Environmental Hearing Board

Adjudications
and
Opinions

1994

Volume II

COMMONWEALTH OF PENNSYLVANIA
Maxine Woelfling, *Chairman*

MEMBERS

OF THE

ENVIRONMENTAL HEARING BOARD

1994

Chairman...............MAXINE WOELFLING

Member ....ROBERT D. MYERS

Member ....RICHARD S. EHMANN

Member ....JOSEPH N. MACK
(Resigned August 1, 1994)

Secretary.............M. DIANE SMITH

Cite by Volume and Page of the
Environmental Hearing Board Reporter

Thus: 1994 EHB 1

ISBN No. 0-8182-0193-2

FOREWORD

This volume contains all of the adjudications and opinions issued by the Environmental Hearing Board during the calendar year 1994.

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

ADJUDICATIONS

CASE NAME	PAGE
Al Hamilton Contracting Company (7/18/94)	1027
Al Hamilton Contracting Company (7/27/94)	1074
Al Hamilton Contracting Company (8/10/94)	1148
Ted Babich	1281
Benco, Inc. of Pennsylvania	168
Bethenergy Mines, Inc.	925
Bethlehem Steel Corporation	1371
Butler Township Area Water and Sewer Authority	1674
Rudy Byler	874
Concerned Citizens of Earl Township	1525
Delaware Environmental Action Coalition and Dr. James E. Wood	1427
Empire Sanitary Landfill, Inc. (2/1/94)	30
Empire Sanitary Landfill, Inc. (11/1/94)	1489
Franklin Plastics Corporation	100
Furnley H. Frisch d/b/a Furnley H. Frisch & Sons	1226
Stephen Haydu	826
Larry D. Heasley, et al.	624
Jay Township, et al.	1724
Thomas Kilmer	1799
Harold S. Landis	1781
George Leck & Son, Inc.	1811
Lehigh Gas & Oil Company	767
George M. Lucchino	380

McDonald Land & Mining Company, Inc. and Sky Haven Coal, Inc. 705
McKees Rocks Forging, Inc. 220
David A. Murdoch 1817
National Forge Company 553
North Pocono Taxpayers' Association and North Pocono C.A.R.E. 449
P.A.S.S., Inc. 1875
Perry E. and Jeanne E. Phillips 1266
Seneca Landfill, Inc. 1190
Daniel Weimer 1850
Edmund Wikoski 1461
Wilbar Realty, Inc., and Carl Kresge, President 999
Wood Processors, Inc. and Archie Joyner 315

OPINIONS AND ORDERS

CASE NAME	PAGE
Adams Sanitation Company, Inc. (4/5/94)	502
Adams Sanitation Company, Inc. (11/1/94)	1482
Ted Babich	541
Blue Marsh Laboratories Inc.	1451
Borough of Ridgway	1090
Butler Township Area Water and Sewer Authority	592
Richard P. Butler	1184
Joseph F. Cappelli & Sons, Inc.	1835
Chester Residents Concerned for Quality Living	204
City of Harrisburg (2/16/94)	155
City of Harrisburg (9/16/94)	1309
City of Harrisburg (11/7/94)	1706
Christine Ann Crawford and Corey Eichman, et al. (4/28/94)	583
Christine Ann Crawford and Corey Eichman, et al. (7/6/94)	912
Foster R. College	1642
Del-Aware Unlimited, Inc. (5/17/94)	744
Del-Aware Unlimited, Inc. (7/14/94)	983
Downingtown Area Regional Authority	440
Doylestown Federal Savings & Loan (5/6/94)	618
Doylestown Federal Savings & Loan (9/28/94)	1362
Doylestown Federal Savings & Loan (11/2/94)	1632
Dunkard Creek Coal, Inc.	1655
Dunkard Township, Greene Township, Washington Township, Cumberland Township, Monongahela Township, and Morgan Township	1635

East Penn Manufacturing Company, Inc. 1454

Electric Motor and Supply, Inc. 1478

Empire Sanitary Landfill, Inc. (9/30/94) 1365

Empire Sanitary Landfill, Inc. (10/14/94) 1419

Envyrobale Corporation (11/7/94) 1714

Envyrobale Corporation (12/6/94) 1842

Eric Joseph Epstein 1471

William Fiore, d/b/a Municipal and Industrial Disposal Company (2/2/94) 90

William Fiore, d/b/a Municipal and Industrial Disposal Company (11/2/94) 1629

Furnley H. Frisch d/b/a Furnley H. Frisch & Sons 1409

Mrs. Peggy Ann Gardner, Mrs. Barbara Judge and Mrs. Mary Jane Eckert (4/14/94) 529

Mrs. Peggy Ann Gardner, Mrs. Barbara Judge and Mrs. Mary Jane Eckert (9/7/94) 1250

Greene County Citizens United et al. 1217

Gerald C. Grimaud, Anna Kroptavich, Widow of Joseph Kroptavich and Irene L. Kitchnefsky 303

Harmar Township (3/8/94) 296

Harmar, Township of, and Bauerharmar Coal Corp. (8/9/94) 1107

The Harriman Coal Corporation 1331

Ronald S. Kell and Edith M. Kell 1301

Kenneth P. Koretsky 905

Alvin and Lois Lampenfeld 1777

Lehigh Township, Wayne County (93-341-W) 406

Lehigh Township, Wayne County (91-090-W) 402

Lower Paxton Township Authority 1826

George M. Lucchino (9/23/94) 1346

George M. Lucchino (10/19/94) 1434

Mountain View Reclamation and Geological Reclamation Operations
Waste Systems, Inc. 1790

Multilee, Inc. 989

New Castle Township Board of Supervisors (7/7/94) 919

New Castle Township Board of Supervisors (9/22/94) 1336

New Hanover Corporation 1353

Newtown Land Limited Partnership 856

P.A.S.S., Inc. 522

Pequea Township (3/25/94) 415

Pequea Township and E. Marvin Herr, E.M. Farms (5/27/94) 755

Philadelphia Electric Company, et al. 810

QC, Inc. 1242

Quehanna-Covington-Karthaus Area Authority 571

Rescue Wyoming, et al. (3/30/94) 425

Rescue Wyoming, et al. (9/13/94) 1304

Rescue Wyoming, et al. (9/20/94) 1324

Ridgway, Borough of 1090

SCA Services of Pennsylvania, Inc. 1

Snyder Brothers, Inc. (11/4/94) 1702

Snyder Brothers, Inc. (12/29/94) 1888

Solar Fuel Company, Inc., A Corporation 737

Township of Harmar and Bauerharmar Coal Corp. (8/9/94) 1107

John D. and Sandra T. Trainer, Bruce A. and Alyce Curtis, and The Plumstead Township Civic Association 749

Geoffrey B. Tyson 868

University Area Joint Authority, et al. 1671

Elva Wickizer, Timmy Paul Wickizer and Victoria Wickizer 1412

Wood Processors, Inc. and Archie Joyner 597

James E. Wood 347

Zanita A. Zacks-Gabriel 536

1994 DECISIONS

Act 339, 35 P.S. §701, *et seq.*

Payments toward costs of sewage treatment plants (701)--440

Air Pollution Control Act, 35 P.S. §4001 *et seq.*

Civil penalties (4009.1)--30, 100

Definitions (4003)--1724

Permits (4006.1)--1724

Powers and duties of DER (4004)

Enforcement orders--100

Regulations

25 Pa. Code, Chapter 123: Standards for Contamimants

fugitive emissions (123.1-123.2)--100

odor emissions (123.31)--30, 100

Bituminous Coal Mine Act, 52 P.S. §701.101, *et seq.*--737

Bituminous Mine Subsidence and Land Conservation Act, 52 P.S. §1406.1, *et seq.*

Regulations

25 Pa. Code, Chap. 89, Underground Mining of Coal

Subchapter F: Subsidence Control (89.141 *et seq.*)--925

Clean Streams Law, 35 P.S. §691.1, *et seq.*

Civil penalties (691.605)--1781

Definitions (691.1)--220

DER enforcement orders (691.210, 691.610)--1027

Operation of mines (691.315)

Operator responsibility for pre-existing discharges--749

Potential pollution (691.402)--1226

Regulations

25 Pa. Code, Chapter 92, NPDES

Permits (92.3-92.17)--1525

Approval of applications (92.31)--1090

Permit conditions (92.51-92.67)--1090

Renewal of NPDES permit--90

25 Pa. Code, Chapter 102, Erosion Control

General Provisions (102.1-102.5)--1226

Erosions and Sedimentation Control Measures and Facilities (102.11-102.13)--1226

Responsibilities of landowners and occupiers (691.316)--220, 1027

Personal liability--502

Coal Refuse Disposal Control Act, 52 P.S. §30.51, *et seq.*

Permits--1724

Costs Act (Award of Fees and Expenses for Administrative Agency Actions), 71 P.S. §§2031-2035

Award of fees and expenses (2033)--597, 1434, 1642, 1655

Definitions (2032)--597, 1642, 1655

Prevailing party--597

Substantial justification--597, 1655

Dam Safety and Encroachments Act, 32 P.S. §693.1, *et seq.*

Permits (693.6-693.9)--425, 449

Regulations

25 Pa. Code, Chapter 105, Dam Safety and Waterway Management--1724

Subchapter A: General Provisions (105.1 *et seq.*)--449, 1817

25 Pa. Code, Chapter 106, Flood Plain Management--1817

Defenses

De minimus non curat lex--30, 100

Discriminatory enforcement--220

Estoppel--874, 999

Retroactive application of the law--502

Environmental Hearing Board Act, 35 P.S. §7511, *et seq.*--90, 168, 1674

EHB Practice and Procedure

Admissions--220, 440, 919, 1331

Amendment of pleadings and notice of appeal--449, 1702, 1850

Appeal *nunc pro tunc*--303, 402, 868, 1217, 1242, 1471, 1635, 1777

Appealable actions--155, 406, 571, 749, 1250, 1346, 1412, 1471, 1799, 1888

Burden of proof

Under acts

Clean Streams Law--1226

Under Board's rules (25 Pa. Code §21.101)

Civil penalties (21.101(b)(1))--100, 999, 1266, 1811, 1850

In general, party asserting affirmative (21.101(a))--30, 100, 315, 449, 705, 1148, 1190, 1226, 1281, 1371

Orders to abate pollution or nuisance (21.101(b)(3), (d), and (e))--30, 100, 168, 315, 705, 767, 925, 1027, 1074, 1148, 1461, 1850

Refusal to grant, issue, or reissue a license or permit (21.101(c)(1))--1281, 1489

Third party appeals of license or permit (21.101(c)(3))--347, 380, 425, 449, 624, 826, 1427, 1525, 1724, 1817, 1875

Certification of interlocutory appeal to Commonwealth Court--1362, 1419

Civil penalties assessments--999, 1799

Proposed--618

Collateral estoppel

Of a DER order--90, 168

Of an EHB final order--744

Consent orders, adjudications, and agreements--1250

Continuance and extensions--347

Declaratory judgment--1371

Demurrer--1454

Directed adjudication--30, 347, 1027

Discovery

Interrogatories--1184

Motion to compel--919

Sanctions--919, 1304

Estoppel

Equitable--1371

Evidence

Best evidence rule--347, 592, 1674

Demonstrative evidence--100

Experts--30, 347, 449, 1027, 1148, 1489, 1674

Hearsay--30, 100, 347, 597, 1324

Missing witness inference rule--1148

Motion in limine--856, 1324, 1655

Parol evidence--592, 1674

Scientific tests--220

Scope of cross-examination--100, 449

Weight--925, 1489

Ex parte communications--1304

Finality--303, 1090, 1346, 1353, 1826

General Rules of Administrative Practice and Procedure (1 Pa. Code §31.1 *et seq.*)

Chapter 35: Formal Proceedings

Subchapter C: Evidence and Witnesses--30

Intervention--755, 912, 989

Joinder--618, 1365

Judicial notice--347

Jurisdiction--425, 529, 755, 810, 856, 1217, 1242, 1346, 1371, 1674, 1724, 1777, 1850

Mootness--755, 810, 983, 1371

No relief available--30, 425, 737, 1451, 1478

Motion to dismiss--303, 406, 529, 737, 744, 810, 856, 905, 1242, 1346, 1451, 1888

Motion for judgment on the pleadings--1835, 1888

Motion to limit issues--425, 905, 919, 1336

Motion for nonsuit--168, 1074, 1427

Motion to strike--1027

Motion for summary judgment--1, 90, 425, 440, 502, 541, 571, 583, 737, 1301, 1309, 1331, 1336, 1353, 1482, 1629, 1671, 1714, 1790, 1842

Notice of appeal

Issue preclusion (25 Pa. Code §21.51(e))--100, 168, 905, 919, 1525, 1674, 1850, 1888

Perfection of appeal (timeliness)--303, 536, 810, 826, 856, 868, 1217, 1242, 1353, 1371, 1777, 1888

Pennsylvania Rules of Civil Procedure--571, 618

Post-Hearing Memoranda--1817

Failure to file--1781

Pre-Hearing Memoranda--905, 1324, 1724

Preliminary objections--1454

Pro se appellants--1184, 1281

Reconsideration--296, 1842

By non-party--1706

Exceptional circumstances--1409, 1482, 1632

Interlocutory order--1250, 1632

Timeliness--1706, 1842

Relevancy--30, 220, 874

Reopening of record--347, 592, 1027, 1706

Res judicata--90, 541

Ripeness--1

Rule to show cause--1412, 1478

Sanctions--1027, 1184, 1304

Scope of review--100, 1027, 1148

Settlements--1724

Standard of review--220, 1371, 1674

Standing--155, 1353, 1365, 1724

Stay proceedings--744

Supersedeas--415, 522

Stay of EHB order--1826

Waiver of issues--624, 856, 905, 1427, 1482, 1525, 1724, 1817

Federal Clean Water Act (33 U.S.C. §1281-1297)

Regulations

40 CFR, Chapter 403--1090

Infectious Waste Incinerator Construction Moratorium, 35 P.S. §6019.1 *et seq.*--204

Judicial Code

Adverse interest rule--100, 347

Municipal Waste Planning, Recycling and Waste Reduction Act, 53 P.S. §4000.101 *et seq.* (Act 101)

Assistance to municipalities (Ch. 11)

Waste volumes (§1112)--1

Fees

Recycling (Ch. 7)--1790

General provisions (Ch. 1)

Definitions--583

Grants (Ch. 9)--155, 1309

Municipal Waste Planning (Ch. 5)--583

Recycling and waste reduction (Ch. 15)--1

Municipalities Planning Code, 53 P.S. §10101 *et seq.*

Approval of plats (§10508)--755

Non-coal Surface Mining Conservation and Reclamation Act, 52 P.S. §3301 *et seq.*

Definitions (§3303)--1461

Mining permit; reclamation plan (§3307)--1461

Operator's license (§3305)--1461

Permit approval or denial (§3308)--425

Pennsylvania Constitution

Article I, Section 1 (inherent rights)--30

Article I, Section 10 (takings)--1799

Article I, Section 27 (natural resources)--449, 624, 1525, 1724, 1875

Pennsylvania Safe Drinking Water Act, 35 P.S. §721 *et seq.*

Civil penalties (§721.13(g))--999

Powers and duties of DER

Abuse of discretion--767, 1371, 1461, 1489, 1799

Department's interpretation of its regulations controls--553, 1309, 1371, 1790

Enforce regulations, duty to--220, 1371

Police or regulatory powers--220, 1027, 1790

Prosecutorial discretion--449, 755

Traffic effects of permit grant, duty to consider--624

Sewage Facilities Act, 35 P.S. §750.1 *et seq.*

Definitions (§750.2)--571

Grants (§750.6)--571

Official plans (§750.5)--168, 874

Permits (§750.7)--168

Powers and duties of DER (§750.10)

Recission of official plan revision approvals--168

Regulations

25 Pa. Code, Chapter 71, Administration of Sewage Facilities Program

Subchapter C: Development Plan Revisions (§§71.31-71.63)--415, 874

25 Pa. Code, Chapter 94, Municipal Wasteload Management

Action on overloaded facilities (§§94.21-94.30)--1826

Sewage enforcement officers

Solid Waste Management Act, 35 P.S. §6018.101 *et seq.*

Bonds (6018.505)--624

Civil penalties (6018.605)--1266, 1811, 1850

Closure orders (6018.602)--315

Daily waste volume limits--1

Definitions (6018.103)

Processing (Act 109)--315

Storage/Disposal--1850

Transfer facility (Act 109)--583

DER enforcement orders (6018.602, 6018.603, and 6018.104(7))--1850

Executive orders

1989 Executive Order--1

Legislative findings and policy (6018.102)--1850

Licenses (6018.501, 502, and 503)

Grant, denial, modification, revocation, suspension (6018.503)--1525

Permits (6018.501, 502 and 503)--1190, 1850

Grant, denial, modification, revocation, suspension (6018.503)--1724

Requirement of (6018.501(a))--905

Record keeping requirements (6018.608)--1

Regulations

25 Pa. Code, Chapter 75, Solid Waste Management

Subchapter C: Permits and Standards (75.21-75.38)--1724

25 Pa. Code, Chapter 271, Municipal Waste Management

Subchapter A: General (271.1-271.100)--204, 553, 1525

Subchapter B: General Requirements for Permits and Applications (271.101-721.200)--1875

Subchapter C: Permit Review (271.201-271.300)--1, 1525

Subchapter D: Financial Requirements (271.301-271-400)--624

Subchapter E: Civil Penalties (271.401-271-500)--1266, 1850

25 Pa. Code, Chapter 272, Municipal Waste Recycling--1309

25 Pa. Code, Chapter 273, Municipal Waste Landfills

Application requirements (273.101-273.200)--1525

Operating requirements (273.201-273.400)--30, 502, 624, 1525, 1790

25 Pa. Code, Chapter 275, Land Applicaiton of Sewage Sludge--522, 1875

25 Pa. Code, Chapter 281, Composting Facilities--1525

25 Pa. Code, Chapter 283, Resource Recovery--1525

25 Pa. Code, Chapter 285, Storage, Collection and Transportation of Municipal Waste--1525, 1811

25 Pa. Code, Chapter 287, Residual Waste Management--553, 1714, 1850

Wastes, types of

Residual waste

Permits (6018.301)--1714

Statutory Construction Act, 1 Pa.C.S.A. §1501 *et seq.*

Later enactments control over earlier (1936)--1674

Legislative intent controls (1921)--1309

Presumptions in ascertaining legislative intent (1922)--571, 874,

Storage Tank and Spill Prevention Act, 35 P.S. §6021.101 *et seq.*

Definitions (§103)--767

Presumption of liability--767

Regulations

25 Pa. Code, Chapter 245: Spill Prevention Program--541, 1281

Surface Mining Conservation and Reclamation Act, 52 P.S. §1396.1 *et seq.*

Bonds--705

Enforcement orders (1396.4c)--1148

Health and safety (1396.4b)--1148

Affecting water supply (1396.4b(f))--826

Payment of costs and attorney fees--1434

Mining permits (1396.4)--1331

Award of attorneys fees (1396.4(b))--1107

Content of permit application (1396.4(a))

Consent of landowner to entry--380

Off-site discharges--705

Regulations

25 Pa. Code, Chapter 86, Surface and Underground Coal Mining: General

Subchapter B: Permits (86.11-86.70)--1336

Subchapter G: Civil Penalties for Coal Mining (86.191-86.203)--1331

25 Pa. Code, Chapter 87, Surface Mining of Coal

Subchapter E: Surface Coal Mines: Minimum environmental standards--1027, 1148

United States Constitution

Commerce Clause--1

Due Process--30, 449, 1250

Equal Protection--874

Takings (Fifth Amendment)--874, 1250, 1281

Water Rights Act, the Act of June 24, 1939, P.L. 42, as amended, 32 P.S. §631 *et seq.*

Water allocation permits--1674

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
2nd FLOOR — MARKET STREET STATE OFFICE BUILDING
400 MARKET STREET, P.O. BOX 8457
HARRISBURG, PA 17105-8457
717-787-3483
TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOARD

ADAMS SANITATION COMPANY, INC.	:	
	:	
v.	:	**EHB Docket No. 90-375-W**
	:	**(Consolidated Docket)**
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** April 5, 1994

OPINION AND ORDER SUR
MOTION FOR SUMMARY JUDGMENT

Maxine Woelfling, Chairman

Synopsis

A motion for summary judgment, treated as motion for partial summary judgment, is granted in part and denied in part.

The Department of Environmental Resources (Department) has the authority under 25 Pa. Code §273.245 to direct a person who operates a municipal waste landfill which contaminates a neighbor's water supply to replace that water supply, even if the contaminants emanate from a portion of the landfill filled by a previous operator. Section 273.245 does not operate retroactively when applied to a situation where contaminants escaped into the environment before the effective date of the regulation so long as, after the effective date of the regulation, (1) the landfill operator charged with replacing the water supply operated the landfill and (2) contamination from the landfill was affecting the water supply. Whether an application of §273.245(a) is retroactive turns on when the contaminants affect a water supply, not on when they are released into the environment.

The Department is authorized under §316 of the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 *et seq.* (Clean Streams Law), to order a landowner or occupier to correct a polluting condition on his land, even if he did not cause or associate himself with the condition or even have actual or constructive knowledge of it. The Department does not deprive a landowner or occupier of due process by ordering him to abate such pollution, moreover. Even assuming the order involves a retroactive application of the law, the Commonwealth can apply regulations made pursuant to the police power retroactively when they are used to alleviate a dangerous condition.

The Department is not entitled to summary judgment with regard to an appellant's claim that the Department's actions were unduly oppressive, and, therefore, deprived the appellant of due process, when genuine issues of fact remain regarding the benefits and burdens which would result from the Department's actions and regarding the appellant's financial assets.

OPINION

This matter was initiated with the September 11, 1990, filing of a notice of appeal by Adams Sanitation Company, Inc. (Adams) seeking review of the Department's August 21, 1990, letter advising Adams that it was responsible for water supply contamination at the Strine residence, which is adjacent to a tract of land in Tyrone Township, Adams County, on which Adams has a municipal waste landfill. The letter directed Adams to provide a replacement water supply to the Strine residence in accordance with §1104(a) of the Municipal Waste Planning, Recycling, and Waste Reduction Act, the Act of July 28, 1988, P.L. 556, (Act 101), 53 P.S. §4000.1104(a) and 25 Pa. Code §273.245(c). Adams' notice of appeal was docketed at No. 90-375-W.

On October 22, 1990, the Department issued Adams an order pursuant to the Clean Streams Law, directing Adams to develop and implement a program to abate groundwater and surface water contamination emanating from the landfill. Adams appealed that order on November 8, 1990, and the appeal was docketed at No. 90-479-W. Adams filed an application for a stay of the Department's order pending appeal on November 19, 1990. The Board denied the stay on February 20, 1991. See Adams Sanitation Company, Inc. v. DER, 1991 EHB 249.

Upon the joint request of the parties, the Board consolidated both Adams appeals at Docket No. 90-375-W on December 4, 1990.

The Department filed a motion for summary judgment and a memorandum in support on June 21, 1993. Adams never filed an answer to the motion, but, on July 16, 1993, it filed a memorandum in opposition. The Department filed a reply to that memorandum on July 27, 1993.

Although the Department requested summary judgment with respect to the entire appeal, it failed to address many of the issues raised in Adams' notice of appeal. In its notices of appeal, Adams raised a host of objections to both Department actions. With regard to the Department's letter directing it to replace the Strines' water supply, Adams asserted that the Department's decision was:[1]

(1) arbitrary and capricious;
(2) an abuse of discretion;
(3) outside the scope of the Department's authority;
(4) unconstitutional because Adams had not engaged in any of the conduct which caused the pollution;
(5) unconstitutional under the Eighth and Fourteenth Amendments of the U.S. Constitution and the "corresponding

[1] While the issues listed are very broadly phrased and in many cases overlapping, this is largely the result of how they were framed in Adams' notice of appeal. Where it was possible to consolidate the issues raised without eliminating any, we have done so.

provisions" of the Pennsylvania Constitution;

(6) unconstitutional because it constituted a "taking" without just compensation and otherwise violated the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution and the "corresponding provisions" of the Pennsylvania Constitution;

(7) unconstitutional and an error of law because it applied Act 101 and the regulations thereunder to Adams; and,

(8) inappropriate because:
   (a) Adams was only an owner or occupier of that portion of the landfill where Adams had actually conducted operations;
   (b) the Department applied the relevant regulations incorrectly; and
   (c) the Department erred as a matter of fact and law as to every one of the bases set forth in the order.

In its notice of appeal regarding the October 22, 1990, order, Adams raised the same objections it did with respect to the letter and added three more. According to Adams, the order was inappropriate because it was improper for the Department to direct the implementation of the abatement plan; because neither the Clean Streams Law nor the Solid Waste Management Act, the Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101, applies to groundwater contamination caused by conduct occurring prior to the enactment of those statutes; and, because the Solid Waste Management Act does not impose liability without fault on operators of municipal waste landfills.

The Department failed to address many of these issues in its motion for summary judgment and supporting memoranda.[2] The only issues the Department discussed in its memorandum were Adams' assertions that the

[2] Adams does not appear to have noticed this discrepancy. Adams never indicated in its memorandum that the Department failed to address these issues.

Department's letter of August 21, 1990, was not authorized under either §1104(a) of Act 101 or §273.245 of the Department's regulations; that the Department's order of October 22, 1990, was not authorized under §316 of the Clean Streams Law; and, that the order and letter violated the due process guarantees under the U.S. and Pennsylvania Constitutions because they involved retroactive applications of the law or were unduly burdensome. Since the Department's motion requested partial summary judgment should summary judgment be inappropriate, we shall treat the motion as a motion for partial summary judgment on those issues the Department addressed.

The Board is empowered to grant summary judgment where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Robert L. Snyder *et al.* v. Department of Environmental Resources, 138 Pa. Cmwlth. 534, 588 A.2d 1001 (1991), appeal dismissed as improvidently granted, ___ Pa. ___, 632 A.2d 308 (1993).

There are no material questions remaining with respect to many of the facts involved in this appeal. Adams is a wholly-owned subsidiary of Keystone Sanitation Company, Inc. (Keystone) and became involved with the landfill after a 1983 transaction between Keystone and Adams Sanitation Company (ADSCO) (Stip. ¶¶ 1, 7).[3] On July 22, 1977, ADSCO entered into a lease with

---

[3] In support of their respective positions, the parties refer to the notes of testimony, pre-hearing stipulations, and exhibits from the supersedeas hearing, together with some stipulated exhibits. For purposes of this opinion we shall cite each type of document as follows:

"N.T. -" denotes notes of testimony from the supersedeas hearing;
"Stip. -" denotes the pre-hearing stipulations;
"Ex. A-" denotes Adams' exhibits in the supersedeas hearing;
"Ex. C-" denotes the Department's exhibits in the supersedeas hearing;
footnote continued

Netta S. Deatrick to operate a sanitary landfill on an approximately 108 acre site owned by Deatrick in Tyrone Township, Adams County (Stip. ¶ 6). ADSCO received a permit to dispose of solid waste on the site from the Department on February 2, 1979 (Stip. ¶ 10). Keystone acquired the assets of ADSCO -- including its rolling stock, customers, landfill equipment, and office equipment -- by virtue of an October 22, 1983, agreement (Ex. A-21, pp. 1-4, ¶ 2). As part of that agreement, Keystone also received ADSCO's lease for the landfill and ADSCO's name and trade name (Ex. A-21, pp. 1-4, ¶ 2). The lease was assigned to Adams on November 15, 1983 (SE-23). The plain language of the lease makes it clear that the lease is for the entire 108 acre tract of land (Ex. C-8 and SE-23).

Adams submitted an application to the Department to operate the landfill in November, 1983[4] (Stip. ¶ 12; Ex. A-17). Although the application noted that the property included 108 acres, Adams proposed to landfill on only 30 of those acres (Ex. A-17, p. 2).

The Department issued a permit to Adams for the landfill on February 1, 1984 (Stip. ¶¶ 5 and 10). Adams began operations at the site that same month and continued until April, 1990 (Stip. ¶ 5). During that time, Adams filled 8.8 acres of the 30 acres covered by the permit[5] (Stip. ¶ 26). Adams

---

continued footnote
and,
"SE-" denotes the stipulated exhibits.

[4] The Department's regulations prohibited the transfer of solid waste permits. See 25 Pa. Code §75.22(f)(1), which was superseded by 25 Pa. Code §271.221 on April 9, 1988. The 1988 regulation, like §75.22(f), requires the reissuance of the solid waste permit, but contains more detailed requirements.

[5] Although both parties agree that the permit covered 30 acres, it is
footnote continued

did not deposit any waste in those areas which ADSCO landfilled; instead, it placed the waste north of that portion of the landfill which had been used by ADSCO (Stip. ¶¶ 9, 26). The waste Adams deposited at the landfill consisted of municipal waste and approximately 1,000 tons of incinerator ash, a residual waste (Adams' memorandum in opposition, p. 3).

The Department issued Adams at least two orders prior to the letter and order at issue here. On August 14, 1989, the Department issued Adams an order directing it to submit a ground water assessment plan for the landfill (SE-30). Adams filed an appeal of that order with this Board, but the Board dismissed the action on October 3, 1990, after Adams filed a praecipe to discontinue the appeal (Stip. ¶¶ 41, 49). The Department issued Adams another order on April 11, 1990, which directed Adams to implement a ground water assessment plan the parties had agreed upon (Stip. ¶ 45, Ex. C-2). Adams did not appeal this order.

Both parties agree for purposes of this motion, that the contamination of Strine's water supply resulted from volatile organic contaminants emanating from the portion of the landfill which ADSCO had used to dispose of its waste (Stip. ¶ 35; the Department's motion for summary judgment, ¶ 47; Adams' memorandum in opposition, p.2).

We shall address each aspect of the Department's motion separately below.

---

continued footnote
unclear from the facts before the Board on this motion just which thirty acres those were. The Department argued that the portion of the landfill ADSCO filled lay within the 30 acres the permit covered. Adams, meanwhile, maintained that the portion of the landfill filled by ADSCO lay outside the 30 acres covered by the permit.

I. Was the Department's letter directing Adams to provide a replacement water supply to the Strine residence authorized under §1104(a) of Act 101 or §273.245(a) of the Department's regulations?[6]

The Department maintains Adams has a duty to replace the Strines' water supply because §1104(a) of Act 101 and §273.245(a) of its regulations impose a duty upon persons operating a municipal waste landfill to replace water supplies polluted by the landfill. According to the Department, Adams cannot object that it did not operate the entire landfill because: (1) the Department had issued two previous orders to Adams based on the premise that Adams operated the entire landfill; (2) Adams failed to appeal one of these orders and withdrew its appeal of the other; and, (3) under the doctrine of "administrative finality" the factual and legal bases of administrative orders which are not successfully appealed are final. The Department also argued that Adams' activities at the site demonstrated that Adams was, in fact, the operator of the entire site.

In its memorandum in opposition, Adams maintained that neither issue preclusion nor the doctrine of administrative finality barred it from challenging the proposition that it operated the entire landfill. According to Adams, moreover, it could not be liable for the pollution to Strines' water supply because it did not "operate" the portion of landfill from which the

[6] As noted earlier in this opinion, we are treating the Department's motion as a motion for partial summary judgment -- not summary judgment -- because the Department failed to address many of the issues Adams raised in its notice of appeal. In its notice of appeal, Adams not only asserted that the Department did not have the authority to order it to replace Strines' water supply under §1104(a) of Act 101 or 25 Pa. Code §273.245(a), it also asserted that §273.245(a) was not authorized under the Solid Waste Management Act. Because the motion and the memoranda failed to address the latter issue, our decision with regard to the Department's authority to direct Adams to replace the water supply is limited to the issue of whether the Department was authorized under §1104(a) of Act 101 or 25 Pa. Code §273.245(a).

pollution emanated. Although Adams concedes that it conducted revegetation, repaired "leachate outbreaks," and engaged in limited other activities on that portion of the landfill, Adams maintains that the Department had requested Adams to take those actions and that Adams cannot be liable for pollution emanating from a portion of the landfill unless it had engaged in "meaningful landfilling activities" on that portion.

We need not decide whether Adams waived those issues which it could have raised in appeals of the August 14, 1989, or the April 11, 1990, orders. Even if we assume there is no issue preclusion here, the Department is entitled to summary judgment with respect to the letter directing Adams to provide a replacement water supply to the Strine residence. Nor need we consider whether the Department's letter would be authorized under §1104(a) of Act 101. The letter identified two sources of authority for the Department's action -- §1104(a) of Act 101 and 25 Pa. Code §273.245(a) -- and, under the undisputed facts here, the Department is authorized to require Adams to replace Strines' water supply under the code provision.

Section 273.245(a) of the Department's regulations provides, in pertinent part:

> A person ... operating a municipal waste landfill which affects a water supply by degradation, pollution or other means shall restore or replace the affected water supply with an alternate source that is of like quantity or quality to the original supply at no additional cost to the owner.

There is no question that Adams was "a person" and was "operating a municipal waste landfill." Adams is a Pennsylvania corporation, and corporations are expressly included in the definition of "person" under the Department's municipal waste management regulations. 25 Pa. Code §271.1. The regulations define a "municipal waste landfill," meanwhile, as a facility using land for

disposing of municipal waste. 25 Pa. Code §271.1. Adams concedes that it "conducted solid waste disposal operations at the Adsco Landfill," (Stip. ¶ 5) and that it accepted municipal waste. (Adams' memorandum in opposition, p. 3.)

There is also no question that the portion of land where ADSCO conducted its waste disposal activities affected the Strines' water supply. Laboratory analyses of the water supply have revealed the presence of poly-chlorinated ethylenes and other pollutants (Ex. A-13, Ex. A-30), and Adams concedes, for purposes of this motion, that the land ADSCO filled is the source of the contaminants compromising the Strines' water supply. (Adams' memorandum in opposition, p. 2.)

The only remaining question, therefore, is whether the land ADSCO used for its waste disposal operations was part of the same landfill which Adams operated. That question is not difficult to resolve. It is clear from the stipulations that the landfill ADSCO used to dispose of its waste was the same one ADSCO operated: the "Adsco Landfill." The stipulations provide that "ADSCO operated the Adsco Landfill from at least June, 1970, through the time that Adams began to operate the Adsco Landfill," and that "[f]rom February 10, 1984, through April 8, 1990, Adams conducted solid waste disposal operations at the Adsco Landfill ..." (Stip. ¶¶ 5 and 8).

Because Adams operated the Adsco Landfill and the landfill polluted the Strines' water supply, the Department had the authority under 25 Pa. Code §273.245(a) to direct Adams to replace that water supply. Even assuming Adams never operated the portion of the landfill from which the pollution emanated, as Adams contends, Adams is liable because it operated other portions of the landfill. The language in the regulation is unambiguous. Section 273.245(a) imposes liability upon persons "operating a municipal waste landfill which affects a water supply," not simply upon persons "operating _a portion_ of a

municipal waste landfill which affects a water supply." The fact that the contamination here is emanating from a portion of the landfill filled by a prior operator -- not Adams -- is immaterial.

II. Was the Department's order directing Adams to develop and implement an abatement plan authorized under §316 of the Clean Streams Law?

The Department contends that it has the authority under §316 of the Clean Streams Law to order Adams to develop and implement an abatement plan because Adams owns or occupies land in the Commonwealth which has a condition creating pollution or a danger of pollution. According to the Department, groundwater beneath and surrounding the landfill is already polluted and creates a risk of further pollution, the contamination is emanating from the landfill, and Adams owns or occupies the entire landfill -- not just the portion of the landfill it filled. The Department, furthermore, maintains that Adams cannot assert that it is liable for less than the entire landfill under §316 because Adams had the opportunity to raise that issue in response to earlier Department orders but failed to do so.

In its memorandum in opposition, Adams argued that neither issue preclusion nor the doctrine of administrative finality bar it from challenging the assertion that it is liable under §316 of the Clean Streams Law for pollution emanating from any part of the landfill. According to Adams, moreover, the fact that a person is a landowner or occupier is insufficient, in itself, to require him to remediate pollution under §316. Adams maintained that, in addition, the person must have caused the pollution, or at least have known of the pollution and then associated himself with it in some way. In support of its position, Adams pointed to language in the Commonwealth Court's opinion in North Cambria Fuel Co. v. DER, 153 Pa. Cmwlth. 211, 621 A.2d 802

(1993). North Cambria turned on the construction of §315 of the Clean Streams Law -- not §316 -- but the court did discuss §316 during the course of its opinion, distinguishing the construction of the two sections. Referring to its decision in an earlier case, Philadelphia Chewing Gum Corp. v. Commonwealth, Department of Environmental Resources, 35 Pa. Cmwlth. 443, 387 A.2d 142 (1978), aff'd in part and appeal dismissed in part, sub nom. National Wood Preservers, Inc. v. Commonwealth, Department of Environmental Resources, 489 Pa. 221, 414 A.2d 37 (1980), appeal dismissed, 449 U.S. 803, 101 S. Ct. 47, 66 L.Ed.2d 7 (1980), the Commonwealth Court wrote, "This court went on to hold that before Section 316 liability attaches, the owner or occupant must (1) know or should have known of the existence or condition on the land and (2) must associate himself in some positive respect, beyond mere ownership or occupancy, with the condition after its creation." North Cambria Fuel, 153 Pa. Cmwlth. at ___, 621 A.2d at 1162. Adams maintained that this language shows that the Department is not authorized to order a person to correct an actual or potential polluting condition simply because the condition is located on land he owns or occupies.

We need not decide whether Adams, in response to earlier Department orders, had an opportunity to argue that it was liable for only some parts of the landfill under §316 and that Adams was, therefore, precluded from raising that issue here. Even if we assume there is no issue preclusion here, the Department is entitled to summary judgment.

Adams' assertions to the contrary notwithstanding, a landowner or occupier can have a duty to take corrective measures under §316 simply because a condition on that land is causing, or threatens to cause, pollution.

Section 316 provides, in pertinent part:

> Whenever the department finds that pollution or a danger of pollution is resulting from a condition which exists

on land in the Commonwealth the department may order the landowner or occupier to correct the condition ....

As this Board explained in our recent adjudication in McKees Rocks Forging, Inc. v. DER, EHB Docket No. 90-310-MJ (Adjudication issued, March 2, 1994), where we examined Philadelphia Chewing Gum and its progeny in detail, one is liable under §316 for any polluting condition on land he owns or occupies. A landowner or occupier need not have actual or constructive knowledge of the condition nor have associated with it in anyway. While we did not address the Commonwealth Court's North Cambria decision in our discussion of §316 liability in McKees Rocks, the language Adams refers to from North Cambria, quoted above, does not alter our conclusion. In the passage Adams quoted, the court simply described what it had held in Philadelphia Chewing Gum; the excerpt contained no language suggesting that the court believed the construction of §316 in Philadelphia Chewing Gum to be correct at the time it issued the North Cambria opinion. Even if the language Adams pointed to endorsed the Philadelphia Chewing Gum construction of §316, moreover, that language is only dictum. As Adams itself concedes, the issue in North Cambria was the construction of §315 of the Clean Streams Law, not §316. The court's statements with regard to §316, therefore, are not binding: "Statements of rules of law must be considered as those applicable to the particular facts of that case, and all other legal conclusions stated therein regarded as mere '*obiter dicta*' and not of binding authority." 1 Standard Pennsylvania Practice 2d §2:126.

Lessees of land are "owners or occupiers" of land under §316. See, *e.g.*, Adams Sanitation Company v. DER, 1991 EHB 249. Since the pollution here is emanating from land Adams leased, Adams is responsible for correcting the condition.

III. <u>Did the Department's letter and order involve retroactive applications of the law, which deprived Adams of its right to due process</u>?

The Department maintains that it is entitled to summary judgment with respect to Adams' assertions that the Department's letter and order involved retroactive applications of the law, which deprived Adams of its right to due process under the U.S. and Pennsylvania constitutions. According to the Department, neither the letter nor the order involved retroactive applications of the law. The Department also argued that, even if they were retroactive, the actions comported with due process because any retroactive effects were justified by a rational legislative purpose. Although Adams never responded to the Department's arguments regarding the order directing it to develop and implement the abatement plan, Adams maintained that the requirement that it replace Strines' water supply violated Adams' right to due process because that requirement involved a retroactive and unduly oppressive application of the law. According to Adams, the requirement that it replace Strines' water supply was retroactive because the contaminants were released into the environment before Act 101 was enacted.

The Department is entitled to summary judgment with respect to both the letter and the order. We shall direct our attention to the letter first.

As noted earlier in this opinion, the Department issued the letter directing Adams to replace Strines' water supply pursuant to §1104 of Act 101 and §273.245(a) of the Department's regulations. Section 273.245 was promulgated under the Solid Waste Management Act before Act 101 was even enacted. Section 273.245 became effective on April 9, 1988, 18 Pa. B. 1681; Act 101 was not enacted until July 28, 1988. Even if the Department's letter involved a retroactive application of Act 101, therefore, the letter would not be retroactive if it did not involve a retroactive application of §273.245(a).

It is clear here that the letter does not involve a retroactive application of §273.245(a). Section 273.245(a) provides that "[a] person ... operating a municipal waste landfill which affects a water supply by degradation, pollution or other means shall restore or replace the affected supply ...." 25 Pa. Code §273.245(a). Section 273.245 does not operate retroactively so long as, after the effective date of the regulation, (1) Adams operated a municipal waste landfill, and (2) contamination from the landfill affected the water supply. Both conditions are met here. As noted earlier, §273.245 went into effect on April 8, 1988. Adams continued to conduct solid waste operations at the landfill from that time until April 8, 1990, (Stip. 5), and an October 19, 1990, analysis of Strines' spring shows that the water supply was contaminated (Ex. A-13, p.13). As noted earlier in this opinion, Adams concedes, for purposes of this motion, that the contamination originated from part of the landfill. (Adams' memorandum in opposition, p.2). Although Adams had ceased operations in April of 1990 - before the October, 1990, analysis of Strines' water supply - there is no requirement under §273.245 that the landfill affect the water supply while the operator is actually operating the landfill.

The fact that the Department did not establish that the contaminants continued to enter the water supply after the effective date of the regulation does not preclude summary judgment. Adams argued that imposing liability on an operator under §273.245 for pollution which entered a water supply prior to the effective date of the regulation would give that regulation a retroactive effect. That argument is unavailing, however. The October, 1990 laboratory analysis shows that the contamination continued to affect the water supply after the effective date of the regulation. A regulation or statute does not operate retroactively simply because some of the facts or conditions upon

which its application depends came into existence prior to its enactment. Commonwealth, Department of Labor and Industry, Bureau of Employment Services v. Pennsylvania Engineering Corp., 54 Pa. Cmwlth. 376, 421 A.2d 521 (1980). Indeed, where no vested right or contractual obligation is involved, an act or regulation is not impermissibly construed retroactively when applied to a condition existing on its effective date, even though the condition results from events which occurred prior to that date. Creighan v. City of Pittsburgh, 389 Pa. 569, 132 A.2d 867 (1957); DeMatteis v. DeMatteis, 399 Pa. Super. 421, 582 A.2d 666 (1990).

The Department is also entitled to summary judgment with respect to its order directing Adams to abate the pollution pursuant to §316 of the Clean Streams Law. Even were we to assume, as Adams maintains, that the order involved a retroactive application of the law, the order would still comport with due process. The Commonwealth Court has held that the Commonwealth may apply regulations made pursuant to the police power retroactively when they are used to alleviate a dangerous condition. In Commonwealth, Department of Transportation v. Longo, 98 Pa. Cmwlth. 120, aff'd, 512 Pa. 639, 518 A.2d 265 (1986), property owners sought review of Department of Transportation regulations requiring landowners to post signs prohibiting left turns into their driveways. The Commonwealth Court upheld the requirement despite the retroactive nature of the regulation, writing:

> Clearly, the rules and regulations promulgated by the Commonwealth may be applied retroactively, because "persons hold their property subject to valid police regulation, made, and to be made, for the health and comfort of the people." Accordingly, the fact that a property's present dangerous condition arises only from past activities does not affect the appropriateness of invoking the police power to dispel that immediately dangerous condition. 510 A.2d at 834-35 (citations omitted, emphasis in original).

The same reasoning controls here.

IV. Were the Department's letter and order unduly burdensome, depriving Adams of its right to due process?

The Department maintains that it is entitled to summary judgment with respect to Adams' assertions that the obligations imposed by the Department's letter and order are unduly oppressive, violating Adams' right to due process.[7] According to Adams, the letter and order are unduly oppressive because Adams "bears no responsibility for the condition, has not associated with it, and obtained no profit from the activities which caused it." (Adams' memorandum in opposition, p. 24.) The Department argues that the fact that Adams did not contribute to causing the condition or benefit economically from it does not render the Department's actions unduly oppressive, especially where Adams benefited economically from other parts of the landfill. The Department also contends that, to the extent Adams asserts that the cost of complying with the letter and order were unduly oppressive, the Department is entitled to summary judgment because as part of such a claim Adams must introduce evidence of its own financial status and, by not including any assertions regarding its financial status in the supplemental pre-hearing memorandum, Adams has waived that issue.

The Department is not entitled to summary judgment with respect to this aspect of Adams' appeal. There are genuine issues of fact remaining which preclude summary judgment.

---

[7] This argument is to be distinguished from the general proposition that a party's alleged inability to comply with an order is not a defense to issuance of the order. James E. Fulkroad *et al.* v. DER, EHB Docket No. 91-141-W (Adjudication issued August 24, 1993).

A state's exercise of the police power violates due process if the means chosen are unduly oppressive. Lawton v. Steele, 152 U.S. 133, 14 S.Ct. 499, 38 L.Ed. 385 (1894). To determine whether an exercise of the police power is unduly oppressive, one must evaluate both the benefits and burdens it imposes. Here neither are well delineated. In its motion, the Department never detailed what specific benefits or burdens would result from the letter or the order. Adams' sole reference to benefits or burdens, meanwhile, consisted of a sentence pertaining to the "costs to remediate pollution." (Adams' memorandum in opposition, p. 23). In that passage Adams wrote, "Those costs have been variously estimated, but almost without question approach or exceed $2 million, assuming capping and upgrading the water treatment facility." (Adams' memorandum in opposition, p. 23.) Adams failed to identify any support for this figure, and whether the amount included the cost of replacing Strines' water supply is unclear. Although the Department argued that it is entitled to summary judgment in any event because Adams failed to address its financial status in its pre-hearing memorandum, the Department never, in its motion for summary judgment, asserted that Adams failed to raise the issue of its financial status. The Board has held previously that motions for summary judgment must set forth, with adequate particularity, the reasons for summary judgment and that representations in legal memoranda alone are insufficient. See Ernest Barkman, Grace Barkman, Ern-Bark Inc., and Ernest Barkman Jr. v. DER, EHB Docket No. 90-412-W (Opinion issued May 21, 1993).

ORDER

AND NOW, this 5th day of April, 1994, it is ordered that:

1) The Department's motion for summary judgment is granted with respect to Adams' assertions that:

a.) the Department's letter of August 21, 1990, was not authorized under either §1104(a) of Act 101 or §273.245 of the Department's regulations;

b.) the Department's order of October 22, 1990, was not authorized under §316 of the Clean Streams Law; and

c.) the letter and order involved retroactive applications of the law so as to deprive Adams of its right to due process.

2) The Department's motion for summary judgment is denied with respect to all other issues.

