-L** |
| **COMMONWEALTH OF PENNSYLVANIA, CUMBERLAND COUNTY CONSERVATION DISTRICT and SOLID WASTE AUTHORITY OF CUMBERLAND COUNTY, Permittee** | : | |

## ORDER

AND NOW, this 25th day of February, 2008, the Department's unopposed motion to dismiss is granted and this appeal is dismissed as moot.

**ENVIRONMENTAL HEARING BOARD**

**THOMAS W. RENWAND**
**Acting Chairman and Chief Judge**

**GEORGE J. MILLER**
**Judge**

**MICHELLE A. COLEMAN**
**Judge**

**BERNARD A. LABUSKES, JR.**
**Judge**

**DATED: February 25, 2008**

c: **For DEP Litigation:**
Brenda K. Morris, Library

**For the Cumberland County Conservation District:**
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Southcentral Regional Office
Office of Chief Counsel

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Camp Hill, PA 17011

**For Permittee:**
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Carlisle, PA 17013

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| **THOMAS PECKHAM AND PATRICIA PECKHAM** | : | |
| | : | **EHB Docket No. 2007-156-L** |
| **v.** | : | |
| | : | **Issued: February 25, 2008** |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION** | : | |

## OPINION AND ORDER ON MOTION TO DISMISS

**By Bernard A. Labuskes, Jr., Judge**

**Synopsis:**

The Board dismisses an appeal from what appears to be a Certified Copy of Judgment filed with the Prothonotary of the Erie County Court of Common Pleas because a certified copy of judgment is not an appealable action. Alternatively, to the extent the appeal is from a previous civil penalty assessment, the appeal is dismissed as untimely.

## DISCUSSION

On February 27, 2006, the Department of Environmental Protection (the "Department") issued an assessment of civil penalty against Thomas and Patricia Peckham (the "Peckhams") in the amount of $1,330. The Department hand-delivered the assessment to the Peckhams on March 7, 2006. The Peckhams did not appeal the assessment. About one year later, on March 17, 2007, the Department filed a Certified Copy of Judgment with the Prothonotary's Office of

the Erie County Court of Common Pleas in the amount of $1,330 for the unappealed assessment. The Peckhams indicated in their notice of appeal that they received the certified copy of judgment on May 17, 2007. They filed this appeal on June 13, 2007. The Peckhams left the notice of appeal form blank that directed them to describe the action for which review is sought. However, they attached both the Certified Copy of Judgment and the 2006 assessment to the form. The substance of their objections appears to relate to the assessment itself.

The Department has filed a motion to dismiss this appeal as being taken from an unappealable action and as untimely. The Peckhams did not respond to the motion.

We will grant the Department's motion. Although the Peckhams' notice of appeal is not entirely clear, to the extent that they have appealed the Certified Copy of Judgment, that filing constitutes the first step in a collection action in the Court of Common Pleas and it is not an action of the Department that is appealable to this Board.[1] Alternatively, to the extent the Peckhams are challenging the 2006 assessment, the time for an appeal has long since passed. 35 P.S. § 721.13(g) (civil penalty assessments must be appealed within 30 days of receipt of the assessment). The commencement of a collection action in the court of common please does not resurrect the appeal period, and the Peckhams have not claimed that the certified copy of judgment was their first notice of the assessment. The assessment was in fact hand-delivered on March 7, *2006*.

Accordingly, we issue the Order that follows.

[1] The Peckhams presumably had the option of contesting the judgment in the collection action by filing, e.g., a motion to strike or open judgment.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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| THOMAS PECKHAM AND PATRICIA PECKHAM | : | |
| | : | EHB Docket No. 2007-156-L |
| v. | : | |
| COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION | : | |

**ORDER**

AND NOW, this 25th day of February, 2008, it is hereby ordered that the Department's unopposed motion to dismiss is granted. This appeal is dismissed.

**ENVIRONMENTAL HEARING BOARD**

**THOMAS W. RENWAND**
**Acting Chairman and Chief Judge**

**GEORGE J. MILLER**
**Judge**

**MICHELLE A. COLEMAN**
**Judge**

**BERNARD A. LABUSKES, JR.**
**Judge**

**DATED: February 25, 2008**

c: **For DEP Litigation:**
Brenda K. Morris, Library

**For the Cumberland County Conservation District:**
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Northwest Regional Counsel

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|---|---|---|
| **MICHAEL A. BUTLER** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2007-185-L** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and EXOTIC OIL & GAS, LLC Permittee** | : | **Issued: February 29, 2008** |

## OPINION AND ORDER ON MOTION TO DISMISS FOR MOOTNESS

**By Bernard A. Labuskes, Jr., Judge**

**Synopsis:**

The Board grants the Permittee's motion to dismiss where the permit being appealed has been cancelled thereby rendering the appeal moot.

### Opinion

Michael Butler filed a notice of appeal objecting to the Department of Environmental Protection's issuance of Well Permit No. 37-031-24369-00 to Exotic Oil & Gas, LLC (Exotic) on April 23, 2007. Exotic never drilled the well. On December 17, 2007, Exotic contacted the Department stating that it did not intend to drill a well at the permitted location and seeking to cancel the Permit. The following day the Department informed Exotic that the permit had been cancelled and if it intended to drill the well in that location it would need to apply for a new permit.

Exotic filed a motion to dismiss the appeal for mootness arguing that the subject of the appeal no longer exists. The Department filed a motion in support, arguing as well, that the appeal is moot. Instead of addressing the issue of mootness, Butler's response merely reiterates the substance of his notice of appeal setting forth his objections to the Department's issuance of the well permit while an unresolved complaint existed regarding his water supply. Butler's response does not explain why or how his contention regarding his water supply would somehow prevent this appeal from being moot once the permit was cancelled.

In a motion to dismiss the Board will grant the motion where there are no material facts in dispute and the moving party is entitled to judgment as a matter of law. *Borough of Chambersburg v. DEP*, 1999 EHB 921, 925; *Smedley v. DEP*, 1998 EHB 1281, 1281. After review of the undisputed fact that the permit under appeal no longer exists we will grant Exotic's motion to dismiss for mootness.

This Board has repeatedly held that, where a permit is withdrawn by the permittee and cancelled by the Department, the appeal is moot. Recently, the Board dismissed an appeal as moot because the Department's authorization to operate under a general permit was rescinded. *John C. Gardner v. DEP*, EHB Docket No. 2007-204-L (Opinion issued February 25, 2008). The Board held, "[a]bsent unusual circumstances not present here, the Department's rescission of an action under appeal renders the appeal moot." *Id.* at slip. op. 2; citing *Blue Marsh Laboratories v. DEP*, EHB Docket No. 2006-266-C slip op. at 9-10 (December 8, 2007); *Cromwell Township v. DEP*, EHB Docket No. 2006-058-MG, slip op. at 3-4 (January 19, 2007); *Morris Township v. DEP*, 2006 EHB 55, 56; *Solebury Township v. DEP*, 2003 EHB 208; *Kilmer v. DEP*, 1999 EHB 846, 849. The Board also dismissed an appeal where the Department rescinded a letter that was the subject of an appeal. The rescission of the letter left the Board

with no issue to decide, thus the appeal was dismissed for mootness. *Blue Marsh Laboratories v. DEP*, EHB Docket No. 2006-266-C, slip op. 9-10 (Opinion issued December 28, 2007). In *Tinicum Township,* 2003 EHB 493, the permittee surrendered the permits to the Department that were the basis of the appeal. The Board found that "[s]urrender of the permits has effectively voided consent for the activities Appellants find objectionable and left the Board unable to provide the relief requested." *Id.* at 495. Also, in *Au v. DEP*, 2001 EHB 527, an appeal was dismissed because the Board found that no effective relief could be granted when a surface coal mining permit was withdrawn by the permittee and cancelled by the Department.

Accordingly, we issue the following Order:

**COMMONWEALTH OF PENNSYLVANIA**

**ENVIRONMENTAL HEARING BOARD**

| | | |
|---|---|---|
| **MICHAEL A. BUTLER** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2007-185-L** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and EXOTIC OIL & GAS, LLC Permittee** | : | |

**ORDER**

AND NOW, this 29th day of February, 2008, Exotic Oil & Gas, LLC's motion to dismiss is granted and this appeal is dismissed as moot.

**ENVIRONMENTAL HEARING BOARD**

**THOMAS W. RENWAND**
**Acting Chief Judge and Chairman**

**GEORGE J. MILLER**
**Judge**

MICHELLE A. COLEMAN
**Judge**

BERNARD A. LABUSKES, JR.
**Judge**

**DATED:** **February 29, 2008**

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

**For the Commonwealth, DEP:**
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Office of Chief Counsel
Northwest Regional Office

**For Appellant, *Pro Se*:**
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**For Permittee:**
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Michael Handler, Esquire
LAW OFFICES OF MICHAEL S. DELANEY
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|---|---|---|
| **TINICUM TOWNSHIP, THE INSTITUTE FOR COMMUNITY PRESERVATION and BRUCE WALLACE** | : | |
| **v.** | : | **EHB Docket No. 2008-084-L (Consolidated with 2008-085-L)** |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and PENNSYLVANIA DEPARTMENT OF TRANSPORTATION (PennDOT), Permittee** | : | **Issued: April 21, 2008** |

## OPINION AND ORDER ON PETITIONS FOR SUPERSEDEAS

**By Bernard A. Labuskes, Jr.**

**Synopsis:**

The Board supersedes a portion of a letter that DEP sent to an affected municipality notifying it that DEP would be issuing an emergency permit to PennDOT authorizing it to demolish an historic bridge. The supersedeas petitioners are likely to prevail on the merits in showing that the Board has jurisdiction in their appeals from the letter because of the letter's unique characteristics. The petitioners are also likely to succeed on the merits in proving that the letter was issued in error because it established an improper effective date in the permit. The Board adjusts the designation of an effective date but otherwise denies the petitions for supersedeas.

## OPINION

On March 4, 2008, the Department of Environmental Protection ("DEP") sent Tinicum Township (the "Township") a letter (the "Official Notice Letter") stating that it intended to issue an emergency permit under the Dam Safety and Encroachments Act, 32 P.S. §§ 693.1 *et seq.*, to the Pennsylvania Department of Transportation ("PennDOT") authorizing it to remove the Geigel Hill Road Bridge (the "Bridge") located in Tinicum Township, Bucks County. The Bridge is a Pratt pony truss bridge built in 1887. It is a narrow bridge that originally had a timber deck but is now paved with asphalt. It is held up by steel trusses. It is said to lend an industrial feeling to an area that included a butcher shop, blacksmith shop, barn, and dwelling. There are not many bridges like it left in the Commonwealth. The Bridge crosses Tinicum Creek, which has been designated as an Exceptional Value stream and a Wild and Scenic River. It is within the Ridge Valley Rural Historic District, which is included in the National Register of Historic Places. There is no dispute in this case that the Bridge is a valuable historic resource.

Tragically, a truck ran into one of the trusses in 2002. The Bridge was immediately closed to vehicular traffic and never restored. It has not been maintained since the accident. Although beauty is in the eye of the beholder, in its current condition, plastered as it is with warning signs, blocked by barriers, and generally falling apart, the Bridge is at least arguably detracting from, rather than contributing to, the historical ambience of the district. Until recently, pedestrians have used the Bridge, but PennDOT has now erected signs and barriers designed to restrict all access. PennDOT is afraid that the Bridge could collapse under its own weight at any time due primarily to the damage that it sustained in 2002.

There is no dispute that the Bridge needs to be replaced. The devil, of course, is hidden in the details. PennDOT, the Township, and other interested parties have been negotiating for

years on the design of a replacement bridge. The local interests would like to see a new bridge that mimics the appearance of the old bridge. Among other things, there has been lengthy discussion about incorporating the existing trusses into a new bridge as an ornamental feature. It is our sense that there is considerable frustration on all sides regarding the interminable negotiations.

Early this year PennDOT (who owns the Bridge) decided that it could wait no longer. It told DEP that it wanted an emergency permit to tear down the Bridge. DEP's engineer visited the site, and DEP thereafter decided that it would issue an emergency permit barring "unforeseen circumstances." DEP notified the Township of its intent to issue the permit in its Official Notice Letter of March 4.

Tinicum Township and the Institute for Community Preservation along with Bruce Wallace (the "Petitioners") filed appeals and contemporaneous petitions to supersede the Official Notice Letter. We scheduled a supersedeas hearing for April 1, 2008. Later that same day, Tinicum filed a petition to temporarily supersede the Official Notice Letter until completion of the April 1, 2008 supersedeas hearing. We conducted a temporary supersedeas hearing with the parties by telephone. Upon completion of the call, we granted the Township's petition for temporary supersedeas and issued an Order temporarily superseding the DEP's letter until the close of business on April 1, 2008.

On March 31, 2008, DEP counsel notified the Board that a key witness had a family emergency and would be unavailable for the April 1 supersedeas hearing. The parties agreed to delay the supersedeas hearing and extend the temporary supersedeas. We issued an Order on April 1 extending the temporary supersedeas until such time as a supersedeas hearing could be

held. We held that hearing on April 8. We modified and then extended the temporary supersedeas in a ruling from the bench. We committed the ruling to a written Order on April 9.

At the conclusion of the hearing, we suggested that the parties make another attempt to settle their differences. The parties agreed, and we indicated that we would refrain from issuing an Opinion and Order on the petitions for supersedeas for a few days. It now appears that those negotiations will continue longer than we are willing to let a temporary supersedeas stand.

**Discussion**

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

> (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.

*See also* 35 P.S. § 7514, to the same effect.

A supersedeas is an extraordinary remedy. Accordingly, one 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 822, 827; *Global Eco-Logical Services v. DEP*, 1999 EHB 649, 651; *Oley Township v. DEP*, 1996 EHB 1359, 1361-1362. The petitioners bear the burden of proof. *Eagle Environmental II, L.P. v. DEP*, 2006 EHB 439, 447; *Pennsylvania Fish & Boat Commission v. DEP*, 2004 EHB 473. The issuance of a supersedeas is committed to the

Board's discretion based upon a balancing of the statutory criteria. *UMCO Energy, Inc. v. DEP*, 2004 EHB 797, 802. The Board, however, will not issue a supersedeas where pollution or injury to the public exists or is threatened during the time a supersedeas would be in effect. 35 P.S. § 7514(d)(2); 25 Pa. Code § 1021.63(b). It is important to remember that our ruling on a supersedeas petition is merely a prediction about who is likely to prevail at the hearing on the merits. *Neubert v. DEP*, 2005 EHB 598, 608; *UMCO Energy, Inc. v. DEP*, 2004 EHB 832, 839-40.

**Likelihood of Success on the Merits**

**a. The Jurisdictional Issue**

DEP argues that the Board lacks jurisdiction in this case. DEP has filed a motion to dismiss on that ground. DEP contends that it has not yet issued the emergency permit and its Official Notice Letter is not itself an appealable action. The Petitioners respond that the Official Notice Letter does not merely provide notice of DEP's intent to issue a permit, it actually triggers the effective date of the permit. They add that "[t]his is not a situation where there will be subsequent DEP action to which Appellants will have a practical ability to exercise their right to appeal."

DEP is entirely correct that Departmental notice of a future action is ordinarily not an appealable action in and of itself. *See Energy Resources, Inc. v. DEP*, 2006 EHB 1, 4; *Mon Valley Transportation Center v. DEP*, 2005 EHB 727, 730; *PEACE v. DEP*, 2000 EHB 1, 3; *Lower Providence Township Municipal Authority v. DEP*, 1996 EHB 1139, 1140-41. This case, however, presents a highly unusual, perhaps even unique, situation. The Department's Official Notice Letter does more than provide courtesy notice of a possible future action. First, it unequivocally designates an effective date for the forthcoming permit. Second, it does not say

that a permit might be issued; it says that it *will* be issued. DEP's action clearly impacts the Township's right to prepare for and respond to a permit for an emergency project within its borders, and that impact occurred when it received the letter, not at some possible future date. We anticipate that the Petitioners are likely to prevail on the jurisdictional issue.[1]

**b. The Notice Issue**

Although we are inclined to believe that we have jurisdiction, it is important to emphasize that we only have jurisdiction to review the action that is under appeal. Parties obviously may not litigate the merits of one DEP action by appealing a different DEP action. *CAUSE v. DEP*, 2007 EHB 632, 686; *Onyx Greentree Landfill, LLC v. DEP*, 2006 EHB 404, 413; *Fuller v. DER*, 1990 EHB 1726, 1762; *ROBBI v. DER*, 1988 EHB 500, 503. The action under appeal in this case is the Official Notice Letter of March 4, 2008. The emergency permit is not before us at this time. Although DEP has committed in no uncertain terms to issuing the permit, our review of that permit must await an appeal from its issuance. Our current review is limited to the Official Notice Letter.

DEP's Official Notice Letter firmly establishes a date that PennDOT's emergency permit will be effective. Specifically, the Letter designates the day of permit issuance as the effective date so long as that day falls after April 3, 2008. The Department named April 3, 2008 as the effective date because that was 30 days after DEP issued its March 4, 2008 Official Notice Letter.

There are three reasons why we believe the Petitioners are likely to prevail in showing that the Official Notice Letter was issued in error. First, the Letter does not conform to applicable statutory and regulatory requirements regarding notice to the municipality. There is

[1] The Department's motion to dismiss will be resolved in due course. The parties tell us that an emergency permit has since been issued, which may make the jurisdictional dispute in this appeal rather academic. In any event, this Opinion is limited to predicting the likelihood of success on the issue.

no dispute that an affected municipality (e.g. Tinicum Township) is entitled to notice of the issuance of an emergency permit under the Dam Safety and Encroachments Act. 71 P.S. § 510-5(b)(4); 25 Pa. Code § 105.64(4).[2] The applicant (in this case PennDOT) must notify the municipality as soon as possible verbally and provide a follow-up notice in writing within 48 hours of the issuance of the emergency permit. 71 P.S. § 510-5(b)(4). The notice must be given by the Permittee and it must be given *after* the permit is issued. The emergency permit is then effective 30 days after the Township receives notice (unless, of course, the Township waives the notice requirement). 25 Pa. Code § 105.64(4). The emergency permit expires 30 days after its effective date unless extended in writing by the Department. *Id.*

The Official Notice Letter does not satisfy the requirements of 71 P.S. § 510-5(b)(4) because it was sent by DEP, not PennDOT, and it was issued before, not after, the permit issuance. The applicable regulation, 25 Pa. Code § 105.64(4), is quite clear in providing that the permit's effective date may not be sooner than 30 days after the Township receives the statutorily prescribed notice from PennDOT.

An "editor's note" to 25 Pa. Code § 105.64(4) suggests that the regulation has been superseded in part by 71 P.S. § 510-5(b)(4). This appears to be incorrect. We must and can interpret the statute and the regulation in such a way as to give both of them meaning and effect. *Hazleton Area School District v. Zoning Hearing Board*, 778 A.2d 1205, 1215 (Pa. 2001); *DER*

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[2] 71 P.S. § 510-5(b)(4) reads as follows:

> When the Department issues an emergency permit to respond to or alleviate an actual or imminent threat to life, property or the environment, ... the provisions of clause (2) and any other provision in regulation requiring notice to the affected municipality shall not apply. The applicant shall notify the affected municipality of an emergency permit as soon as possible verbally and provide a follow-up notice in writing within forty-eight (48) hours from the issuance of an emergency permit.

25 Pa. Code § 105.64(4) reads as follows:

> If the municipality in which the emergency occurs has waived notice, the emergency permit is effective immediately. If notice has not been waived by the municipality, the emergency permit is effective 30 days after notice is sent to the municipality in which the emergency occurred. The emergency permit will expire in 30 days unless extended in writing by the Department.

*v. Locust Point Quarries, Inc.*, 396 A.2d 1205, 1209 (Pa. 1979). The statute (71 P.S. § 510-5(b)(4)) defines what notice is required. The regulation (§ 105.64(4)) defines the effective date of the permit. These are two different concepts. Although it is unusual to require initial notice to be given after a permit is issued and create a delayed effective date, the statute and regulation are clear. *See RESCUE v. DER*, 1988 EHB 163, 165 n.1 (describing Act 14 notification, which occurs after authorization to proceed under a DSEA general permit but prior to actual construction as an "anomaly").

The future progress of this litigation may reveal the Environmental Quality Board's thinking in including a post-issuance 30-day requirement for emergency permits. It may be that it reflects a compromise between allowing permits to be issued promptly while still providing the affected municipality with an opportunity to protect its interests and the interests of its citizens in advance of a project that is likely to be completed very quickly. As illustrated by this case, the requirement brings another set of eyes to the project and, perhaps not incidentally, helps ensure that there is a true emergency. If the municipality agrees that there is an emergency, it may waive the 30-day requirement. The 30-day requirement also provides the municipality with a meaningful opportunity to appeal the permit to this Board, thereby protecting its rights under the Environmental Hearing Board Act, 35 P.S. § 7514, the DSEA, 32 P.S. § 693.24, and the United States and Pennsylvania Constitutions.

Secondly, we believe DEP violated not only the letter of the applicable law but its spirit as well. DEP's designation of an effective date before the permit was even issued quite effectively abrogated the Township's rights. The Commonwealth admits that the Official Notice Letter would have enabled PennDOT to demolish the Bridge before the municipality received notice of actual permit issuance. DEP could deliver the permits at 9:00 a.m. and the Bridge, at

least as a legal matter, could have been down by 5:00 p.m. This put the Township in an untenable position. In order to pursue an effective appeal, it needed to appeal the permit Letter. Yet such an appeal is, to say the least, awkward because the precise terms of the permit are not known. Section 510-5 was enacted as part of Act 14, which was passed to give municipalities a greater say in DEP's permitting decisions. *RESCUE v. DEP*, 1988 EHB 163, 165. DEP should not act in a manner designed to defeat that legislative purpose.

Our third problem with the Letter relates to DEP's unequivocal commitment to issue the permit. At the hearing a DEP witness suggested that the Official Notice Letter was a request for comment, but that suggestion is belied by the language of the Letter. One cannot read the Letter and conclude that issuance of the permit is anything less than a *fait accompli*. The certainty of DEP's commitment not only goes to the Board's jurisdiction as discussed above, it gives one the unmistakable impression that DEP's mind has been made up and it had no interest in the Township's or anyone else's input. DEP has decided to issue the permit without considering comments, without deciding what conditions might be appropriate, and without (in the words of the Letter) assessing whether "all applicable regulations have been satisfied." If this is not illegal, it is at least troublesome. *Cf. CAUSE v. DEP*, 2007 EHB 632, 681.

There is nothing in the notice requirements stopping the Department from issuing the permit at this point. Our initial temporary supersedeas suggested that 30 days advance notice is required before a permit may be *issued*. That was incorrect. Rather, 30 days advance notice in accordance with 71 P.S. § 510-5(b)(4) is required before the permit is *effective*. 25 Pa. Code § 105.64(4).

In summary, the Petitioners are likely to succeed on the merits of their claim that DEP did not follow appropriate procedures appurtenant to issuance of an emergency permit. The

statutory and regulatory provisions describing the timing and effect of notice to the affected municipality are clear, albeit unusual, and they must be followed.

**c. Chapter 105 Permitting Obligations**

As a general rule, a person may not remove and/or replace an encroachment such as the Bridge without first obtaining a written permit from the Department authorizing the work. 32 P.S. § 693.6; 25 Pa. Code § 105.11. The Chapter 105 regulations spell out detailed requirements and procedures that must be met and followed in order to obtain such a permit. 25 Pa. Code §§ 105.13 – 105.24. Among other things, the Department may not issue a permit for a project located in waters designated as Exceptional Value waters or within 100 feet of a Wild and Scenic River unless the permit applicant demonstrates that the project will not have an adverse impact. 25 Pa. Code § 105.16(a).

The regulations appear to carve out two loopholes to the permitting requirements. *See generally Felix Dam Preservation Ass'n v. DEP*, 2000 EHB 409, 419. First, a person may obtain a permit waiver in circumstances not alleged to be applicable here. 25 Pa. Code § 105.12. Second, a party may obtain an "emergency permit." 25 Pa. Code § 105.64.

The Petitioners argue that emergency permits should not be reviewed differently than any other encroachment permits, and that all of the Chapter 105 regulations that apply to permitting apply to emergency permits. They contend that DEP erred by committing to issue an emergency permit before applying those provisions to the demolition of the Bridge. It is undisputed that DEP does not intend to apply all of the Chapter 105 permitting regulations to the Bridge removal. As a result, provisions such as the harms-benefits test and the prohibition against adverse effects in Exceptional Value watersheds such as Tinicum Creek will not be applied.

Although to some extent we are reading between the lines, the reason that the Petitioners seem to care about this issue comes down to a concern about the segmentation of the project. If the Commonwealth were required to consider the entire project as a whole, i.e. Bridge removal *and* Bridge replacement, it might be that a replacement bridge with appropriate ornamental features would be an essential mitigating factor that is a prerequisite to the loss of the historical and aesthetic values that the existing Bridge provides.

We are sympathetic to the Petitioners' position, and we are cognizant of the fact that the regulations do not clearly articulate that the emergency permitting requirements are a stand-alone unit, but we are nevertheless fairly certain that the emergency permit regulations stand apart. The DEP officer in charge of permitting, James Newbold, testified that the Department interprets the emergency procedures in Chapter 105 (i.e. 25 Pa. Code §§ 105.61-64) as creating an exception to the standard Chapter 105 permitting process. He indicated that "it would not make sense" to have a separate section of the regulations devoted to emergency procedures if all of the other regulatory procedures applied anyway. DEP's point is well taken. DEP's interpretation is reasonable and it clearly comports with common sense and we are, therefore, likely to adopt it. *Tire Jockey Service, Inc. v. DEP*, 915 A.2d 1165, 1187 (Pa. 2007); *Birdsboro v. DEP*, 795 A.2d 444, 448 (Pa. Cmwlth. 2002); *UMCO Energy, Inc. v. DEP*, 2007 EHB 215, 220. In a true emergency, there simply is not enough time to comply with all of the other time-consuming procedures and requirements set forth in Chapter 105. Perhaps another way of looking at it is that, in an emergency, it goes without saying that the benefits of the work necessary to alleviate the emergency obviously outweigh the harms.

We find that the Petitioners are unlikely to succeed on the merits of their argument that the Official Notice Letter was issued in error on the alleged ground that all of the Chapter 105

permitting regulations must be applied to emergency permits. However, we would like to believe that, just because DEP is not *required* to apply all of Chapter 105, it will not be anxious to ignore the values expressed in those regulations. *See* 25 Pa. Code § 105.64(b) (emergency permits may include special conditions). For example, the work in this case is to be performed in an extremely important watershed. Adverse impacts in such watersheds must be minimized. There is still room for plenty of discretion in fashioning the terms of an emergency permit, and that discretion must not be abused.

**d. The Prerequisites for an Emergency Permit**

The Petitioners argue that DEP issued the Official Notice Letter in error because emergency permits may only be issued if the Department finds that "immediate remedial action is necessary to alleviate an imminent threat to life, property or the environment," 25 Pa. Code § 105.64(4), and this regulatory standard cannot be met in this case. The regulatory standard incorporates several constituent requirements. Only "remedial action" may be permitted. The remedial action must be "necessary." It must "alleviate" a "threat to life, property or the environment" that is "imminent." In short, emergency permits should be limited to true emergencies.

The Chapter 105 regulations establishing a permit review process are there for a reason. It is important to be vigilant in guarding against abuse of loopholes to those regulations. They should not be more readily available in cases where the Commonwealth itself needs a permit (*see, e.g.,* in addition to the instant appeal, *Felix Dam Preservation Ass'n v. DEP*, 2000 EHB 409).[3] It is neither appropriate nor fair for the Commonwealth to require everyone to comply with detailed permitting requirements except itself. The Commonwealth is not above the law.

[3] It is interesting that DEP issued an emergency permit to itself in *Felix Dam*, but when that permit expired before work commenced, and apparently in light of public concern regarding the project, it turned out that an emergency permit was not required after all. *Id.*, 2000 EHB at 430.

*Columbia Gas Transmission Corp. v. DEP*, 2003 EHB 676, 689; *PUSH v. DER*, 1996 EHB 1623, 1627.

Furthermore, the Commonwealth by the liberal use of emergency permits should be careful not to signal permit applicants that it is acceptable to manufacture their own "emergency." It may not be appropriate for example, for the owner of an encroachment to stand idly by while its asset is damaged in 2002, gradually gets worse over the years, and eventually becomes an "emergency" six years later. Of course, if there is an emergency, there is an emergency, even if it resulted from negligence or inattention.

Because emergency permits allow applicants to skirt otherwise applicable regulatory review procedures, because they could easily be subject to abuse, because they allow for the segmentation of projects that are better addressed holistically, and because by definition they should be considered the exception not the rule, such permits should be narrowly tailored to eliminating the emergency that justifies their issuance. The regulatory language itself refers to only "that immediate remedial action" that is necessary to alleviate the imminent threat. 25 Pa. Code § 105.64. Only "remedial" work may be permitted. The fact that the permit is presumed to expire in 30 days from its effective date further demonstrates that only emergency work should be permitted. An emergency permit should not be used to unnecessarily or prematurely permit aspects of a project that go beyond the emergency condition.

The threat in this case is the collapse of the Bridge. If the Bridge suddenly collapses while someone is on or under it, the person could be injured or die. The Bridge could fall into the stream causing immediate harm to the stream and continuing harm from instream removal efforts that could have been minimized with a controlled removal planned and implemented in advance. Debris in the stream resulting from a Bridge failure could cause flooding and

downstream damage. Collapse would make it difficult to salvage the existing trusses on the Bridge for use in a replacement bridge. The trusses are said to be one of the more historically significant aspects of the Bridge.

There is undoubtedly a threat, but it is difficult to predict whether the threat is imminent. Importantly, none of the Commonwealth's experts were willing to testify even in response to very direct questions that the Bridge is likely to fall down within the 30-day period mandated by our supersedeas Orders. The engineers consistently testified that the Bridge could last days *or years*. We cannot resist observing that it seems odd that a bridge that sustained most of its damage in 2002 is suddenly in danger of imminent collapse in 2008. There obviously has been continuing deterioration caused by the ravages of time and the elements, but PennDOT does not point to any particular event that has suddenly made the situation urgent. PennDOT's case might be more accurately characterized as an increased awareness and realization of a hazard that has actually been in place for some time. There is evidence in the record that might support a finding that PennDOT's sudden need to demolish the Bridge is at least partly driven by its frustration in negotiating endlessly with the Township and other interested parties regarding the particulars of a replacement bridge.

There are other factors and signs that suggest to us that the 30 days following our temporary supersedeas order are not critical. Of course, the permit can be issued at any time. Lining up contractors and other preparatory work is not precluded by our Order. Furthermore, DEP was obviously willing to wait 30 days when it issued the Official Notice Letter, and it delayed the originally scheduled supersedeas hearing because one of its witnesses was not available.

Although the evidence does not support a finding that the Bridge is about to collapse within 30 days of our temporary supersedeas order, we are nevertheless inclined to believe that the regulatory prerequisite of an "imminent" threat has been met. One seasoned and qualified expert engineer for the Commonwealth testified that the Bridge is in the worst condition of any bridge that he has inspected in his entire career. Another expert testified that he cannot explain why the Bridge is still standing. All three of the Commonwealth's experts, although unable to pinpoint a date, were willing to testify that the Bridge presents an imminent threat from an engineering perspective. The experts are particularly concerned that a flood would bring the Bridge down.

The last question that needs to be answered under 25 Pa. Code § 105.64 is: What "immediate remedial action is necessary" to alleviate the threat of an imminent Bridge collapse? PennDOT's design consultant, Alfred Benesch & Company, did not recommend complete demolition of the Bridge. Rather, it recommended a bridge inspection. PennDOT commissioned a certified inspector from DMJM Harris to perform a limited inspection on January 28, 2008. DMJM expressed concern that the Bridge remained open to pedestrian traffic. That situation has been partially, if perhaps not perfectly, addressed. DMJM did not unqualifiedly recommend immediate demolition. Rather, it concluded that "unless the Department [PennDOT] performs repairs to the left truss and/or a detailed analysis it is recommended that the bridge be demolished."

In response to DMJM's report, PennDOT decided upon a complete demolition of the structure. There was no alternatives analysis. There is no record of any serious consideration of "repairs and/or a detailed analysis." It was quite apparent from the witnesses' testimony at the hearing that neither PennDOT nor DEP gave any thought to possible stop-gap measures to shore

up the Bridge during a permit review. Rather, the engineers apparently (and understandably) thought that it would be a complete waste of time and money to perform interim repairs on a bridge that was about to be destroyed anyway. DEP's engineer seemed to take a somewhat deferential view of the matter, repeatedly testifying that PennDOT was "taking the lead" on this project. This is cause for some concern because the fundamental purpose of the Chapter 105 permitting requirements is to ensure that DEP conducts an *independent* review, even when a sister state agency is the permittee. Among other things, DEP's regulations require it to ensure that only necessary remedial work is permitted pursuant to emergency procedures. PennDOT has no incentive aside from the Chapter 105 regulations to consider interim measures.

Nevertheless, we must take the record as we find it, and all three Commonwealth engineers were unwilling to endorse any possible alternatives that would alleviate the imminent threat short of demolition. They were consistent in their belief that no repairs are advisable or even possible. While we are not entirely sure these opinions are based on a complete study, the Petitioners bear the burden of proof and they have not convinced us that they are ultimately likely to succeed in demonstrating that there are interim measures capable of alleviating the imminent threat less draconian than Bridge removal. The Petitioners' expert engineer's opinions were based in part on a computer model that he did not himself run, that did not appear to have been properly applied to the facts, and that was shown to have produced results that did not comport with field conditions. *Cf. M&M Stone Co. v. DEP*, EHB Docket No. 2005-343-L, slip op. at 43 (Adjudication, January 31, 2008) (expert opinion based upon modeling is more credible when it squares well with actual conditions). He also was rather imprecise in describing the "minor repairs" that he believed could be performed to the Bridge to "provide a level of comfort."

The Commonwealth asserts that one of the most alarming scenarios presented by the current condition of the Bridge is one where it collapses while someone is one, near, or under it. The Petitioners respond that this threat can be eliminated by erecting barriers to pedestrian access. Of course, such barriers would not protect anyone proximate to, but not on, the Bridge when it collapsed. Furthermore, common experience suggests and the Commonwealth's experts testified that determined pedestrians often ignore even the most impressive attempts to deny them access. More importantly, barriers do nothing to reduce the other threats posed by a collapse discussed above.

The Petitioners' engineer suggested that removing the macadam from the bridge deck would reduce the load on the Bridge by thousands of pounds. The macadam must be removed as part of the Bridge demolition, so removing it is said to not be a waste of money. The Petitioners also presented the testimony of a contractor who stated that his company could remove the asphalt gingerly in such a way as to not damage the structure.

The Township's engineer did not clearly opine that the macadam could be removed without endangering the Bridge. The Commonwealth's experts expressed great skepticism that the macadam could be removed safely and that such removal would alleviate the threat of an imminent collapse. We are not convinced that the Petitioners' macadam-removal proposal is reliable and safe enough to put the remainder of the demolition on hold. Furthermore, if the Bridge is dangerous to pedestrians in its current condition, we wonder whether removing the macadam and exposing the ancient wood deck would be prudent.

In short, it appears that the danger of a bridge collapse is real, and that the danger satisfies the regulatory standard of being imminent. The threat of harm during the period when a full-blown Chapter 105 permit review would proceed cannot be materially reduced by

emergency repairs or other interim measures. Based upon the current record, the Petitioners are unlikely to prevail on the merits of proving that DEP erred in using emergency permitting procedures, so long as the effective date is adjusted in accordance with this Opinion and Order.

**Balancing of Harms Associated with a Supersedeas**

It is important to remember that we are only superseding part of the Official Notice Letter. This appeal from the issuance of the Official Notice Letter is not so much a case about the destruction of the Bridge as it is about its destruction pursuant to the truncated review afforded by the emergency permit procedures. The fact that our review is limited at this point to the Official Notice Letter all but precludes us from issuing a supersedeas that does anything more than correct DEP's procedural error. It is the harm caused by the procedural short-circuiting that demands our attention at this point. We are not in a position to supersede an emergency permit that has not yet been appealed. The pertinent harms to be analyzed are the harms associated with the issuance or denial of a supersedeas of the Notice Letter, not a forthcoming permit. The fate of the Bridge during the pendency of a supersedeas, however, comes into play indirectly to the extent that our action postpones the fate of the Bridge. Specifically, the effect of our Order is to delay the effective date of a permit by 30 days from the issuance of our amended temporary supersedeas order. It is that 30-day period that must be the focus of our analysis.

The law regarding municipal notice virtually compels a supersedeas to allow for proper notice to the Township. The harm attendant to lack of proper notice is eliminated by superseding that part of the Official Notice Letter that established an unlawful effective date. For the reasons discussed above, within the 30-day period that began with our amended temporary supersedeas order, we do not find that there is a likelihood of injury to the public.

Beyond that 30-day period, the potential harm to the Petitioners in the absence of a supersedeas becomes much more speculative and removed from the Official Notice Letter itself. The longer-term harm to the Petitioners that was threatened had we not issued a supersedeas (and the Bridge was immediately demolished as a result) would have been a loss of the aesthetic and historical benefits of the Bridge without the project having been subjected to a full review under Chapter 105.

Sadly, there is no real dispute that the Bridge is beyond permanent rehabilitation. The Bridge will be lost and there is no way to prevent that. It is also undisputed that bridge demolition will result in the loss of an important historic resource. The Petitioners' concern is that the emergency permitting procedures do not allow for a harms-benefits analysis or prohibit adverse effects on a high quality watershed. Had those provisions been brought to bear, the Petitioners believe they might have a better chance of convincing the Commonwealth that the loss of the historical resource must be mitigated by replacing it with a new bridge that minimizes the loss of the original bridge and contributes to or at least does not detract from the historic district. By segmenting the project into demolition and replacement, it is unclear how DEP will balance harms and benefits in a future permit potentially limited to the design and merits of the replacement bridge.

We need not assume, however, that DEP will ignore historical issues when it considers a permit application for a new bridge. The fact that the old bridge will have been demolished by then does not mean that DEP has no obligation under the regulations to consider the adverse impact of an anachronistic replacement bridge in the midst of an important historic district on an Exceptional Value, Wild and Scenic stream. In fact, PennDOT has already demonstrated a sensitivity to historical issues in connection with the new bridge and we expect that sensitivity

will continue. DEP's issuance of a permit that does not consider applicable criteria will of course be subject to this Board's review if an appeal is filed.

In consideration of all of these factors as discussed above, we issue the Order that follows.

**COMMONWEALTH OF PENNSYLVANIA**
**ENVIRONMENTAL HEARING BOARD**

| | | |
|---|---|---|
| **TINICUM TOWNSHIP, THE INSTITUTE FOR COMMUNITY PRESERVATION and BRUCE WALLACE** | : | |
| **v.** | : | **EHB Docket No. 2008-084-L** |
| | : | **(Consolidated with 2008-085-L)** |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and PENNSYLVANIA DEPARTMENT OF TRANSPORTATION (PennDOT), Permittee** | : | |

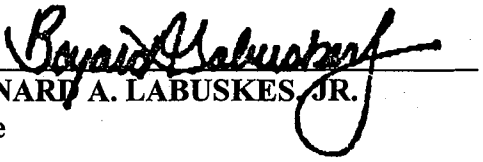
## ORDER

AND NOW, this 21st day of April, 2008, it is hereby ordered that the DEP's Official Notice Letter of March 4, 2008 is hereby superseded as follows:

1. DEP was free to issue an emergency permit at any time after April 8, 2008.
2. PennDOT is required to notify the Township of the issuance of an emergency permit in accordance with 71 P.S. § 510-5(b)(4).
3. The effective date of an emergency permit (i.e. the date on which PennDOT may actually begin demolition pursuant to the permit) may not be any sooner than 30 days after PennDOT gives the Township notice in accordance with the preceding paragraph. 25 Pa. Code § 105.64(4).
4. Unless extended by DEP, the permit will expire 30 days after its *effective* date, not the date of its issuance.

The petitions for supersedeas are in all other respects denied.

**ENVIRONMENTAL HEARING BOARD**



**BERNARD A. LABUSKES, JR.**
**Judge**

**DATED: April 21, 2008**

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

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| | | |
|---|---|---|
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION** | : | |
| **v.** | : | **EHB Docket No. 2007-125-CP-L** |
| **JOHN P. PECORA, JAMES D. PECORA, ANN PECORA GREGO, ELIZABETH PECORA, JAY J. PECORA AND PHILIP A. PECORA, Defendants** | : | **Issued: May 1, 2008** |

# ADJUDICATION

**By Bernard A. Labuskes, Jr., Judge**

**Synopsis:**

The Board assesses a civil penalty of $113,538.97 for the Defendants' intentional violations of the Clean Streams Law and Dam Safety and Encroachments Act, which resulted in severe damage to an Exceptional Value wild trout streams and its tributaries.

**Background**

Ten years ago, the Department of Environmental Protection (the "Department") first inspected property in Bradford Township, McKean County (the "Site") owned, operated, and occupied by the Defendants Philip A. Pecora ("Pecora"), John P. Pecora, James D. Pecora, Ann Pecora, Greg Pecora, Elizabeth Pecora, and Jay J. Pecora (the "Pecoras") and documented unpermitted, unplanned, uncontrolled earth disturbance activities and stream encroachments. The Department issued a Notice of Violation ("NOV") to Pecora in August 1998 and its

enforcement efforts have continued essentially unabated ever since.

From 1998 through 2005, The Department issued multiple inspection reports and NOVs to Pecora. On February 3, 2005, the Department issued an administrative order to the Pecoras for violations of the Clean Streams Law, 35 P.S. § 691.1 *et seq.*, and the Dam Safety and Encroachments Act, 32 P.S. § 693.1 *et seq*. The order cited the Pecoras for performing extensive uncontrolled and unpermitted excavation and grading activities on the Site. The work encroached into Minard Run, an Exceptional Value stream that has also been designated as a wild trout stream. The activities resulted in severe damage to the stream, including disfigurement of the stream channel itself. The order required the Pecoras to restore the Site. The Pecoras did not appeal the order. As a result, all of their violations as documented in that order are now long past dispute.