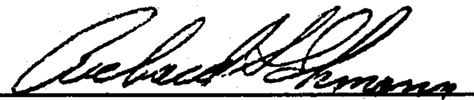
ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

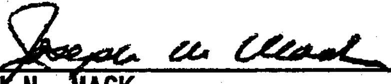
MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member



RICHARD S. EHMANN
Administrative Law Judge
Member



JOSEPH N. MACK
Administrative Law Judge
Member

DATED: April 5, 1994

cc: **Bureau of Litigation**
Library: Brenda Houck
Harrisburg, PA
For the Commonwealth, DER:
Kurt J. Weist, Esq.
Central Region
For the Appellant:
Robert B. Hoffman, Esq.
REED, SMITH, SHAW & McCLAY
Harrisburg, PA

jm

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
2nd FLOOR — MARKET STREET STATE OFFICE BUILDING
400 MARKET STREET, P.O. BOX 8457
HARRISBURG, PA 17105-8457
717-787-3483
TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOARD

P.A.S.S., Inc.	:	
	:	
v.	:	EHB Docket No. 94-012-MR
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: April 7, 1994
and BIO-GRO SYSTEMS, INC., PERMITTEE	:	

OPINION AND ORDER
SUR
PETITION FOR SUPERSEDEAS

By: Robert D. Myers, Member

Synopsis:

A Permit for the agricultural utilization of sewage sludge will not be superseded when the evidence shows that it poses no threat of harm to health or the environment. Appellant's evidence, based primarily on laboratory experiments, is not sufficient to overcome the volumes of evidence accumulated over the past several decades in actual field locations.

OPINION

P.A.S.S., Inc. (Appellant) filed a Notice of Appeal on January 18, 1994[1] contesting the issuance by the Department of Environmental Resources (DER) on December 16, 1993 of Solid Waste Permit No. 603340 (Permit). The Permit, issued to Bio-Gro Systems, Inc. (Permittee), authorized the agricultural utilization of sewage sludge on the J.C. Enterprises Farm in Ringgold Township and Timblin Borough, Jefferson County.

---

[1]A corrected Notice of Appeal was filed on January 26, 1994, correcting the numbering of certain paragraphs containing Appellant's objections.

On March 7, 1994, Appellant filed a Petition for Supersedeas to which Permittee filed an Answer on March 24, 1994. On that date a hearing was held on the Petition in Harrisburg before Administrative Law Judge Robert D. Myers, a Member of the Board, at which all parties were represented by legal counsel. On March 31, 1994 Appellant and Permittee filed post-hearing memoranda. DER chose not to exercise this option.

The facts in the narrative that follows are derived from the Petition and Answer, the testimony at the hearing and the exhibits admitted into evidence at the hearing.

The Permit was based upon an application filed with DER on April 22, 1992 and revised on February 18, 1993. Additional revisions and other information were filed on other dates throughout the pendency of the application, including dates subsequent to a public hearing held on June 24, 1993. The Permit authorizes the application of sewage sludge (known as Alcosoil) generated at the Alcosan Woods Run Treatment Facility on 14 non-contiguous fields on the J.C. Enterprises Farm. These fields, spread out over a 5 square mile area, range in size from 3 acres to 41 acres. Coal deposits beneath 10 of the fields have been deep mined.[2] The remaining overburden ranges from 100 to 400 feet in thickness and, very likely, is fractured naturally and as a result of the deep mining. Surface mining (principally of the Lower Freeport) also has been conducted in the area.

Alcosoil, according to the application, is a lime-stabilized sewage sludge with a pH of 11 to 12. It is a mixture of primary and waste-activated sludge from a treatment plant where over 95% of the flows come from domestic and

[2]These mined deposits consisted of the Lower Kittanning beneath 8 fields and both the Lower Kittanning and Lower Freeport (which lies above the Lower Kittanning) beneath 2 fields.

commercial customers and less then 5% from industrial customers. The industrial flows are all pretreated. The Permit, *inter alia*, specifies the application rate and acceptable application methods for the Alcosoil; stipulates the crops (hay, clover, grass) and crop rotations for each field; mandates erosion and sedimentation controls; requires pH to be maintained at 6.5; and calls for sampling and monitoring of the sewage sludge, the soils, the surface water and the groundwater.

Appellant (a Pennsylvania nonprofit corporation bearing the name P.A.S.S., Inc., an acronym for People Against Sewage Sludge) has members living adjacent to some of the permitted fields and has members obtaining their domestic water supplies from wells. No public water system is available to residents of the area. Appellant's evidence at the supersedeas hearing, primarily based upon the testimony of Reginald P. Briggs, a geologist, Dr. Stanford L. Tackett, a chemist, and Dr. Karl M. Schurr, a toxicologist, may be summarized as follows:

1. The components of sewage sludge can vary from day to day;

2. Sewage sludge from treatment plants handling industrial waste will contain heavy metals, especially lead;

3. Lead and other heavy metals will leach from soils even at a pH of 6.5 and enter the groundwater;

4. Fractures in the bedrock, occurring naturally or from deep mining, will permit groundwater to enter the mine pool (where the deep mining caverns have flooded) or the shallow groundwater beneath the floodplain of Pine Creek;

5. Members of Appellant obtain their domestic water supplies from the mine pool or the floodplain of Pine Creek;

6. Lead and other heavy metals in the groundwater will adversely affect the health of these members, especially children; and

7. Some of the slopes on the permitted fields exceed 20%, thereby increasing the risk that sewage sludge will run off the fields and contaminate surface water.

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

Appellant argues that lead contamination of the groundwater from which its members obtain their domestic water supplies will cause irreparable harm because of the deleterious effect on the health of these members. Appellant argues further that it is likely to prevail on the merits on this issue. Possible harm to the public or other parties from the issuance of a supersedeas was not addressed by Appellant.

Conceding that injury to the health of Appellant's members would constitute irreparable harm, we are not persuaded that the prospects of such a result are sufficient to justify a supersedeas. It is true that the components of sewage sludge may vary from day to day and that sewage sludge like that approved by the Permit will contain heavy metals such as lead. The evidence presented by Permittee, however, shows that the application rates approved by DER, in conjunction with isolation distances and other protective criteria, are so conservative that heavy metals contamination of soils or groundwater is an exceedingly remote possibility.

Dr. William E. Sopper, who testified for Permittee, has spent the last 30

years studying the use of municipal sewage sludge on reclamation sites. He has personally supervised the application of this material on more than 35 sites, monitoring them for a minimum of two years and some for as long as 12 years to determine the effect on soils, groundwater, vegetation and animals. As a consultant to the U.S. Environmental Protection Agency (EPA), he has analyzed over 80 projects where sewage sludge was used to reclaim mining sites in the United States, England, Scotland and Germany. His work has convinced him that properly treated and stabilized sewage sludge can be used in an environmentally safe manner to reclaim mining lands without any significant risk to animal or human health. Since the application rates for agricultural utilization are only about 1/10 those for reclamation, he concludes that the risk is virtually nonexistent.

Dr. Sopper's consulting work for EPA was part of a comprehensive risk assessment for sewage sludge conducted by EPA. As a result of that risk assessment, EPA's regulations at 40 CFR Chapter 503, effective February 19, 1993, provide that the lead content of sewage sludge cannot exceed 300 parts per million and that 268 pounds of lead per acre is the maximum that can be applied in a lifetime. The Alcosoil approved by the Permit has a lead content ranging between 77 and 83 parts per million, well below the 300 parts per million limit. When the annual application rate of 5 to 6 tons of sludge per acre is considered, the amount of lead being applied each year is minimal in Dr. Sopper's opinion.

DER's Stephen M. Socash supported Dr. Sopper's conclusions when he was called by Permittee. Socash has been closely involved with the development of the 1988 version of 25 Pa. Code Chapter 275, the regulations pertaining to the land application of sewage sludge, and with later developments concerning those regulations. He explained that DER looked at all the available research and

formulated the regulations on the basis of that information. The regulations contain application rates that are conservatively set. Then, they establish other criteria intended to prevent harm to the public or the environment if the application rates are not conservative enough. These criteria include, *inter alia*, isolation distances, soil requirements, slope limitations and soil conservation practices.

DER has issued permits for more than 1,250 agricultural utilization sites and 50 reclamation sites since the late 1970s and has monitored those sites ever since. No health or environmental problems have been found. Because of this history, DER concluded in 1988 that groundwater monitoring was not necessary on agricultural utilization sites and was optional on land reclamation sites.

Permittee's evidence, based on decades of data from actual application sites, is more persuasive, in our opinion, than the laboratory-derived evidence presented by Appellant. We are persuaded also by the fact that EPA, which has recently revised the safe-drinking-water level for lead to zero, has not banned lead-containing sewage sludge from land application. While Appellant's Dr. Tackett finds this puzzling, we find that it reinforces the volumes of evidence establishing that the agricultural utilization of sewage sludge poses no threat to health or the environment.

The only remaining issue relates to the slopes which, Appellant claims, exceed the 20% limitation on some of the fields. Mr. Briggs testified to this effect by using contour lines on a map rather than field surveys. As Permittee's Ronald F. Doumont testified, determining slopes in this manner is inexact because of map distortions and scale. He testified that DER requires a field survey of each field prior to the application of sewage sludge. Any slopes determined to exceed 20% at that time will be excluded. Taking all of this evidence into

consideration, we are not convinced that it warrants the granting of a supersedeas. Even accepting Mr. Brigg's measurements, the portion of each field affected is generally 5% to 10% of the acreage. Clearly, the bulk of the acreage is suitable and the field surveys will determine the suitability of the rest.

Finding no threat of irreparable harm to Appellant and finding no likelihood that Appellant will prevail on the merits, we refuse to grant a supersedeas.

ORDER

AND NOW, this 7th day of April, 1994, it is ordered that the Petition for Supersedeas is denied.

ENVIRONMENTAL HEARING BOARD

ROBERT D. MYERS
Administrative Law Judge
Member

DATED: April 7, 1994

cc: **Bureau of Litigation**
Library, Brenda Houck
For the Commonwealth, DER:
Donna L. Duffy, Esq.
Northwest Region
For the Appellant:
Robert P. Ging, Jr., Esq.
Confluence, PA
For the Permittee:
Louis B. Kupperman, Esq.
Cathy Curran Myers, Esq.
OBERMAYER, REBMANN, MAXWELL & HIPPEL
Harrisburg, PA

sb

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
2nd FLOOR — MARKET STREET STATE OFFICE BUILDING
400 MARKET STREET, P.O. BOX 8457
HARRISBURG, PA 17105-8457
717-787-3483
TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOARD

MRS. PEGGY ANN GARDNER, MRS. BARBARA JUDGE and MRS. MARY JANE ECKERT

v. : **EHB Docket No. 93-381-E**

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES : **Issued: April 14, 1994**

OPINION AND ORDER
SUR MOTION TO DISMISS

By: Richard S. Ehmann, Member

Synopsis:

The Board denies the Department of Environmental Resources' (DER) motion to dismiss for lack of jurisdiction. DER failed to show that its determination that it would not compensate the appellants for their rights to coal mine reserves underlying Moraine State Park (for which DER previously had denied a variance for permission for appellants to surface mine) did not affect the appellants' rights, privileges, or obligations and that the Board lacked jurisdiction to consider the appeal.

OPINION

The instant appeal was filed with this Board on December 23, 1993 by Mrs. Peggy Ann Gardner, Mrs. Barbara Judge, and Mrs. Mary Jane Eckert (collectively "Gardners"). Presently before the Board is DER's motion to dismiss the appeal and Gardner's response thereto.

In their notice of appeal, Gardners assert that they are the heirs of C.W. House, who was the owner in fee of a 189 acre tract of land known as the C.W.

House Tract located in Brady Township, Butler County, which was condemned in fee by the Commonwealth of Pennsylvania, Department of Forests and Waters (DER's Predecessor) in January of 1967 in order to include the C.W. House Tract in Moraine State Park. They further assert that on April 26, 1967, the Department of Forests and Waters filed a Declaration of Relinquishment in the Court of Common Pleas of Butler County, revoking its condemnation of the C.W. House Tract with respect to surface mineable coal and surface coal mining rights and revesting these rights in the owners of the C.W. House Tract. Gardners assert they are the current owners of these rights.

In 1988, Gardners filed a Petition for Appointment of Viewers pursuant to Section 502(e) of the Eminent Domain Code, Act of June 22, 1964, Special Sess., P.L. 84, as amended, 26 P.S. 1-502(e), in the Common Pleas Court of Butler County seeking compensation from DER for their right to surface mine coal on the C.W. House Tract. The Common Pleas Court sustained DER's preliminary objections on the basis that the Gardner's claim of a "de facto" taking was not ripe because an administrative remedy, in the form of their applying for a variance pursuant to Section 4.2(c) of the Surface Mining Conservation and Reclamation Act, Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.4b(c), for permission to mine the coal under the previously condemned land in Moraine State Park had not yet been exhausted. Upon an appeal of this decision to the Commonwealth Court, the Court affirmed the Common Pleas Court's decision. Gardner v. Commonwealth, DER, 145 Pa. Cmwlth. 345, 603 A.2d 279 (1992).

Gardners then asked DER to make a determination on whether the tract qualified for such a variance. DER responded that it would require a full and complete surface mining permit application and an application for a variance pursuant to 25 Pa. Code §86.102(4). Exhibits A, B, and C attached to the notice

of appeal are copies of the letters from DER setting forth these requirements. Gardners appealed these DER letters to the Board at two separate appeals (Docket Nos. 92-508-E and 92-514-E) which were consolidated at Docket No. 92-508-E and eventually terminated by means of a Consent Adjudication entered into by the parties on March 10, 1993 and approved by the Board on March 17, 1993. See Exhibit D to notice of appeal. In this Consent Adjudication, the parties, inter alia, agreed that the information then available to DER was sufficient for it to determine whether to approve the variance; DER denied the variance; and it was agreed that this action of DER was final and appealable to this Board. As part of the Consent Adjudication, DER also agreed to undertake a program of geophysical testing and drilling at the site, to be completed by May 30, 1993, and to provide Gardners with the results of its testing and drilling.

In the Stipulation filed on March 22, 1994, (Stip.), the parties stipulate that DER undertook an analysis of the geology at the C.W. House Tract, which included the taking of resistivity soundings, and then the development of a prognosis for drill intercepts undertaken by DER employees and a consultant for DER, Bill Edmunds, which was concurred with by Jack Foreman, who was a consultant on behalf of Gardners (Stip.). Drilling supervised by DER employees and Mr. Foreman was done to confirm and describe the stratgraphy (Stip.). These same people, along with Bill Edmunds, selected coal for analysis (Stip.). Based on the drilling and testing results provided them by DER, Gardners' consultant prepared a mineable coal reserve estimate which was presented to DER on November 5, 1993, along with their estimate of the value of just compensation for their surface mineable coal and mining rights. When the test results were analyzed by the DER employees and Bill Edmunds, their recommendation was that the coal could not economically be mined because of its depth, quantity, and quality, and the

difficulty and expense of mining in conformance with law (Stip.). (Their analytical data is attached to the parties' Stipulation.) DER Deputy Secretary James Grace, on the recommendation of the DER employees and Bill Edmunds, made the determination that DER would not offer the Gardners any money for the coal (Stip.). That determination was communicated to the Gardners' counsel by DER's counsel by telephone on December 7, 1993 (Stip.).

In their appeal, Gardners challenge DER's determination that they are not entitled to compensation for the coal reserves on the C.W. House Tract and their mining rights, objecting, inter alia, that this violates their rights under the Fifth Amendment to the United States Constitution and under Article 1, Section 10 of the Pennsylvania Constitution. In its motion to dismiss, DER advances the Gardners have failed to show that DER's challenged communication was an "adjudication" or "action" of DER. DER also argues we have no jurisdiction because we lack the jurisdiction to order DER to monetarily compensate the Gardners for any "taking" of its property by DER. DER instead contends that the Gardners should have appealed the variance denial to the Board, and that this was the only appealable action or adjudication by DER which affected their property rights.

As we stated in Huntingdon Valley Hunt v. DER, EHB Docket No. 93-133-W (Opinion issued october 28, 1993), the Board has jurisdiction to hear appeals from DER "actions" and "adjudications" as those terms are defined by our rules and the Administrative Agency Law. An "action" is defined by our rules as:

> Any order, decree, decision, determination or ruling by [DER] affecting personal or property rights, privileges, immunities, duties, liabilities or obligations of any person, including, but not limited to, denials, modifications, suspensions and revocations of permits, licenses and registrations....

25 Pa. Code §21.2(a). An "adjudication is similarly defined by the Administrative Agency Law. 2 Pa. C.S. §101. As we explained in Huntingdon Valley Hunt, we have long interpreted these provisions to mean that applicable actions are ones that affect personal or property rights, privileges, or obligations (citing County of Clarion v. DER, EHB Docket No. 92-274-W (Opinion issues April 23, 1993); Benson Lincoln Mercury, Inc. v. Cmwlth., Dept. of Transportation, 145 Pa. Cmwlth. 159, 602 A.2d 496 (1992)).

We find DER's determination that it would not give the Gardners any money for their coal underlying Moraine State Park is an appealable action reviewable by this Board. Clearly, DER's determination here has affected the Gardners' property rights vis a` vis their coal. The parties do not dispute that the Gardners hold the rights to this coal and, since DER has denied them a variance for permission to surface mine it, the Gardners cannot mine this coal.

We further reject DER's contention that because we lack jurisdiction to award monetary damages for any taking by DER to the Gardners, we lack jurisdiction to review DER's determination that the Gardners' property rights were not worth any compensation. The Gardners are not asking the Board for monetary relief; rather, they are asking us to review whether DER was correct in its determination that there are no economically mineable coal reserves on the C.W. House Tract and, if DER was incorrect, whether the Gardners are entitled to be compensated for the value of their coal which they argue DER has "taken" by its refusal to allow them to mine and refusal to justly compensate them for it. We agree that we have jurisdiction to the extent of the relief sought by the Gardners' appeal. See Beltrami Enterprises, Inc. v. DER, _____ Pa. Cmwlth. ____, 632 A.2d 989 (1993) (Board has jurisdiction over appeals which, inter alia, raise constitutional challenges to an order of DER based upon takings-related

analysis); Beltrami Brothers Real Estate, Inc., et al. v. DER, EHB Docket No. 89-016-W (consolidated appeal) (Opinion issued July 30, 1993) (Board has jurisdiction to determine whether property was taken by DER without just compensation where alleged taking did not result from DER exercising power of eminent domain).[1]

Both the Fifth Amendment of the United States' Constitution and Article I, Section 10 of the Pennsylvania Constitution provide that private property shall not be taken for public use without just compensation.[2] The Gardners could not have known whether DER would compensate them for this coal until DER reached the determination which they have challenged in the present appeal.[3] We accordingly deny DER's motion.

---

[1]See, also, the Commonwealth Court's opinion in Machipongo Land and Coal Company v. Department of Environmental Resources, 155 Pa. Cmwlth. 72, 624 A.2d 742 (1993), wherein a petition for review of the designation by the Environmental Quality Board of certain lands as unsuitable for mining at 25 Pa. Code §86.130(b)(14) was transferred to the Board under the doctrine of primary jurisdiction. In reaching its determination that the Board was the more appropriate forum to adjudicate petitioner's claim that the regulation effected a taking without just compensation, the Commonwealth Court noted the Board's authority to consider whether a regulatory taking has occurred.

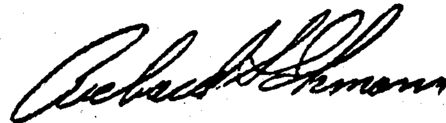
[2]The courts of the Commonwealth have interpreted the takings clause using the same framework as the federal courts. See Mock v. DER, ____ Pa. Cmwlth. ____, ____, n. 10, 623 A.2d 940, 947, n. 10 (1993).

[3]We recognize that the Gardners' response to DER's motion also alternatively asks us to hold that a taking occurred when the variance was denied in the Consent Adjudication approved at EHB Docket No. 92-508-E, leaving only the question of damages over which the Board lacks jurisdiction. We are not deciding the takings issue in this Opinion, as we are only addressing DER's jurisdictional challenge, but we point out that if the Gardners believe they are entitled to summary judgment on this issue, they may bring the matter before us in an appropriately supported motion rather than in this response to DER's motion.

ORDER

AND NOW, this 14th day of April, 1994, it is ordered that DER's motion to dismiss for lack of jurisdiction is denied.

ENVIRONMENTAL HEARING BOARD



RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: April 14, 1994

cc: **Bureau of Litigation**
Library: Brenda Houck
Harrisburg, PA
For the Commonwealth, DER:
Virginia J. Davison, Esq.
Bureau of Legal Services
For the Appellant:
Stanley R. Geary, Esq.
BUCHANAN INGERSOLL
Pittsburgh, PA

sb

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
2nd FLOOR — MARKET STREET STATE OFFICE BUILDING
400 MARKET STREET, P.O. BOX 8457
HARRISBURG, PA 17105-8457
717-787-3483
TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOARD

ZANITA A. ZACKS-GABRIEL :
:
v. : **EHB Docket No. 93-382-E**
:
COMMONWEALTH OF PENNSYLVANIA, :
DEPARTMENT OF ENVIRONMENTAL :
RESOURCES and HARBORCREEK : **Issued:** April 21, 1994
TOWNSHIP SUPERVISORS, Permittee :

OPINION AND ORDER
SUR MOTION TO DISMISS

By Richard S. Ehmann, Member

Synopsis

Where a third party appeals the Department of Environmental Resources' ("DER") issuance of a permit and files her appeal more than thirty days after publication of notice of DER's issuance of the permit in the Pennsylvania Bulletin, this Board lacks jurisdiction over such an untimely appeal and must therefore dismiss it.

OPINION

Background

On December 21, 1993, this Board received a Notice of Appeal from Zanita A. Zacks-Gabriel ("Zacks-Gabriel"). The Notice of Appeal challenged DER's issuance of Water Obstruction and Encroachment Permit No. E25-494 to the Harborcreek Township Supervisors. The permit authorizes Harborcreek to remove an existing structure in Eight Mile Creek and replace it with a twin cell reinforced box culvert and twin spans to convey Township Road T-753 over the creek. The permit

was submitted to us with Zacks-Gabriel's Notice of Appeal. It is dated April 16, 1993.[1] The Notice of Appeal states that Zacks-Gabriel first received notice of this permit on December 2, 1993.

On March 2, 1994, DER filed a Motion to Dismiss for Lack of Jurisdiction, which seeks the dismissal of Zacks-Gabriel's appeal on two separate bases. DER's Motion alleges that this appeal was untimely filed because it was filed more than thirty days after notice of the permit's issuance appeared in the Pennsylvania Bulletin. DER's motion also alleges that the Zacks-Gabriel appeal asserts DER's failure to enforce conditions of the permit and such DER failures are not actions appealable to this Board.

While awaiting Zacks-Gabriel's response to DER's Motion, on March 7, 1994, we received a similar Motion to Dismiss on behalf of Harborcreek.[2] Zacks-Gabriel filed no timely response to DER's Motion.[3]

---

[1]The Notice of Appeal also challenges the issuance of Permit GP-3 to Richard Long. These permits are separate permits issued by DER to two different entities. Moreover, Zacks-Gabriel advised the Board that Long's permit is dated September 29, 1993. Accordingly, by Order dated February 15, 1994, the Board ruled that the appeal as to Long's permit was a separate appeal and assigned it Docket No. 93-385-E. This opinion does not address the appeal of Long's permit.

[2]Because we are granting DER's Motion to Dismiss, we do not deal with Harborcreek's Motion which raises identical issues.

[3]On March 28, 1994, four days after her response to this Motion was due, this Board received Zacks-Gabriel's Answer to Department's Motion to Dismiss. It admits this appeal was filed untimely and stipulates Zacks-Gabriel's consent to dismissal on that basis while also asserting we have jurisdiction over this appeal. The letter transmitting this Answer to us also indicates consent to dismissal based on (continued...)

DER's Motion has attached to it page 1086 from Volume 10 of the Pennsylvania Bulletin of March 6, 1993. This page contains notice of issuance of this permit to Harborcreek. As Zacks-Gabriel is not the permittee in this appeal, she had thirty days from publication of this notice within which to timely appeal under 25 Pa. Code §21.52(a). Lower Allen Citizens Action Group v. Department of Environmental Resources, 119 Pa. Cmwlth. 263, 538 A.2d 130 (1988), Gerald C. Grimaud, *et al.* v. DER, *et al.*, EHB Docket No. 93-344-E (Opinion issued March 9, 1994) ("Grimaud"). This means that while she did not have to file an appeal within thirty days of the permit's issuance, Zacks-Gabriel had to file her appeal within thirty days of this March 6, 1993 publication. Zacks-Gabriel's appeal was not received until over nine months after this publication. It was thus untimely filed under 25 Pa. Code §21.52(a) and, as stated in Grimaud, we lack jurisdiction over such appeals. Accordingly, DER's motion is meritorious and must be granted. Thus, we enter the following order.

---

[3](...continued)
untimeliness as long as the dismissal is "...without prejudice as to any other rights I would have had, had the appeal not been filed." As this Board does not negotiate the status of dismissals with parties, we have elected to dismiss this matter on the merits of DER's Motion.

ORDER

AND NOW, this 21st day of April, 1994, it is ordered that DER's Motion to Dismiss is granted and this appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

MAXINE WOELFLING
Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: April 21, 1994

See following page for service list.

cc: **For the Commonwealth, DER:**
Mary Susan Gannon, Esq.
Michael D. Buchwach, Esq.
Northwest Region
For Appellant:
Zanita Zacks-Gabriel, Esq.
Erie, PA
For Permittee:
Robert C. Ward, Esq.
DUNLAVEY, WARD & PAGLIARI
Erie, PA

bl

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
2nd FLOOR — MARKET STREET STATE OFFICE BUILDING
400 MARKET STREET, P.O. BOX 8457
HARRISBURG, PA 17105-8457
717-787-3483
TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOARD

TED BABICH :
v. : EHB Docket No. 94-002-E
COMMONWEALTH OF PENNSYLVANIA :
DEPARTMENT OF ENVIRONMENTAL RESOURCES : Issued: April 21, 1994

OPINION AND ORDER SUR MOTION FOR SUMMARY JUDGMENT

By: Richard S. Ehmann, Member

Synopsis

Where a person appeals from DER's denial of his application for certification as a storage tank installer/inspector and then simply withdraws his appeal, the appeal is terminated with prejudice pursuant to 25 Pa. Code §21.120(e). In a subsequent appeal from a DER denial of a second application for certification by this same person, under the doctrine of *res judicata* a DER Motion For Summary Judgment will be sustained as to DER's second certification denial where the grounds for appeal are identical to those raised in the first appeal. DER had no duty to warn the *pro se* appellant of the potential for application of the doctrine of *res judicata* in a subsequent appeal prior to his withdrawal of his first appeal.

25 Pa. Code Chapter 245 and the statutes under which it is promulgated do not contain a "grandfather clause" allowing existing storage tank installers to be excused from compliance with this chapter's mandate of certifications for all storage tank installers or inspectors.

Background

On January 5, 1994, Ted Babich ("Babich") filed a Notice Of Appeal with this Board. Babich is appealing from DER's letter dated September 7, 1993 stating he meets the qualifications for temporary certification in classes UMX and UMR as a storage tank installer and inspector under Section 107(d) of the Storage Tank and Spill Prevention Act, Act of July 6, 1989, P.L. 169, No. 32, 35 P.S. §6021.101 *et seq.* ("STSPA") and 25 Pa. Code §§245.111 and 245.113. The letter indicates Babich is so certified until September 21, 1994. Included with this letter is information concerning testing for a more permanent certification. Also challenged by Babich is a second separate DER letter also dated September 7, 1993 denying Babich certification in classifications UMeX, UMvl and IUM.

After this appeal's commencement the parties filed their respective Pre-Hearing Memoranda. Simultaneously with the filing of its Pre-Hearing Memorandum, DER filed a Motion For Summary Judgment. DER's Motion and supporting Memorandum Of Law argue that as to the first four objections to its letters set forth in Babich's appeal, the doctrine of *res judicata* bars the raising of same. As to the fifth ground, DER's Motion asserts there is no "grandfather clause" in the applicable regulations. It also asserts that Babich seeks certification under a "grandfather clause". Finally, it asserts that Babich has failed to demonstrate compliance with these regulations as to the three other certifications he sought, so no certificates may be issued to him by DER in those classifications.

On April 1, 1994, we received Babich's Objections to DER's Motion For Summary Judgment. Babich, who appears without the benefit of legal counsel to represent his interests, asserts in his Objections that he was not notified of

the applicability of the doctrine of *res judicata* in his prior withdrawn appeal. Next, he asserts his new application for certification is a new issue, so what happened to his prior application does not affect it and he should be able to go forward on all five grounds for appeal. Babich also asserts that the dismissal of his prior appeal should have been without prejudice and that as a result, its termination should not be considered as a final judgment. In a statement headed New Matter, Babich next argues that his temporary certification should be permanent, not temporary, since he meets the experience and education minimum requirements in classifications UMX and UMR. Babich next asserts his Certification No. 1825 should be extended until all appeals are exhausted. Finally, he asserts federal regulation of underground storage tanks supersede regulation thereof by DER.[1] Babich provided the Board no memorandum of law in support of these objections.

Discussion

This Board's ability to grant motions for summary judgment cannot be questioned. Robert L. Snyder, et al. v. DER, 138 Pa.Cmwlth. 534, 588 A.2d 1001 (1991), petition for allocatur dismissed as improvidently granted, ___Pa.___, 632 A.2d 308 (1993). However, we grant such motions only in cases that are clear and free from doubt. Hayward v. Medical Center of Beaver County, 530 Pa. 320, 608 A.2d 1040 (1992) ("Hayward"). Moreover, in addressing such motions, the Board will view the underlying facts in a light most favorable to the non-moving party. RESCUE Wyoming, et al. v. DER, et

---

1 Because Babich's Objections suggest at No. 5 that his temporary certification should be extended until all appeals are satisfied, on April 5, 1994, we issued an order which provides that insofar as Babich is seeking supersedeas by making this statement, his request is denied without prejudice because it fails to conform to the minimum standards for a petition for supersedeas which are set forth in our rules.

al., EHB Docket No. 91-503-W (Opinion issued March 30, 1994). Here, Babich is the non-moving party.

Res Judicata

DER's main ground for summary judgment is its argument that the legal doctrine of *res judicata* bars our consideration of the first four of Babich's five objections to DER's letter.

DER asserts without contradiction from Babich that Babich previously applied for a certification under the STSPA and that DER denied his application. On March 25, 1993, Babich appealed that denial to this Board and it was assigned Docket No. 93-067-E ("the 1993 Appeal"). In that appeal Babich voiced four objections. They were:

> 1. I have been installing tank-pumps prior to new regulations.
>
> 2. Commonwealth always had regulations on tank-pumps just revised regulations.
>
> 3. New regulations unconstitutional any knowledge received prior to seven years does not apply.
>
> 4. Qualifications of each Board member who enforced or made new regulations such as did each member to install 20 tanks or 20 categories each to know whether it takes 20 exact installations and not 19 or 21 to be qualified.

DER avers that there subsequently were discussions between DER and Babich and the parties agreed that Babich could reapply for a certification, DER would review same, DER would notify Babich of DER's decision and Babich could appeal DER's decision to this Board. DER also advised Babich he could either continue the 1993 Appeal or withdraw it. Thereafter, Babich wrote to us requesting to withdraw his appeal. In response to Babich's letter and on July 13, 1993, the Board entered its order marking the 1993 Appeal's docket closed and discontinued.

Babich then reapplied to DER for his installer/inspector certification. After a discussion with DER, Babich agreed to reduce the categories in which he sought such a certification from 19 to 3, but thereafter sought DER's certification in 5 categories. After review of his application, DER granted Babich temporary certifications in two of the five categories and denied it in the other three. According to DER's letter to Babich (attached to his Notice Of Appeal), these denials were based on DER's perception that Babich failed to sufficiently document his fulfillment of the requirements for such certifications. This is the same concept underlying the DER certification denial which caused Babich to initiate the 1993 Appeal.

DER argues from these facts that when the instant appeal and the 1993 Appeal are compared, they show that persons or parties are identical, as is the identity of the quality or capacity of the parties suing and being sued. It also asserts an identity of causes of action and an identity of issues. From its conclusion that these elements all exist, DER asserts *res judicata* applies to bar this appeal because it is subsequent to the 1993 Appeal wherein a final judgment was obtained. DER cites Mr. and Mrs. John Korgeski v. DER, 1991 EHB 935 ("Korgeski") as authority for this argument. As a Board we have applied this doctrine previously in the cited opinion and elsewhere. This doctrine does bar relitigation of causes of action and facts or issues previously litigated and we will apply it in the proper situation. Dunkard Creek Coal, Inc. v. DER, EHB Docket No. 92-439-E (Opinion issued April 21, 1993) ("Dunkard Creek").

There is no question that we have before us in the instant appeal the same parties in the same posture as the 1993 Appeal. There is also no question that Babich raised four identical issues in each of these appeals.

Moreover, in each appeal, there is an appeal from a denial of certification to Babich by DER. To this extent there is an identity of the four factors. However, here Babich also challenges DER's grant of two temporary certifications. Such an issue was not before us in the 1993 Appeal. We recognize that this is before us here because in his Objections To Department Of Environmental Resources For Motion For Summary Judgment at No. 4, Babich says in part: "Permanent certification should be issued without examination by DER." Thus, the two appeals are not identical in all ways.

However, insofar as Babich is challenging DER's denial of his request for installer/inspector certification in the three classifications for these four reasons, partial summary judgment based upon this *res judicata* theory has merit. In this more limited area, there is a match up of the 1993 Appeal and the current appeal.

In response to DER's Motion, Babich asserts he was not notified he could be barred by *res judicata* from raising the same issues if he were to appeal a DER denial of his second application for certification. Concerning the 1993 Appeal, on June 25, 1993, DER's attorney wrote to Babich on DER's behalf in connection with the 1993 Appeal. In her letter (Exhibit M-2 to DER's Motion), she states in relevant part:

> It is my understanding that you agreed to reapply to the Department. I am advised by the Department's program staff that when the Department receives your resubmitted application, the Department could review the application and make a determination within approximately two to three weeks. You will be notified of the Department's decision. If the Department denies you certification, based on your new application, you have the right to and may appeal that decision to the Environmental Hearing Board.
>
> In our phone conversation we also discussed the status of your current appeal and your options for continuing or withdrawing that appeal. It is my understanding that you agreed to withdraw your present appeal and that you will

notify the Board, in writing, that you wish to withdraw your appeal. Please send a copy of your letter to the Board to the Department at the address above. If you do not withdraw your appeal, you should respond to the Department's Request for Admissions and Interrogatory and First Set of Interrogatories. These documents where [sic] sent to you by the Department on June 22.

Your decision to reapply for certification and to withdraw your present appeal may affect your legal rights and you may want to consult with your attorney before you do so. Should you have any questions, please feel free to contact me at 442-4262.

It is clear from this letter that DER's counsel left to Babich the decision of whether to withdraw or proceed with the 1993 Appeal; she did not advise him as to how to proceed and clearly could not ethically do so since she was already representing DER in that appeal where Babich and DER were adversaries. Nevertheless, DER's counsel did warn Babich that withdrawal of this appeal could affect his legal rights and he should talk to his lawyer about the impact thereof. Counsel for DER could do no more.

Moreover, when Babich filed his Notice Of Appeal in the 1993 Appeal, he listed Attorney James J. Gladys as his lawyer. While the record in that appeal shows a letter from this attorney indicating he does not represent Babich,[2] it also shows a letter to Attorney Gladys from this Board (dated July 1, 1993) indicating we needed some indicia of Babich's assent to this position because Babich had stated in writing to us that Mr. Gladys was his attorney. Before we received any such response from Babich or Gladys we received Babich's letter withdrawing this appeal. All of this does not show

---

2 We may take judicial notice of the record therein. See Dunkard Creek and the cases cited in that opinion.

Babich had counsel but shows that at least Babich clearly had a lawyer he could talk to about his rights if he wished to retain the lawyer to provide this advice.

Finally, Babich has failed to show some duty or obligation on this Board to provide him such advice. No such duty exists. The Board's role is to adjudicate the dispute between DER and Babich. It cannot fulfill that obligation with the impartiality which Babich and DER have the right to expect if it provides legal counsel to a party appearing before it in regard to the proceeding over which it is presiding. In short, such partisan role is the antithesis of the Board's adjudicatory duty. Since no duty to give Babich this advice exists, Babich's argument must be rejected.

Babich also argues that the 1993 Appeal should not have been terminated with prejudice. In that appeal Babich wrote to this Board saying: "As per conversation with Chief Counsel Barbara Grabowski I am withdrawing my appeal and reapplying for storage tank installer/inspector license." (DER Exhibit M-3[3]) Nothing in Babich's letter gives any clue that he sought to have that appeal withdrawn without prejudice. Had he done so the Board would have considered his request, but in the absence of such a request the Board operates in accordance with the mandate in its rules. 25 Pa. Code §21.120 provides a withdrawal of an appeal prior to adjudication "... shall be with prejudice as to all matters which have preceded the action unless otherwise indicated by the Board." In conformance with this rule, the 1993 Appeal's

---

3 The Exhibits identified in this opinion are attached to DER's Motion.

withdrawal by Babich was with prejudice. Babich gives us no reason to ignore this rule, so we reject this argument. Since the 1993 Appeal was ended with prejudice to Babich, *res judicata* is applicable here under Korgeski.

Babich's other Objections to DER's Motion include how long the temporary certification should be good for, whether it should be permanent certification and whether or not federal regulations of underground storage tanks supersede state regulation thereof. All of them fail to address or rebut DER *res judicata* argument. Accordingly, we need not address their merit.

Babich's Fifth Objection

In his current appeal Babich not only raised the four objections addressed above but also a fifth objection. In it Babich says he has installed tanks under prior regulations and should be permitted, based on that experience, to continue to do so. He asserts he should be "grandfathered" into such an allowance.

DER's Motion seeks summary judgment on this objection, too. It asserts that as to the three certifications which DER denied the regulations set minimal standards, that Babich's application did not show Babich met these standards and that the regulations contain no "grandfather clause". Babich fails to cite to us the location of a "grandfather clause" in the STSPA or the regulations dealing with storage tanks and installer/inspector certifications. Our review of the STSPA and the regulations promulgated thereunder reveal no such clause. 25 Pa. Code §§245.101 through 245.141 deal explicitly with certifications of this type. Nothing in these sections deals with a "grandfather clause." The closest they come to anything like that is in 25 Pa. Code §245.103(a). That section authorizes DER to temporarily certify a

person as an installer and inspector when that person meets the minimum experience requirements. However, 25 Pa. Code §245.103(c) then specifies that by September 21, 1994, even such temporary certificate holders must pass an examination to be certified as permanent certificate holders or suffer revocation of their temporary certificates. Thus, on its face there seems to be little merit to this fifth ground for appeal.

However, this fifth ground for appeal could be a broad attack on the validity of the statute and regulations for failing to provide a "grandfather clause". Further, such a challenge might cover more than merely the areas of certification in which Babich was issued only a temporary certificate. If this is Babich's challenge, his task before us is substantial particularly since he has elected to proceed *pro se*. However, according to Hayward we can only grant DER's Motion if it is clear and free from doubt. On this issue DER's Motion is not clear or free from doubt; instead it does not address this potential argument at all. As a result, here it must be denied.

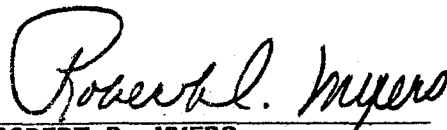
As stated earlier in this opinion, we have also denied this motion to the extent Babich is using this appeal to challenge DER's issuance of his temporary certificate in classifications UMX and UMR. Looking at his appeal from this perspective, it appears that at a minimum he is challenging the reasonableness of these regulations generally and as applied to him. Apparently he is also challenging the constitutionality of DER's application of these regulations to him. This appeal has been scheduled for a hearing on its merits on May 9, 1994. The parties are advised that in light of the order below, sustaining DER's Motion in part, they will be limited in the evidence they may offer to that evidence relevant to the remaining issues.

O R D E R

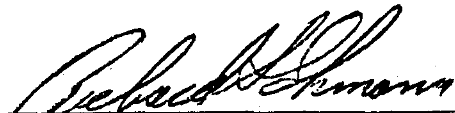
AND NOW, this 21st day of April, 1994, it is ordered that DER's Motion For Summary Judgment is granted in part and denied in part. It is ordered that the Motion is granted to the extent the first four objections in Babich's Notice Of Appeal raise a challenge to DER's denial of his certification in classifications UMeX, UMvL and IUM. It is also ordered that the Motion is granted as to Babich's fifth objection, to the extent it asserts a "grandfather clause" exists and DER erred in failing to certify him pursuant thereto. It is ordered that the Motion is denied in all other respects.

ENVIRONMENTAL HEARING BOARD

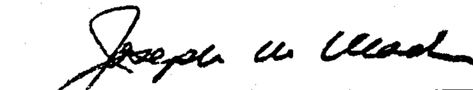
MAXINE WOELFLING
Administrative Law Judge
Chairman



ROBERT D. MYERS
Administrative Law Judge
Member



RICHARD S. EHMANN
Administrative Law Judge
Member



JOSEPH N. MACK
Administrative Law Judge
Member

DATED: April 21, 1994

cc: **Bureau of Litigation**
Library: Brenda Houck
For the Commonwealth, DER:
Barbara Grabowski, Esq.
Western Region
For Appellant:
Ted Babich, *pro se*
Glenwillard, PA

med

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
2nd FLOOR — MARKET STREET STATE OFFICE BUILDING
400 MARKET STREET, P.O. BOX 8457
HARRISBURG, PA 17105-8457
717-787-3483
TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOARD

NATIONAL FORGE COMPANY	:	
	:	
v.	:	EHB Docket No. 93-227-E
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: April 22, 1994

ADJUDICATION

By Richard S. Ehmann, Member

Synopsis

Where a DER interpretation of 25 Pa. Code Chapters 271 and 287 is that impoundments which are a part of an industrial establishment's wastewater treatment plant are regulated under 25 Pa. Code Chapters 287, that interpretation will not be overturned unless clearly erroneous. DER's interpretation of these regulations is not clearly erroneous because, though the wastes in these impoundments include a sludge comprised in part of sewage solids, they do not contain "sewage sludge" as defined by 25 Pa. Code §271.1. Sludge from such a treatment plant is also not like wastes generated in people's homes, so it also does not fall within the group of wastes defined to be "municipal wastes".

25 Pa. Code Sections 271.2(b)(3) and 287.2(b)(3) refer to "sewage sludge" as defined in 271.1 and provide that such sewage sludge will be

treated as "municipal waste." These regulation subsections do not provide that every sludge which is in part made up of sewage solids falls within the group of sludges defined as "sewage sludge".

Where parties submit a matter to this Board for adjudication based upon stipulated facts, the Board may not consider allegations as to additional facts in a party's brief.

BACKGROUND

On August 12, 1993 this Board received an appeal by National Forge Company ("Forge"). Forge was appealing the position recited in a letter dated July 14, 1993 from the Commonwealth of Pennsylvania Department of Environmental Resources ("DER"), concerning an impoundment at Forge's plant in Brokenstraw Township, Warren County. The letter signed by Brian Mummert, the Residual Waste Coordinator of DER's Waste Management Office in Meadville, stated that DER had determined that the impoundment in that facility's wastewater treatment plant is a residual waste impoundment subject to DER's residual waste regulations. The letter also stated that this impoundment is not exempt from these regulations by operation of 25 Pa. Code §287.2(b)(3) because the facts as to the impoundment's use makes that regulation inapplicable. Finally, it concludes that DER's Form T3 must be filled out by Forge as to this impoundment and should be submitted to DER within 30 days.

On October 4, 1993, DER filed a Motion to Dismiss this appeal, and later that month Forge filed its response. By an Opinion and Order dated November 10, 1993, we denied DER's Motion. In doing so, we construed the motion in favor of Forge (the non-moving party) and held that it appeared that DER's letter was a final decision by DER that this impoundment is covered

by these regulations. We then held that because the regulations mandate certain actions by Forge in response to that decision, DER's letter constituted an appealable action.

Near the end of the discovery period and at the parties' request, we held a telephone conference with their counsel. In that conference, the parties proposed the submission of this matter to the Board for adjudication based on a stipulated factual record and cross motions for summary judgment. We agreed to this procedure.

The parties' factual stipulation was filed with us on December 15, 1993. Simultaneously, DER filed its Motion For Summary Judgment.

DER's Motion For Summary Judgment takes the position that Forge's Irvine plant is an industrial facility as defined under Section 103 of the Solid Waste Management Act, Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.103 ("SWMA"). It then asserts that sludge from any industrial wastewater treatment plant or wastes from any industrial operations are residual wastes as defined in that same section and in 25 Pa. Code §287.1. It asserts next that the liquid and solid wastes from Forge's facility fall within the classification "residual wastes" rather than municipal wastes, and the impoundments existing at this wastewater treatment plant are impoundments as defined by these residual waste regulations (25 Pa. Code Chapter 287). Next, DER argues that by definition there is no sewage sludge at the Forge plant because "sewage sludge" is a defined term in these regulations which Forge's sludge does not fit. Accordingly, DER asserts if there is a sludge at

this plant which has sewage solids in it, it is not "sewage sludge" mixed with residual wastes which is a type of waste addressed in 25 Pa. Code Sections 271.2(b)(3) and 287(2)(b)(3).[1]

On January 10, 1994 we received Forge's Cross Motion For Summary Judgment.

In response to DER's Motion, Forge asserts that DER's interpretation of its regulations to cover Forge's settling ponds under the residual waste portions of DER's solid waste regulations is in error. It says these ponds contain sanitary wastewater solids. It argues DER has the burden of proceeding and the burden of proof. It then asserts that DER's Motion relies on facts not stipulated to by the parties, which non-stipulated additional facts are outside the record in this appeal, and facts which are unsupported by the records in DER's possession. As a result, Forge argues that DER's Motion must be rejected as unsupported. Forge next asserts that based on the information in its NPDES permit, the permit application and the types of treatment provided at its plant site, the wastes reaching its settling ponds are mostly non-contact cooling water and sewage-type sanitary municipal wastes. Further, Forge asserts that sewage sludge mixed with other residual wastes is not "residual waste" by definition and that DER's position that Forge's sludge is "residual waste" is a reversal of its prior position. Forge also argues that DER confuses the term "industrial wastewater" under the Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 *et seq.* ("Clean Streams Law"), with "residual wastes" under the SWMA, and there

---

[1]By its footnote number 2 (Page 7 of DER's Brief) DER continues to assert a lack of jurisdiction in this Board for the reason set forth in its Motion To Dismiss. Our review of the presiding Board Member's opinion rejecting DER's Motion confirms its soundness. We adopt its reasoning here to affirm rejection of DER's Motion. We have jurisdiction over the appeal.

is no showing that any solids are being discharged from Forge's facilities are a form of industrial wastewater solids rather than sewage solids. From this conclusion, Forge argues its wastes are "sewage sludge". Finally, Forge asserts that since the discharge of industrial wastewater can be eliminated at Forge's facility and this possibility is recognized in Forge's NPDES permit, this proves the remaining water should not be treated as residual waste but as municipal waste.

Based upon a full and complete review of the parties' Joint Stipulation of Facts, the Board makes the following Findings of Fact.