When the Pecoras did not comply with the order, the Department filed a petition to enforce it in Commonwealth Court. The action was settled with a consent decree between Pecora and the Department on June 29, 2005. The Department reserved the right in the consent decree to seek civil penalties from the Pecoras "for non-compliance with the Department's February 3, 2005 Order and the violations set forth in the Department's Order." The Department filed a complaint for civil penalties with this Board on April 10, 2006 requesting a civil penalty for the Pecoras' failure to timely comply with the Order. Although the Pecoras filed an answer to the complaint, they eventually stopped defending themselves in that action. They did not attend the hearing. We issued our Adjudication on October 4, 2007. *DEP v. Pecora,* 2007 EHB 545 ("*Pecora I*"). We assessed a penalty of $18,500 for the Pecoras' delay in compliance with the February 3, 2005 Order. The Commonwealth Court affirmed our Adjudication. *Pecora v. EHB,* No. 2036 C.D. 2007 (Pa. Cmwlth. March 18, 2008) (unreported).

Meanwhile, in June 2006, a Department employee saw from the highway that Pecora was again engaged in extensive earth disturbance activities on the Site. The activities were polluting Minard Run. The Department conducted a full inspection and recorded videotape pursuant to a search warrant on July 12, 2006. As discussed in greater detail below, the inspection revealed numerous and extensive unpermitted activities covering more than five acres.

On July 26, 2006, the Department filed a motion for preliminary injunction and a complaint in equity for injunctive relief with the Commonwealth Court to enjoin the Pecoras from further conducting earth disturbance activities and maintaining unauthorized encroachments and water obstructions on the Site. On August 24, 2006, the Commonwealth Court issued a preliminary injunction enjoining the Pecoras from conducting any new earth disturbance activities without first obtaining a permit from the Department. On April 11, 2007, the Commonwealth Court issued an order in which it converted its preliminary injunction into a permanent injunction. Pecora has been permanently enjoined from conducting any new earth disturbance activities without first obtaining a permit from the Department, save for those activities necessary to comply with the Court's order, which compelled restoration throughout the Site.

Which brings us to the current action. The Department filed its complaint for civil penalties in this matter on May 11, 2007. When the Pecoras did not answer the complaint, the Department moved for entry of a default adjudication. The Pecoras did not oppose the motion. We granted the Department's motion. *DEP v. Pecora*, EHB Docket No. 2007-125-CP-L (Opinion and Order, September 28, 2007). We deemed all relevant facts admitted pursuant to 25 Pa. Code § 1021.74 and we precluded the Pecoras from contesting liability pursuant to 25 Pa. Code § 1021.161. We scheduled a hearing to receive evidence regarding the amount of civil

penalties to be assessed, which we held on February 7, 2008. The Pecoras did not attend. Although Pecora moved for and received an extension of the deadline for filing a post-hearing brief, he never filed a brief.

## FINDINGS OF FACT

### 1. Facts Deemed Admitted

1. 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"); the Dam Safety and Encroachments Act, Act of November 26, 1978, P.L. 1375, *as amended*, 32 P.S. §§ 693.1-693.27 ("Dam Safety Act"); Section 1917-A of the Administrative Code, Act of April 9, 1929, P.L. 177, *as amended*, 71 P.S. § 510-17; and the rules and regulations promulgated thereunder. (Complaint ¶ 1.)

2. The Pecoras own the Site. (Complaint ¶ 5.)

3. Pecora occupies and maintains a residence at the Site. (Complaint ¶ 6.)

4. Minard Run flows through the Site and has been designated as an Exceptional Value water pursuant to 25 Pa. Code § 93.46. (Complaint ¶ 7.)

5. On June 16, 2004, the Department met with Pecora at the Site and observed that the stream channel and floodway of Minard Run had been excavated and graded without a permit from the Department and that earth disturbance activities at the Site had caused soil and sediment to enter Minard Run and a tributary to Minard Run. (Complaint ¶ 8.) The Department issued an NOV to Pecora. (Complaint ¶ 9.)

6. On December 9, 2004, the Department again inspected the Site and observed additional excavation and grading of the stream channel and floodway of Minard Run. This new disturbance had again been done without a permit from the Department and the continuing lack

of erosion and sedimentation controls caused more soil and sediment to enter Minard Run and a tributary to Minard Run. In addition, the Department observed that new earth disturbance activities had been conducted on approximately two additional acres of the Site along Minard Run and a tributary to Minard Run creating potential pollution to waters of the Commonwealth. (Complaint ¶ 10.)

7. The February 3, 2005 Order directed the Pecoras to immediately cease all earth disturbance activity and restore the Site. (Complaint ¶ 11.)

8. The Pecoras did not appeal the Order or comply with it. (Complaint ¶ 12.)

9. On June 21, 2006, the Department observed that Pecora was again excavating and grading at the Site without erosion and sediment controls in place, and was causing soil and sediment to discharge into Minard Run and its tributaries. (Complaint ¶ 17.)

10. On July 12, 2006, the Department executed a search warrant and conducted an inspection of the Site. (Complaint ¶ 19.)

11. A tributary to Minard Run located along the western boundary of the Site (hereinafter referred to as the "Western Tributary") had been disturbed by excavating and/or grading activities beginning near the southern end of Fuller Road and extending approximately 1,000 feet upstream in and around the Western Tributary. (Complaint ¶ 20.)

12. A steel pipe culvert approximately 20 feet in length had been installed in the bed of the Western Tributary, approximately 625 feet upstream of the southern end of Fuller Road, and was covered with bare earth that was eroding downstream into the Western Tributary. (Complaint ¶ 21.)

13. A rock dam approximately 6 to 8 feet high had been installed across the Western Tributary approximately 875 feet upstream of the southern end of Fuller Road and had resulted

in erosion and scouring of the Western Tributary downstream. (Complaint ¶ 22.)

14. An earth embankment dam approximately 10 feet high with a corrugated metal pipe culvert had been installed across the Western Tributary approximately 975 feet upstream of the southern end of Fuller Road and had resulted in erosion and scouring of the Western Tributary downstream. (Complaint ¶ 23.)

15. Approximately five acres of excavation and/or grading had occurred in an area immediately south of the residence located on the Site, including the grading of two drainage swales that remained without vegetation. (Complaint ¶ 24.)

16. Approximately 0.6 acres of excavation and/or grading had occurred in an area located along the southern tree line on the Pecora Property, including the grading of two drainage swales that remained without vegetation. (Complaint ¶ 25.)

17. Approximately three acres of excavation and/or grading had occurred in an area along the western bank of a tributary to Minard Run located along the Eastern boundary of the Pecora Property (hereinafter referred to as the "Eastern Tributary"), resulting in the deposition of sediments into the Eastern Tributary. (Complaint ¶ 26.)

18. A series of connected ponds had been excavated in the northcentral portion of the Site and the areas around the ponds had been recently graded and left without vegetation. (Complaint ¶ 27.)

19. A pipe had been constructed in the western-most point and extended to discharge into Minard Run, and the pipe permitting sediment-clouded water and sediment to be discharged and deposited directly to Minard Run. (Complaint ¶ 28.)

20. An area approximately 30 feet by 265 feet had been graded along the bank of Minard Run east of the outlet of the discharge pipe that was within 50 feet of the top of the bank

of Minard Run. (Complaint ¶ 29.)

21. Approximately 1.6 acres of grading had occurred in an area north of the barn located near the western boundary of the Site resulting in two small ponds, and areas of bare or sparsely vegetated earth. (Complaint ¶ 30.)

22. The grading in the area north of the barn on the Site directed water from the Site onto an adjoining neighbor's property and also caused sediments to be discharged to a ditch located north of the barn along the western boundary of the Site that empties into Minard Run (the "North Ditch"). (Complaint ¶ 31.)

23. Other areas of excavation and/or grading were present on the Site that remained without vegetation or sparsely vegetated. (Complaint ¶ 32.)

24. No erosion or sediment control measures were installed or implemented at the Site to prevent erosion, sedimentation, or runoff from the excavation or grading activities described above. (Complaint ¶ 33.)

25. The total area of excavating and grading at the Site without erosion and sediment controls in place was more than five acres. (Complaint ¶ 34.)

26. The excavating and grading of the Site was performed by or at the direction of Pecora. (Complaint ¶ 35.)

27. Pecora did not use sufficient Best Management Practices ("BMPs") to minimize the potential for accelerated erosion and sedimentation from earth disturbance activities at the Site. (Complaint ¶ 49.)

28. Pecora did not develop an erosion and sediment control plan for his earth disturbance activities at the Site. (Complaint ¶ 48.)

29. Pecora did not use "Special Protection Best Management Practices" to maintain

and protect the Exceptional Value Minard Run from degradation. (Complaint ¶ 49.)

30. Neither Pecora nor any other person or entity acting on his behalf had a permit or any other authorization from the Department to perform Earth Disturbance Activities at the Site or discharge sediment into Minard Run, the Eastern Tributary, or the Western Tributary. (Complaint ¶ 52.)

31. As a result of the Earth Disturbance Activities at the Site, Pecora allowed sediment to be discharged from the Site into Minard Run, the Eastern Tributary, and the Western Tributary resulting in pollution and creating the danger of further pollution of the waters of the Commonwealth. (Complaint ¶ 53.)

32. Pecora did not obtain an NPDES Permit for Stormwater Discharges Associated with Construction Activities for the Pecora Property. (Complaint ¶ 58.)

33. Pecora did not have a permit or any other authorization from the Department to construct, operate, or maintain the water obstructions and encroachments that he installed or implemented on the Site. (Complaint ¶¶ 66-69.)

**2. Additional Facts Taken From *Pecora I***

34. Pecora's activities prior to the consent decree caused severe damage to the Exceptional Value stream. (*Pecora I*, 2007 EHB at 549.)

35. Pecora's activities prior to the consent decree changed what had been a well-defined, narrow, deep stream channel, into one with wide, shallow, ill-drained side banks and in-stream gravel bars. This increased the temperature of the water and added a significant sediment load to the stream. The activities destroyed habitat and otherwise compromised the ability of the stream to function as a wild trout stream of exceptional value. (*Pecora I*, 2007 EHB at 549.)

36. Pecora's failure to comply with the Department's February 3, 2005 order prior to

the Commonwealth Court action was intentional. (*Id.* at 550.)

37. Pecora complied with the consent decree by September 29, 2005.

38. Pecora's delay in compliance with the February 3, 2005 Order resulted in continuing damage to the waters of the Commonwealth. (*Id.* at 550-51.)

39. Photographs from a June 2005 inspection revealed a large area of denuded landscape that continued to cause excess sedimentation of Minard Run, which itself remained in its disfigured condition. (*Id.* at 551.)

**3. Additional Findings From The Hearing in this Case**

40. In this case as in *Pecora I*, Pecora received copies of the Board's Orders, including the Order scheduling the hearing, but he made it clear to the Baord's staff that he would not be participating in the proceedings. Pecora did indicate after the hearing that he intended to file a post-hearing brief and requested an extension of time within which to do so, which we granted. Pecora, however, never filed such a brief.

41. At least some of Pecora's earthmoving activities serve no obvious purpose. (Notes of Transcript Page ("T.") 33; DEP Exhibit No. ("Ex.") 1-4.)

42. The Minard Run basin spans approximately ten square miles south of Bradford, Pennsylvania and runs into the east branch of the Tunungwant Creek. (T. 39.)

43. Of the 17,000 miles of flowing water in the 56 counties of northern Pennsylvania, only 385 miles of water, or approximately 2 percent of streams regionally and 4 percent of streams statewide are designated Exceptional Value waters. (T. 40.)

44. The Pennsylvania Fish and Boat Commission has designated Minard Run as a wild trout stream. It sustains a naturally reproducing population of wild trout. (T. 40.)

45. The July 12, 2006 inspection revealed that the extensive areas of uncontrolled,

exposed soils on the Site were polluting the streams with excessive sedimentation that was very visible to the naked eye. (T. 18-20, 42; Ex. 4.)

46. The channel of the Western Tributary was dredged. (T. 42; Ex. 4.)

47. The stream channel of Minard Run had been widened and made more shallow. (T. 42-43.)

48. The topography of the Site, from the southern portion of the Site going east, facing north toward Minard Run, is comprised first of steep hillsides and then the flat valley floor. Water flows from above and drops its sediment load in the valley of the Site. (T. 27-28; Ex. 4.)

49. An airport runway was constructed on the Site. The area around the runway indicated that the area was recently disturbed, with evidence of bulldozer tracks. (T. 25; Ex. 4.)

50. Several sediment basins were constructed in the Western Tributary and were filled with muddy water. (Ex. 4.)

51. The sediment basins were tiered with small pipes and dam systems. (Ex. 4.)

52. A stream is comprised of substrates, like gravel, cobbles, boulders, and sand and silt. Sand and silt are a natural part of an ecosystem. (T. 41.)

53. Sediment pollution occurs when excessive sediment enters a stream. Sediment pollution manifests itself as very muddy or chocolate brown water, as highly eroded stream banks, as the movement of sediment through a stream, as large amounts of sand and silt deposits in slower moving areas of streams, and as the layering of sand and silt particles on top of gravel and cobble substrates. (T. 41-42.)

54. Excessive sedimentation is hazardous to stream health and may be ascertained by examining the physical habitat, the streambed, and biological factors, like aquatic

macroinvertebrates. (T. 45.)

55. Rain events resulted in a piling-on of silt and sand deposits in both Minard Run and the Western Tributary. (T. 42, 43.)

56. Crevices in the gravel and cobble substrates are filled with these deposits, resulting in embeddedness. Embeddedness is the process by which sediments compact into gravel cobble substrate and cement together in the stream channel, rendering it difficult or impossible to remove rocks from the stream. (T. 45.)

57. Aquatic macroinvertebrates reside in the interstitial spaces of the gravel and cobbles so where embeddedness is present, marcoinvertebrates habitat is removed. (T. 45-46.)

58. Fewer macroinvertebrates result in the depletion of a food source for fish. (T. 46.)

59. Excessive sedimentation is also detrimental to fish populations in that it suffocates fish eggs, which require a lot of oxygen. Trout lay eggs in the same depositional erosion areas where sediment collects. After several rain events, the accumulation of sediment suffocates the eggs. (T. 46.)

60. Excessive sedimentation also hurts fish directly. Sand and silt particles enter fish gills causing abrasions and sores, which opens them up to infection and parasites that enter the sores. (T. 46-47.)

61. A stream channel that is widened and shallowed makes a stream warmer. Trout are vulnerable to warmer water. (T. 42-43.)

62. The extent of damage from the earthmoving activity at the Site is significant. (T. 44; Ex. 1.)

63. There were no erosion or sediment control measures at the Site to prevent erosion,

sedimentation or runoff from the excavation and grading activities. (T. 13, 21, 44; Ex. 4.)

64. Pecora's illegal conduct caused severe sediment pollution to the Western Tributary and Minard Run and destroyed any aquatic habitat used by the macroinvertebrate population. (T. 41-47.)

65. The condition of the Site as a result of Pecora's illegal conduct significantly impacted Minard Run's ability to continue to produce wild trout. (T. 40, 45-47, 60.)

66. Pecora knowingly and intentionally violated the law.

67. The Department incurred $37,538.97 in enforcement costs in attempting to obtain compliance from Pecora since June 21, 2006. (T. 50-52; Ex. 7.)

68. The Department conducted a stream assessment on August 3, 2006 and determined that excessive sediment pollution from the Site had entered the stream for at least the 22 days between the July 12 inspection and the August 3 assessment. (Ex. 9.)

69. Very large amounts of sediment piled up at a beaver dam downstream from the Site. (T. 44.)

70. The Pecoras saved approximately $7,500 by not obtaining a permit and an approved E&S plan. (Ex. 7.)

## DISCUSSION

As with our Adjudication in *Pecora I,* the only remaining issue that we need to address at this point is the amount of the civil penalty to be assessed. The Dam Safety and Encroachments Act provides for a maximum $10,000 penalty, plus $500 for each day of continued violations. 32 P.S. § 693.21(a)(3); *DEP v. Carbro Construction Corporation*, 1997 EHB 1204, 1228. In the case of the Clean Streams Law, the Board may assess a maximum civil penalty of $10,000 per day for each violation. 35 P.S. § 691.605; *DEP v. Angino*, 2007 EHB 175, 202. We consider

similar factors in determining a penalty amount under both laws. Under the Encroachments Act, the Board is to consider the willfulness of the violation, damage or injury to the stream regimen and downstream areas of the Commonwealth, cost of restoration, the cost to the Commonwealth of enforcing the provisions of the act against the violator, and other relevant factors. 32 P.S. § 693.21(a)(3). We recently had this to say regarding the assessment of civil penalties under the Clean Streams Law:

> In determining the penalty amount, the Board is to consider the willfulness of the violations, damage or injury to the waters of the Commonwealth or their uses, costs of restoration, and other relevant factors. *DEP v. Strubinger,* EHB Docket No. 2004-120-CP-C, slip op. at 15-16 (Adjudication October 4, 2006). The deterrent value of the penalty is also a relevant factor. *Westinghouse v. DEP*, 745 A.2d 1277, 1280-81 (Pa. Cmwlth. 2000); *Leeward,* 2001 EHB at 886; *DEP v. Whitemarsh Disposal Corporation*, 2000 EHB 300, 346.

*DEP v. Angino*, 2007 EHB 2002.

The Board's role in a complaint for civil penalties is to make an independent determination of the appropriate penalty amount. The Department may suggest an amount in the complaint but the suggestion is purely advisory. *Id.*, 2007 EHB at 2003; *DEP v. Leeward Construction, Inc.,* 2001 EHB 870, 885. The guidance the Department uses in determining a suggested civil penalty is not binding on the Board. *United Refining Company v. DEP*, 2006 EHB 846, 849-50; *Dauphin Meadows v. DEP,* 2001 EHB 521. In fact,

> this Board must be wary of placing too much emphasis on the Department's internal guidance documents. We do not view it as our responsibility to evaluate whether the Department has followed its own guidance document in calculating a *suggested* penalty in a complaint action. Rather, our responsibility is to assess a penalty based upon applicable statutory maxima and criteria, regulatory criteria (if any), and Board precedent. *DEP v. Hostetler,* EHB Docket No. 2005-011-CP-K. (Adjudication June 8, 2006); *Leeward,* 2001 EHB at 908, 913.

*DEP v. Kennedy,* 2007 EHB 15, 26.

We have often stated that deterrence is a major factor in determining an appropriate civil penalty. We discussed the value of deterrence in *DEP v. Leeward Construction,* 2001 EHB 870:

> We consider the deterrence value of the penalty to be very important in this matter. Leeward continues to be engaged in large earthmoving projects, but more generally, all such contractors must understand the importance of not only installing but maintaining adequate controls. It is only natural to discount the importance of controls. They seem collateral to the primary mission of a project, which is to prepare a site for new buildings, roads or other development. They do not advance the primary objective, and in fact, can be something of a distraction. Owners will be quick to complain if a building pad is not ready on time, but perhaps not so concerned if a settling basin does not work. A construction project is necessarily a muddy affair. The effects of the construction activity itself appear to be relatively short-lived. Despite these considerations, E&S controls are not a nuisance item to be installed as an appeasement to the regulators and then forgotten. They are critically important in preventing pollution of the waters of the Commonwealth. They must command the utmost attention and care for the life of the project or the streams of the Commonwealth are bound to continue to suffer where there is development. The penalty assessed must be large enough to counteract the natural tendency to minimize their importance, and it must be reflective of the economics of large projects.

2001 EHB at 870, 890. *See also Angino,* 2007 EHB at 209 (deterrence appropriate where defendant has extensive plans for property); *DEP v. Hostetler*, 2006 EHB 359, 365 (Board assessing civil penalty to deter defendant from acting in the same manner again in the future); *DEP v. Breslin*, 2006 EHB 130 (deterrence appropriate in light of defendant's checkered compliance history).

When we assess a civil penalty for water pollution, we consider such factors as the actual and potential harm to the stream and its inhabitants, the size of the disturbed area, the magnitude and duration of the discharge, the classification and condition of the stream, and the degree to which the discharge exceeded permit limits. *Angino*, 2007 EHB at 193. With regard to the factor of willfulness, we have defined the various levels of culpability as follows:

> An intentional or deliberate violation of law constitutes the highest degree of willfulness and is characterized by a conscious choice on the part of the violator to engage in certain conduct with knowledge that a violation will result. Recklessness is demonstrated by a conscious disregard of the fact that one's conduct may result in a violation of the law. Negligent conduct is conduct which results in a violation which reasonably could have been foreseen and prevented through the exercise of reasonable care.

*Id.* (quoting *DEP v. Whitemarsh Disposal Corporation*, 2000 EHB 300, 349).

As previously noted, we assessed a penalty of $18,500 against the Pecoras in *Pecora I* for their delay in compliance. In our adjudication in *DEP v. Strubinger,* 2006 EHB 740, we assessed the amount of the penalty requested by the Department, $9,110, for conduct somewhat akin to the Pecoras' but on a much smaller scale on a site with a stream of much lower quality than Minard Run and its tributaries. In *DEP v. Hostetler,* 2006 EHB 359, we assessed a $20,500 civil penalty for Hostetler's failure to implement erosion and sediment controls while harvesting timber, which resulted in damage to a high quality stream and the springs leading to it. In *DEP v. Kennedy,* 2007 EHB 15 and *DEP v. Breslin*, 2006 EHB 130, we assessed civil penalties of $35,000 and $25,000 respectively for the defendants' failures to submit discharge monitoring reports for their sewage treatment plants. Although these penalties were for reporting violations, they reflected the length of the violations and the defendants' willfulness and intent to violate the law. In *Angino*, we assessed a penalty of $21,000 for conduct not as severe or contumacious as that at issue here.

The violations in this case are not disputed. The Department's complaint contains three counts: Count I is a request for penalties for conducting earth disturbance activities without implementing adequate erosion and sedimentation controls including special protection best management practices without a control plan and without a permit, all of which resulted in

pollution and a continuing danger of pollution of Exceptional Value streams in violation of Sections 307, 401, and 402 of the Clean Streams Law, 35 P.S. §§ 691.307, 401 and 402; Count II is a request that penalties be assessed for conducting earth disturbance activities requiring an NPDES Permit for Stormwater Discharges Associated with Construction Activities in violation of Section 611 of the Clean Streams Law, 35 P.S. § 691.611; and Count III is a request that we assess penalties for constructing water obstructions and encroachments without a permit in violation of sections 6 and 18 of the Encroachments Act, 32 P.S. 693.6 and 693.18.

Each day of each continuous violation of the Clean Streams Law and the Encroachments Act constitutes a separate violation for penalty purposes. 35 P.S. § 691.605, 32 P.S. § 693.21. The Department has asked for penalties based upon 22 days of violations. The Department has suggested a penalty of $113,538.97, which it arrived at as follows:

| | |
|---|---|
| E&S violations | |
| No BMPs | $10,000 |
| No NPDES permit | $10,000 |
| Pollution event | $ 5,000 |
| Potential for pollution | $ 2,500 |
| Adjustment for intentional conduct (40%) | $11,000 |
| | $38,500 |
| Encroachment violations | |
| No permit | $ 8,000 |
| Environmental damage (22 days x $1,000) | $22,000 |
| Cost savings to Pecora | $ 7,500 |
| DEP enforcement costs | $37,538.97 |

(Ex. 7-9.)

Although we are, of course, not bound by the Department's suggestion, we believe that it

is fair and appropriate under the circumstances. Pecora has pointlessly, deliberately, and repeatedly caused severe damage to an Exceptional Value wild trout stream and its tributaries. Pecora's destructive activity has dramatically reduced Minard Run's ability to support a population of naturally reproducing trout. Despite a decade of enforcement activity including two Commonwealth Court cases, Pecora does not appear to have been deterred from violating the law. Pecora's violations were intentional and deliberate. It is obvious to us that he has made a conscious choice to violate the law. Pecora has committed numerous violations over many acres of land with no attempt whatsoever to minimize damage.

It is tempting to downplay the severity of Pecora's violations by rationalizing that they merely involved dirt, but this case illustrates just how much damage irresponsible earth disturbance activities can cause. Pecora's activities essentially ruined a healthy habitat for a wild trout stream. He dredged out stream channels, made the stream wider and shallower, eliminated riparian zones, created erosional scars, accelerated stream bank erosion, and disfigured the stream bottoms. (T. 41-47, 60.) A toxic spill may do a lot of damage, but the effects can often be relatively short-lived as the substance is flushed away. Here, Pecora has destroyed the attributes of the stream that gave it exceptional value. It is unclear to what extent the streams have recovered. Since the Pecoras chose not to defend themselves, we have no evidence to refute the bleak scenario described by the Department. There may be two sides to this story, but the Pecoras--quite remarkably in our view given the stakes involved--chose not to share their side of the story.

## CONCLUSIONS OF LAW

1. The Environmental Hearing Board has jurisdiction over the parties and the subject matter of the May 11, 2007 Complaint. 35 P.S. § 691.610; 32 P.S. § 693.18 and 35 P.S. § 7514.

2. The Department bears the burden of proof when it files a complaint for a civil penalty. 25 Pa. Code § 1021.22.

3. 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"); the Dam Safety and Encroachments Act, Act of November 26, 1978, P.L. 1375, *as amended*, 32 P.S. §§ 693.1 – 693.27 ("Dam Safety Act"); Section 1917-A of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, *as amended*, 71 P.S. §§ 510-17 ("Administrative Code"); and the rules and regulations promulgated thereunder ("Regulations").

4. Minard Run is as an "Exceptional Value" water, pursuant to 25 Pa. Code § 93.4(b). Minard Run and tributary waters to Minard Run are "waters of the Commonwealth" as defined by Section 1 of the Clean Streams Law, 35 P.S. § 691.1.

5. The earth disturbance activities and encroachments installed at the Site without the necessary plans and permits were violations of the Clean Streams Law and the Dam Safety Act. 35 P.S. §§ 691.307, 691.401, 691.402, and 691.611; 32 P.S. §§ 693.6(a), 693.6(c), and 693.18.

6. 25 Pa. Code § 102.4(b) requires the implementation of erosion and sediment control "Best Management Practices" to minimize the potential for accelerated erosion and sedimentation from Earth Disturbance Activities.

7. 25 Pa. Code § 102.4(b)(2) requires a person proposing earth disturbance activities to develop an Erosion and Sediment Control Plan if the earth disturbance activity results in a total earth disturbance of 5,000 square feet or more, or if the earth disturbance activity has the potential to discharge to a waters classified as High Quality or Exceptional Value waters.

8. 25 Pa. Code § 102.4 requires a person proposing Earth Disturbance Activity that may result in a discharge to a water of the Commonwealth classified as High quality or Exceptional Value to use "Special Protection Best Management Practices" to maintain and protect the water from degradation.

9. The sediment being discharged from the Site into Minard Run and its tributaries as described above, constitutes "pollution" as that term is defined in Section 1 of the Clean Steams Law, 35 P.S. § 691.1, and a "pollutant," as defined in 25 Pa. Code § 92.1.

10. Pursuant to Sections 401 and 402 of the Clean Streams Law, 35 P.S. §§ 691.401 and 691.402, no person shall put or place into any of the waters of the Commonwealth or allow or permit to be discharged from property owned or occupied by such person into any of the waters of the Commonwealth, any substance of any kind or character resulting in pollution or creating the danger of pollution of the waters of the Commonwealth, except as permitted or otherwise authorized by the Department.

11. The Pecoras have allowed sediment to be discharged from the Pecora Property into Minard Run, the Eastern Tributary, and the Western Tributary resulting in pollution or creating the danger of pollution of the waters of Minard Run, the Eastern Tributary, and the Western Tributary in violation of Sections 401 and 402 of the Clean Streams Law, 35 P.S. §§ 691.401 and 691.402.

12. The pollution and continuing danger of pollution from the discharge of sediment from the Site into Minard Run, the Eastern Tributary, and the Western Tributary without a permit is prohibited and a nuisance pursuant to Sections 307 and 401 of the Clean Streams Law, 35 P.S. §§ 691.307 and 691.401.

13. Pursuant to Section 605 of the Clean Streams Law, 35 P.S. § 691.605, the

violations described herein subject the Pecoras to the assessment of a separate civil penalty for each day for each separate violation.

14. Pursuant to 25 Pa. Code § 102.5, a person proposing Earth Disturbance Activities that involve five acres or more of earth disturbance must obtain an NPDES Permit for Stormwater Discharges Associated with Construction Activities prior to commencing the earth disturbance activity.

15. Section 611 of the Clean Streams Law, 35 P.S. § 691.611, makes it unlawful to fail to comply with any rule or regulation of the Department or to violate regulations adopted under the Clean Streams Law.

16. The dredging of stream channels, the steel pipe culvert installed by Pecora and the excavation and grading within the channel of the Eastern Tributary, the Western Tributary, Minard Run and their associated floodways are each "Encroachments" or "Water Obstructions" as defined in Section 3 of the Encroachments Act, 32 P.S. § 693.3.

17. Section 6(a) of the Encroachments Act, 32 P.S. § 693.6(a), and 25 Pa. Code § 105.11, prohibit the construction operation, or maintenance of any water obstruction or encroachment without the prior written permit of the Department.

18. Pecora's failure to obtain the required permits from the Department for the encroachments at the Site constitutes unlawful conduct pursuant to Section 6(a), 6(c), and 18 of the Encroachments Act, 32 P.S. §§ 693.6(a), 693.6(c), and 693.18, and a violation of 25 Pa. Code § 105.11.

19. Pursuant to Section 21 of the Encroachments Act, 32 P.S. § 693.21, the violations of the Pecoras, as described herein, subject the Pecoras to the assessment of a separate civil penalty for each day for each separate violation.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

| | | |
|---|---|---|
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION** | : | |
| **v.** | : | **EHB Docket No. 2007-125-CP-L** |
| **JOHN P. PECORA, JAMES D. PECORA, ANN PECORA GREGO, ELIZABETH PECORA, JAY J. PECORA AND PHILIP A. PECORA, Defendants** | : | |

**ORDER**

AND NOW, this 1st day of May, 2008, the Pecoras are jointly and severally assessed a civil penalty of $113,538.97.

**ENVIRONMENTAL HEARING BOARD**

**THOMAS W. RENWAND**
**Acting Chairman and Chief Judge**

**GEORGE J. MILLER**
**Judge**

**MICHELLE A. COLEMAN**
**Judge**

**BERNARD A. LABUSKES, JR.**
**Judge**

**DATED: May 1, 2008**

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

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

| | | |
|---|---|---|
| **SUSAN PICKFORD** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2007-266-L** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and PENNSYLVANIA AMERICAN WATER CO., Permittee** | : | **Issued: May 2, 2008** |

## OPINION AND ORDER ON MOTION TO DISMISS

**By Bernard A. Labuskes, Jr.**

**Synopsis**

The Board dismisses an untimely appeal from permits that were issued years before the appeal was filed. The Board also finds that a Departmental letter that merely refused to put those permits on hold at the request of a third-party appellant is not an appealable action.

## OPINION

Susan Pickford ("Pickford") filed this appeal on November 30, 2007 from the following permits and a letter issued by the Department of Environmental Protection (the "Department"), all of which relate to two drinking water facilities operated by Pennsylvania American Water Company ("PAWC"):

| | Issuance Date | Date of Publication in *Pennsylvania Bulletin* |
|---|---|---|
| Safe Drinking Water Act ("SDWA") Construction Permit 6703512 | 3/24/2004 | 4/17/2004 34 *Pa. Bull.* 2125 |

| | | |
|---|---|---|
| SDWA Construction Permit 2104506 | 2/16/2005 | 3/5/2005<br>35 *Pa. Bull.* 1621 |
| SDWA Operation Permit 7210029 | 3/29/2006 | 4/15/2006<br>36 *Pa. Bull.* 1786 |
| Letter from Rodney Nesmith (DEP)<br>To Pickford ("Nesmith Letter") | 11/1/2007 | N/A |

The construction and operation permits issued in 2004, 2005, and 2006 authorized PAWC to, among other things, construct and operate chloramine disinfection facilities at two of its plants. The Nesmith Letter constituted the Department's response to a website complaint that Pickford sent to the Department on October 20, 2007 regarding PAWC's use of chloramine, which asked the DEP to "withdraw or place a hold" on PAWC's permits. PAWC has moved to dismiss Pickford's appeal from the permits as untimely and her appeal from the Nesmith Letter as having been brought from a letter that is not appealable. The Department has filed a response to PAWC's motion stating that it fully supports the motion.

It would seem to go without saying that Pickford's November 2007 appeal from permits issued in 2004, 2005, and 2006 is untimely. Our rules provide that a third-party appellant such as Pickford must file an appeal within 30 days of publication of notice of the action in the *Pennsylvania Bulletin.* 25 Pa. Code § 1021.52. Pickford argues, however, that the Department did not specify in the notices of the *Pennsylvania Bulletin* that PAWC would be using chloramine and the notices were, therefore, inadequate to trigger the appeal period. She relies heavily on Judge Krancer's opinion in *Solebury v. DEP*, 2003 EHB 208, which held that notice in the *Pennsylvania Bulletin* must be "reasonably calculated to inform interested parties of the action taken and provide the information necessary to provide an opportunity to present objections, or, in our case, to appeal to the Board." 2003 EHB at 213.

In *Solebury,* the action in question – a Section 401 Certification pursuant to the Clean Water Act – was misleadingly listed in the *Bulletin* as approval of an "Environmental Assessment." Judge Krancer found that even an experienced practitioner would have been unlikely to conclude that approval of an "Environmental Assessment" is the same thing as a Section 401 Certification. He concluded that the *Bulletin* notice specifying approval of an "Environmental Assessment" did not trigger the appeal period for the Section 401 Certification. *Id.* at 215. *See also P.R.I.D.E. v. DER*, 1986 EHB 905, 907 (notice of the issuance of a mine drainage permit does not serve as notice of the issuance of an accompanying mining permit).

Here, Pickford does not argue that PAWC's permits were mischaracterized in the *Bulletin*; rather, she contends that the notices did not include enough pertinent information. Specifically, she complains that the notices did not state that chloramine could be used under the permits as a disinfectant. It would be unreasonable to require the Department to publish an entire permit in the *Bulletin.* There is no reason or requirement for selecting the disinfection method in drinking water permits for special notice or particular emphasis. Since we see nothing inaccurate, incomplete, or misleading in the *Bulletin* notices of PAWC's permits, it was Appellant's duty to secure copies of the permits and to appeal from any challenged aspects therein. PAWC cannot be expected to defend in 2008 a permit issued in 2004 because one of its customers did not realize until recently that the permits authorized chloramination.

Turning to the Nesmith Letter, we agree with PAWC and the Department that it is not an appealable action. We have repeatedly held that a letter from the Department that merely reaffirms or refuses to reconsider an earlier decision does not constitute an appealable action. *Franklin Township Municipal Sanitary Authority v. DEP*, 1996 EHB 842; *Conshohocken Borough Authority v. DER*, 1992 EHB 615; *Lansdale Borough v. DER,* 1986 EHB 654; *Borough*

*of Lewistown v. DER,* 1985 EHB 903. As we explained in *Franklin Township*, to hold otherwise would mean that any third party could appeal any Department action at any time by simply asking the Department to reconsider its earlier decision. 1996 EHB at 942. That would completely eviscerate any semblance of administrative finality. The Nesmith Letter did nothing more than refuse to "withdraw or put a hold" on PAWC's permits at Pickford's request. This is not an independently appealable action.

Pickford asks us to grant allowance of an appeal *nunc pro tunc* because she acted quickly once she understood two things: (1) PAWC's permits authorized the use of chloramine, and (2) SDWA permits authorizing particular methods of disinfection can be appealed to this Board. We may only allow *nunc pro tunc* appeals where there has been fraud, a breakdown in the Board's operations, or other unique and compelling circumstances. *Achenbach v. DEP,* 2006 EHB 211. Neither a late realization of all of the particulars of a Departmental action nor ignorance regarding EHB appeal requirements constitute grounds for a *nunc pro tunc* appeal. *Emerald Mine Resources v. DEP*, 2007 EHB 611, 613; *Ricardo v. DEP*, 1997 EHB 1; *Paradise Township Citizen Committee v. DER,* 1992 EHB 668.

Accordingly, we issue the Order that follows.

**COMMONWEALTH OF PENNSYLVANIA**
**ENVIRONMENTAL HEARING BOARD**

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| **SUSAN PICKFORD** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2007-266-L** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and PENNSYLVANIA AMERICAN WATER CO., Permittee** | : | |

## ORDER

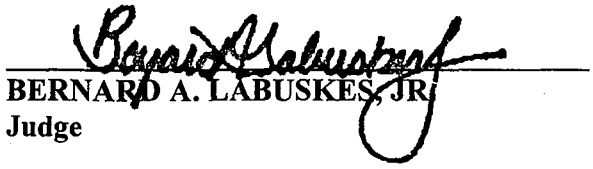
AND NOW, this 2nd day of May, 2008, it is hereby ordered that this appeal is **dismissed.**

**ENVIRONMENTAL HEARING BOARD**

**THOMAS W. RENWAND**
**Acting Chairman and Chief Judge**

**GEORGE J. MILLER**
**Judge**

**MICHELLE A. COLEMAN**
**Judge**



**BERNARD A. LABUSKES, JR.**
**Judge**

**DATED: May 2, 2008**

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

| | | |
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| **MOST HEALTH SERVICES, INC.** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2007-069-MG** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION** | : | **Issued: May 6, 2008** |

# ADJUDICATION

**By Michelle A. Coleman, Judge**

**Synopsis:**

The Board agrees with the $80,500 civil penalty assessed by the Department against the operator of a mobile X-ray unit company for taking X-rays as part of a screening program without a prescription or approval from the Department of Environmental Protection. There is no doubt that the actions taken by the operator violate the Department's regulations under the Radiation Protection Act, therefore the penalty assessed by the Department is a reasonable fit to the circumstances of the violation. Accordingly, the Board upholds the penalty of $80,500.

## BACKGROUND

Before the Board is an appeal of Most Health Services, Inc. (MHI or Appellant) challenging a civil penalty assessment by the Department of Environmental Protection pursuant to the authority of the Radiation Protection Act which was filed on February 22, 2007. MHI argues that the amount of the penalty, $80,500, is excessive and constitutes an abuse of discretion by the Department.

A hearing was held on December 4, 2007, before the Honorable George J. Miller. The

record consists of a transcript of 171 pages and eight exhibits. Both parties filed post-hearing memoranda which included proposed findings of fact and conclusions of law. After full consideration of these materials we make the following:

## FINDINGS OF FACT[1]

1. The Department is the agency with the duty and authority to administer and enforce the Radiation Protection Act, Act of July 10, 1984, P.L. 688, *as amended*, 35 P.S. §§ 7110.101-7110.703 (Act); Section 1917-A of the Administrative Code, Act of April 9, 1929, P.L. 177, *as amended*, 71 P.S. § 510-17; and the rules and regulations promulgated thereunder. (Stip. ¶ 1)

2. Since 1988 MOST Health Services, Inc. (MHI or Appellant) has been a Pennsylvania corporation which at all relevant times operated out of offices at 501 Preston Avenue, Voorhees, NJ 08043. (Stip. ¶ 2)

3. MHI was predominantly engaged in the enterprise of sending staff and equipment to various business customers to conduct health screenings, primarily concerning asbestosis. (Stip. ¶ 3)

4. At all relevant times MHI possessed for use in its mobile screening business a movable X-ray unit, which MHI duly registered with the Department's Bureau of Radiation Protection (Bureau) as a New Jersey-based, out-of-state, radiation source. (Stip. ¶ 4)

5. MHI's movable X-ray unit was and is a 300 milli-ampere, 120 kilovolt dedicated chest X-ray unit. (Stip. ¶ 5)

6. Since 1991, Mr. Charles Kemeny has been president and 46% shareholder of MHI. (Stip. ¶ 6)

7. Mr. Kemeny is one of two MHI officers responsible for familiarity and company

[1] References to the transcript are abbreviated as "N.T. ___". The parties submitted a stipulation of facts which was admitted into the record as Ex. B-1. The stipulations are referenced as "Stip. ¶ __." The Department's exhibits are designated "Ex. C-__" and MHI's as "Ex. A-__."

compliance with government regulations. (Stip. ¶ 7)

8. In late 2001 or early 2002, Mr. Kemeny was approached by Texas law firm Provost Umphry for the purpose of setting up mass chest X-rays by MHI at union hall sites in Pennsylvania. (Stip. ¶ 12)

9. MHI contracted with Provost Umphry to take two X-rays of each union member who showed up at each site; a lateral (side) view and a P-A (posterior-to-anterior or back-to-front) view. (Stip. ¶ 13)

10. In accordance with its contract with Provost Umphry, MHI conducted the first series of X-rays on February 19, 2002 at a Best Western motel in Harrisburg, Dauphin County. MHI conducted the second series of X-rays on February 21, 2002 at the Woodlands Inn and Resort in Wilkes-Barre, Luzerne County, and the third series on February 23, 2002 at the Comfort Inn in Essington, Delaware County (collectively, "the mass X-rays"). (Stip. ¶15)

11. The mass X-rays were administered without the knowledge, authorization or approval of the Department. They were also conducted without the authorization or the presence of a licensed practitioner of the healing arts. The total number of these humans exposed was 161 persons. (Stip. ¶ 16).

12. Mr. Kemeny testified that he was unaware that he had to obtain authorization from the Department or a prescription from a licensed practitioner of the healing arts to take X-rays in Pennsylvania. (N.T. 119)

13. He also testified that a prescription by a practitioner of the healing arts would not have changed the manner in which the X-rays were taken nor would obtaining a prescription have generated a cost to MHI. (Kemeny, N.T. 125-27)

14. James G. Yusko of the Department's Southwest Regional Office, testified as an expert in radiation health. He testified that there are health risks associated with exposure to

radiation from X-rays, although there are also diagnostic benefits to the procedure which often outweigh the risks. Accordingly, the Department has implemented a policy of limiting exposure to "as low as reasonably achievable" or "ALARA." (N.T. 13, 15-23)

15. Generally speaking, the preferred method of performing chest X-rays is from back to front, or posterior to anterior, because it reduces the shadow of the heart and reduces the intensity of radiation exposure for women. (Yusko, N.T. 25)

16. Some of the risks associated with improperly performed X-rays include the economic and physiologic risk of a "false negative" or "false positive." A "false positive" is an identification of a disease that is not, in fact present. A "false negative" is when a disease is present but not identified. (Yusko, N.T. 22-23)

17. There is no evidence that the MHI X-rays were taken improperly or resulted in any false negative or false positive readings. (Craig, N.T. 89-90)

18. Bridget Craig, an environmental protection compliance specialist in the Department's Bureau of Radiation Protection, calculated the civil penalty. (Craig, N.T. 73)

19. The MHI matter was brought to her attention by her supervisor, Terry Derstine, the Program Manager for the Bureau of Radiation Protection in the Department's Southeast Regional Office. He had received an anonymous complaint that MHI had taken X-rays without authorization in the form of a transcript of a video deposition of Mr. Kemeny. He referred the matter to Ms. Craig and asked her to review the information and make a recommendation. (Derstine, N.T. 38-41; Craig, N.T. 73-74)

20. Ms. Craig recommended that the Department issue a notice of violation and hold an enforcement conference with MHI. As a result of the conference, the Department decided on a unilateral assessment of civil penalty. (Derstine, N.T. 38-41; Craig, N.T. 73-74)

21. The penalty was based on MHI's failure to secure prescriptions for the X-rays or

authorization from the Department to perform X-rays without a prescription. (Notice of Appeal, Attachment A[2]; 25 Pa. Code §§ 221.11(g) and 221.11(g)(2).