FINDINGS OF FACT

1. DER is the agency with the duty and authority to administer and enforce the SWMA; the Clean Streams Law; 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 by the Environmental Quality Board ("rules and regulations").

2. Forge is a corporation which, at all times relevant to this appeal, has owned and operated a steel manufacturing and forging facility located in Brokenstraw Township, Warren County, near Irvine, Pennsylvania ("Irvine Facility").

3. At all relevant times to this appeal, Forge treats industrial wastewater generated by its manufacturing and related operations and sanitary wastewater generated by its employees' normal bodily functions at the Irvine Facility wastewater treatment plant.

4. At all relevant times to this appeal, pursuant to NPDES Permit No. PA0004766 issued on November 17, 1993, Forge treats approximately

2,200,000 gallons of wastewater per day at its Irvine Facility wastewater plant. Approximately 80%-90% of the wastewater is generated from Forge's manufacturing and related operations.

5. Included in Forge's Irvine Facility wastewater treatment plant are depressions, excavations and/or diked areas designed to hold accumulations of liquid wastes or wastes containing free liquids and solids ("settling ponds").

6. Forge uses the settling ponds for holding, storage, treatment, settling and/or aeration of wastewater generated at Forge's Irvine Facility.

7. Forge discharges effluent from the settling ponds into Brokenstraw Creek, a surface water that flows through the Irvine Facility.

8. On July 14, 1993, the Department sent a letter to National Forge in which it stated the Department's view that the settling ponds were subject to the Residual Waste Regulations, not the Municipal Waste Regulations.

9. Brokenstraw Creek is a water of the Commonwealth as defined by Section 1 of the Clean Streams Law, 35 P.S. §691.1.

DISCUSSION

In examining these arguments we start by clarifying our undertaking. The parties initially referred to their respective motions as motions for summary judgment. However, we have before us a stipulated factual record rather than the record which supports the more common motion for summary judgment. Thus, these are not pure motions for summary judgment. However, neither party disputes our ability to grant judgment here. Accordingly, we will treat these motions as cross-motions for judgment on a stipulated record.

Burden of Proof

Having made this clear, we next turn to the issue of the burden of proof. DER does not address this issue in its Post-Hearing Brief, while Forge does (beginning on page 3) and argues that the burden is on DER. Forge advances this argument (under 25 Pa. Code §21.101) stating that DER asserts the affirmative in this appeal, i.e., DER argues the residual waste regulations apply. Forge is correct. 25 Pa. Code §21.101(a) of our rules imposes the burden of proof on the party asserting the affirmative of an issue. Here DER is asserting that the group of solid waste management regulations called the residual waste regulations apply. Moreover, DER's letter notifying Forge that these regulations apply has an impact which is not unlike DER's issuance of an Administrative Order to Forge. As was pointed out in our prior opinion in this appeal, the residual waste regulations mandate specific actions within specific deadlines by owners of impoundments to which these regulations apply. Thus, a DER determination that they apply creates a scenario where the impoundment's owners must act in a certain fashion within certain time frames much as he or she would if issued an order by DER. Clearly, in this order scenario DER has the burden of proof under 25 Pa. Code §21.101(b)(3). It is appropriate that DER bear it here, too.

Facts Not Of Record

The final preliminary issue we must address is the question of what facts we may consider in judging the merits of the parties' motions. Forge raises this issue by asserting that DER's Motion relies on facts not of record and so must fail. Forge argues that DER has failed to show by stipulated facts that the solids in Forge's impoundments are from industrial wastewater. Our order of December 17, 1994 provided in Paragraph 4 that:

> Thereafter, this Board shall adjudicate the merits of this appeal based on these motions and the factual stipulations of the parties.

Of course, beyond the factual stipulations we have DER's letter to Forge dated July 14, 1993. This is because it was attached to Forge's Notice of Appeal and was the letter from which its appeal sprang. However, we do not have other facts or documents before us. Forge is correct that insofar as either party's Motion relies upon facts not stipulated to by the parties, but facts outside of the record, we may not consider them. If we are to decide this matter on stipulated facts, and that is how it was submitted to us, other facts are barred. Forge not only argues this is so; it admits we are limited to the stipulated facts on Page 8 of its Brief. However, Forge's argument has a double edge which cuts Forge as well. Forge's Brief makes a series of arguments based upon the treatment facilities at its plant, the manufacturing operations there, the information within its application for its NPDES permit and the provisions of NPDES permit No. PA 0004766. These arguments are all based on facts outside the corners of the parties' Joint Stipulation of Facts. Further, insofar as Forge would assert that we consider these facts, it has the burden of showing us a stipulation as to them on DER's behalf. No such stipulation thereto by DER has been provided this Board by Forge. Accordingly, we will not consider these "facts".[2]

Having addressed these preliminary issues, we now turn to the merits

---

[2]Forge's attachment of NPDES Permit documents to its Pre-Hearing Memorandum does not get it around this problem. Not only are our Orders clear and undisputed on this point but in its Pre-Hearing Memorandum these documents are listed as those Forge will seek to introduce into the record. This document listing procedure (in Pre-Hearing Memoranda) has never been the vehicle by which documentary evidence becomes a part of the record before us. It serves at a pre-hearing stage to identify for all parties and this Board which documents that party may subsequently move to have formally admitted into the evidentiary record when the merits hearing is held and the evidentiary record is made.

of the parties' arguments.

Deference to DER Interpretations of Regulations

DER first asserts that its interpretations of the regulations it administers are entitled to some deference by this Board and should only be overturned if clearly erroneous. We have so held in the past including opinions where we did not hesitate to overturn faulty DER interpretations. See Baney Road Association v. DER, et al., 1992 EHB 441. We will continue to follow this reasoning here.

Settling Ponds Are Residual Waste Impoundments

Clearly the stipulated facts and the definition of "industrial establishment" compel the conclusion that Forge's steel manufacturing and forging plant is an "industrial establishment" as defined in Section 103 of the SWMA, supra, and 25 Pa. Code §287.1. It is an establishment engaged in manufacturing. There is no evidence supporting the idea that it could, for example, be a "commercial establishment" which is defined in both of the same locations as: "An establishment engaged in nonmanufacturing or nonprocessing business, including but not limited to stores, markets, office buildings, restaurants, shopping centers and theaters." As DER points out, it also fails to meet the definition of "institutional establishment" which is defined in Section 103 as: "Any establishment engaged in service including, but not limited to, hospitals, nursing homes, orphanages, schools and universities", or a "municipality" which is defined as "[a] city, borough, incorporated town, township or county or any authority created by any of the foregoing".

As a result the wastes coming from this plant constitute "residual wastes" as defined, again, in 25 Pa. Code §287.1 and Section 103. Clearly Forge's "residual wastes" are defined to include:

> garbage, refuse, other discarded material or other wastes including solid, liquid, semisolid or gaseous materials resulting from any industrial...operations and sludge from any industrial...wastewater treatment facility if it is not hazardous. 25 Pa. Code §287.1

DER's Brief then examines the definition of "municipal waste" and concludes the liquid and solid waste in the impoundments which comprise a portion of Forge's wastewater treatment plant comprise "residual wastes" not "municipal waste".[3] Clearly, this manufacturing plant's wastewater treatment plant cannot be considered a municipal, commercial, or institutional wastewater treatment plant, so its sludge does not automatically fit within the section's definition of municipal waste.

Next DER states that "impoundment", as defined in 25 Pa. Code §287.1, includes the settling ponds which are part of Forge's wastewater treatment facility. We agree. From its name, the purpose of a treatment plant settling pond is apparent. It is a pond which allows wastewater to become sufficiently quiescent to cause solids to settle out of the liquid. Moreover, the parties stipulate these ponds are used to store, treat, settle and aerate wastewater from the manufacturing plant. Further, the parties stipulate that these ponds are "depressions, excavations and/or diked areas designed to hold accumulations of liquid wastes or wastes containing free liquids and

---

[3]Municipal waste is defined as: "Garbage, refuse, industrial lunchrooms or office waste, and other material including solid, liquid, semisolid, or contained gaseous material resulting from operation of residential, municipal, commercial or institutional establishments and from community activities, and sludge not meeting the definition of residual or hazardous waste under this section from a municipal, commercial or institutional...wastewater water treatment plant. 25 Pa. Code §287.1.

solids."[4] Since "impoundments" are defined in 25 Pa. Code §287.1 to be a facility or part of a facility which is a "natural topographic depression, manmade excavation or diked area...designed to hold an accumulation of liquid wastes or wastes containing free liquids. The term includes holding, storage, settling and aeration...ponds..." We see no way to conclude Forge's ponds are not impoundments as defined in the residual waste regulations. As this was DER's conclusion, we sustain its interpretation of these regulations.

The Plant's Sludge Is Not Sewage Sludge

The fact that these impoundments receive sewage and other sanitary wastewater as the parties stipulate does not change this conclusion. The parties' stipulated facts say that 80% to 90% of the wastewater received at Forge's water treatment facility (including these impoundments) is from manufacturing operations. At least a portion of the remainder is the sanitary waste, but the parties do not stipulate to facts showing it is all wastewater of this type. However, even if it is all sanitary wastewater, our conclusion remains sound.

Forge argues that the treatment plant sludge is "sewage sludge" and "sewage sludge" is treated as a "municipal waste" not a "residual waste," so its impoundments cannot be residual waste impoundments. We reject this argument for several reasons.

It is true if sewage is discharged into Forge's settling ponds, the solids which remain after the treatment and the decanting of any liquid could be called a sludge of sewage but, under the regulations promulgated pursuant

---

[4]By having agreed these ponds hold solids, Forge eliminates its own argument that DER had to prove through stipulated facts that solids therein were from industrial wastewater. Based on our interpretation of these regulations that is not a fact DER had to prove to be sustained on its interpretation of these regulations. Accordingly, we reject Forge's assertion that DER's argument is based on facts outside the record.

to the SWMA, "sewage sludge" is a defined term. According to 25 Pa. Code §271.1, sewage sludge is: "The coarse screenings grit and dewatered or air-dried sludges, septic and holding tank pumpings and other residues from municipal and residential sewage collection and treatment systems." As DER points out, the wastewater treatment plant at Forge's steel manufacturing and forging operation is not a municipal or residential sewage treatment plant.

Equally important, a sludge from sewage treatment is not "sewage sludge" when it is produced by treatment occurring in any commercial, institutional or industrial wastewater treatment plant. The exclusion of sludge from these three types of plants does not appear accidental and is not explained away by Forge. Since "sewage sludge" is defined in this fashion, we thus read it to exclude the sludge at Forge's treatment facilities as "sewage sludge."

Moreover, there is no evidence before us that Forge's treatment system only treats sewage or that the sludge is a sludge made up only of the solids remaining after sewage treatment. The evidence shows sewage is only one of the wastewater streams treated in these impoundments. We cannot say that this proves the sludge is sewage mixed with sludges from other wastes; however, we cannot say it is not, either. Insofar as Forge wished to make this assertion, it was up to it to offer evidence on this point and we have none before us.

Forge's Sludge Is Not Municipal Waste

Forge also argues that under 25 Pa. Code §271.2(b) it is clear that its sludge is to be treated as "municipal waste" so its settling ponds cannot be residual waste impoundments. Section 271.2(b)(3) provides:

> (b) Management of the following types of residual waste is subject to this article instead of Article IX (relating to residual waste

management), and shall be regulated as if the waste is municipal waste, regardless of whether the waste is a municipal waste or residual waste.

(3) Sewage sludge, including sewage sludge that is mixed with other residual waste.

Section 287.2(b)(3) reads the same but directly references Article VIII, which addresses municipal wastes. We begin our analysis of these sections by noting that from a reading of these sections "sewage sludge" must be by necessary implication a residual waste. To read the language in Section 271.2(b)(3) in any other way requires that we read this section without the inclusive "mixed with other residual waste" as if it read "sewage sludge that is mixed with residual waste." We believe the inclusion of the word "other" in this regulation was not unintentional. Moreover, "sewage sludge" is a defined term, so that if Section 271.2(b)(3) and the "sewage sludge" definition are read together we must conclude that they mean that "sewage sludge" from municipal or residential treatment facilities is to be treated as a "municipal waste" even if it would otherwise be a "residual waste" or if it is not purely a sludge of sewage solids but includes sewage solids and other material from industrial establishments which discharge their waste waters to a municipal sewage system.

We are well aware that municipal sewage treatment plants regularly receive industrial wastes from industrial facilities. DER has an extensive regulatory program dealing with this issue, the regulations for which are found in 25 Pa. Code Chapter 94. As stated in 25 Pa. Code §94.2(4), one of the purposes of this program is to allow the owners and operators of sewage facilities to manage wasteloads discharged to their facilities to "improve opportunities to recycle and reclaim municipal and industrial wastewaters and sludges." Thus, we read Section 271.1(b)(3) and Section 287.2(b)(3) to deal

with sludges from municipal and residential facilities which have industrial or commercial wastewaters discharged to them as if they are municipal wastes rather than residual wastes. In turn, non-municipal or non-residential facilities' sludges thus remain residual wastes.

We point out that to read this regulation any other way is to allow those with residual waste sludges from treatment plant impoundments treating wastes from industrial establishments to escape regulation of these residual wastes as residual wastes merely by diluting them, however slightly, with some sewage waste waters. If that were the regulation's intent then the exception would swallow the rule, and shortly there will no longer be any such wastes regulated as residual wastes. We cannot believe the Environmental Quality Board intended such an absurd interpretive result. For the reasons outlined above we thus reject it.

Forge's NPDES Permit

Forge also argues from its NPDES Permit and NPDES Permit application that the facts therein show the wastes in its plant's impoundments are not "residual waste." These documents and the facts therein are not before us, so we cannot consider this proffered "evidence." However, Forge also argues that since "municipal waste" is defined to include "industrial lunchroom or office waste and other material", it is intended to include its factory's sludge. It then asserts this phrase's use means the wastes people generate in their homes and sewage is generated there. From this, Forge concludes that sludge is like waste generated in people's homes so it is "municipal waste". In response, we point out that commercial offices throw away volumes of waste paper, plastics and used office products of many descriptions. Industrial lunchrooms do also and add leftover food, food wrappers, cleaning products and similar materials. Neither produce sewage or sewage sludge in their daily garbage or refuse.

Homeowners produce refuse or garbage containing all of these products as well, but where the homeowner's garbage is picked up at his home, the homeowner does not haul a can of sewage or sewage sludge to the curb for the garbagemen to pick up. All of this is by way of saying sludge from Forge's treatment plant is not the type of waste envisioned by this phrase and we reject Forge's argument in this regard.

DER's Change of Position

Lastly, Forge argues that before it received DER's letter of July 14, 1993 from Mr. Mummert, another DER employee had represented to it that the treatment plant impoundments were excluded from coverage by DER's residual waste regulations. It contends the appealed-from letter was in response to its own request that DER clarify its position on this issue and DER flip-flopped on it. The facts of DER's prior position and Forge's seeking clarification are not before us in the Stipulation Of Facts and thus we may not consider them. Without them, this argument lacks any factual support and must be rejected.

Even if we could have before us the factual evidence to support this argument by, for example, considering the unverified allegations in Forge's response to DER's earlier motion to dismiss, the result would not change. These allegations show Forge had oral communications from DER stating positions on the regulations which were both consistent and inconsistent with that in Mr. Mummert's letter. As a result, Forge sought clarification. DER gave it but it was not what Forge wanted to hear, so Forge appealed. Even if these facts were before us, they provide no basis for reversing the decision in Mummert's letter. When this DER letter was written, the residual waste regulations were barely a year old. The fact that DER's position was not clear until the sending of this letter shows only that DER's

interpretations on every aspect of the 141 pages of residual waste regulations were not finalized the instant these regulations were published.[5] Such a circumstance is no justification for a reversal thereof.

Accordingly, we make the following conclusions of law and enter the appropriate order.

CONCLUSIONS OF LAW

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

2. DER bears the burden of proof in this appeal under 25 Pa. Code §21.101 because it is asserting the affirmative as to coverage of Forge's impoundments by 25 Pa. Code Chapter 287 and because, by the nature of its finding that these regulations apply thereto, the regulations mandated a course of conduct by Forge much the same as if DER ordered Forge to undertake specific activities.

3. Where parties submit a matter to this Board for adjudication based on stipulated facts, the Board cannot consider evidence outside of that stipulated to by parties.

4. DER's interpretation of the regulations it administers is entitled to deference from this Board unless clearly erroneous.

5. DER correctly interprets 25 Pa. Code Chapters 271 and 287 to conclude that the impoundments within Forge's wastewater treatment plant are governed by the residual waste regulations found in 25 Pa. Code Chapter 287, rather than the municipal waste regulations found in 25 Pa. Code Chapter 271,

---

[5]Forge's last argument that it can stop all nonsewage discharges so that the ponds only contain sewage solids and its NPDES permit anticipates this, is all based on facts not before us. We will not consider it since doing so would violate the terms under which the parties submitted this matter to us to adjudicate.

even though sewage and sanitary wastewater are discharged thereto along with other manufacturing operation wastewaters.

6. A steel manufacturing and forging operation is an industrial establishment, not a commercial or institutional establishment or a municipality.

7. Sewage sludge, as referred to in 25 Pa. Code §271.2(b)(3) and 287.2(b)(3), references that term as defined in 25 Pa. Code §271.1, which means such sludge must be generated only by either municipal or residential sewage treatment.

ORDER

AND NOW, this 22nd day of April, 1994, it is ordered that the appeal of Forge is dismissed.

ENVIRONMENTAL HEARING BOARD

MAXINE WOELFLING
Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: April 22, 1994

cc: **Bureau of Litigation**
Library: Brenda Houck
Harrisburg, PA
For the Commonwealth, DER:
Mary Susan Gannon, Esq.
David A. Gallogly, Esq.
Northwest Region
For Appellant:
Ronald L. Kuis, Esq.
Pittsburgh, PA

sb/med

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
2nd FLOOR — MARKET STREET STATE OFFICE BUILDING
400 MARKET STREET, P.O. BOX 8457
HARRISBURG, PA 17105-8457
717-787-3483
TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOARD

QUEHANNA-COVINGTON-KARTHAUS AREA AUTHORITY :
v. : EHB Docket No. 93-121-W
: Consolidated here: 93-039-MJ
COMMONWEALTH OF PENNSYLVANIA, :
DEPARTMENT OF ENVIRONMENTAL RESOURCES : Issued: April 26, 1994

OPINION AND ORDER SUR CROSS-MOTIONS FOR SUMMARY JUDGMENT

By: Maxine Woelfling, Chairman

Synopsis

A Department of Environmental Resources (Department) letter informing a municipal authority that it is not a "local agency" under §6(b) of the Pennsylvania Sewage Facilities Act, the Act of January 24, 1966, P.L. (1965) 1535, as amended, 35 P.S. §750.6 (SFA), is not an action or adjudication because it did not finally affect the authority's rights.

A party's "Response" to a motion for summary judgment, which sets forth specific factual averments, contains supporting affidavits, and requests summary judgment be granted in its favor, will be treated as a cross-motion for summary judgment. Furthermore, a party's motion for summary judgment will not be quashed merely because an affidavit was attached to a supporting legal memorandum and not to the motion itself.

The Department's motion for summary judgment is granted. Although a joint municipal water authority successfully sued a land developer and landowners

in the Court of Common Pleas to prevent them from violating the permit requirements of §7 of the SFA, it is not entitled to reimbursement under §6(b) for the costs of that litigation. A joint municipal authority is considered to be a local agency entitled to reimbursement under §6(b) only if it has the authority under §8(a) to administer the permitting provisions of §7.

OPINION

The cross-motions for summary judgment presently before the Board stem from the unsuccessful attempts of the Quehanna-Covington-Karthaus Area Authority (Authority) to secure reimbursement under §6(b) of the SFA, 35 P.S. §750.6(b), for legal expenses relating to a residential development where individual sewage facilities were constructed without the requisite permits.

In August 1985, the Authority, along with Covington, Karthaus, and Girard Townships, all of which are located in Clearfield County, commenced an action in the Court of Common Pleas of Clearfield County against Sandy Creek Forest, Inc. and individual lot owners in the Sandy Creek Forest Development (collectively referred to as "Defendants"), who were installing and operating sewage facilities in violation of §7 of the SFA, 35 P.S. §750.7 (Affidavit of Susan Hoffman, Auth's Brief Ex. A, 7).[1] Section 7(a) requires a person to have a permit before, *inter alia*, installing or constructing an individual sewage system and constructing or occupying a building for which an individual sewage system is required. 35 P.S. §750.7(a). On March 28, 1991, the court entered summary judgment in favor of the Authority and the Townships, and enjoined Defendants from constructing or occupying any buildings or operating any sewage

[1]The parties' exhibits will be cited as "Authority's Ex.__" for those attached to the Authority's motion, "Auth's Brief Ex.__" for those attached to the Authority's brief, and "Department's Ex.__" for those attached to the Department's motion.

facilities at the Sandy Creek Forest Development until they obtained the necessary permits under the SFA (Authority's Ex. A). Commonwealth Court affirmed this decision on April 1, 1992. Quehanna-Covington-Karthaus Area Authority v. Sandy Creek Forest, Inc., 146 Pa. Cmwlth. 675, 606 A.2d 968 (1992).[2] A petition for allowance of appeal is currently pending before the Pennsylvania Supreme Court (Affidavit of Susan Hoffman, Auth's Brief Ex. A, 9).

On December 21, 1992, the Authority and Covington Township asked the Department to determine, *inter alia*, whether the Authority was a "local agency" under the SFA and thereby entitled, under §6(b), to reimbursement for the expenses it incurred in the Sandy Creek Forest litigation. The Department responded in a letter dated January 27, 1993, that the Authority was not a "local agency" and would not qualify for reimbursement of its expenses under §6(b) (Authority's Notice of Appeal). The Authority filed a notice of appeal from this determination on March 1, 1993, which we docketed at No. 93-039-MJ.

The Authority filed an application for reimbursement with the Department on March 1, 1993 (Department's Ex. 14), the last day on which it could do so, see, 25 Pa. Code §72.44(c). Referring to both §§2 and 8 of the SFA, the Department stated in its March 31, 1993, response that the Authority did not qualify as a "local agency" entitled to reimbursement and its request for reimbursement was, therefore, denied (Authority's Notice of Appeal). The Authority filed a notice of appeal from this determination on May 10, 1993, which we docketed at No. 93-121-W.

By order dated June 4, 1993, we consolidated the two appeals at No. 93-121-W. After a telephone conference with the parties, during which the

---

[2]The litigation in the Court of Common Pleas and Commonwealth Court will be referred to as the "Sandy Creek Forest litigation."

appropriateness of resolving the appeals on motions was discussed, we issued an order establishing a schedule for the filing and briefing of a motion for summary judgment. The Authority filed its motion for summary judgment and supporting memorandum on July 16, 1993. The Department filed its response, in which it also requests summary judgment, and supporting memorandum on September 3, 1993. The Authority filed a reply brief on October 15, 1993.

Before we address the merits of the parties' cross-motions for summary judgment, we will resolve several preliminary issues raised in those motions. In filing its "Response to Appellant's Motion for Summary Judgment," the Department not only requests summary judgment be granted in its favor, but also moves to dismiss the Authority's appeal of the January 27, 1993, letter and to quash the Authority's motion for summary judgment. The Authority counters that only its motion for summary judgment is properly before the Board, since the Department has merely filed a "Response."

Because it may narrow the issues before us, we first address the Department's motion to dismiss the Authority's appeal of the January 27 letter. In order to be appealable, the January 27 letter must have been a Department "action" or "adjudication." See, Elephant Septic Tank Service and Louis J. Constanza v. DER, EHB Docket No. 92-560-E (Opinion issued April 30, 1993). An "adjudication" is defined as "[a]ny final order, decree, decision, determination or ruling by an agency affecting personal or property rights, privileges, immunities, duties, liabilities or obligations of any or all of the parties to the proceeding in which the adjudication is made." 2 Pa.C.S. §101. An "action" is similarly defined. 25 Pa. Code §21.52(a). Because the January 27 letter did not deny the Authority's application for reimbursement under §6(b), but was merely the Department's interpretation that the Authority would not qualify for

such reimbursement, we find that it was not a Department action or adjudication. See, Elephant Septic Tank Service, at p. 7; see also, Sandy Creek Forest v. Cmwlth., Dept. of Environmental Resources, 95 Pa. Cmwlth. 457, ___, 505 A.2d 1091, 1093 (1986) (a letter stating what the law requires is not a final action or adjudication). Although the letter indicated that in all likelihood the Department was going to deny the Authority's application, the Department did not finally affect the Authority's rights until it actually denied the application on March 31, 1993. Accordingly, the Authority's appeal at Docket No. 93-039-MJ is unconsolidated and dismissed.

Turning next to the Department's motion to quash the Authority's motion for summary judgment, we find it is without merit. Citing our decision in County of Schuylkill v. DER, 1990 EHB 1370, in which we stated that a motion for summary judgment may not be granted on the basis of representations in and exhibits attached to legal memoranda, the Department contends the Authority's motion is invalid because the Authority attached an affidavit to its legal memorandum and not the motion itself. Our concern in County of Schuylkill, however, was not the location of the moving party's affidavit, but the fact that its motion was facially invalid. 1990 EHB at 1373. Since the Authority's motion for summary judgment is facially sufficient, County of Schuylkill is inapplicable here. Accordingly, the Department's motion to quash the Authority's motion for summary judgment is denied.

And finally, looking at the Authority's claim that the Department has not filed a cross-motion for summary judgment, we find it is without merit. In its "Response," the Department sets forth specific factual averments, supported by affidavits, and requests summary judgment be granted in its favor. Despite the contents of this response, the Authority contends it is not a motion for

summary judgment because it is not labeled a "Motion for Summary Judgment." We are unwilling to accept the Authority's request to elevate form over substance. Under Pa.R.C.P. 126, we may disregard procedural defects that do not affect a party's substantial rights. Such procedural defects include errors of nomenclature. See, McCarron v. Upper Gwynedd Township, 139 Pa. Cmwlth. 528, ___, 591 A.2d 1151, 1153 (1991). We will, therefore, treat the Department's "Response" as a cross-motion for summary judgment.

With these procedural matters behind us, we turn now to the merits of the parties' cross-motions for summary judgment. We will grant summary judgment if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Pa.R.C.P. 1035(b); New Hanover Corp. v. DER, EHB Docket No. 90-225-W (Opinion issued May 14, 1993).

The parties agree this matter will be resolved by determining whether the Authority is a local agency entitled to reimbursement under §6(b), which states:

> Local agencies complying with the provisions of this act in a manner deemed satisfactory by the secretary shall be reimbursed annually by the department from funds specifically appropriated for such purpose equal to one-half of the cost of the expenses incurred by the local agency in enforcement of the provisions of this act.

35 P.S. §750.6(b). The term "local agency" is defined as "a municipality, or any combination thereof acting cooperatively or jointly under the laws of the Commonwealth, county, county department of health or joint county department of health," while a "municipality" is further defined as "a city, town, township, or borough." 35 P.S. §750.2.

The Authority was jointly created by the Boards of Supervisors of Covington and Karthaus Townships under §3A of the Municipality Authorities Act, the Act of May 2, 1945, P.L. 382, as amended, 53 P.S. §303A, to supply clean drinking water to Covington, Karthaus, and Girard Townships (Department's Exs. 2 and 3; Affidavit of Susan Hoffman, Auth's Brief Ex. A, 4 and 5). Although a single entity, see, 53 P.S. §302 (an "authority" is "a body politic and corporate, created pursuant to this act"), the Authority was formed by a combination of municipalities, Covington and Karthaus Townships, acting jointly or cooperatively under the law of the Commonwealth, in this case the Municipality Authorities Act.

While the Authority satisfies the broad definition of local agency in §2 of the SFA, that does not necessarily lead to the conclusion that it is entitled to reimbursement under §6(b). To reach such a conclusion, we must examine the duties and responsibilities exercised by the Authority pursuant to the SFA.

Section 7 of the SFA prohibits a person from installing or constructing an individual or community sewage system without a permit that indicates the site, plans, and specifications of the system comply with the provisions of the SFA and the Department's regulations at 25 Pa. Code Ch. 72. A "local agency" is given broad authority to administer and enforce these permitting provisions. 35 P.S. §§750.7(a) and (b)(1), (2), (4), and (6), and 750.12. Any "local agency" theoretically has the authority to administer the permitting provisions of §7 within its political boundaries, but this authority, is limited by §8(a), which states:

> County or joint county departments of health shall administer section 7 of this act in the area subject to their jurisdiction. In all other areas, section 7 of this act shall be

> administered by each municipality unless said municipality has transferred or delegated the administration of section 7 of this act to another local agency, or is cooperating in said administration in conformance with the act of July 12, 1972 (P.L. 762, No. 180), and said other local agency has accepted administration of section 7 of this act. Municipalities are hereby encouraged jointly to administer section 7 of this act on a county or joint county level. No local agency shall voluntarily surrender administration of the provisions of this act except to another local agency pursuant to this section.

35 P.S. §750.8(a).

In interpreting the SFA we must construe §6(b) with reference to the entire SFA. See, 1 Pa.C.S. §1922(2); O'Boyle's Ice Cream Island, Inc. v. Commonwealth, 146 Pa. Cmwlth. 374, ___, 605 A.2d, 1301, 1302 (1992). In other words, where the term "local agency" is used in one place in the SFA, we must construe it to mean the same when it is used elsewhere in the statute. See, Winkelman v. Pennsylvania Financial Responsibility Assigned Claims Plan, 418 Pa. Super. 439, ___, 614 A.2d 717, 720 (1992). Therefore, reading §§2 and 8(a) together, a local agency must not only be a municipality, joint municipal authority, etc., but must also, either by virtue of its status or its arrangements with another local agency, have the authority to administer and enforce §7 of the SFA. As a result, §8 defines who may administer §7 and, therefore, limits which local agencies are are eligible for reimbursement under §6(b) of the SFA. Any other result would be nonsensical, since the only thing a local agency does under the SFA is administer and enforce the permitting provisions of §7.

We find support for this position in the Commonwealth Court's decision in Bodnar v. Columbia County Sanitary Administration Committee, 51 Pa. Cmwlth. 332, 414 A.2d 735 (1980). In Bodnar, the court had to determine whether the

Committee had standing to sue Bodnar under §12(a), which states, in relevant part:

> Any local agency or any municipality which is a member of a local agency shall have the power to institute suits in equity to restrain or prevent violations of section 7 ....

35 P.S. §750.12(a). The court found that the Committee had standing to sue under §12 because the municipality in which Bodnar lived had, pursuant to §8(a), delegated the administration of §7 to the Committee. 51 Pa. Cmwlth. at ___, 414 A.2d at 737. Under §8(b)(7), the court continued, the Committee had the authority to file suit under §12. *Id.* What we find so compelling in Bodnar is that even though §12 authorizes "[a]ny local agency" to file suit, and the Committee clearly satisfies the definition of local agency, the court referred to §8 to determine whether the Committee was a local agency under §12. Similarly here, we refer to §8 to determine whether the Authority is a local agency under §6(b).

Looking at the language of §6(b), we find that it authorizes the Department to reimburse "[l]ocal agencies complying with the provisions of this act in a manner deemed satisfactory by the secretary," not merely "[l]ocal agencies." Construing §§6(b) and 8(a) together, the limiting phrase "[l]ocal agencies complying with the provisions of this act" must refer to local agencies that have the authority to administer the provisions of the SFA. Because the only thing a local agency does under the SFA is administer and enforce the permitting provisions of §7, there are no provisions in the SFA with which a local agency could comply if the local agency lacked the authority to administer the SFA.

There is no dispute that Covington Township empowered the Clearfield County Sewage Committee to administer the SFA for Covington Township

(Department's Exs. 10 and 11; Affidavit of Rosemary Gary, Department's Ex. 4). Indeed, every township in Clearfield County, with the exception of Graham Township, is a member of the Clearfield County Sewage Committee. (Department's Exs. 4 and 11.) Furthermore, there is no evidence before us that Covington Township also empowered the Authority to do the same. To the contrary, it is undisputed that the Authority was formed by Covington and Karthaus Townships "to acquire, hold, construct, improve, maintain, operate, own, lease, either as lessor or lessee, water works, water supply works and water distribution systems" in Covington, Karthaus, and Girard Townships (Department's Exs. 2 and 3; Affidavit of Susan Hoffman, Auth's Brief Ex. A, 4 and 5). Because Covington Township did not delegate the administration of §7 to the Authority, the Authority is not a local agency entitled to reimbursement under §6(b).

The result we reach here furthers the intent of the General Assembly in enacting §6(b). See, 1 Pa.C.S. §1921(a) (object of statutory construction is to effectuate the intention of the General Assembly). Section 6(b) was intended to reimburse delegated local agencies (i.e. local agencies with authority under §8 of the SFA) for the costs they incur to administer the permitting provisions of §7. This includes the costs of hiring Sewage Enforcement Officers and supporting technical and administrative personnel; inspecting and testing sewage systems; submitting reports and data to the Department; and adopting rules and regulations, as well as the cost of filing a lawsuit pursuant to §12(a). See, 35 P.S. §750.8(b); 25 Pa. Code §72.44(f).[3]

Because there are no genuine issues of material fact and the Authority

---

[3]Whether reimbursement is only sought for the cost of a single lawsuit is immaterial; the critical issue is whether the lawsuit is prosecuted by a local agency which has the power under §8 of the SFA to administer the provisions of §7. There may be instances where a properly delegated local agency seeks reimbursement for the costs of one lawsuit.

is not entitled to reimbursement under §6(b) for the costs it incurred in the Sandy Creek Forest litigation, the Department's cross-motion for summary judgment is granted. Accordingly, the Authority's motion for summary judgment is denied.

ORDER

AND NOW, this 26th day of April, 1994, it is ordered that:

1) The Department's motion to dismiss the Authority's appeal of the Department's January 27, 1993, letter is granted. The Authority's appeal at Docket No. 93-039-MJ is unconsolidated and dismissed;

2) The Department's motion to quash the Authority's motion for summary judgment is denied;

3) The Authority's motion for summary judgment is denied; and

4) The Department's cross-motion for summary judgment is granted and the Authority's appeal is dismissed.

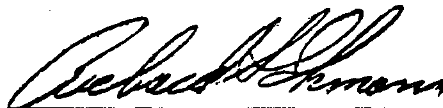
ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

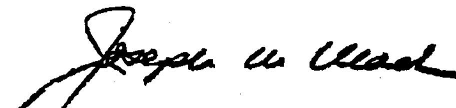
MAXINE WOELFLING
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member



RICHARD S. EHMANN
Administrative Law Judge
Member



JOSEPH N. MACK
Administrative Law Judge
Member

DATED: April 26, 1994

cc: Bureau of Litigation
Library, Brenda Houck
For the Commonwealth, DER:
Nels J. Taber, Esq.
Central Region
For Appellant:
Charles E. Gutshall, Esq.
Susan E. Schwab, Esq.
RHOADS & SINON
Harrisburg, PA

jm

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
2nd FLOOR — MARKET STREET STATE OFFICE BUILDING
400 MARKET STREET, P.O. BOX 8457
HARRISBURG, PA 17105-8457
717-787-3483
TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOARD

CHRISTINE ANN CRAWFORD and COREY EICHMAN, et al.	:	
v.	:	EHB Docket No. 93-350-MJ (Consolidated)
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES and BROWNING-FERRIS INDUSTRIES OF PA, Permittee	:	Issued: April 28, 1994

OPINION AND ORDER SUR
APPELLANTS' MOTION FOR SUMMARY JUDGMENT

By Joseph N. Mack, Member

Synopsis

The Appellants' Motion for Summary Judgment is denied where they have failed to demonstrate that issuance of a permit for the land application of sewage sludge violates Act 101 or a county's Act 101 plan. Nothing in Act 101 prevents the issuance of a permit for land application of sewage sludge even where the activity covered by the permit is not specifically listed in the county's Act 101 plan. Section 507(a) of Act 101 only restricts the issuance of permits for municipal waste landfills and resource recovery facilities not provided for in a county's Act 101 plan. The land application of sewage sludge does not fall into either of these categories.

OPINION

This matter originated on November 19, 1993 with the filing of an appeal by Christine Ann Crawford from the issuance of Permit No. 603301 ("permit") to Browning Ferris Industries of PA, Inc. d/b/a Ad+Soil ("BFI") on

October 15, 1993 by the Department of Environmental Resources ("the Department") for the agricultural utilization of sewage sludge on the Wheeler Aman Farm ("Aman Farm") in West Vincent Township, Chester County.[1] The appeal was docketed at EHB Docket No. 93-350-MJ. Ms. Crawford challenged the issuance of the permit, alleging, *inter alia*, that the permittee was not the permit applicant, that the Department failed to adhere to the applicable regulations governing the disposal of residual waste, that the Department failed to hold a fair hearing and unbiased review of the permit application, and that the grant of the permit violates Article I, §27 of the Pennsylvania Constitution.

A separate appeal of the permit was filed on December 6, 1993 by the following: Corey Eichman, Thomas Griffin, Michael Wildfeur, James Barausky, and Camphill Village Kimberton Hills, Inc.[2] The appeal, docketed at EHB Docket No. 93-364-MR, was perfected on December 27, 1993 and set forth objections similar to those stated in the appeal filed by Christine Crawford. In addition, the appeal alleged that issuance of the permit was contrary to and inconsistent with the terms of Chester County's Act 101 municipal waste management plan ("Act 101 plan").[3]

On February 24, 1994, both appeals were consolidated at EHB Docket

---

[1] Ms. Crawford received notice of the permit issuance on October 21, 1993 by letter dated October 15, 1993.

[2] Mr. Eichman, *et al*., received notice of the permit issuance on November 13, 1993, upon publication in the Pennsylvania Bulletin.

[3] The plan was adopted pursuant to the Municipal Waste Planning, Recycling and Waste Reduction Act, Act of July 28, 1988, P.L. 556, 53 P.S. §4000.101 *et seq*. ("Act 101"), which required counties to adopt a municipal waste management plan for municipal waste generated within their boundaries. See 53 P.S. §4000.501.

No. 93-350-MJ. Ms. Crawford and Mr. Eichman, *et al.*, are hereinafter collectively referred to as the "Appellants".

On March 23, 1994, the Appellants filed a motion for summary judgment solely on the question of whether the permit issuance is contrary to the Chester County Act 101 plan. It is the Appellants' contention that because the disposal of sewage sludge on the Aman Farm is not provided for in the Act 101 plan, issuance of the permit authorizing BFI to dispose of sludge on the Aman Farm violates Act 101. BFI and the Department filed responses in opposition to the motion on April 4, 1994 and April 8, 1994, respectively. Both BFI and the Department contend that Act 101 does not prohibit issuance of the permit. The Appellants filed a reply letter on April 8, 1994 responding to both BFI's and the Department's objections.

Summary judgment may be granted where the pleadings, depositions, answers to interrogatories and admissions on file, together with any affidavits, demonstrate that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Pa. R.C.P. 1035(b); New Hanover Corporation v. DER, 1992 EHB 570, 572-573. The motion must be reviewed in the light most favorable to the non-moving party. Robert C. Penoyer v. DER, 1987 EHB 131.

Before proceeding to the merits of the Appellants' motion, we must address a procedural matter raised by BFI. BFI asserts that the notices of appeal do not raise any issue regarding whether the permit fails to comply with Act 101 and, therefore, this cannot form the basis of the Appellants' motion for summary judgment. It is true that any issue which an appellant fails to raise in its notice of appeal is waived unless good cause can be shown for raising it at a later date. Commonwealth, Game Commission v. Commonwealth, DER, 97 Pa. Cmwlth. 78, 509 A.2d 877 (1986), aff'd on other

grounds, 521 Pa. 121, 555 A.2d 812 (1989). While Ms. Crawford's appeal does not raise any issue related to compliance with Act 101, the appeal filed by Mr. Eichman, *et al.*, clearly does raise this issue. Objection VII.3 of their appeal states, "The issuance of Solid Waste Permit No. 603301 by DER is contrary to and inconsistent with the terms and provisions of the Chester County Act 101 Municipal Waste Management Plan as approved by DER." This clearly raises the issue on which the Appellants base their motion for summary judgment.

The Appellants argue that because disposal of sewage sludge on the Aman Farm is not provided for in Chester County's Act 101 plan, it does not comply with the plan and, in turn, violates Act 101. The required content of municipal waste management plans is set forth in §502 of Act 101. According to §502, each plan shall contain, *inter alia*, a description of the origin, content, and weight or volume of municipal waste generated within the county's boundaries currently and during the next ten years and an identification and description of the facilities where municipal waste is currently being disposed or processed. 53 P.S. §4000.502(b) and (c).

The parties do not dispute that the sewage sludge in question constitutes "municipal waste". Sewage sludge is included in the definition of municipal waste in both Act 101 and the Solid Waste Management Act, Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 *et seq.* ("SWMA"). See 53 P.S. §4000.103 and 35 P.S. §6018.103.

The parties do, however, dispute whether the agricultural utilization of sewage sludge constitutes "disposal". The Appellants assert that the permit authorizes the disposal of municipal waste at the Aman Farm. BFI, on the other hand, argues that when sewage sludge is applied to land for the purpose of agricultural utilization, that does not constitute "disposal". The

Department takes the position, in its memorandum in opposition to the motion for summary judgment, that the activity covered by the permit in question does fall within the definition of "disposal" under the SWMA and Act 101.

"Disposal" is defined in Act 101 as

> The deposition, injection, dumping, spilling, leaking or placing of solid waste into or on the land or water in a manner that the solid waste or a constituent of the solid waste enters the environment, is emitted into the air or is discharged to the waters of this Commonwealth.
>
> 53 P.S. §4000.103.

The definition of "disposal" in the SWMA is identical to that in Act 101 except that it also includes the "incineration" of waste. 35 P.S. §6018.103.[4] Because "disposal" includes the "placing of solid waste into or on the land...in a manner that the solid waste or a constituent of the solid waste enters the environment...", the application of sewage sludge to the Aman Farm falls within the definition of disposal under Act 101 and the SWMA. The regulations governing the land application of sewage sludge, at 25 Pa. Code, Chapter 275, provide further evidence that this activity is regulated as "disposal" of municipal waste. Section 275.1 lays out the scope of Chapter 275 and states, "This chapter sets forth application and operating requirements for a person or municipality that disposes of sewage sludge by land application..." 25 Pa. Code §271.1 (Emphasis added). Finally, in prior decisions, the Board has recognized the agricultural utilization of sewage sludge as constituting "disposal". See, *e.g.*, Wayne J. Busfield v. DER, 1980

---

[4] The regulations governing the disposal of municipal waste also define "disposal" as it is set forth in Act 101. 25 Pa. Code §271.1.

EHB 179.[5] Therefore, we agree with the Appellants and the Department that the application of sewage sludge at the Aman Farm constitutes "disposal" under the SWMA and Act 101.

The next issue is whether the Department violated Act 101 by issuing a permit for the disposal of sewage sludge at the Aman Farm when this activity is not provided for in Chester County's Act 101 plan. Both BFI and the Department argue that nothing in Act 101 prohibits issuance of the permit regardless of whether it was specifically provided for in Chester County's Act 101 plan. In particular, they rely on §507 of Act 101, 53 P.S. §4000.507.

Section 507 of Act 101 defines the relationship between county municipal waste management plans and the Department's authority to issue permits under the SWMA. Pursuant to §507(a), once a county has an approved municipal waste management plan under Act 101 and has submitted the implementing documents to the Department, the Department may "not issue any permit, or any permit that results in additional capacity, for a <u>municipal waste landfill or resource recovery facility</u> under the Solid Waste Management Act" unless the proposed facility is provided for in the plan or meets certain other requirements. 53 P.S. §4000.507(a) (Emphasis added). As BFI and the Department point out, §507(a) of Act 101 does not restrict the Department in its ability to issue all forms of permits under the SWMA, but only limits the Department's authority to issue permits for municipal waste landfills and resource recovery facilities. The land application of sewage sludge constitutes neither a "municipal waste landfill" nor a "resource recovery

---

[5] <u>Busfield</u> involved the issuance of a solid waste permit by the Department for the application of sewage sludge to farmland for agricultural purposes. Although the question of whether this activity constituted disposal was not an issue in that appeal, the Board, in its adjudication of the matter, referred to the application of the sludge as "disposal".

facility". The definition of "municipal waste landfill" in Act 101 specifically excludes "any facility that is used exclusively for disposal of...sludge from sewage treatment plants or water supply treatment plants", and a "resource recovery facility" is a "processing facility...for the extraction and utilization of materials or energy from municipal waste". 53 P.S. §4000.103. The application of sludge to farmland falls into neither of these categories.

The Appellants argue, however, that issuance of the permit, even if not specifically proscribed by §507(a), is, nonetheless, prohibited by §1701, which defines "unlawful conduct" under Act 101. The Appellants point specifically to §1701(a)(4), which makes it unlawful to "[a]ct in a manner that is contrary to the approved county plan or otherwise fail to act in a manner that is inconsistent with the approved county plan." 53 P.S. §4000.1701(a)(4). The Appellants contend that BFI's permit is inconsistent with the Chester County Act 101 plan and, therefore, violates §1701(a)(4) of Act 101.

A copy of the "Chester County Act 101 Municipal Waste Management Plan" is included as an exhibit to the Appellants' motion for summary judgment. Section 2.2.3.1 of the Plan addresses sewage sludge generation and disposal. The only reference to land application of sewage sludge is contained in the introductory paragraph to this section, which states, "According to the Rules and Regulations [of Title 25] sewage sludge can be disposed by landfilling, land application, incineration and composting. Each of these disposal options requires a permit approved by the Pennsylvania Department of Environmental Resources." This section then states that in 1989 approximately 5000 tons of dry sludge were disposed at the Lanchester Landfill and that this practice will continue in the future. It also makes a

recommendation that the Chester County Solid Waste Authority ("the Authority") consider accepting liquid sludge for disposal at the Lanchester Landfill's leachate treatment facility provided that the landfill has adequate storage and treatment capacity, the Authority obtains a National Pollution Discharge Elimination System permit, and the leachate treatment facility meets operational standards. The Act 101 plan does not, however, require that all sewage sludge generated within the county be disposed at the Lanchester Landfill. In fact, the Act 101 plan contains no restrictions on the disposal of sewage sludge. As a result, we cannot find that the Department's issuance of the permit to BFI for the land application of sewage sludge at the Aman Farm is inconsistent with or contrary to the plan. Nor can the Appellants assert that the plan is deficient for failing to contain restrictions on the disposal of sewage sludge since they did not appeal the Department's approval of the plan. Because there is nothing in Act 101 or Chester County's Act 101 plan which would prevent issuance of the permit to BFI for land application of sewage sludge at the Aman Farm, the Appellants' motion for summary judgment must be denied.

Furthermore the Appellants' motion is procedurally defective. Although the Appellants include a copy of the Chester County Act 101 plan as Exhibit A to their motion, there is no affidavit or other document verifying that Exhibit A is a true and correct copy of the actual plan adopted by the county and approved by the Department. As the Department also notes in its memorandum opposing the motion, Appendix E to the Act 101 plan, which purports to contain the plan's implementing documents, contains only copies marked "Draft", with no explanation as to whether these are, in fact, copies of the actual implementing documents.

Because these questions of material fact remain and, further, because the Appellants have failed to demonstrate that issuance of the permit to BFI violates Act 101, their motion for summary judgment is denied.

O R D E R

AND NOW, this 28th day of April, 1994, it is hereby ordered that the Appellants' Motion for Summary Judgment is denied.