22. Ms. Craig consulted the Bureau's enforcement policy and civil penalty matrix to develop her civil penalty. (Craig, N.T. 75; Ex. C-3)

23. Her penalty calculation was based on the severity of the violation, and the level of culpability of MHI. She then took into account the lack of actual damage and the lack of economic benefit to MHI for failing to get prescriptions from a practitioner of the healing arts for the X-rays. (Craig, N.T. 77-83; 87-88)

24. The penalty matrix provides three levels of severity for a violation of the Radiation Protection Act and regulations. A Level I violation is one that results in physical injury and is the most serious level of violation. A Level II violation is one that creates a potential for injury. Level III is the least serious violation and is for paperwork or clerical violations. Ms. Craig concluded that MHI's violation created a potential injury to human health because there was evidence of exposure to radiation without a good reason. (Craig, N.T. 77-78; Ex. C-3)

25. The matrix also assesses four levels of culpability: wilfull, reckless, negligent and accidental. Ms. Craig determined that MHI's conduct was reckless because the company is a registered company in Pennsylvania and should have been aware of the regulations that require either a prescription or authorization from the Department to perform X-rays within the Commonwealth. (Craig, N.T. 78-80)

26. A Level II violation with a culpability assessment of "reckless" results in a penalty of $5,000 - $10,000 per violation. Ms. Craig determined that $5,000 per violation was appropriate. She multiplied $5,000 by 161 unauthorized X-rays and reached an initial penalty calculation of $805,000. (Craig, N.T. 81-83; Ex. C-3)

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[2] Ex. B-2.

27. However, she felt that this amount was not a reasonable penalty amount given the circumstances of the violations. Accordingly, she reduced the penalty by 90% for a final calculation of $ 80,500. (Craig, N.T. 83, 86-87; Notice of Appeal, Attachment A)

## OPINION

In an appeal from a civil penalty assessment, the Department bears the burden of proof.[3] Accordingly, the Department must prove by a preponderance of the evidence that the violations occurred and that the civil penalty assessed is lawful and reasonable given the circumstances of the violation.[4] Our review is *de novo*; thus our decision is based upon the record developed before the Board.[5] Where we find that a penalty is not a reasonable fit given the facts of the violation, we may adjust a penalty assessment accordingly.[6]

In this appeal, MHI does not challenge the fact of the violations. However, it argues that the amount of the penalty is excessive and should be reduced. As we explain below, we disagree.

MHI does not challenge the Department's conclusion that it violated the Department's regulations by taking X-rays without either a prescription or an approval from the Department.[7] MHI admits that it neither had a prescription, as required by 25 Pa. Code § 221.11(g), nor

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[3] 25 Pa. Code § 1021.122(b)(1).
[4] *See, e.g., Benacci v. DEP*, 2005 EHB 560.
[5] *Id.*
[6] *Keinath v. DEP*, 2003 EHB 43.
[7] Section 221.11(g) provides:

> (g) An individual may not be exposed to the useful beam except for healing arts purposes or under § 221.15 (relating to use of X-rays in research on humans). An exposure shall be authorized by a licensed practitioner of the healing arts. This provision specifically prohibits deliberate exposure for the following purposes:
>
> (1) Exposure of an individual for training, demonstration or other nonhealing arts purposes.
>
> (2) Exposure of an individual for the purpose of healing arts screening except as authorized by the Department. When requesting authorization, the registrant shall submit the information outlined in § 221.13 (relating to information to be submitted by persons requesting approval to conduct healing arts screening).

authorization from the Department to perform the X-ray screenings under Section 221.11(g)(2).[8] Therefore, we find that the Department sustained its burden of proving that there was a violation of the regulations. It was appropriate to initiate enforcement action as authorized by the Radiation Protection Act.

The Radiation Protection Act[9] authorizes the Department to assess civil penalties:

> In addition to proceeding under any other remedy available at law or in equity for a violation of this act or a regulation or order of the department promulgated or issued hereunder, the department may assess a civil penalty upon the person for the violation. This penalty may be assessed whether or not the violation was willful or negligent. The civil penalty shall not exceed $ 25,000 plus $ 5,000 for each day of continued violation. In determining the civil penalty, the department shall consider, where applicable, the willfulness of the violation, gravity of the violation, good faith of the person charged, history of the previous violations, danger to the public health and welfare, damage to the air, water, land or other natural resources of the Commonwealth or their uses, cost of restoration or abatement, savings resultant to the person in consequence of the violation and any other relevant facts.[10]

To implement the directives of the act, the Department utilizes a penalty policy which creates a matrix which consists of twelve ranges of penalties based upon the gravity of a particular violation and the level of culpability of the violator. Each level of penalty "discounts" the maximum penalty of $ 25,000 per day of violation.[11]

Although the Board has found the Department's penalty matrices helpful as a starting point in our analysis of a civil penalty, we are not bound by it.[12] Rather, the purpose of our review is to determine whether the Department correctly applied the criteria of the Radiation Protection Act and whether the resulting penalty is reasonable and appropriate.[13]

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[8] Stip. ¶ 16.
[9] Radiation Protection Act, Act of July 10, 1984, P.L. 688, 35 P.S. §§ 7110.101-7110.703.
[10] 35 P.S. § 7110.308(e).
[11] Ex. C-3, pp. 32-37.
[12] *Clearview Land Development Co. v. DEP*, 2003 EHB 398; *Keinath v. DEP*, 2003 EHB 43.
[13] *Sunoco, Inc. (R&M) v. DEP*, 2004 EHB 191, *affirmed,* 865 A.2d 960 (Pa. Cmwlth. 2005).

Ms. Craig arrived at the $80,500 penalty by choosing a penalty range for a violation that created a potential injury to human health as a result of reckless conduct. According to the matrix, the range for such a violation was $5,000 to $10,000. She began with a $5,000 penalty and multiplied it by 161 individuals who were X-rayed, which resulted in an initial calculation of $805,000. Recognizing that this amount was not a reasonable fit, she discounted the penalty by 90% to arrive at $80,500. The Board finds Ms. Craig's process to be reasonable and therefore agrees with the Department's assessment.

Although the Board may disagree with the Department's characterization of MHI's culpability as reckless we will not adjust the penalty in this matter. Ms. Craig stated that a level of negligence could be described as someone who was not very careful and violated the regulation.[14] Mr. Kemeny admits to not reading or being familiar with the Commonwealth's regulations concerning the use of X-ray units in Pennsylvania. This type of behavior was not "very careful." However, "reckless" is a conscious disregard of the fact that conduct may result in a violation of the law. "Negligence" is a failure to exercise reasonable care.[15] There is no evidence on the record that Mr. Kemeny was deliberately unaware of the regulatory requirements for authorization to X-ray individuals or that he had received warnings from the Department and ignored them. He testified that he had nothing to gain by not getting prescriptions or an authorization, inasmuch as it would not have added to his expenses nor would it have changed the manner in which the X-rays were taken.[16] Therefore he had no reason to ignore the requirement. Rather, he simply failed to make himself aware of the requirements.

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[14] N.T. 79.
[15] *See, e.g., 202 Island Car Wash, L.P. v. DEP*, 2000 EHB 679.
[16] N.T. 125-27.

However, ignorance of the law is no excuse for violating the law.[17] There was no testimony that it would have been especially difficult for Mr. Kemeny to have informed himself about the regulatory requirements for performing X-rays within the Commonwealth. We agree with the Department that it has a significant interest in the regulation of radiation sources. Further, Mr.Yusko stressed the importance of the Department being aware of the presence of out-of-state X-ray providers doing business within the Commonwealth in order to make sure that X-rays are being performed in such a way as to minimize the risk caused by radiation exposure.[18] So it is clear that a substantial penalty is appropriate. We will not adjust the $80,500 penalty even though we believe MHI's culpability is more consistent with negligence rather than recklessness. Since the DEP reduced the calculated penalty by 90%, which is substantially less than the assessed penalty under negligence using the Department's matrix, we will not adjust the penalty.

The Board is extremely concerned that MHI took x-rays of 161 people on two occasions without following the law. We are aware that radiation exposure to humans poses health risks and that this type of activity must gain all prior approvals before being conducted within our Commonwealth. We believe that the $80,500 civil penalty is reasonable and not excessive.

We therefore make the following:

## CONCLUSIONS OF LAW

1. The Board's scope of review is *de novo. Benacci v. DEP*, 2005 EHB 560.
2. In an appeal of a civil penalty, the Department bears the burden of proof. 25 Pa. Code § 1021.122(b)(1).

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[17] *E.g., Enterprise Tire Recycling v. DEP*, 1999 EHB 900 (appellant's assertion that it did not know it needed a permit for a solid waste activity is not a defense to the Department's compliance order.)
[18] N.T. 19-20.

3. The Appellant, MHI, violated Section 221.11(g) of the Department's radiation protection regulations by performing X-rays without a prescription from a licensed practitioner of the healing arts or authorization from the Department to perform health screenings. 25 Pa. Code § 221.11(g).
4. The assessment of a civil penalty is authorized by the Radiation Protection Act. 35 P.S. § 7110.308(e).
5. The $ 80,500 penalty assessed by the Department is a reasonable fit for MHI's violation of the Department's radiation protection regulations.

We therefore enter the following:

**COMMONWEALTH OF PENNSYLVANIA**
**ENVIRONMENTAL HEARING BOARD**

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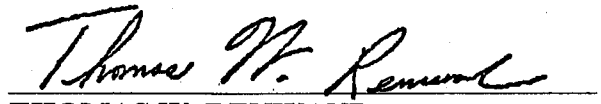
| **MOST HEALTH SERVICES, INC.** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2007-069-MG** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION** | : | |

## ORDER

AND NOW, this 6th day of May, 2008, the appeal of Most Health Services, Inc. is sustained in part consistent with the above adjudication. Most Health Services Inc. shall pay a civil penalty in the amount of **$80,500**. The amount is due and payable immediately to the Commonwealth of Pennsylvania, Radiation Protection Fund. The appeal is dismissed in all other respects.

**ENVIRONMENTAL HEARING BOARD**



**THOMAS W. RENWAND**
**Acting Chairman and Chief Judge**

**MICHELLE A. COLEMAN**
**Judge**

**BERNARD A. LABUSKES, JR.**
**Judge**

**A Concurring Opinion of Judge Bernard A. Labuskes, Jr. is attached. A Dissenting Opinion of Judge George J. Miller is attached.**

**DATED: May 6, 2008**

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

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**COMMONWEALTH OF PENNSYLVANIA**
**ENVIRONMENTAL HEARING BOARD**

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|---|---|---|
| **MOST HEALTH SERVICES, INC.** | : | |
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| | : | **EHB Docket No. 2007-069-MG** |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION** | : | |

## CONCURRING OPINION

I concur in the majority opinion. I cannot disagree that a penalty of $80,500 is a reasonable fit. I write separately and briefly to outline why I believe that a much higher penalty could also have been justified in this case.

Under the scheme hatched by MHI and the Texas law firm of Provost Umphry, the decisions concerning who would be X-rayed, the number and orientation of X-rays taken, and whether additional tests were to be taken were made solely by Provost Umphry, not by medical practitioners. The mass X-rays were conducted without any health professionals having any involvement whatsoever. Patients were advised that they could be retested even if they had previously been tested and found negative within the past few years, but they were not warned that they might have been X-rayed too recently to be safely reexposed so soon. MHI did not require the patients to show identification before they were X-rayed. MHI did not ask the patients the date of their last chest X-ray. Before X-raying, Provost Umphry did not inquire of the patients as to their medical history, but it did make sure to have them sign contingent fee agreements respecting occupational exposure litigation.

Exposure to radiation can obviously have serious consequences. Radiation is a known human carcinogen, and there is no known safe level of exposure to it. Accordingly, there are

only two circumstances in which X-ray machines may be used on humans. The first is in compliance with a prescription given by a licensed practitioner of the healing arts. The second is in accordance with a general screening program that has been designed by a physician and has been preapproved by the Department after review in consultation with additional medical practitioners. In either case, a health professional's involvement is critical. The goal in either case in requiring a health professional's involvement is to prevent *exactly* the sort of thing that happened here.

I believe that the penalty could have been much higher in this case for several reasons. First, for a company that is in the business of giving X-rays to assert that it is not familiar with the law regarding the giving of X-rays is unbelievable and unacceptable. If a landfill owner came before this Board and professed ignorance regarding the laws regarding solid waste disposal, it would have been laughed out of court. It is inconceivable that the operator of equipment potentially dangerous to human health would claim such ignorance of applicable laws.

The laws in question have been on the books since at least 1987. We are not dealing here with an obscure regulation or some byzantine guidance document. Furthermore, that X-rays should only be given under a health professional's direction strikes me as common sense and common knowledge. My guess is that the average fifth-grader knows that you need to see a doctor before you get an X-ray.

Exposure to X-rays, especially chest X-rays, should not be trivialized. X-rays are only indicated if a patient has symptoms or there is some other reason that the potential benefits of a diagnostic aid outweigh the known risks. At the risk of stating what should be obvious, that is precisely why prescriptions are required.

This case is no different than a pharmacist handing out potentially dangerous drugs with

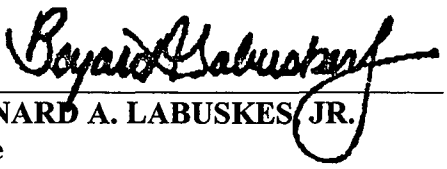
known side-effects at the county fair without prescriptions. No one would think twice if the pharmacist were assessed a civil penalty of five hundred dollars or more for each incident.

X-rays are to be given for healing purposes, not to search out potential plaintiffs for tort litigation. MHI's violations strike at the heart of the radiation protection program, a program in which Pennsylvania has recently dramatically increased its role by becoming an Agreement State. If a nuclear power plant has a minor leak with no known human exposure, it does and should make front-page news. Here, 161 people were deliberately exposed with the only apparent purpose being to find toxic tort plaintiffs.

MHI claims it made no money as a result of the lack of prescriptions. In fact it would not have made *any* money if it had followed the law because no reputable doctor would have sanctioned what MHI did here. It was not necessary for the Department to prove the negative that a doctor would *not* have written prescriptions for some or all of the patients, just as it would not be necessary for prosecutors proceeding against our hypothetical pharmacist at the county fair to prove that a doctor would *not* have written a prescription for any of the fair goers. It was not necessary to prove that ill effects in any patients have been observed to date. All of these arguments miss the fundamental point that persons cannot be allowed to set up stands for free X-rays either at county fairs, or here, in hotel rooms, with no approval or supervision by health professionals.

Each X-ray constituted a violation. MHI has conceded that point. Assessing a penalty on a daily basis instead of per violation would have been arbitrary and possibly even unlawful. It would be like saying that Bonnie and Clyde were only guilty of one bank robbery per day no matter how many stops they made that day. MHI is not entitled to a volume discount. Assessing one penalty per day regardless of whether one or one hundred violations occurred on that day makes no sense to me.

Our review of a penalty assessment is for a reasonable fit. We do not review the penalty and decide what might have been a more reasonable amount. The Department's assessment of one percent of the statutory maximum is an extremely tolerant penalty but I cannot disagree it falls within the range of reasonableness.



**BERNARD A. LABUSKES, JR.**
**Judge**

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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| **MOST HEALTH SERVICES, INC.** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2007-069-MG** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION** | : | |

## DISSENTING OPINION OF JUDGE GEORGE J. MILLER

**By George J. Miller, Judge**

I cannot agree that the assessed penalty is a reasonable fit for the violations proven at the hearing. The Department had the burden of proving that such a large penalty is justified. The Department presented no evidence that a physician would not have given the required prescriptions. Nor was there evidence that the Department would not have granted approval out-of-hand of such a mass screening if a proper application had been made. Indeed, Mr. Yusko testifying for the Department, indicated that approval could have been given for a mass screening, even though the resulting x-rays may have also been used by workers for litigation.

The appellant's evidence was that the screening was done according to procedures used in normal physician directed x-rays to minimize harm to the worker. While appellant is presumed to know that either Department approval or a prescription is required, he testified that appellant previously had performed a similar x-ray program of Department employees without a physician's prescription. While such a screening would be lawful because of the Department's request, this experience may have lulled appellant into believing that a screening of others might be done without a prescription. Even the majority opinion concedes that the appellant's conduct

was more reasonably described as "negligent" rather than "reckless."

I also think that a 90% reduction of a penalty calculation based on the number of persons screened is a purely arbitrary decision designed to avoid the charge that a full penalty of $25,000 per day of violation would be unreasonable. Indeed, the majority opinion relies on this reduction as making the penalty a reasonable fit without any explanation as to why such a reduction is reasonable under the circumstances. I believe that a penalty assessment based on the number of days of violations would be more appropriate. Such an assessment at least avoids such an arbitrary decision and seems to me to result in a more reasonable fit for the violations proven by the Department.

**ENVIRONMENTAL HEARING BOARD**

George J. Miller

**GEORGE J. MILLER**
**Judge**

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

| | | |
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| **DAVID N. SCAIFE** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2007-063-L** |
| | : | **(Consolidated with 2007-093-L)** |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION** | : | **Issued: May 6, 2008** |

## OPINION AND ORDER
## ON REQUEST FOR AN EXTENSION OF PREHEARING DEADLINES

**By Bernard A. Labuskes, Jr., Judge**

**Synopsis:**

The Board denies a request for an extension of prehearing deadlines where it is clear that the Department is not proceeding with adequate dispatch in working toward a settlement or with regard to the action under appeal.

## OPINION

This consolidated appeal stems from in-stream work performed on David N. Scaife's property that the Department alleges required permits. Scaife appealed the Department's order requiring, among other things, the restoration of the affected streams, and subsequently appealed the Department's disapproval of a related interim erosion and sedimentation control plan, but he has apparently endeavored to meet the requirements set out in the Department's order.

The interim erosion and sedimentation control plan required by the Department's order has been submitted, approved, and implemented. A preliminary restoration plan was submitted

in January 2007 and a more detailed plan was submitted in April 2007. The parties met on site in June 2007 and a modified restoration plan was submitted in September 2007. In October 2007, Scaife submitted additional information at the Department's request and he currently awaits the Department's final review of the restoration plan.

There has been little or no litigation activity since this case was filed in February 2007 as the parties have focused upon achieving an amicable resolution. Several requests for extensions have been requested and granted, until recently when the parties submitted yet another request for a six-month stay with very little explanation, which we denied. Not to be deterred, the parties have submitted a revised request with some additional explanation and asked for a one-month stay. Although this request is far more reasonable, we will nevertheless deny it.

As an independent agency, we do not wish to associate ourselves with the Department's lack of attention to its own administrative order. The issuance of an order is a very serious matter. It is one thing to allow permit applicants to languish indefinitely because reviews cannot be performed with any degree of diligence. *See, e.g., BP Products North America v. DEP*, 2007 EHB 93, (permit application pending for five years). It is quite another if the Department takes enforcement action and then effectively prevents the recipient of its action from coming into compliance. For the Department to ignore a party's attempt to comply with an order by allowing a restoration plan to sit in somebody's in-box for months on end is absolutely unacceptable. By granting the parties' request for an extension we would become a de facto party to this nonfeasance. Litigation pending before this Board is not an excuse for unconscionable delay. Settlement discussions must move forward at a reasonable pace or this Board will proceed toward a hearing.

The Department's conduct not only violates its obligation to be receptive to the recipient of the order, it violates its public trust. Presumably the Department would not have issued an order if it did not believe the streams needed to be restored. The appellant has shown a willingness to cooperate. And yet, months pass and the stream is not restored because the Department has "personnel issues."

Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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| **DAVID N. SCAIFE** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2007-063-L** |
| | : | **(Consolidated with 2007-093-L)** |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION** | : | |

## ORDER

AND NOW, this 6th day of May, 2008, it is hereby ordered that the joint request of David N. Scaife and the Department for a stay is denied.

**ENVIRONMENTAL HEARING BOARD**

**BERNARD A. LABUSKES, JR.**
**Judge**

**DATED: May 6, 2008**

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

**For the Commonwealth, DEP:**
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Southwest Regional

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| **RISINGSON FARM** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2007-079-L** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION** | : | **Issued: May 7, 2008** |

# ADJUDICATION

**By Bernard A. Labuskes, Jr., Judge**

**Synopsis:**

The Board dismisses an appeal from the Department's revocation of a permit-by-rule authorization to operate a yard waste composting facility. The operator demonstrated that it was unable or unwilling to comply with applicable requirements.

## FINDING OF FACTS

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, 35 P.S. § 6018.101 *et seq.*, the Clean Streams Law, 35 P.S. § 691.1 *et seq.*, the Air Pollution Control Act, 35 P.S. § 4001 *et seq.*, Section 1917-A of the Administrative Code of 1929, 71 P.S. § 510-17, and the rules and regulations promulgated under those statutes. (Stipulation of the Parties ("Stip.").)

2. Risingson Farm is a Pennsylvania corporation with a mailing address of 5828 Park Valley Road, Schnecksville, PA 18078. Dennis Atiyeh is the president and operator of Risingson Farm. (Stip.)

3. Risingson Farm operated a yard waste composting/land application facility. The facility and its operations are located within North Whitehall and Washington Townships, Lehigh County. (Stip.)

4. On September 29, 2005, Risingson Farm submitted to the Department a General Permit Application for an On-Farm Organic Waste Composting Facility. However, this was not the proper application for operating its yard waste composting/land application facility since Risingson Farm was designating only five acres for composting yard waste and, therefore, was eligible for a permit-by-rule authorization under Section 271.103(h) of the municipal waste regulations. The Department returned the General Permit Application to Risingson Farm and indicated the appropriate forms to be submitted. (Stip.)

5. On October 24, 2005, Risingson Farm submitted to the Department its initial September 29, 2005 form, as well as the appropriate application forms to operate a yard waste composting/land application facility. Risingson Farm is a "yard waste composting facility" as that term is defined at 25 Pa. Code § 271.1. The application forms consisted of a completed "Yard Waste Composting Facility Application Form," "Land Application of Yard Waste Form" and several attachments. In its applications, five acres of the facility were designated for composting, and 92 acres were designated for land application. (Stip.)

6. On November 15, 2005, after reviewing Risingson Farm's submittals and applications, the Department issued approvals for a yard waste composting facility and for land application of yard waste. Risingson Farm was required to operate in accordance with

the Department's Guidelines for Yard Waste Composting Facilities. Both approvals contained various approval conditions. (Stip.)

7. The approval for yard waste composting required, among other things, the following conditions:

a. No person or municipality shall bring to or receive any materials at a leaf composting facility other than: leaves, grass, shrubbery and tree trimmings that have been shredded or chipped, unless shredding or other chipping is provided at the facility, and similar related yard debris.

b. Grass clippings shall not be brought to or received at a leaf composting facility unless:

   i. the grass clippings are delivered to the yard waste composting facility in bulk. Bags or other collection containers must be emptied of all grass clippings, delivered to the composting facility by the end of each day.

   ii. the grass clippings are to be incorporated into the windrows of partially composted leaves within three (3) days of delivery to the site.

c. No more than 3,000 cubic yards of yard waste shall be placed, stored, or processed on any acre of a facility where composting activity occurs or is planned to occur.

d. Each yard waste composting facility shall be operated in a manner which results in the biological degradation of the vegetative material received.

e. Compost piles or windrows should be maintained to a dimension of eight (8) feet in height or sixteen (16) feet in width, unless the composting technology can adequately manage the compost piles, and is approved by the Department.

f. The compost piles or windrows shall be turned in and reconstructed at least once every three months to assure effective aeration and to promote decomposition. A higher turning frequency may be required, depending on the composting technology unless the composting technology requires more intensive management.

g. Residue Disposal

i. The operator shall not allow non-compostable residues or solid waste other than yard waste to accumulate at the facility, and shall provide for proper disposal or processing.

ii. Yard waste and municipal waste that is received at the facility, but that is not suitable for composting, shall be removed weekly, and disposed or processed at a permitted municipal waste facility.

h. The only area where composting operations may be conducted are as presented on the drawing submitted on October 24, 2005, identified as "Site 1".

i. The maximum amount of yard waste, in process material, and finished material that can be placed, stored, or processed on any acre of the site is limited to 3,000 cubic yards (cy), or 15,000 cy for this site; this includes unprocessed and in-process yard waste and finished compost.

(Stip.)

8. The approval for land application required, among other things, the following conditions:

a. The operator shall not permit non-compostable residues or solid waste other than yard waste to accumulate at the facility and shall provide for proper disposal.

b. All yard waste and municipal waste received at the facility that is not suitable for composting shall be disposed or processed at a permitted municipal waste facility.

c. Yard waste is not to be stockpiled and should be incorporated within one week of arrival on site.

(Stip.)

9. Mr. Atiyeh began accepting waste in the spring of 2006. He acknowledged that he accepted materials during the summer of 2006 that included plastic bags and heavy

wooded materials such as stumps, heavy tree limbs, and the like. (Notes of Transcript page ("T.") 152.)

10. Mr. Atiyeh acknowledged that he should not have accepted these materials because he did not have the proper equipment to process them. (T. 152.)

11. On June 21, 2006, having received a complaint for odor, burning and excessive quantity of flies at the facility, a representative from the Department inspected the site. It was noted that unprocessed material was on site. Mr. Atiyeh represented that a tub grinder and screener were being delivered by the second week of July and that the unprocessed waste material (i.e., plastic bags and other non-compostable materials) would be screened to remove plastic bags and other materials upon receipt of the equipment. (Stip.)

12. During the June 21, 2006 inspection, the Department pointed out some work that needed to be done on the site including removal of litter in the windrows (T. 18-20, 23-27; Commonwealth Exhibit ("C. Ex.") 4 including photos C, E, F, G, H, J, K, M, Q) and specifications of the windrows (T. 21, 23-24; C. Ex. 4 including photos C, E, F-K, M, Q). In addition, the land application area was not consistent with the Department's Yard Waste Guidelines. Among other things, there were piles of yard waste that were approximately three feet high where they should have been no higher than six inches. (T. 22-23, 26-28; C. Ex. 4 including photos A, L, N, P, R-T.)

13. The Department did not cite any violations as a result of the June 21 inspection. (T. 17.)

14. Risingson Farm endeavored to obtain the equipment necessary to process the waste over the course of several months but it did not obtain any equipment until January 2007. (T. 156-62; Appellant Exhibit No. ("A. Ex.") 1.)

15. Meanwhile on July 20, 2006, after receiving additional odor complaints, the Department inspected the site again. (T. 46; C. Ex. 5.) Numerous violations existed on the site. (C. Ex. 5.) The windrows had vegetation growing on them indicating that the piles were not being properly managed and not allowing for active biological decomposition. (T. 47, 58; C. Ex. 5 pp. 2, 4, photo I.) The compost and processing materials were not being managed and cultivated properly, which increased the potential for off-site odors. (T. 47; C. Ex. 5.) There were large piles of grass clippings outside the five-acre compost area which were not incorporated into the windrows within 24 hours after being received at the site. (T. 48; C. Ex. 5 including photo B.) The compost piles were not sited and maintained to prevent and minimize fires. (T. 49.)

16. The windrows and piles of yard waste exceeded the five-acre composting area and encroached into the land application area. (T. 48-49, 53.) These large random piles of yard waste in the land application area were not being properly land applied and were four to five feet high. (T. 49, 52-54, 56-57; C. Ex. 5 including photos A, B, D-H.)

17. The Department sent a Notice of Violation ("NOV") to Risingson Farm on August 8, 2006 citing the violations observed during the July 20, 2006 inspection. The NOV requested that Risingson Farm provide prompt correction and recommended that the facility submit a proposed plan and schedule to correct the violations and to prevent their reoccurrence, as well as make arrangements for regular and proper collection and disposal of any non-compostable municipal waste on the site. The NOV further indicated that failure to bring the site to compliance could result in an action to compel compliance. (Stip.)

18. The Department inspected the site again on September 28, 2006. That inspection revealed that every violation that was present during the July 20, 2006 inspection

still existed. (T. 60-61; C. Ex. 8.) The site also had three additional violations which were not present during the previous July 20, 2006 inspection. (N.T. 60-61.)

19. The Department found two small fires smoldering. (T. 61-62; C. Ex. 8 including photos A, B.) The burn piles contained waste material such as paint cans, mattress springs, and other metallic waste. (T. 63; C. Ex. 8 including photos A-B.)

20. The Department issued a compliance order to Risingson Farm on October 16, 2006. The order directed Risingson Farm to immediately cease accepting yard waste and immediately cease burning solid waste, remove and properly dispose of all non-compostable solid wastes from the yard wastes at the site within seven days from receipt of the order, and otherwise bring the site into compliance. (Stip.; C. Ex. 11.)

21. Risingson Farm did not appeal the compliance order. (T. 83.)

22. On October 18, 2006, Risingson Farm informed the Department that the issues in the compliance order were being resolved. (T. 85; C. Ex. 12.) Shortly thereafter, Risingson contacted the Department and informed it that the site was in compliance and ready for an inspection. (T. 87.)

23. The Department inspected the site again on October 30, 2006. (T. 31; C. Ex. 13.)

24. The site was still in violation for failing to comply with the Department's Yard Waste Guidelines. The violations included those listed in the October 16, 2006 compliance order. (Stip.; C. Ex. 13.)

25. On October 31, 2006, having received complaints detailing the burning of yard waste, the Department revisited the site and noted that material that had been pointed

out the day before as an example of what may not be burned was what had been burned. (T. 32-38, 40, 90; C. Ex. 13 including photos 4A-12A.)

26. On November 1, 2006, the Department informed Risingson Farm by letter that the site continued to be out of compliance, that the compliance order remained in effect, and that the facility could not accept waste. The letter stated that continued noncompliance could lead to permit revocation.

27. In mid-November 2006, Risingson Farm contacted the Department and requested another inspection. (T. 92.) On November 21, 2006, the Department responded by sending a letter to Risingson Farm asking it to affirm that the work needed to bring the site into compliance had been completed. (T. 92; C. Ex. 20.) The letter set forth what the Department expected to be completed. (T. 93; C. Ex. 20.) The letter also noted, for a second time, that further noncompliance could result in revocation of Risingson Farm's permit. (T. 93; C. Ex. 20.)

28. The Department followed up its November 21, 2006 letter with an email to Risingson Farm on December 5, 2006 seeking more information from Risingson Farm about its compliance efforts. The email informed Risingson Farm, for a third time, that further noncompliance could lead to permit revocation. (T. 94; C. Ex. 23.)

29. On December 14, 2006, the Department received a letter from Risingson Farm stating that the site was in compliance. (T. 95; C. Ex. 24.)

30. On January 2, 2007, the Department conducted another inspection and found that many of the same violations listed previously still existed on the site. (Stip.) During this inspection, Mr. Atiyeh represented that he would bring the site into compliance within 30 days. (T. 182-83; C. Ex. 25.)

31. The Department noted in its January 2, 2007 inspection report, for a fourth time, that further noncompliance could result in permit revocation. (T. 100; C. Ex. 25.)

32. On January 10, 2007, Risingson Farm contacted the Department and requested a longer extension beyond the 30 days it originally requested to come into compliance. (C. Ex. 27.) The Department denied this request on January 12, 2007. (T. 107; C. Ex. 31.)

33. On January 18, 2007, the Department conducted a follow up inspection to monitor Risingson Farm's progress. The conditions at the site were generally unchanged. Although Risingson had made some progress, the site was still not in compliance. (T. 107, 111; C. Ex. 29.)

34. On February 2, 2007, the Department once again inspected the site. (T. 113; C. Ex. 33.) Although conditions at the site had improved, the site remained substantially out of compliance. (T. 114, 128, 174; C. Ex. 33 including photos 15-24.)

35. At the February 2, 2007 inspection it was noted that a screener was on site and that piles adjacent to the screener showed signs of work having been done on them.

36. The screener, however, had broken down and was not working. The screener only worked for a few days. (T. 162.) Although new windrows had been constructed, the windrows still contained plastic bags and bulky wood materials. (C. Ex. 33.)

37. On February 8, 2007, the Department revoked Risingson Farm's yard waste composting and land application approvals. (T. 116; C. Ex. 34.) Risingson Farm's failure to bring the site into compliance led to the issuance of the revocation. (T. 137.) It is this revocation that is the subject of this appeal.

38. In June 2006, the Department began receiving complaints regarding the Risingson Farm facility. (T. 117.) Between June 2006 and March 2007, the Department

received at least 11 complaints (T. 117) from 17 named complainants as well as three anonymous complainants. (T. 117.) The Department also received numerous phone calls regarding the site. (T. 117-118.)

39. With proper equipment, staff and management, the site could have been brought into compliance in a matter of weeks. (T. 87-88, 121.) Risingson Farm was given seven months to bring the site into compliance after first being advised of problems on June 21, 2006, but was not able to do so.

40. Risingson Farm is unable or unwilling to operate a yard waste facility in accordance with applicable requirements.

41. The Department acted reasonably by revoking Risingson Farm's authorization to operate a yard waste facility.

## DISCUSSION

The Solid Waste Management Act provides that no person "shall store, collect, transport, process, or dispose of municipal waste" unless such activity is authorized and permitted by the Department. 35 P.S. § 6018.201(a). Risingson Farm operated a permit-by-rule[1] yard waste composting and land application facility. Regulations promulgated under the Act define a yard waste composting facility as follows:

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[1] Regulations promulgated under the Act allow for a person proposing to operate a yard waste composting facility to obtain a permit-by-rule in lieu of an individual or general permit. In short, a permit-by-rule allows a person to operate under the Act without going through the full-blown permitting process. However, certain conditions must be met. Specifically, the regulations provide:

> A person or municipality that operates a yard waste composting facility that is less than 5 acres, other than an individual backyard composting facility, shall be deemed to have a municipal waste processing permit-by-rule *if the person or municipality meets the requirements of subsections (a) -- (c)* [relating to waste storage; preparedness, prevention, and contingency plan; daily records; financial assurances; and inappropriate activity], *the facility is operated in accordance with the Department's guidelines on yard*

> A facility that is used to compost leaf waste, or leaf waste and grass clippings, garden residue, tree trimmings, chipped shrubbery and other vegetative material. The term includes land affected during the lifetime of the operation, including, but not limited to, areas where composting actually occurs, support facilities, borrow areas, offices, equipment sheds, air and water pollution control and treatment systems, access roads, associated onsite or contiguous collection and transportation activities, and other activities in which the natural surface has been disturbed as a result of or incidental to operation of the facility.

25 Pa. Code § 271.1.

Risingson Farm was required to operate in accordance with the Department's guidelines on yard waste composting (the "Guidelines"). 25 Pa. Code § 271.103(h); *Patti v. DEP*, 1999 EHB 610, 617.

There is only one issue in this case; namely, was it *reasonable* for the Department to *revoke* Risingson Farm's permit-by-rule? There are no significant disagreements about the essential facts, no question that violations occurred and ultimately were never completely resolved, and no dispute that the Department was authorized by statute to revoke the permit. Risingson Farm's sole contention is that the Department simply acted too harshly by revoking its permit. Our role is limited to determining whether the Department's decision was unreasonable, or as we used to say, an abuse of discretion. *Swinehart v. DEP*, 2007 EHB 334, 337. *See generally, Pequea Township v. Herr,* 716 A.2d 678, 686 (Pa. Cmwlth. 1998).

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> *waste composting* and the operator submits a written notice to the Department that includes the name, address and telephone number of the facility, the individual responsible for operating the facility and a brief description of the facility.

25 Pa. Code § 271.103(h) (emphasis added).

We believe that the Department's action was entirely reasonable. Between June 2006 and February 2007, the Department inspected the Risingson Farm site no less than eight times. The Department's inspections continually turned up the same violations. There comes a point where compliance assistance must end and enforcement must begin. Risingson Farm should never have taken on so much waste in the first place without the ability to handle it correctly. Having made that mistake, it should have done whatever was necessary to expeditiously rectify the situation. It failed to do so. The Department took the only reasonable course of action under the circumstances.

Risingson Farm's case boils down to a series of excuses for its admitted violations. It contends that it diligently attempted but failed to procure processing equipment. Although we are skeptical regarding this claim as a matter of fact (Stip.; T. 148, 155-61, 179, 185-86; A. Ex. 1), even if we accept it as true, Risingson Farm should not continue to have a permit if it cannot obtain the necessary equipment. In other words, anyone who does not have the ability to comply should not be in the business. *See generally Ramey Borough v. DER*, 351 A.2d 613 (Pa. 1976); *Starr v. DEP*, 2003 EHB 360, 373. Risingson Farm's argument in effect constitutes an admission of an inability to comply, which justifies the revocation.

Risingson Farm points out that it made significant progress between January and February 2007. This is true, but it is a case of too little too late. The Department began pointing out problems in June 2006. Neighbor complaints streamed in continuously. It was not unreasonable in our view to require complete compliance by February. To repeat, the site should never have been so dramatically out of compliance in the first place, but generously given months to get back in compliance, Risingson Farm failed to perform. Furthermore, even as of February, it was apparent that Risingson Farm did not have the

necessary operable equipment to do the job. It was obvious, then, that even if it had been able to rectify past problems, future problems were virtually inevitable. There was no sense of comfort or satisfaction here that Risingson Farm could be allowed to move forward with a full-blown composting operation. If it took seven months to achieve significant progress (but still not complete compliance), it would have been unreasonable to allow Risingson Farm to take on more waste with no apparent ability to handle it.

Risingson Farm makes the rather unusual claim that the Department should have warned it that revocation *definitely* would occur if it did not bring the site into compliance. We think this is exactly wrong. The Department should never say that it is "definitely" going to do something until it does it. *See Tinicum Township v. DEP*, EHB Docket No. 2008-084-L (Opinion, April 21, 2008). The Department gave Risingson Farm every opportunity to comply and warned it at least four times of a possible revocation if it failed to do so. This was hardly unreasonable.

Risingson Farm argues that the Department buckled under public pressure from Risingson Farm's neighbors, who lodged a steady stream of complaints. The record does not support this allegation. If the Department was biased by the "public pressure" and "simply tired of hearing public complaints" about the facility, the Department would not have waited so long to revoke the approvals. Risingson Farm improperly accepted unprocessed materials for a three week period in June 2006, which created long-lasting nuisance conditions on the site. Mr. Atiyeh indicated that he would rectify the situation, but he did not. Instead, he accepted even more unprocessed material. Consequently an NOV was sent on August 8, 2006, and the compliance order was issued on October 16, 2006 directing that no more material be accepted until compliance was achieved. The work that needed to be done was

simple and could have been done within a couple of weeks. Unfortunately, Risingson Farm did not do the necessary work, and the nuisance conditions continued. As the record reflects, despite the Department's efforts to obtain voluntary compliance, Risingson Farm was simply unable and/or unwilling to correct the conditions at the facility, which ultimately led to the revocation.

## CONCLUSIONS OF LAW

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

2. Proceedings before the Board are *de novo*. *Warren Sand & Gravel Co., Inc. v. DER*, 341 A.2d 556 (Pa. Cmwlth. 1975).

3. The Department may issue such orders as are necessary to aid in the enforcement of the provisions of the Solid Waste Management Act, including orders revoking permits. 35 P.S. § 6018.104(7).

4. Pursuant to 25 Pa. Code § 1021.122(b)(3), the Department bears the burden of proof when it revokes or suspends a license, permit or approval, and has satisfied its burden in this case.

5. The Department was authorized to revoke Risingson Farm's approvals if the applicant is found to have failed to comply with any provision of the Solid Waste Management Act. *See* 35 P.S. § 6018.503.

6. Risingson Farm's composting facility was deemed to have a municipal waste processing permit-by-rule and was required to operate in accordance with the Department's guidelines on yard waste composting in accordance with 25 Pa. Code § 271.103.

7. Section 103(b) of the Department Municipal Waste Regulations, 25 Pa. Code § 271.103, provides that a person or municipality that operates a yard waste composting

facility that is less than five acres, other than an individual backyard composting facility, shall be deemed to have a municipal waste processing permit-by-rule if the person or municipality meets the requirements of subsections (a) – (c) and the facility is operated in accordance with the Department's guidelines on yard waste composting. 25 Pa. Code § 271.103(h).

8. Risingson Farm operated a yard waste composting/land application facility which designated only five acres for composting yard waste and, therefore, was eligible for a permit-by-rule authorization under Section 271.103(h).

9. Risingson Farm was required to comply with the Yard Waste Guidelines, which were developed to "provide instructions and operating procedures for the operation of a yard waste composting facility operating under permit-by-rule." The Department's Yard Waste Guidelines "appl[y] to all persons. . .who own or operate a yard waste composting facility operating under 25 Pa. Code § 271.103(h) Permit-By-Rule."

10. Risingson Farm's composting operation was in violation of the Department's Yard Waste Guidelines from July 20, 2006 until at least February 2, 2007.

11. Risingson Farm's land application operation was in violation of the Department's Yard Waste Guidelines from July 20, 2006 until at least February 2, 2007.

12. Risingson Farm's failure to comply with the Department's October 16, 2006 Compliance Order was a violation of 35 P.S. § 6018.610 and 25 Pa. Code § 271.103.

13. The Department's revocation of Risingson Farm's permit-by-rule authorization was reasonable and in accordance with the law in all respects.

**COMMONWEALTH OF PENNSYLVANIA**
**ENVIRONMENTAL HEARING BOARD**

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|---|---|---|
| **RISINGSON FARM** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2007-079-L** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION** | : | |

## ORDER

AND NOW, this 7th day of May, 2008, the appellant's appeal is **dismissed**.

**ENVIRONMENTAL HEARING BOARD**

**THOMAS W. RENWAND**
**Acting Chairman and Chief Judge**

**GEORGE J. MILLER**
**Judge**

**MICHELLE A. COLEMAN**
**Judge**

**BERNARD A. LABUSKES, JR.**
**Judge**

**DATED: May 7, 2008**

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

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

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| **CHRISTOPHER D. LAW** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2007-270-MG** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION** | : | **Issued: May 13, 2008** |

**OPINION AND ORDER ON**
**MOTION TO DISMISS**

**By George J. Miller, Judge**

**Synopsis**

The Board dismisses an appeal from an e-mail from the Department to the appellant which describes the outcome of an investigation of the appellant's complaint that his neighbor had encroached upon a floodway. The Department concluded that there was no encroachment upon the floodway and closed the complaint file. The Board declines to review the Department's decision to close the appellant's complaint because it constitutes an exercise of the Department's prosecutorial discretion.

**OPINION**

On December 6, 2007, the Appellant, Christopher Law, filed a notice of appeal which challenged a November 9, 2007 e-mail from the Department which informed him that the Department had closed a complaint filed by the Appellant against his neighbor. The Appellant

had complained to the Department that his neighbor had built a retaining wall and placed fill and other structures in the floodway of the West Branch of Chester Creek, which, according to the Appellant, created a risk of damage to his property. As we explain more fully below, we believe that the e-mail constitutes an exercise of the Department's prosecutorial discretion and dismiss the appeal.

The facts relevant to the Department's motion to dismiss are not in dispute. On September 7, 2007, the Appellant submitted a complaint to the Department which alleged that one of his neighbors placed fill, a retaining wall, and other obstructions in the floodway and wetlands adjacent to the West Branch of Chester Creek. The complaint was processed through the Department's e-mail complaint system. An inspector visited the site and conducted an on-site investigation and review of the floodway line on September 20, 2007. The inspector concluded that fill had not been placed in the wetlands or the floodway and that there were no violations of the Department's Chapter 105 regulations which preclude encroachments on wetlands and floodways without proper authorization.

The Appellant was informed of the outcome of the Department's inspection by e-mail dated November 9, 2007. The e-mail explained that the Department had confirmed that none of the neighbor's activities were in the floodway and that there was no violation of Chapter 105. The e-mail also stated that the Appellant had a "right to appeal any DEP decision through proper legal channels."[1] The Appellant filed an appeal with the Board on December 6, 2007. The Appellant argued that the Department had incorrectly concluded that there was no fill in the floodway and that the Department's conclusion that there was no fill in the floodway was arbitrary and unsubstantiated.

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[1] Notice of Appeal, Ex. D (incorporated into the Department's motion to dismiss).

The Department now moves to dismiss the Appellant's appeal. The Department argues that the letter to the Appellant is not an action reviewable by the Board, but rather represents an exercise of the Department's prosecutorial discretion. The Appellant opposes the motion and contends that he is adversely affected by the Department's action; that the Department in the letter told him that he had a right to review, and that the Department arbitrarily ignored evidence in concluding that there was no violation by his neighbor. As we explain more fully below, we agree that the Department's e-mail explaining the outcome of the complaint investigation represents an exercise of the Department's enforcement discretion, and we will dismiss the Appellant's appeal.

The concept of prosecutorial discretion is a Board-created exception to Board's authority to review actions of the Department.[2] It derives from the notion that it is the Department, not the Board, which has the legislative authority to pursue enforcement action against violators.[3] Accordingly, it is left to the Department to choose how and when to invest its enforcement resources, largely without interference from judicial action by the Board. Therefore, even if an individual is acting unlawfully and the Department chooses to tolerate the conduct by declining enforcement action, the Board will not review that decision by the Department.[4] Similarly, when the Department performs an investigation of a complaint and concludes that there are no violations, that decision, too, will generally remain undisturbed.[5]

Accordingly, the Department's e-mail describing the outcome of its investigation of the conditions reported by the Appellant does not create an appealable action. Rather, the e-mail

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[2] *PUSH v. DEP*, 1998 EHB 250.

[3] *See North Pocono Taxpayer Ass'n v. DER*, 1994 EHB 449.

[4] *Montenay Montgomery Limited Partnership v. DEP*, 1998 EHB 302.

[5] *E.g., Gordon-Watson v. DEP*, 2005 EHB 812; *Associated Wholesalers, Inc. v. DEP*, 1997 EHB 1174.

constitutes the Department's conclusion that there are no violations of the Department's regulations at the site and its decision to close the matter. Such a decision is the exercise of quintessential enforcement discretion on the part of the Department, which is not subject to judicial review by the Board.

The Commonwealth Court's recent decision in *DEP v. Schneiderwind*,[6] is instructive. In that case, the Department concluded that a nearby quarry operation did not cause the petitioner's water loss. The Board heard the appeal and was reversed by the Commonwealth Court, which held that the Department's refusal to prosecute the petitioner's claim for water loss was not reviewable and the Board erred in considering the appeal and reviewing the merits of the complaint.[7] The Appellant attempts to distinguish *Schneiderwind*, arguing that the Department exercised its discretion by "taking action" on the Appellant's complaint. If by "taking action" the Appellant means that the Department investigated his complaint, there is no basis for distinguishing the two matters. In *Schneiderwind* the Department also undertook an investigation and concluded that the petitioner's water loss was not caused by the quarry operation.[8] Yet the court found that the investigation there was not a reviewable action by the Department. Similarly, we find that the Department's investigation of the Appellant's complaint does not give rise to an action of the Department reviewable by the Board.

In an analogous case, the Board dismissed an appeal in *Gordon-Watson v. DEP*,[9] where the appellants complained that the Department of Transportation had deposited fill on a neighboring property without a permit. The Department of Environmental Protection

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[6] 867 A.2d 724 (Pa. Cmwlth. 2005).

[7] 867 A.2d at 272.

[8] The quality of the Department's investigation was the primary issue before the Board. *See* 867 A.2d at 726, and 2003 EHB 274.

[9] 2005 EHB 812.

investigated the matter and concluded that the Department of Transportation's activity did not require a permit and did not violation Department violations. The Board dismissed the appeal from the letter from the Department to the appellant's explaining the conclusion of the investigation on the grounds that the letter did not constitute a reviewable action of the Department. Specifically, the Board found that the letter was merely "descriptive" and did not require any action on the part of the appellants, but merely explained the application of regulations to a third party.

The Appellant argues that he has a right to review because the Department's letter contained the statement that he had "a right to appeal" through "proper legal channels." This language, alone, can not create jurisdiction any more than the failure of the Department to include language in an otherwise appealable letter divests the Board of jurisdiction.[10] It is the Environmental Hearing Board Act, as interpreted by the Board and the courts which vests the Board with jurisdiction, not language in a letter from an employee of the Department. We do note, however, that the Appellant retains any right he may have to pursue an action directly against his neighbor in the courts.

The Appellant also suggests that the Department inspector "harbors great animosity" toward the Appellant which may have contributed to the inspector's conclusion that there was no violation. The only evidence in support of this allegation is an October e-mail between the inspector and another employee of the Department wherein the inspector stated "I spoke with Mr. Law. I think he has gone around the bend." While this statement is impolite, it does not rise to the level of "corruption," which the Commonwealth Court observed in *Schneiderwind* may

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[10] *Onyx Greentree Landfill, LLC. v. DEP*, 2006 EHB 404, 415; *Eljen Corp. v. DEP*, 2005 EHB 918, 927 ("Likewise, the presence of such words [notifying the appellant of his right to appeal] would not in itself make a non-appealable communication appealable.")

provide a basis for reviewing a refusal to prosecute.[11] The Appellant has put forth no other evidence from the record which supports any claim of corruption on the part of the Department.[12]

In short, we must dismiss the Appellant's appeal. The Department's e-mail is clearly a description of the investigation that was performed on the Appellant's complaint and explains the Department's conclusion that there is no violation of the regulations on the property. Nothing in the e-mail requires any action on the part of the Appellant. Accordingly, the e-mail evidences an exercise of prosecutorial discretion on the part of the Department. We therefore enter the following:

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[11] *Schneiderwind*, 867 A.2d at 727.

[12] Moreover, it does not appear that a claim of bias or corruption was raised in the Appellant's notice of appeal.

**COMMONWEALTH OF PENNSYLVANIA**
**ENVIRONMENTAL HEARING BOARD**

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|---|---|---|
| **CHRISTOPHER D. LAW** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2007-270-MG** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION** | : | |

## ORDER

AND NOW, this 13th day of May, 2008, the motion to dismiss the appeal of Christopher Law by the Department of Environmental Protection in the above-captioned matter is hereby **GRANTED** and the appeal is **DISMISSED**.

**ENVIRONMENTAL HEARING BOARD**

**GEORGE J. MILLER**
**Judge**

**MICHELLE A. COLEMAN**
**Judge**

**BERNARD A. LABUSKES, JR.**
**Judge**

**DATED: May 13, 2008**

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

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|---|---|---|
| **CHRISTOPHER D. LAW** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2007-270-MG** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION** | : | |

## DISSENTING OPINION OF JUDGE THOMAS W. RENWAND

**Thomas W. Renwand, Acting Chairman and Chief Judge**

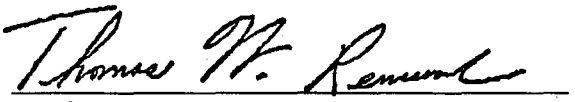
I respectfully dissent. The decision of the Pennsylvania Department of Environmental Protection (Department) that a neighbor's placing of fill, a retaining wall, and other obstructions allegedly in the floodway and wetlands adjacent to the west branch of Chester Creek is a final action of the Department subject to the jurisdiction of the Pennsylvania Environmental Hearing Board (Board).

Prosecutorial discretion, the Board created exception to our jurisdiction that the majority relies on to deny Appellant Christopher Law a hearing or even a review of the Department's action in this case, is a doctrine borrowed from the criminal law. At its core prosecutorial discretion is a separation of powers issue founded on the belief that a criminal prosecutor has very broad discretion in deciding whether to charge a person with a crime. I believe it has little application to Board proceedings.

The Pennsylvania Environmental Hearing Board Act makes no mention of prosecutorial discretion. 35 P.S. Section 7511 *et. seq.* Instead, it contains broad language declaring that "The Board has the power and duty to hold hearings and issue adjudications ...on orders, permits,

licenses or *decisions* of the Department." 35 P.S. Section 7514(a). (*emphasis added*) Moreover, although "[t]he Department may take an action initially... no action of the Department adversely affecting a person shall be final ... until the person has had the opportunity to appeal the action to the Board ...." 35 P. S. Section 7514(c).

In this case, the Department fully investigated Appellant Christopher Law's claim and reached the decision that his claim was without merit. Rather than an exercise of prosecutorial discretion, it is an adjudicatory act which adversely affects the rights of Mr. Law. I would hold that the Board created doctrine of prosecutorial discretion has no application to adjudicatory decisions of the Department which are based upon the merits of a claim rather than based upon a policy determination. Therefore, I would deny the Department's Motion to Dismiss and give Mr. Law his day in court.



**THOMAS W. RENWAND**
**Acting Chairman and Chief Judge**

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| **JEFF LIPTON, LOUISE E. MOYER, BRIAN K. MOYER and JACQUELINE D. MOYER** | : | |
| **v.** | : | **EHB Docket No. 2007-026-MG (consolidated with EHB Docket No. 2008-038-MG)** |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, DISTRICT TOWNSHIP, And PINE CREEK VALLEY WATERSHED ASSOCIATION, INC.** | : | **Issued: May 20, 2008** |

## OPINION AND ORDER ON MOTIONS FOR SUMMARY JUDGMENT and MOTION TO DISMISS

**By George J. Miller, Judge**

**Synopsis**

The Board grants the Department's motion for summary judgment which seeks to dismiss the landowners' appeal from the Department's rescission of an approval of a sewage module for a residential land development. We find as a matter of law that the Department reasonably rescinded its approval of a sewage module under the Sewage Facilities Act, in order to consider whether the proposed on-lot disposal systems would adequately protect the exceptional value waters located on the site as required by the Department's antidegradation regulations.

The Board also grants the Department's motion to dismiss the appeal of the sewage module as moot. Since the Board holds that the Department properly rescinded its approval of the module, there is no further relief that can be granted.

## OPINION

Before the Board are separate motions for summary judgment filed by each of the parties to these appeals involving sewage facilities planning for a subdivision located in Berks County known as Fredericksville Farms. Fredericksville Farms is located within the Pine Creek watershed.[1] The Pine Creek Valley Watershed Association (the Association) contends that the Department should consider the impact that the proposed sewage facilities might have on wetlands and other surface waters which are located on the property and which are part of the Pine Creek watershed. The Pine Creek and its tributaries are designated by the Department as exceptional value (EV) waters. The Association's advocacy on this point has generated a series of appeals resulting in a rather complex procedural history described below. For the purposes of the motions for summary judgment, most of the factual background does not appear to be disputed.

The Fredericksville Farms subdivision is owned by Jeff Lipton. Louise Moyer, Brian Moyer and Jacqueline Moyer each own lots. Mr. Lipton is marketing the remaining lots for sale and the Moyers utilize their lots for farming activity.[2] Fredericksville Farms consists of eight lots on approximately 74 acres. There are approximately 11 acres of wetlands located in the southeastern portion of the property.[3] The parties do not dispute that these wetlands contain headwaters and tributaries to Pine Creek, and are therefore part of the Pine Creek EV watershed.[4]

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[1] Exhibit 1 to the Department's motion for summary judgment is a stipulation of facts signed by all the parties. These facts will be referenced as "Stip.¶ __."

[2] Collectively Mr. Lipton and the Moyers will be referred to as "Landowners."

[3] Association's Brief, Statement of Material Facts, ¶ 3 and Ex. 2.

[4] See Stip. ¶ 5 and Association's Brief, Statement of Material Facts ¶¶ 8-11 and Exs. 1, 2,3, and 5.

The lots in Fredericksville Farms are to be served by on-lot sewage disposal systems. The proposed on-lot systems are designed to discharge effluent to absorption areas in the ground and allow the effluent to percolate through the soil, ultimately to be assimilated into groundwater.[5] The groundwater flow on the property generally flows toward the east into a tributary of Pine Creek.[6]

The Department approved a sewage module for the Fredericksville Farms subdivision in November 2006. Neither the sewage planning specialist who approved the module nor anyone else at the Department explicitly considered the impact that the discharge from the on-lot septic systems may have on the EV waters that form the Pine Creek watershed.[7] Accordingly, the Pine Creek Valley Watershed Association challenged the Department's action by filing a notice of appeal in January 2007. The Landowners[8] intervened.

In the meantime, the Association was litigating another appeal before the Board relating to a sewage module for the Mulberry Hill II Subdivision, making a similar argument: that the Department should consider the impact that on-lot disposal systems may have on the Pine Creek watershed pursuant to the Department's antidegradation regulation, 25 Pa. Code § 93.4c, when reviewing sewage modules.[9] After that case went to hearing and the Association had filed its post-hearing memorandum, the Department agreed to rescind its approval of that sewage module in order to consider potential impacts of its approval on the EV watershed, if any.

Shortly thereafter, the Department also rescinded the approval for Fredericksville Farms, and filed a motion to dismiss the Association's appeal on the basis of mootness. The Landowners

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[5] Stip. ¶ 4.
[6] Association's Brief, Statement of Material Facts, ¶ 5 and Ex. 4.
[7] Stip ¶ 6.
[8] See Footnote 2, above.
[9] *Pine Creek Valley Watershed Association v. DEP*, EHB Docket No. 2005-249-MG.

filed a notice of appeal from the rescission, challenging the Department's decision to further investigate the connection between the proposed method of sewage disposal and the EV watershed. The Association intervened in the appeal of the rescission. The Board consolidated the plan approval appeal with the rescission appeal and directed the parties to come to an agreement on how best to proceed. The parties contended that the issue before the Board was essentially one of law which could be decided on motions for summary judgment. Accordingly, each party has now filed a motion for summary judgment.

*The Landowners' Motion*

The basis for the Landowners' motion is simple: The Department's antidegradation regulations do not apply to the proposed method of sewage disposal because the on-lot systems do not discharge effluent as either a point source or a non-point source. Rather, according to the Landowners, the on-lot systems are an approved "non-discharge alternative" as defined by the Department's antidegradation guidance document. They contend that because the antidegradation regulations only relate to the protection of EV waters from point sources and non-point sources, and not non-discharge alternatives, it was improper to apply the required analysis to the Landowners' sewage module. Therefore, the Board should grant judgment in favor of the Landowners, and rescind the Department's rescission letter.

Both the Department and the Association oppose the Landowners' motion and take the position that there is no legal basis for the Landowners' analysis. In the Department's view, the antidegradation regulations apply to *any* permit or approval action that may have an effect on surface waters, including sewage planning modules and Act 537 plan revisions. The Association also argues that the Landowners' reliance on a Department guidance document which defines on-lot sewage disposal as a "non-discharge alternative" means only that there is no discharge

directly to a surface water. In the Association's view, the proposed on-lot systems discharge to groundwater which in turn discharges to surface water.

*The Association's Motion*

The Association's position is also simple: The Department has an absolute duty to consider the impact of on-lot sewage disposal systems on special protection waters pursuant to the antidegradation regulations. Therefore it was proper for the Department to rescind the approval for Fredericksville Farms. The Association points out that there is no dispute that the Department did not undertake such a review. There is no dispute that the wetlands on the property contain headwaters and tributaries to Pine Creek. Further, the groundwater on the site flows from the parcels toward the wetlands thereby creating at least a potential of pollution to the watershed. The Department generally concurs with the relief requested by the Association's motion, and agrees that the Department should consider whether the proposed systems will impact the watershed. However, the Department contends that it should not be required to perform an alternatives analysis required by 25 Pa. Code § 93.4c(b)(1)(i)(A) and (B). In the Department's view, this provision only applies to point source discharges.

The Landowners counter that there is no factual or legal basis to conclude that the proposed on-lot systems will have any potential impact on surface waters. On the legal argument the Landowners reiterate the contention in their own motion that the proposed sewage disposal systems are neither point source nor non-point source discharges, therefore the antidegradation regulations do not apply. As a point of fact, they argue that the hydrology study performed to determine whether the soil would be sufficient to remediate nitrate pollution below the drinking water standard is sufficient to demonstrate that no sewage from the systems will reach surface waters.

*The Department's Motion*

The Department agrees with the Association that it had a mandatory duty to consider whether or not the proposed sewage systems would negatively impact the Pine Creek watershed pursuant to the antidegradation regulations and the sewage facilities regulations which require compliance with the Clean Streams Law and regulations. Accordingly, the Department takes the position that it did not abuse its discretion as a matter of law, by rescinding the Fredericksville Farms approval in order to perform this analysis.

As we explain more fully below, we will grant the Department's motion for summary judgment. We believe that the Department acted reasonably by rescinding the Fredericksville Farms sewage module in order to consider what impact, if any, the proposed sewage systems may have on the Pine Creek watershed.

## DISCUSSION

### Motions for Summary Judgment

The purpose of summary judgment is to challenge the sufficiency of the evidence that the opposing party has to support his claim at hearing.[10] Accordingly, the Board will only grant summary judgment where the evidentiary materials which support the motion demonstrate that the moving party is entitled to judgment as a matter of law.[11] In considering the merits of a motion for summary judgment, we view the record in the 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

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[10] *Scalice v. Pennsylvania Benefits Trust Fund,* 883 A.2d 429 (Pa. 2005); *Jones v. SEPTA*, 772 A.2d 435 (Pa. 2001); *Jackson v. DEP*, 2005 EHB 496.

[11] *E.g. Global Ecological Services, Inc. v. Department of Environmental Protection,* 789 A.2d 789 (Pa. Cmwlth. 2001); *Barra v. DEP*, 2006 EHB 198.

against the moving party. Finally, the entry of judgment in the moving parties' favor is only appropriate in cases where the right to judgment is clear and free of doubt.[12]

The Department's mandate under the antidegradation regime is clear: "The water quality of Exceptional Value waters *shall be* maintained and protected."[13] In order to carry out this mandate, Section 93.4c of the Department's regulations, sets out general procedures for review:

> (i) Existing use protection *shall be provided* when the Department's evaluation of information . . . indicates that a surface water attains or has attained an existing use.
>
> . . . .
>
> (iv) The Department will make a final determination of existing use protection for the surface water as part of the final permit or approval action.[14]

All of the parties agree that the Department did not explicitly perform any type of review pursuant to Section 93.4c of the regulations. All of the parties agree that the Pine Creek watershed is an EV water,[15] and all of the parties agree that the wetlands located on the Fredericksville Farms property are part of the Pine Creek watershed. The Department's regulations define wetlands as a "surface water."[16] The parties have stipulated that sewage effluent will be discharged to absorption areas and will ultimately be assimilated into groundwater through the soil. There does not appear to be a dispute that the general direction of groundwater flow is from at least some of the proposed subdivision lots toward the wetlands on the property. Accordingly, we can find no error in the Department's desire to review the proposed sewage facilities in order to make sure that the effluent from the proposed sewage

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[12] *Scalice; Jones.*

[13] 25 Pa. Code § 93.4a.

[14] 25 Pa. Code § 93.4c(a)(1)(i) and (iv).

[15] "Exceptional value" is defined as a "protected water use" by Section 93.3. 25 Pa. Code § 93.3.

[16] 25 Pa. Code § 93.1.

facilities is indeed remediated by percolation through the soil before it reaches the groundwater thereby ensuring that the existing use of the wetlands in the EV watershed are protected. The antidegradation regulations clearly provide authority for such a review. Indeed the sewage facilities regulations also required that the Department ensure that sewage modules and approvals of official plans comply with antidegradation and other Clean Streams Law requirements.[17] We further find no fault in the Department's desire to correct its oversight in failing to undertake this review in the first instance by taking the initiative to revoke the approval before being ordered to do so by the Board.[18]

We reject the Landowners' contention that the antidegradation regulations do not apply to on-lot sewage facilities because they are neither a point source nor a non-point source. This premise is based on the Landowners' view that the on-lot systems discharge to the ground and remediate sewage discharges through the soil, rather than discharging directly to surface water. The Landowners argue that this view is supported by the Department's antidegradation guidance manual which defines on-lot systems as an acceptable "non-discharge alternative."

First, even if we were to accept the Landowners' premise, there is nothing in the simple language of Section 94.3a which limits the command to protect the water quality of EV waters only from direct discharges to surface waters, nor do we find an exemption in the regulation from review of "non-discharge alternatives" because they discharge through an absorption area rather than directly to water. The fact that sewage may be remediated through the soil does not by itself mean that there is no possible impact on the wetlands and that the project should be shielded from review by the Department. The parties have stipulated that the effluent is

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[17] 25 Pa. Code § 71.32(d)(1).

[18] *See Blue Mountain Preservation Association v. DEP*, 2006 EHB 589 (vacating and remanding an NPDES permit for antidegradation review).

ultimately "assimilated into groundwater." There is no question that sewage from residences is pollution and that the purpose of the on-lot systems is to remediate that pollution. Whether those systems are adequate for the purposes of protecting the existing use of the watershed – as a point source, as a non-point source or as something else – is not necessary for us to resolve here. The regulation only requires that the Department protect the existing use of a watershed. It does not limit the types of discharges from which the watershed must be protected.

The Landowners also contend that there is no proof that all of the groundwater on the site will reach the surface waters on the site, and that even if it does, the nitrate studies which were done in the context of the sewage facilities regulations adequately establish that there is no pollution to the groundwater. By contrast, at the hearing in the appeal relating to the Mulberry Hill II Subdivision, the Association's expert testified that the Department's initial studies done in the context of the sewage planning module were inadequate to determine whether the sewage disposal plumes would not reach the Pine Creek watershed, located a few hundred feet from the property-line of the proposed development. In his view, it was likely that given the topography of the property and the likely flow of the groundwater, a more detailed study would show that the plumes from several of the on-lot systems would converge in a "funnel effect" and reach the Pine Creek watershed, resulting in pollution of the watershed.[19] The Department agreed to withdraw its approval of that sewage module in order to consider what impacts, if any, the proposed on-lot systems would have on the Pine Creek watershed, after the hearing. No doubt, a similar criticism might be made of the studies performed in the Landowners' sewage module. Accordingly, it was lawful and appropriate for the Department to review the situation in order to determine the

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[19] See testimony of John Ward, N.T. 42-62.

possible effect of its approval of the sewage module on EV waters.[20] The Department may well conclude that the proposed systems will not cause pollution either because the sewage is adequately remediated by discharge through the soil, or that the groundwater is not, in fact, hydrogeologically connected to the surface waters.

Further, the Board clearly required the Department to perform an independent antidegradation review in *Blue Mountain Preservation Association v. DEP.*[21] There the Department had argued that the best management practices incorporated into the Chapter 102 erosion and sedimentation control regulations were an acceptable substitute for the antidegradation analysis required by Chapter 94. The Landowners have not demonstrated that the Chapter 71 nitrate analysis requirement, which assures compliance with the drinking water standard for nitrogen contamination, has any direct relationship to the broader requirements of the antidegradation regulations or that there is any unity of purpose or process between the two sets of regulations. Accordingly, we see no basis to depart from the *Blue Mountain Preservation* holding in this case.

Thus, the only issue for our resolution is whether the Department's position that it should have reviewed the sewage module under Section 93.4c, provides a reasonable basis for the Department to rescind its approval in order to effectuate that review. We find that the presence of wetlands on a substantial portion of the site which are part of an EV watershed and the testing of the Association's expert in the appeal related to the Mulberry Hill II Subdivision provide an adequate basis for the Department's desire to investigate whether there may be an adverse impact

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[20] *Blue Mountain Preservation Association v. DEP*, 2006 EHB 589 (in a challenge to a stormwater permit the appellant need not prove that there will be degradation of the surface water, but only that the proper analysis was not performed).

[21] 2006 EHB 589.

on the existing use of the watershed by the addition of on-lot sewage disposal facilities to the property, and that further review to answer that question is reasonable and appropriate.[22] As we explained above, this analysis is clearly required by Sections 93.4a and 93.4c. Further, Section 71.32(d)(1), requires that the Department determine whether the proposed plan revision complies with the requirements of the Clean Streams Law. Accordingly, the Department is authorized and required to consider whether the approval of the sewage module was consistent with the regulations promulgated to effectuate the mandates of the Clean Streams Law, including the antidegradation regulations.

In short, we will grant the Department's and Association's motions for summary judgment and deny the Landowners' motion. Given our disposition of the Department's motion, we need not reach the issues raised in the Association's motion relating to the specifics of the analysis that the Department should perform under the antidegradation regulations.

**Motion to Dismiss**

We also have before us the Department's motion to dismiss the Association's appeal of the grant of the sewage module as moot.[23] The Department moved to dismiss the appeal because the approval had been rescinded and the Association had effectively achieved the relief which is sought in the appeal. The Landowners opposed the motion because they had filed an appeal from the rescission. The Association did not oppose the Department's motion.

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[22] *See Eagle Environmental LP v. DEP*, 1998 EHB 896, *affirmed,* No. 2704 C.D. 1998 (Pa. Cmwlth. filed October 19, 2001) (the Department did not abuse its discretion in suspending solid waste, air quality, and NPDES permits for a proposed landfill project based on the Department's revocation of a permit to fill wetlands in order to allow the opportunity for the Department to conduct further review of the project.)

[23] This motion was filed in December, 2007. The Board delayed disposing of the motion in order to permit the parties an opportunity to file the motions to dismiss in the rescission appeal.

In light of the Department's withdrawal of the approval of the sewage module and our ruling that the Department's desire to review the proposal under the antidegradation regulations is lawful and reasonable, we agree with the Department that the Association's original appeal is moot. There is no further relief that the Board can provide in the appeal of the sewage module.

We therefore enter the following;

**COMMONWEALTH OF PENNSYLVANIA**
**ENVIRONMENTAL HEARING BOARD**

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|---|---|---|
| **JEFF LIPTON, LOUISE E. MOYER, BRIAN K. MOYER and JACQUELINE D. MOYER** | : | |
| **v.** | : | **EHB Docket No. 2007-026-MG** |
| | : | **(consolidated with EHB Docket** |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, DISTRICT TOWNSHIP, And PINE CREEK VALLEY WATERSHED ASSOCIATION, INC.** | : | **No. 2008-038-MG)** |

**ORDER**

**AND NOW**, this 20th day of May, 2008, upon consideration of the motions for summary judgment and the motion to dismiss in the above-captioned matter, it is hereby ordered as follows:

1. The motions for summary judgment of the Department of Environmental Protection and the Pine Creek Valley Watershed Association are hereby **GRANTED**.

2. The motion for summary judgment of the Landowners is **DENIED**.

3. The Landowners' appeal at Docket No. 2008-038-MG is **DISMISSED**

4. The Department's motion to dismiss the appeal of the Pine Creek Valley Watershed Association at Docket No. 2007-026-MG is **GRANTED** and that appeal is **DISMISSED**.

**ENVIRONMENTAL HEARING BOARD**

**THOMAS W. RENWAND**
**Acting Chairman and Chief Judge**

**GEORGE J. MILLER**
**Judge**

**MICHELLE A. COLEMAN**
**Judge**

**BERNARD A. LABUSKES, JR.**
**Judge**

**DATED: May 20, 2008**

**C:** **DEP Bureau of Litigation:**
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SECRETARY TO THE BOARD

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|---|---|---|
| **PINE CREEK VALLEY WATERSHED ASSOCIATION, INC.** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2005-249-MG** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, ROCKLAND TOWNSHIP, Permittee and LEON E. SNYDER, Intervenor** | : | **Issued: May 20, 2008** |

## OPINION AND ORDER ON APPLICATION FOR ATTORNEY FEES

**By George J. Miller, Judge**

**Synopsis**

The Board determines that it may exercise its discretion to award costs and counsel fees under the Clean Streams Law to an appellant whose appeal challenged the Department's approval of a sewage module under the Sewage Facilities Act. This challenge was based in part on the Department's failure to consider the impact of its approval on exceptional value waters as required by the Department's antidegradation regulations promulgated under both statutes. The Department's withdrawal of its approval was responsive to this claim in the appeal. A hearing will be scheduled to determine the amount of the costs and fees to be awarded.

## BACKGROUND

The Pine Creek Valley Watershed Association (Appellant) filed an application for counsel fees and costs in this appeal following the Department's withdrawal of its

approval of a sewage planning module for the land development of the Mulberry Hill II Subdivision proposing on-lot septic systems for each of 11 residential lots. This approval constituted a revision to the official sewage facilities plan of Rockland, Longswamp and District Townships. The Department's withdrawal of its approval followed a hearing on the merits of the appeal and after the Appellant had filed and served its post hearing brief and requests for findings of fact and conclusions of law. The Department chose not to file responsive post hearing materials. Instead, the Department moved to dismiss the appeal as "moot in light of its rescinding its approval of the sewage module at issue in this appeal to allow the Department to consider the potential impact the proposed module will have on exceptional value waters of the Commonwealth." The Appellant concurred in the request and the Board dismissed the appeal.

The Appellant's application is based on the authority of Section 307(b) of the Clean Streams Law.[1] Subsection (b) provides in relevant part:

> The Environmental Hearing Board, upon the request of any party, may in its discretion order the payment of costs and attorney's fees it determines to have been reasonably incurred by such a party in proceedings under this Act.

The Appellant's application seeks an award of counsel fees in a range of from $63,407 to $98,910 and costs in the total amount of $12,644.29, including a consultant's fee of $11,089.96. The Appellant has also filed a supplemental application for fees relating to the costs of its application for fees. This amendment brings the total claim for counsel fees to a range of $76,051 to $98,910 with attorney's fees based on an hourly rate of $300 per hour.

[1] Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. § 691.207(b).

From the Department's point of view, the central, threshold question raised by the Appellant's application for recovery of counsel fees is whether the Department's withdrawal of its approval of a sewage module applied for under the Sewage Facilities Act[2] as a necessary part of a new real estate development can be considered an action pursuant to the Clean Streams Law. The Appellant's application for fees and costs is predicated entirely on the fee-shifting provision of the Clean Streams Law. The Department argues that this proceeding is solely under the Sewage Facilities Act which contains no provision for the recovery of counsel fees. The Department also argues that a contrary interpretation would lead to virtually unlimited liability for counsel fees in many other areas of its regulatory program such as permits under the mining legislation.

The Appellant argues that it is entitled to counsel fees under this provision of the Clean Streams Law because the application of the Sewage Facilities Act to the sewage module application is essentially irrelevant. It argues that (1) its appeal was a proceeding pursuant to the Clean Streams Law, (2) was based on the Department's antidegradation regulations that were promulgated under the authority of both the Clean Streams Law and the Sewage Facilities Act, and (3) that this regulatory program is designed to protect further pollution of exceptional value waters, the sole aim of the appeal. The Department responds that the proceeding is under the Sewage Facilities Act because the sole authority for an appeal from the Department's approval of a sewage module is contained in the Sewage Facilities Act.

The Appellant also argues that the authorization to the Board to award counsel fees in its discretion must be liberally interpreted based on the Supreme Court's recent

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[2] Pennsylvania Sewage Facilities Act, the Act of January 24, 1966, P.L. (1965) 1535, *as amended*, 35 P.S. §§ 750.1-750.20a (Sewage Facilities Act).

decision in *Solebury Township v. Department of Environmental Protection.*[3] In that case the Supreme Court upheld the right to recover counsel fees under Section 307(b) of the Clean Streams Law, even though the proceeding before the Department was an application for a Water Quality Certificate required by the Federal Water Pollution Control Act.[4] Such a certificate was required to obtain a permit under the state Dam Safety and Encroachments Act[5] in connection with a highway project by the Pennsylvania Department of Transportation. The Dam Safety Act contains no fee-shifting provision. Nevertheless the Court held the Board had broad discretion to award fees in the appropriate case such as the certificate appeal under Section 307(b).[6] The Court remanded the matter back to the Board to determine whether fees should be awarded based on Pennsylvania's public policy favoring liberal construction of fee-shifting provisions.[7]

The Department raises many other objections to the Appellant's claim. The Department argues, in the alternative, the claim should be sharply reduced because not all of these fees relate to the litigation of any issue under the Clean Streams Law. It says that the notice of appeal as amended contained 28 separate objections, and that all but two of them were dropped prior to the hearing on the merits. In addition, the Department says that matters such as specific charges, hourly rates and hours spent are factual issues that entitle the Department to discovery and a hearing. The Appellant argues by contrast that

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[3] 928 A.2d 990 (Pa. 2007).
[4] 33 U.S.C. §1251 *et. seq.*
[5] Act of November 26, 1978, P.L. 1375, *as amended*, 32 P.S. §§ 693.1- 693.27.
[6] 928 A.2d at 1003.
[7] *Id.* at 1005.

the Board should award it the full amount of its claim based on the affidavits and documents filed with the petition.

## OPINION

We conclude that the Supreme Court's recent decision in *Solebury Township* on counsel fees under the Clean Streams Law authorizes us to interpret Section 307(b) of the Clean Streams Law liberally in favor of exercising our discretion to award counsel fees in this case. The Department does not dispute that its decision to withdraw its approval was responsive to the Appellant's contention that the Department failed in its duty to consider the impact of its approval of a sewage module on exceptional value (EV) waters. Nor does the Department dispute that this duty arises under the Department's antidegration regulations which were promulgated under both the Clean Streams Law and the Sewage Facilities Act. Accordingly, it appears that the Appellant achieved success in the Department's withdrawal of its approval that lead to a final resolution of the appeal.

In *Solebury*, the Supreme Court said that Section 307(b) of the Clean Streams Law gives the Board the ability and discretion to adopt standards by which applications for counsel fees may be awarded in view of Pennsylvania's strong policy to justly compensate parties who challenge agency action by liberally interpreting fee-shifting provisions.[8] According to the Court, those standards should include consideration of the practical relief sought by the appellant, rather than restricting recovery to those who achieve a final ruling on the merits. Rather, under Pennsylvania law, it is sufficient for the Board to find that the appellant is a "prevailing party" in the sense that it has

[8] 928 A.2d at 1004. The Court expressed the same policy in its decision in *Lucchino v. Department of Environmental Protection*, 809 A.2d 264 at 285 (Pa. 2002).

prevailed with some success on the merits and that a formal judgment in the appellant's favor should not be required.[9]

Accordingly, we reject the Department's position that counsel fees cannot be awarded because this appeal can only be considered to be a proceeding under the Sewage Facilities Act. The notice of appeal specifically charges that the Department failed to consider the potential impacts to Exceptional Value Watersheds and that the module submitted violates the antidegradation requirements of the Clean Streams Law as set forth in 25 Pa. Code §§ 93.4, 93.4b, and 93.4c. The Appellant's prehearing memorandum, evidence at the hearing, and its post hearing submissions focused on the claim that the Department had failed to consider the impact of the module's approval on exceptional value waters. In addition, we have decided by a separate opinion issued today that the Department's withdrawal of its approval of the sewage module in a similar appeal was reasonable for reasons advanced by the Appellant in this appeal.[10]

Further, the appeal is properly characterized by the Appellant as a proceeding under the Clean Streams Law. The antidegradation regulations were adopted under the authority of both the Clean Streams Law and the Sewage Facilities Act. In addition, Pennsylvania, like all other states, was required to adopt antidegradation requirements in its regulations by EPA under the Federal Water Pollution Control Act as a condition of the Department being delegated authority by EPA to administer Pennsylvania's water

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[9] 928 A.2d at 1004. We see no necessity to conduct a hearing on the issue of whether the Appellant was a prevailing party. The Board's order scheduling the briefing of issues raised by the petition required the Department to raise all objections it had to the grant of the petition. The Department's answer to the petition and its brief does not dispute that the Department's withdrawal of its approval of the sewage module was responsive to the Appellant's claims in this appeal.

[10] *Lipton v. DEP*, EHB Docket No. 2007-026-MG. (Opinion issued May 20, 2008).

quality program.[11] As a result, these regulations have been an important part of the Department's permitting system under both Acts, and the provenance of these antidegradation requirements as a Clean Streams Law matter is beyond question.[12]

However, we cannot accept the Appellant's claim that we can issue an award of counsel fees on the present record. While the Appellant has submitted affidavits and documents in support of its position, our authority to make an award of counsel fees is limited to costs and attorney's fees the Board determines to have been "reasonably incurred by such party."[13] We do not think we can make an award based solely on the materials before us. An award of fees in this case may well depend on how much time of counsel and the Appellant's environmental consultant was spent on each of the issues raised by the notice of appeal that properly may allow us to characterize the appeal as a proceeding under the Clean Streams Law. The Department has also reserved its right to challenge what an appropriate hourly rate for work of counsel may be for purposes of the calculation of an allowable fee. These appear to be disputed issues of material fact as to which the Department is entitled to discovery and a hearing.

A hearing is also appropriate to enable the Department to express its views on what the Board's standard on the recovery of counsel fees should be under this provision of the Clean Streams Law.[14] The Department's brief expresses concern that an award of

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[11] 40 C.F.R. § 131.12.

[12] In the *Solebury* decision, the Supreme Court relied in part on the fact that the requirement of a water quality certificate arose from a requirement of the federal Act which was an integral part of Pennsylvania's permitting scheme under the Clean Streams Law.

[13] 35 P.S. § 691.307(b).

[14] We think it unnecessary here to review the Board's prior decisions on an award of counsel fees under the mining laws. The Supreme Court's decisions in *Solebury* makes it clear that the Board is not bound in this case by the criteria adopted by the Board

counsel fees in this case will open the floodgates to claims for counsel fees in cases arising under other laws such as the mining laws. If the Board elects in this appeal to set forth general rules on the recovery of counsel fees under the Clean Streams Law, the Department should have an opportunity to express its views on what those general rules should be.

Accordingly, we enter the following:

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in its *Kwalwasser* decision. See *Kwalwasser v. DER*, 569 A. 2d 422 (Pa. Cmwlth. 1990). In *Solebury* the Court said the Board may channel its discretion based on considerations set forth in those criteria, but the Board must consider the practical relief sought when characterizing an appellant as a prevailing party. 928 A.2d at 1003 and 1004.

**COMMONWEALTH OF PENNSYLVANIA**
**ENVIRONMENTAL HEARING BOARD**

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

## ORDER

AND NOW this 20th day of May, 2008, it is hereby ordered as follows:

1. The Board may exercise its discretion to award counsel fees to the Appellant in the above-captioned appeal, subject to the Board's determination of the appropriate amount of any such award following a hearing to determine the appropriate amount.

2. Counsel shall be available for a conference call in the near future to discuss the scheduling of such a hearing and any necessary discovery proceedings.

**ENVIRONMENTAL HEARING BOARD**

George J. Miller

**GEORGE J. MILLER**
**Judge**

**DATED:** **May 20, 2008**

**c:** **DEP Bureau of Litigation:**
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| **UPPER SAUCON TOWNSHIP MUNICIPAL AUTHORITY and UPPER SAUCON SEWAGE TREATMENT AUTHORITY** | : | |
| **v.** | : | **EHB Docket No. 2007-038-MG** |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, BOROUGH OF COOPERSBURG, Permittee, and McGRATH HOMES, Intervenor** | : | **Issued: May 20, 2008** |

## OPINION AND ORDER ON MOTION FOR SUMMARY JUDGMENT

**By George J. Miller, Judge**

**Synopsis**

The Board denies a motion for summary judgment which fails to establish that the schedule for a township's corrective action plan contravenes the Department's regulations as a matter of law. There are genuine issues of disputed material fact concerning whether the measure of compliance by the occurrence of ten storm events which generate flows in excess of 1.4 mgd is a reasonable measure of time for the purposes of Section 94.21 of the Department's wasteload management regulations.

## BACKGROUND

Upper Saucon Township Municipal Authority and Upper Saucon Sewage Treatment Authority (collectively, Appellant) filed this appeal from the Department's conditional approval

of the Corrective Action Plan (CAP) submitted to the Department by the Borough of Coopersburg. The Department's approval letter states that the submitted plan proposes a systematic plan to identify and reduce/eliminate sources of infiltration/inflow (I/I) which are causing periodic hydraulic overloading of Upper Saucon's South Branch Interceptor during wet weather conditions. The Department's approval letter prohibits the Borough from approving any new connections to its system unless approved by Upper Saucon Township until the Department may grant the Borough the right to permit new connections itself.

The Borough's CAP did not set a calendar date for the completion of the various steps contained in the plan to correct the I/I problems in the Borough's system. Rather, the schedule approved by the Department appears on Page 29 of the CAP as "...the elimination of the hydraulic surcharges will require ten storm events of significant magnitude to produce peak flows in excess of 1.4 MGD at the Borough meter station."

Appellant has moved for summary judgment based on the language of 25 Pa. Code § 94.21(a)(3) that a submitted CAP is to "...contain a schedule showing the dates each step toward compliance...will be completed." They contend that the Department's approval of the CAP is improper because the CAP does not set forth a calendar date for each step toward compliance.

**OPINION**

We cannot hold that the approved schedule in the CAP contravenes Section 94.21 as a matter of law. Rather, there are questions of material fact at issue as to whether the timeframe described by the CAP is reasonable and appropriate and substantially complies with the regulation or whether the only reasonable interpretation of the regulation is that compliance must be achieved by a set calendar date and not some other measure of time. Accordingly, we will deny the Appellant's motion for summary judgment.