ENVIRONMENTAL HEARING BOARD

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: April 28, 1994

cc: **Bureau of Litigation**
Library: Brenda Houck
For the Commonwealth, DER:
Mary Y. Peck, Esq.
Southeastern Region
For Appellant:
Christine Ann Crawford, pro se
P. O. Box 797
Kimberton, PA 19442
Stephen Zipperlen, Associate Director
Camphill Village
P. O. Box 155
Kimberton, PA 19442
For Permittee:
Michael R. Bramnick, Esq.
John W. Carroll, Esq.
PEPPER, HAMILTON & SCHEETZ
Harrisburg, PA

ar

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
2nd FLOOR — MARKET STREET STATE OFFICE BUILDING
400 MARKET STREET, P.O. BOX 8457
HARRISBURG, PA 17105-8457
717-787-3483
TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOARD

BUTLER TOWNSHIP AREA WATER AND SEWER AUTHORITY	:	
	:	
v.	:	**EHB Docket No. 93-041-E (Consolidated Docket)**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** April 29, 1994

OPINION AND ORDER SUR
CROSS-MOTION TO REOPEN RECORD

By Richard S. Ehmann, Member

Synopsis:

The Board grants the Department of Environmental Resources' ("DER") cross-motion to reopen the record. DER's offered testimony is not inadmissible because of the best evidence rule or parol evidence rule.

OPINION

The instant consolidated appeals involve a challenge by Butler Township Water and Sewer Authority ("Authority"), *inter alia*, to conditions in Water Allocation Permit No. WA-10-904 and Water Allocation Permit Modification Order WA-10-904 issued by DER to the Authority. A hearing on the merits was held on September 1-2, 1993, before Board Member Richard S. Ehmann. Both parties subsequently agreed that the record should be reopened to admit into evidence the Board-approved COA in Pennsylvania-American Water Company ["PAWC"], *et al.* v. DER, EHB Docket No. 92-411-E (Consolidated), dated February 22, 1994, concluding a dispute between PAWC and DER. This COA was entered with regard to DER's issuance of PAWC's water allocation permit for its Butler water treatment and

distribution facilities from which PAWC supplies water in bulk to the Authority. The COA was then admitted as Exhibit R-1 in a reopened merits hearing held on March 31, 1994. The Authority rested its case after the admission of Exhibit R-1, but DER sought to examine Thomas Denslinger concerning the circumstances surrounding the COA as related to PAWC's water supply and the effect of the COA on his previous testimony at the merits hearing in the instant appeal. The Authority objected to Denslinger's testifying on DER's behalf, asserting the best evidence rule and the parol evidence rule. The hearing was adjourned so that the parties could conduct discovery as to Denslinger's testimony and for DER to brief the applicability of these rules. We received DER's legal memorandum on April 14, 1994.

"The 'best evidence' rule limits the method of proving the terms of a writing to the presentation of the original writing, where the terms of the instrument are material to the issue at hand, unless the original is shown to be unavailable through no fault of the proponent." Al Hamilton Contracting Co. v. DER, 1992 EHB 1366 (quoting Warren v. Mosites Construction Co., 253 Pa. Super. 395, 402, 385 A.2d 397, 400 (1978)). In describing the best evidence rule, the Authority quotes Scott v. Bryn Mawr Arms, Inc., 454 Pa. 304, ___, 312 A.2d 592, 594 (1973), stating "where parties ... have deliberately put their engagements in writing, the law declares the writing to be not only the best, but the only, evidence of their agreement." This is not a statement of the "best evidence" rule, but the parol evidence rule. See Scott, *supra* at ____, 312 A.2d at 594. Here, there is no issue relating to the availability of the original COA, as the parties have stipulated to the admission of Exhibit R-1. We thus reject the Authority's argument that the best evidence rule is applicable in this matter.

The parol evidence rule generally prohibits the introduction of oral

testimony to vary the terms of a written agreement. In re Estate of Hall, 517 Pa. 115, 535 A.2d 47 (1987). It provides:

> Where the alleged prior or contemporaneous representations or agreements concern a subject which is specifically dealt with in the written contract, and the written contract covers or purports to cover the entire agreement of the parties, the law is now clearly and well settled that in the absence of fraud, accident or mistake the alleged oral representations or agreements are merged in or superseded by the subsequent written contract, and parol evidence to vary, modify or supersede the written contract is inadmissible in evidence.

LeDonne v. Kessler, 256 Pa. Super. 280, ___, 389 A.2d 1123, 1126 (1978) (citations and footnote omitted). See also National Bldg. Leasing, Inc. v. Byler, 252 Pa. Super. 370, ___, 381 A.2d 963, 965 (1977). The parol evidence rule is generally applicable to bind parties to a written agreement or those claiming through such parties. See Evans v. Otis Elevator Co., 403 Pa. 13, 168 A.2d 573 (1961); Badler v. L. Gillarde Sons Co., 387 Pa. 266, 127 A.2d 680 (1956).

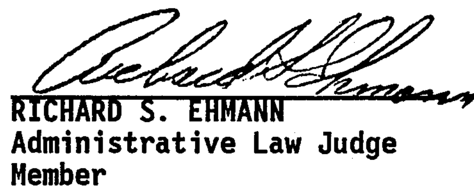
DER argues that Denslinger should be allowed to explain the factual circumstances involving portions of the COA which the Authority has asserted are relevant to "refute and rebut" DER's position that the Authority must meter its interconnection points with the PAWC water system. DER says Denslinger's testimony would concern the facts giving rise to the terms of the COA, specifically bearing upon PAWC's construction of PAWC's new pumping facility and its increased pumping capacity, the adequacy of its water supply, and the need for PAWC to have drought contingency plans. His testimony would also address the effect of PAWC's increased pumping capacity under the COA on PAWC's water supply problems in the Butler District system and DER's drought contingency rationale for requiring the Authority to install interconnection meters.

As DER asserts, here the Authority was not a party to the COA. The Authority cites Evans in support of its argument that the parol evidence rule applies here. In Evans, the Supreme Court ruled that the defendant-elevator company could not introduce parol evidence to show that the agreement between it and the plaintiff's employer/additional defendant imposed no obligation on it to inspect the elevator which injured the plaintiff and report on its condition to his employer. The Court instead found the plaintiff was not a stranger to the agreement because the elevator company owed him a duty of care by reason of its undertaking the agreement and that the elevator company could not avoid this duty by asserting the parol evidence rule was inapplicable to this agreement. Unlike the situation in Evans, DER is not here attempting to avoid some duty to the Authority. Rather, DER seeks to offer Denslinger's testimony to explain whether its reasons for metering of the Authority's interconnection points with PAWC are appropriate in light of the COA. We will not bar Denslinger's testimony on the basis of the parol evidence rule, especially where his testimony is not being offered to alter, vary or contradict the COA with any additional terms. Rempel v. Nationwide Life Insurance Co., 227 Pa. Super. 87, 323 A.2d 193 (1974), affirmed, 471 Pa. 404, 370 A.2d 366 (1977).

O R D E R

AND NOW, this 29th day of April, 1994, it is ordered that DER's Cross-Motion to Reopen the Record is granted and that in accordance with the foregoing opinion, Thomas Denslinger will be permitted to testify at a continuation of the reopened merits hearing to be scheduled by further Order of this Board.

ENVIRONMENTAL HEARING BOARD



RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: April 29, 1994

cc: **DER Bureau of Litigation:**
(Library: Brenda Houck)
For the Commonwealth, DER:
Matthew L. Wolford, Esq.
Michael D. Buchwach, Esq.
Northwest Region
For Appellant:
Leo M. Stepanian, Esq.
STEPANIAN & MUSCATELLO
Butler, PA

bl

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
2nd FLOOR — MARKET STREET STATE OFFICE BUILDING
400 MARKET STREET, P.O. BOX 8457
HARRISBURG, PA 17105-8457
717-787-3483
TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOARD

WOOD PROCESSORS, INC. and ARCHIE JOYNER :
:
v. : EHB Docket No. 90-442-E
:
COMMONWEALTH OF PENNSYLVANIA :
DEPARTMENT OF ENVIRONMENTAL RESOURCES : Issued: May 6, 1994

**OPINION AND ORDER SUR
APPLICATION OF ARCHIE JOYNER
TO AWARD COUNSEL FEES AND EXPENSES**

By: Richard S. Ehmann, Member

Synopsis

On remand from the Commonwealth Court, the Application of Archie Joyner To Award Counsel Fees and Expenses Pursuant to 71 P.S. §2031 *et seq.* is granted. Because the maximum award under Section 2 of the Act of December 13, 1982, P.L. 1127, as amended, 71 P.S. §2032 (the "Costs Act"), is limited to $10,000, our award to Joyner may not exceed this amount. The amount of $10,000 is awarded to Joyner, who had proven that his attorneys fees and expenses exceed $10,000. Where a corporate officer shows that DER has sought to hold him personally liable for certain violations and as to those violations that the corporation was defended so as to prevent either it or the officer from being found liable, the officer may recover fees for the hours his lawyer spends on such a joint defense as well as the fees for the hours of attorney time expended solely on issues of personal liability. Where DER begins and abandons one proceeding against a corporation and its officers and then starts a second expanded proceeding as to the same incidents and the same parties, the fact that it prevails in the second proceeding does not show

DER was substantially justified in commencing its initial but abandoned action. In deciding questions arising under the Costs Act which are of first impression, it is appropriate to refer to the cases addressing similar issues under the federal Equal Access To Justice Act, 28 U.S.C. §2412, on which the Costs Act is modeled.

Background

This appeal initially arose in 1990 when DER issued an administrative order to Wood Processors, Inc. ("WP"), Archie Joyner ("Joyner") and Art Foss. After a supersedeas hearing on March 7, 1991 before then Board Member Terrance J. Fitzpatrick in an appeal therefrom by Wood and Joyner, this Board granted supersedeas of DER's Order as to Joyner only. Our opinion is reported at 1991 EHB 607. Thereafter, DER withdrew its administrative order.[1] On May 23, 1991, Joyner filed the Application To Award Counsel Fees and Expenses, which is addressed herein in connection with this withdrawn order and his appeal therefrom. Joyner's application sought counsel fees and expenses in the amount of $29,455.51.

By an Opinion And Order Sur Application For Attorneys Fees dated April 2, 1992, this Board denied Joyner's Application. Our Opinion is reported at 1992 EHB 405. Joyner appealed from our denial of this Application to the Commonwealth Court. In Archie Joyner v. Commonwealth, DER, 152 Pa.Cmwlth. 441, 619 A.2d 406 (1992) ("Joyner v. Commonwealth"), the Commonwealth Court sustained the Joyner appeal, reversed this Board and

---

1 This order's withdrawal occurred simultaneously with DER's issuance of an Amended Order to the same parties. The Amended Order was also appealed by WP and Joyner. In our adjudication at Wood Processors, Inc., et al v. DER, EHB Docket No. 91-219-E (Adjudication issued March 11, 1994) ("Joyner II") we sustained DER's Amended Order in large measure. That Amended Order is not before us here.

remanded this matter to this Board for a hearing in which Joyner could present evidence of the attorneys fees and expenses incurred in defense of the allegations made against him in DER's order.[2] Thereafter, the Supreme Court denied DER's request for *allocatur* on October 6, 1993 and the Commonwealth Court returned this file to us on October 12, 1993. On its return to us, this appeal was reassigned to Board Member Richard S. Ehmann because of Board Member Terrance J. Fitzpatrick's resignation during the pendency of the Commonwealth Court proceedings.

On November 5, 1993, Board Member Ehmann issued an Opinion and Order denying DER's request that either this appeal or Joyner II (which had also been reassigned to him) be assigned to another Board Member. Thereafter, on November 9, 1993, he conducted the evidentiary hearing mandated by the Commonwealth Court. Subsequently, the parties filed their briefs on the issues raised by that hearing with the last brief, a Reply Brief on behalf of Joyner, being received by the Board on January 31, 1994.

In its Brief DER argues that the maximum amount of fees which should be awarded to Joyner is $1,135.00. It reaches this conclusion by arguing that Joyner's lawyer represented both Joyner and WP, and, since WP had to be defended, Joyner, as the sole officer, had to attend the hearing to do this, so any costs which are attributable to defending WP cannot be recovered by Joyner. Accordingly, DER concludes that all he can recover are the attorneys fees and costs attributable to any personal (as opposed to corporate) liability. DER also argues that the expert witness fees and court reporter costs are attributable to WP's defense and are not recoverable. It also

---

2 On February 8, 1993, the Commonwealth Court denied reargument in this matter.

asserts the Board erred in admitting Exhibit J-1 into evidence in the Costs Act hearing because it is hearsay. Further, DER argues that without Exhibit J-1, the records are so unclear that no fees or costs should be awarded. Finally, DER asserts that since Joyner II is still pending before this Board, there is no final determination that DER's position was not substantially justified, that substantial justification exists and that this means that no costs or fees should be awarded and Joyner's application must be denied.

Joyner's Brief asserts that DER has not shown any substantial justification. It next argues that we erred in limiting the admissibility of Exhibit J-1 and that it should be fully admissible as a business record. Joyner argues that it has produced adequate proof of the costs and fees for which Joyner seeks recovery. It asserts the proofs are adequate as to Attorney Anderson's hours. Next, Joyner argues WP was a prevailing party in this appeal, too, and to properly defend Joyner, WP had to be defended, so WP's costs are recoverable on Joyner's behalf. It also asserts any risk of non-apportionment of these fees falls on DER, not Joyner, because WP and Joyner prevailed. Finally, it asserts that there should be a cost-of-living increase added to the $75 per hour in the Costs Act to cover the increase in the cost-of-living since the statute's passage, and thus Joyner should be allowed to recover fees at a rate of $105.60 per hour. Joyner's Reply Brief argues that the substantially justified issue raised by DER ceased being an issue by virtue of the Commonwealth Court's opinion in Joyner v. Commonwealth.

Discussion

Substantial Justification

The first issue we must deal with is the question of whether DER's position in this litigation was substantially justified. We deal with it

because if DER's position in this litigation is substantially justified, then under Section 3(a) the Costs Act (71 P.S. §2033(a)), fees may not be awarded. While we deal with this issue first, we summarily reject DER's argument.

In its Costs Act opinion the Commonwealth Court concluded approvingly as to this Board's supersedeas opinion: "In other words, the charges brought against Joyner in the first order were 'substantially unwarranted'." Joyner v. Commonwealth. It explicitly rejected the idea that DER could avoid Costs Act claims in this appeal based on possible future success in litigation on Joyner II based on the amended order, saying:

> To deny fees and expenses to Joyner because the amended order may establish liability would be to circumvent a stated purpose of the Costs Act, which is to deter the initiation of unwarranted actions.

Id. at ___, 619 A.2d at 410.

This conclusion leaves no option but rejection of DER's argument.

Fees For Joint Defense

The parties take different views on the issue of whether Joyner may recover any costs for the time spent in his counsel's preparation on issues which simultaneously provide a defense for Joyner and WP. Joyner argues that in his defense there were two alternative theories under which he could have been found not liable in this appeal. The obvious first one is for his lawyer to successfully defeat any claims that Joyner was liable as a corporate officer who participated in WP's violation or that Joyner and WP were alter egos and thus WP's corporate veil should be pierced to impose liability on Joyner. This is the personal liability segment of Joyner's defense, and on it, even DER's Costs Act Brief agrees there is some reason to find in favor of Joyner if one does not subscribe to certain other DER arguments.

The second theory under which Joyner asserts he could escape personal liability is for his lawyer (who represented both Joyner and WP) to defeat claims that WP violated the applicable statutes and regulations. Joyner argues that one cannot pierce the corporate veil to reach Joyner or hold him personally liable as a corporate officer co-participant with WP in violations, if the Board finds no violations by WP in the first place. Thus, a defense of WP is a joint defense of WP and Joyner.

The evidence from the Costs Act hearing established that Joyner retained this law firm to defend both him and WP (T-31)[3] and it was he, not WP, who paid the firm's entire retainer. (T-54, 142) Moreover, at this hearing his counsel's unrebutted testimony was that his firm would not have undertaken representation of WP alone and undertook representation of WP only to defend Joyner. (T-32-33) This evidence clearly supports Joyner's argument and displays the intertwined nature of the WP/Joyner defenses on the occurence of the violations while undercutting DER's counter-argument.

DER argues that WP had to have a defense, so efforts of Joyner and the lawyers had to be expended in any scenario, whether the hours spent were for learning the Environmental Hearing Board supersedeas procedure, discovering the basis for DER's case against WP, or preparing WP's supersedeas case, and there should be no recompensation of Joyner as to fees and costs under the Costs Act incurred in regard thereto. DER reads former Board Member Fitzpatrick's opinion as supporting this conclusion. DER asserts this argument also applies both to the supersedeas hearing's transcription costs

---

3 Reference to T-__ are references to pages of the Costs Act Hearing's transcript. J-__ and C-__ are references to Joyner and DER exhibits introduced into the record at that hearing.

and the expert witness' fee for providing expert testimony since he did not testify on personal liability issues but as to the issue of harm to the environment.

The first hole in DER's argument is DER's assignment of virtually all of the time spent by the law firm in gearing up to handle this appeal to attorney time billable solely to WP, which according to DER's argument renders the costs of this time unrecoverable. In order to adequately represent either party, the law firm which represented them both spent time becoming familiar with this Board's procedure, its rules, the evidence and the statute under which DER acted. This time is chargeable solely to WP only if the law firm only represented WP. The same is true of time spent preparing for the hearing, or writing post-hearing briefs. Here, this firm's lawyers represented both appellants simultaneously. In and of itself this means that absent some showing to the contrary by DER, where an hour is spent reviewing the Board's procedure, a maximum of only half that time is billable to WP.

The next error in DER's reasoning is the underlying assumption within it that WP had to be defended. DER takes this position at least in part based on our Costs Act opinion. However, the Commonwealth Court overturned that opinion. Moreover, our review of the evidence offered in this appeal and our Finding of Facts in Joyner II suggest strongly that there was no reason WP had to be defended. According to the facts found in our published Adjudication in Joyner II, it appears that WP was virtually assetless while suffering from a super-abundance of liabilities and a lack of prospects. If this is the case, there was no reason to defend WP from WP's position because it was out of

business and either judgment-proof or nearly judgment-proof. In this circumstance, WP's defense only makes sense in the context of a defense which produces a result favorable to WP and Joyner.

Thirdly, if there were no defense of WP but all of this effort was nevertheless expended solely to defend Joyner, the costs and fees would all be recoverable by Joyner. In such a scenario, Joyner would let a default judgment be entered against WP but raise all of the WP defenses in a defense solely of himself by arguing an essential element of the DER's evidence needed to convict Joyner is a WP violation. In this scenario, which from a practical standpoint appears to be virtually what happened here, all of these efforts would be expended solely for Joyner's defense, so they all would be recompensible fees and costs. The fact that, rather than letting a default be entered against WP, Joyner paid for efforts at a joint defense of both does not make the costs automatically non-reimbursable.[4]

Further, as Joyner contends, it is the result which counts, i.e., the Board's conclusion as to his liability. Joyner argues that if his lawyers advance three theories on his behalf as to why he should not be held personally liable and Joyner prevails on any one of them, he should be

---

[4] Even if we disregarded Joyners' evidence showing that WP was defended to provide Joyner a defense and would not have been defended but for this reason, to accept DER's theory requires us to assume the preparation and presentation of WP's defense was offered solely to protect WP and was offered without any intent to defend Joyner. We repeat what is stated above. The relationship of Joyner and WP was such that at least this portion of these appellants' defenses was fully integrated. Preparation of a defense of WP on the alleged violations was simultaneously preparation of a defense of Joyner on the alleged violations. Thus, even disregarding the aforementioned evidence, at a minimum, 50% of all the time spent preparing all defenses to the occurrence of the alleged violations themselves had to be billable as time spent on Joyner's behalf. As a result, at a minimum, even under DER's theory, fully half the time it argues is billable solely to WP had to be expended on Joyner's behalf and would thus be recoverable here.

recompensed under this act for the costs in achieving this result even if the Board rejects his other theories. We agree. Certainly when DER denies a permit for a variety of reasons and, in an appeal therefrom, prevails on one of them, neither DER nor its counsel consider counsel's efforts in defense of those alternative reasons invalid or meritless. The same is true in the scenario where multiple defenses are offered and we sustain a party on one of them without considering the merits of the remainder.

There is no case law under the Costs Act on this argument which has been cited to us by the parties or which our research has identified. However, this does not end our inquiry on this point. As suggested by Joyner's Brief, the Commonwealth Court has recognized that Pennsylvania's Costs Act is patterned after the Equal Access To Justice Act, 28 U.S.C. §2412 ("EAJA"). See Hardy v. Commonwealth, DER, 101 Pa.Cmwlth. 1, 515 A.2d 356 (1986). Accordingly, we look at cases under that statute for guidance in addressing this point. Our research there reveals two cases which support rejection of DER's position. They are Devine v. Sutermeister, 733 F.2d 892 (Fed. Cir. 1984), and Wedra v. Thomas, 625 F.Supp 272 (D.C.N.Y. 1985).

In Devine v. Sutermeister, *supra*, the National Treasury Employees Union ("NTEU") successfully defended against an appeal by the Office of Personnel Management ("OPM") which had lost an arbitration over its attempted removal of an employee while nevertheless prevailing on some of its charges against that employee. NTEU then sought attorneys fees under the EAJA, and in response, OPM argued in part that the NTEU had not prevailed on all issues so it was only entitled to fees for the discrete phases of the proceeding on which it had prevailed rather than the proceeding as a whole. There the court held that if the OPM had argued for compensation only for discrete phases

meaning trial level proceeding versus appellate proceedings or damage issues versus merits issues, it might draw a conclusion in its favor. However, the court went on to point out that OPM was advancing this discrete phases argument in a proceeding where no such phases exist and asking that costs be limited based on success on a particular motion or issue. Because this was so, the court rejected OPM's request reasoning: "a prevailing party should not be denied fees for its failure to prevail on every procedural motion or claim where there is no clear distinction between the former and that party's ultimate success." 733 F.2d 894, 897.[5]

Wedra v. Thomas, *supra*, involved an EAJA claim in a suit by inmates of a witness protection unit within a federal prison against the Warden, which sought declaratory relief, money damages and injunctive relief as to five separate issues concerning their rights. The suit settled. The settlement produced the relief sought by the inmates on three of the five issues plus concessions on the fourth issue but no real relief on the fifth issue raised. An EAJA request followed. In rejecting the federal government's defense that since the inmates had only prevailed on three of five issues, they could only recover fees thereon, the Court rejected what it called the government's "mechanical mathematical formula" citing Hensley v. Eckerhart, 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed. 2d 40 (1983). The Court then held that the proper focus is on the results obtained and the degree to which the successful and unsuccessful claims are separable. In rejecting the government's argument the court reasoned that where, as here, the successful

---

[5] On the question of considering the validity of a party's legal position on an issue at discrete times in EAJA litigation such as at the merits hearing and later when the EAJA claim is heard, see the interesting opinion in Brinker v. Guiffrida, 798 F.2d 661 (3d Cir. 1986).

and unsuccessful claims arise from a common core there are not a series of discrete claims.

This approach appears sound to us and applicable here. The facts here show a common core of facts and a lawful but intertwined relationship between Joyner and WP when the alleged violations occurred. It follows that the defenses thereto are also intertwined, mixed together or commingled. There cannot be clearer circumstance where this occurs than in the case where a common defense is asserted for two separate persons. As the Court pointed out in Wedra v. Thomas, *supra*, in this circumstance it would be unreasonable to expect Joyner's counsel to identify each hour spend exclusively on defending WP as opposed to defending both WP and Joyner.

In reversing us in Joyner v. Commonwealth, the Commonwealth Court held that under the Costs Act, Joyner could recover the fees which were incurred in his defense. The court specifically stated:

> We read this Section as imposing upon the applicant the burden of presenting sufficiently detailed information to enable an accurate award of fees and expenses to be made. Such fees and expenses are properly limited to those incurred in defense of the charges made against Joyner in DER's first order. As the party in possession of the information, Joyner is in a better position to show how the legal costs were allocated between his defense and that of WPI.

Joyner v. Commonwealth at ____, 619 A.2d at 411.

It is with this Commonwealth Court opinion where the majority of this Board and the dissenter part company. When our decision was taken to the Commonwealth Court by Joyner, that Court did not disagree with us in a fashion which left our opinion intact. It reversed our order and remanded this appeal to us for further proceedings consistent with its opinion. The significant portion of the Commonwealth Court's opinion in this regard is the Court's

conclusion that we had erred in precluding Joyner from "presenting evidence to demonstrate how legal costs were apportioned between his defense and that of [WP]." The court then specifically directed:

> At the hearing to be held on remand, Joyner should be given the opportunity to present evidence of attorney's fees and expenses incurred in defense of the allegations made against him in DER's first Order."

Joyner v. Commonwealth, at ___, 619 A.2d 411.

Thus, the Commonwealth Court did not rule on these merits of the fees and costs issue in rendering its opinion. The evidence now presented shows the attorneys fees and expenses expended on Joyner's behalf. It shows fees and costs efforts expended on joint defenses but these are clearly efforts on Joyner's behalf too. Importantly, the Court did not say recoverable fees must be for efforts exclusively on Joyner's behalf. It did not rule on the "exclusivity" versus "joint defense" issue in any fashion. The dissenting opinion mistakenly draws the opposite conclusion and this is the error from which it flows.

We read the language quoted from the Court's Opinion as allowing Joyner to prove his fees and costs including defenses based upon the theory which include a joint WP/Joyner defense to the occurrence of these violations. Accordingly, fees and costs for preparing such a defense are recoverable by Joyner.

In reaching this conclusion on the facts of the matter now before us, we pause to make clear the limited nature of this conclusion's application. To receive a costs award based on this conclusion, a costs-seeking party must not only prove all of the elements required of it by the Costs Act without falling victim to its restrictions but must also prevail in a circumstance

"derived" in part from another party's "primary" responsibility for that conduct. Moreover, this second liable party must also be proven not to be responsible therefor (and the costs-seeking party's counsel must expend time defending the actions of both the costs-seeking party and this non-derivative "primarily" liable party on this theory).

Admission of Exhibit J-1

With this conclusion before us, we turn to the admission of Exhibit Exhibit J-1. It is a compilation, from the computer records of the law firm representing Joyner, of the hours spent by the firm on this appeal and related matters. It was prepared by Attorney Gary Leadbetter from these records and signed by him, and Leadbetter testified at length as to what it showed. DER argues it is hearsay and we erred in admitting it. Insofar as it represents Leadbetter's work on this appeal and he appeared at the hearing with his time sheets (Exhibit J-2) to testify at length with regard thereto, we affirm the presiding Board Member's earlier ruling. Exhibit J-1 is a compilation of Leadbetter's original records and he was present to testify thereon and therefrom. He was cross-examined extensively as to these fees by DER. This document is a summary which aided that testimony and summarized these original records. Further, the evidence shows that the computer on which the law firm keeps its billing records cannot currently produce a computer "run" of time records for attorney times entered into its memory before 1992, and the time records in this appeal are from 1991. (T-17) Accordingly, we have no problem with this document's use and reject DER's objections thereto.

Counsel for DER asserts this Exhibit is excludable hearsay; we disagree. The hearsay rule bars the admission into evidence of out-of-court statements offered for the truth of the matters asserted because they are not

generally made under circumstances under which their credibility may be tested through cross-examination. The best description of the rule comes from our Supreme Court. In Johnson v. Peoples Cab Co., 386 Pa. 513, 513-514, 240 A.2d 720-721 (1956), it opined:

> The primary object of a trial in American courts is to bring to the tribunal, which is passing on the dispute involved, those persons who know of their own knowledge the facts to which they testify. If it were not for this absolute *sine qua non*, trials could be conducted on paper without the presence of a single flesh and blood witness. However, with such a pen-and-ink procedure, there would be no opportunity to check on testimonial defects such as fallacious memory, limited observation, purposeful distortions, and outright fabrication. The great engine of cross-examination would lie unused while error and perjury would travel untrammeledly to an unreliable and often-tainted judgment. Accordingly, nothing is more adamantly established in our trial procedure than that no one may testify to what somebody else told him. He may only relate what is within the sphere of his own memory brought to him by the couriers of his own senses.

Here, as to the time records of Gary Leadbetter, this rule does not apply; Leadbetter and his original time sheets were in court. He testified that he prepared Exhibit J-1 from the computer records and those records were from his time sheets. He indicated his choice on this information was either to prepare Exhibit J-1 or to provide the time sheets while deleting all references to other clients and their matters. (T-17) Most importantly, after addressing each of the entries of the time he spent on Joyner's behalf, he was available for cross-examination by DER, and DER not only cross-examined him, it subsequently recalled him as its own witness. (T-149-152) This exhibit thus is not excludable hearsay.

Awards As To Cost

With Exhibit J-1's admission, coupled with the testimony from Joyner's attorney, it is clear that the court reporter costs and expert witness' fees are recoverable costs. They total $1,507.30. We do not award Joyner the remaining portion of his costs which deal with telephone, duplicating and Federal Express charges, however. Attorney Leadbetter could not tell us how these charges were arrived at. (T-130) Moreover, Joyner's lawyers represented him in this appeal and simultaneously in a Commonwealth Court proceeding brought by DER to enforce its order. We cannot award costs to Joyner based on monies expended as to that proceeding, and Attorney Leadbetter could not separate which costs were for which proceeding. Since Joyner has the burden of proving his costs, and these costs may include some for the Commonwealth Court case, we can award none of them on this record.

Award As To Fees

Turning to the fees charged to Joyner for the work by Attorney Leadbetter for this proceeding only, we find Attorney Leadbetter spent 99.6 hours on this proceeding in the period from February 6, 1991 through March 14, 1991. This appears to be a reasonable amount of time to prepare and try this supersedeas proceeding.[6] At the $75.00 per hour rate for such services set forth in Section 2 of the Costs Act (71 P.S. §2032), that time is worth $7,470.

---

6 As Louis Nizer stated: "[Preparation] is the be-all of good trial work. Everything else - felicity of expression, improvisational brilliance - is a satellite around the sun. Thorough preparation is that sun". As quoted in Newsweek, December 11, 1973, and The Quotable Lawyer, Ed. by D. Shrager and E. Frost, Facts on File, Inc., New York 1986, p. 306.

As to the time recorded on Exhibit J-1 as expended by Attorney Gretchen W. Anderson on Joyner's behalf, there are problems with Exhibit J-1's use. Firstly, Attorney Anderson did not testify and is no longer with this firm. (T-94-95) Secondly, Mr. Leadbetter's firm no longer has her original time sheets. (T-95) Thirdly, Attorney Leadbetter cannot testify from his first-hand knowledge that the amount of time recorded in Exhibit J-1 as spent by Attorney Anderson on this appeal is an accurate record thereof. Clearly, as to Anderson, Exhibit J-1 is hearsay. We need not address whether it falls within the Business Record exception to hearsay's bar, however. Attorney Leadbetter spent eleven hours with Attorney Anderson on March 7, 1991, attending this Board's supersedeas hearing. (T-48, 137-138) This is reflected in Exhibit J-1. He also spent seven hours with both her and Joyner working on his appeal on February 26, 1991 according to his records recorded on Exhibit J-1. (T-41-42, 136) Again he was present at the hearing with his records to sustain the burden of proof in regard to at least these hours of her time and for purposes of cross-examination by DER. Thus, as to this 18 hours of Attorney Anderson's time, we again have no hearsay problem. If we compensate Joyner at $75 per hour for only that much of Anderson's time, it adds $1,350 in compensable fees. This $1,350, when added to the costs of $1,507.30 and Leadbetter's fees of $7,470.00, totals $10,327.30. Under Section 2 of the Costs Act, the maximum award may not exceed $10,000. Carl Oermann v. DER, 1992 EHB 1555; McDonald Land and Mining Co. v. DER, 1992 EHB 522.

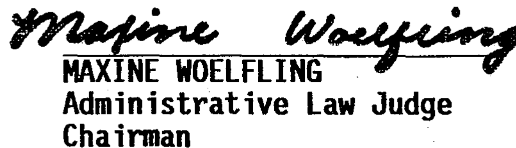
Accordingly, even with fees for only these hours, we exceed that amount and must reduce this total to $10,000.

Based upon the foregoing discussion we enter the following Order.[7]

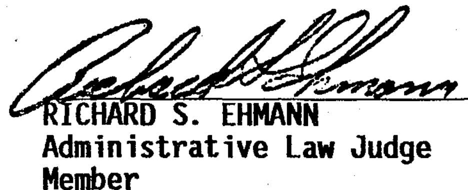
O R D E R

AND NOW, this 6th day of May, 1994, it is ordered that the Application To Award Counsel Fees and Expenses filed on behalf of Joyner is granted. DER shall, within thirty days, pay $10,000 to Joyner.

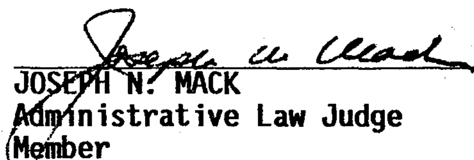
ENVIRONMENTAL HEARING BOARD



MAXINE WOELFLING
Administrative Law Judge
Chairman



RICHARD S. EHMANN
Administrative Law Judge
Member



JOSEPH N. MACK
Administrative Law Judge
Member

Board Member Robert D. Myers dissents and files a dissenting opinion.

DATED: May 6, 1994

---

7 In reaching this conclusion, we not only have not ruled on whether Exhibit J-1 is admissible as to Anderson's hours as an exception to the hearsay rule but also have not addressed Joyner's request that his counsel be compensated at a rate in excess of $75.00 per hour. Likewise, we leave unaddressed Joyner's argument that WP is a prevailing party and its assertion that any risk of non-apportionment of fees between WP and Joyner falls on DER.

cc: **Bureau of Litigation**
Library: Brenda Houck
For the Commonwealth, DER:
Anderson Lee Hartzell, Esq.
Southeast Region
For Appellant:
Gary R. Leadbetter, Esq.
Conshohocken, PA

med

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
2nd FLOOR — MARKET STREET STATE OFFICE BUILDING
400 MARKET STREET, P.O. BOX 8457
HARRISBURG, PA 17105-8457
717-787-3483
TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOARD

WOOD PROCESSORS, INC. AND ARCHIE JOYNER :
:
v. : EHB Docket No. 90-442-E
:
COMMONWEALTH OF PENNSYLVANIA, :
DEPARTMENT OF ENVIRONMENTAL RESOURCES :

OPINION BY
ADMINISTRATIVE LAW JUDGE
ROBERT D. MYERS

I dissent because my colleagues on the Board have abandoned a legal principle set forth in our first Opinion and Order on this fee application and affirmed by Commonwealth Court and, in the process, have been overgenerous with the Commonwealth's money.

When this case was first before us in 1991 and 1992, apportionment of the fees and costs between Joyner and Wood Processors, Inc. was clearly raised and argued by both parties. In our Opinion and Order (1992 EHB 405), we stated on page 408:

> In addition, Joyner argues that the fees he is seeking to recover have been properly stated; these fees cannot be divided between Wood and him because his fees would have been the same even if his counsel had not also represented Wood. This is so, Joyner contends, because his first line of defense in this proceeding was to contest allegations that Wood had operated illegally (Emphasis added).

We rejected Joyner's argument on page 409, ruling that "Joyner should not be allowed to recover costs which were incurred to defend both Wood and Joyner." Since Joyner provided no apportionment and since the Board had no basis on which

to make an apportionment, we rejected the application. Our Opinion and Order went on to state that, even if we could make an apportionment, "special circumstances" made an award unjust.

When the case was subsequently before Commonwealth Court, the apportionment issue was argued as well as the "special circumstances" issue. The Court reversed the Board on the latter issue but agreed with the Board on the necessity of apportionment. The Court said at 619 A.2d 406 (1992) at page 411:

> We read this Section as imposing upon the applicant the burden of presenting sufficiently detailed information to enable an accurate award of fees and expenses to be made. Such fees and expenses are properly limited to those incurred in defense of the charges made against Joyner in DER's first order. As the party in possession of the information, Joyner is in a better position to show how the legal costs were allocated between his defense and that of [Wood Processors, Inc.]. (Emphasis added).

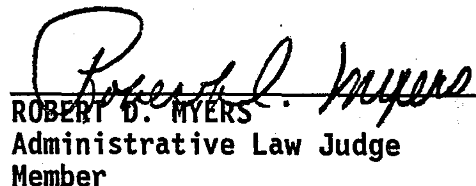
Joyner's argument that his defense and that of Wood Processors, Inc. were necessarily intertwined was rejected by Commonwealth Court just as it had been rejected previously by this Board. The case was remanded to the Board because we had not given Joyner the opportunity to present evidence "to demonstrate how the legal costs were apportioned between his defense and that of [Wood Processors, Inc.]. At the hearing to be held on remand, Joyner should be given the opportunity to present evidence of attorney's fees and expenses incurred in defense of the allegations made against him in DER's first order." (619 A.2d 406 (1992) at 411) (emphasis added)

Instead of presenting such evidence at the remand hearing, Joyner reprised his argument that no allocation was warranted since his defense was tied inextricably to Wood Processors, Inc.'s defense. The majority of the Board now accepts this argument, ignoring the fact that it was previously rejected not only

by a unanimous decision of this Board but by a three-judge panel of Commonwealth Court.

In the process the majority is awarding $10,000 to Joyner. While I agree that Joyner is entitled to recover for legal fees and expenses related to DER's abandoned claim for piercing the corporate veil in order to reach Joyner,[1] and would be willing to award a reasonable amount on that basis, Joyner has given us nothing on which to make that award. The only entry on the fee and expense record submitted with the Application that clearly relates to Joyner's personal liability is legal research on this point on February 22, 1991 for 1.5 hours. I am certain that additional time would have been spent on Joyner's sole behalf, but I am not convinced that a $10,000 award would be appropriate even if a precise allocation could be made.

The final irony in this case lies in the conflicting positions taken by Joyner. He successfully gained a supersedeas and became a prevailing party by taking the legal position that Wood Processors, Inc. was not his alter ego but a separate and distinct entity. Now, when legal fees are involved, he claims that he and Wood Processors, Inc. should be lumped together because they could not have been defended separately. I refuse to reward this disingenuousness.



ROBERT D. MYERS
Administrative Law Judge
Member

sb

[1]These would be legal fees and expenses connected to showing that Wood Processors, Inc. was not Joyner's alter ego.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
2nd FLOOR — MARKET STREET STATE OFFICE BUILDING
400 MARKET STREET, P.O. BOX 8457
HARRISBURG, PA 17105-8457
717-787-3483
TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOARD

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
v.	:	**EHB Docket No. 93-376-CP-W**
DOYLESTOWN FEDERAL SAVINGS & LOAN	:	**Issued:** May 6, 1994

OPINION AND ORDER SUR RULE TO SHOW CAUSE

By: Maxine Woelfling, Chairman

Synopsis

A complaint against additional defendants is dismissed. The Environmental Hearing Board has no authority to assess a civil penalty against a person not named as a defendant in a complaint for the assessment of civil penalty. The Board also has no authority to adjudicate the rights of parties *vis-ā-vis* each other. Furthermore, neither the Board's Rules of Practice and Procedure nor the General Rules of Administrative Practice and Procedure provides for a complaint to join additional defendants.

OPINION

This matter comes before us on a Complaint for the Assessment of Civil Penalty filed on December 15, 1993, by the Department of Environmental Resources (Department) against Doylestown Federal Savings and Loan, Division of Third Federal Savings[1] (Doylestown) for earthmoving activities at the Fox Hunt

[1]It appears from Doylestown's Answer that its proper name is Doylestown Federal Savings & Loan, a division of Third Federal Savings & Loan.

Development in Plumstead Township, Bucks County. In the three count Complaint, the Department avers Doylestown failed to implement and maintain proper erosion and sedimentation controls and caused the discharge of sediment into Pine Run Creek, in violation of various provisions of the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 *et seq.*, and the Department's regulations thereunder, 25 Pa. Code Ch. 102.

Doylestown filed its Answer and New Matter, as well as a Complaint Against Additional Defendants (third party complaint) on January 14, 1994. In its third party complaint, Doylestown seeks to join as additional defendants in this matter Ivymor Contractors, Inc., a construction and earthmoving firm, and Gilmore & Associates, Inc., an engineering and project management firm. Doylestown avers that Gilmore managed the Fox Hunt Development project and that Ivymor was contracted to perform work there. As a result, Doylestown claims, Gilmore and Ivymor are liable for the violations cited in the Civil Penalty Assessment or, in the alternative, must indemnify Doylestown for any amount of civil penalties it may be found to owe the Department.

Ivymor filed preliminary objections on February 7, 1994, alleging that the Board lacks jurisdiction over the third party complaint because, pursuant to its contract with Doylestown, controversies arising out of the contract must be submitted to arbitration. Because Ivymor's preliminary objections raised questions about our jurisdiction, we issued a rule on February 8, 1994, requiring the parties to show cause whether the Board has the authority to entertain Doylestown's third party complaint.

In its February 24, 1994, response, Doylestown asserts the Board has jurisdiction to join additional defendants. Doylestown contends that under 25 Pa. Code §21.64 the Board has adopted the Pennsylvania Rules of Civil Procedure

where they do not otherwise conflict with the Board's own rules of procedure. Because the Board's rules do not limit the pleadings regarding civil penalty assessments, Doylestown concludes that the Board has adopted Pa.R.C.P. 2226-2232 (concerning the joinder of parties) and, therefore, has jurisdiction over Ivymor and Gilmore.

Both Gilmore and Ivymor, as well as the Department, assert in their responses that the Board's jurisdiction is defined in §4 of the Environmental Hearing Board Act, the Act of July 31, 1988, P.L. 530, as amended, 35 P.S. §7514, which only gives the Board the power to hold hearings and issue adjudications on orders, permits, licenses, or decisions of the Department. They contend that the Board has no jurisdiction over causes of action based on breach of contract or negligence and, therefore, has no authority to entertain Doylestown's third party complaint.

It is a well-settled proposition that an agency's powers are limited to those expressly conferred or given by necessary implication. Cmwlth., Dept. of Environmental Resources v. Butler County Mushroom Farm, 499 Pa. 509, 454 A.2d 1 (1982). Because this case involves a complaint for civil penalties under the Clean Streams Law, the Board's powers are governed by §605(a), which states, in relevant part:

> In addition to proceeding under any other remedy available at law or in equity for a violation of a provision of this act, rule, regulation, order of the department, or a condition of a permit issued pursuant to this act, the department, after hearing, may assess a civil penalty upon a person or municipality for such violation....

35 P.S. §691.605(a). The term "department" can mean either the Department or the Board, depending on the function exercised. 35 P.S. §691.1. Applying the definition of "department" to §605(a), which only permits a civil penalty to be

assessed "after hearing," it is clear that the authority to assess a civil penalty resides with the Board. DER v. Allegro Oil and Gas Co., 1991 EHB 34, 39.

Our ability to assess a civil penalty is not unlimited, as this language might suggest, but only extends to situations where the Department first files a complaint for civil penalties. *Id.*; 25 Pa. Code §21.56(a). This becomes especially clear when §605(a) is read *in pari materia* with the Environmental Hearing Board Act, which limits the Board's authority to instances where the Department has first taken an action. See, 35 P.S. §7514. An action is defined by the Board's Rules of Practice and Procedure as:

> Any order, decree, decision, determination or ruling by the Department affecting personal or property rights, privileges, immunities, duties, liabilities or obligations of any person, including, but not limited to ... complaints for the assessment of civil penalties.

25 Pa. Code §21.1. Because the Department only filed a Complaint for the Assessment of Civil Penalty against Doylestown, we have no authority to assess a civil penalty against Gilmore and Ivymor.

We also have no authority to force Gilmore and Ivymor to indemnify Doylestown if we eventually assess a civil penalty upon it. The Board is not a tribunal of general jurisdiction. Al Hamilton Contracting Co. v. DER, 1989 EHB 383, 386. It does not have the authority to adjudicate the rights of parties *vis-ā-vis* each other. *Id.* Any claims for indemnification or for the enforcement of a contract are not proper matters for resolution before the Board, but, rather, must be raised in a separate civil action. McKees Rocks Forging, Inc. v. DER, 1991 EHB 405, 409.

We further reject Doylestown's argument that the Board's Rules of Practice and Procedure adopt Pa.R.C.P. 2226-2232 and authorize a complaint to join additional defendants. Although we once permitted the joinder of additional

defendants, DER v. Consolidated Rail Corp., 1980 EHB 415, we have since rejected this position as being based on an incorrect interpretation of our rules. New Hanover Twsp., *et al.* v. DER and New Hanover Corp., 1988 EHB 812, 814-815.[2] As we explained in Al Hamilton, 1989 EHB at 385:

> The Pa.R.C.P. are not generally applicable to proceedings before the [Board]. The Board is bound by the General Rules of Administrative Practice and Procedure, 1 Pa. Code §31.1 *et seq.*, and its own Rules of Practice and Procedure, 25 Pa. Code §21.1 *et seq.* Neither the Board's Rules of Practice and Procedure nor the General Rules of Administrative Practice and Procedure provide explicity for joinder.

See also, McKees Rocks Forging, 1991 EHB at 407-408; Berwind Natural Resources, 1985 EHB at 356, 358.

Accordingly, Doylestown's third party complaint must be dismissed. We have no authority to assess a civil penalty upon Gilmore and Ivymor or to adjudicate their rights with respect to Doylestown. Furthermore, neither our Rules of Practice and Procedure nor the General Rules of Administrative Practice and Procedure provide for a complaint to join additional defendants.

---

[2]The Conrail decision was based on the Supreme Court's decision in Stevenson v. Cmwlth., Dept. of Revenue, 489 Pa. 1, 413 A.2d 667 (1980), which held that the joinder of additional parties was permitted before the Board of Arbitration of Claims (now the Board of Claims). In Conrail, the Board found that our Rules of Practice and Procedure were analogous to those of the Board of Arbitration of Claims and since joinder was permissible before the Board of Arbitration of Claims it is also permissible before the Board. 1980 EHB at 416. We declined to follow the Conrail decision in New Hanover Twsp., however, because our rules concerning the adoption of the Pa.R.C.P., 25 Pa.Code §21.64, are not analogous to the rules of the Board of Arbitration of Claims concerning the adoption of the Pa.R.C.P., 4 Pa. Code §121.1. 1988 EHB at 816. At 25 Pa. Code §21.64, the Board's rules merely recognize the various "pleadings" in the Pa.R.C.P., while at 4 Pa. Code §121.1, the rules of the Board of Arbitration of Claims recognize the "proceedings" in the Pa.R.C.P. *Id.* Just because the Board recognizes the pleadings in the Pa.R.C.P. does not mean that it incorporates all of the other provisions of the Pa.R.C.P. *Id.*

O R D E R

AND NOW, this 6th day of May, 1994, it is ordered that Doylestown's Complaint Against Additional Defendants is dismissed.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

DATED: May 6, 1994

cc: **DER Bureau of Litigation:**
(Library: Brenda Houck)
For the Commonwealth, DER:
Michelle A. Coleman, Esq.
Southeast Region
For Doylestown Federal Savings & Loan:
Jeffrey P. Garton, Esq.
BEGLEY, CARLIN & MANDIO
Langhorne, PA
For Ivymor Contractors, Inc.:
Claudia Drennen McCarron, Esq.
SILVERMAN & JONAS
Willow Grove, PA
For Gilmore & Associates, Inc.:
Michael P. Coughlin, Esq.
LESSER & KAPLIN
Blue Bell, PA

bl

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
2nd FLOOR — MARKET STREET STATE OFFICE BUILDING
400 MARKET STREET, P.O. BOX 8457
HARRISBURG, PA 17105-8457
717-787-3483
TELECOPIER 717-783-4738

M. DIANE SMIT
SECRETARY TO THE B

LARRY D. HEASLEY, et al.	:	
	:	
v.	:	EHB Docket No. 90-311-MJ
	:	(Consolidated)
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
and COUNTY LANDFILL, INC., Permittee	:	Issued: May 13, 1994

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

By Joseph N. Mack, Member

Synopsis

In a third-party appeal of the Department's issuance of a permit to construct and operate a solid waste disposal facility in Farmington Township, Clarion County, the Appellants have failed to meet their burden of proving that the Department's issuance of the permit was an abuse of discretion. With respect to the issue of bonding, the Department was not required to include the cost of relocating waste from another landfill in its calculation of the closure bond for the site which is the subject of this appeal. Secondly, the appellants failed to demonstrate that issuance of the permit violates Article I, §27 of the Pennsylvania Constitution; compliance with the provisions of the Solid Waste Management Act and the underlying regulations ensures compliance with Article I, §27 since Article I, §27 considerations are incorporated into the Solid Waste Management Act and regulations. Finally, the Appellants raised numerous other objections which were stated simply as proposed conclusions of law with no further argument. These include the

following issues: groundwater monitoring and protection, traffic, emergency measures, maximum daily disposal rate, final permitted elevation, measurement of waste volume, substance monitoring, and cover soil testing. The Appellants presented little or, in some cases, no evidence with respect to these issues and did not meet their burden of demonstrating that the permit failed to comply in any of these areas.