Section 94.21(a)(3), provides, among other things, that when a sewage facility is determined to be "overloaded," the permittee of such a facility will submit a CAP to the Department:

> setting forth the actions to be taken to reduce the overload and to provide the needed additional capacity. The written CAP shall include, but not be limited, to limitations on and a program for control of new connections to the overloaded sewerage facilities and a schedule showing the dates each step toward compliance with paragraph (2) [which requires the design and construction of facilities necessary to meet anticipated sewerage demands] shall be completed.[1]

There is no calendar day and date for compliance in the Borough's CAP. The Appellant's argue that this lack of calendar date is a fatal flaw in the CAP and that it could take years before compliance can be achieved. However, the Department and the Borough argue that ten storm events of sufficient magnitude to generate flows in excess of 1.4 mgd is a measurable and reasonable timeframe from compliance by the Borough. Indeed, the Borough in opposition to the Appellant's motion, submitted the affidavit of William Erdman, P.E., the Borough's engineer, which indicates that four of these storms have already occurred. Data acquired during these events has resulted in the identification and repair of many sources of inflow and infiltration.[2] Further, the Department states that in its discretion, requiring a compliance schedule based on certain storm events which are of sufficient magnitude to allow for meaningful investigative measures to take place, was fair and reasonable in the circumstances. The Department points out that the Appellant's own expert concedes that inflow and infiltration can only be identified at a time of high flow because they "disappear and go undetected until the next event."[3] The Department also contends that the Department's conditional approval retains the right to add

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[1] *Id.*
[2] Borough's Response, Ex. A.¶¶ 12-13.
[3] Motion for Summary Judgment, Ex. 2 at 5.

additional requirements, should the schedule "not yield the expected results." According to the Department, this reservation provides the Department the additional authority to make sure that the Borough rectifies the inflow/infiltration problem within a reasonable period of time.

The Appellant does not direct the Board to any regulatory or case authority which requires the Department to provide a calendar date certain for the implementation of corrective action under Section 94.21. Nor does the Appellant contest the premise that the inflow and infiltration only occurs during high flow events and disappear after such events. Accordingly, we have no basis upon which to say that the Department's approach to the Borough's overload problem is unreasonable or inappropriate as a matter of law.

In support of its motion, the Appellant relies on excerpts from several depositions taken in another case, *Upper Saucon Township v. DEP.*[4] The Borough is not a party in that appeal, nor does the Department's counsel in this case represent the Department in that appeal.[5] The testimony to which the Appellant directs us, does not support the Appellant's position that there are no factual matters in dispute concerning the interpretation of the CAP's compliance schedule. In one deposition a Department witness simply testifies that there is no Department definition or protocol which defines a "high wet weather event."[6] In the other deposition, the Department witness simply states that Section 94.21 requires an implementation schedule in order for a CAP

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[4] EHB Docket No. 2007-171-MG.

[5] Both the Department and the Borough strenuously object to the use of these depositions on the basis of hearsay. Obviously depositions from another appeal constitute hearsay and can not be used in support of a motion for summary judgment, unless some exception to the hearsay rule applies. *Botkin v. Metropolitan Life Insurance Co.*, 907 A.2d 641 (Pa. Super 2006). The Appellant has made no attempt to show that an exception applies that might provide a basis for the admission of these depositions.

[6] Motion for Summary Judgment, Ex. 6 at 39-40.

to be valid.[7] First, we see no mention of a "high wet weather event," in the implementation schedule of the Borough's CAP. Rather, the schedule requires completion of repairs after "ten storm events of significant magnitude to produce peak flows in excess of 1.4 mgd." Accordingly, even if there is no regulatory definition of a "high wet weather event" the designation of a storm which generates flows in excess of 1.4 mgd is an objective standard that may measure an appropriate date for compliance to remedy an overload. The Department and the Borough both argue that from an engineering standpoint, such a definition was the most reasonable manner in which to measure compliance with the sewage facilities regulations. To the extent that the Appellant challenges that judgment as a matter of engineering, clearly then, there is an issue of fact which must be resolved after a hearing on the subject.

Second, no one disagrees that Section 94.21 requires a compliance schedule in order for a CAP to be valid. The question for resolution is whether the measure of the schedule by ten storm events which generate flows in excess of 1.4 mg is a reasonable interpretation of "dates toward compliance" given the allegedly unique circumstances presented by the Borough's overload situation. We find that this question can only be answered by factual and scientific testimony which the Appellant has failed to demonstrate is undisputed in its motion.

Accordingly, we will deny the Appellant's motion and enter the following order:

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[7] Motion for Summary Judgment, Ex. 7 at 101.

**COMMONWEALTH OF PENNSYLVANIA**
**ENVIRONMENTAL HEARING BOARD**

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| **UPPER SAUCON TOWNSHIP MUNICIPAL AUTHORITY and UPPER SAUCON SEWAGE TREATMENT AUTHORITY** | : | |
| **v.** | : | **EHB Docket No. 2007-038-MG** |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, BOROUGH OF COOPERSBURG, Permittee, and McGRATH HOMES, Intervenor** | : | |

## ORDER

**AND NOW**, this 20th day of May, 2008, upon consideration of the motion for summary judgment by the Upper Saucon Township Municipal Authority and the Upper Saucon Township Sewage Authority, the motion is hereby **DENIED**.

The Board will contact the parties shortly in order to schedule a hearing on the merits.

**ENVIRONMENTAL HEARING BOARD**

George J. Miller

**GEORGE J. MILLER**
**Judge**

**DATED: May 20, 2008**

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| **PDG LAND DEVELOPMENT, INC.** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2007-041-R** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and CITIZENS FOR PENNSYLVANIA'S FUTURE, Intervenor** | : | **Issued: May 21, 2008** |

## OPINION AND ORDER ON THE DEPARTMENT'S MOTION FOR PROTECTIVE ORDER

**By Thomas W. Renwand, Acting Chairman and Chief Judge**

**Synopsis:**

The Pennsylvania Environmental Hearing Board grants in part and denies in part the Pennsylvania Department of Environmental Protection's Motion for a Protective Order seeking to prohibit the Appellant, PDG Land Development, Inc., from deposing the Department Secretary and Deputy Secretary for Mineral Resources. The Board, after carefully reviewing the briefs and following oral argument, finds that although the Secretary may have some limited involvement in the matter, Appellants have not demonstrated that they cannot discover this relevant information through means other than taking the Secretary's deposition. Therefore, the Board grants the Motion for a Protective Order prohibiting PDG from deposing Secretary Kathleen A. McGinty. Instead, it allows PDG to serve interrogatories on the Department to be answered by the Secretary. The Board denies the Motion for Protective Order as to Deputy

Secretary J. Scott Roberts finding that his involvement predates his current position and is more extensive. The Board finds that his deposition may be the best discovery device that may lead to the discovery of relevant evidence.

## DISCUSSION

Presently before the Pennsylvania Environmental Hearing Board (Board) is the Pennsylvania Department of Environmental Protection's (Department) Motion for Protective Order (Motion) which seeks to preclude Appellant PDG Land Development, Inc. (PDG) from taking the depositions of Department of Environmental Protection Secretary Kathleen A. McGinty and Deputy Secretary J. Scott Roberts. The Motion is vigorously opposed by PDG. The Board conducted oral argument on the issue and has carefully reviewed the papers filed in the case.

This Appeal arises from the Department's December 2006 denial of a surface mining permit application originally submitted by PDG in July 2003 in connection with its plans to develop an area of land in the Hays neighborhood of the City of Pittsburgh. (Notice of Appeal, Paragraphs 2, 6, 7)

Discovery before the Pennsylvania Environmental Hearing Board is governed by our Rules of Practice and Procedure, 25 Pa. Code Section 1021.101 *et. seq.*, in conjunction with the Pennsylvania Rules of Civil Procedure. The scope of discovery is very broad.

> a) ...[A] party may obtain discovery regarding any matter, not privileged, which is related to the subject matter involved in the pending action,...
>
> b) It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Rule 4003.2 (a) and (b) of the Pennsylvania Rules of Civil Procedure.

The purpose of discovery is so all sides can gather information and evidence, plan trial strategy, and discover the strengths and weaknesses of their respective positions. *George v. Schirra*, 814 A.2d 202 (Pa. Super. 2002); *DEP v. Neville Chemical Company*, 2004 EHB 744, 746. The Board is charged with overseeing ongoing discovery between the parties during the litigation and has wide discretion to determine appropriate measures necessary to insure adequate discovery while at the same time limiting discovery where required. *DEP v. Neville Chemical Company*, 2005 EHB 1, 3-4; *Stern v. Vic Snyder*, Inc., 273 A.2d 139 (Pa. Super. 1984); 25 Pa. Code Section 1021.102.

Both parties direct our attention to *New Hanover v. DER*, 1989 EHB 138, in which Appellant sought to depose Department Secretary Arthur Davis and a Deputy Secretary. The appeal involved the issuance of permits authorizing the construction and operation of a municipal waste landfill. In that case, Secretary Davis, together with the Deputy Secretary, visited the landfill site and proposed facility shortly before the permits were issued, with several permit additions added at the instruction of the Department's Central Office in Harrisburg. New Hanover Township suspected that these permit conditions were added as a direct result of the Secretary's and Deputy Secretary's inspection and wished to depose both officials accordingly.

Judge Woelfling, although holding that the information related to the site visit of the Secretary and Deputy Secretary was both relevant to New Hanover and unavailable through other witnesses, granted the Department's Motion for a Protective Order precluding their depositions on the basis that "...given the responsibilities of these Department officials, that a less intrusive means of acquiring this information exists, and that is to propound written interrogatories upon Secretary Davis and the Deputy Secretary." 1989 EHB at 140.

In *Lower Paxton Township v. DEP*, 2001 EHB 256, former Chief Judge Krancer denied

the Department's Motion for a Protective Order finding that Department Deputy Secretary Tropea appeared to be personally and directly involved in the decision to deny Lower Paxton Township's Act 537 plan. More importantly, the Department's Motion for a Protective Order was premised on a claim of deliberative process privilege. Chief Judge Krancer found that the deliberative process privilege was not applicable and ordered the deposition to take place. Here, the Department bases its Motion not on any deliberative process privilege but on the Board's Rules of Practice and Procedure and the Pennsylvania Rules of Civil Procedure.

In *Neville Chemical Company v. DEP*, 2004 EHB 744, we granted the Department's Motion for a Protective Order. Neville Chemical Company was defending an action brought by the Department seeking the largest civil penalty for environmental harm in the history of the Commonwealth of Pennsylvania. 2004 EHB at 747. We were persuaded to grant the Motion for a Protective Order not only because of the nature of the action, but we were "also persuaded by the Secretary's verification in which she stated her only involvement with the civil penalty action was to receive a draft complaint, be briefed on the matter, and to ultimately authorize its filing. She advised that she had no direct, personal involvement in the drafting of the complaint or in the calculation of the requested civil penalties." 2004 EHB at 748.

Likewise, in the present action the fact that the Secretary participated in a conference call more than three years after the original permit application was submitted and received memos and emails generally advising her of the status of the Department's review of the application should not necessarily open her up to being deposed. Of course, the Secretary and other high Department officials need to be kept aware of the status of any matter that they feel warrants their attention. Their interest and leadership should not automatically subject them to being deposed. This is especially true where, as here, less intrusive means of discovery are

available to discover relevant information known by the Secretary. In addition, the notes of the conference call highlighted by PDG have been produced together with the identification of everyone on the call. Most of these people have been deposed; several for more than one day. Moreover, the Department action being appealed, the denial letter of December 21, 2006, sets forth the reasons for the denial. Thus, the success of PDG's Appeal will depend on convincing us that the Department's reasons as set forth in its denial letter of December 21, 2006 are unreasonable.

Pursuant to the mandates of Rule 4011 and our own Rule 1021.102 which affords us broad authority to enter Orders regarding discovery, a party seeking to depose high Department and governmental officials needs to show not only that the officials have relevant knowledge and direct personal involvement but that the same information cannot be obtained through less intrusive means.[1] This could include other discovery options such as interrogatories or the depositions of others. Top executive officials should not, absent extraordinary circumstances, be called upon to give depositions.

Applying this standard to the facts leads us to grant the Department's Motion and prohibit PDG from deposing Secretary Kathleen A. McGinty. Instead, PDG can craft some narrowly focused interrogatories which may be served on the Department so that Secretary McGinty can answer them.

Deputy Secretary J. Scott Roberts seems to have had more involvement than Secretary McGinty. Moreover, some of his involvement took place before he was Deputy Secretary of Mineral Resources. We are not convinced that other discovery options are available. It seems that this information would be best discovered in a deposition rather than through interrogatories

[1] Limiting the depositions of high officials based simply on the alleged importance of the case is not a good measure as every party believes its case is both important and unique.

or through other witnesses. Therefore, we will allow a short deposition of Deputy Secretary Roberts. The deposition, however, should be at his convenience, in his Harrisburg office, and the direct and redirect examination should not total more than one hour.

We will issue an appropriate order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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| **PDG LAND DEVELOPMENT, INC.** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2007-041-R** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and CITIZENS FOR PENNSYLVANIA'S FUTURE, Intervenor** | : | |

## ORDER

AND NOW, this 21st day of May, 2008, IT IS ORDERED as follows:

1) The Department's Motion for Protective Order is **granted in part** and **denied in part**.

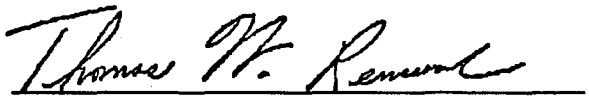
2) The Motion for Protective Order prohibiting the deposition of the Honorable Kathleen A. McGinty is **granted**. No party may take her deposition. Interrogatories, narrowly drafted, may be propounded and served on the Department for the Secretary to answer.

3) The Motion is **denied** regarding Department of Environmental Protection Deputy Secretary J. Scott Roberts.

4) Deputy Secretary Roberts' deposition may be taken at a mutually convenient time. The deposition shall be conducted in his office in Harrisburg. The direct and redirect questioning of Mr. Roberts shall take no more than **one hour.**

5) The parties shall advise the Board of the date and time of Deputy Secretary Roberts' deposition.

**ENVIRONMENTAL HEARING BOARD**



**THOMAS W. RENWAND**
**Acting Chairman and Chief Judge**

**DATED:** May 21, 2008

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

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| **RICHMOND TOWNSHIP and GRANDE LAND, L.P.** | : | |
| **v.** | : | **EHB Docket No. 2007-034-MG (consolidated with EHB Docket No. 2007-198-MG)** |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and GRANDE LAND, L.P., Intervenor** | : | **Issued: May 29, 2008** |

## OPINION AND ORDER ON MOTION FOR SANCTIONS

**By George J. Miller, Judge**

**Synopsis**

The Board grants in part and denies in part a motion to dismiss an appeal as a sanction for failing to respond to discovery requests. The Board finds that the permittee has not abandoned its desire to prosecute the appeal. However, since the permittee was clearly dilatory in filing discovery responses after representing to the Board that he would do so, it is appropriate to award reasonable costs and fees in connection with the filing of the motion for sanctions.

## OPINION

Before the Board is a motion for sanctions filed by Richmond Township against Grande Land, L.P. (Permittee), for failure to answer discovery. Specifically the Township seeks the assessment of reasonable costs and fees associated with the filing of the motion for sanctions and

also seeks dismissal of the Permittee's appeal, contending that the Permittee's failure to answer discovery evidences a lack of intent to pursue the appeal. We decline to dismiss the Permittee's appeal, but will grant the Township's request for reasonable costs and fees.

On January 15, 2008, the Township served its first set of discovery requests upon the Permittee. When the Permittee failed to serve answers to this discovery within thirty days, as required by the Pennsylvania Rules of Civil Procedure, the Township filed a motion to compel on February 25, 2008. The Board held a conference call with the parties on March 7, 2008. The Permittee's counsel represented to the Board that the materials had for the most part been compiled, and that he would serve the materials to opposing counsel within the next week. Accordingly, by order issued the same day, the Board extended the discovery deadlines to May 7, 2008, in order to accommodate the service of the Permittee's answers and the scheduling of depositions.

The Permittee never served the promised discovery materials. Accordingly, on April 23, 2008, the Township filed a motion for sanctions, contending that the Permittee's failure to answer discovery had impeded the Township's ability to plan trial strategy and was a violation of the Board's rules and the Board's March 7th Order. On May 9, 2008, having received no response to the motion for sanctions, the Board again held a conference call. The Permittee's counsel represented that he had never received the Township's motion for sanctions either by the Board's electronic filing system (e-file), or by First Class Mail. He explained that he had written answers to the interrogatories prepared, but that he had not sent them. He further stated that he had been pursuing other avenues outside the litigation to resolve the appeal and therefore had not answered the Township's discovery requests. The Township argued that the Permittee had had notice of the motion for sanctions, even if counsel had not received it by other means and that

none of the excuses offered by the Permittee's counsel were adequate to explain the lack of diligence in pursuing the appeal.

Following the conference call, the Board ordered the Permittee's counsel to provide the Board with an affidavit stating that he had never received the motion for sanctions and was also to provide a written explanation for his failure to answer the Township's discovery. The Township was required to provide the Board with certificates of service for the motion for sanctions and was relieved of its obligation to answer the Permittee's discovery until the Board's decision on the motion for sanctions. The Permittee responded to the Board's order on May 16, 2008. The filing included a written explanation for the failure to respond to discovery, the affidavit of counsel that he had not received a copy of the Township's motion for sanctions until the day of the conference call, and answers to the Township's interrogatories and document requests. The Township also served the Board with the electronic filing receipts, e-mail correspondence among counsel, and an unsigned copy of the certificate of service, which counsel for the Township says he remembers signing, but for some reason his office did not retain a signed copy as is the usual practice.

The mystery of the motion for sanctions may never be solved, but the fact remains that the Permittee did not respond to the discovery of the Township either when the Rules of Civil Procedure required it, or when counsel represented to the Board that he would be mailing the materials in a week. This Board has stated many times that the integrity of the discovery process is integral to the proper functioning of the Board. Without a full and complete exchange of information, the Board can not efficiently perform its fact-finding function at hearing.

As an explanation for his failure to answer discovery, counsel for the Permittee explains that he simply underestimated the amount of time and effort involved in pursuing an appeal

before the Board, particularly in view of the shear volume of paperwork involved in reviewing the Township's Act 537 Plan. At the time he told the Board that he could deliver discovery answers, he had not completely reviewed all of the materials and underestimated the time it would take to do so. He includes an apology to the Board and an apology to opposing counsel, and asks that the Board not dismiss the appeals.

It is clear from the letter response to the Township's motion that the Permittee has not abandoned its desire to pursue resolution of the appeals before the Board. Dismissal is a severe sanction, and is generally only used in extreme cases, where the appellant has either not responded at all to either the Board or the opposing parties, or has repeatedly disobeyed orders of the Board without adequate explanation.[1] Since the Permittee has provided at least some explanation for failing to serve timely responses to discovery, it is not appropriate to dismiss the Permittee's appeal at this time. Permittee's counsel has promised the Board that he will prioritize his schedule and not cause any further delay in these proceedings, and we will take him at his word.

Yet we believe that there must be some consequence in order to redress the Township for the Permittee's conduct. Deadlines set by orders of the Board are to be taken seriously. Further, the Board must be able to rely upon the representations made by counsel both orally and in writing, and have some confidence that the deadlines set in its orders will be obeyed. Similarly, opposing counsel has a right to rely on the statements made to the Board and the regularity of the Board's process. The Township has had to expend resources attempting to secure discovery

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[1] *E.g., Jetson Direct Mail Services, Inc. v. Department of Labor and Industry,* 782 A.2d 631 (Pa. Cmwlth. 2001); *Swistock v. DEP*, 2006 EHB 398.

responses which could otherwise have been utilized in analyzing prospective evidence, developing a strategy for trial or settlement negotiations.

Board Rule 1021.161 authorizes the Board to impose sanctions for failing to abide by Board orders and rules of procedure, including those permitted under Pa. R.C.P. No. 4019.[2] Subsection (g)(1) of Rule 4019, permits a tribunal to award a party moving for sanctions reasonable expenses, including attorney's fees in connection with the Township's preparation of the Motion for Sanctions and accompanying Memorandum of Law.[3] We believe that such an award is an appropriate sanction in order to – at least in part – compensate the Township for the delay of these proceedings and the efforts required to secure basic discovery, and will impress upon the Permittee the importance of complying with orders of the Board in the future.

In conclusion, it is important that discovery in these appeals conclude as promptly as possible and we urge the parties to work together with civility and professionalism in order to do so. Accordingly, we will lift the stay on the obligation of the Township to respond to any outstanding discovery requests by the Permittee and set new pre-hearing deadlines in our order.

We therefore enter the following:

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[2] 25 Pa. Code § 1021.161.

[3] Pa. R.C.P. No. 4019(g)(1); *Kennedy v. DEP*, 2006 EHB 477. *See also* Pa. R.C.P. No. 4019(c)(5)(authorizing such order as is just).

**COMMONWEALTH OF PENNSYLVANIA**
**ENVIRONMENTAL HEARING BOARD**

| | | |
|---|---|---|
| **RICHMOND TOWNSHIP and GRANDE LAND, L.P.** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2007-034-MG** |
| | : | **(consolidated with EHB Docket** |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and GRANDE LAND, L.P., Intervenor** | : | **No. 2007-198-MG)** |

**ORDER**

AND NOW, this 29th day of May, 2008, upon consideration of the motion for sanctions by Richmond Township in the above-captioned matter, it is HEREBY ORDERED as follows:

1. The motion for reasonable costs and attorney's fees in association with the preparation of the motion for sanctions and accompanying memorandum of law is hereby GRANTED. The amount of the award shall be determined after the Board's review of an appropriately filed petition by the Township.

2. The motion for sanctions is denied in all other respects.

3. All outstanding discovery responses shall be served on or before June 30, 2008.

4. Any additional discovery shall be completed on or before July 30, 2008.

5. All dispositive motions, if any, shall be served on or before August 29, 2008.

**ENVIRONMENTAL HEARING BOARD**

George J. Miller

**GEORGE J. MILLER**
**Judge**

**DATED: May 29, 2008**

c: **DEP, Department of Litigation:**
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| **HANOVERIAN, INC., d/b/a QUAKER ALLOY; 200 CASCADE DRIVE ORDINARY TRUST; and DONALD METZGER** | : | **EHB Docket No. 2006-192-MG (consolidated with EHB Docket Nos. 2006-256-MG and 2007-028-MG)** |
| **v.** | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION** | : | **Issued:** June 5, 2008 |

## OPINION AND ORDER ON DISCOVERY MOTIONS

**By George J. Miller, Judge**

**Synopsis**

The Board grants in part and denies in part the Department's motion for sanctions, and denies the appellants' motion to strike objections and compel answers to discovery. The Board denies the Department's request to dismiss two of the appellants' appeals as a sanction for failing to provide complete answers to interrogatories and request for documents, but will grant the Department's request for reasonable fees and costs related to the motions that the Department has filed in order to secure complete discovery responses. The Board denies the appellants' motion because the Department has served answers to interrogatories and production of documents in spite of objections to the appellants' broadly worded requests and the appellants have failed to specify which discovery answers were incomplete.

## BACKGROUND AND PROCEDURAL HISTORY

These motions have their genesis in three appeals filed by Hanoverian, Inc. dba Quaker Alloy, 2000 Cascade Drive Ordinary Trust, and Donald Metzger (Appellants), which challenge three actions of the Department involving a property located in Myerstown Borough and Jackson Township, Lebanon County and an associated solid waste permit. The Appellants have appealed the Department's revocation of that permit, forfeiture of a bond related to the permit and an administrative order. The three appeals were consolidated by the Board by orders dated December 6, 2006, and January 12, 2007.

Not long after the appeals were filed, the discovery disputes began. The Department served its first round of interrogatories on October 4, 2006. The Appellants failed to respond to these interrogatories within the 30-day period required by the Pennsylvania Rules of Civil Procedure as incorporated into the Boards' rules. The Department filed a motion to compel on November 15, 2006. The Board held a conference call, wherein the Appellants claimed that they could not answer the discovery because the Department had failed to provide adequate access to the public file related to the solid waste permit. The Department disputed this claim, but contended that the Appellants had not followed the proper procedure to schedule an appointment to inspect the file. Accordingly, by order dated December 7, 2006, the Board ordered the Appellants to provide full and complete answers to the Department's discovery on or before January 12, 2007. The Board also ordered the Department to make its public file available to the Appellants on or before December 21, 2006. According to the Department's current motion for sanctions, the parties engaged in further skirmishes in securing a mutually agreeable time for the file review, but eventually the Appellants did review the file.

However, the Appellants still did not file responses to the Department's discovery requests, and on January 23, 2007, the Department filed a motion for sanctions which sought dismissal of the permit revocation and bond forfeiture appeals. Perhaps inspired by the motion, the Appellants finally submitted some responses to the Department's discovery on January 26, 2007. By letter dated January 30, 2007, the Department informed the Board that the Appellants answers were incomplete and still desired to pursue the sanctions requested in its January 23 motion.

On January 31, 2007, the Board held a conference call with the parties. The Appellants argued that they had not answered the October 4 interrogatories from the Department on time, because there was a misunderstanding concerning an informal agreement between the Appellants and the Department regarding an extension of time to serve answers. The Board decided to reserve ruling on the motion and, among other things, ordered the parties to work out a discovery agreement and discuss the shortcomings of the Appellants' discovery answers. Further squabbling ensued, but the parties were able to reach an agreement which was adopted by the Board in an order dated February 14, 2007. That order required the Appellants to file and serve supplemental answers to the Department's first set of interrogatories by February 21, 2007, and supplemented answers to the Department's second set of interrogatories and responses to document requests by March 16, 2007. Accordingly, the Department's motion for sanctions was dismissed as moot.

The Appellants did eventually respond to the Department's discovery, however they failed to submit proper verifications to their answers. Moreover, as the Department details in its current motion, those answers remained incomplete and in many cases inscrutable. Before the Department could file another motion seeking discovery relief, on April 7, 2007, the Appellants

removed the appeals to federal court, taking the position that the Department's actions were in violation of federal bankruptcy law and that the Board failed to appreciate the important federal issues raised in the appeals. By order dated March 31, 2008, the U.S. District Court for the Middle District of Pennsylvania remanded the appeals to the Board because the Appellants' removal petition was untimely filed.[1]

**OPINION**

On April 16, 2008, the Board held another conference call in order to determine what discovery remained and to set new prehearing deadlines in the vain hope that the parties could set aside their differences and to move the matter forward to resolution on the merits. The Department informed the Board that the discovery responses filed by the Appellants remained incomplete, unresponsive or otherwise inadequate and that it desired to file another motion for sanctions. The Appellants also represented that the Department's responses to its discovery requests were incomplete. Accordingly, the Board ordered the parties to inventory the discovery exchanged to date and file whatever motions they deemed appropriate. The parties have each filed the motions described below. We grant in part and deny in part the Department's motion for sanctions. We deny the Appellants' motion to strike and compel.

The procedural rules of the Board have incorporated the discovery rules in the Pennsylvania Rules of Civil Procedure.[2] The general requirements for interrogatory answers is that they be (1) in writing, inserted in the spaces provided in the interrogatories; (2) full and

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[1] Apparently, the Appellants' counsel further distinguished himself before that tribunal and was sanctioned pursuant to Federal Rule of Civil Procedure 11 (c), for failing to conduct a reasonable inquiry into the facts and the law before filing his petition for removal. *Hanoverian, Inc. v. Pennsylvania Department of Environmental Protection*, No. 1:07-cv-00658 (M.D. Pa. March 31, 2008).

[2] 25 Pa. Code § 1021.102.

complete, unless objected to; (3) verified; and (4) served within thirty days after service of the interrogatories.[3] The integrity of the adjudication process requires the parties to promptly and thoroughly respond to discovery in conformance with the rules of procedure.[4] Regrettably, not all litigants respect this process. For this reason, the Board's rules provide the authority to impose sanctions upon a party who fails to properly comply with this rule, and the other discovery rules. Such sanctions may include precluding the offending party from presenting evidence or dismissal of the proceeding.[5]

Having failed to secure sufficient answers to discovery, the Department has filed a motion for sanctions, which contends that the Appellants' discovery responses as supplemented remain incomplete, seeking dismissal of the permit revocation and bond forfeiture appeals and seeking costs and expenses related to the Department's efforts to secure discovery responses in the amount of $ 3,381.83. The Department has included two binders of exhibits with its motion, including the record of the federal court proceedings. Additionally, the exhibits from the January 23, 2007 motion for sanctions are incorporated by reference.

The Department's motion includes an exhaustive catalog of its efforts to secure not just "full and complete" answers to interrogatories, but comprehensible answers to interrogatories. The Department additionally argues that the Appellants have filed answers, but those answers did not attach a proper verification, nor have the Appellants adduced a privilege log of documents that they have not produced on the basis of privilege.

The Appellants' response to the Department's motion sheds very little light on the matter. The Appellants refuse to admit even the most basic factual assertions made by the Department,

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[3] Pa. R.C.P. No. 4006.
[4] *Environmental & Recycling Services, Inc. v. DEP*, 2001 EHB 824.
[5] 25 Pa. Code § 1021.161.

and characterize many factual statements as "conclusions of law." In other averments, where the Department characterizes actions of the Appellants or their counsel, the Appellants have refused to offer any enlightenment to the Board, but instead contend that they are without sufficient knowledge to answer the question, even after what they allege to be a reasonable investigation. For example, Paragraph 3 of the Department's motion states: "Hanoverian is represented by Donald Litman." This contention is "Denied as a conclusion of law. . . ." Similarly factual statements related to the dates that the appeals of the Appellants were filed and the docket numbers they were assigned are denied as "conclusions of law." A description of the Appellants' removal action, which was docketed with the Board, is also denied as a conclusion of law along with the allegation that inclusion of such an averment, among other things, is not "allowable" under "the operating Rules of the Commonwealth Court which applies to appeals from the Environmental Hearing Board."[6] Paragraph 28 of the Department's motion states that "Hanoverian filed to object, respond, or even request an extension to the Department's First Discovery Requests within 30 days," to which the Appellants unhelpfully respond with the statement that "Appellant is without sufficient knowledge to either admit or deny said averments . . ." In other responses, the Appellants' "answer" is simply unresponsive either because it does not address the averment made by the Department, or simply makes no sense. While many of these matters are not critical to our resolution of the motions, the Appellants' apparent unwillingness to even properly characterize statements as "facts" rather than "legal conclusions" adds credence to the Department's claim that the Appellants are intentionally refusing to engage

[6] It is not clear what "operating Rules" the Appellants are referring to, but procedure before the Board is, of course, governed by the Board's Rules of Procedure, and not the rules of the Commonwealth Court. Similarly, local rules of the courts of common pleas also do not apply in proceedings before the Board, which the Appellants reference in other areas of their response.

in discovery and does not aid the Board in its resolution of these discovery disputes.[7] The Appellants' defense is further obfuscated by the Appellants' insistence on arguing the merits of their appeals rather than addressing the allegations of the Department's discovery motion. While it is certainly the Board's goal to ultimately resolve the issues raised in the appeals on the merits, we can not do that if we can not complete the exchange of information required by the discovery process.

We agree with the Department that the Appellants have not filed full, complete, properly verified answers to interrogatories. The Appellants do not appear to contend that we should consider their answers complete, but have attempted to obscure the shortcomings of their responses by either blaming former owners and/or counsel of the company, or blaming the Department for failing to comply with the local rules of the court in Lebanon County, which do not apply to proceedings before the Board.[8] The Appellants have twice been ordered to file proper answers to the Department's discovery and urged by the Board to deal civilly with the Department in order to complete discovery.

Yet, dismissal is a severe sanction, and we are loath to penalize a client, at this point, for the obdurate behavior of counsel.[9] The Department describes in great detail the shortcomings of the conduct of the Appellants' counsel in the removal proceedings in federal court. Although it is clear from Judge Kane's opinion that the Appellants' counsel engaged in a course of

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[7] Although we do not consider the federal court record in our disposition, we do observe that Judge Kane described the Appellants' filings before her tribunal as "unresponsive", "vague", and "impenetrable." We certainly can make the same observations of the Appellants' filings in this case.

[8] For example, although the Board certainly encourages parties to attempt to resolve discovery disputes on their own before seeking Board involvement, the Board's rules do not currently require parties to do so. *American Iron Oxide Co. v. DEP*, 2005 EHB 779.

[9] *Jetson Direct Mail Services v. Department of Labor and Industry*, 782 A.2d 631 (Pa. Cmwlth. 2001).

contumacious conduct before that tribunal and that the Department had to expend significant resources to litigate the Appellants' frivolous removal application, we do not believe it is appropriate to consider counsel's behavior in another tribunal in fashioning a remedy for improper conduct before the Board. The Appellants did make some attempt to supplement answers, even if belatedly and not in strict adherence with procedural rules. Accordingly, at this time we will not dismiss the Appellants' appeals as a sanction for failing to comply with discovery, but will give the Appellants one more opportunity to comply properly with the Board's procedural rules and properly answer the Department's discovery requests.

However, we will grant the Department's application for costs. The Appellants, in their response to the Department's motion, have not challenged the amount of the Department's claim. The amount requested by the Department appears to be reasonable. For a third time, we also order the Appellants to properly answer the Department's discovery, by providing the missing, incomplete or unclear information described in Table I of the Department's motion, properly verified in conformance with the Pennsylvania Rules of Civil Procedure. Any documents which the Appellants declined to produce on the basis of privilege shall be included in a privilege log filed concurrently with discovery answers. Any document responsive to the Department's discovery requests but which is no longer in the Appellants' possession shall be specifically identified as such.

The Appellants have filed a "motion to strike" which asks the Board to overrule the Department's objections to its interrogatories and order answers. They complain generally that the Department's answers include "boilerplate" and the motion included objections such as:

> 25 PA. Code 1021.93 governs the filing of discovery motion, and the inclusion of the responses; however, the Appellee failed to denote which documents are

> responsive to which requests, the Appellant reserves the right to attach said records, because they are unintelligible as to which request and/or objection.[10]

Further, with the exception of Interrogatory No. 76, the Appellants have not directed the Board's attention to any specific interrogatory answer of the Department. Nevertheless, we have reviewed the Department's answers to the Appellants' interrogatories. It is true that the general objections to the interrogatories are comprehensive. Additionally, the Department also included a substantial number objections to the interrogatories, due in part because many of the interrogatories and document requests are broadly worded, imprecise and unclear. Yet the Department also did not completely refuse to answer the questions. To the extent that the Appellants appear to be objecting to the answers of the Department which direct the Appellants to the Department's public file, the procedural rules permit the referral to files in lieu of written answers to interrogatories.[11] Accordingly, without a more specific objection from the Appellants directed to a specific interrogatory answer or objection made by the Department, we will not guess the nature of the Appellants' objection to the Department's answer or comb the Department's answers on the Appellants' behalf.

The Appellants do make a specific objection concerning the Department's answer to Interrogatory No. 76, which seeks photographs, diagrams or models of the "surrounding area or areas of the landfill."[12] In response, the Department directed the Appellants to the Department's public file and also included a CD of various photographs and computer files, along with a table identifying the content of each file on the CD. The Appellants' object to the CD on the grounds that they cannot read the files. Although the CD itself was not provided to the Board, our review

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[10] Appellant's Motion to Strike ¶ 4 (grammatical errors included).
[11] Pa. R.C.P. No. 4006(b); *Borough of Ambler v. DEP*, 2006 EHB 761.
[12] Appellants' Motion to Strike, Ex. C.

of the table prepared by the Department indicates that the vast majority of the files are in common formats such as Microsoft Excel (.xls), Adobe Portable Document Format (.pdf). The Department points out that digital photograph files (.jpg) can be read with Microsoft Explorer and .txt files can be read with Microsoft Notepad, both of which are common business computer programs. Without some demonstration from the Appellants as to why these files are "unreadable" we cannot say that the Department's provision of files in these formats was unreasonable, particularly since the Appellants did not specify a format in which they wanted the documents produced.

The global imaging data files are more problematic. These data files apparently are generated with specialized geographic information system modeling software known as ESRI. The Department admits that this software is specialized software. However, the Department also points out that the data in these files – the location of monitoring wells – was also conveyed in more commonly accessible .pdf and Excel files. Accordingly, without some specific showing from the Appellants that the ESRI files provide important information not depicted in the .pdf and Excel files, we will not compel the Department to provide more specific answers to the Appellants' Interrogatory No. 76. Therefore, we will deny the Appellants' Motion to Strike and to Compel Discovery.

To conclude, the Appellants should be on notice that the Board may dismiss the Appellants' appeals should it appear that the Appellants' counsel continues his pattern of evasive and incomplete discovery responses. We may view further attempts by the Appellants to fail to

provide clear and complete answers as a refusal to engage in the discovery process, which may result in the dismissal of their appeals.[13]

Discovery before the Board is not a game, and deliberate efforts to supplant the exchange of information among the parties in an appeal before the Board is unacceptable. Yet, the Board also urges both parties to set aside the obvious animosity which exists between counsel in order to move these appeals forward to resolution. Our judicial resources are much better spent reviewing the admissible evidence produced at a hearing on the merits rather than combing through reams of paper that have been filed in order to resolve discovery conflicts that should have been resolved by the parties themselves.

We therefore enter the following:

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[13] *See Swistock v. DEP*, 2006 EHB 298.

**COMMONWEALTH OF PENNSYLVANIA**
**ENVIRONMENTAL HEARING BOARD**

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|---|---|
| **HANOVERIAN, INC., d/b/a QUAKER ALLOY;** | : |
| **200 CASCADE DRIVE ORDINARY TRUST;** | : |
| **and DONALD METZGER** | : **EHB Docket No. 2006-192-MG** |
| | : **(consolidated with EHB Docket** |
| **v.** | : **Nos. 2006-256-MG and** |
| | : **2007-028-MG)** |
| **COMMONWEALTH OF PENNSYLVANIA,** | : |
| **DEPARTMENT OF ENVIRONMENTAL** | : |
| **PROTECTION** | : |

## ORDER

AND NOW, this 5th day of June, 2008, upon consideration of the discovery motions filed in the above-captioned matter, it is hereby ORDERED as follows:

1. The Department's motion to dismiss the Appellants August 28, 2006 appeal of the Department's revocation of Solid Waste Permit No. 300742 and November 20, 2006 appeal of the bond forfeiture is **DENIED.**

2. The Department's motion to stay discovery by the Appellants is **DENIED**.

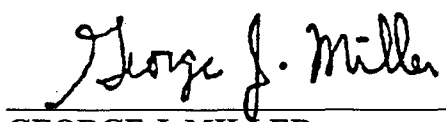
3. The Appellants shall serve supplemental answers to interrogatories and request for production of documents and provide proper verifications to those answers within **10 days** of entry of this order.

4. The Appellants and counsel in this matter, Donald Litman and the firm of Edwards and Litman, are jointly and severally liable for the Department's reasonable costs and fees in the amount of **$3,381.83**. Payment shall be made by certified check in that amount made payable to the Department of Environmental Protection and delivered, within 30 days of this Order, to Martin Sokolow, Regional Counsel, Office of Chief Counsel, Southcentral Regional Office, Department of Environmental Protection, 909 Elmerton Avenue, Harrisburg, PA 1710-8200. A failure to make this payment as scheduled may result in a dismissal of these appeals.

5. The Appellants Motion to Strike Objections to Discovery and to Compel Discovery is **DENIED**.

6. Any additional discovery shall be completed on or before **July 30, 2008.**

**ENVIRONMENTAL HEARING BOARD**



**GEORGE J. MILLER**
**Judge**

**DATED:** June 5, 2008

**c:** **Department of Litigation:**
Attn: Brenda K. Morris, Library

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SECRETARY TO THE BOARD

| | | |
|---|---|---|
| **JAMES A. NISKI, JR.** | : | |
| | : | |
| **v.** | : | |
| | : | **EHB Docket No. 2006-277-L** |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION** | : | **Issued: June 6, 2008** |

# ADJUDICATION

**By Bernard A. Labuskes, Jr., Judge**

**Synopsis:**

The Board finds that an appellant is entitled to coverage for mine-related subsidence damage that occurred to his insured structure even though the damage started before the policy was issued. The Department knew or reasonably should have known about the damage before it issued the policy. The Department could have issued a policy that excluded coverage for the damage but it did not do so.

## FINDINGS OF FACT

1. The Department of Environmental Protection (the "Department") administers the Coal and Clay Mine Subsidence Insurance Fund (the "Fund"), which was created to insure owners of structures against damages resulting from subsidence of coal and clay mines. 52 P.S. §§ 3201-3224.1; 25 Pa. Code §§ 401.1 – 401.23.

2. James A. Niski, Jr. ("Niski") and his wife own a duplex that he formerly rented

out at 122-124 Spring Street in Wilkes-Barre (the "Property"). Niski is a construction worker who lives in Brooklyn, New York. (Notes of Transcript page ("T.") 40.)

3. On June 30, 1992, long before Niski bought the Property, investigators from the Department and the federal Office of Surface Mining ("OSM") responded to a complaint that a large depression had developed between the Property and the house next door at 130 Spring Street. The investigators concluded that the depression was mine-related and that it posed a safety and health threat. As part of an emergency project to alleviate the threat, OSM repaired damage to the foundation of the Property. (T. 182; Department Exhibit ("DEP Ex.") 1, 15, 16.)

4. Ms. Liberanski, a previous owner of the Property, filed a mine subsidence complaint in March 1995 reporting movement and cracking of the previously repaired foundation wall. On July 18, 1995, the Department paid her claim in the amount of $1,555.63. (T. 168, 170, 182; DEP Ex. 1, 15, 16.)

5. There is no record that the damage was in fact repaired. (DEP Ex. 16.)

6. Richard Thomas, the Department employee who was later responsible for issuing a policy to Niski and investigating his subsequent claim, was personally involved in and aware of the prior subsidence problems at the Property. (T. 168, 180.)

7. On November 16, 2005, Niski telephoned OSM and reported a possible mine-related subsidence problem affecting his property. (T. 114-15; DEP Ex. 1, 19.)

8. On November 17, 2005, representatives of the Department and OSM inspected the Property. (T. 115-31; DEP Ex. 1, 19.) By report dated December 8, 2005, the Department representative documented the damages observed at the Property; notably, damages to the foundation of the structure, gaps between the foundation and frame of the structure, horizontal and vertical cracks in the block wall foundation, some of which had been previously patched,

settlement of the dirt floor of the basement, and movement of the foundation wall towards the inside of the basement. (DEP Ex. 1, 1A-D, 19.)