Procedural History

This matter arose on July 27, 1990 when Larry D. Heasley, et al. ("Appellants") appealed the issuance of a solid waste disposal and processing permit ("solid waste permit") and water obstruction permit by the Department of Environmental Resources ("Department") to County Landfill, Inc. ("County Landfill") for the construction and operation of a solid waste disposal and/or processing facility in Farmington Township, Clarion County. On October 29, 1990, the Appellants also appealed the issuance of a gas collection permit connected with the aforesaid waste disposal facility.[1] These two appeals were consolidated on December 26, 1990 at EHB Docket No. 90-311-MJ.

Although the Appellants raised a number of issues in their notices of appeal, several of these issues have been disposed of either by agreement of the parties or in an Opinion and Order Sur Permittee's Motion for Partial Summary Judgment issued by the Board on November 7, 1991. See Larry D. Heasley, et al. v. DER and County Landfill, Inc., 1991 EHB 1758 ("November 1991 Opinion"). The November 1991 Opinion granted summary judgment to the Department and County Landfill on the following issues: disposal of residual and special handling waste, limitations on the amount of municipal waste which

[1] The three permits pertaining to the waste disposal facility are herein collectively referred to as "the permit".

may be accepted, economic effect on property values, zoning, withholding of the solid waste permit pending submission of application for NPDES permit, economic effect on the tourism industry, insurance coverage, ownership of property within the permitted area, compliance history of Aardvark and Envirite companies, length of permit term, replacement of water supplies, U.S. Army Corps of Engineers permit, notification of maximum tonnage exceedance, location near a cemetery, compliance with 25 Pa. Code §273.202 (mineral rights), compliance with 25 Pa. Code Chapter 131 (ambient air quality standards), and air quality and ambient air testing.

On February 3, 1992, the Board Member to whom this matter was assigned ordered the parties to submit a Statement of Legal Issues Which Remain to be Adjudicated ("Statement of Legal Issues"). County Landfill and the Appellants submitted separate statements on February 21, 1992 and April 1, 1992, respectively. The Department did not submit a Statement of Legal Issues. On April 6, 1992 County Landfill filed a response to the Appellant's Statement of Legal Issues. In addition, the parties submitted a Joint Stipulation on April 1, 1992.

In a pre-hearing conference call held between the parties and Board Member Joseph N. Mack on April 6, 1992 and at the start of the hearing on April 20, 1992, it was determined which issues remained to be adjudicated. There was disagreement as to whether the Appellants had waived certain issues pertaining to bond amount and testing of cover soils since these issues were not included in the Appellants' Statement of Legal Issues. In the April 6, 1992 pre-hearing conference call, counsel for the Appellants stated that the Appellants did not intend to waive these issues, and on April 9, 1992, the Appellants submitted a Supplemental Statement including these two issues.

During the April 6, 1992 conference call and again at the start of the hearing (Transcript, p. 5-6), Board Member Mack allowed the inclusion of these issues by the Appellants.

A hearing was held on seven days beginning on April 20, 1992 and ending on June 25, 1992. Post-hearing briefs were filed by the Appellants on November 13, 1992 and County Landfill on December 17, 1992. By letter dated January 3, 1993, the Department stated that it did not intend to file a post-hearing brief.

In their post-hearing brief, the Appellants did not address a number of the issues remaining to be adjudicated which had been established in the pre-hearing conference call and at the start of hearing.[2] Any arguments which are not preserved by a party in its post-hearing brief are deemed to be waived. Lucky Strike Coal Co. v. Commonwealth, DER, 119 Pa. Cmwlth. 440, 547 A.2d 447 (1988). In addition, any issues raised by the Appellants in their post-hearing brief other than the issues stipulated to by the parties are not before us for review.[3]

The record consists of seven volumes of transcript and 36 exhibits. After a full and complete review of the record, we make the following findings of fact:

---

[2] This matter is addressed in more detail in the Discussion section of this Adjudication.

[3] For instance, in their post-hearing brief, the Appellants raise the issues of sewer sludge and air quality monitoring. The issue of sewer sludge was waived by Appellants during the April 6, 1992 conference call. The issue of air quality was disposed of in the November 1991 Opinion.

FINDINGS OF FACT

1. The Appellants are Larry D. Heasley, Margreth M. Ward, Judy Fitzgerald, Pamela Wolbert, Theodore W. Ochs, Jack W. Fuellhart, Janice Fuellhart, Kermit Brosius and Mary Ellen Brosius. (J.S. 2) All of the appellants live and/or own businesses in the vicinity of the landfill. (Notice of Appeal)

2. The Department is the agency of the Commonwealth charged with the duty and authority to enforce and administer the Solid Waste Management Act ("SWMA"), Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 *et seq.*; §1917-A of the Administrative Code, Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-17; and the regulations promulgated thereunder.

3. The permittee is County Landfill, a corporation duly incorporated under the laws of the Commonwealth of Pennsylvania, with a business address at Route 36, Township Road 620, P. O. Box 237, Leeper, Pennsylvania 16233.

4. On June 27, 1990, the Department issued Solid Waste Permit No. 101187 to County Landfill to operate a solid waste disposal and/or processing facility ("the Landfill"), in Farmington Township, Clarion County, Pennsylvania. (J.S. 3)

5. A public hearing was held on the solid waste permit application on March 7, 1990 at the Leeper Fire House in Clarion County. (J.S. 6)

6. The solid waste permit was based on an application consisting of nineteen separate submissions. (J.S. 5)

7. On June 29, 1990, the Department's Division of Waterways and Storm Water Management issued Water Obstruction and Encroachment Permit No. E16-072 to County Landfill. (J.S. 4)

8. The Appellants filed a notice of appeal on July 27, 1990 challenging the issuance of the permits. (Notice of Appeal; J.S. 7)

9. On September 11, 1990 the Department's Bureau of Air Quality Control issued Plan Approval No. 16-322-001 to County Landfill for the construction and operation of a gas collection system at the Landfill. (J.S. 8)

10. Following publication in the Pennsylvania Bulletin on September 29, 1990, the Appellants filed a notice of appeal on October 29, 1990 challenging the Plan Approval. (Notice of Appeal; J.S. 9)

11. By Order of the Board on December 26, 1990, the two appeals were consolidated. (J.S. 10)

Location of the Landfill

12. The Landfill is situated on a topographic high point, northwest of Pennsylvania Route 66, between the villages of Crown and Leeper in Farmington Township, Clarion County. (J.S. 11)

13. The Landfill is located approximately two miles from Cook Forest State Park, four miles from the nearest boundary of the Allegheny National Forest, and 35 miles from the Kinzua Dam. (J.S. 12, 13, 14)

14. The Landfill is an expansion of the former Kinnear Landfill. (J.S. 21)

15. Waste from the old Kinnear Landfill will be transferred to the new Landfill. (Ex. P-2, p. 16)

Act 101 Plan

16. David Black is a county commissioner for Clarion County. (T. 111)

17. As a county commissioner, Mr. Black served on a committee charged with developing a solid waste disposal plan for Clarion County pursuant to the Municipal Waste Planning, Recycling and Waste Reduction Act ("Act 101"), Act of July 28, 1988, P.L. 556, 53 P.S. §4000.101 *et seq*. (T. 112)

18. The committee was a four-county committee comprised of Clarion, Venango, Forest, and Crawford counties. (T. 112)

19. The initial Act 101 Plan submitted by the Clarion County Commissioners designated the following facilities for the disposal of municipal waste generated within Clarion County: Greentree Landfill in Elk County, operated by Browning-Ferris Industries ("BFI"); Northwestern Landfill in Butler County; and Tri-County Industries Landfill in Mercer County. (T. 128, 131-132)

20. The initial Act 101 Plan submitted by Clarion County was rejected by the Department for technical reasons and because the Plan did not include any facility within its own county. (T. 126-127, 131)

21. The second Act 101 Plan submitted by Clarion County added County Landfill as one of the designated facilities for disposal of municipal waste. (T. 127, 128) This Plan was approved by the Department. (T. 127)

22. County Landfill is the only permitted municipal waste landfill in Clarion County. (T. 134)

23. Eighty to ninety percent of the waste to be disposed at County Landfill will originate from Clarion, Venango, Forest, and Crawford counties. (T. 319)

Description of Landfill

24. The Landfill is permitted for municipal waste. (Ex. P-1) It is not authorized to accept any hazardous waste. (T. 675).

25. The Landfill consists of a double-lined system. (T. 669-670) The primary liner is constructed of 100 mil high-density polyethylene ("HDPE"). (T. 699) The secondary liner is constructed of 60 mil HDPE. (T. 670).

26. The minimum requirement for a municipal waste primary liner is 50 mil and for a municipal waste secondary liner is 30 mil. (T. 670)

27. A 100 mil HDPE liner is compatible with leachate generated from any municipal waste or residual waste. (T. 671)

28. At the time of the hearing, the leachate treatment system had not yet been constructed. The leachate collection system, however, was in place. (T. 324)

Relocation of Kinnear Waste

29. Transfer of the Kinnear waste to the new landfill is expected to take approximately four and one-half years. (T. 1001)

30. The Kinnear Landfill was permitted to accept municipal waste and, with specific approval from the Department, the following types of residual waste: general plant refuse, mill scale, and refractory brick. (T. 106-107, 109)

31. The Kinnear Landfill was a natural attenuation system. (T. 104)

32. Because it was a natural attenuation landfill, no leachate information was available from the Kinnear Landfill. (T. 104)

33. Because no leachate information was available from the Kinnear Landfill, the Department required County Landfill to submit leachate data from another landfill which had accepted waste similar to that accepted by the Kinnear Landfill. (T. 104)

34. As part of its permit application, County Landfill submitted to the Department leachate/liner compatibility data from the Southern Allegheny Landfill. (T. 668)

35. Southern Allegheny is permitted for municipal waste with modifications for one type of residual waste, consisting of industrial waste. (T. 668)

36. Leachate from the Southern Allegheny Landfill was analyzed using EPA Method 9090, which demonstrates compatibility of leachate to a proposed liner material. (T. 668) Testing showed that the leachate was compatible with the liner proposed by County Landfill. (T. 669)

37. The Department also determined the liner to be compatible with the three types of residual waste which had been accepted by the Kinnear Landfill. (T. 109)

38. A drill sample of waste was taken from the Kinnear Landfill in January or February 1990. (T. 790-791) Analysis of leachate from the waste showed it to be typical of that produced by municipal waste, with some parameters not as high as typical municipal waste leachate. (T. 792-793)

39. Prior to any residual waste from the Kinnear Landfill being deposited into the new Landfill, it is required to be scrutinized against the specific terms and conditions of County Landfill's permit. (T. 108)

40. If, during the transfer of waste from the Kinnear Landfill, any unknown materials are encountered, they will be segregated and analyzed to

determine if they are hazardous. If they are found to be hazardous, they cannot be transferred to the new Landfill. (T. 675)

41. The cost to relocate the Kinnear waste is approximately $2.50 per cubic yard. (T. 324)

42. At the time of the hearing, approximately 60,000 cubic yards of waste had been relocated from the Kinnear Landfill to the new Landfill, and a total of approximately 300,000 cubic yards remained to be relocated. (T. 323)

43. Anthony Talak is a Regional Engineer in the Meadville, Pennsylvania office of the Department's Bureau of Waste Management. (T. 491)

44. The Department did not require the relocation of waste from the Kinnear Landfill. (T. 504, 527)

45. County Landfill proposed the relocation of the Kinnear waste in its permit application. (T. 503)

46. Issuance of the permit to County Landfill was not contingent on relocation of the Kinnear waste to the new Landfill. (T. 503)

Bond Amount

47. The amount of the closure bond approved by the Department is $3,658,168.00. (J.S. 19)

48. The bond amount was calculated by Brian Mummert in the Department's Bureau of Waste Management. (T. 222, 239, 242)

49. County Landfill's application is the only bond calculation Mr. Mummert has performed which involved the transfer of waste from an unlined system to a lined one. (T. 257-258)

50. The purpose of a closure bond is to cover the estimated cost to the Commonwealth of closing a site should the owner of the site not fulfill its obligations or become insolvent. (T. 387)

51. In calculating the amount of the closure bond, the Department did not include in its calculation the cost to remove waste from the Kinnear Landfill. (T. 252, 263) The Department did not consider the cost of removing waste from the Kinnear Landfill to be a part of closure of the new Landfill. (T. 502)

52. If County Landfill defaults before all of the Kinnear waste is moved to the new Landfill, the closure bond will be used by the Department to close the new site, and the remaining Kinnear waste will not be moved to the new site. (T. 504-505)

53. Approximately two to three acres remain open at the Kinnear Landfill. (T. 505)

54. The bond amount reflects the cost of placing a cap and final cover over five acres. (T. 271-272)

55. The first pad of the landfill is slightly over 12 acres. The first pad is to be divided into three sections of approximately four acres each. (T. 272)

56. Mr. Mummert rounded this figure up to five acres and required that the cost of a cap and final cover be initially calculated for five acres. (T. 272)

57. As the operation expands into the next section or pad, County Landfill is required to submit an updated bond to cover any additional cost of capping and placement of final cover. (T. 273)

58. Initially, there will be eighteen groundwater monitoring wells at the site. (T. 344) The bond amount reflects this number of monitoring wells. (T. 339)

59. County Landfill submitted a bonding worksheet with its application. (Ex. P-5, p. 1879-1893)

60. The amount of the bond calculated by County Landfill in its worksheet was $2.1 million. (T. 388-389) The bond amount required by the Department exceeds this amount by more than $1.5 million.

61. Mr. Mummert did not accept the figures provided by County Landfill in its bonding worksheet with respect to groundwater monitoring. He revised these figures based on discussion with Departmental hydrogeologist Craig Lobins. (T. 337-338)

62. County Landfill is required to notify the Department of any changes in the operation or design of the Landfill which would require the bond to be recalculated. (T. 335) This includes the installation of additional monitoring wells. (T. 335)

63. In estimating closure and post-closure costs for the Landfill, the Department relied on the guidance manual prepared by Pope and Reid Associates ("Pope & Reid Manual") for the federal Environmental Protection Agency ("EPA"). (T. 262, 266) This manual is recognized as a standard in the industry for calculating closure and post-closure costs for landfills. (T. 262)

64. County Landfill estimated the cost of placing a cap and final cover on five acres to be $5,000. Mr. Mummert recalculated this amount to be $19,440 based on his review of other bond worksheets and estimates from local contractors. (T. 340)

65. In calculating the bond amount, Mr. Mummert did not take into consideration violations at the Kinnear Landfill. (T. 232)

66. The bond calculation takes into consideration the cost of decontamination of equipment and removal of contaminated soil. (T. 258, 264-265, 270; Ex. P-5, p. 1882A)

67. The bond calculation takes into account the cost to construct, maintain and repair the leachate collection system. (T. 244, 341, 347) This amount was based on Mr. Mummert's review of other bond documents and worksheets. (T. 341)

68. The bond calculation takes into account the cost of monitoring well maintenance and repair. (T. 341-342) The calculation is based on information contained in the Pope & Reid Manual. (T. 342)

69. The bond calculation takes into account the cost of maintaining the leachate detection system. (T. 347-348)

70. The bond calculation takes into account the cost of leachate treatment, removal of leachate storage tanks, decontamination of the leachate treatment facility, and cost of treating sludge. (T. 348; Ex. P-5, p. 1892A)

71. The bond calculation takes into account the amount of leachate which would be collected during closure. County Landfill had initially estimated the leachate volume to be 349,800 gallons. However, based on projections by Department engineer Joel Fair, the Department estimated the leachate volume to be 941,700 gallons and adjusted the bond worksheet to reflect the higher volume. (T. 345)

72. In addition to its calculation of costs, the Department incorporated a 15 percent contingency fee to cover administrative and overhead costs, costs associated with quality assurance and quality control, and unexpected costs. (T. 349-350; Ex. P-5)

73. The bond amount also takes into account inflation representing the Implicit Price Deflation for Gross National Product published by the U.S. Department of Commerce. (T. 350) The Department used a figure of 10 percent for inflation based on a worksheet provided by the EPA for calculating this amount. (T. 351)

74. In calculating the bond amount, the Department gave no special consideration to the fact that acid mine drainage exists at the Landfill site since, under the terms of the permit, all leachate, regardless of whether it includes acid mine drainage, must be treated. (T. 352)

75. In calculating that portion of the bond amount reflecting the cost for offsite management of leachate, the Department took into consideration weight restrictions on state and township roads in the area of the landfill. (T. 369) This resulted in a greater amount being allocated to transportation costs in connection with the bond. (T. 386)

76. In preparation for trial, Mr. Mummert recalculated the bond amount based on updated figures and arrived at a total of $3,647,189, or $38,000 less than the actual bond amount. (T. 382, 386; Ex. A-7, p. 3) This did not cause the Department to decrease the amount of the bond, however. (T. 383)

77. Pursuant to condition 32 of its solid waste permit, County Landfill is required to provide updated bond liability calculations in its annual report to the Department. (T. 390-391)

78. The amount of the bond has not been revised since the issuance of the permit. (T. 383, 613-614)

Groundwater Protection

79. As part of the permitting process, the Department required County Landfill to implement an extensive groundwater investigation program so as to distinguish between contamination caused by pre-existing conditions at the site and contamination resulting from the Landfill. (T. 532)

80. Jeffrey Peffer is a registered professional engineer with a specialty in geological engineering. (T. 683, 687) He holds a Bachelor of Science degree in geology and a Master of Engineering degree in engineering science, both from Pennsylvania State University. (T. 686)

81. Mr. Peffer provided expert testimony in the areas of hydrogeology and geological engineering. (T. 689)

82. Mr. Peffer was involved in the preparation of the Phase I portion of County Landfill's permit application. (T. 699, 723)

83. Beginning in September 1987 and continuing until April or May 1988, Mr. Peffer's firm implemented a groundwater testing program at the Landfill site, which consisted of drilling 24 monitoring wells and 59 test pits. (T. 700-701)

84. The testing revealed widespread degradation of the groundwater at the site by acid mine drainage. (T. 722) The existence of acid mine drainage at the site pre-dates the Kinnear Landfill. (T. 944; Ex. P-2, p. 418-420)

85. The testing also revealed a limited area of groundwater contaminated with chloride which stemmed from the Kinnear Landfill. (T. 722)

86. Between November 1988 and February 1989, Mr. Peffer's firm conducted geophysical borehole logging for the purpose of defining the geology and groundwater conditions at the site. (T. 730, 739)

87. Based on the information gathered from the borehole logging, it was determined that the proposed site of the Landfill was the most upgradient position in the flow system. (T. 743)

88. The groundwater monitoring plan approved by the Department includes a total of thirty groundwater monitoring wells at the site. (T. 533, 756-757)

89. The thirty monitoring wells consist of twelve clusters of two wells and six single wells. (T. 755-756)

90. At the locations containing two wells, one well will monitor a shallow zone and the other a deeper zone. (T. 755)

91. The shallow wells monitor a saturated zone at the base of an old mine pit. The deeper wells monitor groundwater in the Homewood Sandstone, the first significant stratigraphic horizon below the Landfill. (T. 752, 847)

92. The shallow wells are for the purpose of early detection. The deeper wells are for the purpose of monitoring groundwater which has moved downward below the shallow zone. (T. 753)

93. In choosing the locations for the placement of groundwater monitoring wells at the site, the following criteria were followed: first, keeping a regular spacing pattern around the perimeter of the Landfill leaving no large gaps and, second, locating as many wells as possible on fracture traces, which are zones of preferred groundwater flow. (T. 759)

94. The groundwater monitoring plan addressed the following three issues: differentiating between contamination from pre-existing acid mine drainage and any contamination resulting from the Landfill, differentiating

between contamination from the Kinnear Landfill and any new contamination from the new Landfill, and the lack of any upgradient monitoring wells based on the Landfill's location at the most upgradient point of the site. (T. 761-762)

95. To address the first issue, that of differentiating between contamination caused by the Landfill and that caused by acid mine drainage which exists at the site, County Landfill agreed to plot the value of certain parameters spatially and over time to determine if there were any changing patterns. (T. 763) County Landfill also agreed to employ conventional statistical analysis of data. (T. 763, 860)

96. Construction of the new Landfill will help to eliminate some of the acid mine drainage in three ways: First, spoils which are the source of the acid mine drainage will be incorporated into the Landfill as cover material. Second, reclamation of the area will eliminate a series of closed depressions in the mined area where water accumulates enhancing the formation of acid mine drainage. Third, the entire lined Landfill will form a cap over the remaining spoils. (T. 775-776)

97. To address the issue of the chloride plume emanating from the Kinnear Landfill, the Department required County Landfill to submit a groundwater assessment plan. (T. 763-764) The plan was implemented in the Fall of 1990 and completed in May 1991. (T. 765)

98. The groundwater assessment revealed elevated levels of iron and manganese associated with the chloride plume. (T. 766)

99. Chloride, iron, and manganese are not pollutants but, rather, secondary contaminants. They are not health-endangering, but are regulated in drinking water for aesthetic purposes. (T. 723, 768)

100. The relocation of the Kinnear waste will help to abate the groundwater contamination resulting from the Kinnear Landfill because it will eliminate the source of the contamination. (T. 768-769)

101. The chloride plume is moving laterally away from the Kinnear Landfill; as it moves away, it is dispersing and becoming diluted. (T. 869-870)

102. As the chloride plume moves away from the Kinnear Landfill, it travels downward to the level of the Homewood Sandstone. This is why Mr. Peffer proposed the deeper tier of monitoring wells at the level of the Homewood Sandstone. (T. 992-993)

103. In addition to the monitoring wells set forth in the groundwater monitoring plan, County Landfill established a temporary monitoring well, TW-201, located between the Kinnear Landfill and the site of the first phase of the new Landfill for the purpose of differentiating between groundwater contamination resulting from the Kinnear Landfill and any contamination which results from operation of the new Landfill. (T. 773, 800)

104. County Landfill also continued to monitor groundwater wells at the Kinnear site since they provide historical data. (T. 774)

105. Any leachate generated by the Kinnear waste in the new Landfill will be collected as part of the leachate collection system. (T. 769)

106. Also as a result of the groundwater assessment, County Landfill detected the presence of lead and zinc at the site; however, these were found to correlate to the acid mine drainage which exists at the site, and were not the result of the Kinnear Landfill. (T. 769-770)

107. The groundwater monitoring system is designed to address the third issue, that of the lack of a monitoring well at a more upgradient

position than the Landfill. The groundwater monitoring wells proposed by County Landfill are sufficient in number, location and depth so as to be representative of water quality in the area and to provide for an early detection of groundwater degradation from the facility. (T. 770-771)

108. Of the thirty wells proposed for the site, 18 were in existence at the time of the hearing. The remainder are to be phased in as the Landfill progresses. (T. 772)

109. County Landfill's surface water monitoring consists of surface water monitoring points at erosion and sedimentation basins around the perimeter of the fill. (T. 885) In addition, the shallow level groundwater monitoring wells will monitor groundwater which discharges to the surface. (T. 881)

110. The permit requires quarterly and annual monitoring of the parameters set forth in 25 Pa. Code §273.284. (T. 1002; Ex. P-1, p. 6-7)

<u>Groundwater Assessment Plan</u>

111. County Landfill's groundwater assessment plan addresses each of the criteria set forth in 25 Pa. Code §273.286(c), dealing with the required contents of a groundwater assessment plan. Specifically, the plan discusses the number of wells and piezometers to be used in the analysis of groundwater, as well as the location and depth of the wells. (Ex. P-11, p. 2192 *et seq.*)

112. Details concerning the construction of monitoring wells are contained in Form 18 of the permit application. (Ex. P-11, p. 2193; Ex. P-5, p. 1352 *et seq.*)

113. Sampling and analysis of groundwater are to be conducted in accordance with the Sampling and Analysis Plan included with the permit application. (Ex. P-11, p. 2193)

114. The groundwater assessment plan contains procedures for evaluating water quality data. (Ex. P-11, p. 2194) The data will be interpreted primarily with spatial or isocon plots. Time-series plots will also be used for pre-operational wells and wells at the Kinnear site. (Ex. P-11, p. 2194)

Traffic and Roads

115. The approach routes to the Landfill include State Route 36, traveling north from Interstate 80; State Route 66, traveling north from Interstate 80; State Route 4004; and roads north of the Landfill. (T. 625)

116. Route 36 travels through Cook Forest State Park for approximately one and one-half miles. (T. 28)

117. Hiking trails in the Park cross Route 36 at five locations. (T. 26-27) These trails are heavily used. (T. 27)

118. Carl Schlentner, the Park's Superintendent, was not contacted by the Department with regard to County Landfill's permit application. (T. 13)

119. Mr. Schlentner has not observed any trucks in the Park which he could identify as waste-hauling trucks. (T. 33)

120. Thomas Badowski, Operational Site Manager for County Landfill, was aware of no truck traffic traveling to the Landfill by means of Route 36 through Cook Forest State Park, other than that of local garbage collection. (T. 320, 322)

121. Approximately 50 to 60 trucks unload at the Landfill per day. (T. 319)

122. One-third to one-half of the truck traffic travels to the Landfill along a portion of Route 66 south of the intersection of Routes 66 and 36. (T. 321)

123. The only traffic control for the intersection of Route 66 with Route 36 consists of two stop signs with flashing beacons, one for each approach to Route 36. (T. 643)

124. Timothy Pieples is an Assistant Traffic Engineer in charge of Safety and Studies with the Pennsylvania Department of Transportation ("PennDOT"). (T. 617) At the time of the hearing, he had held this position for ten years, and prior to that was a Civil Engineer in PennDOT's Safety Section for two years. (T. 617-618)

125. Mr. Pieples is a registered professional engineer in civil and sanitary engineering and has received specialized training in traffic studies. (T. 618)

126. The Department contacted PennDOT for its expertise on traffic matters in connection with County Landfill's permit application. (T. 621-622; Ex. P-19)

127. In response to the Department's letter, Mr. Pieples conducted a review which consisted of the following: generating an accident history for the approach routes to the Landfill, reviewing sight distances along the approach routes, reviewing truck traffic in the area, reviewing the size and weight of trucks that will be using the facility, and reviewing the Department's information with respect to the facility. (T. 623, 626)

128. PennDOT retains a file of average daily traffic counts for a particular area. (T. 623) Mr. Pieples reviewed the information provided by the Department with respect to traffic counts in the area of the Landfill and

found the Department's data to be accurate according to PennDOT's files. (T. 623-624)

129. In calculating the average daily traffic count, PennDOT takes into consideration seasonal fluctuations in traffic. (T. 647-648)

130. Since there already is truck traffic on Route 36, Mr. Pieples was able to rely on accident statistics for Route 36 to determine if there is or will be a problem involving trucks. (T. 641)

131. Based on Mr. Pieples' review of the accident history for the area, there has not been a significantly high number of accidents involving large trucks in the area leading to the Landfill. (T. 625)

132. Based on Mr. Pieples' review of the accident history for the area, there have been no "clusters" along the approach routes to the Landfill; "clusters" are groups of accidents in a particular location occurring in approximately the same manner. (T. 625-626)

133. Mr. Pieples measured the sight distances at the intersection of Routes 66 and 4004 and at the intersection of Route 4004 and Township Road 620. (T. 636; Ex. P-21)

134. Mr. Pieples compared these measurements against the minimum required sight distances for driveways contained in Title 67 of the Pennsylvania code. (T. 628) PennDOT uses this chart in determining the safety of sight distances along approach routes. (T. 628)

135. The sight distances measured by Mr. Pieples on the approach routes to the Landfill were greater than the minimum required site distances set forth in Title 67. (T. 629)

136. There is a ten ton weight limitation on Route 4004. (T. 630)

137. PennDOT issued a permit to County Landfill allowing it to exceed the weight restrictions for Route 4004. (T. 634) In return, County Landfill was required to enter into an Excess Maintenance Agreement for Route 4004 and to post a bond. (T. 630, 635)

138. Based on its review, PennDOT determined that the increase in traffic generated by the Landfill will not have a significant impact on traffic safety. (T. 632-633; Ex. P-20) PennDOT notified the Department of its findings. (Ex. P-21)

139. The Department imposed no restrictions on truck traffic through the Park based on PennDOT's determination regarding traffic safety. (T. 539)

Observations of Area Residents

140. Theodore Ochs owns residential property approximately two and one-half miles from the Landfill, bordering Route 66. (T. 44)

141. Mr. Ochs has observed no difference in traffic along Route 66 since June 27, 1990, the date of issuance of the permit. (T. 53)

142. Mr. Ochs also owns property in Farmington Township which borders the entrance to the Landfill. (T. 54-55) A portion of the property had been strip-mined. (T. 59-60)

143. Sometime after January 1, 1990, Mr. Ochs noticed a chalky-white liquid on his Farmington property. (T. 61)

144. Mr. Ochs took a sample of the liquid and provided it to "a gentleman from Ohio that worked on the EPA Cleanup Project". (T. 61)

145. Although Mr. Ochs testified that he received the results of the analysis of the liquid found on his property, these were not offered into evidence. (T. 62)

146. Mr. Ochs testified that he is concerned about unplugged gas wells connected with the County Landfill operation. However, there are no unplugged gas wells located between the Landfill and his residential property. (T. 47, 75)

147. There is an open gas well located on property which is owned by Mr. Ochs and his brother. He has taken no steps to plug it. (T. 76)

148. Judy Fitzgerald lives in Leeper, Pennsylvania, 1-3/4 miles from the Landfill. (T. 199)

149. She generally travels along Route 66, crossing the intersection with Route 36, on her way to and from work. (T. 205)

150. She finds it difficult to cross the Route 36 intersection because of the amount of traffic. (T. 203)

151. Although Ms. Fitzgerald testified that she has observed more refuse or sanitation trucks on Route 66 since June 27, 1990, she admitted that she began to focus her attention on these types of trucks after that date. (T. 206, 217)

152. Ms. Fitzgerald engages in recreational activities at Cook Forest State Park. (T. 209) She has not altered her recreational activities at the Park since June 27, 1990. (T. 215)

153. Ms. Fitzgerald stopped drinking the water from the well on her property six months prior to the hearing because of her concerns about the Landfill's impact on groundwater. (T. 200-201) Ms. Fitzgerald had not had her well water tested for six years prior to the hearing, and did not know whether her well water was or was not drinkable. (T. 200, 220)

154. Margreth Ward resides on property located 1.7 miles north of the intersection of Routes 36 and 66, slightly beyond State Road 4004 leading to the Landfill. (T. 279, 295)

155. Ms. Ward draws her water supply from a spring located on her property. (T. 279)

156. Because of the proximity of her property to the Landfill, County Landfill is required to test Ms. Ward's spring water quarterly. (T. 282)

157. After receiving the July 1991 quarterly report for sampling done in May 1991, Ms. Ward has not used her spring water for drinking water because the quarterly report showed "increases in the numbers". (T. 283, 284)

158. Ms. Ward admitted that test results since the July 1991 quarterly report have shown "decreases". (T. 298)

159. Quality of groundwater can be affected by seasonal fluctuations and amount of rainfall. (T. 782)

160. Ms. Ward did not seek expert advice with respect to her drinking water after receiving the July 1991 results. (T. 300)

161. Neither the July 1991 test results nor any results of the testing of Ms. Ward's water were introduced into evidence.

162. Ms. Ward travels along Route 66 daily on her commute to and from work. (T. 286) She has observed an increase in the number of refuse trucks on Route 66 since June 27, 1990. (T. 285)

163. Larry Heasley resides in Leeper, Pennsylvania along Route 36, one and one-half miles east of the Route 36/66 intersection and approximately two miles from the Landfill. (T. 302)

164. Mr. Heasley draws his drinking water from a spring on his property. (T. 302) He was using the spring for drinking water at the time of the hearing. (T. 317)

165. Mr. Heasley is a partner in the Sawmill Restaurant, located on the northwest side of the intersection of Routes 66 and 36, one and one-half miles south of the Landfill. (T. 303, 304)

166. The restaurant is required to have its water tested monthly for bacteria and quarterly for nitrates. Since June 27, 1990, there has been no change in the quality of the water. (T. 305)

167. Mr. Heasley engages in recreational activities at Cook Forest State Park. He has not altered his use of the Park since June 27, 1990. (T. 315)

Environmental Harm vs. Environmental Benefit

168. The Department did not require a demonstration of need for construction of the Landfill under 25 Pa. Code §271.127 because it determined that no unmitigable environmental degradation or danger to the public was likely to result and, further, that some environmental benefits would be derived from construction of the Landfill. (T. 522)

169. The condition of the site prior to construction of the Landfill was an unreclaimed surface mine with acid mine drainage and sedimentation and erosion problems. (T. 522)

170. The primary environmental benefit resulting from construction of the Landfill is the abatement of acid mine drainage existing at the site. (T. 522)

171. Sixty-five acres of the site will be lined for the Landfill. This will inhibit the infiltration of water through acid-forming overburden,

as well as prevent the affected water from feeding the groundwater system. (T. 522, 530)

172. Wally Run, which receives discharge from the site, is acid-affected. The discharge of an effluent which meets NPDES standards will result in a benefit to the quality of the stream. (T. 523)

173. Regrading and revegetating the site will reduce the amount of erosion, and runoff will be collected and treated. (T. 522)

174. A second environmental benefit resulting from the Landfill is the transfer of the Kinnear waste to a double-lined system. (T. 523)

Emergency Measures

175. Form 27 of the permit application is the Preparedness, Prevention and Contingency ("PPC") Plan for the site. The PPC Plan contains emergency measures for the site. (T. 662)

176. The PPC Plan was reviewed by Richard Marttala, an environmental chemist in the Department's Bureau of Waste Management, Field Operations. (T. 662)

177. The PPC Plan contains information regarding the following: types of waste on-site, procedures for prevention of leaks, inspection monitoring, preventive maintenance for equipment and Landfill structure, procedures for responding to leaks in the liner, security, employee training, description of emergency equipment on-site, evacuation procedures and any other factors which could affect operation of the Landfill. (T. 665-666)

178. In his review of the PPC Plan, Mr. Marttala required County Landfill to maintain additional emergency equipment to that set forth in the Plan, including a device for checking the atmosphere for combustible gases. (T. 662)

179. The PPC Plan also applies to the transfer of the Kinnear waste. (T. 667)

180. Mr. Marttala also reviewed the Waste Acceptance Plan, in Form 14 of the permit application. The Waste Acceptance Plan contains procedures to be followed in the event hazardous waste or questionable material is uncovered in the transfer of the Kinnear Waste. (T. 663-664)

181. County Landfill responded to all of the revisions required by Mr. Marttala. (T. 664)

Testing of Cover Soil

182. County Landfill provided information on soil types and testing in Forms 13, 14, and 23 of its permit application. (T. 149, 163)

183. The soils information provided in County Landfill's application was reviewed by Department soils scientist, John Guth. (T. 144-145)

184. Form 13 details the types of soils proposed to be used as cover. (T. 163)

185. Mr. Guth reviewed Form 13 and determined that the soil texture described therein met the requirements of the regulations. (T. 164)

186. In his review, Mr. Guth requested additional volume calculations, which County Landfill supplied. (T. 164)

187. Before any soil may be taken from an area not tested for use as cover soil, a sample must first be submitted for testing. (T. 151-152)

188. The permit requires that soils to be utilized as daily and intermediate cover must fall within USDA textural classes as identified in 25 Pa. Code §§273.232 and 273.233, and that soils to be utilized as final cover must fall within the USDA textural classes as identified in 25 Pa. Code §273.234. (T. 198-199)

189. Cover soil is to be tested for texture and coarse fragments. (T. 146) In addition, soil to be used as intermediate cover must be tested for its ability to sustain vegetation. (T. 157)

190. Form 14 contains information regarding the placement of cover soil and the frequency of testing. (T. 165)

191. Daily cover soil will be tested once per quarter. (T. 149)

192. Mr. Guth required that intermediate and final cover soil be tested more frequently than once per quarter in order to determine the soils' ability to sustain vegetation. (T. 165-167)

193. Intermediate and final cover soils are to be sampled as follows: one sample per 5000 cubic yards or one sample per acre per foot of depth. (T. 149)

194. There are no regulations governing the frequency with which cover soil must be tested. (T. 166)

195. In the nine or ten permit reviews that Mr. Guth has conducted, he has never recommended testing for daily cover soil more or less frequently than once per quarter. (T. 196)

196. If Department inspections determine that any problem exists with respect to cover soil at the site, the Department can impose increased testing of cover soil. (T. 196)

Maximum Daily Disposal Rate

197. At the time of the hearing, the Landfill was accepting approximately 500 tons of waste per day. (T. 319)

198. The volume of waste which the Landfill is permitted to accept for disposal is an average daily volume of 1000 tons and a maximum daily

volume of 1500 tons. (J.S. 16; T. 1003) These figures include waste coming from the Kinnear Landfill. (T. 1006-1007)

199. The maximum disposal rates were set by the Department during the permit review and were approved by technical supervisor, Anthony Talak. (T. 1003)

200. The approved disposal rates are reasonable and are not likely to pose any operational problems for the Landfill. (T. 1004, 1015-1016)

201. In calculating the maximum and average daily disposal rate limits, the Department took into consideration the amount of truck traffic which could be handled without creating operational problems. (T. 1015-1016)

Final Permitted Elevation

202. The highest point of final permitted elevation is 1830 feet above sea level. (T. 545, 561)

203. The lowest point of final permitted elevation is 1675 feet above sea level. (T. 561)

204. County Landfill provided information on elevation and grading control in Form 23 of its permit application. (T. 547; Ex. P-5, p. 1425-1431)

205. In addition, County Landfill submitted a slope stability analysis prepared by F. T. Kitlinski and Associates, Inc. dated October 1989. (Ex. P-8, p. 1994; T. 548)

206. The slope stability analysis determined the stability of the height and slopes of the fill over the liner system and the stability of the cap placed over the fill. (T. 548) The analysis takes into account such factors as the height and weight of the fill, design of the liner system, and forces acting upon the system such as the mass of weight bearing down on the system. (T. 549, 568)

207. The results of the slope stability analysis provide minimum acceptable factors of safety for determining stability of the fill and slopes. (T. 549)

208. The slope stability analysis showed that the Landfill slopes will be stable. (T. 561-562; Ex. P-8, p. 2011)

209. The individual within the Department who reviewed the slope stability analysis and the information in the permit application dealing with elevation and grading was Joel Fair, a sanitary engineer in the Facilities Section of the Bureau of Waste Management. (T. 541, 544, 548) Mr. Fair provided expert testimony as an engineer at the hearing. (T. 560)

210. Based on his review, Mr. Fair made a determination that the information contained in County Landfill's permit application met the requirements of the regulations with respect to stability and elevation. (T. 561-562)

211. Special consideration was given by the Department to the fact that the site of the Landfill had previously been a strip mine. (T. 574)

Formula for Measuring Volumes of Waste

212. County Landfill's Operations Plan (Form 14) states that the Landfill will weigh all waste as it is received on a 70 foot long, 80 ton capacity scale that meets all applicable statutory and regulatory requirments. (Ex. P-5, p. 1221)

213. The Operations Plan also requires that the operator of the scale be a licensed public weighmaster under the Public Weighmasters Act, 73 P.S. §§1771-1796.

214. Condition 1 of the permit incorporates the procedures set forth in the Operations Plan for the measurement of waste. (Ex. P-1, p. 2)

Substance Monitoring

215. Condition 30 of the permit states that the Landfill shall be operated to prevent and control surface and groundwater pollution. (Ex. P-1, p. 9)

216. Condition 16 of the permit requires County Landfill to conduct quarterly and annual monitoring of groundwater for the parameters set forth in 25 Pa. Code §273.284 and to submit the results of the monitoring to the Department. (Ex. P-1, p. 7; Ex. P-5, p. 1420-1424)

Testimony of Andrzea Nazar

217. Andrzea Nazar provided expert testimony on behalf of the Appellants on the issue of groundwater monitoring at the site of the Landfill. (T. 412)

218. Mr. Nazar holds a Master's Degree in geology, with a specialization in hydrogeology and engineering geology, which he received in 1962 from the Academy of Mining and Metallurgy in Poland. (T. 396)

219. He has previous experience as a professional engineer and a hydrogeologist. (T. 398, 399-401)

220. Mr. Nazar visited the Landfill on four occasions: once in 1988, twice in 1989, and once in the vicinity of the site in August 1990.

221. Mr. Nazar reviewed the Phase I and II portions of County Landfill's permit application; he did not review the actual permit issued to County Landfill. (T. 420-421, 436)

222. Mr. Nazar expressed concern that the location of monitoring wells MW-1 and MW-2A was too shallow to monitor groundwater and that well MW-1 could not act as an upgradient monitoring well because of its location on the boundary of the Landfill. (T. 444, 445)

223. Mr. Nazar's testimony did not establish that the well locations which he reviewed were the final monitoring locations established for the site since the location of the monitoring wells was revised from the initial proposal. (T. 476-477)

224. Mr. Nazar's review was limited to the groundwater monitoring system initially proposed by County Landfill in its permit application submitted in April 1989. (T. 485) This was not the groundwater monitoring system ultimately approved by the Department. (T. 753)

225. At a meeting in or about January 1990, the Department expressed concerns over the groundwater monitoring system which had been proposed by County Landfill. Specifically, the Department's concern was that the system, as proposed, left too many lateral gaps between monitoring wells. (T. 754-755)

226. As a result of its meeting with the Department, County Landfill revised its groundwater monitoring plan, increasing the number of monitoring locations from 9 to 18. (T. 755) This plan was ultimately approved by the Department. (T. 757) This plan was not reviewed by Mr. Nazar. (T. 485)

227. Mr. Nazar did not review the revised groundwater sampling and analysis plan for the site submitted by County Landfill to the Department in February 1990. (T. 487-488)

228. Mr. Nazar questioned the adequacy of the number and thickness of seals placed on monitoring wells W-17 through W-20. (T. 1118, 1119, 1125, 1126)

229. Mr. Nazar's explanation as to the inadequacy of the seals placed on the monitoring wells is valid only if the confining layers in question have intergranular permeability such that water moves through all the

pores in the rock. (T. 1140) The sandstone layers in question do not have intergranular permeability of any significance. (T. 1141)

230. At the time of the hearing, the disputed wells were operating properly and could withstand hydraulic gradients of 40 pounds per square inch of pressure. (T. 1142-1143)

DISCUSSION

In a third-party appeal of the Department's issuance of a permit, the burden of proof lies with the appellant to prove that the Department acted in contravention of the law or abused its discretion. 25 Pa. Code §21.101(c)(3); Concerned Residents of the Yough, Inc. v. DER, EHB Docket No. 86-513-MJ (Consolidated) (Adjudication issued February 1, 1993), p. 31. Therefore, the appellants carry the burden of demonstrating that the Department's issuance of the permit in question was an abuse of discretion or violation of law.

Before proceeding, we must first examine the issues which are before us for review. The Appellants' post-hearing brief fails to address the issue of blasting, and therefore, in accordance with Lucky Strike, *supra*., this issue is deemed to be waived. In addition, although the Appellants make proposed findings of fact regarding the following issues, there is no further discussion of these issues in the Appellants' argument or proposed conclusions of law: whether the days and hours of operation of the landfill are hazardous, whether the calculation of truck traffic did not take into account increased traffic during summer and hunting seasons, whether the roads leading up to the Landfill are adequate to handle the truck traffic, whether the permit fails to restrict the size of vehicles at the Landfill. Because the Appellants failed to raise any argument regarding these issues in their post-hearing brief, they, too, are deemed to be waived. *Id.*

The issues which remain for adjudication may be summarized as follows: (1) whether the permit issuance violated Article I, §27 of the Pennsylvania Constitution, (2) adequacy of the amount of the closure bond, (3) adequacy of the well-monitoring system, (4) traffic through Cook Forest State Park and along Route 66, (5) adequacy of emergency measures during relocation of waste from the Kinnear Landfill, (6) maximum daily disposal rate, (7) final permitted elevations, (8) formula for measuring waste volume, (9) adequacy of substance monitoring, (10) adequacy of groundwater protection system, and (11) testing of cover soils.

Bond Amount

The Appellants challenge the bond amount set by the Department for several reasons. The Appellants' primary objection is that the bond amount fails to include the cost of relocating waste from the Kinnear Landfill to the County Landfill. Secondly, the Appellants argue that the bond should incorporate the cost of eliminating acid mine drainage from the site. Thirdly, the Appellants argue that the Department's calculation of the bond should have been based on a seven acre, rather than five acre, pad. Finally, the Appellants raise a number of challenges to the bond amount in their Proposed Conclusions of Law. These latter objections simply recite the requirements of 25 Pa. Code §271.331, regarding bond amount determination, and contend that the bond in question fails to comply therewith.

As noted above, the Appellants' primary contention is that the Department should have included the cost of relocating the Kinnear waste in setting the amount of the closure bond for the Landfill. In response, County Landfill argues that relocation of the Kinnear waste is not a part of closure and, as such, was properly excluded from the bond calculation.

At the hearing, the Appellants called as their witness, Brian Mummert, the individual within the Department who was responsible for calculating the bond amount. Mr. Mummert testified that the bond calculations do not reflect the cost of relocating the Kinnear waste because that is not a part of closure. Mr. Mummert's testimony was further supported by that of the Department's Regional Engineer Anthony Talak, who is responsible for supervising the technical staff which conducts bond reviews for solid waste permits. It is the Department's position that, because the purpose of a closure bond is to cover the cost of closing a landfill in the event of a default by the permittee, the cost of relocating the Kinnear waste to the Landfill was properly excluded from the bond calculation as not being a part of the closure process.

County Landfill asserts that, because the Appellants called Brian Mummert as their witness, they are bound by his testimony and may not disclaim his statements. It is true that the Appellants are bound by the testimony of Mr. Mummert as their witness. However, it is the Board's role to determine whether the position of the Department, as stated by Mr. Mummert, with regard to the exclusion of the cost of relocating the Kinnear waste in the bond calculation, is a sound one and supported by the statute and regulations.