9. The damage seen in 2005 was to the same foundation wall that suffered prior subsidence damage. (T. 37, 115, 124, 127, 142, 182; DEP Ex. 1, 19.)

10. The damage to the Property was caused by mine subsidence. (T. 15-18, 13-38, 132, 142, 144, 211; Niski Exhibit ("N. Ex.") 3; DEP Ex. 10.)

11. Niski did not have mine subsidence insurance in November 2005 when he reported the problem. (T. 157; DEP Ex. 1, 6, 7.) The Department employee who inspected the Property recommended that he obtain such insurance. (T. 126, 141.)

12. Niski, through his wife, took that advice and requested an application for insurance from the Department on December 21, 2005. (T. 150-54; DEP Ex. 2.) The Department forwarded the necessary forms to Niski. (T. 153.)

13. Niski returned the completed application to the Department on or about December 27, 2005. (T. 156-57; DEP Ex. 7, 15.)

14. The application, among other things, required Niski to answer a series of yes-or-no questions. Niski answered "no" to the following question:

> Are you aware of any ***damages*** or other problems with walls, floors, foundations, or other structural components due to past or present movement, shifting, deterioration, etc.?

Niski answered "yes" to the following question:

> Are you aware of any earth movement or stability problems such as sliding, settling, upheaval, mine discharge or mine subsidence that have occurred on or affect **your** *property*? (all emphases original)

In a space after the latter question offering an opportunity to explain an affirmative answer, Niski wrote: "I was told when I bought it that it was built on a mine." (DEP Ex. 6.)

15. The term "damages," although in bold and italics, is not defined. (T. 224.)

16. The Department did not inspect or otherwise investigate the Property in any way in connection with Niski's application in 2005. (T. 156-61, 222.)

17. When the Department processed Niski's application, it did a computer check of its records: "When entering the data nothing appeared on the screen to indicate there was a previous claim for the 124 side of the double block [i.e. the Property]." (DEP Ex. 16.)

18. The Department issued Niski a policy with a coverage limit of $40,000 for the Property on the day the application was received, December 27, 2005, with the policy period running from December 27, 2005 through December 26, 2006 (Policy No. 4035751) (the "Policy"). (DEP Ex. 7, 8, 15.)

19. The Policy covered a "**LOSS** to the **INSURED STRUCTURE** which occurs during the **POLICY PERIOD** and which is caused by **MINE SUBSIDENCE** ... ." (emphasis original). (DEP Ex. 4.)

20. On June 8, 2006, Niski's expert, Gerald Ahnell, inspected the Property and concluded that the Property had sustained mine subsidence damage. (DEP Ex. 10.)

21. Also on June 8, 2006, the City of Wilkes-Barre, through its Building Code Official, retained a structural engineer who conducted an inspection of the Property, deemed it unsafe for habitation, and recommended immediate evacuation of the Property. (Stipulation of the parties; DEP Ex. 9, 10, 15.) Niski's tenants were subsequently evicted and the Property remains vacant. (T. 44.)

22. Following the evacuation order, on June 9, 2006, Niski called the Department and submitted a claim for coverage under the Policy. (T. 162; DEP Ex. 16.) On June 12, 2006, the Department sent Niski a Damage Claim Notice form to complete and return. (DEP Ex. 16.)

23. On June 14, 2006, Niski called the Department asking questions about the written Damage Claim Notice form he had just received in the mail. The Department representative told him to list the damages he is claiming, like cracks and wall bowing inward and also the date the damages occurred. Niski stated he did not know the date the damages occurred. The Department representative then said, put down the date you first noticed the damages. Niski responded that he first noticed the damages in January. (DEP Ex. 16.)

24. Niski submitted his Damage Claim Notice on or about June 17, 2006. (T. 93-94; DEP Ex. 14.)

25. The Department inspected the Property on July 26 and 27, 2006. (DEP Ex. 15.) The Department concluded that "the claimant's house was not insured at the time when the above-mentioned subsidence occurred." (DEP Ex. 15.)

26. On its claim summary, the Department checked the statement "caused by mine subsidence prior to policy period." The Department did not check the statement "damages a continuation of problems existing at policy issuance." (DEP Ex. 15.)

27. The Department officially denied the claim by letter dated October 6, 2006, roughly four months after the claim was submitted. (DEP Ex. 15.) It is this denial that is the subject of this appeal.

28. Edward Motycki, the official in charge of the Department's mine subsidence insurance program, testified that he denied the claim because "it was primarily preexisting damage. I do believe and agree that it has gotten worse over time, but the location of the problem is essentially the same location that was there prior to the policy being written." (T. 195-96.) (Motycki is referring to the damage that was observed in November 2005 as opposed to the same damage in 1992 and 1995.)

29. Motycki gave conflicting testimony regarding whether he also denied the claim because of the "whole issue about whether the applicant was upfront and forthright with us on the application." (Compare T. 196 with T. 211-213.) This purported basis for denying the claim was never cited in any of the documents of record. (T. 212, 214.) It was apparently only in Motycki's "thought process." (T. 212.) It also was not included in the Department's prehearing memorandum. It was revealed for the first time at the hearing. (T. 211-12.)

30. Although the Policy provided that "[t]he Fund does not provide coverage for any Policyholder who has intentionally concealed or misrepresented any material fact or circumstance relating to this insurance" (DEP Ex. 4, ¶ 13), the Department did not invoke this provision as a basis for denying coverage. (T. 208, 211-12; DEP Ex. 15.)

31. The damage that Niski's expert and the Wilkes-Barre officials saw in June 2006 and which the Department subsequently witnessed at its inspection in July 2006 included the damage that had already manifested itself in November 2005 when Niski called OSM and before Niski obtained insurance. That is to say, the subsidence damage started before Niski had insurance. (T. 62-68, 74-76, 87, 89, 96, 126-31, 140, 145, 147, 209-11; N. Ex. 3, 5; DEP Ex. 1, 19, 20.)

32. The subsidence damage also occurred after Niski had insurance and during the Policy period. The amount and extent of the damage increased between November 2005 and June and July 2006. (T. 65-67, 126, 129-31, 140, 196, 209-211, 215, 217.) The damage that occurred after the Policy was issued was of a greater magnitude than the damage that occurred before the Policy was issued. (T. 217.)

33. The cracks grew larger, the ground settled significantly more, the wall buckled more, and the foundation dropped more after Niski was insured. (T. 14, 62, 139-40, 209-11, 215,

217; N. Ex. 5.)

34. The damage observed in November 2005 was not severe enough to compel evacuation and condemnation of the Property. (T. 140.)

35. The Department will issue insurance when there has been preexisting subsidence damage in some cases. It seems to depend on the severity and nature of the damage, but the Department does not appear to have any clear policy or practice governing coverage for losses relating to preexisting conditions. (T. 173-75, 181-83, 185-86, 198-99, 203-04.)

36. The Department has never canceled Niski's Policy. (T. 208.)

37. Removal and replacement of the entire section of damaged wall is necessary to repair the problem. (T. 210.)

## DISCUSSION

Niski bears the burden of proving by a preponderance of the evidence that he is entitled to coverage under his mine subsidence insurance policy. *Phillips v. DER*, 1993 EHB 950, 966-67; *Clapsaddle v. DER*, 1992 EHB 1029, 1050-52. The Department is incorrect in arguing that its adjustment of claims is a discretionary function. Niski either has coverage or he does not. The Department does not have discretion to pay a claim that is not covered or discretion to deny a claim that is covered under a policy. Therefore, unlike most cases before this Board, we do not review the Department's denial of an insurance claim for reasonableness. Rather, the terms of Niski's Policy govern the rights and obligations of the parties to the extent the Policy is consistent with the applicable statute and regulations. *Altimari v. John Hancock Variable Life Insurance Co.*, 247 F. Supp 2d 637, 644 (E.D. Pa. 2003) (Pa. law); *Estate of Higgins v. Washington Mutual Fire Ins. Co.*, 838 A.2d 778, 781-82 (Pa. Super. 2003).[1]

[1] We recognize that federal court rulings are not binding on this Board, but there is virtually no case law

Under the terms of his Policy, Niski is covered for a "loss to the insured structure which occurs during the policy period and which is caused by mine subsidence." (DEP Ex. 4, ¶ 2) (emphasis deleted). (*See* 25 Pa. Code § 401.21, to the same effect.) A "loss" refers to "physical damage to the insured structure." (DEP Ex. 4, ¶ 1.) "Mine subsidence" refers to "the movement of the ground surface as a result of the collapse of underground coal or clay mine workings." (*Id.*) There is no dispute here that Niski has suffered a "loss," i.e. physical damage, to his "insured structure." There was also no serious or credible dispute in this case that the physical damage to Niski's house was caused by mine subsidence, and Niski's claim was not denied on that basis.[2] The primary issue in dispute, then, is whether Niski's loss "occurred during the policy period." The policy period ran from December 27, 2005 through December 26, 2006. Therefore, the issue may also be expressed as whether Niski's loss occurred between December 27, 2005 and December 26, 2006.

The term "occur" is not defined in Niski's Policy. When a term is not defined in a policy, we resort to its common meaning. *Kvaerner Metals Division of Kvaerner U.S., Inc. v. Commercial Union Ins. Co.*, 908 A.2d 888, 897-98 (Pa. 2006); *Madison Construction Co. v. The Harleysville Mutual Insurance Co.*, 735 A.2d 100, 108 (Pa. 1999). To "occur" is "to be found, to exist." WEBSTER'S NEW WORLD DICTIONARY (2d College ed. 1980). The physical damage to Niski's Property clearly could be found and existed during the Policy period. Therefore, it

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regarding the Subsidence Fund, both parties have referred us to cases regarding general insurance law, and we view it as helpful and appropriate to refer to such case law to assist us in our resolution of this appeal.

[2] The Department has occasionally hinted in its Board filings that Niski failed to show a connection between his loss and mine subsidence. If the Department believed there was a causation issue, it was incumbent upon it to say so, not hint at it. In fact, the Department has never clearly articulated such a position. In any event, Niski's expert credibly opined that the loss was caused by mine subsidence, the Department has found in the past that subsidence occurred exactly in this area, and all of the Department's witnesses conceded in their testimony that the loss could have been caused by mine subsidence. Indeed, the Department denied Niski's claim because the loss "was caused by *mine*

would seem that Niski has satisfied all of the requirements for coverage under his Policy.

In order to avoid what would appear to be a straightforward case of coverage, the Department mounts a vigorous two-pronged defense. First, it argues that Niski's damage is not covered because it first appeared before Niski obtained insurance. In other words, the damage occurred both before *and* during the policy period. In the Department's view, a loss that starts before the policy period should not be covered even if the loss extends into the policy period. The second prong of the Department's defense is that Niski is not covered because he misled the Department when he applied for insurance. We find both of these defenses to be lacking in merit.

There is nothing in Niski's Policy to suggest that a loss that starts before the policy is issued and continues to occur during the policy period is excluded from coverage. Exclusions for damages associated with preexisting conditions are generally legal in Pennsylvania, *Knepp v. Nationwide Insurance Co.*, 471 A.2d 1257, 1259 (Pa. Super. 1985) but no such exclusion is contained in Niski's Policy. Insurance contracts are generally treated as contracts of adhesion, at least where, as here, the policyholder is a noncommercial entity. *Burton v. Republic Ins. Co.*, 845 A.2d 889, 898 (Pa. Super. 2004). Insurance policies are construed strictly against the insurer and in favor of coverage. *Ranieli v. Mutual Life Ins. Co.*, 413 A.2d 396, 400 (Pa. Super. 1979). An insurer, the drafter of the policy, must be specific in its use of language; an exclusion from liability must be clear and exact in order to be given effect. *Prudential Property and Casualty Ins. Co. v. Sartno*, 903 A.2d 1170, 1177 (Pa. 2006). There is no such clear and exact exclusion for losses that are a continuation of preexisting damage in Niski's Policy.

The Department argues that it is not required to issue a policy where there is preexisting damage. That is entirely correct, but it misses the point. The Department could have refused to

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*subsidence* prior to the policy period." (DEP Ex. 15) (emphasis added).

issue a policy in the first place because of the preexisting condition at Niski's Property, 25 Pa. Code § 401.11(e), but it did not. It could have required that preexisting damage be repaired or that the cost of repairing it be established before issuing a policy, *id.*, but it did not do so. It presumably could have excluded this particular preexisting damage or all damage related to any preexisting conditions from the Policy, but it did not do so. Having done none of these things, the issue before us is whether the Department may nevertheless deny Niski's claim. That issue turns on the language of the Policy, and to repeat, there is nothing in that language that limits coverage to conditions arising entirely after the start of the policy period.

Under Pennsylvania law, the proper focus for resolving issues of insurance coverage is the reasonable expectations of the insured. *TICO Ins. Co. v. March*, 155 F. Supp. 2d 441, 446 (E.D. Pa. 2001) (Pa. Law). Niski could reasonably expect that the damage to his foundation would be covered because the Policy did not exclude it, and because Niski knew that the Department was aware of the problem before it issued the Policy. In fact, it was a Department employee who advised Niski to obtain the insurance after he inspected the site and documented the damage. (FOF 11.)

The Department contends that it would not have issued a policy to Niski had it known of the preexisting condition. This argument fails to persuade for any number of reasons. First, what the Department would have, could have, or should have done is beside the point. Once the Department decided to issue the Policy and accepted Niski's premium payment, the parties' legal relationship changed completely. Arguing about what might have been is irrelevant.

Second, the Department's argument is based upon pure, self-serving speculation based upon hindsight. It is not even particularly believable speculation because the Department has no consistent or coherent policy or practice regarding when it will approve coverage where there is

preexisting damage. There is nothing in the applicable law or regulations that absolutely excludes coverage under such circumstances. To the contrary, an insurance policy may be issued, for example, where previous damage has been repaired "to the satisfaction of the Department," 25 Pa. Code § 401.11(e). Although there is no record here that the damage to the Property reported by the prior owner in 1995 was ever actually repaired, let alone repaired to the Department's satisfaction, the Department has not cited that prior damage as a basis for denying Niski's claim. Furthermore, it would appear that coverage is sometimes available even when the prior damage has not been repaired. Witness the following exchanges on the record:

> BY THE COURT:
> Q How do you define preexisting damage? I mean let's say there's a crack that's so small you can barely see it. It's not causing any problem, but over time the crack grows. Is it preexisting as of the date that tiny little crack?
> A Yes. The date we inspect it, yes, that's when – anything before our – before the issuance of the policy is preexisting.
> Q So, if there's a tiny little crack in the wall before you issue the insurance policy but then that crack grows to be a much bigger crack after the insurance policy, the damage is not covered is your interpretation?
> A That crack may be covered if the subsidence occurs and affects the whole wall and we have to replace the whole wall. Then that, you know, initial small crack would now be covered if we had to replace the whole wall. You understand what I'm saying?
> Q No.
> A You could have a small crack in the wall to begin with. You go into any house, you're going to see cracks. No house is really perfect perfect, even brand new built ones. But over – but if a subsidence should occur to that wall and the whole wall is damaged, we would fix the whole wall and that crack would not be excluded. That crack would be repaired along with the whole wall. If the damage, mine subsidence damage is sufficient enough to cause damage to the whole wall, we would replace the whole wall.
> Q Why does it have to be sufficient to damage an entire wall? I mean suppose the crack – just as a hypothetical, assume that that tiny little crack, there's no question it's caused by mine subsidence, but it's not really causing any problems, but it just grows and grows and grows. Does the Department trace it back to

> that tiny little crack before the coverage? I mean what's the triggering event?
> A We may or may not, Judge. We do try to give the benefit of a doubt, you know. If it's there and we see a lot of subsidence around it, we would probably address it.

(T. 173-75.) This actually sounds a lot like what happened at the Niski Property. Small cracks before the Policy was issued grew into problems that will require the whole wall to be replaced.

Another Department official testified as follows:

> Q Let me ask it again to be clear. As I understood some of the Judge's questions earlier, one of the things he was asking was if I have a home and it has any damage, I'm not sure of the extent of damage yet, the first question is can it be insured by MSI [i.e. the Fund]?
> A The answer is it depends on the severity and the nature of the damage. First of all, we have to know about it. As I briefly stated, we don't inspect each and every site. We simply can't do that with the volume of applications that we receive and try to keep the rates affordable. We don't inspect each and every site. But if we do select to inspect it because of a red flag that was thrown and we see damages, if they're relatively minor and we don't believe it's an ongoing problem, we'll simply do out best to document those conditions and write the policy.
>
> If there are serious structural damages, we can do a variety of things. We might require the applicant to repair the damage. We might require the applicant to get cost estimates from reputable contractors to properly repair it. And then that would serve as an exclusion to the policy. But it really depends on the nature and severity of the problems.
>
> If it's an ongoing problem, if we believe this is something that's currently developing in the structure, whether it's mining-related or not, we don't write a policy until we're sure it's over. And we do have regulations that state that if we cannot separate new damage from old damage, we have the right and ability to deny coverage.

(T. 198-99.)

Of course, this testimony illustrates the Department's confusion between issuing a policy in the first place and denying a claim under an existing policy. But beyond that, the Department says it will issue a policy if preexisting damage is "relatively minor" and not "ongoing." The

damage to Niski's house in November was certainly minor relative to what happened later. The damage to his Property by the Department's admission got much worse after his Policy was issued. The post-Policy damages were "not the same magnitude." (T. 217.) The damage seen in November 2005 was not serious enough to require that the Property be condemned. It is hard to say whether the damage was "ongoing," but again, what is clear is that the Department did not exercise any of these fine distinctions in this case. It simply issued Niski a policy without any exclusions whatsoever, knowing that the structure in question has had subsidence problems since at least 1992.

Not only is the Department's contention that it would not have issued a policy had it known of the preexisting damage irrelevant and speculative, it is not consistent with the facts. The truth of the matter is that the Department *did* know about the problem. It not only knew about the prior subsidence events and damage to this very structure dating back to 1992 as previously mentioned, it actually inspected and documented the problem again in November 2005. Nevertheless, perhaps in a case of the left hand not knowing what the right hand is doing, it issued a policy in December 2005.

The Department claims that it was misled by Niski's application into not conducting another inspection. The Department says that Niski was not candid and forthcoming in his application, and it has gone so far as to allude to a section in the insurance policy relating to intentional concealment or fraud. (DEP Ex. 4, ¶ 13.) We fail to see how the Department could be misled when it had conducted its own inspection, albeit through a different section of the mining program, one month prior to the application and it had been involved with the site as far back as 1992. The Fund had even paid a prior claim for this precise problem at this precise location.

In any event, the argument strikes us as an attempt to divert attention from the Department's own lack of due diligence. If the Department did not know about the preexisting damage, it reasonably should have known about it. The Department's record check did not show any prior claims relating to the property, even though there had obviously been a prior claim. (DEP Ex. 16.) The Department did not uncover its own inspection report from November 2005, but it obviously found and relied upon that report when Niski later put in his claim. The Department's adjuster did not remember his prior personal history with the site when he reviwed Niski's application. Although we do not wish to suggest that the Department must conduct an inspection in connection with an application in every case,[3] under the facts of *this* case the Department was not justified in blindly relying upon Niski's application as an excuse for not conducting an investigation, and then subsequently denying coverage based upon its lack of an investigation. Niski struck us as a credible but perhaps less than a terribly sophisticated individual. On his application, he checked "no" to the question whether he was aware of any problems with walls, but "yes" to this question: "Are you aware of any earth movement or stability problems such as sliding, settling, upheaval, mine discharge or mine subsidence that have occurred on or affect your property?" The Department's representative testified that he did not take this answer seriously because Niski wrote "I was told when I bought it that it was built on a mine." We believe that an insurer acting with reasonable prudence at a minimum would have conducted further investigation to clear up these apparent inconsistencies. Instead, the Department never called Niski. (T. 177.) It did not reject the application or request additional

[3] *But see* 52 P.S. § 3212 (the Department "*shall* make such investigation as may be necessary," and describing what follows if an application is deemed approved because the Department fails to make "the *necessary* investigation or inspection") (emphasis added). At a minimum, inspections are encouraged to avoid precisely the sort of coverage dispute that is now before us.

information. It did not ask for photographs or take any of its own. *See* 25 Pa. Code § 401.12 (right to take photographs in connection with an application). It did not conduct an additional inspection. By failing to act carefully, the Department, quite literally, assumed the risk.

Accordingly, we conclude that the Department erred by denying Niski's claim. The parties stipulated that the cost of repairs would be $20,275 under one estimate. The Department did not dispute the amount but objected to the admission of the evidence as irrelevant or perhaps premature because it denied Niski's claim in its entirety. We sustain the Department's objection and remand the matter to the Department for further processing of the claim consistent with this Adjudication.

## CONCLUSIONS OF LAW

1. This Board has jurisdiction. 52 P.S. § 3224.1; *Phillips v. DER*, 577 A.2d 955, 938 (Pa. Cmwlth. 1990)

2. Niski bears the burden of proof by a preponderance of the evidence. *Phillips v. DER*, 1993 EHB 950, 966-67; *Clapsaddle v. DER*, 1992 EHB 1029, 1050-52.

3. The terms of the insurance policy govern the rights of the parties to the extent the policy is consistent with applicable law. *Estate of Higgins v. Washington Mutual Fire Insurance Co.*, 838 A.2d 778, 781-82 (Pa. Super. 2003).

4. The Fund's subsidence insurance policy could have but did not include an exclusion for any losses related to preexisting conditions.

5. The Department could have but did not exclude coverage for defined preexisting conditions in Niski's Policy.

6. The Department could have but did not deny Niski coverage for his Property due to the preexisting conditions. 25 Pa. Code § 401.11(e).

7. The Department has no consistent or coherent policy or practice when it comes to deciding whether to cover losses related to preexisting conditions.

8. The Department must exercise due diligence in its administration of the Fund. The Department may not deny coverage that resulted from its lack of due diligence when issuing the insurance policy under the unique facts of this case.

9. Niski is entitled to be reimbursed for the cost of repairing the physical damage that occurred to his Property between December 27, 2005 and December 26, 2006.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

| | | |
|---|---|---|
| **JAMES A. NISKI, JR.** | : | |
| | : | |
| **v.** | : | |
| | : | **EHB Docket No. 2006-277-L** |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION** | : | |

## ORDER

AND NOW, this 6th day of June, 2008, it is hereby ordered that Niski's appeal is sustained. The Department is instructed to process Niski's claim in accordance with this Adjudication.

**ENVIRONMENTAL HEARING BOARD**

**THOMAS W. RENWAND**
**Acting Chairman and Chief Judge**

**GEORGE J. MILLER**
**Judge**

**MICHELLE A. COLEMAN**
**Judge**

BERNARD A. LABUSKES, JR.
**Judge**

**DATED: June 6, 2008**

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

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SECRETARY TO THE BOARD

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| **HANOVERIAN, INC., d/b/a QUAKER ALLOY; 200 CASCADE DRIVE ORDINARY TRUST; and DONALD METZGER** | : | **EHB Docket No. 2006-192-MG (consolidated with EHB Docket Nos. 2006-256-MG and 2007-028-MG)** |
| **v.** | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION** | : | **Issued:** June 12, 2008 |

## OPINION AND ORDER ON MOTION TO DISMISS

**By George J. Miller, Judge**

**Synopsis**

The Board grants a motion to dismiss a trust as an appellant in an appeal from the Department's issuance of an administrative order related to a residual waste landfill. The trust at issue is not a "person" within the meaning of the Environmental Hearing Board Act and therefore does not qualify as an appellant.

## OPINION

The Department moves to dismiss the 200 Cascade Drive Ordinary Trust as an appellant in an appeal from an administrative order of the Department in connection with a residual waste landfill on a property in Myerstown Borough and Jackson Township, Lebanon County. Neither the "Trust" nor any of the other appellants have filed any response to this motion.

The December 7, 2006 administrative order is directed to Hanoverian, Inc. and Donald C. Metzger, the trustee and beneficiary of the trust, respectively. The order directs Hanoverian and Metzger to, among other things, refrain from selling the landfill to person who does not have a proper permit, and to comply with various permitting, bonding and closure requirements related to the landfill. On January 8, 2007, an appeal was filed which identified Hanoverian, Inc., a corporation, 200 Cascade Drive Ordinary Trust, and Donald Metzger, an individual, as appellants (collectively, Appellants). As exhibits to the notice of appeal the Appellants included a copy of the Department's order with attached site maps, a copy of the 200 Cascade Drive Ordinary Trust agreement, and a press release from the Department. The notice of appeal identified Hanoverian as the trustee of the landfill property, which is the subject of the 200 Cascade Drive Ordinary Trust agreement. Donald Metzger is identified as the beneficiary of that trust.

The Department argues that the Trust should be dismissed as an appellant because the Trust lacks the capacity to sue, lacks standing to file an appeal, is not a "real party in interest" and that the Board lacks subject-matter jurisdiction over an appeal filed by the Trust. Neither Hanoverian, Metzger, nor the Trust has filed any response to the Department's motion.[1] We agree with the Department that the Trust lacks the capacity to file an appeal before the Board because it is not a "person" as that term is defined by the Board's rules.

The Environmental Hearing Board Act provides that "no action of the department adversely affecting a *person* shall be final as to that *person* until the *person* has had the

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[1] For a detailed description of the conduct of the consolidated litigation of the appeal of the administrative order and two other appeals filed by Hanoverian, see *Hanoverian v. DEP*, EHB Docket No. 2006-192-MG (Opinion filed June 5, 2008).

opportunity to appeal the action to the board . . ."[2] The term "person" is not defined in the Act, but our regulations do provide a definition:

> An individual, partnership, association, corporation, political subdivision, municipal authority or other entity.[3]

We have reviewed the agreement which created the Trust and find that it does not create an "entity" such that it can be deemed a legal "person" pursuant to the Board's regulations. Rather, the document is more akin to a contract which sets forth an agreement between Hanoverian, the trustee, and Metzger, the beneficiary, wherein the landfill property will be held by Hanoverian for the benefit of Metzger.[4] The agreement specifically provides that the Trust is not intended to create a corporation, business trust, or an association in the nature of a corporation. The agreement also provides that it will not be filed or recorded, which would be a requirement if it were intended to create some sort of corporate entity.[5]

There does not appear to be Pennsylvania case law directly on point to support the proposition that the Trust is not a person for the purposes of instituting a legal proceeding. But there are certainly cases in other jurisdictions which support our view that this particular trust is not a legal "person" within the meaning of the Environmental Hearing Board Act:

> It is a general principal of the common law that only "legal persons" may sue or be sued. See *Puerto Rico v. Russell & Co.,* 288 U.S. 476, 480, 77 L. Ed. 903, 53 S. Ct. 447 (1933) (discussing the status as a "legal person" of a Puerto Rican business association). At common law, the estate created by a trust agreement or a will is not a legal person, and so has no capacity to sue or be sued. *Lazenby v.*

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[2] Act of January 13, 1988, P.L. 530, *as amended*, 35 P.S. § 7514(c)(emphasis added).

[3] 25 Pa. Code § 1021.2.

[4] See Restatement (Second) of Trusts § 2 (1959), which defines a trust as "a fiduciary relationship with respect to property, subjecting the person by whom the title to the property is held to equitable duties to deal with the property for the benefit of another person, which arises as a result of a manifestation of an intention to create it."

[5] See 15 Pa. C.S. § 9501-9507, detailing the creation of a "business trust". Section 9503(a), requires the trust document to be filed with the Department of State.

> *Codman,* 116 F.2d 607, 609 (2d Cir. 1940) (A testamentary trust "is not a juristic person and the trustee is the only party entitled to bring suit."); *Hanson v. Birmingham,* 92 F. Supp. 33, 41 (N.D.Iowa 1950) (A common law trust "is certainly not a person in the eye of the law."). Instead, the trustee is the proper party to any lawsuit involving a trust. *Navarro Savings Ass'n. v. Lee,* 446 U.S. 458, 64 L. Ed. 2d 425, 100 S. Ct. 1779 (1980) (holding that the trustee is the real party in interest for purposes of determining diversity of citizenship in litigation involving a trust).[6]

The requirement that a litigant be a legal person is also reflected in Pennsylvania case law. For example, in *Philadelphia Facilities Management Corp. v. Biester,*[7] the Commonwealth Court held that the Philadelphia Gas Works was not an identifiable legal entity, but merely a collective name for properties owned by the City of Philadelphia. Therefore the Philadelphia Gas Works could not be a plaintiff either on its own behalf or on the behalf of others. In the *Estate of Gasbarini v. Medical Center o Beaver*[8], the Supreme Court observed that a decedent's estate could not be a party to a law suit unless a personal representative exists.

In short, just as a collective name of properties or a name designating the property of a decedent is not a legal entity for the purposes of maintaining a suit, a fiduciary agreement such as the 200 Cascade Ordinary Trust also is not a legal entity for the purposes of maintaining an appeal from an action of the Department.

We further note that the Department's order was not directed in any way to the Trust. Rather, the requirements of the order are directed to the beneficiary, Metzger and the trustee, Hanoverian. The Trust was only mentioned in the order in the context of the description of the owner of the property. Accordingly, we will grant the Department's motion and dismiss 200 Cascade Drive Ordinary Trust as an appellant. We therefore enter the following:

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[6] *Schechter v. Department of Revenue (In re Markos Gurnee Partnership)*, 182 B.R. 211, 215 (Bankr.D.Ill. 1995).

[7] 431 A.2d 1123 (Pa. Cmwlth. 1981).

[8] 409 A.2d 343 (Pa. 1979).

**COMMONWEALTH OF PENNSYLVANIA**
**ENVIRONMENTAL HEARING BOARD**

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| **HANOVERIAN, INC., d/b/a QUAKER ALLOY; 200 CASCADE DRIVE ORDINARY TRUST; and DONALD METZGER** | : | **EHB Docket No. 2006-192-MG (consolidated with EHB Docket Nos. 2006-256-MG and 2007-028-MG)** |
| **v.** | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION** | : | |

**ORDER**

AND NOW, this 12th day of June, 2008, the Department's motion to dismiss 200 Cascade Drive Ordinary Trust as an appellant in the appeal docketed at **EHB Docket No. 2007-028-MG** is hereby **GRANTED**. The amended caption of the appeal, which should be reflected on all future filings with the Board is:

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| **HANOVERIAN, INC., d/b/a QUAKER ALLOY; and DONALD METZGER** | : | **EHB Docket No. 2006-192-MG (consolidated with EHB Docket Nos. 2006-256-MG and 2007-028-MG)** |
| **v.** | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION** | : | |

**ENVIRONMENTAL HEARING BOARD**

Thomas W. Renwand

**THOMAS W. RENWAND**
**Acting Chairman and Chief Judge**

GEORGE J. MILLER
**Judge**

MICHELLE A. COLEMAN
**Judge**

BERNARD A. LABUSKES, JR.
**Judge**

**DATED:** June 12, 2008

**c:** **Department of Litigation:**
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| **BLUE MARSH LABORATORIES, INC.** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2006-266-C** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION** | : | **Issued: June 16, 2008** |

## OPINION AND ORDER
## ON MOTION TO DISMISS FOR MOOTNESS

**By Michelle A. Coleman, Judge**

**Synopsis**:

Because the Appellant regained the accreditation that was previously suspended by the Department there is no longer any relief the Board can grant in this appeal since the suspended accreditation was the subject of the appeal. The Board grants the Department's motion to dismiss for mootness.

## OPINION

***Procedural History***

This November 29, 2006 appeal by Blue Marsh Laboratories, Inc. (Blue Marsh or Appellant) was consolidated with its January 2007 appeal. On December 28, 2007 by its Opinion and Order on the Department's Motion for Partial Summary Judgment the Board removed the consolidation of the two appeals and dismissed the January appeal as moot. The November appeal remained under the Board's jurisdiction. Currently before the Board is the Department's

Motion to Dismiss the November appeal for mootness stating that Blue Marsh has regained accreditation leaving the Board with no effective relief to be granted.

***Discussion***

The Board will not recite the factual background of this appeal which has already been set forth in the Board's Opinion and Order on December 28, 2007. Only the facts pertaining to this motion before the Board will be provided.

In a motion to dismiss the Board will grant the motion where there are no material facts in dispute and the moving party is entitled to judgment as a matter of law. *Michael Butler v. DEP*, EHB Docket No. 2007-185-L (Opinion issued February 29, 2008), slip op. 2; *Onyx Greentree Landfill, LLC v. DEP*, 2006 EHB 404, 411; *Borough of Chambersburg v. DEP,* 1999 EHB 921, 925; *Smedley v. DEP,* 1998 EHB 1281, 1281.

Blue Marsh appealed the Department's November 9, 2006 letter informing Blue Marsh that DEP was suspending certain fields of its accreditation. During the course of this appeal, Blue Marsh participated in and successfully completed a series of proficiency test studies regaining all fields of its accreditation that were previously suspended by the Department in the November letter. The Department contends that fact renders the appeal moot. The Appellant does not dispute the fact that it regained its accreditation during the pendency of the appeal.

We previously dismissed the January appeal, that had been consolidated with this appeal, because there was no effective relief that the Board could provide to the Appellant when the Department rescinded the letter that formed the basis of the appeal. *See Blue Marsh Laboratories, Inc. v. DEP*, 2007 EHB 777. We are again faced with a similar situation in which we are unable to provide effective relief.

The appropriate inquiry in determining whether a case is moot is whether the Board will

be able to grant effective relief. *Horsehead Resource Development Co., Inc. v. DEP*, 780 A.2d 856, 858 (Pa. Cmwlth. 2001), appeal denied, 568 Pa. 708 (2002); *see Bensalem Township Police Benevolent Assoc., Inc. v. Bensalem Township*, 777 A.2d 1174, 1178 (Pa. Cmwlth. 2001) ("where intervening changes in the factual matrix of a pending case occur which eliminate an actual controversy and make it impossible for the court to grant the requested relief, the case will be dismissed as moot").

This appeal is based on the fact that Blue Marsh lost certain fields of its accreditation following a DEP determination stated in a letter dated November, 2006. The only effective relief that we could have provided to the Appellant would have been to reinstate their accreditation. However, that reinstatement occurred during the pendency of this appeal, therefore Blue Marsh obtained the relief it sought had it prevailed in this appeal. Since Blue Marsh has been restored to its *status quo ante* there is no additional relief the Board can provide to the Appellant. *See Broad Top Township v. DEP*, 2004 EHB 500 (appeal rendered moot by issuance of modification which undid the action taken in a previous modification and restored the *status quo ante*); *see also Michael A. Butler v. DEP*, Docket No. 2007-185-L (Opinion and Order issued February 29, 2008) (appeal dismissed for being moot when a permit being appealed was cancelled); *Solebury Township v. DEP,* 2004 EHB 23 (appeal of section 401 water quality certification was rendered moot when DEP subsequently revoked the certification); *Borough of Edinboro v. DEP,* 2000 EHB 1167 (appeal rendered moot where DEP issued letter expressly withdrawing previously-issued letter that formed basis of appeal); *Commonwealth Environmental Systems, L.P. v. DEP,* 1996 EHB 340 (appeal of an action affecting a solid waste permit becomes moot when DEP issues a subsequent modification superseding the prior appealed action); *Empire Sanitary Landfill, Inc. v. DEP,* 1991 EHB 66.

Since we are unable to grant any meaningful relief to the Appellant under the circumstances, the appeal should be dismissed. Blue Marsh, however, asks us to find its current accreditation problem an exceptional circumstance that would keep the appeal from being dismissed. Blue Marsh's certificate of accreditation expired on February 28, 2008 because it failed to submit its annual renewal application and appropriate fees to the Department. The Appellant contends that its files were seized by the Office of Attorney General and therefore Appellant was unable to submit the annual fees and renewal application. For that reason, Blue Marsh contends that this creates exceptional circumstances and the appeal should not be dismissed. We find that Blue Marsh's attempt to keep this appeal alive through exceptional circumstances must fail.

The fact that Blue Marsh was unable to submit its application and fees to renew its accreditation is not related to this appeal before the Board. This appeal is based on DEP's November 9, 2006 letter suspending certain accreditation fields, not for failure to resubmit an annual application for accreditation. The fact that it did not submit an application before the February 2008 deadline is a separate appealable action and not related to this appeal. The Board does not find exceptional circumstances to exist in this matter and the Department's motion is granted.

Therefore we enter the following order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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| **BLUE MARSH LABORATORIES, INC.** | : | |
| | : | |
| **v.** | : | **EHB Docket No. 2006-266-C** |
| | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION** | : | |

**ORDER**

AND NOW, this 16th day of June 2008, the Department's motion to dismiss is granted and this appeal is dismissed as moot.

**ENVIRONMENTAL HEARING BOARD**

**THOMAS W. RENWAND**
**Chief Judge and Chairman**

**GEORGE J. MILLER**
**Judge**

**MICHELLE A. COLEMAN**
**Judge**

BERNARD A. LABUSKES, JR.
**Judge**

**DATED:** **June 16, 2008**

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

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WILLIAM T. PHILLIPY IV
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|---|---|---|
| **EMERALD COAL RESOURCES, LP** | : | |
| | : | |
| **v.** | : | |
| | : | **EHB Docket No. 2006-165-L** |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and SAMUEL R. BARCLAY, Recipient** | : | **Issued: June 17, 2008** |

# PARTIAL ADJUDICATION

**By Bernard A. Labuskes, Jr., Judge**

**Synopsis:**

The Board determines that a third-party appeal of the Department's registration of a gas well is timely when the appeal was filed within thirty days of the third party receiving actual notice of the gas well registration.

## FINDINGS OF FACT

**Parties**

1. The Department of Environmental Protection (the "Department") is the agency with the duty and authority to administer and enforce the Oil and Gas Act, 58 P.S. §§ 601.101 – 601.605; the Coal and Gas Resource Coordination Act, 58 P.S. §§ 501 – 518; and Section 1917-A of the Administrative Code of 1929, 71 P.S. § 510-17; and the rules and regulations promulgated under those statutes.

2. Samuel R. Barclay ("Barclay") is an individual who owns and resides on roughly 60 acres in Whitely Township, Greene County. (Stipulation.)

3. In 1975 Barclay connected an unused gas well located on his property (the "Well") to his residence as a fuel source for home heating and other domestic purposes. (Stipulation.)

4. The Well was drilled in the early 1900s. (Stipulation.)

5. From the time he connected the Well to his residence until the commencement of activities to plug the Well in 2006, Barclay used the gas from the Well for his residential heating and energy needs. (Board Exhibit ("B. Ex.") 1.)

6. Emerald Coal Resources, L.P. ("Emerald") is a Delaware limited partnership in the business of mining coal by the underground method in Pennsylvania. (Stipulation.)

7. Emerald leases from Pennsylvania Land Holdings Corporation, its affiliate, the coal comprising the Pittsburgh seam of coal that underlies the Barclay property. (Stipulation.)

Well Registration

8. The Oil and Gas Act, 58 P.S. §§ 601.101 – 601.605, is designed to cover the Department's responsibility for oil and gas wells from cradle to grave. (Notes of Transcript page ("T.") 21.)

9. A person may register a gas well with the Department as either an operator or a surface property owner. (T. 26-27.)

10. The purpose behind registering wells is to have an inventory of wells and to make sure that the wells are operated in compliance with the Oil and Gas Act. (T. 21, 24, 28, 31, 82.) Additionally, well registrations allow the Department to assign responsibility to registrants for previously unpermitted and unregistered wells. (T. 28, 73, 75.)

11. The Department only registers wells that have not been previously registered or permitted. (T. 21.)

12. As long as a well has not been previously registered or permitted, the Department will register the well. (T. 86.)

13. The Department does not register wells as "active," "abandoned," "plugged," or with any other classification. (T. 38-39.) Whether a well is being operated is not relevant to the issue of registration. (T. 39.)

14. Once a well registration form is received, the Department checks its records to determine whether the well had been previously registered or permitted. (T. 32.) If it has not, the Department assigns the well a number using the American Petroleum Institute's numbering system ("API number"). (T. 32.)

15. The Department writes the API number and the well location on the well registration form. (T. 39.) The Department also marks the location of the well on its master maps. (T. 32.)

16. The registration form is then sent back to the registrant with a cover letter with instructions for the registrant to place the API number on the well. (T. 33.)

17. Well registrations are not published in the Pennsylvania Bulletin. (T. 139.)

The Barclay Well Registration

18. On October 28, 2003, The Department received a well registration form from Barclay for the Barclay Well. (Stipulation; B.Ex. 2; T. 139.)

19. The Well had not been previously permitted or registered. (Stipulation; T. 144.)

20. Barclay identified himself on the well registration form as the operator of the Well and provided information about the Well. He included a $15.00 registration fee with the form that

was mailed to the Department. (Stipulation.) Barclay also included a map depicting the location of the well along with the registration form. (T. 139.)

21. Barclay did not supply all the information requested on the well registration form. Barclay placed question marks in the boxes requesting the date drilled, casing record, type and amount of cement, the size, type, setting and depth of packers, and the Well's producing horizons. (B.Ex. 2; T. 140, 149.)

22. By letter dated November 3, 2003 to Barclay, the Department registered the Well by returning the well registration form and map as accepted, stamped, and marked by the Department during processing, and advised Barclay that an API number had been assigned to the Well. (B.Ex. 2.)

23. Prior to registering the Well, the Department did not inspect the Well or inquire into whether the Well was abandoned or was operating as a producing well by Barclay. (Stipulation.)

24. Emerald performed a search of the IRIS network on or about June 2005. IRIS is an online imaging system maintained by the Topographic and Geologic Survey of the Department of Conservation and Natural Resources that stores scanned images of various oil and gas documents, among other things. (T. 37-38.) Emerald viewed the well registration form submitted by Barclay on IRIS, which was marked and stamped by the Department. (C.Ex. 1; T. 167.) The only information available on IRIS is an electronic image of the completed registration form. That form does not show on its face whether a registration has been accepted. (A copy of Barclay's processed well registration form as it appeared on IRIS is attached hereto as Appendix A.) The Department's November 3, 2003 letter was not posted on IRIS. (T. 37-38, 58, 205.)

25. Emerald did not receive actual notice of the Department's November 3, 2003 letter registering the Well until June 6, 2006. (Commonwealth Exhibit 1; T. 153, 166, 203, 205.)

## DISCUSSION

On July 3, 2006, Emerald appealed the Department's November 3, 2003 registration of the Barclay Well. On July 20, 2007, the Department filed a motion to dismiss Emerald's appeal as untimely, which we denied, citing a lack of evidence on the record regarding the Department's process of registering wells. *Emerald Mine Resources, LP v. DEP*, 2007 EHB 611. We held a full hearing on the merits on February 14, 2008,[1] upon the conclusion of which we expressed concern to the parties regarding the timeliness of Emerald's appeal. With the parties' consent, we bifurcated briefing and directed the parties to address the issue of timeliness before engaging in further briefing on the merits. After review of the record, we now determine that Emerald's appeal is timely and that briefing on the merits is necessary.