The subject of bonds is addressed in §505 of the SWMA, 35 P.S. §6018.505. Paragraph (a) of that section requires that the operator of a municipal waste disposal facility (other than a municipality) post a bond with the Department for the land affected by the facility. The bond is to be posted in an amount determined by the Secretary of the Department

> based upon the total estimated cost to the Commonwealth of completing final closure according to the permit granted to such facility and such measures as are necessary to prevent

> adverse effects upon the environment; such measures include but are not limited to satisfactory monitoring, post-closure care, and remedial measures.
>
> 35 P.S. §6018.505(a)

"Closure" is the point at which the "municipal waste processing or disposal facility permanently ceases to accept waste, and access is limited to activities necessary for postclosure care, maintenance and monitoring." 25 Pa. Code §271.1. "Postclosure care" involves those

> "[a]ctivities after closure which are necessary to ensure compliance with the [SWMA] and [the municipal waste regulations], including application of final cover, grading and revegetation; groundwater, surface water and gas monitoring; erosion control and gas control; leachate treatment, and abatement of pollution or degradation to land, water, air or other natural resources."

Id.

The municipal waste regulations, at 25 Pa. Code §271.331, provide a number of guidelines for determining the amount to be posted for a closure bond. Included in the factors to be considered in determining the amount of the bond is the following:

> The costs to the Commonwealth to conduct closure and postclosure care activities at the point in the life of the facility when costs to the Commonwealth would be greatest, as determined by the cost estimate for closure and postclosure care under this section, as well as costs of monitoring, sampling and analysis, soil and leachate analysis, facility security measures, remedial abatement measures and postclosure restoration and maintenance measures.
>
> 25 Pa. Code §271.331(c)(1)

The "cost estimate for closure and postclosure care" referred to above is set forth in §271.331(b), which requires a permit applicant to prepare a written estimate of the cost of closing the facility and other related costs necessary to comply with the requirements of Chapter 271 of the regulations. As to "related costs", these are to "include direct and indirect expenses for taking measures during the period preceding final closure to prevent and correct adverse environmental affects [sic] from the operation of the facility". 25 Pa. Code §271.331(b).

It is the Appellants' contention that relocation of the Kinnear waste was required by the permit as a remedial measure. The Appellants argue that "if the DER deems the relocation of the waste such an important mediation measure to require it to be part of a permit...then the bond calculation should have considered the costs of relocation of the waste." However, according to the testimony of Regional Engineer Anthony Talak, relocation of the Kinnear waste was not required as a remedial measure or as a condition of issuing the permit to County Landfill. Had County Landfill not included relocation of the Kinnear waste in its permit application, the Department would not have required the relocation.

In calculating the bond, the Department considered what measures would be necessary for it to take to close the facility should County Landfill default on its obligations under the permit. Mr. Talak testified that, if closure was required prior to the completion of relocating the Kinnear waste, the Department would not, as part of closing the Landfill, complete the

process of moving the Kinnear waste into the Landfill. Rather the Landfill would be closed at whatever stage it was in, and any remaining Kinnear waste would be left in place.[4]

Even if not required by the permit, the Appellants argue that relocation of the Kinnear waste is a measure "necessary to prevent adverse effects upon the environment", as set forth in §505(a) of the SWMA, due to the chloride plume which emanates from the Kinnear Landfill. The existence of the chloride plume was documented by a groundwater testing program conducted at the site of the Kinnear Landfill and the proposed Landfill from September 1987 to April or May 1988. (F.F. 85) The testing showed that a limited area of groundwater was contaminated by chloride which stemmed from the Kinnear Landfill. Subsequent testing, between Fall 1990 and May 1991, showed elevated levels of iron and manganese associated with the chloride plume. (F.F. 98) The Appellants argue that the presence of these substances poses a threat to the environment and public health and, as such, removal of the Kinnear waste is necessary to prevent further harm.

The Appellants misread the language of §505(a) of the SWMA as requiring abatement of the chloride plume as a necessary measure for closure of the Landfill. Section 505(a) of the SWMA and §271.331(b) of the regulations require that the closure bond be in such an amount as to correct any adverse effects to the environment resulting from <u>operation of the landfill for which the bond is being posted</u>. The chloride plume is not a result of operation of the Landfill but pre-existed the issuance of the permit to County Landfill. The closure and postclosure care of the Landfill, as

---

4 This is not to say that the Kinnear Landfill would not be subject to any other regulations with respect to the waste remaining in-place.

defined herein, does not include the cost of abating contamination which preceded the operation of the Landfill and resulted from a separate entity. That is not what is required by the SWMA or regulations. The same reasoning applies with respect to the Appellants' argument regarding elimination of acid mine drainage at the site.

Moreover, despite their assertion that the chloride plume poses a threat to the environment and public health, the Appellants failed to present any evidence demonstrating that the chloride and other contaminants, iron and manganese, pose any health or safety risk. According to the testimony of hydrogeologist Jeffrey Peffer, chloride, iron and manganese are not health-endangering and are regulated in drinking water for aesthetic purposes only.

It is the Appellants' contention, however, that existence of the chloride plume, as well as acid mine drainage, poses an additional problem separate from any question of health effects. The Appellants argue that, so long as the chloride plume and acid mine drainage exist at the site, it will be impossible to differentiate between the contamination already existing at the site and any new contamination being generated by the Landfill. As discussed later in this adjudication, however, the problem of differentiating between old and new contamination at the site was recognized and addressed in the revised groundwater monitoring plan submitted to and approved by the Department.

Finally, in support of their argument the Appellants rely on two related cases: T. C. Inman, Inc. v. Commonwealth, DER, 124 Pa. Cmwlth. 332, 556 A.2d 25 (1989) ("Inman I"), and T. C. Inman, Inc. v. Commonwealth, DER, 147 Pa. Cmwlth. 168, 608 A.2d 1112 (1992) ("Inman II"). In explaining the legal basis for requiring the posting of a bond, the Commonwealth Court in

Inman I stated as follows:

> The concept of requiring a waste disposer to post a bond as financial guarantee that it will fulfill its closure obligations is fundamental to the entire waste management regulatory program. The bond ensures that adequate funds are available to perform the necessary closure work.

124 Pa. Cmwlth. at 339, 556 A.2d at 28 (Emphasis added). The Court in Inman I, however, did not address the question of what constitutes "closure obligations" or "closure work".

The Appellants cite Inman II for the proposition that a bond must reflect the terms and conditions of the permit for which it is posted. The Appellants' reliance on Inman II is misplaced, however. First, Inman II, like Inman I, dealt with the Department's imposition of a closure bond upon a landfill which had been operated for fifteen years without a permit. Therefore, Inman II did not even discuss the issue of permit terms and conditions in relation to setting the amount of a closure bond. Secondly, the burden of proof in Inman II was on the Department to establish by a preponderance of the evidence that its imposition of the closure bond was an appropriate exercise of its authority. In the present case, the burden of proof is on the Appellants to establish by a preponderance of the evidence that the bond amount set by the Department was an abuse of discretion.

Although Inman II does not address the issue of permit terms in connection with the bond amount, the Appellants are correct in their assertion that the terms of the permit must be considered in calculating the closure bond. Section 505(a) of the SWMA requires that the amount of the bond be based on the "estimated cost to the Commonwealth of completing final closure according to the permit granted to such facility and such measures as are

necessary to prevent adverse effects upon the environment". 35 P.S. §6018.505(a) (Emphasis added). Nowhere in the permit is there any requirement that County Landfill relocate the Kinnear waste, much less a requirement that County Landfill do so as part of closure. In fact, there is no mention of the relocation of the Kinnear waste anywhere in the permit. As noted earlier, relocation of the Kinnear waste was not a condition imposed on County Landfill by the Department as part of its permit; it certainly was not a condition for closure. Based on this, we can find no basis for holding that the cost of relocating the Kinnear waste should have been factored into the bond amount. Therefore, the Department properly excluded this cost from its calculation of the bond.

The Appellants also argue that the bond was improperly calculated because it was based on a pad of five acres as opposed to seven acres. The portion of the bond worksheet to which the Appellants refer is line 1 of Worksheet C, entitled "Cap and Final Cover Placement". Line 1 of this Worksheet C reads, "Maximum area to be capped and covered (includes only areas that will be open at any one time)." This line contains a figure of five acres. The Appellants dispute this figure on the basis that the permit application referred to modules of seven acres in size. However, Brian Mummert, who calculated the bond for the Department, testified as to how he arrived at the figure of five acres. The first pad consists not of seven acres or five acres, but slightly more than twelve acres. However, the pad is to be divided into three areas of slightly over four acres each. Mr. Mummert rounded this up to five acres, which would be open at any one time. (F.F. 56) Mr. Mummert further testified that when Pad 2 is developed, there will be a total of ten acres open at any one time, and when that occurs, County

Landfill will be required to submit an updated bond reflecting the larger open area. (F.F. 57) Based on Mr. Mummert's explanation of how he arrived at a figure of five acres for line 1 of worksheet C, and the Appellants' failure to challenge Mr. Mummert's testimony, we accept this figure as reasonable.

Finally, as noted earlier, the Appellants raise a number of additional challenges to the bond amount based on its alleged failure to include the factors listed in §271.331(c) of the regulations.[2] The Appellants first contend that the bond amount was insufficient and in violation of the regulations "in that it did not take into account the nature and size of the facility" and "type of operation" as required by 25 Pa. Code §271.331(c)(2). The Appellants also contend that the bond amount is insufficient and in violation of the regulations "in that it did not take into account the additional estimated costs to the Department from applicable public contracting requirements" as required by 25 Pa. Code §271.331(c)(5). The Appellants' post-hearing brief contains no findings of fact regarding these matters, nor was any evidence remotely related to these matters introduced by the Appellants at the hearing. We are at a loss in attempting to address these contentions since the Appellants have provided us with no

---

[2] These objections are set forth in the Appellants' Proposed Conclusions of Law and contain no argument in support thereof. We wish to discourage parties in the future from taking part in this practice. Any arguments which a party may have in support of its case should be presented as just that - an argument- and not simply as a proposed conclusion of law leaving the Board to guess at how and why the party reached this conclusion. Where the party has no argument to support its proposed conclusion of law, it would do well to omit the proposed conclusion from its brief, rather than to "throw it in" in the hope that the Board may find a basis for it which the party itself could not. We are particularly bothered by the Appellants' actions in the present case of including in their post-hearing brief several proposed conclusions of law, for which not only have they provided no supporting argument but, additionally, no proposed findings of fact and no evidence at the hearing.

basis for them. Because the Appellants bear the burden of proving their contentions, and there has been no evidence entered into the record regarding these matters, we have no choice but to find that the Appellants have failed to sustain their burden of proof.

The Appellants' next contention is that the bond amount was insufficient and in violation of the regulations "in that it did not take into account the quantity, type and nature of the waste to be managed at the facility" as required by 25 Pa. Code §271.331(c)(3). Although the Appellants do not expand on this any further, in their Proposed Findings of Fact they state that the "bond did not take into account the nature of the residual waste at the Old Kinnear Landfill." (Appellants' Proposed Findings of Fact 11) Reading these together, we understand the Appellants to be alleging that the bond amount is insufficient because it failed to consider the fact that some of the waste deposited at the Kinnear Landfill was residual waste.

We disagree with the Appellants that the Department failed to consider the fact that certain types of waste classified as residual waste were deposited at the Kinnear Landfill. The Kinnear Landfill was permitted to accept municipal waste and, with specific approval from the Department, the following types of residual waste: general plant refuse, mill scale, and refractory brick. Because the Kinnear Landfill was a natural attenuation landfill, no leachate data was available from it, and, therefore, the Department required County Landfill to submit leachate data from a landfill which had accepted waste similar to that accepted by the Kinnear Landfill. Analysis of the leachate, in accordance with EPA Method 9090, demonstrated it to be compatible with the Landfill's liner. (F.F. 36) Moreover, prior to any residual waste from the Kinnear Landfill being deposited into the new

Landfill, the waste must be scrutinized against the specific terms and conditions of County Landfill's permit.

The Appellants direct us to nothing in the record which would lead us to conclude that the Department failed to consider the nature of waste to be deposited at the Landfill. Therefore, we must conclude that the Appellants have failed to meet their burden of proof on this issue.

The Appellants assert that the "number of monitoring wells, and thus their cost as built into this bond amount, were insufficient given the topography and geology of the area and the quantity, type and nature of the waste to be managed at the facility." The Appellants contend that this violates §271.331(c)(4). Subsection (c)(4), however, does not address this subject; rather, the issue of monitoring costs is dealt with in subsection(c)(1).

We disagree with the Appellants' contention that the bond calculation underestimated the cost of the monitoring wells.[6] The Department's Brian Mummert provided extensive testimony as to the manner in which monitoring costs were calculated as part of the bond amount. Worksheet E of the Department's bond calculation form deals with "groundwater monitoring". Mr. Mummert testified that he did not accept all of the figures provided by County Landfill in the worksheet which it submitted to the Department, but consulted with Department hydrogeologist Craig Lobins. Based on his discussions with Craig Lobins, Mr. Mummert revised several figures contained in the worksheet submitted by County Landfill. On line 1 of the worksheet, Mr. Mummert increased the number of wells to be monitored from nine to 18 since the latter

---

[6]The adequacy of County Landfill's monitoring system is discussed subsequently herein.

figure represented the number of wells with which the facility would initially open. On line 2 of the worksheet, which called for the number of samples per well, Mr. Mummert required six samples, as opposed to the one sample proposed by County Landfill. This resulted in line 3, or "total number of samples", increasing from 9 (9 wells x 1 sample) to 108 (18 wells x 6 samples). Based on his discussion with Craig Lobins, Mr. Mummert required six analyses per sample, for a total of 648 analyses (108 samples x 6 analyses per sample). Based on his review of other bond worksheets and further discussion with Mr. Lobins, Mr. Mummert calculated the unit cost of collecting samples to be $25.00 per sample. This resulted in a total cost of $2700 for collecting samples. (108 samples x $25.00). Mr. Mummert did not explain how he arrived at a figure of $26.00 for line 8, representing "average cost of single analysis", but it appears that he rounded up County Landfill's figure of $25.89. The total cost of analyses came to $16,848 (648 total analyses x $26.00) as opposed to County Landfill's figure of $6,525 (252 total analyses x $25.89). On line 10 of the worksheet, Mr. Mummert increased the number of manhours required for evaluation of data from four to eight due to the increase in the number of monitoring wells. Mr. Mummert accepted County Landfill's figure of $50 per hour as the unit cost per manhour. This resulted in a total cost of $400 for manhours of evaluation. (8 manhours x $50). The total number of samplings required per year was four. Based on this, the total cost of sampling per year was calculated to be $79,792 [($2700 cost of collecting samples + $16,848 cost of analyzing samples + $400 cost of evaluating samples) x 4 samplings per year]. To arrive at the total estimated cost of groundwater monitoring, Mr. Mummert multiplied the total cost of

sampling by ten years.[7] This resulted in a figure of $797,920, representing that portion of the total bond amount relating to the cost of groundwater monitoring.

The Appellants failed to point to any errors in Mr. Mummert's computations with respect to groundwater monitoring. In fact, Exhibit A to the Appellants' post-hearing brief, which contains the Appellants' calculation of what they assert the bond amount should be, accepts Mr. Mummert's figure of $797,920 as representing the total estimated cost of groundwater monitoring. Based on Mr. Mummert's detailed explanation of his calculations with respect to the cost of groundwater monitoring, and the Appellants' lack of any challenge thereto, we find that the Appellants have failed to meet their burden of proof on this issue.

The Appellants next assert that the bond amount failed to "take into account the costs related to the land uses around the facility", as required by 25 Pa. Code §271.331(c)(4). Again, the Appellants do not explain in what manner the Department failed to meet this requirement. According to Mr. Mummert's testimony, he visited the site of the proposed Landfill anywhere from five to ten times during the application review. On at least one or two of these visits, he traveled around the perimeter of the site. He testified that he was aware of the rural setting surrounding the site. (T. 367-368) In calculating the estimated cost for off-site management of leachate, in Bonding Worksheet A - "Leachate Management", Mr. Mummert took into consideration weight restrictions on state and township roads in the vicinity of the

[7]Section 505(a) requires that liability under the bond shall be for the duration of the operation and for up to ten full years after final closure. 35 P.S. §6018.505(a).

Landfill. Factoring these weight restrictions into the calculation required that a greater amount be allocated to transportation costs, since it would require more truckloads to carry material from the facility. (F.F. 75)

Because the Appellants did not provide any argument in support of their proposed conclusion of law regarding this issue, we are at a loss to determine what the Appellants' specific objection is. The Appellants have failed to demonstrate what land uses the Department failed to consider in its calculation of the bond. Because the burden is on the Appellants and they have submitted no evidence or argument regarding this issue, we must conclude that they have failed to meet their burden of proof.

The Appellants' next contention is that the Department failed to comply with 25 Pa. Code §271.331(c)(7), which requires that the bond calculation include "[t]he additional estimated cost for at least the next 3 years which is anticipated to be caused by inflation, determined by averaging the annual Implicit Price Deflation for Gross National Product...for at least the prior 3 years." The Appellants' contention is patently wrong. Mr. Mummert testified at the hearing that he did include this figure in his calculations, and it appears on the bond calculation worksheet. There is no basis for the Appellants' allegation, and, therefore, we dismiss it.

The Appellants next argue that the Department was required to take into consideration the compliance history of the Kinnear Landfill, pursuant to 25 Pa. Code §271.331(c)(8). That section requires that, in calculating the bond amount, the Department take into consideration "[t]he compliance history of the operator, applicant, permittee and related parties." The Appellants provide no basis for requiring that the compliance history of the Kinnear Landfill be a part of County Landfill's bond application. The Appellants have

not demonstrated that the Kinnear Landfill is a "related party" to County Landfill. Moreover, the Appellants made no effort to demonstrate that the Kinnear Landfill's compliance history was not considered by the Department in calculating the bond amount. Although the Appellants called Mr. Mummert as their witness, no questions were asked of him regarding this matter. Therefore, we find that the Appellants have not met their burden of proof with respect to this issue.

The Appellants next argue that the bond amount "failed to take into consideration the true costs of the leachate treatment facility at this site which has a history of acid mine drainage." Again, however, the Appellants failed to produce any evidence in support of their claim. Mr. Mummert testified that the cost of the leachate treatment facility was included in the calculation of the bond amount. The calculations for leachate treatment consist of a three page worksheet entitled "Leachate Management - Bonding Worksheet A", which factors in the cost for leachate collection, on-site treatment of leachate, off-site management of leachate, and maintenance of the leachate collection system and leak detection system. When asked at the hearing if, with respect to calculating the cost of leachate treatment, special consideration was given to the fact that the site has a history of acid mine drainage, Mr. Mummert replied that the leachate collection and treatment system is designed to collect and treat all leachate that is generated at the site, even that which consists of acid mine drainage. (T. 352)

The Appellants have presented no evidence to dispute the Department's calculations with respect to the estimated cost of leachate collection and treatment, nor have they presented any basis for requiring that special

consideration be given to the fact that acid mine drainage exists at the site. In fact, in Exhibit A to their post-hearing brief, in which the Appellants set forth the manner in which they contend the bond should have been calculated, they do not even address the Leachate Management Bonding worksheet or provide any new figures for this portion of the bond amount. Considering the evidence before us and the Appellants' lack of any support for their contentions, we have no basis for finding that the bond fails to reflect the true cost of leachate treatment at the site.

Finally, the Appellants allege that the bond amount is inaccurate because the permit application estimated final closure in or about the Spring of 2005, whereas the permit expires in 2000. In support of this contention, the Appellants direct us to "Ex. p. 5, p. 001877". No such document exists in the record; however, we understand this to be a reference to "Ex. P-5, p. 001877" which is a page of the permit application submitted by County Landfill. The page to which the Appellants refer is in the portion of the application dealing with closure and post-closure operations. Therein, County Landfill estimated that final closure would take place in the Spring of 2005 depending on the rate of site utilization. The actual permit issued to County Landfill expires in 2000. (Ex. P-1)

The Appellants direct us to nothing in the bond worksheet which indicates that the Department, in calculating the bond, relied on the estimated closure date referred to in the permit application. Moreover, the purpose of requiring a closure bond is to cover the cost of closure at any given moment should the permittee default on its obligations. Thus, regardless of when the permit is due to expire, the bond must be sufficient to cover the cost of closing the facility at any time during its operation or

after expiration of the permit. Liability on the bond is for the duration of the operation and for up to ten years after final closure of the permit site. 35 P.S. §6018.505(a). The Appellants have failed to demonstrate that the Department's calculation of the bond amount was in any way based on an inaccurate estimate of when closure was to take place.

We note that the Department's source for much of the data factored into its bond calculation was obtained from the Pope and Reid Manual, which is used by EPA for estimating closure and post-closure costs of landfill facilities. This manual is recognized as a standard for calculating closure and post-closure costs for landfills. (F.F. 63)

Finally, we note that the bond contains a 15% "contingency fee" which the Department adds into the amount of the bond as an extra precaution to cover such expenses as administrative costs, quality control, and quality assurance. (F.F. 72)

For the reasons set forth herein, we find that the Appellants have failed to meet their burden of proving that the Department abused its discretion in calculating the amount of the closure bond.

Well Monitoring System

The Appellants raise the following allegations with respect to the well monitoring system which the Department approved for the Landfill: the wells do not adequately represent points that need to be monitored, no well monitors the surface of the highest point of the water table and other well locations do not adequately compensate for this, no well adequately monitors surface water at an appropriate point, and sampling on a quarterly and annual basis is insufficient to insure compliance with the regulations. The Appellants provide no argument in support of their contentions.

At the hearing, the Appellants presented the testimony of hydrogeologist Andrzea Nazar. Mr. Nazar holds a Masters Degree in geology with a specialization in hydrogeology and engineering geology, which he obtained in 1962 from the Academy of Mining and Metallurgy in Poland. He has worked as a hydrogeologist and as a professional engineer. The Appellants offered Mr. Nazar to provide expert testimony regarding the groundwater monitoring system at the Landfill site, and he was accepted by the Board to testify for this purpose. (T. 412)

Although the Appellants rely on the testimony of Mr. Nazar to challenge the groundwater monitoring system approved by the Department, Mr. Nazar admitted that he had never reviewed the groundwater monitoring system which was ultimately approved by the Department nor the permit which was issued to County Landfill. Mr. Nazar's review was limited to the groundwater monitoring system initially proposed in the permit application submitted by County Landfill in April 1989. However, the monitoring system that was first proposed in the permit application changed during the review process. At a meeting in or about January of 1990, the Department expressed concerns over the groundwater monitoring system which had been proposed by County Landfill. Specifically, the Department was concerned that the system, as proposed, left too many lateral gaps between monitoring wells, and it requested County Landfill to revise the plan to add more locations. As a result of its meeting with the Department, County Landfill revised its groundwater monitoring plan and increased the number of proposed monitoring locations from nine to eighteen. This plan was ultimately approved by the Department.

Because the Appellants' expert, Mr. Nazar, by his own admission never reviewed the groundwater monitoring plan which the Appellants seek to attack,

we have difficulty placing any weight on Mr. Nazar's testimony, particularly with respect to the assertion that the wells do not adequately represent points which need to be monitored.

On the other hand, County Landfill's expert hydrogeologist, Jeffrey Peffer, was knowledgeable of the groundwater monitoring system which was approved by the Department, and he provided thorough and convincing testimony as to the adequacy of the system. Mr. Peffer holds a Bachelor's Degree in geology and a Master's Degree in engineering science, both from Pennsylvania State University. He is a registered professional engineer in Pennsylvania with a specialty in geological engineering and heads a groundwater consulting firm specializing in hydrogeology and groundwater consulting matters. Mr. Peffer was accepted by the Board to provide expert testimony in the areas of hydrogeology and geological engineering.

Mr. Peffer prepared the Phase I portion of County Landfill's permit application and was involved in the development of the groundwater monitoring system which was ultimately approved by the Department. The groundwater monitoring system approved for the site consists of eighteen monitoring locations. Twelve of the monitoring sites contain two wells: One well is located in the shallow zone, which is the saturated area at the base of an old mine pit; the other well is in a deeper zone, within the Homewood sandstone. (F.F. 89-91) The other six locations contain only one well in the deeper zone. (F.F. 91)

The regulations governing the permitting and operation of municipal waste landfills require that the monitoring wells be sufficient in number,

location, and depth as to be representative of water quality at the site. 25 Pa. Code §273.282(b)(1). The minimum number of wells required by the regulations is four. 25 Pa. Code §273.282(a)(1) and (2).

The number of monitoring wells approved for the County Landfill site is thirty. (F.F. 88) The criteria which Mr. Peffer followed in establishing the locations of the wells were as follows: First, wells were placed in a regular pattern around the perimeter of the Landfill, leaving no large gaps between any two locations. Secondly, as many wells as possible were located on fracture traces, linear fractures which are probable manifestations of concentrated bedrock fracturing and, thus, zones of preferred groundwater flow. Based on all of the hydrogeologic data which Mr. Peffer obtained from the Landfill site and which he provided to the Department, he was able to conclude that the number, location, and depth of the wells set forth in the groundwater monitoring system which was approved by the Department were sufficient to be representative of water quality.

The Appellants have given us no basis for concluding that the wells contained in the groundwater monitoring system approved by the Department do not adequately represent points which need to be monitored. The testimony on which the Appellants rely refers to a monitoring system which was not approved by the Department and which contained only half as many monitoring locations than the plan which was approved. As to the plan which was approved, the Appellants provided no testimony. Mr. Peffer, on the other hand, provided thorough and credible testimony for us to conclude that the monitoring wells are representative of water quality at the site.

The Appellants next challenge the lack of an upgradient monitoring well, and argue that the other wells do not adequately compensate for this, in

violation of the regulations. There is no dispute that the site does not contain an upgradient monitoring well. The parties stipulated to the fact that the Landfill is located on a topographic high point and occupies the most upgradient position in the groundwater flow system.

The regulations require that a water quality monitoring system consist of:

> [a]t least one monitoring well at a point hydraulically upgradient from the disposal area... that is capable of providing representative data of groundwater not affected by the facility, <u>except</u> when the facility occupies the most upgradient position in the flow system. In that case, sufficient downgradient monitoring wells shall be placed to determine the extent of groundwater degradation or pollution from the facility.
>
> 25 Pa. Code §273.282(a)(1). (Emphasis added)

Because the Landfill occupies the most upgradient position in the flow system, making it impossible to place a monitoring well at a location hydraulically upgradient from it, it is necessary that the site contain sufficient downgradient monitoring wells for determining when groundwater degradation or pollution has occurred.

Although the Appellants assert that the downgradient monitoring wells proposed for the County Landfill site are insufficient in number, location, or depth to determine the extent of any groundwater degradation or pollution resulting from the Landfill, they presented no evidence in support of this contention. As noted earlier, we cannot rely on the testimony of the Appellants' expert, Mr. Nazar, since he did not review the final groundwater monitoring plan approved by the Department, which contains twice the number of monitoring locations than did the initial plan.

The record indicates that the purpose of placing monitoring wells in the shallow zone was for the early detection of any contamination of the groundwater which might occur. The deeper wells then serve the purpose of monitoring any groundwater which moves below the shallow well. Based on Mr. Peffer's testimony, discussed earlier, we conclude that the wells proposed for the site are sufficient in number, location and depth to provide for early detection of groundwater degradation from the Facility.

The Appellants' third contention with respect to well monitoring at the site is that no well adequately monitors surface water at an appropriate point. Again, however, the Appellants offered no evidence to support their contention. Mr. Nazar was presented to provide expert testimony solely on the groundwater monitoring system at the Landfill site (F.F. 217), not on the monitoring of surface water, and no other expert testimony was elicited with respect to this matter.

County Landfill's expert, Mr. Peffer, however, did provide testimony with respect to the monitoring of surface water. He noted, initially, that the Appellants' contention is illogical since a "well" is not used to monitor surface water. Secondly, Mr. Peffer's testimony established that it is not necessary to have a separate monitoring point on the surface since the groundwater monitoring zones located in the shallow zone monitor groundwater which then discharges to the surface. Thus, the shallow groundwater monitoring wells perform the same function as monitoring at the surface would do. (F.F. 109)

Finally, the Appellants contend that sampling of the monitoring wells on a quarterly and annual basis is insufficient to insure compliance with the regulations. Given that the regulations require sampling on a quarterly and

annual basis, we are hard-pressed to understand the basis for the Appellants' assertion. The requirements for monitoring well sampling are set forth at 25 Pa. Code §273.284. Certain parameters such as chloride, iron, and manganese, must be sampled quarterly. 25 Pa. Code §273.284(1) through (3). Other parameters require only annual sampling. 25 Pa. Code §273.284(4) through (6).

Condition 16 of County Landfill's permit requires sampling on a quarterly and annual basis in accordance with 25 Pa. Code §273.284. (F.F. 110) This meets the requirements of the regulations, and the Appellants have presented us with no basis for finding that the frequency of sampling is inadequate. In order to meet this burden, the Appellants must demonstrate that the requirement of the regulations for quarterly and annual testing is not sufficient to ensure protection of the groundwater. The Appellants have offered no evidence to demonstrate this, nor do they propose the frequency with which the groundwater should be sampled in order to ensure groundwater protection. Based on the above, we conclude that the Appellants have failed to meet their burden of proof with respect to the groundwater monitoring system approved by the Department for the Landfill site.

Traffic Safety

In numbers 5 and 6 of their proposed conclusions of law, the Appellants contend that the Department abused its discretion by failing to restrict ingress to and egress from the Landfill through Cook Forest State Park along State Route 36, and by allegedly failing to consider issues of traffic safety along State Route 36.

The Landfill is located to the northwest of Route 66, approximately two miles from Cook Forest State Park. Approach routes to the Landfill include Route 66 and Route 36. Traffic going to the Landfill would travel

along Route 66, then State Route 4004, and, finally, Township Road 620, which leads to the Landfill entrance. Traffic approaching the Landfill from points to the southeast would travel first along Route 36, which runs through Cook Forest State Park for a stretch of approximately one and one-half miles, until Leeper, Pennsylvania, where Route 36 intersects with Route 66 at a point south of the Landfill's location.

The number of trucks unloading at the Landfill per day ranges from 50 to 60. (F.F. 121) It is the Appellants' contention that the increased truck traffic generated by the Landfill will threaten the safety of pedestrians and other vehicles traveling through Cook Forest State Park and will pose a problem for traffic safety along Route 66, particularly at its intersection with Route 36, where, the Appellants assert, traffic is already heavy.

Regarding the issue of whether the Department abused its discretion by failing to restrict Landfill traffic through the Park, the Appellants presented the testimony of Carl Schlentner, Park Superintendent of Cook Forest State Park. Mr. Schlentner provided detailed information as to the number of visitors to the Park each year and the types of activities they engage in at the Park. The primary activity engaged in by most of the visitors to the Park is hiking. Heavily-used trails cross Route 36 at five locations in the Park. However, although Mr. Schlentner provided testimony as to activities which might be affected by a substantial increase in traffic through the Park, the Appellants provided no evidence demonstrating that traffic in the Park along Route 36 will significantly increase as a result of the Landfill. Mr. Schlentner stated that he has not observed any waste-hauling trucks in the Park. County Landfill's Operational Site Manager, Thomas Badowski, was aware

of no traffic traveling to or from the Landfill by means of Route 36 through the Park, other than local garbage collection. In fact, the bulk of traffic going to the Landfill--between one-third and one-half--originates on Route 66 south of its intersection with Route 36. (F.F.122)

The Department's Anthony Talak, Regional Engineer for the Bureau of Waste Management, testified that the Department did evaluate the need for restricting Landfill traffic through the Park. As a result of its evaluation, the Department determined that the incremental increase in traffic through the Park resulting from the Landfill would be insignificant, and, therefore, no restrictions were needed. The Appellants presented no evidence to dispute the Department's finding.

Likewise, with regard to Route 66, which is the primary route of access to the facility, the Appellants presented no evidence regarding traffic safety along this route other than observations of area residents. The witnesses testified that traffic is heavy at times at the intersection of Routes 66 and 36, particularly from Friday morning to Saturday afternoon during May through October. However, no effort was made to quantify the amount of traffic on Route 66 or the effect on traffic as a result of the Landfill, other than one witness who travels Route 66 every day on her way to and from work who testified that it was not unusual for her to see two to three trucks waiting to make a left turn from Route 66 onto Route 4004. Another witness testified that she has noticed an increase in the number of refuse trucks on Route 66 since June 27, 1990, the date of the permit issuance. However, she did not know whether these trucks were going to County Landfill. In addition, she testified that she had observed refuse trucks on Route 66 prior to June 27, 1990, but began to focus her attention on them

after that date. Based on these observations, the Appellants would have us conclude that the Department did not properly consider the issue of traffic safety along Routes 66 and 36 in issuing the permit for construction and operation of the Landfill.

The Board has held that the SWMA and Article I, §27 of the Pennsylvania Constitution mandate that the Department consider issues of traffic safety when it evaluates a solid waste permit application. Korgeski v. DER, 1991 EHB 935, 949; T.R.A.S.H., Ltd. v. DER, 1989 EHB 487, *aff'd*, 132 Pa. Cmwlth. 652, 574 A.2d 721 (1990). For the reasons set forth below, we conclude that the Department properly considered issues of traffic safety in its review of County Landfill's application.

In evaluating the impact which the Landfill would have on traffic safety in the area, the Department consulted with PennDOT. We have noted in previous decisions that it is not an abuse of discretion for the Department to defer to PennDOT's expertise with respect to issues of traffic safety and to rely on PennDOT's conclusions. See Heasley, 1991 EHB at 1771. See also, Lower Windsor Township, et al. v. DER, EHB Docket No. 90-580-E (Adjudication issued September 15, 1993, p. 44; Charles Bichler v. DER, 1989 EHB 36, 41; Township of Indiana v. DER, 1984 EHB 1, 38. The ultimate determination on matters of traffic safety as they relate to operation of solid waste facilities, however, lies with the Department. Heasley, *supra.* at 1771-1772; T.R.A.S.H., Ltd. v. DER, 1989 EHB 487, 552.

By letter dated September 1, 1988, the Department submitted to PennDOT a project summary, location map, and traffic information in connection

with the Landfill application and requested PennDOT to make a determination as to whether the expected increase in traffic was likely to have a significant impact on traffic safety on the approach routes to the Landfill.

The matter was assigned to Timothy Pieples, Assistant Traffic Engineer in charge of Safety and Studies at PennDOT. At the time of the hearing, Mr. Pieples had been employed with PennDOT for 12 years, first as a Civil Engineer in the Safety Section for two years. In addition, he has received specialized training in traffic studies. Following the receipt of the Department's letter, Mr. Pieples conducted a study of truck traffic in the area of the Landfill, reviewed Departmental information regarding the size and weight of trucks that would be using the facility, and generated an "accident history" for the approach routes to the Landfill.

PennDOT maintains a file of average daily traffic counts in a particular area. Mr. Pieples noted that the information provided by the Department regarding the amount of traffic in the vicinity of the Landfill was accurate according to PennDOT's data. In calculating the average daily traffic count for a particular area, PennDOT takes into consideration seasonal fluctuations in traffic for that area.

As part of his review Mr. Pieples generated an "accident history" for Routes 66 and 36 in the vicinity of the Landfill. This consisted of reviewing accident statistics and, in particular, the numbers of accidents along these routes involving large trucks, as well as "clusters" or groups of accidents which have occurred in approximately the same manner in a particular location. A review of the accident history for Routes 66 and 36 revealed that there has not been a significantly high number of accidents involving large trucks, nor have there been clusters along these routes. (F.F. 131)

In addition, Mr. Pieples reviewed the sight distance at the intersection of Routes 66 and 4004 and at the intersection of Route 4004 and Township Road 620. Mr. Pieples compared the sight distances at these intersections with the state-required minimum sight distances for driveways and found that the sight distances for all of the approach routes to the Landfill were greater than the minimum required. (F.F. 135)

Finally, Mr. Pieples reviewed whether there were any weight limitations on the approach routes to the Landfill. Although Routes 66 and 36 had no limitation, Route 4004 is subject to a ten-ton limitation. PennDOT granted County Landfill a permit allowing it to exceed the weight limitation on Route 4004, but required the company to enter into an Excess Maintenance Agreement for maintenance of the roadway and to post a bond with respect to the agreement.

Based on Mr. Pieples' review, PennDOT notified the Department that the increase in traffic generated by the Landfill should not have a significant impact on traffic safety. As a result of PennDOT's evaluation, the Department determined that issuance of the permit would not pose a threat to traffic safety in the area of the Landfill and imposed no restrictions on Landfill traffic through Cook Forest State Park or along Route 66.

The Appellants presented no expert testimony on the issue of traffic safety, but offered only the lay testimony of area residents. Lay testimony may be helpful in portraying the traffic situation in a certain area. Korgeski, *supra*. However, where the Appellants have the burden of proof and have presented no expert testimony to dispute the testimony of PennDOT Traffic Engineer, Timothy Pieples, who performed a traffic study on the approach routes to the Landfill and determined that the Landfill would have no

significant impact on traffic safety, the observations of area residents are not sufficient to carry the Appellants' burden of proof.

Therefore, we conclude that the Appellants failed to meet their burden of demonstrating that the Department failed to give proper consideration to issues of traffic safety along Route 66 and along Route 36 in Cook Forest State Park.

Emergency Measures During Waste Relocation

In number 7 of their proposed conclusions of law, the Appellants contend that the permit fails to make adequate provision for emergency measures during the relocation of waste from the Kinnear Landfill to the new facility. The Appellants do not expand on this argument in their post-hearing brief. However, in paragraph 26 of their Notice of Appeal, the Appellants asserted that the permit failed to make any provision for what is to be done in the event hazardous waste is encountered during the relocation of the Kinnear waste.

The Appellants presented no evidence supporting either of these contentions at the hearing. The only testimony on this matter came from Richard Marttala, an environmental chemist in the Department's Bureau of Waste Management, Field Operations, who was called by County Landfill as an expert witness. Mr. Marttala reviewed Form 27 of County Landfill's permit application, the PPC Plan, which deals with emergency measures. The PPC Plan sets forth the procedure for responding to an emergency at the Landfill. The PPC Plan contains information regarding the types of waste on-site, procedures for the prevention of leaks, inspection monitoring, preventive maintenance for equipment and the landfill structure, procedures for responding to leaks in the liner, security for the site, and factors which could affect the operation

of the Landfill. In addition, the Plan provides for employee training, describes what emergency equipment is on-site, and discusses evacuation procedures. The PPC Plan applies not only to operation of the Landfill, but also to the process of relocating the Kinnear waste.

Mr. Marttala also reviewed the Waste Acceptance Plan in Form 14 of the application. Because the new facility is not permitted to accept hazardous waste, the Waste Acceptance Plan contains procedures to be followed in the event that hazardous waste is encountered during the relocation of the waste from the Kinnear Landfill. This includes the description of various types of waste and procedures for recognizing and identifying questionable waste. In addition, it includes a procedure to be followed in the event that any hazardous waste is discovered.

In his review of the PPC Plan and Waste Acceptance Plan submitted by County Landfill, Mr. Marttala required County Landfill to submit additional information and to correct certain deficiencies in the Plans. In particular, Mr. Marttala recommended the inclusion of additional emergency equipment for the Landfill. One such piece of equipment that he recommended was an explosimeter, a device for checking the atmosphere for combustible gases. County Landfill responded to all of the revisions required by Mr. Marttala.

Based on Mr. Marttala's testimony and the Appellants' lack of any evidence in support of their contention, we find that the Appellants have failed to demonstrate that the Department abused its discretion by not requiring adequate emergency measures.

Maximum Daily Disposal Rate

The permit sets the maximum daily disposal rate for the Landfill at 1500 tons and the average daily disposal rate at 1000 tons. The Appellants

contend that it was an abuse of discretion for the Department to set the maximum daily disposal rate at 1500 tons when the Operations Plan submitted with the application proposed a maximum daily disposal rate of 1200 tons.[8]

The Appellants presented no evidence at the hearing demonstrating that 1500 tons was an unreasonable amount. In fact, the subject of maximum daily disposal rate did not arise until the presentation of County Landfill's case. The Department's Anthony Talak testified that the maximum and average daily disposal rates for the Landfill were set by the Department during the course of the permit review. As a technical supervisor, he was responsible for ensuring that the rates were reasonable.

In setting the maximum daily disposal rate at 1500 tons and the average daily disposal rate at 1000 tons, the Department considered the amount of truck traffic which the facility could reasonable handle. The Department also considered what amount of waste the Landfill could handle without having operational problems. Based on his review of these factors, Mr. Talak considered these rates to be reasonable and not likely to pose any detriment. These rates also factor in the amount of waste to be transferred from the Kinnear Landfill.

During cross-examination of Mr. Talak, counsel for the Appellants did not question him as to why a limit of 1500 tons was chosen as opposed to the 1200 ton limit proposed in the permit application. Nor did the Appellants in any way establish that a maximum daily limit of 1500 tons was unreasonable

---

[8] In their post-hearing brief, the Appellants state simply that the Department abused its discretion in setting the maximum daily disposal rate at 1500 tons. It is necessary to refer to paragraph 29 of their notice of appeal to determine the basis for the Appellants' contention. In paragraph 29 of their notice of appeal, the Appellants refer to the Operations Plan (Form 14) and the maximum daily disposal rate proposed therein by County Landfill.

or that the Landfill was incapable of handling this amount without risk of operational problems, traffic hazards, or environmental harm.

Because the Appellants presented no evidence in support of their contention, we must conclude that they have not met their burden of demonstrating that the Department abused its discretion in setting a maximum daily disposal rate of 1500 tons.

Final Permitted Elevation

In proposed conclusion of law number 9 of their post-hearing brief, the Appellants contend that the permit fails to establish reasonable requirements for final permitted elevations. The Appellants presented no evidence regarding this issue in the presentation of their case. In fact, the only evidence on this issue came during the presentation of County Landfill's case during testimony by Joel Fair, a sanitary engineer with the Department's Bureau of Waste Management, Facilities Section. Mr. Fair was involved in the review of County Landfill's permit application, including that portion dealing with waste elevation. The final permitted elevation for the Landfill ranges from 1675 feet at its lowest point and 1830 feet at its highest point. These elevations are depicted on drawings submitted by County Landfill with its application, which were admitted at the hearing as Exhibit P-15.[9] Based on his review of the material submitted by County Landfill with its permit application, Mr. Fair concluded that the information regarding waste elevation complied with the Department's requirements.

Mr. Fair also provided extensive testimony with respect to slope stability. In its post-hearing brief, County Landfill discusses Mr. Fair's

[9] The drawings appear in Exhibit P-15 beginning on p. 2325.

review of this matter in depth. However, the Appellants did not raise the issue of slope stability and, therefore, this matter is not before us for review. County Landfill's discussion of slope stability, as well as other issues such as grading, is no doubt an attempt to address any possible objection the Appellants might have concerning the issue of elevation since the Appellants provide no clue as to what the basis for their objection is. The Appellants state simply, "The permit fails to establish reasonable requirements for final permitted elevations." No reason is given as to why the final permitted elevations set by the permit may not be reasonable. Nor is any further explanation provided in the notice of appeal, which simply contains the same, vague allegation.

More notably, the Appellants presented no evidence at the hearing related to the issue of final permitted elevations.[10] As noted earlier in this adjudication, the Appellants have the burden of proving their allegations by a preponderance of the evidence. Where there has been no evidence presented in support of an allegation, we cannot find that this burden has been met. Therefore, we must conclude that the Appellants have failed to meet their burden of proving that the permit fails to set reasonable requirements for final permitted elevations.

Formula for Measuring Volumes of Waste

In proposed conclusion of law number 10 of their post-hearing brief, the Appellants contend that the permit fails to establish an adequate formula for measuring volumes of waste.

---

[10]This is reflected in the proposed findings of fact in the Appellants' post-hearing brief which contain no proposed findings regarding the issue of final permitted elevations.

Section 273.214 of the regulations, dealing with measurement of waste, provides as follows:

> (a) An operator of a municipal waste landfill that has received, is receiving or will receive 30,000 or more cubic yards of solid waste in a calendar year shall weigh solid waste when it is received. The scale used to weigh solid waste shall conform to the Weights and Measures Act of 1965 (73 P.S. §§1651-1692) and regulations thereunder. The operator of the scale shall be a licensed public weigh master under the Public Weighmasters Act (73 P.S. §§1771-1796) and regulations thereunder.
>
> (b) The operator of a facility that is not required by subsection (a) to weigh waste when it is received shall accurately measure waste by volume or weight prior to unloading.
>
> 25 Pa. Code §273.214

Form 14 of the permit application, which is the Operations Plan, states that waste is to be weighed on a 70-foot long, 80-ton capacity scale, or its equivalent, which meets the requirements of the Weights and Measures Act of 1965, 73 P.S. §§1651-1692, and the regulations thereunder. The Operations Plan also requires that the operator of the scale be a licensed public weighmaster under the Public Weighmasters Act, 73 P.S. §§1771-1796, and the regulations thereunder. Condition 1 of the permit incorporates the procedures set forth in the Operations Plan for the measurement of waste. These procedures for the measurement of waste received at the Landfill fully meet the requirements of 25 Pa. Code §273.214. Therefore, we find that the Appellants have failed to meet their burden of proof on this issue.

Substance Monitoring

In number 13 of their proposed conclusions of law, the Appellants state, "The permit did not contain adequate substance monitoring in violation

of the regulations."[11] Again, the Appellants present no evidence or legal arguments in support of this contention.

Condition 16 of the permit requires County Landfill to conduct quarterly and annual monitoring of groundwater for the parameters set forth in 25 Pa. Code §273.284, and to submit the results of analyses to the Department. (F.F. 217)

The Appellants have not demonstrated that County Landfill should be required to monitor for substances beyond the requirements of the regulations. Moreover, if their contention is that the regulations do not provide for adequate substance monitoring, this issue was not raised in the notice of appeal and, therefore, is not before us for review. Game Commission, *supra*. Therefore, we find that the Appellants have failed to meet their burden of proof on the issue of substance monitoring.

Groundwater Protection

In proposed conclusion of law number 14, the Appellants contend that the permit contains an inadequate system for groundwater protection under §§273.286(c)(1)-(4) and 273.287(b)(1)-(3) of the regulations. These sections deal with the submission of a groundwater assessment plan and an abatement plan.

Pursuant to 25 Pa. Code §273.286(a), the operator of a municipal waste landfill must prepare and submit to the Department a groundwater assessment plan whenever one of the following events occurs:

---

[11] The Appellants do not elaborate on what they mean by "substance" monitoring. However, we understand this to refer to the monitoring of substances in the groundwater since the issue of air quality monitoring was addressed in our November 1991 Opinion, and no other issues regarding the adequacy of monitoring have been raised by the Appellants.

> (1) Data obtained from monitoring by the Department or the operator indicates groundwater degradation at any monitoring point for parameters other than chemical oxygen demand, pH, specific conductance, total organic carbon, turbidity, total alkalinity, calcium, magnesium and iron.
>
> (2) Laboratory analyses of one or more contiguous public or private water supplies shows the presence of degradation that could reasonably be attributed to the facility.
>
> 25 Pa. Code §273.286(a)

Because monitoring data at the Kinnear Landfill showed the presence of a chloride plume in the strip-spoils aquifer and in the Homewood Sandstone aquifer at the site, County Landfill submitted a groundwater assessment plan pursuant to §273.286(a). The groundwater assessment plan was admitted at the hearing as Exhibit P-11, pages 2192 to 2264.

Paragraph (c) of §273.286, cited by the Appellants, specifies what information must be provided in a groundwater assessment plan. This section states as follows:

> (c) The groundwater assessment plan shall specify the manner in which the operator will determine the existence, quality, quantity, areal extent and depth of groundwater degradation, and the rate and direction of migration of contaminants in the groundwater. A groundwater assessment plan shall be prepared by an expert in the field of hydrogeology. The plan shall contain, at a minimum, the following information:
>
> (1) The number, location, size, casing type and depth of wells, lysimeters, borings, pits, piezometers and other assessment structures or devices to be used.
>
> (2) Sampling and analytical methods for the parameters to be evaluated.
>
> (3) Evaluation procedures, including the use of previously gathered groundwater quality

information, to determine the concentration, rate and extent of groundwater degradation or pollution from the facility.

(4) An implementation schedule.

25 Pa. Code §273.286(c).

The groundwater assessment plan submitted by County Landfill individually addresses each of the criteria set forth in §273.286(c). The plan discusses the number of wells and piezometers to be used in the analysis of the groundwater, as well as the location and depth of the wells. Details concerning the construction of the wells are contained in Form 18 of the permit application. Sampling and analysis are to be conducted in accordance with the Sampling and Analysis Plan included with the application. Groundwater will be tested for the list of parameters set forth in 25 Pa. Code §273.116 (dealing with groundwater quality description). The water quality data will be interpreted as set forth in the section of the groundwater assessment plan entitled "Evaluation Procedures", primarily by the use of spatial or isocon plots. With respect to the Kinnear Landfill and wells pre-existing the new operation, time series plots will be used. In addition, isocon and time-series plots will be specially prepared for certain parameters, including chloride. Implementation of the plan was scheduled to begin following construction of additional wells and obtaining necessary approval of the plan from the Department.

The Appellants do not state in their post-hearing brief any specific objections they have to the groundwater assessment plan submitted by County Landfill in relation to the requirements of 25 Pa. Code §273.286(c). However,

we can gather their objections from the testimony of their expert witness, Andrzea Nazar, who questioned the location and depth of the monitoring wells as well as the seals placed on the wells.

Mr. Nazar testified that two of the monitoring wells were not deep enough to monitor groundwater. He also questioned whether the location of the monitoring wells was sufficient to monitor groundwater adequately. However, as noted earlier, Mr. Nazar admitted that he never reviewed the groundwater assessment plan or the results of the plan submitted to the Department in May 1991. Therefore, we can give little weight to Mr. Nazar's testimony regarding the depth and location of the groundwater monitoring wells.

On the other hand, County Landfill's expert, Jeffrey Peffer, was thoroughly familiar with the groundwater assessment plan, having assisted in its preparation. Mr. Peffer established that the groundwater assessment involved sampling at approximately thirty well locations. As part of the assessment, Mr. Peffer and his associates prepared spatial plots of the parameters being identified in order to determine if certain pollutants correlated to certain areas. The result of the assessment was to document the path of the chloride plume emanating from the Kinnear Landfill and the correlation of iron and manganese therewith.

Mr. Nazar also questioned the adequacy of the seals placed on monitoring wells W-17 through W-20. In his opinion, the seals are insufficient in number and thickness and will not serve to confine the aquifer. However, his explanation contained large gaps and failed to provide convincing evidence for questioning the adequacy of the seals. Moreover, the validity of Mr. Nazar's argument depends on certain assumptions about the permeability of the confining layers. In order for Mr. Nazar's testimony to

hold true, the various confining layers must have intergranular permeability so that water may move through all the pores in the rock. This was not demonstrated by Mr. Nazar.

Perhaps the best proof of the adequacy of the seals on the monitoring wells was that the seals on the wells already in place at the time of the hearing were working properly and demonstrated an ability to withstand hydraulic gradients of 40 pounds per square inch of pressure. (F. F. 232)

The Appellants also challenge County Landfill's compliance with 25 Pa. Code §273.287(b), which deals with the information which is required to be contained in an abatement plan. Pursuant to 25 Pa. Code §273.287(a), an operator of a municipal waste landfill is required to prepare and submit to the Department an abatement plan whenever one of the following occurs:

> (1) The groundwater assessment plan prepared and implemented under §273.286 (relating to groundwater assessment plan) shows the presence of groundwater pollution at one or more monitoring wells.
>
> (2) Monitoring by the Department or operator shows the presence of groundwater pollution from one or more monitoring wells, even if a groundwater assessment plan has not been completed. The operator is not required to implement an abatement plan under this paragraph if the following conditions are met:
>
> (i) Within 10 days after receipt of sample results showing groundwater pollution, the operator resamples the affected wells.
>
> (ii) Analysis from resampling shows to the Department's satisfaction that groundwater pollution has not occurred.
>
> 25 Pa. Code §273.287(a).

No formal abatement plan was required by the Department on the basis that no health-endangering parameters were found to be present and the

chloride plume was found to be dispersing. Although a formal abatement plan was not required, abatement of the chloride plume was to be brought about by relocation of the Kinnear waste.

As stated above, 25 Pa. Code §273.287(a)(1) requires the preparation and submission of an abatement plan where the groundwater assessment plan shows the presence of pollution.

"Pollution" is defined in the SWMA as follows:

> Contamination of any air, water, land or other natural resources of the Commonwealth such as will create or is likely to create a public nuisance or to render such air, water, land or other natural resources harmful, detrimental or injurious to public health, safety or welfare, or to domestic, municipal, commercial, industrial, agricultural, recreational or other legitimate beneficial uses, or to livestock, wild animals, birds, fish or other life.
>
> 35 P.S. §6018.103.

The only evidence before us indicates that the presence of chloride, iron, and manganese in groundwater is not health-endangering and that these parameters are not treated as pollutants but as secondary contaminants. The Appellants provided nothing to rebut this evidence.

Moreover, the Appellants never raised the issue of whether an abatement plan was required. Their objection was only that County Landfill failed to comply with 25 Pa. Code §273.287(b)(1) through (3), which specifies the information which must be contained in an abatement plan. The Appellants provided no evidence to establish that an abatement plan was required in the first place.

Finally, the issue of abatement of the chloride plume emanating from the Kinnear Landfill was addressed by County Landfill in its groundwater

monitoring plan discussed earlier. Relocation of the Kinnear waste to the lined landfill is expected to abate the chloride plume by eliminating the source of the contamination. This was admitted by the Appellants in their post-hearing brief.

For the reasons set forth above, we find that the Appellants have failed to meet their burden of proof with respect to groundwater assessment and abatement.

Testing of Cover Soils

The Appellants contend that the Department abused its discretion by not requiring that cover soil be tested more frequently than once per quarter. In addition, the Appellants contend that the testing of cover soils should involve the testing of Kinnear waste which is to be moved into the new Landfill. The Appellants assert that more frequent testing and testing of the Kinnear waste is necessary in order to ensure compliance with §273.232(b)(1) and (2) of the regulations.

Daily cover must be placed on exposed waste in accordance with 25 Pa. Code §273.232(b). The daily cover must meet various performance standards including the two requirements cited by the Appellants:

> (1) Prevent vectors, odors, blowing litter and other nuisances.
>
> (2) Cover solid waste after it is placed without change in its properties and without regard to weather.
>
> 25 Pa. Code §273.232(b)(1) and (2).

The Appellants' argument appears to focus on the second requirement above. They allege that, due to the fact that some unknown types of waste may surface from the Kinnear Landfill, testing should be done more frequently.

The regulations governing the operation of municipal waste landfills do not specify the frequency with which cover soil must be tested. The frequency with which cover soil must be tested at the County Landfill site was determined by the Department's John Guth, who reviewed the soils-related portions of County Landfill's permit application. Mr. Guth was called as a witness by the Appellants regarding the issue of cover soil testing.

Mr. Guth's determination as to the required frequency of testing was based on the soils information contained in Form 13 (Soils Information - Phase I) and Form 14 (Operations Plan) of the permit application. Mr. Guth approved the testing of daily cover once per quarter, but required more frequent testing of intermediate and final cover. Intermediate and final cover is to be tested as follows: one sample per 5000 cubic yards or one sample per acre per foot depth. Under this formula, the testing for intermediate and final cover occurs more frequently than once per quarter.

In response to questioning by counsel for the Appellants, Mr. Guth explained how he determined the frequency with which the various types of cover soil were to be tested. The purpose of daily cover is solely to cover the waste to prevent odors emanating from the waste and to prevent vectors from entering into the waste.[12] Of the nine or ten permit reviews which Mr. Guth had conducted as of the time of the hearing, he had never required more frequent or less frequent testing of daily cover. On the other hand, intermediate and final cover must meet more stringent criteria since the purpose of this type of cover is to sustain vegetative growth. Soil of a

---

[12]Page 167 of the transcript quotes Mr. Guth as saying that the purpose of daily cover is "to prevent...vectors entering into the lakes..." (Emphasis added) We find this to be a transcription error; Mr. Guth's testimony should read "waste" instead of "lakes".

particular texture is required for this purpose and, therefore, more frequent testing is necessary. For these reasons, Mr. Guth required that intermediate and final cover soil be tested more often than once per quarter. Based on his analysis, Mr. Guth determined that the testing frequencies required by the permit are adequate and reasonable. As an additional safeguard, more frequent testing of any type of cover soil may be required if future inspections reveal that a problem exists after issuance of the permit.

The Appellants provided no basis for requiring the testing of daily cover more frequently than once per quarter.[13] Moreover, the Appellants seem to confuse what is required by the regulations. Although they rely on §273.232(b) of the regulations for their argument concerning the frequency of testing, this section deals with performance standards for the composition of cover soil, and requires that the composition of the material used for daily cover be such as to meet certain performance standards. The permit requires that the soils to be utilized as daily cover fall within the USDA textural classes identified in §273.232.

Based on the testimony of Mr. Guth, whom the Appellants called as their witness, and the lack of any evidence demonstrating that more frequent testing of the daily cover soil is needed to insure compliance with §273.232(b)(1) and (2), we find that the Appellants have failed to meet their burden of proof on this issue.

---

[13] Although the Appellants did not limit their argument to daily cover, we can assume that this is the focus of their argument since intermediate and final cover are required to be tested more frequently than once per quarter. Moreover, §273.232(b)(1) and (2) of the regulations, which the Appellants reference, deals with daily cover only.

Article I, §27

Finally, the Appellants argue that issuance of the permit violates Article I, §27 of the Pennsylvania Constitution on the following grounds: the Department failed to comply with the SWMA and the regulations thereunder; the Department failed to make reasonable efforts to reduce the environmental incursion to a minimum, particularly with regard to Cook Forest State Park; and the environmental harm, affecting recreational activities in the area, outweighs any benefit to be derived from the Landfill.

Article I, §27 of the Pennsylvania Constitution provides as follows:

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

In National Solid Wastes Management Association v. Casey, 143 Pa. Cmwlth. 577, 600 A.2d 260 (1991), and more recently in Concerned Residents of the Yough, Inc. v. Commonwealth, DER, No. 458 C.D. 1993 (Pa. Cmwlth. 1994) ("CRY"), the Commonwealth Court stated that the SWMA and the regulations promulgated thereunder indicate an intent by the General Assembly "to regulate in plenary fashion every aspect of the disposal of solid waste, [and] consequently, the balancing of environmental concerns mandated by Article I, Section 27 has been achieved through the legislative process." CRY, slip op. at 21. Because the Article I, §27 considerations have been incorporated into the SWMA and the regulations, compliance with the provisions of the SWMA and the regulations is tantamount to compliance with Article I, §27.

The Appellants failed to prove that the Department in any way failed to comply with the requirements of the SWMA or the regulations in issuing the permit. On the contrary, the record demonstrates that the Department's review of County Landfill's permit application involved a thorough and conscientious effort to insure that the requirements of the statute and regulations had been met. Therefore, we find that the Article I, §27 considerations have been met.

CONCLUSIONS OF LAW

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

2. The Appellants have the burden of proving that the Department's issuance of the permit to County Landfill was an abuse of discretion or violation of law. 25 Pa. Code §21.101(c)(3).

3. Any issues which a party fails to preserve in its post-hearing brief are deemed to be waived. Lucky Strike, *supra*.

4. The Department did not abuse its discretion by failing to include the cost of removing the Kinnear waste in its calculation of the closure bond approved for County Landfill.

5. The Appellants failed to meet their burden of proving that the Department erred in calculating the amount of the closure bond.

6. The Appellants failed to meet their burden of proving that the groundwater well monitoring system approved for the site is inadequate.

7. The Department may defer to PennDOT's expertise on matters of traffic safety. Lower Windsor Township; *supra*.; Bichler, *supra*.

8. The Appellants failed to meet their burden of proving that the Department failed to give proper consideration to issues of traffic safety.

9. The Appellants failed to meet their burden of proving that the permit does not make adequate provision for emergency measures during relocation of the Kinnear waste.

10. The Appellants failed to meet their burden of proving that the maximum daily disposal rate set by the permit is unreasonable.

11. The Appellants failed to meet their burden of proving that the permit fails to establish reasonable requirements for final permitted elevations.

12. The Appellants failed to meet their burden of proving that the permit fails to establish an adequate formula for measuring volumes of waste.

13. The Appellants failed to meet their burden of proving that the permit fails to provide for adequate substance monitoring.

14. The Appellants failed to meet their burden of proving that the permit contains an inadequate system for groundwater protection.

15. The Appellants failed to meet their burden of proving that cover soil at the site should be tested more frequently than once per quarter.

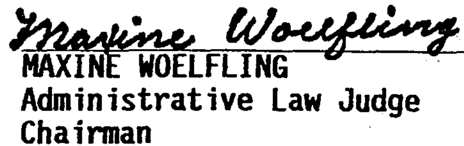
16. The Appellants failed to meet their burden of proving that issuance of the permit violates Article I, §27 of the Pennsylvania Constitution.

17. The Department's issuance of the permit to County Landfill was not an abuse of discretion or violation of law.

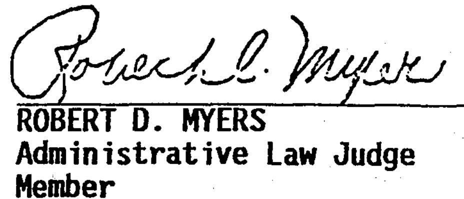
ORDER

AND NOW, this 13th day of May, 1994, it is hereby ordered that the appeals of Larry D. Heasley, *et al.*, consolidated at EHB Docket No. 90-311-MJ are dismissed.

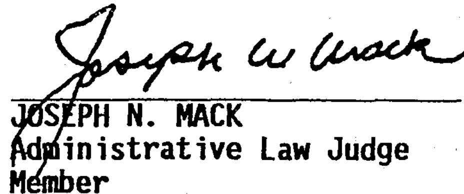
ENVIRONMENTAL HEARING BOARD



MAXINE WOELFLING
Administrative Law Judge
Chairman



ROBERT D. MYERS
Administrative Law Judge
Member



JOSEPH N. MACK
Administrative Law Judge
Member

Board Member Richard S. Ehmann did not participate in this decision.

DATED: May 13, 1994

cc: **DER, Bureau of Litigation:**
Library: Brenda Houck
For the Commonwealth, DER:
Kenneth T. Bowman, Esq.
Southwest Region
For Appellant:
Virginia I. Cook, Esq.
Pittsburgh, PA

For Permittee:
M. Joel Bolstein, Esq.
Lois Reznick, Esq.
Thomas H. Lee, Esq.
DECHERT PRICE & RHOADS
Philadelphia, PA

ar

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
2nd FLOOR — MARKET STREET STATE OFFICE BUILDING
400 MARKET STREET, P.O. BOX 8457
HARRISBURG, PA 17105-8457
717-787-3483
TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOARD

MCDONALD LAND & MINING COMPANY, INC. and SKY HAVEN COAL, INC.	:	
v.	:	EHB Docket No. 89-096-MJ (Consolidated)
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: May 16, 1994

ADJUDICATION

By Joseph N. Mack, Member

Synopsis

Where the Department of Environmental Resources ("Department") fails to establish a hydrologic connection between the permittees' mine sites and two acid mine seeps which exist off the permit areas, and further fails to establish a hydrologic connection between one of the permit sites and a degraded spring which exists off the permit area, the Department has failed to sustain its burden of proof with respect to the issuance of compliance orders directing the permittees to treat the seeps and spring. Secondly, the Department may not deny a request for bond release on the basis of the acid mine seeps where the evidence demonstrates that no hydrologic connection exists between the seeps and the permit area.

Introduction

This matter is a consolidation of appeals filed by McDonald Land and Mining Company, Inc. ("McDonald") and Sky Haven Coal, Inc. ("Sky Haven"). The

first appeal was filed by McDonald on April 3, 1989 challenging the Department's March 23, 1989 denial of McDonald's request for bond release in connection with its mining operation at the Butler site in Lawrence Township, Clearfield County. This appeal was docketed at EHB Docket No. 89-096-M. On November 13, 1989, the Department issued a compliance order to both McDonald and Sky Haven requiring them jointly to treat two off-site seeps, referred to as 1-B and 2-C, which the Department alleged were related to the companies' adjoining mine sites. McDonald and Sky Haven filed separate appeals from the compliance order, which were docketed at EHB Docket Nos. 89-556-MJ and 89-597-MJ. Also on November 13, 1989, the Department issued a separate compliance order to Sky Haven requiring treatment of a spring labeled 4-D which the Department alleged was contaminated by mining at the Siebenrock site. Sky Haven appealed this order, and the appeal was docketed at EHB Docket No. 89-596-MJ. On January 23, 1990 the Environmental Hearing Board entered an order consolidating all of these appeals at EHB Docket No. 89-096-MJ.

The Department argues that there is a direct hydrologic connection between seeps 1-B and 2-C and both the Butler mine site and the Siebenrock mine site which lie adjacent to each other and upgradient of the seeps. The Department also argues that the degradation of spring 4-D was a result of mining on the Siebenrock property.

Each of the appellants argues that the Department failed to establish a direct hydrologic connection between the mine sites and the seeps and spring, or, in the alternative, that the other was responsible for the seeps. In addition, both of the appellants argue that the Department had no authority to base the issuance of the compliance orders on a discharge of

manganese where the mining permits did not contain a provision concerning manganese and where the permit and the coal extraction, backfilling and revegetation were all completed before regulations were promulgated establishing a specific manganese effluent limitation.

A hearing on this matter was held in the State Office Building in Pittsburgh, Pennsylvania beginning on October 23, 1990 and concluding on October 29, 1990. At the close of the Department's case-in-chief with regard to the issuance of the compliance orders, McDonald and Sky Haven moved for a directed adjudication on the basis that the Department had not made out a *prima facie* case. The presiding Board Member advised the parties that the grant of a directed adjudication required the concurrence of a majority of the Board, and the appellants elected to proceed with presenting their cases-in-chief. Post-hearing briefs were filed by all of the parties as follows: the Department on April 19, 1991, McDonald on April 22, 1991, and Sky Haven on April 22, 1991. McDonald filed a reply brief on May 6, 1991. Both of the appellants in their post-hearing briefs raise the question of whether the Department established a *prima facie* case with regard to issuance of the compliance orders. Any arguments that the parties did not raise in their post-hearing briefs are deemed waived. Lucky Strike Coal Company and Lewis J. Beltrami v. Commonwealth, DER, 119 Pa. Cmwlth. 440, 547 A.2d 447 at 449 (1988).

After a full and complete review of the record consisting of a transcript of 741 pages and fifty-one exhibits, we make the following findings of fact.

FINDINGS OF FACT

1. The Department is the executive agency with the duty and the authority to administer and enforce the Surface Mining Conservation and Reclamation Act, Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1 *et seq.*, ("Surface Mining Act"); Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 *et seq.*, ("the Clean Streams Law"); Section 1917-A of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-17 ("the Administrative Code") and the rules and regulations promulgated thereunder. (Stip. 1)[1]

2. McDonald is a Pennsylvania corporation with its principal place of business at Star Route, Box 53, Curwensville, Pennsylvania 16833 and is licensed to mine coal by the surface mining method under License Number 100659. (Stip. 2)

3. Sky Haven is a Pennsylvania corporation with its principal place of business at R. D. 1, Box 180, Penfield, Pennsylvania 15849 and is licensed to mine coal by the surface mining method under License Number 101812. (Stip. 3)

4. On February 3, 1978 the Department issued to McDonald mine drainage permit number 4577SM16 for a site known as the Butler operation in Lawrence Township, Clearfield County. (Stip. 4; McDonald Ex. 1A)

5. On March 15, 1979 DER issued to Sky Haven mine drainage permit number 4578BC3 for a site known as the Siebenrock operation located in Lawrence Township, Clearfield County. (Stip. 5; Sky Haven Ex. 1)

---

[1] "Stip. ___" refers to a stipulated fact contained in section E of the parties' Joint Stipulation submitted to the Board on September 28, 1990. "T. ___" refers to a page in the hearing transcript. "Ex. ___" refers to an exhibit admitted at the hearing.

6. Neither permit contained a specific effluent limitation for manganese or a specific requirement for monitoring or control of manganese. At the time the permits were issued, the mining regulations did not address manganese. (Stip. 6)

7. The Butler and Siebenrock sites are adjacent. (Stip. 7) The Butler site lies to the west of the Siebenrock site. (McDonald Ex. 16)

8. There is no difference hydrogeologically between the McDonald and Sky Haven sites; they constitute a single mine hydrogeologically. (T. 145)

9. McDonald conducted coal removal operations at the Butler site from approximately August 1979 through August 1981. McDonald mined and removed the Middle and Lower Kittanning coal seams. (Stip. 12)

10. Sky Haven conducted coal removal operations on the Siebenrock site from approximately December 1979 through April 1981. Sky Haven also mined the Middle and Lower Kittanning coal seams. (Stip. 13)

11. A relatively impervious layer of clay lies under the Lower Kittanning coal seam. (Stip. 14)

12. Each site has a capacity for the production of acid mine drainage. (Stip. 15)

13. According to the permit file, acid mine drainage had occurred on the Siebenrock site prior to mining by Sky Haven. (T. 101)

14. Both the McDonald and Sky Haven sites are reclaimed and revegetated. All erosion and sedimentation controls have been removed except for a single sedimentation pond still remaining on the McDonald site. (T. 36)

15. DER's inspectors did not notice any acid seeps before McDonald or Sky Haven began mining. (Stip. 11)

Issuance of Compliance Orders

16. On May 23, 1983, DER Surface Mine Conservation Inspector Walter Kuzemchock discovered seeps 1-B and 2-C. (T. 37)[2]

17. Seeps 1-B and 2-C are located at the toe or slightly downslope of the toe of old spoil remaining from previous operations off the permit sites and on the opposite side of the township road from the McDonald and Sky Haven operations. (T. 47)

18. The seeps are more accurately characterized as being seep areas as opposed to a discrete seep. (T. 50)

19. The seeps are located south-southeast of the western portion of the Siebenrock site and southeast of the McDonald site. (Commonwealth Ex. 2A; McDonald Ex. 16)

20. Seep 2-C is located to the west of seep 1-B. (Commonwealth Ex. 2A)

21. Seep 1-B is the larger of the two seeps. (T. 50)

22. Spring 4-D lies to the southeast of the Siebenrock site. Spring 4-D was identified by Sky Haven as existing prior to its mining and was reported in its mining permit application as being off permit and containing some acid mine drainage. (Stip. 10, 16; T. 618, 624-625)

23. Seeps 1-B and 2-C, as well as spring 4-D, are located beyond the permit limits of both McDonald and Sky Haven. (T. 36, 37; Commonwealth Ex. 5)

---

[2] 1-B and 2-C are referred to throughout the record as both "seeps" and "discharges". However, the evidence indicates that they are seeps, and, therefore, to avoid confusion, we will refer to them throughout this adjudication as "seeps".

24. Seeps 1-B and 2-C are recharged by drainage flowing off the Lower Kittanning coal seam. (T. 497)

25. Inspector Kuzemchock concluded that the seeps had existed for an "indeterminate" period of time prior to his discovery of them, partly because of the presence of dead trees in the area of the seeps. (T. 44)

26. At the time of the hearing, there no longer existed any observable flow at the location specified in the compliance order as seep 2-C. (T. 80) This leaves seep 1-B as the only seep capable of collection and treatment as directed by the compliance order to McDonald and Sky Haven. (T. 81)

27. Seeps 1-B and 2-C (when it was measurably discharging) together with spring 4-D consist of acid mine drainage which is characterized by low pH levels (below the level of 6), acidity exceeding alkalinity, elevated iron and manganese levels, and high sulfate levels. (T. 87)

28. The Department sampled the seeps on May 23, 1983 and July 6, 1983. (Stip. 18)

29. Sampling of seep 1-B on May 23, 1983 showed the following characteristics: pH 3.0, acidity 1082 mg/l, sulfates 4400 mg/l, iron 78.28 mg/l, manganese 212.42 mg/l and aluminum 96.71 mg/l. (Stip. 18(a)(i))

30. Sampling of seep 2-C on May 23, 1983 showed the following characteristics: pH 3.0, acidity 1112 mg/l, sulfates 3410 mg/l, iron 100.7 mg/l, manganese 209.38 mg/l and aluminum 94.24 mg/l. (Stip. 18(b)(i))

31. Sampling of seep 1-B on July 6, 1983 showed the following characteristics: pH 3.1, acidity 1220 mg/l, sulfates 2640 mg/l, iron 118.94 mg/l, manganese 232.18 mg/l, and aluminum 35.72 mg/l. (Stip. 18(a)(ii))

32. Sampling of seep 2-C on July 6, 1983 showed the following characteristics: pH 3, acidity of 1310 mg/l, sulfates 4345 mg/l, iron 145.92 mg/l, manganese 229.52 mg/l and aluminum 63.65 mg/l. (Stip. 18(b)(ii))

33. Spring 4-D exhibited signs of acid mine drainage in samples taken in 1978 prior to commencement of Sky Haven's mining. (T. 97)

34. Two premining samples of spring 4-D were taken on May 5, 1978 and October 2, 1978. The analyses of the samples showed the following ranges: pH 5.1 - 5.25, acidity 3.95 - 18 mg/l, sulfates 315.0 - 470.0 mg/l, iron 0.05 - 3.4 mg/l, and manganese 0.10 mg/l. (Stip. 16)

35. Forty-nine samples of spring 4-D were taken from January 16, 1980 to June 19, 1989. Analyses of the samples showed the following ranges: pH 3.20 - 5.35; acidity 6.4 - 552 mg/l; sulfates 225.0 - 2406.0 mg/l; iron 0.00 - 51.30 mg/l and manganese 2.9 - 41.3 mg/l. (Stip. 16)

36. Spring 4-D has not shown signs of continuous degradation since 1978. The lowest pH level (3.20) and the highest levels of acidity (552 mg/l), sulfates (2406 mg/l), and iron (51.30 mg/l) were reported for a sample collected on February 28, 1983. The highest level of manganese (41.30 mg/l) was reported for a sample collected on October 28, 1982. After February 1983, the condition of the spring fluctuated and then improved, though never to the 1978 levels. (Commonwealth Ex. 13-A)

37. On August 17, 1989, Department hydrogeologist John Berry prepared a report which asserted a hydrologic connection between seeps 1-B and 2-C and the Butler and Siebenrock operations. The report also asserted a hydrologic connection between the degraded spring 4-D and the Siebenrock operation. (Stip. 22)

38. On November 13, 1989, the Department issued Compliance Order 894154 to Sky Haven and McDonald jointly, ordering them to treat seeps 1-B and 2-C. (Stip. 23)

39. Also on November 13, 1989, the Department issued Compliance Order 894153 to Sky Haven alone, ordering it to treat spring 4-D. (Stip. 23)

40. Both of the compliance orders were based on John Berry's August 17, 1989 report. (Stip. 23)

Denial of McDonald's Request for Bond Release

41. Sky Haven obtained Stage I bond release for the Siebenrock operation on July 16, 1982, prior to discovery of the seeps by the Department. (Stip. 17)

42. Sky Haven obtained Stage II bond release on May 15, 1985, after discovery of the seeps. (Stip. 19)

43. L. Douglas Saylor, Mining Permit Compliance Specialist in the Department's Hawk Run Office, admitted that his investigation prior to approving Sky Haven's Stage II bond release did not consider whether any off-site acid mine discharges existed. (T. 26-28)

44. By letter dated March 23, 1989, the Department denied McDonald's request for bond release for the Butler operation. (Stip. 20)

45. The Department denied McDonald's request for bond release in part because of the existence of seeps 1-B and 2-C. (Stip. 20; T. 19; Commonwealth Ex. 3)

46. The March 23, 1989 bond release denial letter was written and sent to McDonald before any hydrological study had been done with respect to seeps 1-B and 2-C. (T. 33)

47. Mining Inspector Kuzemchock had recommended the release of bonds on the McDonald site in his February 16, 1989 Completion Inspection Report. (Ex. C-3)

Local Structure of Butler Site

48. Scott Jones, is a hydrogeologist with the Department (T. 118). He holds a Bachelor of Science degree in geology from Susquehanna University and a Master's degree in geology from the University of West Virginia. Mr. Jones was accepted by the Board as an expert witness in geology, hydrology, and geochemistry. (T. 121)

49. Mr. Jones visited the Butler operation on or about September 26, 1980. (T. 121-123)

50. During his site visit, Mr. Jones entered the southern side of the Butler pit during the mining of the Lower Kittanning coal seam. He established that the dip of the pit floor was 15 degrees to the south. (T. 125) This differed from what was shown on the maps in the permit application. (T. 125)

51. The data in McDonald's permit application pertains to the structure of the Middle Kittanning coal seam, rather than the Lower Kittanning coal seam. (T. 335) Using the information in the permit application to calculate dip and strike produces a result which does not correspond to the actual dip of the Butler site. (T. 345)

52. The dip of the Butler mine site, as determined by Mr. Jones, varies from the regional dip of the area by 45 degrees. (T. 184)

Groundwater Flow Direction

53. "Groundwater flow direction" refers to the primary direction in which shallow groundwater moves within a specific area. (T. 133)

54. The principal influence on the flow direction of groundwater moving through or from a mine site is the pit floor. (T. 134-135)

55. Surface water permeates through the spoil to the pit floor. (T. 134, 135)

56. Water flows downhill, in relation to topography and structure as well as lithology. (T. 146)

57. The elevation of seep 2-C is higher than the elevation of the pit floor of the Butler mine. (T. 441-442)

<u>John Berry's Report</u>

58. John Berry is employed as a hydrogeologist in the Hawk Run office of the Department's Bureau of Mining and Reclamation. (T. 86) He obtained that position in August 1988. (T. 89)

59. Mr. Berry is a graduate of Indiana University of Pennsylvania, but his course work at the university did not involve hydrology or hydrogeology. His only course work in geology consisted of a single college level course in the geology of petroleum reserves. (T. 86-90)

60. Mr. Berry's training in hydrogeology consisted of "in house" training working with his peers at the Department in the field of hydrogeology for less than a year prior to this investigation. (T. 87, 90)

61. Mr. Berry took his only formal course in hydrogeology in the Fall of 1989 at Pennsylvania State University <u>after</u> the preparation of the report which is the basis for the compliance orders in this case. (T. 90)

62. Mr. Berry determined that there is a hydrologic connection between seeps 1-B and 2-C and the Butler and Siebenrock sites and, further, that there is a hydrologic connection between spring 4-D and the Siebenrock site. (Stip. 27)

63. Mr. Berry's determination of a hydrologic connection between the Butler and Siebenrock mine sites and seeps 1-B and 2-C and a hydrologic connection between the Siebenrock site and spring 4-D was based upon his review of the topography of the area, geologic structure, and chemical analyses of the seeps. (T. 146, 151, 152, 259-260)

64. Mr. Berry's analysis of the topography of the area was limited to "on site visits" of the "lay of the land" of the permitted areas as related to the seeps. (T. 260)

65. Based on his observations, Mr. Berry concluded that the topography of the sites slopes to the southeast and that this causes surface water on the sites to move downhill in the direction of the seeps. (T. 147-148)

66. Mr. Berry had no map or measurements to support his statement that the topography of the sites slopes to the southeast and that this would result in a hydrogeologic connection of the sites to the seeps. (T. 207, 208, 209, 210, 260)

67. The "chemical analysis" relied upon by Mr. Berry in reaching his conclusion of a hydrologic connection between the sites and the seeps and spring was limited to identifying the presence of acid mine drainage on the permitted areas and at the seeps. Mr. Berry did not quantify any of the specific chemical components or physical properties making up the acid mine drainage on either the permitted areas or at the seeps. (T. 262, 263)

68. Both mine sites are producing acid mine drainage. (T. 149) However, the water quality on the Butler and Siebenrock sites is not identical to that of the seeps. (T. 149)

69. The water at seeps 1-B and 2-C is more highly degraded than the water on the permit sites. (T. 149)

70. Mr. Berry opined that the acid mine drainage at seeps 1-B and 2-C is more highly degraded than water on the Butler and Siebenrock sites because it begins to "catalyze" on itself. (T. 149) He did not provide any further explanation of what he meant by this.

71. Previous mining on the Siebenrock property and the Butler property, prior to Sky Haven's and McDonald's mining, produced acid mine drainage; however, those portions which were previously mined are not hydrologically connected to the seeps and spring at issue in the present case. (T. 101-102; Stip. 8)

72. In 1978, the Siebenrock property had pit water within the area covered by Sky Haven's permit that showed a pH level of 3.5 and sulfates of 229 parts per million ("ppm"), from a previous mining operation on the site. (T. 141-142; Stip. 10)

73. Some of the samples which Mr. Berry included as part of his report were not from either the Butler or Siebenrock properties but were of other McDonald operations and had been included by him to show the potential for acid mine drainage on nearby properties. (T. 241, 242)

74. In determining the local structure of the area of the McDonald and Sky Haven sites and the seeps, Mr. Berry relied solely on the permit files and on regional data in the Pennsylvania Geological Atlas. (T. 180-183, 218) Mr. Berry admitted that he, himself, made no investigation to establish what the local structure of the area was. (T. 180, 181)

75. The regional structure of the area surrounding the mine sites shows a northeast, southwest strike with a dip to the southeast. (T. 483)

76. In order to determine whether a seep is related to a particular property, it is necessary to have site specific information as to geology; it is not sufficient to rely solely on the regional geology of the area. (T. 483)

77. Mr. Berry did not consider the local structure to be an important factor in determining the hydrologic connection between the mine sites and the seeps; he determined that accurate local structure information was not needed and that knowledge of the general dip would suffice. (T. 182, 183, 219) He did this with knowledge of and in spite of Scott Jones' information regarding the local structure. (T. 183)

78. Mr. Berry admitted on cross examination that no water from the Butler site could reach either of the seeps if the local structure was as described by DER hydrogeologist Scott Jones. (T. 186)

79. Mr. Berry made one geologic cross section to characterize the dip on the Butler and Siebenrock sites, but used only information taken from the Butler site. (T. 269, 270)

80. No geologic cross section was ever done by Mr. Berry of the Siebenrock property despite the availability of drill hole data from the U.S. Bureau of Mines. (T. 259)

81. Mr. Berry admits that the dip he used for his expert opinion as well as the cross section he constructed was in error because the Lower Kittanning coal seam cropped below township road 601 indicating a steeper dip in a different direction. (T. 203, 204)

82. Mr. Berry admitted on cross examination that he did not spend as much time as he should have on the local structure of the sites. (T. 182)

83. The lowest point on the Butler and Siebenrock tracts is at the junction of township roads 610 and 601 ("T.610" and "T.601"), well removed from the seeps and spring. (T. 173, 189)

84. Sky Haven's application contains an aerial photograph of the site prior to the application which shows an old pit and spoil; T.601 was built on the old spoil. (T. 48)

85. The high point in T.601 is located east of the Siebenrock-Butler boundary line approximately half-way across the Siebenrock site, and it is a gradual slope from there to the junction of T.601 and T.610. (T. 53, 54)

86. Mr. Berry's theory of flow to the seeps and springs depends upon assuming a "low wall" along T.601 the entire length of the Butler property, which directs the groundwater across the direction of dip and to the northeast and impedes its natural flow to the south. (T. 204, 205) There is no basis in the evidence presented for such an assumption. (T. 204, 205)

Sky Haven's Expert Testimony

87. Sky Haven called Wilson Fisher as an expert witness at the hearing. Mr. Fisher is president and chief engineer of Hess and Fisher Engineers, Inc. (T. 603-604)

88. The parties stipulated to Mr. Fisher being qualified to testify as an expert in engineering, geology, and hydrogeology. (T. 604)

89. As part of his field work in preparing Sky Haven's mining application for the Siebenrock property, Mr. Fisher visited spring 4-D and the areas where seeps 1-B and 2-C were subsequently found to exist. (T. 625)

90. During his pre-mining investigation, Mr. Fisher observed no evidence of seeps at the locations where 1-B and 2-C were found to exist. (T. 626)

91. The local structure of the Siebenrock site varies considerably. In some areas, the dip is to the northeast, in others to the northwest, and in others to the southeast. (T. 611) Numerous rolls exist on the Lower Kittanning coal seam which make a determination of the dip difficult. (T. 610-611)

92. Although Mr. Fisher concluded that there was no hydrologic connection between the Siebenrock site and the seeps and spring based on his analysis of the water quality characteristics of each location, he admitted that his conclusion was preliminary and that he did not regard his research as being sufficiently complete as to be acceptable proof or disproof of his hypothesis. (T. 668)

93. Although Mr. Fisher advanced several hypotheses as to what might have caused seeps 1-B and 2-C, he admitted that he had insufficient data to prove or disprove any of the hypotheses. (T. 661-663, 663-664)

McDonald's Expert Testimony

94. McDonald called David Lindahl as an expert witness. Mr. Lindahl is employed as Chief Geologist by the General Engineering Division of EADS Group. (T. 476, 479)

95. Mr. Lindahl holds a Bachelor of Science degree in geology from Pennsylvania State University and a Master's degree in geology from the University of Pittsburgh. (T. 476) He has also taken several courses in geology and hydrology in the field of coal mining. (T. 476)

96. As part of his work, Mr. Lindahl conducts groundwater assessments on a regular basis. (T. 479-480)

97. Mr. Lindahl was qualified by the Board to testify as an expert in hydrogeology and geology. (T. 481)

98. Mr. Lindahl visited the Butler site on several occasions beginning in August or September 1989. (T. 509)

99. The site specific dip on the Butler property is to the south and slightly west of south. (T. 490)

100. The evidence indicates that the recharge area for seeps 1-B and 2-C does not lie on the Butler property. (T. 504)

101. Although Mr. Lindahl concluded that the recharge area for seeps 1-B and 2-C lies on the Siebenrock property, he never visited the Siebenrock site, nor did he include it as part of his investigation. (T. 504, 511)

102. Based on his investigation, Mr. Lindahl concluded to a reasonable degree of scientific certainty that the McDonald operation did not contribute to seeps 1-B and 2-C. (T. 508)

DISCUSSION

The burden of proof in this matter is split: With respect to the issuance of the compliance orders, the Department must prove by a preponderance of the evidence that there is a hydrologic connection between the two seeps, 1-B and 2-C, and the Butler and Siebenrock sites, as well as a hydrologic connection between the Siebenrock site and spring 4-D. 25 Pa. Code §21.101(b)(3); Hepburnia Coal Co. v. DER, 1986 EHB 563. The standard by which this burden must be met requires that "the evidence of facts and circumstances on which [the Department] relies and the inferences logically deductible therefrom must so preponderate in favor of the basic proposition [the

Department] is seeking to establish as to exclude any equally well supported belief and any inconsistent proposition." Midway Sewerage Authority v. DER, 1991 EHB 1445, (quoting from Henderson v. National Drug Company, 343 Pa. 601, 23 A.2d 743, 748 (1942).

With regard to the Department's denial of McDonald's request for bond release, the burden is on McDonald to prove by a preponderance of the evidence that the Department abused its discretion in refusing to release the bond. 25 Pa. Code §21.101(a); Dunkard Creek Coal v. DER, 1988 EHB 1197, 1200; H & R Coal Co. v. DER, 1986 EHB 979, 980.

As noted earlier, at the hearing McDonald and Sky Haven moved for a directed adjudication[3] with respect to issuance of the compliance orders on the basis that the Department had failed to establish a *prima facie* case. Because we have evidence placed in the record by both of the appellants, and, further, because we must review the evidence placed in the record by McDonald on the question of the bond release denial, we elect to adjudicate this matter on the basis of all the evidence before us, rather than as a directed adjudication.

Compliance Orders

The Department correctly notes in its post-hearing brief that, in order to meet its burden, it must demonstrate a hydrologic connection between the seeps and spring and the Siebenrock and Butler sites. It need not demonstrate that the water became polluted as a result of the operator's mining activities. Thompson and Phillips Clay Co. v. Commonwealth, DER, 136

---

[3] Although the appellants' motion was for summary judgment, in light of the fact that the motion was made at the hearing at the end of the Department's case-in-chief, it is more appropriately treated as a motion for a directed adjudication.

Pa. Cmwlth. 300, 582 A.2d 1162 (1990), allocatur denied, ___ Pa. ___, 598 A.2d 996 (1991); Hepburnia Coal, *supra*. at 602. The appellants argue that the Department has failed to meet its burden. McDonald contends that the evidence demonstrates that there is no hydrologic connection between the seeps and the Butler site, while Sky Haven argues that there is insufficient information from which to conclude that a hydrologic connection exists between the seeps and the sites and between the spring and the Siebenrock site.

The record demonstrates the following: The Butler and Siebenrock sites are adjacent and constitute a single mine hydrogeologically. The Butler site lies to the west of the Siebenrock site. McDonald conducted coal removal operations on the Butler site from approximately August 1979 through August 1981. Siebenrock conducted removal operations on the Siebenrock site from approximately December 1979 through April 1981. Both operators mined the Middle and Lower Kittanning coal seams. Beneath the Lower Kittanning seam lies a relatively impervious layer of clay. Both sites are producing acid mine drainage. According to the Department's permit file, acid mine drainage had also occurred on the Siebenrock site prior to mining by Sky Haven.

Seeps 1-B and 2-C were discovered by DER Surface Mine Conservation Inspector Walter Kuzemchock during an inspection of the sites on May 23, 1983. Both seeps are located at or near the toe of spoil left from mining operations preceding Sky Haven and McDonald. The seeps are located south-southeast of the western portion of the Siebenrock site and southeast of the Butler site, on the opposite side of T.601, which sits atop the old spoil. The seeps are located off the permit sites. Water discharging from the seeps consists of acid mine drainage. At the time of the hearing, seep 2-C was no longer discharging.

Spring 4-D lies to the southeast of the Siebenrock site beyond the permit area. The spring existed prior to the commencement of mining by Sky Haven and was identified by Sky Haven in its permit application as being contaminated by acid mine drainage.

In order to establish a hydrologic connection between the sites and the seeps and spring, the Department attempted to demonstrate that groundwater flow from the sites is in the direction of the seeps and spring. John Berry was the principal hydrogeological witness for the Department. The joint compliance order to McDonald and Sky Haven requiring them to treat seeps 1-B and 2-C and the order to Sky Haven requiring it to treat spring 4-D were based upon an August 17, 1989 report prepared by Mr. Berry, in which he concluded that there was a hydrologic connection between the seeps and the Siebenrock and Butler sites and between spring 4-D and the Siebenrock site. Although Mr. Berry was permitted by the Board to testify as an expert in hydrogeology, the weight which we assign to his testimony is limited by several factors. Prior to his investigation of this matter, Mr. Berry's sole experience in the field of hydrogeology consisted of less than one year of in-house training working with his colleagues in the Department. In addition, Mr. Berry had no undergraduate courses in hydrology or hydrogeology. His only formal course work in hydrogeology consists of one class taken in the Fall of 1989 at the Pennsylvania State University after preparation of the report which is the basis for the compliance orders in this appeal.[4]

---

[4] If the Department expects the Board to give serious consideration to the expert opinions presented by it, it would be well-advised to offer witnesses with adequate training and experience who are qualified to conduct competent investigations and to give testimony as experts on the subject matter in question.

In reaching his conclusion that there is a hydrologic connection between the seeps and the two mine sites and between spring 4-D and the Siebenrock site, Mr. Berry testified that he relied primarily on the following factors: topography (surface features), structure (strike and dip), and chemical analysis of the water at the seeps.[5] However, Mr. Berry provided minimal data on each of these factors to support his conclusion of a hydrologic connection.

Little information as to the topography of the sites can be gleaned from Mr. Berry's testimony. His analysis of the topography was limited to an observation of the "lay of the land" of the permitted areas as related to the seeps. Based on his observations, Mr. Berry determined that the topography of the area slopes to the southeast, causing surface water to move downhill in the direction of the seeps and spring. However, he had no maps or measurements to support his statement that the topography does indeed slope to the southeast.

The chemical analysis relied upon by Mr. Berry was limited to identifying that acid mine drainage exists on both the Butler and Siebenrock sites. In Hepburnia, *supra.*, we examined the question of whether a hydrologic connection can be inferred or assumed from the presence of acid mine drainage on a site. There, we held that a hydrologic connection could not be inferred without establishing a chemical connection between the acid mine drainage being produced on the site and that emanating from the off-site discharge or seep. 1986 EHB at 598-602. In the present case, the only evidence which the

---

[5] Although Mr. Berry also stated that he relied on lithology in determining a hydrologic connection, he provided no direct testimony on how he used this factor in arriving at his conclusion.

Department presented is that acid mine drainage exists at the Siebenrock and Butler sites. The Department presented no evidence demonstrating that the acid mine drainage which appears on the two sites is chemically similar to that of the seeps and spring. In fact, the evidence demonstrates that they are not identical: the water quality at the seeps is more highly degraded than the water on the sites. (F.F. 68, 69) Mr. Berry's explanation for this difference in water quality between the sites and seeps is that the water at the seeps begins to "catalyze on itself". We find it difficult to understand how heavy metals such as iron and manganese can "catalyze" on themselves to provide water which is more highly degraded than its source. Nor did Mr. Berry provide an explanation as to what he meant by this or how such a reaction would occur. (F.F. 70) Based on the lack of any further evidence, we cannot accept Mr. Berry's theory as an explanation for the difference in water quality between the seeps and sites.

As to spring 4-D, there is no dispute that the spring was polluted by acid mine drainage prior to Sky Haven's mining. The Department was aware of this at least as early as 1978 when Sky Haven applied for a permit to mine the Siebenrock site. Sky Haven identified spring 4-D in its permit application and noted that it was contaminated by acid mine drainage at that time. The Department points to the fact that the condition of the spring has further degraded following coal removal operations by Sky Haven. The record does reflect that the spring has been further degraded by acid mine drainage since 1978. Samples taken from January 16, 1980 to June 19, 1989 showed an average pH level lower than that in 1978 and showed higher average levels of acidity, sulfates, iron, and manganese than in 1978. Conditions at the spring did not continuously decline from 1978 to 1989, however. Rather, the spring was most

severely degraded, in terms of low pH level and high levels of acidity, sulfates, iron, and manganese, in February 1983. After February 1983, the readings fluctuated somewhat and then began to show signs of improvement, though never to the 1978 levels. (F.F. 36)

The fact that spring 4-D showed increased signs of degradation after Sky Haven mined the Siebenrock site is a factor to consider in determining whether there exists a hydrologic connection between the site and the spring. However, by itself, it does not provide a sufficient basis for concluding that such a connection exists. This is especially true where, following 1983, the spring has shown some signs of improving without any apparent corresponding change in water quality at the Siebenrock site. Moreover, as will be discussed in more detail later, the Department failed to establish that groundwater flow from the Siebenrock site is in the direction of the spring.