As a starting point, this Board only has jurisdiction to hear appeals from Department actions that are filed in a timely manner. 25 Pa. Code § 1021.52(a). In instances such as this where a third party files an appeal, our rules provide that an appeal must be filed "thirty days after actual notice of the action if a notice of the action is not published in the Pennsylvania Bulletin." 25 Pa. Code § 1021.52(a)(2)(ii); *see Pickford v. DEP*, EHB Docket No. 2007-266-L, slip op. at 2 (Opinion, May 2, 2008); *Walker v. DEP*, 2007 EHB 117, 134. The Department did not publish notice of its registration of the Well in the Pennsylvania Bulletin.

Our first task, as in all exercises of this nature, is to identify the action being appealed. *Winegardner v. DEP*, 2002 EHB 790, 792-93. Although there was some initial lack of clarity on Emerald's part regarding the question, it is now clear that the action under appeal is the Department's registration of the Well.

The record is not entirely clear as to what actually constitutes the "registration." The Department argues, inconsistently, that once it assigns an API number and writes the number on

[1] Barclay did not attend the hearing and has not actively participated in the appeal.

the well registration form, the well is registered. (Department Reply Brief, 3.) At another point, the Department states that it was the November 3, 2003 letter that registered the well. Specifically, the Department proposed the following finding of fact: "*By letter dated November 3, 2003 to Barclay ("Letter"), the Department registered the Well* by returning the Well Registration Form and Map as accepted, stamped and marked by the Department during processing, and advised Mr. Barclay that an API number had been assigned to the Well." (Department Brief, 6, ¶ 26) (emphasis added). Along the same lines, the Department in its post-hearing brief states, "*To complete the well registration process*, a copy of the Well Registration Form and Map as marked and accepted by the Department is sent to the registrant with a letter notifying the applicant that an API number has been assigned to the well." (Department Brief, 11) (emphasis added). We will adopt the Department's proposed finding of fact, as reinforced by its brief, and hold that the Department's November 3, 2003 letter constituted the registration of the Barclay Well.

There is nothing in the Oil and Gas Act or the regulations promulgated under it that supports the argument that the assignment of an API number constitutes registration. In fact, the only statutory reference to "registration numbers" (not API numbers) is found in Section 203 of the Act, which provides that "[t]he well operator shall install the registration number issued by the Department in a legible, conspicuous and permanent manner on the well within 60 days of issuance." 58 P.S. § 601.203(c).

The record supports the Department's proposed finding of fact. Although the assignment of an API number is certainly one component of a well registration, the assignment does not constitute registration in and of itself. Upon receiving a well registration form, the Department engages in any number of tasks (*see* FOF 14-16), all of which might be said to "evince" (to use the Department's word) registration. However, these individual tasks and components of a well

registration do not constitute a registration until the application has been fully and completely processed and a letter has been sent to the applicant.

The Department argues that it is "common knowledge to people who work in the coal industry" that an API number is assigned once a well is registered. The record does not support this assertion, but even if it did, the argument actually reinforces our conclusion that assignment of an API number and registration of the well are separate events. Still further, our jurisdiction does not turn on the "common knowledge" of a particular industry. The standard of actual notice under our rules does not depend on the sophistication of an appellant.

Thus, in the Department's own words, a well registration is not complete until the letter is sent. In this case, then, the letter constitutes not only the Department's notice of its action but the action itself. Therefore, the question before us is when did Emerald obtain actual notice of that letter. Contrary to much of the material in the Department's post-hearing briefs, the question is not when did Emerald know about the letter, i.e. the registration. It is not when Emerald reasonably should have known about the letter. With the exception of publication in the Pennsylvania Bulletin, which the Department chose not to pursue here, it is not when did Emerald have constructive notice of the letter. Our rules refer only to actual notice, and that is where our focus must lie.

We are not suggesting that Emerald was required to see a copy of the actual letter before it needed to file an appeal. For example, a posted sign clearly indicating that an approval has been granted may be sufficient if it is seen. *See Stevens v. DEP*, 2000 EHB 438, 444. Here, there is no record evidence of any postings on the Well that would have given a clear indication that it was registered. Further still, there is nothing in the record to suggest that Emerald was ever in a position to see such a posting if one existed.

The Department argues that Emerald knew about the Well and has known that it was being operated, perhaps illegally, since 2003. This is obviously beside the point. To have notice that a well is operating and to have actual notice that it is registered are two different things. In fact, Emerald's field survey that resulted in the discovery of the well and upon which the Department relies occurred in May 2003, six months *before* the well was registered.

In connection with Emerald's application for a pillar permit, a Department employee sent Emerald a hand-written note that read: "[t]he Department's information indicates that [the Well] is active. Please call Mr. Trout at [his phone number] to verify if needed." The Department appears to have abandoned its position that this note constituted notice, and wisely so, because the note is both informal, imprecise, and in any event does not indicate that the well was registered.

The Department's strongest argument is that Emerald had actual notice of the well registration from information it gathered during its June 2005 search of the IRIS system. The only information available in the IRIS system, however, was Barclay's well registration form received by the Department on October 28, 2003. Although markings on the registration form indicate that the Department received and processed it, there is nothing objective on the form itself that indicates the Well had been registered. As can be seen on the form, which is attached hereto as Appendix A, there is no clear indicia of a final Department action. The only clear indication of the Department's registration of the Well is the November 3, 2003 letter sent to Barclay. This letter was not available on IRIS, and there was no indication on IRIS that such a letter existed. If a party cannot determine from a document that the Department has taken action, then actual notice of the alleged action cannot be said to have occurred. Hints or vague references that a Department action may have occurred do not suffice. *Barra v. DEP*, 2004 EHB 276, 284; *cf. Soil Remediation Systems, Inc. v. DEP*, 703 A.2d 1081, 1084 (Pa. Cmwlth. 1997) (placing "advanced copy" stamp on first

page of facsimile suggested that the information in the facsimile did not serve as definitive or final notice). It logically follows that any statements made by Emerald employees that are attributed to the information found on IRIS cannot be said to "evince" actual notice of registration of the Well given the lack of clarity and objectivity of the information. Without a doubt, Emerald had actual notice that Barclay submitted a well registration form, and that the form was received by the Department on October 23, 2003. Additionally, Emerald had notice that the Department processed the registration form, but the information available on IRIS cannot be said to give notice of the Department's final action.

The weakness of the Department's position is further revealed if we imagine that this appeal was filed by Barclay himself. Unless and until Barclay received notice from the Department that his well had been registered, he would have had no idea whether it had in fact been registered. Assigning an API number, without notifying the registrant that the Department has registered the well, gives no notice that the well has in fact been registered. *See Soil Remediation Systems, Inc.*, 703 A.2d at 1084 (a determination must be final before it can be appealed, and the finality of the decision must be communicated to the affected parties). There is no reason that actual notice for a third-party appellant should be treated any differently. To repeat, it is the Department's November 3, 2003 letter that embodied the Department's action, not the assignment of the API number.

Emerald has shown that it did not receive actual notice of the November 3, 2003 letter until June 6, 2006. The Department has been unsuccessful in its attempt to point to something that occurred earlier that gave Emerald actual notice. Emerald's appeal is timely because it was filed within thirty days of that actual notice.[2]

[2] We are not indifferent to the problem of hearing appeals from Department actions many years after the action occurred. We are not unduly concerned about a landslide of stale appeals, however, because, as Emerald has pointed out, we would not be writing this Adjudication if notice of the registration had been published in the Pennsylvania Bulletin. Furthermore, we would be faced with a different case if the Department clearly expressed on IRIS that a well

## CONCLUSIONS OF LAW

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

2. A third party has thirty days after receiving actual notice of a Department action to file a notice of appeal if notice of the action is not published in the Pennsylvania Bulletin. 25 Pa. Code § 1021.52(a)(2)(ii).

3. Emerald first received actual notice of the Department's registration of the Barclay Well when it received the Department's November 3, 2003 letter on June 6, 2006.

4. Emerald's notice of appeal was timely because it was filed within thirty days of Emerald receiving actual notice of the Department's November 3, 2003 registration of the Barclay Well.

---

had been registered and, for example, its document stamps said as much or it included the registration approval letters on IRIS.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

| | | |
|---|---|---|
| **EMERALD COAL RESOURCES, LP** | : | |
| | : | |
| **v.** | : | |
| | : | **EHB Docket No. 2006-165-L** |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and SAMUEL R. BARCLAY, Recipient** | : | |

## ORDER

AND NOW, this 17th day of June, 2008, it is hereby ordered that Emerald's appeal is timely and briefing on the merits is required. Emerald shall file its post-hearing brief on the merits on or before **July 21, 2008**. The Department shall file its post-hearing brief on the merits on or before **August 21, 2008**. Emerald shall file a reply brief, if necessary, on or before **September 5, 2008**.

**ENVIRONMENTAL HEARING BOARD**

**THOMAS W. RENWAND**
**Acting Chairman and Chief Judge**

**GEORGE J. MILLER**
**Judge**

**MICHELLE A. COLEMAN**
**Judge**

**BERNARD A. LABUSKES, JR.**
**Judge**

**DATED: June 17, 2008**

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

**For Commonwealth, DEP:**
Gail A. Myers, Esquire
Southwest Regional Counsel

**For Appellant:**
Eugene E. Dice, Esquire
Brian J. Clark, Esquire
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Harrisburg, PA 17101

**For Recipient:**
Samuel R. Barclay
299 Quiet Valley Road
Waynesburg, PA 15370

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL PROTECTION
Oil and Gas Management Program

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Southwest Regional Office

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# WELL REGISTRATION FORM

**This form is for wells that have not been permitted. Please type or print.**

Name of applicant: SAMUEL R. BARCLAY | DEP ID #: 214847
Address: 299 QUIET VALLEY ROAD
City: WAYNESBURG | State: PA | Zip Code: 15370
Phone: 724-627-5942 | Fax:

Applicant is (Check one): [X] Well operator [ ] Surface property owner
Project Number (If previously assigned by DEP):
County: GREENE
Applicant's Signature: Samuel R. Barclay

Under the Oil and Gas Act, a property owner is exempt from bonding and plugging requirements and the registration fee for registering an abandoned well if the owner of the surface real property on which the abandoned well is located did not participate in or incur costs in the drilling or extraction operation of the abandoned well and had no right of control over the drilling or extraction operation of the abandoned well.

**Please group wells by county. Use a separate form to list wells in each different county.**

| DEP Only API (Reg) # | Municipality | Farm Name | Well # | Serial # | Date Drilled | Well Type | Total Depth | Casing Record Size (dia) & Length (ft) | Type & Amount of Cement | Packers: Size/Type, Setting/Depth | Producing Horizons |
|---|---|---|---|---|---|---|---|---|---|---|---|
| 059-02120 | WHITELY TOWNSHIP | BARCLAY | 1 | | ? | GAS | 3271 | ? | ? | ? | ? |

Sec. 1 GARARDS FORT
10,300' WEST OF 80° 05' 00"
8,900' SOUTH OF 39° 52' 30"

AUTH # 535424
SITE # 625256
CLNT # 214847
APS # 500907

| Checklist: Attachments required, if applicant is .... | ...well operator | ...surface property owner |
|---|---|---|
| 1. Well locations plotted on a 7½ minute topographic map, or other description to enable the Department to find the well site. | [X] | [ ] |
| 2. Driller's log, if available. | [ ] | [ ] |
| 3. Registration fee of $15 per well or $250 blanket fee for all well registrations submitted simultaneously. | [ ] | Not applicable |
| 4. A new bond instrument or Bond Exhibit A form, needed for wells drilled after April 18, 1985. | [ ] | Not applicable |

**The registration number issued pursuant to this application must be installed on the well in a legible, conspicuous and permanent manner within 60 days of issuance.**

60 days = 12-27

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Appendix A

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

| | | |
|---|---|---|
| **ILSE EHMANN, THOMAS GORDON, JEANNE GORDON, RICHARD OSBORNE, ELAINE OSBORNE AND JUDY DENNIS** | : | |
| | : | **EHB Docket No. 2007-150-L** |
| **v.** | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and HERBERT KILMER, Permittee** | : | **Issued: June 19, 2008** |

## OPINION AND ORDER
## ON MOTION FOR SUMMARY JUDGMENT

**By Bernard A. Labuskes, Jr., Judge**

**Synopsis:**

The Board denies a motion for summary judgment in an appeal from the Department's issuance of a permit for a small noncoal surface mining operation due to disputed issues of fact.

## OPINION

The Department of Environmental Protection (the "Department") issued a small noncoal surface mining permit to Herbert Kilmer ("Kilmer") authorizing the operation of a bluestone quarry in New Milford, Susquehanna County known as the Blueberry Hill Quarry (Permit No. 2382-58060874-01) (the "Permit"). Ilse Ehmann, et al. (the "Appellants") filed this appeal from the issuance of the Permit and they have now moved for summary judgment. The Department opposes the motion. Kilmer through his attorney advised the Board that he will no longer participate in this appeal.

The Appellants present four arguments in support of their motion. First, they argue that the Department erred by not requiring Kilmer to provide public notice of his permit application. Second, they challenge the amount of bonding required by the Department. Third, they argue that the Department erred by not following the antidegradation requirements for a potential discharge from the mine into a High Quality stream. Finally, they argue that Kilmer should have been required to obtain an NPDES permit.

Summary judgment may be granted where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Lipton v. DEP*, EHB Docket No. 2007-026-MG, slip op. at 6 (Opinion, May 20, 2008); *Bertothy v. DEP*, 2007 EHB 254, 255. The granting of summary judgment is appropriate when a limited set of material facts are truly undisputed and the appeal presents a clear question of law. *Bertothy*, 2007 EHB at 255; *CAUSE v. DEP*, 2007 EHB 101, 106. Here, however, there are many factual questions that have yet to be answered.

**Public Notice**

The Noncoal Act provides:

General rule. - The applicant shall give public notice of every application for a permit...under this act in a newspaper of general circulation, published in the locality where the permit is applied for, once a week for four consecutive weeks.

52 P.S. § 3310(a).

The Act also provides:

> Waiver of Permit requirements. – The Environmental Quality Board may by regulation waive the permit requirements for any category of surface mining operation under this act which it determines has an insignificant effect upon the safety and protection of life, health, property and the environment.

52 P.S. § 3326(a). Pursuant to this section as well as its general rulemaking authority under the Act, the EQB promulgated 25 Pa. Code § 77.108(f) for small permits, which provides:

> Permit applications...under this section are exempt from the newspaper public notice requirements of section 10(a) of the act...

Notice of permit *issuance* is published in the Pennsylvania Bulletin. *Id.*

Kilmer did not in fact advertise public notice of his application prior to issuance of the Permit. Since there is no dispute that Kilmer was exempt from the newspaper notice requirement pursuant to Section 77.108(f), the Appellants challenge the regulation itself. Of course, challenging a regulation is a tough row to hoe. We apply a three-part test for determining the validity of a regulation: (1) whether the rulemaking body, here the EQB, was within its granted rulemaking power, (2) whether the regulation was issued pursuant to the proper procedures, and (3) whether the regulation is reasonable. *Eagle Environmental II and Chest Township v. DEP*, 2002 EHB 335, 344, *aff'd*, 818 A.2d 574, 579 (Pa. Cmwlth. 2003), *aff'd*, 884 A.2d 867 (Pa. 2005). There is a presumption in favor of regulatory validity, and courts and this Board must exercise caution when treading close to the legislative area. *Northampton, Bucks County Municipal Authority v. DER*, 555 A.2d 878, 881 (Pa. 1989).

The Appellants do not assert that Section 77.108(f) was issued pursuant to improper procedures. They do, however, assert that Section 77.108(f) goes beyond the EQB's rulemaking power to waive "permit requirements" under the Noncoal Act and that the regulation is unreasonable. Specifically, they argue that the public notice requirements are not "permit requirements" within the meaning of Section 3326. They argue that Section 3326 of the Noncoal Act does not clearly allow waiver of public notice, and it could not have been the Legislature's intent to allow a waiver of such an important, fundamental right of the public to be able to participate in permitting decisions at a meaningful point in the review process. Omission of the

newspaper publication requirement severely dilutes any chance that the public will learn of an application and effectively eliminates in the vast majority of cases the opportunity to submit written comments or objections regarding a permit application or request participation in public hearings or informal conferences, the Appellants contend.

The Department gives us little to go on in response. It states that the Independent Regulatory Review Commission (IRRC) expressly considered whether newspaper notice should be waived, and it published the following statement in the Pennsylvania Bulletin:

> One commentator claimed that the Department had not provided an explanation on how it determined that waiving permit requirements under section 26(a) of the Noncoal SMCRA (52 P.S. § 3326(a)) will have an insignificant affect upon safety and protection of life, health, property and the environment. Proposed § 77.108(f) provided exemptions from newspaper notice for small noncoal permits and bond releases. The commentator recommended that the Department provide newspaper notice or provide documentation of insignificant effects on safety, and the like.
>
> The Board disagrees with the commentators that raising the tonnage limit for small noncoal operations from 2,000 tons (1,814 metric tons) per year to 10,000 tons (9,070 metric tons) per year will have a significant impact on safety and protection of life, health, property and the environment.
>
> Noncoal operators which normally produce 10,000 tons (9,070 metric tons) per year or less are usually mining shale, flagstone, topsoil or sand and gravel. These operations typically do not pump or encounter groundwater. In most cases the noncoal mineral is for local use.
>
> Adverse environmental impacts, including significant impacts on fish and wildlife, will not occur due to the increased tonnage. The area excavated to remove 10,000 tons (9,070 metric tons) of material is very small.

28 *Pa. Bull.* 619. We do not see, however, how this comment is particularly responsive to the concerns raised by the Appellants regarding a transparent permit review process accompanied by a meaningful opportunity for public comment that they insist is mandated by the Act.

The Appellants have made some very compelling points. We wonder whether there is a realistic opportunity for public input if there is no public notice whatsoever of a permit application. We nevertheless feel uncomfortable attempting to resolve the question of a regulation's validity in the context of a summary judgment motion. We believe the matter would benefit from further deliberation following a hearing on the merits. Among other things, it would be helpful to have a record regarding whether the "category" at issue here (as that term is used in the Act) of small bluestone quarries has an "insignificant effect" on the environment. 52 P.S. § 3326(a). We would benefit from additional input from the parties on whether public notice provisions are "permit requirements" within the meaning of that statutory provision.

**Bonding**

When the Department issued the Kilmer Permit, the bond was set at $1,000 per acre. The bond amount was determined based upon a policy of the Department in place at the time of the issuance of the Permit that required a bond of $1,000 per acre for all small bluestone quarries. The Department subsequently recalculated that bond based on updated 2007 guidelines to be $26,493. The Department attempted to negotiate the terms of a consent order and agreement with Kilmer regarding rebonding of this and other sites. That effort was unsuccessful. Kilmer refused to pay the recalculated bond and because of that and because of his general unwillingness or inability to comply with the law, the Department denied his mining license renewal and revoked all of his permits. Kilmer appealed those actions, but after an unsuccessful attempt to obtain a supersedeas, he withdrew all of his appeals that had been pending before the Board.[1]

[1] As a result of the permit revocations and Kilmer's withdrawal of his appeals, the Department has filed a motion to dismiss this appeal as moot. Briefing on that motion is underway.

The Department essentially concedes that the Permit was issued with inadequate bonding, although it says the amount was "reasonable for its time." Therefore, had the Appellants stopped there, we might have been in a position to issue summary judgment. The Appellants, however, go on to criticize the Department's recalculation of the bond amount:

> The published guidelines upon which the Department now decides to rely have no application to noncoal surface mines and clearly apply only to coal. Without any basis for his bond increase, Herbert Kilmer cannot, unfortunately, be required to post an increased bond until the minimum statutory and regulatory bases are established by the Department.

The Appellants add:

> The Department's temporary fix for an indeterminate, interim period also fails to meet the specific requirements of Section 77.202 that the Department or the Secretary publish 'the bond schedule' for noncoal surface mining operations. The selection of a bond rate schedule authorized and published under a different statute and regulations (and effective prior to the issuance of the Kilmer permit) may sound appropriate, but it simply fails to meet the required test of the regulations under the Noncoal Act that a schedule be published for 'small noncoals.' Seventeen years without such required schedule cannot be justified and the Department's tardiness impacts this record.

It is true that, prior to issuance of the Permit, the Department neither established nor published bonding amount rate guidelines applicable to small bluestone quarry operators based on the estimated cost to the Department for completing the reclamation requirements of the permittee under the Noncoal Surface Mining Conservation and Reclamation Act, ("Noncoal Act") 52 P.S. §§ 3301-3326. Prior to issuance of the Permit, the Department published "Calculation of Land Reclamation Bonds on *Coal* [emphasis added] Mining Operations; Notice of Bond Rate Guidelines" with an effective date of April 1, 2007. However, the coal mining guidelines were not used by the Department in calculating the bond amount for the Kilmer Permit when it was first issued.

The Department argues that there is nothing in the Noncoal Act or the regulations that requires the Department to publish technical guidance setting forth rates for noncoal mining bonds. To argue that the Department must first publish bond rates specific to noncoal mines is unsupportable in the Department's view. The Department continues that these published rates will only have the force and effect of a statement of policy; they would not establish a binding norm. With or without these published rates, the Department argues, the issue is the same: whether the amount of the bond required by the Department is a reasonable exercise of the Department's discretionary authority. The Department further insists that its use of rates for coal mines is reasonable. The costs for a noncoal site are similar, if not identical, to the costs for a coal mine site. The Department states that the use of the rates for coal mines is an interim measure until noncoal rates are finalized. The Department's recalculation of $26,496 is reasonable, according to the Department.

It is not entirely clear whether it will be necessary for us to get into the bond recalculation, but to the extent that we must, it is readily apparent that the issue will require development of a factual record. Although the existing bond is inadequate, it is not clear exactly what bond amount would be appropriate. Therefore, summary judgment is inappropriate.

**Antidegradation & Permit Requirement**

There is no dispute that the quarry will discharge to a special protection watershed *if* it has a discharge. The receiving watercourse for stormwater runoff from the quarry is within the Salt Lick Creek Basin, which is classified as a High Quality, Cold Water Fishery ("HQ, CWF"). There is considerable dispute, however, whether the quarry will have a point-source discharge. The Department denies that there will ever be a discharge from the site with the E&S controls in place. Therefore, it did not require Kilmer to obtain an NPDES permit. The Appellants point to

several Department documents including the permit itself that suggest that the quarry will have a discharge. They argue that the stormwater controls at the site do not satisfy the criteria for a nondischarge operation set forth in the Department's own guidance documents. They complain that "the Department has mightily attempted to avoid the appropriate burdens placed upon permittees that discharge or may discharge into special protection waters...." Specifically, the Department has skirted the antidegradation requirements in 25 Pa. Code Chapter 93, in the Appellants' view.

Appellants draw our attention to the fact that the Department's Water Quality Antidegradation Implementation Guidance for mining activities and Engineering Manual for Mining Operations provide that design sedimentation impoundments should have a capacity of 8,600 cubic feet per acre of drainage area or be able to contain the 10-year, 24-hour precipitation event without flow through the emergency spillway. The Antidegradation Guidance provides that, "[b]ecause precipitation is inevitable, only a few small mining operations can easily achieve a nondischarge state. These operations are usually small sand and gravel mines where all water within the confines of the mine drains to one or more internal sumps and then percolates into the groundwater." The E&S Plan worksheet #8 for each sediment trap at the Kilmer quarry apparently provides a required capacity of 4,000 cubic feet per acre of drainage area ("CF/AC").

The special conditions of the Permit provide that in the event a point source discharge occurs, applicable effluent limitations as specified in Part A will apply. "In the event of a permanent point source discharge, the permittee shall immediately contact the surface mine conservation inspector." "A new NPDES permit application is to be submitted to the Pottsville District Office with seven (7) days of the discharge." The special conditions further provide that,

> [m]inor field adjustments or additions to the permitted erosion and sediment pollution control plan shall be made as necessary to

> insure that runoff from all affected, unstablilized areas passes through an adequate erosion and sediment pollution control device prior to exiting the site; runoff from off-site, unaffected areas is properly diverted around or through the site without coming into contact with sediment laden, on site runoff and; drainage to controls or other facilities as designed are maintained.

The Department raises some interesting arguments in response to the Appellants' concerns. It states that it will take at least a 10-year storm event for a trench leading from a sedimentation trap to overflow, and if it does overflow, the flow of water will be "laminar." This may be the first time the Department has argued that a discharge from a trench is not a point source. The Department also contends that the amount of water leaving the mine site will be no greater than if the mine was not there. Again, we are not aware of any prior instance where the Department has contended that the quantity of flow from a site must be greater than natural conditions for a discharge permit to be required. Still further, the Department argues that a permit is not required because Kilmer's E&S controls will adequately protect the waters of the Commonwealth. Yet again, we might be faced with the first case where the Department argues that no permit is necessary simply because a party has adequate protective controls in place. In any event, the Department fundamentally rests on the position that the quarry is a nondischarge facility, and therefore, there is no need to comply with antidegradation requirements designed to protect the High Quality watershed.

We explained in *Blue Mountain Preservation, Inc., v. DEP*, 2006 EHB 589, that the antidegradation regulations outline a very specific and particular process and procedure that an applicant proposing a discharge to High Quality Waters must follow in making certain affirmative demonstrations to the Department as a prerequisite to the Department's granting of a permit for such a discharge. 25 Pa. Code § 93.4c(b)(1). First, a person proposing a new, additional, or increased discharge to High Quality or Exceptional Value Waters must evaluate

nondischarge alternatives to the proposed discharge and use an alternative that is environmentally sound and cost-effective when compared with the cost of the proposed discharge. 25 Pa. Code § 93.4c(b)(1)(i)(A) (first sentence). In the event that a nondischarge alternative is demonstrated to be not environmentally sound and cost-effective, the proponent of the discharge is to show that the new, additional, or increased discharge shall be subject to the best available combination of cost-effective treatment, land disposal, pollution prevention and wastewater reuse technologies (Antidegradation Best Available Control Technologies or ABACT). 25 Pa. Code § 93.4c(b)(1)(i)(A) (second sentence). Finally, a person proposing a new, additional, or increased discharge to High Quality or Exceptional Value Waters who has demonstrated that no environmentally sound and cost-effective nondischarge alternative exists is to demonstrate that the discharge will maintain and protect the existing quality of receiving surface waters. 25 Pa. Code § 93.4c(b)(1)(i)(B). *Blue Mountain Preservation*, 2006 EHB at 603-04.

Both the Department and the Appellants quite correctly refer us to *Zlomsowitch v. DEP*, 2004 EHB 756, as controlling precedent. There, as here, the Department insisted that the permittee's water pollution controls created an acceptable "nondischarge alternative," even though the site would in fact have had a discharge during severe rainfall events. We noted the Department's illogical position in that case of having issued a discharge permit but arguing there would be no discharge. We specifically rejected the Department's argument that a site with sporadic discharges is a "nondischarge site." We pointed out that the Department's definition was rather arbitrarily defined by the Department witness, who testified that a site that discharges is really a nondischarge site if it only discharges when there is more than a 10-year/24-hour storm event. In the end, we rejected the Department's arguments and remanded the permit for

application of the antidegradation analysis. We recognized the possibility that the analysis could very well result in the same runoff controls being imposed, but we insisted on the proper analysis being performed.

This case gives us a feeling of *déjà vu* all over again. Once again the Department is resisting application of its own regulations by characterizing an operation as a discharge-free zone. There are, however, a few new twists. The Department here argues that off-site flow will really *never* occur (even though it required the permittee to design controls that account for such flow). As previously mentioned, it has said that any discharge that occurs will be "laminar" and "will be no greater than if the mine was not there." It claims that the site is "isolated." It argues that the on-site controls are large enough to protect water quality, even though they apparently do not conform to the Department's own guidelines.[2] In perhaps the strangest twist of all, the Department defends its action by drawing our attention to the fact that Kilmer will be required to obtain an NPDES permit if the site develops a "permanent" discharge. We will look forward to the Department's explanation of how this contention can be reconciled with our holding in *Zlomsovitch.* But look forward we must because there are too many unanswered factual questions at this point to decide the matter on summary judgment.

Accordingly, we enter the order that follows.

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[2] In an internal memorandum attached to the Appellants' reply brief, a Department employee states that she does not "want to instigate a policy [requiring the antidegration analysis] that will require a significant workload for us and the small N-C/Bluestone Industry, but as it appears that the Kilmer application will most likely be appealed again, this issue needs to be addressed."

**COMMONWEALTH OF PENNSYLVANIA**
**ENVIRONMENTAL HEARING BOARD**

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|---|---|---|
| **ILSE EHMANN, THOMAS GORDON, JEANNE GORDON, RICHARD OSBORNE, ELAINE OSBORNE AND JUDY DENNIS** | : | |
| | : | **EHB Docket No. 2007-150-L** |
| **v.** | : | |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and HERBERT KILMER, Permittee** | : | |

**ORDER**

AND NOW, this 19th day of June, 2008, the Appellants' motion for Summary Judgment is **denied**.

**ENVIRONMENTAL HEARING BOARD**

**BERNARD A. LABUSKES, JR.**
**Judge**

**DATED: June 19, 2008**

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

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| | | |
|---|---|---|
| **WHEELING PITTSBURGH STEEL CORP. and AMERICAN IRON OXIDE COMPANY** | : | |
| **v.** | : | **EHB Docket No. 2005-093-R (Consolidated with 2005-094-R and 2006-060-R)** |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION** | : | **Issued: June 20, 2008** |

# ADJUDICATION

**By Thomas W. Renwand, Acting Chairman and Chief Judge**

**Synopsis:**

The processing of spent pickle liquor, also referred to by the Appellants as ferrous chloride solution, constitutes reclamation and, therefore, does not qualify for an exemption under 40 C.F.R. § 261.2(e) (i) or (ii) of the solid waste regulations. Therefore, the Department properly issued a variance to AMROX for the intake and processing of spent pickle liquor. However, a variance condition that requires AMROX to sell at least 75 % of the iron oxide that results from the processing of the spent pickle liquor is revised to simply require that AMROX may not store more than 25% of the iron oxide.

***Overview***

This matter involves the question of whether spent pickle liquor, sometimes referred to as ferrous chloride solution, which is produced by the steel industry in the manufacture of steel and then processed by Appellant American Iron Oxide Company (AMROX) to produce iron oxide

and hydrochloric acid, should be regulated by the Pennsylvania Department of Environmental Protection (Department) as a hazardous waste.

Spent pickle liquor is produced by steel manufacturers, including Appellant Wheeling-Pittsburgh Steel Corporation (Wheeling-Pittsburgh), in the course of a steel treatment process commonly known as "pickling." In this process, rolled sheets of steel are run through a series of hydrochloric acid baths which remove iron scale buildup from the surface of the steel. The hydrochloric acid in the pickle liquor reacts with the iron oxides present on the steel surface to yield ferrous chloride. After continued use, the solution loses its effectiveness in treating the steel, and the resulting solution, commonly called spent pickle liquor or ferrous chloride solution (FCS), is removed from the pickling baths. The spent pickle liquor is sent to AMROX which processes it to produce hydrochloric acid, which can again be used in the pickling of steel. The process also produces iron oxide which is then sold. The question in this appeal is whether the spent pickle liquor/FCS that is taken in by AMROX and processed to produce newly-formed hydrochloric acid and iron oxide should be classified as a "hazardous waste," thereby subjecting it to the Department's hazardous waste regulations and requiring AMROX to have a permit or variance. If the answer to that question is yes, then a secondary issue is whether the terms and conditions that the Department placed in AMROX's variance are reasonable and are not arbitrary and capricious.

Before examining these questions in more detail, we note that in most instances this adjudication refers to the material that is in question in this appeal as "spent pickle liquor." Occasionally we use the terms "spent pickle liquor" and "FCS (ferrous chloride solution)" interchangeably. There was some dispute over the proper terminology and whether the pickle liquor that is sent to AMROX for processing is actually "spent" since it is able to be reused after

further processing. The Appellants presented testimony by Mr. Pat Smith, an employee of Wheeling-Pittsburgh, who drew a distinction between the two terms: He refers to "FCS" as the material that goes to AMROX for processing and "spent pickle liquor" as FCS that has become unable to be processed any further. (T. 168-70) However, the record also indicates that what is being called "FCS" in this case is frequently referred to as "spent pickle liquor" and the terms "FCS" and "spent pickle liquor" may be used interchangeably by regulators in the field (T. 20-21), chemists (T. 53) and those within the industry (e.g., Ex. A-6, A-14, C-5, C-7). Based on all of the testimony and argument presented by the parties, it is our understanding and conclusion that "spent pickle liquor" may be used as a generic term for FCS and refers generally to hydrochloric acid solution that has been through the pickling process. Moreover, the Environmental Protection Agency (EPA) does not make the distinction. A "spent material" is defined in the Resource Conservation and Recovery Act (RCRA) regulations as "any material that has been used and as a result of contamination *can no longer serve the purpose for which it was produced without processing.*" 40 C.F.R. § 261.1(c)(1) (emphasis added). The FCS at issue in this case is pickle liquor that has been used by Wheeling-Pittsburgh until it has absorbed too much iron and is no longer effective for pickling steel without further processing. In other words, it is "spent."

***History***

The Environmental Protection Agency (EPA) is authorized under the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6901 *et seq.*, to approve states' hazardous waste programs and delegate primacy over hazardous waste regulation to such states. *Id.* at § 6926. EPA granted such authorization to Pennsylvania's hazardous waste program in 1986. 51 Fed. Reg. 1791 (Jan. 15, 1986).

In 1993, the Department amended its hazardous waste regulations by, among other things, adding an exemption to the definition of waste for "co-products." It defined the term "co-products" as including materials that must first be reclaimed. 23 Pa. B. 363, 374, 377; Ex. C-3.

The AMROX facility began operation in 1995. From that time until 1999, AMROX accepted spent pickle liquor under two regulatory schemes: Spent pickle liquor from designated generators that met certain chemical parameters was deemed a "co-product" and was exempt from the Department's requirements pertaining to solid and hazardous waste. Spent pickle liquor that was not deemed a co-product, either because it did not meet the designated chemical parameters or was not produced by a designated generator, was accepted by AMROX as a hazardous waste pursuant to a "hazardous waste storage permit-by-rule."

In 1999, Pennsylvania enacted a new regulatory scheme for hazardous waste. This included rescinding its old regulations, including the co-product exemption, and adopting much of the federal RCRA hazardous waste regulations, which do not contain an exemption for co-products or a hazardous waste "permit-by-rule" option. (25 Pa. Code Chap. 260a-270a).[1] EPA granted authorization for the program, effective November 27, 2000. 65 Fed. Reg. 57, 734; 57, 736.

Between 2002 and 2005, the Department developed a draft variance from the solid and hazardous waste regulations, entitled "Variances from Classification as a Solid Waste." (Ex. A-17, 18 and 19) The Department issued the variance in 2005. Under the variance, spent pickle liquor that is received from designated suppliers that meets certain chemical parameters is exempt from the solid and hazardous waste requirements, while spent pickle liquor that is

[1] Section 260a.1. *Incorporation by reference, purpose, scope and applicability.*

(a) Except as expressly provided in this chapter, 40 C.F.R. Part 260 and its appendices (relating to hazardous waste management system: general) are incorporated by reference.

received from other suppliers or which does not meet the designated chemical parameters would require AMROX to obtain a hazardous waste permit, unless a modification to the variance is obtained. AMROX and Wheeling-Pittsburgh (collectively the Appellants) have appealed the variance and its amendments and these consolidated appeals are the subject of this litigation.

It is the Department's contention that the variance places AMROX in exactly the same position in which it had been under the old co-product exemption, under which it operated successfully for years and that it has continued its operation under the variance without significant change.

## FINDINGS OF FACT

1. Appellant American Iron Oxide Company (AMROX) owns and operates a facility in Allenport, Pennsylvania which processes ferrous chloride solution, or spent pickle liquor, received from the steel industry. (T. 20-21, 219-20; Ex. A-2)

2. Appellant Wheeling-Pittsburgh Steel Corporation (Wheeling-Pittsburgh) is a steel manufacturing company. One of its plants is located in Allenport, Pennsylvania adjacent to the AMROX facility. (T. 206-07; Ex. A-2)

3. Appellee Department of Environmental Protection (Department) is the agency of the Commonwealth of Pennsylvania authorized to administer Pennsylvania's hazardous waste management regulations pursuant to the Resource Conservation and Recovery Act (RCRA). (Parties' Joint Stipulation)

4. Spent pickle liquor is produced by Wheeling-Pittsburgh and other steel manufacturers during a process in which rolled sheets of steel are run through a series of hydrochloric acid baths to remove iron scale, or rust, buildup from the surface of the steel. (T. 52-53)

5. This process is known as "pickling." (T. 21, 169)

6. During the pickling process, the hydrochloric acid reacts with iron oxide present on the steel surface. (T. 52)

7. Spent pickle liquor is sometimes referred to as ferrous chloride solution (FCS). (T. 53)

8. Spent pickle liquor is corrosive and contains concentrations of heavy metals lead and chromium. (Ex. C-1)

9. After continued use, the spent pickle liquor is no longer effective in treating the steel. (T. 53, 113, 175; Ex. A-50, p. 57)

10. After repeated use, the pickle liquor becomes ineffective in treating steel because its acidic properties weaken and its iron content becomes too high. (T. 175)

11. AMROX receives the spent pickle liquor from Wheeling-Pittsburgh and other steel manufacturers. (T. 20-21)

12. Upon receipt by AMROX, the spent pickle liquor is placed into storage tanks. (T. 21, 53)

13. The spent pickle liquor is next pumped through a Venturi scrubber and separator to remove some of the water. (T. 48)

14. The spent pickle liquor is next sprayed into the spray roaster where it is converted into hydrochloric acid and iron oxide. (T. 48)

15. The process inside the spray roaster involves very high heat and water and is known as pyrohydrolysis. (T. 54-55)

16. During pyrohydrolysis, molecules of the spent pickle liquor disassociate into individual atoms, which reform into hydrochloric acid and iron oxide. (T. 55)

17. The iron oxide falls to the bottom of the spray roaster and is removed for sale. (T. 22, 48, 56)

18. The hydrochloric acid produced by AMROX is 18% by weight. By changing its equipment, AMROX could produce a higher concentration of hydrochloric acid. (T. 47, 62)

19. Infrequently, AMROX engages in what is referred to as an IROX process, which is designed to remove silica and metals from the spent pickle liquor in order to produce a higher purity iron oxide. (T. 21, 27, 64-65)

20. From a chemistry standpoint, the AMROX process of producing hydrochloric acid from spent pickle liquor appears to be similar to the production of virgin sulfuric acid from spent sulfuric acid, which is specifically exempt from EPA's hazardous waste regulations. (T. 72-73; 40 C.F.R. § 261.4(a)(7))

21. In 1995, when AMROX applied for operational approval, Pennsylvania had its own set of hazardous waste regulations which differed from those of EPA. (T. 310)

22. In the 1995-1996 timeframe, Pennsylvania's regulations allowed companies to apply for a hazardous waste permit-by-rule and/or a determination that their material was a co-product. (T. 308, 311)

23. With a hazardous waste permit-by-rule, a permittee was deemed by regulation to have a hazardous waste permit if certain conditions were met. (T. 311)

24. A co-product determination meant that the material in question was comparable to a commercially available product. (T. 311)

25. On August 14, 1995, AMROX submitted to the Department an application for a hazardous waste permit-by-rule for the spent pickle liquor/FCS it handled. (T. 316-17; Ex. A-6)

26. On September 7, 1995, the Department approved the permit-by-rule. (T. 317; Ex. A-8)

27. In 1996, the Department approved a co-product determination for the spent pickle liquor/FCS. (T. 319)

28. AMROX operated under both the permit-by-rule and the co-product determination until 2005: The co-product applied to spent pickle liquor/FCS received from Wheeling-Pittsburgh and US Steel's Irvin Plant. Other sources of spent pickle liquor/FCS fell under the hazardous waste permit-by-rule. (T. 319-20) The hazardous waste permit-by-rule also covered all storage of spent pickle liquor/FCS at the AMROX facility. (T. 319-20)

29. In 1999, Pennsylvania's hazardous waste regulations changed, and the hazardous waste permit-by-rule and co-product aspects of the regulations were eliminated. (T. 324)

30. At that time, Pennsylvania's regulations came into line with the Federal Resource Conservation and Recovery Act (RCRA) regulations. (T. 307-08)

31. The purpose of RCRA is to prevent the mismanagement of hazardous waste. (T. 326)

32. Under RCRA, there is more regulation if a company sends its hazardous waste offsite for recycling, rather than conducting it onsite. If reclamation is involved, there is even more regulation because there is more opportunity for spill or release. (T. 330-31)

33. Spent pickle liquor is listed as a hazardous waste by EPA because it is corrosive and contains significant concentrations of the heavy metals lead and chromium. (T. 332-33; Ex. C-1)

34. Regulators take preambles of EPA final and proposed regulations into consideration as guidance from the agency. (T. 329)

35. The Department's expert witness, Carl Spadaro, is an engineer with the Department's Waste Program. (Ex. C-45; T. 298)

36. Mr. Spadaro holds a Bachelor of Science Degree in Environmental Engineering. (Ex. C-45; T. 299)

37. Prior to joining the Department, Mr. Spadaro worked as an environmental scientist in EPA's Region III, which included assisting states in the development of their hazardous waste programs so they conformed to the federal hazardous waste program. (T. 299)

38. Mr. Spadaro assisted the Department in the development of its hazardous waste program. (T. 299-300)

39. Mr. Spadaro was recognized by the Board as an expert in the field of hazardous waste management. (T. 303-04)

40. The Appellants' expert witness, Dr. Richard McCullough, is Dean of the Mellon College of Science and professor of chemistry at Carnegie Mellon University. (T. 29)

41. Dr. McCullough holds a Bachelor's Degree, Master's Degree and Ph.D. in chemistry. (T. 30) He was also a post-doctoral research fellow. (T. 30)

42. Dr. McCullough was recognized by the Board as an expert in chemistry and chemical processing. (T. 42)

43. Documents relied upon by Dr. McCullough refer to the process conducted by AMROX as regeneration. (T. 135, 138)

44. Based on our analysis, the Board finds that the process in which AMROX engages constitutes regeneration and reclamation and, therefore, does not qualify for the exemption set forth in 40 C.F.R. § 261.2(e)(i) or (ii).

## DISCUSSION

The Appellants bear the burden of demonstrating that the spent pickle liquor/FCS at issue in this appeal should not be regulated as a hazardous waste and that it qualifies for one of the exemptions listed in the federal regulations at 40 C.F.R. Chapter 261. 25 Pa. Code § 1021.122(c)(3).[2]

***Is the Spent Pickle Liquor used by AMROX a Solid Waste?***

EPA has listed spent pickle liquor as a hazardous waste and has determined that spent pickle liquor meets the characteristics for designating a material as a hazardous waste under 40 C.F.R. §§ 261.20-24, due to its corrosivity and heavy metal content. (Ex. C-1; T. 333-34)) Therefore, there is no question that if Wheeling-Pittsburgh simply disposed of its spent pickle liquor rather than shipping it to AMROX, it would be treated as a hazardous waste. The Appellants contend, however, that the spent pickle liquor involved in this case is excluded from regulation as a hazardous waste because it is a recycled material that is exempt from the definition of solid waste.[3]

In order for a material to constitute a hazardous waste under RCRA, it must first be a solid waste. 40 C.F.R. § 261.3(a) and 25 Pa. Code § 261a.1. A solid waste is any *discarded* material that is not otherwise excluded from the definition of solid waste. 40 C.F.R. § 261.2(a)(1). In the federal regulatory scheme, the term *discarded* does not simply carry its

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[2] A party appealing an action of the Department shall have the burden of proof in the following cases:

* * * * *

(3) When a party to whom a permit approval or certification is issued protests one or more aspects of its issuance or modification.

[3] We agree with the Department that if we conclude that the spent pickle liquor is a "solid waste," then we need not address the question of whether it is a "*hazardous* waste" since the crux of the Appellants' case is that the spent pickle liquor should not be treated as a waste at all, not

common usage of something that is abandoned or thrown away. It also includes items that are *recycled*. *Id.* at § 261.2(a)(2)(i)-(iii). A material is *recycled* if it is used, reused or reclaimed. *Id.* at § 261.1(c)(7). However, depending on the nature of recycling, the material may be exempt from being classified as a solid waste.

The Appellants point to the solid waste exemptions set forth at 40 C.F.R. § 261.2(e), asserting that two of them apply here.[4] That section states in relevant part as follows:

> (e) *Materials that are not solid waste when recycled.*
>
> (1) Materials that are not solid wastes when they can be shown to be recycled by being:
>
> (i) Used or reused as ingredients in an industrial process to make a product, provided the materials are not being reclaimed; or
>
> (ii) Used or reused as effective substitutes for commercial products.

(Subsections (i) and (ii) of § 261.2(e)(1) shall be collectively referred to herein as the solid waste exemptions.) The Appellants argue that the FCS used in AMROX's process qualifies under both of these exemptions.

***Regulatory Interpretation and Expert Testimony***

An issue raised by the parties both in pretrial proceedings and in their post hearing briefs is the extent to which the Board may rely on expert testimony in construing the meaning of a regulation. Former Chief Judge Krancer addressed the issue of statutory and regulatory construction in *Army for a Clean Environment v. DEP*, 2005 EHB 628, quoting from the Pennsylvania Supreme Court's decision in *Commonwealth v. Gilmour Manufacturing Co.*, 822 A.2d 676 (Pa. 2003), at 679, as follows:

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whether, if it is a solid waste, is it then a hazardous waste.

[4] There is also a third exemption listed at 40 C.F.R. § 261.2(e)(iii), but the Appellants do not contend that it applies here.

> The General Assembly has directed in the Statutory Construction Act that the object of interpretation and construction of all statutes is to ascertain and effectuate the intention of the General Assembly. Generally speaking, the best indication of legislative intent is the plain language of a statute. Furthermore, in construing statutory language, "words and phrases shall be construed according to the rules of grammar and according to their common and approved usage. ..." (citations omitted)

2005 EHB at 634, fn 8.

Our analysis of whether the solid waste exemptions apply to the Appellants requires us to have an understanding of what is meant by certain terms used in the regulations, including *reclamation*, *reuse* and *regeneration* (which is a type of reclamation.) It is the Department's contention that much of the testimony provided by the Appellants' expert witness, Dr. Richard McCullough, with regard to these processes should not be relied on by the Board since, in the Department's view, it is an improper attempt by the Appellants to provide expert testimony on regulatory interpretation, which is solely a matter for the Board.

The Board has held in *Shenango, Inc. v. DEP*, 2006 EHB 783, *aff'd*, 934 A.2d 135 (Pa. Cmwlth. 2007), that expert opinions on questions of law are generally prohibited. Writing for the Board, Judge Labuskes stated as follows:

> Legal conclusions are within the purview of the Board, not witnesses. *Browne v. Commonwealth*, 843 A.2d 429, 434 (Pa. Cmwlth. 2004). Opinions on questions of law are generally prohibited [citations omitted]. While the Board in some cases may allow testimony regarding how the Department interprets a particular regulation or how a regulation was developed or applied, such testimony is actually factual, not expert, testimony. In other words, the Board may need to know how the Department as an institution interprets or applies a regulation, but a given witness's *opinion* regarding the legal meaning or effect of a regulation is irrelevant and improper. *Commonwealth v. Neal*, 618 A.2d 438, 439 (Pa. Super. 1992).

*Id.* at 795.

The restriction against allowing expert testimony on legal conclusions applies equally to the Department as it does to parties challenging Department actions. In other words, neither party may provide expert opinion on questions of law. Where testimony is given by Department personnel on how a regulation is developed or applied, as stated in *Shenango*, the Board does not view this as expert testimony on how we must interpret the regulation. Rather, it is simply descriptive of how the Department applies it. If an appellant feels that the regulation should be applied in a different manner, it may make that argument. Ultimately, however, the legal interpretation of a regulation is within the purview of the Board. *Shenango, supra.* This was made clear by the Commonwealth Court's affirmance of the Board's decision in *Shenango, Inc. v. Department of Environmental Protection*, 934 A.2d 135 (Pa. Cmwlth. 2007), where the court held that a witness' opinion on the legal appropriateness of the Department's actions in light of a particular regulation is "a matter which is solely left to the Board to determine." *Id.* at 140, fn 10.

That is not to say, however, that expert testimony may not be given on subjects that may assist in the Board's interpretation of a regulation. This is particularly true where the regulation includes technical language or terms of art. In this case, for example, in order to arrive at a legal conclusion on whether the spent pickle liquor produced by Wheeling-Pittsburgh and utilized by AMROX should be regulated as a hazardous waste, it is necessary to rely on expert testimony in understanding the various processes that exempt a material from being classified as a waste. For instance, if we look at the definition of solid waste in 40 C.F.R. § 261.2(a)(1), we see that a material is not a solid waste when it is *recycled.* A material may be recycled if it is *used or reused* as an ingredient in an industrial process, provided it is not being *reclaimed.* A product is *reclaimed* if it processed to recover a reusable product or if it is *regenerated.* 40 C.F.R. §

261.1(c)(4). The term "*regenerated*" is not defined in the RCRA regulations but is explained in a variety of ways in documents consisting of both a preamble to 1985 regulations (a process to remove contaminants in a way that *restores* wastes to their usable original condition), 50 Fed. Reg. 614,633 (Jan. 4, 1985), and later in proposed regulations that were never finalized (a process allowing used products to be *reused* for their original purpose or some other purpose). Once again we are back to the term *reused*, which is a type of *recycling*, which is where we started. Without some expert testimony as to what these terms mean in the real world, we would have difficulty determining whether or how any of these terms apply to the process utilized by AMROX.

On January 25, 2008, the Board held oral argument in which the parties were given an opportunity to expand on arguments set forth in their post hearing briefs, including the issue of deference and expert testimony. The Appellants argued that without the use of expert testimony a party opposing a Department action has a difficult time meeting its burden of demonstrating that the Department's interpretation of a regulation is not entitled to deference. In response, the Department acknowledged that "deference" does not equate to "expertise." It is the Department's position that it is entitled to *deference* because it is empowered with enforcing the regulations at issue, but disagreed that in doing so the Board is according the Department *expertise* in the interpretation of the regulations since that is solely within the province of the Board. The Department further acknowledged that *Shenango* did not preclude parties from presenting expert testimony about the application and effect of the Department's interpretation of a regulation.

The Environmental Hearing Board is not a reviewing court, but rather a quasi-judicial administrative tribunal with its own specialized expertise, charged with holding a *de novo*

proceeding on the Department action being challenged. *Warren Sand & Gravel Co. v. Department of Environmental Resources*, 341 A.2d 556, 565 (Pa. Cmwlth. 1978); *Smedley v. DEP*, 2001 EHB 131. Because the function of the Board is not simply to review the decision of the Department but to hear the matter anew and, further, because the Board has specialized expertise in the interpretation of environmental regulations, it is not placed in the same position as a reviewing court. The Appellants should be assured that whenever we are called upon to accord deference in the interpretation of a regulation, we do not view this as expert testimony but, rather, as simply descriptive of how the Department applies the regulations it has been charged with enforcing. It is then up to the Board to determine whether this application of the regulations comports with our legal interpretation of it. Where it is necessary to hear expert testimony on subjects that will assist us in the interpretation of a regulation, as in this case, both sides approach us on equal footing in their ability to present expert testimony.

We turn now to the two exemptions to "solid waste" that the Appellants assert apply to their operation:

*1. Materials that are used or reused as ingredients in an industrial process that are not reclaimed – exemption (i):*

The Appellants argue that the spent pickle liquor received by AMROX from Wheeling-Pittsburgh and other steel manufacturers meets this exemption since it is used as an ingredient by AMROX to manufacture newly-formed hydrochloric acid and iron oxide. The Department counters that the second part of the test is not met; that is, it argues that the spent pickle liquor is *reclaimed* and, therefore, ineligible for the exemption.[5]

[5] In response to the Board's question of why EPA treats *reclaimed* materials as solid waste, which appears counter to the goal of encouraging recycling, the Department asserts that while "the goal of reclamation activities may be laudable, i.e., to recover a useable product from

According to the RCRA regulations: "A material is 'reclaimed' if it is processed to recover a usable product, or if it is regenerated. Examples are recovery of lead values from spent batteries and regeneration of spent solvents." 40 C.F.R. § 261.1(c)(4). Notably, the definition refers to the regeneration of spent materials. Unfortunately, *regeneration* is not defined in the RCRA regulations and, therefore, the parties point to various regulatory preambles that attempt to define the term.

The preamble to the 1985 final regulations, on which the Appellants rely, defines regeneration as a:

> process to remove contaminants in a way that restores [wastes] to their usable original condition.

50 Fed. Reg. 614,633 (Jan. 4, 1985).

The Appellants make a number of arguments as to why their process does not meet that definition. They argue, first, that the spent pickle liquor is not a waste but, rather, a feedstock for AMROX's production of hydrochloric acid and iron oxide and, second, they contend that contaminants are not removed in the process; rather, any so-called contaminants are oxidized and become part of the iron oxide product. The Department does not dispute that AMROX uses an industrial process to produce two new products, i.e., hydrochloric acid, or usable pickle liquor, and iron oxide. However, it asserts that simply because one is a manufacturer does not

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the waste, or regenerate the waste for further use. . .environmental protection must trump incidental burdens associated with regulatory oversight." (DEP Post Hearing Brief) It is the Department's contention that the risk of mismanagement and environmental release during reclamation requires the product to be regulated as a solid waste. In response, the Appellants point out that many manufacturing processes contain numerous steps and have a potential for environmental harm similar to any purported harm from recycling activities but are not regulated by RCRA. Therefore, they argue that the potential for environmental harm and the fact that a process involves numerous steps is not enough, by itself, to subject the operation to RCRA authority.

necessarily mean that it cannot concurrently be a waste processor. The Department asserts that the definition of waste reclaimer includes one who extracts usable products (in this case, iron) or regenerates a material for sale (in this case, hydrochloric acid, or pickle liquor). The Department argues that simply because a material is sent to a manufacturing facility for reclamation it does not mean that the item cannot be classified as a waste. In support it cites to an EPA Appeals Board decision stating that a waste can be considered "discarded" before being subject to metals reclamation.[6] Additionally, the Department disputes the Appellants' interpretation of "reclamation" as involving processing where no chemical reaction takes place.

In response to the Department's argument that one can be a manufacturer while at the same time being a waste processor, the Appellants argue that RCRA's authority does not extend to recycling processes that are akin to ordinary manufacturing. They again point to the preamble to the 1985 regulations with regard to the definition of solid waste:

> [T]he grant of authority in RCRA over recycling activities is not unlimited. Specifically, we do not believe our authority extends to certain types of recycling activities that are shown to be very similar to normal production operations or to normal uses of commercial products.

50 Fed. Reg. 614, 616-17 (Jan. 4, 1985). The Appellants assert that the Department's sole justification for its broad reading of RCRA's scope is its belief that processes with multiple steps need to be regulated in order to prevent environmental harm. The Appellants point out that there are a huge number of manufacturing operations that use toxic materials and that could result in substantial environmental harm that are not governed by RCRA because they do not involve the handling of waste. That is the key, argue the Appellants, to determining whether RCRA applies: it does not simply apply to any operation where hazardous materials may be involved. Rather, it

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[6] *In re: Howmet Corp.,* Docket Nos. RCRA-06-2003-0912; RCRA-02-2004-7102; RCRA (3008)

applies only where the process involves the handling and disposal of waste, i.e., material that is discarded.

We disagree with the Appellants' first argument that the spent pickle liquor cannot constitute a waste. The spent pickle liquor would be a waste if not processed by AMROX for reuse. There was ample evidence that the product becomes unusable without further processing. (F.F. 9 and 10), and without processing, the product would need to be disposed of or otherwise handled as a hazardous waste. (F.F. 33) We also disagree with the Appellants' second argument that no contaminants are removed in their process. AMROX processes the spent pickle liquor to remove iron oxide in order to restore hydrochloric acid to a condition that is usable by the steel industry. The fact that the contaminant – iron oxide – has some market value, rather than simply being disposed of, does not lead us to a different conclusion.

The Appellants do not agree that the hydrochloric acid is "restored" from the spent pickle liquor; rather, they contend the used pickle liquor is "chemically converted" into new products, i.e., hydrochloric acid and iron oxide. It is their contention that this chemical reaction, which creates new products, is not the same as reclaiming a material through regeneration or other such means. The Appellants assert that AMROX's "manufacturing process is fundamentally dissimilar, as a matter of chemistry, from those examples of 'reclamation' and 'regeneration' that EPA provided in the regulations to guide regulators...." (App. Post Hearing Brief, p. 22) The Appellants' expert, Dr. Richard McCullough, who holds the position of Dean of the College of Science at Carnegie Mellon University, testified that the examples of "reclamation" and "regeneration" given in the preamble to the 1985 regulations involve a purely *physical* separation of a component from another material to make that component useable, whereas what AMROX

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Appeal No. 05-04, May 24, 2007 (2007 EPA App. Lexis 19, 36).

does is a *chemical* reaction in which new products are made. In sum, the Appellants assert that they are not simply taking the spent pickle liquor and removing contaminants from it so that it can be used again by the steel industry; rather, they argue that they are receiving it from the steel industry as a usable product and using it to manufacture new hydrochloric acid and iron oxide.

However, even if we accept the Appellants' argument that the AMROX process does not simply remove iron oxide from the spent pickle solution but creates newly formed hydrochloric acid through a chemical, as opposed to physical, reaction, we still find that AMROX's process constitutes regeneration, which is a type of reclamation. AMROX's expert, Dr. Richard McCullough, provided an excellent description of the chemical reaction that occurs with AMROX's process, and we agree with his conclusion that the AMROX process involves a chemical reaction, as opposed to a purely physical separation. However, we find that regeneration can occur *regardless* of whether the reaction is physical or chemical. As noted earlier, there is no definition of "regenerate" provided in the RCRA regulations. However, the common definition of "regenerate" provided by Webster's includes the following: "1: to become formed again. . .2.a: to generate or produce anew. . .b: to produce again chemically sometimes in a physically changed form 3: to restore to original strength or properties. . . ." *Webster's Ninth New Collegiate Dictionary* 991 (1989). Even with the Appellants' argument that the AMROX process involves a chemical, as opposed to physical, reaction, we find that it constitutes regeneration. Moreover, we see no reason to differentiate between a chemical reaction or physical reaction for the purpose of determining whether regeneration has occurred. In reaching this conclusion, we agree with the Connecticut Supreme Court that reclamation may occur "regardless of the chemical changes that may take place or the varying chemical forms in which a material may occur." *MacDermid, Inc. v. Department of Environmental Protection*, 778 A.2d

7, 16 (Conn. 2001) (adopting the reasoning of the State Commissioner of Environmental Protection). Therefore, we find that AMROX's operation meets the definition of both regeneration and reclamation.[7] (F.F. 44)

One thing that gives us pause in arriving at this conclusion, however, is the fact that EPA has specifically held that the processing of spent sulfuric acid to make virgin sulfuric acid does not constitute reclamation, stating, "This process does not constitute reclamation because the spent sulfuric acid is neither regenerated (impurities are not removed from the spent sulfuric acid to make it reusable) nor recovered (acid values are not recovered from the spent acid), and finding that the spent sulfuric acid is being used as an 'ingredient.'" 48 Fed. Reg. 14472, 14487, n. 30 (April 4, 1983). We are unsure as to why this differentiation was made since, based on Dr. McCullough's testimony, the processing of sulfuric acid to make virgin sulfuric acid is similar to the process used by AMROX to produce newly formed hydrochloric acid, which meets the definition of reclamation. The Department attempts to differentiate the two processes by arguing that AMROX is not producing virgin hydrochloric acid and that its process involves the removal of contaminants unlike that of the spent sulfuric acid processing. While we do not find these arguments persuasive, without further information about the processing of spent sulfuric acid we are reluctant to conclude that the processing of spent pickle liquor should receive the same exemption from the definition of reclamation.

The Department attempted to show the EPA's position on this matter by proffering a letter authored by Paul Gotthold, Chief of the Pennsylvania Operations Branch for EPA's Region

[7] The Department's post hearing brief discusses an even more recent definition of "reclamation" contained in an EPA preamble to regulations that were never finalized. We need not address whether that definition is applicable since even under the definition of "reclamation" that the Appellants believe is applicable, we still find that the AMROX process does constitute reclamation.

III. (Comm. Ex. 66) The letter was written in response to the Department's inquiry as to EPA's view of whether the AMROX operation constituted reclamation. (T. 346) The Appellants objected to the letter's admission on the basis of hearsay, and the objection was sustained. We hereby affirm that ruling.

As we have previously held in *Groce v. DEP*, 2006 EHB 856, *aff'd,* 921 A.2d 567 (Pa. Cmwlth. 2007), *petition for allowance of appeal denied,* 2008 Pa. LEXIS 26 (Pa. Jan. 25, 2008), where a federal agency has delegated its power to a state agency, in this case the Pennsylvania Department of Environmental Protection, but remains actively involved in the interpretation of the regulations subject to review, we cannot simply rely upon letters from individuals within that agency to determine the agency's position on a certain subject. Actual testimony is necessary in order to afford the opposing party an opportunity to cross examine the basis for the author's viewpoint. We sympathize with the Department and are extremely mindful of the fact that it may be easier for a camel to pass through the eye of a needle than to get the EPA to testify in a state administrative proceeding. However, as we emphasized in *Groce*, which involved a refusal to testify by Federal Land Managers under the guise of the federal housekeeping statute at 5 U.S.C. § 301:

> We find that where a federal agency, in this case the United States Environmental Protection Agency, has delegated its authority to a state government agency, in this case the Pennsylvania Department of Environmental Protection, to handle the review and issuance of a permit or plan approval, and where federal agencies. . .are actively involved in that plan approval review, in the interest of comity and due process, neither § 301 nor any agency regulations adopted pursuant thereto should be used as a basis for refusing to allow the employees of those federal agencies to testify in an action involving the very plan approval they were actively involved in reviewing. We further caution that where the office of a Federal Land Manager declines to produce its employees for testimony in a proceeding before this Board, they run the risk of having their determination of adverse impact overturned.

2006 EHB at 961. In the *Groce* case, it was a group of appellants challenging a Department decision who were thwarted in their efforts to present letters from federal officials in lieu of actual testimony.

While it may have been extremely beneficial to hear EPA's guidance on this subject, simply introducing a letter at trial is not the way to do it.[8] The Appellants had no opportunity to cross-examine the author of the letter, and we have no way of knowing whether this was simply Mr. Gotthold's viewpoint or the position of the entire agency. Moreover, if the tables were turned and the Appellants had received a favorable response from Mr. Gotthold stating their operation should be exempt from Pennsylvania's hazardous waste regulations, we are fairly certain the Department would have objected to the admission of that response as hearsay. Indeed, when the Department attempted to introduce Mr. Gotthold's letter, counsel for the Appellants stated that he had had a conversation with Mr. Gotthold that indicated a different viewpoint! This is precisely the reason we are reluctant to rely on a letter from EPA as opposed to actual testimony.

As Acting Chairman and Chief Judge Renwand stated at the trial of this matter:

> Here is the problem that I'm wrestling with [in trying to figure out what Mr. Gotthold said]. We have had numerous cases where when people actually come in and testify, what they said in some letter or in some expert report either they didn't write it, somebody else was responsible for it, or they back off from it. When we have these type letters that are just submitted, we don't have that cross-examination and that due process that this hearing is supposed to afford people. I have no doubt that the opinion of the EPA is very important to the Department and to the regulators in the Department [in] forming their opinion. I'm not saying that the

[8] On the other hand, statements made by EPA in preambles to their rulemaking can be seen as being more authoritative since such statements are intended to reflect the position of the agency and are part of the more public and more scrutinized rulemaking process.

> EPA's view on it isn't admissible. What I am saying is that the EPA needs to come in here and testify sitting in that chair and let Mr. Komoroski then question him or question the EPA official or, if they can't come to Pittsburgh from Philadelphia, that a deposition could be taken. . . .[T]he EPA has certain oversight responsibilities. As part of that oversight responsibility, they need to get involved in the actual due process hearings that develop out of their oversight responsibilities. From my experience, most of the time all they do is send letters and it puts the Department in a bind because you want to rely on them. You want to admit them and you want us to give these letters gold seals [of approval] and use that to buttress an opinion that supports the Department's position but in doing that. . .we are faced with situations where the other side doesn't get to cross-examine. They don't get to cross-examine under oath. I mean, you can call them up and then you object to what Mr. Gotthold has told Mr. Komoroski and then we are going to hear, you know, that your witness talked to him later. I mean, that's not the way we operate and I think probably the most important thing that this Board does is that it makes sure that due process requirements are followed.

(T. 348-50)

In response to the Department's question as to whether the letter could be admitted for the limited purpose of showing a reason why the Department acted, Judge Renwand stated he would take that under consideration but noted as follows:

> I realize the Department doesn't control the EPA and from what we heard in other cases, it's very difficult to get the EPA to testify in state proceedings. I think that needs to be addressed. As long as we have situations where we let their letters in and they don't have to come in [and testify], it's never going to come to the forefront.

(T. 350)

Therefore, while we permit the Department to acknowledge that it wrote to EPA for guidance and that EPA responded, the letter is not admissible for its content.

Nonetheless, based on our reading of the definition of "reclamation" and what little EPA guidance we do have in the form of preambles to existing regulations, we find that the process in which AMROX engages constitutes reclamation and, therefore, does not qualify for the

exemption set forth in 40 C.F.R. § 261.2(e)(i). (F.F. 44) We also hasten to add that we make this determination after hearing the evidence in this case *de novo* and closely examining the resulting record. *Pennsylvania Trout v. Department of Environmental Protection*, 863 A.2d 93 (Pa. Cmwlth. 2004); *Leatherwood, Inc. v. Department of Environmental Protection*, 819 A.2d 604 (Pa. Cmwlth. 2003); and *Smedley v. DEP*, 2001 EHB 131. Indeed, we have probably heard more testimony and developed more of a record on this issue than any tribunal or court in the United States. We turn now to the second solid waste exemption for which the Appellants argue the spent pickle liquor processing qualifies.

*2. Materials that are used or reused as effective substitutes for commercial products – exemption (ii):*

The second exemption provided by 40 C.F.R. § 261.2(e), excludes from the definition of "solid waste" those materials being "used or reused as effective substitutes for a commercial product." *Id.* at § 261.2(e)(ii). The Appellants argue that the spent pickle liquor at issue falls within this exemption since it is being used as a substitute for commercially manufactured FCS that is used for the manufacture of iron oxide and hydrochloric acid. The Appellants claim that if the spent pickle liquor from Wheeling-Pittsburgh were not available, AMROX would be required to purchase commercially-available FCS for use in the very same manner. The Appellants base their argument, in part, on the assertion that the Department had previously agreed with the classification of spent pickle liquor as an effective substitute for commercial FCS when it classified it as a co-product. The Appellants point to a 1996 and 2005 Consent Order in which the Department stated the spent pickle liquor from Wheeling-Pittsburgh's pickling process was not a waste because AMROX was using it as an effective substitute for a commercial product. The Department points out that the 2005 Consent Order merely recited what had been

stated in 1996, and that the regulatory context has changed since that time and the co-product classification is no longer applicable. The Appellants argue that the change in regulatory framework does not matter because the Department's determination was a factual one. Regardless of whether the Department's determination was a purely factual one, and we are not convinced that it was, the fact that it was made under an entirely different regulatory scheme limits our ability to rely on that decision under the current regulatory framework. We agree with the Department that we cannot base our decision on whether the spent pickle liquor is an effective substitute for a commercial product on findings made by the Department under a different set of regulations.

The Appellants make the argument that AMROX is a manufacturer of hydrochloric acid and iron oxide and that the spent pickle liquor they receive from the steel industry is an effective substitute for commercially available FCS in the production of hydrochloric acid and iron oxide. In other words, they contend that if they did not receive FCS from steel manufacturers, they would have to purchase FCS in order to manufacture hydrochloric acid and produce iron oxide.

However, the evidence demonstrates to us that AMROX's primary operation is not as a *manufacturer* of hydrochloric acid or iron oxide, but rather as a processor of spent pickle liquor. It provides a service to the steel industry by reclaiming a waste product and turning it into a reusable material. Although the iron oxide that results from the processing of the FCS can be sold on the market, this is secondary to the primary service that AMROX provides, which is the processing of the spent pickle liquor. This conclusion is not meant in any way to take away from the important service that AMROX provides, and we believe the reclamation of materials that would otherwise be disposed of as hazardous waste is commendable and should be encouraged. However, it is not clear to us that EPA had this type of function in mind when it

created the "use or reuse as an effective substitute" exception.

The Department makes the argument that only those products that are directly used or reused as substitutes for commercial products *without first being reclaimed* are entitled to exemption (ii). As AMROX correctly points out, exemption (ii) makes no mention of reclamation, unlike exemption (i) which specifically excludes reclaimed materials from being eligible for the exemption. A third exemption contained in § 261.2(e)(iii) also specifically excludes materials that are first reclaimed. AMROX argues that we should not read language into the regulation when EPA clearly could have included it, as it did in exemptions (i) and (iii).

The Department argues that it was not necessary for EPA to include the language "without first being reclaimed" in subsection (ii) since it would have been redundant. The Department points to § 261.2(c)(3) of the RCRA regulations, which states "Materials noted with a '*' [asterisk] in column 3 of Table 1 are solid wastes when reclaimed (except as provided under § 261.4(a)(17) [relating to mining activities])." The table includes spent materials, and they are designated with an asterisk in column 3 of Table 1, which indicates that spent materials are solid wastes when they are reclaimed. Because § 261.2(c)(3) provides only one exception – for mining activities – the Department argues that any other materials that are reclaimed are solid wastes, even if they are used or reused as a substitute for a commercial product.

The Department also argues that other courts have recognized that the "effective substitute for commercial product" exception is not intended to apply where reclamation takes place, citing in particular decisions by the U.S. Court of Appeals for the D.C. Circuit and the EPA Appeals Board. In *American Mining Congress v. EPA*, 824 F.2d 1177 (D.C. Cir. 1987), the D.C. Circuit Court cited the preamble to EPA's 1985 final rule as stating that a material is not a solid waste if it is used as an ingredient or an effective substitute for a commercial product *if it*

*is not first reclaimed.* 824 F.2d at 1180 (*citing* 50 Fed. Reg. 614 (1985)). However, the court went on to examine the proper scope of EPA's authority under RCRA and found that it should be limited to materials that are discarded or intended for discard and should not apply to in-process secondary materials. In particular, the court states, ". . .a fair reading of the legislative history [of RCRA] reveals intimations of an intent to regulate under RCRA only materials that have truly been discarded" and goes on to cite the Report of the House Committee on Energy and Commerce:

> Waste itself is a misleading word in the context of the committee's activity. Much industrial and agricultural waste is *reclaimed* or put to new use and is therefore *not* a part of the discarded materials disposal problem the committee addresses.

824 F.2d at 1192 (citing H.R. Rep. No. 1491, 94th Cong., 2d Sess. at 2) (emphasis added). In conducting its review, the court noted that EPA's interpretation of the scope of its authority under RCRA "has been unclear and unsteady." Our review of what constitutes an exception to the definition of solid waste leads us to the same conclusion.

*In the Matter of Petro Processors, Inc.*, 1991 EPA ALJ LEXIS 13, Docket No. RCRA-VI-639-H (January 11, 1991), involved a single judge opinion by the EPA Appeals Board examining the question of whether oil emulsions purchased by the respondent, who then processed the emulsions and sold them, constituted solid waste. The opinion notes that a material must not be reclaimed in order to qualify for the "use as an ingredient" or "effective substitute" exceptions of RCRA. However, while the ruling of the Appeals Board was that the oil emulsions did constitute solid waste, the author of the opinion speculated that the D.C. Circuit Court of Appeals would *not* have found the material to be a solid waste. Therefore, we do not find the *American Mining* and *Petro Processors* cases to be entirely supportive of the

Department's position.

However, we do find the Department's reliance on a preamble to a final regulation in 1989 to make a strong case for the argument that EPA did in fact intend the "effective substitute to a commercial product" exception to apply only where the material has not been reclaimed. The preamble states in relevant part as follows:

> Among other things, the rule states that materials used or reused as an ingredient in an industrial process to make new products (provided the materials are not being reclaimed), or used or reused as *effective substitutes for commercial products (again without being reclaimed)*, are not solid wastes.

54 Fed. Reg. 50968, Final Rule, December 11, 1989 (emphasis added).

Clearly, based on this language EPA did intend for the "effective substitute" exception to apply only when materials have not been reclaimed. Moreover, if one looks at the definition of "use/reuse" in the RCRA regulations, it is clear that exemption (ii) does not apply to the process in which AMROX engages. "Used or reused" is defined in the regulations as follows:

> (i) Employed as an ingredient (including use as an intermediate) in an industrial process to make a product (for example, distillation bottoms from one process used as feedstock in another process). However, a material will not satisfy this condition if distinct components of the material are recovered as separate end products (as when metals are recovered from metal-containing secondary materials);or
>
> (ii) Employed in a particular function or application as an effective substitute for a commercial product (for example, spent pickle liquor used as phosphorous precipitant and sludge conditioner in wastewater treatment).

40 C.F.R. § 261.1(c)(5). The first definition refers to the exception set forth in exemption (i) which we have already said does not apply to AMROX because reclamation takes place. The second definition requires that the material in question be "*employed in a particular function or application* as an effective substitute for a commercial product..." (emphasis added) The

evidence does not demonstrate that this is what is occurring here. The spent pickle liquor is not being put to use in a particular function or application. It is being processed so that it can be reused. Even if we accept the Appellants' characterization that the spent pickle liquor is being used as an ingredient in the production of hydrochloric acid and iron oxide, that takes us back to exemption (i) which, as we have stated, does not apply where the product is reclaimed.

As stated earlier and which we emphasize once more, our conclusion that AMROX engages in reclamation and does not qualify for exemptions (i) or (ii) is not meant in any way to take away from the important service that AMROX provides, and we believe the reclamation of materials that would otherwise be disposed of as hazardous waste is commendable and should be encouraged. We believe this is accomplished by the ability to receive a variance from the hazardous waste regulations, such as that received by AMROX in this case. We fail to see how the Department's classification has harmed the Appellants. AMROX has received a variance and is actively involved in processing the spent pickle liquor. We now examine the individual conditions placed in the variance that the Appellants are challenging.

***Conditions in Variance***

The Appellants challenge a number of conditions in the variance, as follows: a limitation on the chemical parameters of the spent pickle liquor accepted by AMROX, a limitation on the generators from whom AMROX may accept spent pickle liquor, a requirement that AMROX sell at least 75% of the iron oxide it produces each year, a limitation on the length of the variance to 5 years, an ability by the Department to terminate the variance at any time and, finally, a restriction on assigning the variance should AMROX sell its facility.

The Department argues that a number of the conditions were drawn from the co-product concurrence and permit-by-rule system under which AMROX operated for years without any

challenge. The Department argues that even if the Board finds that the Appellants' objections are not barred by administrative finality, the fact that the Appellants accepted the conditions and comfortably complied with them for years is evidence they are reasonable. We soundly reject this example of circular reasoning. We note, initially, that the Appellants' objections are not barred by administrative finality. Just as the Department argued earlier that it should not be held to findings it made under the old "co-product" and "permit-by-rule" regulatory scheme, so too the Appellants cannot be held bound to conditions they complied with under an entirely different permitting scheme and set of regulations. As Judge Labuskes noted in *Citizen Advocates United to Safeguard the Environment, Inc. v. DEP*, 2007 EHB 632, 679-80, "The doctrine of administrative finality is a prudential measure that should be applied judiciously. Each time it is applied a Departmental action is effectively insulated from review and a party is deprived of appeal rights."

In *Angela Cres Trust v. DEP*, 2007 EHB 595, 598-600, we held that a permit is not forever shielded from scrutiny where changes to the permit are made. Nowhere is this clearer than in the present case where the Department has issued an entirely new approval under an entirely new regulatory scheme. Moreover, the fact that a permittee can easily comply with a condition does not necessarily make it reasonable or even lawful. Therefore, we consider each of the variance conditions to which the Appellants object.

*Limitation on Chemical Parameters*

Condition 6 of the variance sets out specific chemical parameters that the spent pickle liquor must meet before it can be accepted by AMROX for processing. The Department argues that those chemical parameters are necessary in order to ensure that the spent pickle liquor is not harmful to AMROX's process or cause air pollution during processing or while in storage. We

find it is certainly reasonable for the Department to set parameters on the chemical components of the spent pickle liquor that AMROX is permitted to accept for processing or storage.

*Limitation on Generators*

Condition 5 of the variance states that it applies only to certain generators whom the Department has approved. The Department contends that it placed this condition in the variance in order to ensure that the spent pickle liquor accepted by AMROX would not be highly variable in chemical characteristics or otherwise pose an unacceptable environmental risk. Any generator who wishes to be covered by the variance must first receive approval from the Department. The Department has given its approval to certain generators, including Wheeling-Pittsburgh, based on their ability to demonstrate that their spent pickle liquor is of a consistent nature so that it routinely meets the intended chemical parameters. The Appellants argue that this condition places AMROX at a market disadvantage, and they described at least one potential customer who found it too burdensome to undergo the approval process.

We find that this condition goes hand-in-hand with Condition 6 and ensures that the spent pickle liquor accepted by AMROX meets the requisite chemical parameters without the need for costly spot checking. Additionally, AMROX is not prohibited from accepting spent pickle liquor from other sources; it would simply need to do so in accordance with a hazardous waste permit. We do not find Condition 5 to be an unreasonable requirement.

*75 % Sale of Iron Oxide*

Condition 3 requires AMROX to sell at least 75% of its iron oxide on an annual basis. The Department contends this condition is necessary based on what it contends is "AMROX's own prior history of mismanagement problems with stockpiled and unsaleable iron oxide." At the hearing, the Department presented evidence of prior releases that resulted in iron oxide

draining onto neighboring properties and into the Monongahela River. The Department further agues this condition is necessary to ensure that AMROX's accumulation of the iron oxide does not constitute sham recylcling. The Appellants argue that this condition ignores the fact that the sale of iron oxide, like any commercial product, is governed by market fluctuations.

While we sympathize with the Appellants' argument that they cannot predict the fluctuations of the market, we also find that there should be some control over the amount of iron oxide that AMROX is permitted to store on its property. While we are hesitant to permit the Department to order AMROX to sell a certain amount of iron oxide each year, we will accept a condition that permits AMROX to store no greater than 25% of its iron oxide on an annual basis, unless otherwise agreed to by the Department. We think the facts strongly support that this is the best way to handle this situation.

*Assignment, Termination and Duration*

The variance is limited to 5 years. The Appellants provided no basis for finding that 5 years is an unreasonable duration for the variance, and most permits or approvals contain some sort of expiration. We do not find the 5-year limit to be unreasonable.

The variance may be terminated by the Department at any time under the following circumstances:

> ...when AMROX no longer operates the facility, or AMROX does not operate the facility in compliance with applicable statutes, regulation and orders of the Department, or the effective period of this Variance terminates, or in the determination of the Department a change in federal or State statute, regulations or written policy prohibits such a Variance for this situation.

The Department will give 30 days notice "if circumstances allow." (Ex. A-2) The Appellants argue this creates too much uncertainty which will deter potential customers.

We believe this language is eminently reasonable and we do not believe the evidence

shows any real harm to AMROX's business. We also recognize that the Department must have some mechanism for terminating the variance for non-compliance or a change in the law. Of course, in the event of that occurring, AMROX will have the right to challenge the revocation of the variance in an appeal to this Board. As for the Department's ability to revoke the variance in the event of a change in ownership of the AMROX facility, again the Department must have some mechanism for ensuring that a holder of the variance is in compliance with the law. We find these conditions to be reasonable exercises of the Department's discretion.

## CONCLUSIONS OF LAW

1. The Environmental Hearing Board has jurisdiction over the subject matter of this appeal. 35 P.S. §§ 7511-7516.

2. The Board's scope of review in this matter is *de novo. Warren Sand & Gravel,* 341 A.2d 556, 565 (Pa. Cmwlth. 1978); *Smedley,* 2001 EHB 131.

3. The spent pickle liquor at issue in this case is a hazardous material and is not exempt from being treated as a hazardous waste pursuant to 40 C.F.R. § 261.2(e) (i) or (ii).

4. AMROX's process constitutes reclamation of spent pickle liquor, as it is defined in the regulations and applicable preambles to the regulations at 40 C.F.R. Chapter 261.

5. Regeneration may occur regardless of whether a process is physical or chemical. *MacDermid, Inc. v. Department of Environmental Protection*, 778 A.2d 7, 16 (Conn. 2001).

6. Pursuant to EPA guidance and the Board's own findings, the "effective substitute as a commercial product" exemption of 40 C.F.R. § 261.2(e)(ii) does not apply to reclaimed materials.

7. Witnesses may not give expert testimony on the interpretation of a regulation as

that is solely within the purview of the Board. *Seneca Landfill v. Department of Environmental Protection*, No. 1583 C.D. 2007 (Pa. Cmwlth. May 22, 2008); *Shenango,* 2006 EHB at 795, *aff'd*, 934 A.2d 135 (Pa. Cmwlth. 2007).

8. However, expert testimony may be given on subjects that assist in the Board's interpretation of a regulation. *Id.*

9. A letter from an EPA official setting forth his opinion as to whether AMROX's process constitutes reclamation is inadmissible hearsay and was properly excluded from the record. *Groce, supra.*

**COMMONWEALTH OF PENNSYLVANIA**
**ENVIRONMENTAL HEARING BOARD**

| | | |
|---|---|---|
| **WHEELING PITTSBURGH STEEL CORP. and AMERICAN IRON OXIDE COMPANY** | : | |
| **v.** | : | **EHB Docket No. 2005-093-R (Consolidated with 2005-094-R and 2006-060-R)** |
| **COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION** | : | |

## ORDER

AND NOW, this 20th day of June, 2008, the appeal is *granted in part and denied in part.* The Department is ordered to revise Condition 3 in accordance with our holding herein. In all other respects, the appeal is ***dismissed.***

**ENVIRONMENTAL HEARING BOARD**

**THOMAS W. RENWAND**
**Acting Chairman and Chief Judge**

**GEORGE J. MILLER**
**Judge**

**MICHELLE A. COLEMAN**
**Judge**

**EHB Docket No. 2005-093-R**
**(Consolidated with 2005-094-R**
**and 2006-060-R)**

**BERNARD A. LABUSKES, JR.**
**Judge**

**DATED:** **June 20, 2008**

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

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|---|---|---|
| **WHEELING-PITTSBURGH STEEL CORPORATION and AMERICAN IRON OXIDE COMPANY** | : | |
| **v.** | : | **EHB Docket No. 2005-093-R (Consolidated with 2005-094-R and 2006-060-R)** |
| **COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION** | : | **Issued: June 24, 2008** |

## OPINION AND ORDER ON APPELLANTS' PETITION TO REOPEN THE RECORD

**By Thomas W. Renwand, Acting Chairman and Chief Judge**

**Synopsis:**

The Pennsylvania Environmental Hearing Board denies Appellants' Petition to Reopen the Record to add a twenty-five year old report from an EPA consultant.

***Discussion***

The Pennsylvania Environmental Hearing Board issued its Adjudication on June 20, 2008. In the Adjudication, we neglected to rule on the Appellants' Petition to Reopen the Record to add a report dated February 1983 by an EPA consultant. The Department strenuously opposed the reopening of the record to add this report. We permitted the

Appellants to file a reply memorandum to the Department's response.

We thoroughly reviewed the lengthy impact report. However, we found it unpersuasive and we did not believe, nor do we believe now, that this "evidence" 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." 25 Pa. Code Section 1021.133. Through our oversight, we neglected to advise the parties in our Adjudication that we were denying the Appellants' Petition to Reopen the Record.

We also emphasize that our decision in this case was only arrived at after a great deal of debate. Both sides did an excellent job in presenting their respective arguments. We also emphasize that most of our decisions hinge on testimony. It is rare that a "paper chase" will supply the key piece of evidence that will cause the scales of justice to tilt to the side of the winning party.

**COMMONWEALTH OF PENNSYLVANIA**
**ENVIRONMENTAL HEARING BOARD**

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| **WHEELING-PITTSBURGH STEEL CORPORATION and AMERICAN IRON OXIDE COMPANY** | : | |
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## ORDER

AND NOW, this 24th day of June, 2008, Appellants' Petition to Reopen the Record is ***denied***.

**ENVIRONMENTAL HEARING BOARD**

**THOMAS W. RENWAND**
**Acting Chairman and Chief Judge**

**DATE: June 24, 2008**

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

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