"Groundwater flow direction" refers to the primary direction in which shallow groundwater moves within a specific area. The primary influence on the direction of groundwater flowing through or from a mine site is the structure of the pit floor. (F.F. 54) Mr. Berry obtained his information on the structure of the area from data in the permit files and from regional data contained in the Pennsylvania Geological Atlas. He admitted that he made no personal investigation to determine the local structure of the mine sites.

The regional structure of the area surrounding the mine sites shows a northeast, southwest strike with a dip to the southeast. Regional structure, however, is too general to be relied upon to establish a hydrologic connection between a seep and a particular piece of property. In such a case, it is necessary to have site-specific information. (F.F. 74) This is particularly true in the present case where the dip at each of the mine sites varies from

the regional dip. Whereas the regional dip is to the southeast, which would be in the direction of the seeps and spring, the actual dip of the Butler site is to the south and southwest, away from the seeps, and the dip on the Siebenrock site varies considerably at different points. Therefore, Mr. Berry's reliance on regional structure to establish a hydrologic connection between the Butler and Siebenrock sites and the seeps and spring was in error.

Mr. Berry's reliance on the information on local structure contained in the permit files also provided inaccurate information. DER hydrogeologist Scott Jones, who inspected the Butler site on September 26, 1980 in a matter unrelated to this appeal, determined that the dip of the pit floor of the Butler mine was 15 degrees to the south. (F.F. 50) This differed from the information on local structure contained in McDonald's permit application. Upon further investigation, it was discovered that the dip and strike information in the permit application pertained to the Middle Kittanning coal seam rather than the Lower Kittanning seam which is at issue in this appeal. Using the data which would have been available to Mr. Berry in the permit application produces a result which does not correspond to the actual dip of the Butler pit.[6]

With regard to the Siebenrock site, the record demonstrates that the dip and strike varies considerably at different points throughout the site.

---

[6] We certainly do not condone McDonald's failure to provide more accurate information in its permit application. An applicant for a mining permit is expected to provide accurate information and should be held to the representations it makes in its permit application. Were this the only evidence available to the Department in determining the dip of the Butler site, we would hold McDonald to the representations made in its application. However, where the investigation by DER hydrogeologist Scott Jones produced different results from those set forth in the permit application, Mr. Berry erred in ignoring the work done by his colleague and relying solely on McDonald's permit application.

Measurements taken by Wilson Fisher at the Siebenrock site showed that certain portions of the site dip to the northeast, others to the northwest, and others to the southeast. Measuring the strike and dip on the site is further compounded by the presence of numerous rolls in the coal seam. Mr. Berry admitted that he did no geologic cross-section for the Siebenrock site to determine the direction of the dip; the geologic cross-section which he used to characterize the dip on both the Butler and Siebenrock sites contained only information from the Butler site. (F.F. 79, 80)

Mr. Berry admitted that he did not spend as much time as he should have on the local structure of the sites. He further admitted that, in conducting his review, he had not considered local structure to be an important factor in determining a hydrologic connection between the seeps and spring and the sites. Without more accurate data on local structure, Mr. Berry's determination of a hydrologic connection based on the dip of the sites cannot be accepted as conclusive.

In addition to the Department's lack of information establishing a hydrologic connection between the sites and the seeps and spring, there is also evidence tending to show that a connection does not exist, particularly with respect to the Butler site. As noted earlier, the dip of the Butler site is to the south and slightly west of south, whereas the seeps are located to the southeast of the site. Mr. Berry, himself, admitted that, if the dip was as established by DER hydrogeologist Scott Jones, groundwater from the Butler site could not reach the seeps without some other force acting on it. Although Mr. Berry proposed a theory about an impoundment existing along the old spoil to the south of the site, directing water from the site in the direction of the seeps, no evidence of this was presented. Secondly, the

elevation of seep 2-C is higher than the elevation of the Butler pit. (F.F. 57) No evidence was presented to explain how water from the Butler pit could travel to seep 2-C at a higher elevation. Finally, seep 2-C, which is the seep nearest the Butler site, has stopped flowing. No explanation was provided as to how water from the Butler site can continue to reach seep 1-B, while seep 2-C has stopped flowing. Based on this evidence, we find that the Department has failed to demonstrate that a hydrologic connection exists between the Butler site and seeps 1-B and 2-C.

The evidence regarding Sky Haven is less clear. The seeps lie south-southeast of the western portion of the Siebenrock site, and the spring lies to the southeast. Measurements taken by Sky Haven's expert, Wilson Fisher, showed that the local structure of the site varies considerably. At some points the dip is to the northeast, at others to the northwest, and at others to the southeast. There is no evidence, however, as to the direction of the dip on that portion of the Siebenrock site nearest the seeps. Although Mr. Fisher testifed that the Siebenrock site dips to the southeast at some points, there is no evidence showing at which portion of the site this occurs. The Department made no geologic cross-section of the site demonstrating that the site dips in the direction of the seeps and spring. Based on this, Mr. Fisher concluded that there was insufficient evidence in the record to establish that a hydrologic connection exists between the Siebenrock site and the seeps and spring. Counsel for the Department and McDonald moved to strike Mr. Fisher's testimony since, in his expert report and deposition, he had stated that there was no hydrologic connection between the Siebenrock site and the seeps and spring. Mr. Fisher explained that the conclusions stated in his expert report and deposition were based on his preliminary investigation and evaluation and

that after seeing the evidence presented at trial, he concluded that there was insufficient evidence to draw a definitive conclusion either way. This change in opinion tends to lend support to the Department's case, since Mr. Fisher appears to have backed away from his initial conclusion of no hydrologic connection to one of uncertainty. It does not, however, prove the Department's case. Because the burden is on the Department to demonstrate that a hydrologic connection exists between the Siebenrock site and the seeps and spring, the evidence must preponderate in favor of this conclusion. We recognize that Sky Haven's expert, Wilson Fisher, could not state with a reasonable degree of scientific certainty that no hydrologic connection exists. However, the burden is not on Sky Haven to show that no such connection exists, but on the Department to demonstrate that a connection does exist. Where the evidence is insufficient either to prove or to disprove a hydrologic connection, we must find that the Department has failed to carry its burden of proof.[7]

In conclusion, we find that the Department has failed to demonstrate a hydrologic connection between the Butler site and seeps 1-B and 2-C or between the Siebenrock site and seeps 1-B and 2-C and spring 4-D, and, therefore, the evidence does not support the Department's issuance of the compliance orders which are the subject of this appeal.

---

[7] In reaching this conclusion, we do not rely on the opinion stated by Mr. Fisher at the hearing but, rather, on the Department's lack of evidence establishing such a link. Furthermore, although McDonald's expert witness, geologist David Lindahl testified that the recharge area for seeps 1-B and 2-C lies on the Siebenrock site, we assign no weight to his testimony on this matter since Mr. Lindahl admitted that he never even visited the Siebenrock site, nor did he include it in his investigation. (F.F. 101)

Denial of Bond Release

As noted earlier, McDonald has the burden of proving that it was entitled to a release of its bonds. Under §4(g) of the Surface Mining Act, a Stage I release may occur when the permittee has completed backfilling, regrading, and drainage control of a bonded area in accordance with the reclamation plan and has made provisions for the treatment of any pollutional discharges. 52 P.S. §1396.4(g). In reviewing a challenge to DER's denial of a bond release, the Board must examine whether the permittee has demonstrated that the aforesaid criteria have been met. C & K Coal Co. v. DER, 1992 EHB 1261, 1302.

DER mining inspector Walter Kuzemchock conducted an inspection of the Butler site in connection with McDonald's request for bond release. In his completion inspection report, Mr. Kuzemchock stated that the site had been restored and reclaimed in accordance with the approved reclamation plan. He observed no discharges on or emerging from the bonded area, but did note the presence of the off-site seeps, 1-B and 2-C. In concluding his report, Mr. Kuzemchock recommended the release of McDonald's bonds.

By letter dated March 23, 1989, the Department denied McDonald's request for bond release, citing the following as grounds for the denial:

> 1. There is more than 3000 square feet of area having less than 70% cover surrounding the area of Pond No. 4.
>
> 2. Erosion has developed in the area above Pond No. 4.
>
> 3. Acid mine discharge.
>
> (Commonwealth Ex. 3)

The denial letter further stated that, in order to secure the release of its bonds, McDonald was required to take the following corrective action:

> 1. Revegetate the area around Pond No. 4. Also Stage III cannot be released until all E & S controls have been removed.
>
> 2. Regrade and revegetate erosion gullies.
>
> 3. Pending hydrologic investigation.

(Commonwealth Ex. 3)

At the hearing, counsel for the Department stated that the first two reasons cited for the denial and the first two corrective actions dealt with a different McDonald operation and were not relevant to this appeal. When questioned about the relevance of these matters by the presiding Board Member, counsel for the Department responded as follows:

> JUDGE MACK: Now, I'm to understand, then, that [Exhibit] C-3 [the bond release denial letter] is admitted, with the understanding that 1 and 2 [of] the reasons [cited for denial of the bond release request] are not to be considered by the Board?
>
> MR. MCKINSTRY: That's correct.

(T. 20)

Therefore, in determining whether McDonald's request for bond release was properly denied, the only basis for denial which is relevant to this appeal is the third reason stated in the denial letter, "acid mine discharge".

The "acid mine discharge" cited as the reason for denial of McDonald's request for bond release refers solely to the two off-site seeps, 1-B and 2-C. This is based on the following exchange between counsel for McDonald, Mr. Belin, and counsel for the Department, Mr. McKinstry, at the hearing:

> MR. BELIN: Mr. McKinstry, isn't it also the case that as to Point #3, the acid mine drainage

referred to in that letter refers to the two seeps you referred to in your opening statement for purposes of this appeal?

MR. McKINSTRY: Yes. The Order that was issued in this case would stem from this bond release denial and refers to Seeps B and C.

(T. 19)

Because the evidence indicates that there is no hydrologic connection between the Butler site and seeps 1-B and 2-C, as set forth herein, we cannot uphold the Department's denial of McDonald's request for bond release on that basis. C & K Coal, *supra*. at 1302-1303. Therefore, we sustain McDonald's appeal of its bond release denial with respect to the issue of acid mine discharge.

Manganese Issue

Because of our disposition of this action on the basis that the Department has failed to establish a hydrologic connection between the sites and the seeps and spring, we need not address the issue of manganese concentrations cited by the Department in its orders to the appellants.

CONCLUSIONS OF LAW

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

2. DER bears the burden of proof in appeals of compliance orders. 25 Pa. Code §21.101(b)(3).

3. The permittee bears the burden of proving that all of the criteria for bond release were satisfied at its mine permit site. Dunkard Creek Coal, *supra*.

4. In order for a mining operator to be held liable for abating a discharge off its permitted area, DER must establish a hydrologic connection between the discharge and the mine site. Thompson and Phillips Clay, *supra*.

5. The Department failed to establish by a preponderance of the evidence a hydrologic connection between the Butler site and seeps 1-B and 2-C.

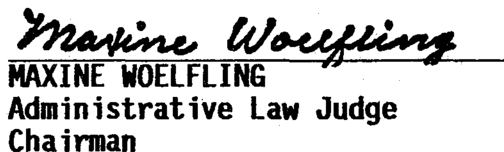
6. The Department failed to establish by a preponderance of the evidence a hydrologic connection between the Siebenrock site and seeps 1-B and 2-C and spring 4-D.

7. Because the evidence indicates that there is no hydrologic connection between the Butler site and seeps 1-B and 2-C, the Department abused its discretion in denying McDonald's request for bond release on that basis.

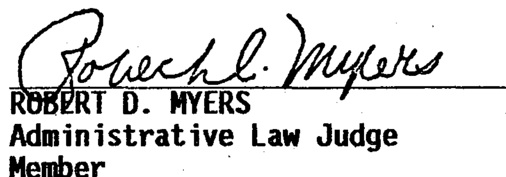
O R D E R

AND NOW, this 16th day of May, 1994, it is hereby ordered that the appeals of McDonald and Sky Haven, consolidated at 89-096-MJ, are sustained.

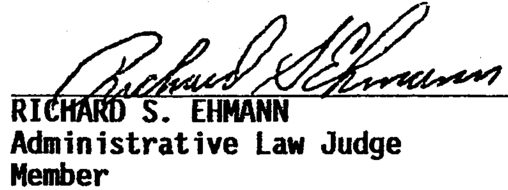
ENVIRONMENTAL HEARING BOARD



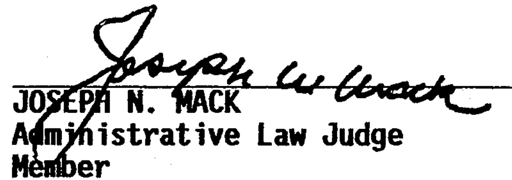
MAXINE WOELFLING
Administrative Law Judge
Chairman



ROBERT D. MYERS
Administrative Law Judge
Member



RICHARD S. EHMANN
Administrative Law Judge
Member



JOSEPH N. MACK
Administrative Law Judge
Member

DATED: May 16, 1994

cc: **DER, Bureau of Litigation**
Library: Brenda Houck
For the Commonwealth, DER:
Gina Thomas, Esq.
Central Region
For McDonald Land & Mining Co.:
Carl A. Belin, Jr., Esq.
Clearfield, PA
For Sky Haven Coal, Inc.:
Ann B. Wood, Esq.
Clearfield, PA

ar

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
2nd FLOOR — MARKET STREET STATE OFFICE BUILDING
400 MARKET STREET, P.O. BOX 8457
HARRISBURG, PA 17105-8457
717-787-3483
TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOARD

SOLAR FUEL COMPANY, INC., A CORPORATION	:	
	:	
v.	:	EHB Docket No. 93-353-E
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: May 16, 1994

OPINION AND ORDER
SUR MOTION FOR SUMMARY JUDGMENT

By Richard S. Ehmann, Member

Synopsis

The Board treats a motion for summary judgment as a motion to dismiss and grants the motion where the appeal is moot. The Board cannot grant appellant/bituminous deep coal mine operator any meaningful relief, as it has complied with the Department of Environmental Resources' (DER's) compliance orders issued under the Bituminous Coal Mine Act directing it to correct hazardous conditions at its mine, no civil penalties can be imposed on the appellant, and these compliance orders will have no impact on renewal of appellant's coal mine activity permit.

OPINION

Appellant Solar Fuel Company, Inc. (Solar Fuel) commenced this challenge on November 23, 1993 to DER's issuance of a series of compliance orders to it pursuant to the Bituminous Coal Mine Act, Act of July 17, 1961, P.L. 659, as amended, 52 P.S. §§701-101 *et seq.* (Bituminous Coal Mine Act), with regard to violations of this act at its deep mine known as the Solar No.

7 Mine in Hooversville, Somerset County. DER filed a motion for summary judgment, along with a supporting brief and supporting affidavits of Lynn D. Jamison, Joseph A. Sbaffoni, and Joseph F. Leone, on April 4, 1994. Solar Fuel filed no timely response to this motion.[1]

DER's motion asserts that the undisputed facts in this matter show that the work which DER ordered Solar Fuel to perform under the challenged compliance orders to correct hazardous conditions at the mine has been completed by Solar Fuel so that the Board can no longer grant meaningful or effective relief. DER accordingly argues that the appeal is moot and should be dismissed with prejudice. While DER's motion is captioned Motion for Summary Judgment, we will treat it as one for dismissal for mootness, since that is what DER seeks.

The undisputed facts are that DER's Underground Deep Mine Safety Inspector Lynn D. Jamison issued Compliance Order (CO) No. 04268 to Solar Fuel on November 8, 1993 at approximately 8:25 a.m., citing Solar Fuel for accumulations of water at various points on its intake haulage roads, as a violation of Section 290(g) of the Bituminous Coal Mine Act, 52 P.S. 701-290(g). (Jamison affidavit at paragraphs 1, 2, 7, and 8) Solar Fuel complied with CO No. 04268 by pumping this water, and DER terminated this CO that same day at approximately 12:03 p.m. (meaning Solar Fuel had fully complied with the order by correcting the cited condition). (Jamison affidavit at paragraphs 9 and 10, Sbaffoni affidavit at paragraph 5)

Inspector Jamison issued CO No. 05745 to Solar Fuel on November 15, 1993 at approximately 9:10 a.m. because water was allowed to accumulate on the

[1] When contacted by the Board's staff, counsel for Solar Fuel indicated he would be filing a request for a brief extension of time in which to file Solar Fuel's response, but no such request was received by the Board.

main haulage road which was in violation of Section 290(g) of the Bituminous Coal Mine Act. (Jamison affidavit at paragraphs 11 and 12) Solar Fuel complied with CO No. 05745 by pumping this water, and DER terminated this CO at approximately 12:10 p.m. that same day. (Jamison affidavit at paragraphs 13 and 14) The areas cited in CO Nos. 04268 and 05745 involved different points on the various haulage roads. (Jamison affidavit at paragraph 15)

Inspector Jamison issued CO No. 05726 to Solar Fuel on November 17, 1993 at approximately 10:43 a.m., citing the company for multiple violations which created an imminent danger of loss of life and/or serious personal injury, including coal spillage, inadequate rock dusting, and broken, missing and stuck conveyor belt rollers which created a potential ignition source, in violation of Section 251(b) of the Bituminous Coal Mine Act, 52 P.S. §701-251(b). (Jamison affidavit at paragraph 16, order attached to Jamison affidavit as Exhibit C and to notice of appeal) CO No. 05726 required cessation of operation of the No. 6, 7, and 8 belt lines until the hazardous conditions were corrected. (Jamison affidavit paragraph 16) Solar Fuel complied with CO No. 05726 by cleaning the Nos. 6, 7, and 8 belt entries, rock dusting, and repairing the defects noted on the conveyor belts. (Jamison affidavit paragraph 17) The belt lines which were the subject of CO No. 05726 resumed operation approximately three to four hours after the order was issued pursuant to Inspector Jamison's verbal instructions to Solar Mine Superintendent Ron Corl. (Jamison affidavit at paragraph 18) CO No. 05726 was terminated on November 18, 1993 at approximately 10:17 a.m. (Jamison affidavit at paragraph 19) CO Nos. 04268, 05745, and 05726 have been terminated by DER because Solar Fuel has fully complied with these orders.

(Jamison affidavit at paragraph 31) Solar Fuel has no outstanding obligations under these COs. (Jamison affidavit at paragraph 20, Sbaffoni affidavit at paragraph 8)

Further, according to Leone's affidavit, as Chief of DER's Bituminous Mining Permits Section, he is responsible for overseeing DER's permitting process for underground bituminous mines, coal refuse disposal facilities and coal preparation plant facilities. (Leone affidavit at paragraph 3) Leone states that the issuance of COs by DER's Bureau of Deep Mine Safety has no effect on DER's permitting process for underground mines where the operator has complied with the COs and they have been terminated by the DER Deep Mine Safety Inspector. (Leone affidavit at paragraph 10) Additionally, Leone states in his affidavit that these COs will not affect Solar Fuel's current Coal Mine Activity Permit, which expires on November 19, 1997, or renewal of this permit. (Leone affidavit at paragraphs 7, 9, and 11) According to Sbaffoni's affidavit, as Chief of the Bituminous Division of DER's Bureau of Deep Mine Safety Program, he is responsible for overseeing DER's review of plans submitted by bituminous underground mine operators relating to roof control, ventilation, drainage, and other mine systems and methods. (Sbaffoni affidavit at paragraph 9) Sbaffoni states that the issuance of COs Nos. 04268, 05745, and 05726 to Solar Fuel does not affect, in any manner, the review of plans submitted by Solar Fuel. (Sbaffoni affidavit at paragraph 10) He further states that DER lacks authority under the Bituminous Coal Mine Act to impose civil penalties or fines. (Sbaffoni affidavit at paragraph 11)

We have previously stated that a matter before the Board becomes moot when an event occurs which deprives the Board of the ability to provide effective relief or when the appellant has been deprived of a stake in the outcome. New Hanover Corporation v. DER, 1991 EHB 1127. See Commonwealth v.

One 1978 Lincoln Mark V, 52 Pa. Cmwlth. Ct. 353, 415 A.2d 1000 (1980); In Re Gross, 476 Pa. 203, 382 A.2d 116 (1978). With regard to enforcement orders or compliance orders issued by DER, the Board has declined to dismiss appeals as moot where the orders under appeal could have an impact on subsequent actions regarding the issuance and renewal of permits, and on the assessment of civil penalties. See Brandywine Recyclers, Inc. v. DER, EHB Docket No. 91-124-E (Consolidated) (Adjudication issued May 13, 1993); Decom Medical Waste Systems (N.Y.), Inc. v. DER, 1990 EHB 460 (and cases cited therein); Al Hamilton Contracting Co. v. Commonwealth, DER, 90 Pa. Cmwlth. 228, 494 A.2d 516 (1985). The reasoning behind this is that if an appellant is prevented from fully litigating a DER order because he has complied with it, he will be deprived of any opportunity to strike the alleged violation from his compliance record. Kerry Coal Co. v. DER, 1988 EHB 755. Thus, we have refused to dismiss appeals as moot despite the appellant's compliance with the challenged DER order where DER could still assess a civil penalty, giving the appellant a stake in the outcome of the appeal. See, *e.g.*, Decom, *supra*.; West Penn Power Co. v. DER, 1989 EHB 157; Granteed v. DER, 1988 EHB 806; Kerry, *supra*.; Bell Coal Co. v. DER, 1987 EHB 883; Scott Paper Co. v. DER, 1987 EHB 13. None of these matters involved challenges to DER orders issued under the Bituminous Coal Mine Act, however.

Viewing the instant motion in the light most favorable to the non-moving party, Solar Fuel, see Pengrove Coal Co. v. DER, 1987 EHB 913, we find this appeal is moot because we can grant Solar Fuel no meaningful relief. There is no question that it has complied with DER's orders and these orders have been terminated. Further, there is no dispute that DER lacks authority under the Bituminous Coal Mine Act to issue any civil penalty assessment to Solar Fuel. The statements in DER's affidavits that DER's review of any plans

submitted by Solar Fuel relating to roof control, ventilation, drainage, and other mine systems and methods, and its renewal of Solar Fuel's Coal Mine Activity Permit will not be affected by these COs is undisputed. Accordingly, we enter the following order.

O R D E R

AND NOW, this 16th day of May, 1994, DER's Motion for Summary Judgment, treated as a Motion to Dismiss, is granted, and Solar Fuel's appeal is dismissed as moot.

ENVIRONMENTAL HEARING BOARD

MAXINE WOELFLING
Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: May 16, 1994

cc: Bureau of Litigation
Library: Brenda Houck

For the Commonwealth, DER:
L. Jane Charlton, Esq.
Southwest Region
For Appellant:
David C. Klementik, Esq.
Windber, PA

ar

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
2nd FLOOR — MARKET STREET STATE OFFICE BUILDING
400 MARKET STREET, P.O. BOX 8457
HARRISBURG, PA 17105-8457
717-787-3483
TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOARD

DEL-AWARE UNLIMITED, INC., et al.	:	
	:	
v.	:	EHB Docket No. 88-078-E
	:	(Consolidated)
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES and	:	
PHILADELPHIA ELECTRIC COMPANY and NORTH	:	
PENN and NORTH WALES WATER AUTHORITIES,	:	
Permittees	:	Issued: May 17, 1994

OPINION AND ORDER SUR
MOTION TO LIFT STAY OF PROCEEDINGS
AND TO DISMISS APPEALS

By: Richard S. Ehmann, Member

Synopsis

Where the sole issues to be adjudicated in this appeal are identical to those adjudicated against this appellant in a prior appeal before this Board, which prior adjudication was sustained on appeal to the Commonwealth Court, the "doctrine of issue preclusion" bars their relitigation here and creates the grounds to sustain the unopposed Motion To Dismiss filed by one of the permittees.

OPINION

Perhaps the instant appeal's history should be longer than it is considering how long it has been pending before this Board, but we will not waste our paper or the reader's time and effort by recounting it here. The background of this appeal is set forth at some length in the Board's Opinion and Order Sur Motion To Dismiss found at 1988 EHB 1097. In that Opinion and Order a large number of appeals are discussed, many of which are no longer before us. In this consolidated appeal (containing the appeals initially

docketed at Nos. 88-078-E and 88-080-E) that 1988 opinion addresses the appeal at No. 88-078-E and concludes that the only issues left to be litigated are those which are the same as the issues then pending in a separate appeal at Docket No. 87-039-R. As to the appeal at No. 88-080-E, the opinion concludes that it has only two issues left for litigation, and they are identical to the issues previously raised in the appeal then pending at Docket No. 87-037-R. After reaching this conclusion as to the issues, because the two 1987 appeals were pending before the Board, the 1988 Opinion included an order staying the instant consolidated appeals pending a final decision in the appeals at Docket Nos. 87-037-R and 87-039-R.[1]

This consolidated appeal remained in that posture until March 11, 1994 when it was reassigned to Board Member Richard S. Ehmann. By Order dated March 30, 1994 as the new presiding Board Member, he ordered each party to file, by April 12, 1994, a status report on this appeal and in that report to discuss the party's opinion of the impact of the unreported Commonwealth Court opinion on Del-AWARE Unlimited, Inc. v. DER, No. 1709 C.D. 1990 (Opinion issued April 22, 1992) ("Del-AWARE v. DER") on this appeal. The Department of Environmental Resources ("DER"), Philadelphia Electric Company ("PECO") and North Penn-North Wales Water Authorities ("NP-NW") filed these reports, but Del-AWARE Unlimited, Inc. ("Del-AWARE") has not done so. The Status Reports of PECO, DER, and NP-NW all take the position that Del-AWARE v. DER moots this appeal. NP-NW included with its Status Report the instant Motion To Lift Stay Of Proceedings And To Dismiss Appeals. By letter dated April 14, 1994 the Board advised the parties to file their responses, if any, to this Motion on

---

1 This stay was continued and the appeals and Docket Nos. 88-078-E and 88-080-E reconsolidated by the Board's Order of January 5, 1989.

or before May 4, 1994. DER advised the Board by letter that DER supports NP-NW's Motion. Neither PECO nor Del-AWARE has filed any response thereto.

NP-NW's Motion is unopposed. It asserts that in our Adjudication dated July 17, 1990, we dismissed the appeals at Docket Nos. 87-037-M and 87-039-M.[2] It avers that Del-AWARE appealed that Adjudication to the Commonwealth Court, which sustained our Adjudication in Del-AWARE v. DER, and there was no appeal from the Commonwealth Court's opinion. It then concludes that this appeal must be dismissed based upon the Commonwealth Court's opinion, the prior orders entered in these appeals identified above, and the fact that Del-AWARE is precluded from relitigating these issues.

Because of the volume of litigation involving these parties both in this forum and elsewhere, we will not simply grant NP-NW's Motion because it is unopposed, although we question how such a decision could be subsequently challenged by Del-AWARE if it failed to oppose the motion now.

The two 1987 appeals by Del-AWARE involve its challenge to the permits issued PECO and NP-NW by DER. Each permit (one for PECO and one for NP-NW) was for an outfall structure and related facilities in connection with the Point Pleasant Diversion Project in which water from the Delaware River is diverted to Perkiomen Creek (for PECO) and Neshaminy Creek (for NP-NW). According to our Adjudication of these consolidated appeals (1990 EHB at 762), the sole issue was whether DER's decision comports with Del-AWARE Unlimited, Inc. v. DER, 1984 EHB 178. That Adjudication concluded DER's decision was sound and, as pointed out above, that Adjudication was affirmed by the Commonwealth Court.

---

2 This Adjudication is found at 1990 EHB 759.

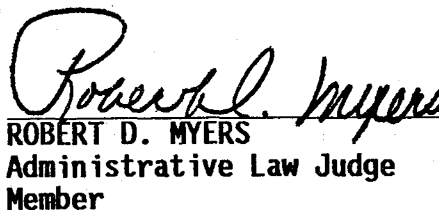
NP-NW asserts that the doctrine of issue preclusion bars relitigation in this appeal of the issues decided and reported above. We have discussed issue preclusion at length regarding these very parties in Del-AWARE Unlimited, Inc. v. DER, et al., 1986 EHB 919. There we applied it against Del-AWARE. Here, we have already ruled that the issues in this consolidated appeal are identical to those finally decided in Del-AWARE's 1987 consolidated appeal. The essential elements for application of the concept of "issue preclusion" in this appeal are thus met. These four elements are: 1) identity of the thing sued for; 2) identity of the cause of action; 3) identity of the persons or parties; 4) identity in quality of the parties for or against whom the claim is made. Id. at 930. Moreover, we have been offered no reason not to apply this concept here.

Accordingly, we enter the following order.

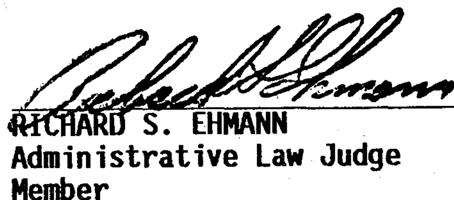
O R D E R

AND NOW, this 17th day of May, 1994, it is ordered that NP-NW's Motion To Lift Stay Of Proceedings And Dismiss Appeals is granted and this consolidated appeal is dismissed.

ENVIRONMENTAL HEARING BOARD



ROBERT D. MYERS
Administrative Law Judge
Member



RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

Board Member Maxine Woelfling did not participate in this decision.

DATED: May 17, 1994

cc: **Bureau of Litigation**
Library: Brenda Houck
For the Commonwealth, DER:
Louis P. Thompson, Esq.
Southeast Region
For Appellant:
Robert J. Sugarman, Esq.
Philadelphia, PA
For PECO:
Jeffrey S. Saltz, Esq.
William G. Frey, Esq.
Philadelphia, PA
For North Penn/North Wales Water:
Jeremiah J. Cardamone, Esq.
Ann Thornburg Weiss, Esq.
Fort Washington, PA

med

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
2nd FLOOR — MARKET STREET STATE OFFICE BUILDING
400 MARKET STREET, P.O. BOX 8457
HARRISBURG, PA 17105-8457
717-787-3483
TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOARD

JOHN D. AND SANDRA T. TRAINER, :
BRUCE A. AND ALYCE CURTIS, and :
THE PLUMSTEAD TOWNSHIP CIVIC ASSOCIATION :
v. : EHB Docket No. 94-016-W
COMMONWEALTH OF PENNSYLVANIA, :
DEPARTMENT OF ENVIRONMENTAL RESOURCES :
and MILLER AND SON PAVING, INC., Intervenor :

THE PLUMSTEAD TOWNSHIP CIVIC ASSOCIATION :
AND PLUMSTEAD TOWNSHIP :
v. : EHB Docket No. 93-320-W
COMMONWEALTH OF PENNSYLVANIA, :
DEPARTMENT OF ENVIRONMENTAL RESOURCES :
AND MILLER AND SON PAVING, INC., Intervenor : Issued: May 17, 1994

OPINION AND ORDER
SUR MOTIONS TO DISMISS

By: Maxine Woelfling, Chairman

Synopsis

The Board lacks jurisdiction to review various interlocutory conclusions and recommendations reached by the Department of Environmental Resources (Department) during the process of evaluating a petition for designation of an area as unsuitable for noncoal surface mining and dismisses appeals of a letter stating the Department's intent to make a recommendation and a letter detailing further steps in reaching an ultimate decision on the petition.

OPINION

The two appeals presently before the Board arise out of the efforts of the Plumstead Township Civic Association (Association) to have a 600 acre tract of land in the municipality, which is situated in Bucks County, designated as

unsuitable for surface mining. The Association's April 5, 1990, petition, which was submitted to the Department pursuant to §315(i) of the Clean Streams Law, the Act of June 25, 1937, P.L. 1987, as amended, 35 P.S. §691.315(i) (Clean Streams Law), was rejected by the Department on the grounds that §315(i) did not apply to noncoal surface mining. The Association appealed the Department's decision to the Board, and the Board entered summary judgment in the Department's favor, 1990 EHB 1593. The Association then petitioned the Commonwealth Court for review of the Board's opinion, and the Commonwealth Court reversed the Board, holding that §315(i) of the Clean Streams Law was not restricted solely to coal mining. Plumstead Township Civic Association *et al.* v. Department of Environmental Resources, 142 Pa. Cmwlth. 455, 597 A.2d 734 (1991). As a result of the Commonwealth Court's decision, the Department was directed to evaluate the petition.[1]

The Department evaluated the petition, and, by letter dated October 4, 1993, advised counsel for the Association, John D. and Sandra T. Trainer, and Bruce A. and Alyce Curtis (collectively, Appellants) that it intended to recommend to the EQB at that body's November, 1993, meeting that the 600 acre area not be designated as unsuitable for surface mining. Appellants challenged that letter in a November 4, 1993, notice of appeal docketed at EHB Docket No. 93-320-W.

The Department presented its recommendation to the EQB, and, in response to concerns raised at the EQB meeting, revised portions of the documents supporting its recommendation. An additional period for public comment was also

[1]§1930-A of the Administrative Code, the Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-30 (Administrative Code), prohibits the Environmental Quality Board (EQB) from designating areas unsuitable for noncoal surface mining if the petition to do so is filed after July 30, 1992. The prohibition does not apply to the petition at issue here.

provided as a result of the EQB meeting. Counsel for Appellants was advised of these events in a December 29, 1993, letter from the Department. Appellants sought the Board's review of that letter in a January 24, 1994, appeal docketed at EHB Docket No. 94-016-W.

Miller and Son Paving, Inc., which has been issued a permit to conduct noncoal surface mining on a 156 acre portion of the 600 acre tract in question,[2] petitioned to intervene in both appeals and its petitions were granted by the Board.

The Department has moved to dismiss both of these appeals. It contends that the Board has no jurisdiction over either appeal, as the Department actions challenged do not constitute appealable actions. It also asserts that the appeal docketed at No. 93-320-W was mooted by the Department's subsequent recommendation at the November 1993, EQB meeting. For the reasons enumerated below, the Department's motions are granted, and these appeals are dismissed.

Section 315(m) of the Clean Streams Law[3] sets forth a procedure for the designation of areas unsuitable for mining:

> Any person having an interest which is or may be adversely affected shall have the right to petition the department to have an area designated as unsuitable for mining operations, or to have such a designation terminated. Pursuant to the procedure set forth in this section, the department may initiate proceedings seeking to have an area designated as unsuitable for mining

---

[2]The issuance of that permit is the subject of a pending appeal by the Plumstead Township Board of Supervisors at Docket No. 91-314-W.

[3]The regulations governing the surface mining of coal, which were adopted pursuant to both the Clean Streams Law and the Surface Mining Conservation and Reclamation Act, the Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1 *et seq.*, set forth detailed procedures governing the evaluation of petitions to designate lands as unsuitable for surface coal mining. Obviously, the regulations governing noncoal surface mining do not contain such procedures because of the Department's interpretation of §315 of the Clean Streams Law and the General Assembly's later prohibition on such designations.

> operations, or to have such a designation terminated. Such a petition shall contain allegations of facts with supporting evidence which would tend to establish the allegations. Within ten months after receipt of the petition the department shall hold a public hearing in the locality of the affected area, after appropriate notice and publication of the date, time and location of such hearing. After a person having an interest which is or may be adversely affected has filed a petition and before the hearing, as required by this section, any person may intervene by filing allegations of facts with supporting evidence which would tend to establish the allegations. Within sixty days after such hearing, the department shall issue and furnish to the petitioner and any other party to the hearing, a written decision regarding the petition, and the reasons therefor. In the event that all the petitioners stipulate agreement prior to the requested hearing, and withdraw their request, such hearing need not be held.

This provision of the Clean Streams Law must also be read in conjunction with §1930-A of the Administrative Code, which authorizes the EQB to make the ultimate decision regarding designation. More simply put, the Department evaluates the petition and makes recommendations to the EQB. The EQB then evaluates the Department's recommendation and decides whether a designation is warranted.

While this process is not completely analogous to the evaluation of a permit application by the Department,[4] it is analogous to the extent that there are many steps along the way where the Department makes "decisions." In concluding that such "decisions" were not reviewable, we observed in Phoenix Resources, Inc. v. DER, 1991 EHB 1681, 1684, that:

> This definition is necessarily expansive because of the many types of actions DER can take under the numerous statutes it administers. Yet, it was never intended that the Board would have jurisdiction to review the many provisional, interlocutory "decisions" made by DER during the processing of an application. It is not that these "decisions" can have no effect on personal or property rights, privileges, immunities,

[4] Largely because the Department does not have the ultimate authority to make the designation.

> duties, liabilities or obligations; it is that they are transitory in nature, often undefined, frequently unwritten. Board review of these matters would open the door to a proliferation of appeals challenging every step of DER's permit process before final action has been taken. Such appeals would bring inevitable delay to the system and involve the Board in piecemeal adjudication of complex, integrated issues. We have refused to enter that quagmire in the past, *Municipal Authority of Buffalo Township v. DER*, 1988 EHB 608, *North Penn Water Authority v. DER*, 1988 EHB 215, *Swatara Township Authority v. DER*, 1987 EHB 757, *Lancaster County Network v. DER*, 1987 EHB 592, and see no sound reason for entering it now.

Our exercise of jurisdiction to review the Department's conclusions and recommendations concerning this petition would needlessly draw us into this controversy, complicating and delaying an ultimate decision by the EQB on the petition. As in Phoenix Resources, we decline that opportunity and dismiss these appeals.

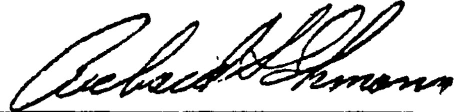
O R D E R

AND NOW, this 17th day of May, 1994, it is ordered that the Department's motions are granted and the appeals docketed at Nos. 93-320-W and 94-016-W are dismissed.

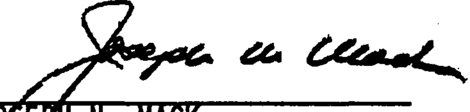
ENVIRONMENTAL HEARING BOARD

MAXINE WOELFLING
Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member



RICHARD S. EHMANN
Administrative Law Judge
Member



JOSEPH N. MACK
Administrative Law Judge
Member

DATED: May 17, 1994

cc: Bureau of Litigation:
Library: Brenda Houck
Harrisburg, PA
For the Commonwealth, DER:
Marc A. Ross, Esq.
Janice J. Repka, Esq.
Central Region
For The Plumstead Township Civic Association
John A. VanLuvanee, Esq.
EASTBURN AND GRAY
Doylestown, Pa

For Miller & Son Paving, Inc.:
Stephen B. Harris, Esq.
HARRIS & HARRIS
Warrington, PA
For Plumstead Township:
Terry W. Clemons, Esq.
CLEMONS AND KLIMPL
Doylestown, PA

jm

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
2nd FLOOR — MARKET STREET STATE OFFICE BUILDING
400 MARKET STREET, P.O. BOX 8457
HARRISBURG, PA 17105-8457
717-787-3483
TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOARD

PEQUEA TOWNSHIP and E. MARVIN HERR, E.M. FARMS

v.

COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES

EHB Docket No. 94-044-E
Consolidated with 94-054-E
Issued: May 27, 1994

OPINION AND ORDER SUR
MOOTNESS

By: Richard S. Ehmann, Member

Synopsis

Where DER rescinds an order issued to a municipality to amend its Official Plan, that action renders appeals therefrom moot and the appeals will be dismissed. Where the intervenor/Appellant in the moot appeal has already filed a new appeal with this Board from DER's rejection of his request under 25 Pa. Code §71.14 for an order to the municipality to amend its plan, the exceptions to the mootness doctrine do not apply to keep the instant appeal alive.

The fact that a person has by intervention become a party in an appeal before this Board does not confer on him a right to control whether or not DER may elect to rescind its order. Since that party has appealed DER's refusal to order the municipality to amend its Official Plan, there is no denial of that party's due process rights by dismissal of the instant appeal based on mootness.

The fact that Herr has filed a Petition For Reconsideration of this Board's Opinion and Order granting supersedeas in this appeal does not create

a ground to ignore the mootness of this appeal, even though DER based its decision to withdraw its order on that Opinion. It is not an abuse of discretion to dismiss this appeal as moot before deciding the pending Petition For Reconsideration because when the appeal became moot, the need to decide the issues raised by the Petition cease to exist.

OPINION

The instant appeal arose when the Department of Environmental Resources ("DER") issued an administrative order to Pequea Township ("Pequea") requiring it to amend its Official Plan (as to sewage facilities) to include municipal sewer service to a tract of land owned by E. Marvin Herr ("Herr").[1]

Pequea sought a supersedeas of DER's order from this Board. After a hearing on its Petition For Supersedeas in which all parties offered evidence on the issues raised by Pequea's Petition, on March 17, 1994, the Board granted supersedeas and indicated that an opinion in support of this Order would be forthcoming soon. Before that opinion was issued and on March 23, 1994, Herr filed his Motion To Lift Supersedeas.

On March 25, 1994, we issued our Opinion on Pequea's Petition. In it, we concluded that Pequea showed a likelihood of success on the merits because the evidence showed that DER had failed to approve or disapprove the revision of Pequea's Official Plan within 120 days as required by 25 Pa. Code §71.32(c) and thus the revision, which eliminated municipal sewer service to

---

1 E. Marvin Herr, E.M. Farms also appealed this Order because it failed to force Pequea to act quickly enough to suit his needs. His appeal was docketed at No. 94-054-E and it was consolidated with Pequea's appeal by our Order dated April 13, 1994. As to Pequea's appeal, Herr also intervened on DER's side.

Herr's tract, was deemed approved. In turn, we concluded this circumstance indicated a valid reason for the township to refuse to amend its plan to provide this service and a strong likelihood it would prevail on the merits.

In response to that Opinion, on April 4, 1994, DER and Pequea filed a Stipulation with this Board under which DER agreed to vacate its administrative order to Pequea, these two parties agreed the appeal could be dismissed as moot, and Pequea agreed to bear its own attorneys fees, costs and expenses in regard to this appeal. Herr, of course, did not subscribe to the Stipulation.

At the same time we received this Stipulation, we received copies of two letters from DER, both dated April 4, 1994. One is to Pequea and withdraws DER's Order to Pequea. The second is from DER to Herr and is DER's denial of Herr's private request to DER to order Pequea to amend its plan to address sewage disposal for Herr's tract.

On April 5, 1994, the Board issued Herr a Rule To Show Cause why this appeal should not be dismissed as moot which was returnable on April 25, 1994.[2] This Rule also stayed all proceedings in this appeal pending receipt of Herr's response to the Rule.

On April 25, 1994, Herr filed his Response To Rule To Show Cause. In it, he asserts that he has an independent right as a party to defend DER's Order and that his due process rights will be violated if the appeal is

---

2 While we awaited Herr's response to that Rule, Herr filed a Petition For Reconsideration and Rehearing and Modification Of Opinion and Order which relates to our Opinion on supersedeas. This Opinion does not address either this Petition or Herr's Motion To Lift Supersedeas. Between the date of Rule and the filing of Herr's Response, Pequea filed a Motion To Dismiss Petition For Reconsideration Or Alternatively To Stay The Requirement To Answer. We do not address this motion herein, either.

dismissed as moot. Next, he asserts that his Petition For Reconsideration should be acted upon because it raises issues not considered by the Board's Opinion. Finally, he asserts that the appeal should not be dismissed because exceptions to application of the mootness doctrine are applicable here.

Upon receipt of Herr's filing, we notified the other parties of his Response To Rule To Show Cause and advised them their responses, if any, thereto had to be filed by May 9, 1994. DER filed no response but on May 6, 1994, Pequea did. It argues counter to each point raised by Herr. We address these arguments below.

Mootness

It has long been the law on appeals before this Board that when an event occurs which renders an appeal moot this Board will dismiss the appeal. Schuylkill Township Civic Association v. DER, et al., 1991 EHB 483; Carol Rannels v. DER, EHB Docket No. 90-110-W (Opinion issued April 29, 1993) ("Rannels"). The key to looking at mootness is the question of whether this Board can grant meaningful or effective relief to the appellant. Centre Lime & Stone Company, Inc. v. DER, et al., 1992 EHB 947; New Hanover Corporation v. DER, 1991 EHB 1127. Where DER has acted to rescind or withdraw its prior appealable action, we have not hesitated to dismiss such appeals as moot. Rannels; Roy Magarigal, Jr. v. DER, 1992 EHB 455 ("Magarigal"); Robert L. Snyder and Jesse M. Snyder, et al. v. DER, 1990 EHB 964 ("Snyder"). Here, as in Snyder, Magarigal and Rannels, DER has withdrawn its action which is appealed. Insofar as Pequea or E. Marvin Herr, E.M. Farms, are appellants, there has been an action which has rendered this Board unable to act to grant

them meaningful relief in their roles as Appellants. There is no longer an order to appeal from. Accordingly, as to each appellant each appeal must be dismissed as moot.

Herr's Party Status

E. Marvin Herr is also before us as an intervenor in Pequea's appeal. In regard thereto he argues that he is a party, which no one disputes, and that he is entitled to full rights in this appeal. Again, this is not disputed. However, Herr next argues that the appeal cannot be dismissed as moot because doing so deprives him of his right to defend DER's Order. This assertion is disputed and we reject it. While Herr has rights as a party, those rights do not include the right or authority to issue orders. Only DER has that authority. Moreover, Herr is not legislatively authorized to control whether or not DER may exercise its prosecutorial discretion as to withdrawal of its order. Party status in this proceeding does not place the mantle of such power on Herr's shoulders. Wisely, the legislature located that power not in the hands of private citizens but in the hands of a governmental agency, and party status does not shift it to Herr.

As part of this argument, Herr asserts Appeal of Municipality of Penn Hills, 519 Pa. 164, 546 A.2d 50 (1988) ("Penn Hills") controls here and requires us to allow this proceeding to go forward. We disagree and find this case inapplicable here. In Penn Hills the property owner intervened in a tax assessment appeal by taxing authorities and, when they withdrew their appeals because they were satisfied with the assessment's propriety, pressed its own appeal to reduce the assessed valuation (and thus reduce its taxes). In an appeal by the taxing bodies from the reduced assessment, the Common Pleas Court held that that tax assessment appeal Board lost jurisdiction when

the taxing bodies withdrew, but the Commonwealth Court reversed this ruling and then the Supreme Court affirmed because the intervenor's rights were not dependent on the initial appellants' rights. However, in that case the assessment was not withdrawn as the order was here, so relief could be granted by that Board. Here the order was withdrawn so we can grant no relief to Herr.

Denial Of Herr's Due Process Rights

We also find no denial of Herr's due process rights as a result of DER's withdrawal of its Order, contrary to Herr's assertion thereof. Herr has filed an appeal to this Board both of DER's action in withdrawing its order and of its letter to him advising Herr that DER has rejected his private request to order Pequea to revise its plan to include his tract. These appeals are docketed at this Board's Docket No. 94-089-E and 94-090-E respectively. Herr's right to a full hearing on the merits of his claims concerning his tract of ground and DER's actions as to this order and his request it order Pequea to act are adequately protected thereby. The fact that Herr has sought reconsideration of our prior opinion and has sought to have us lift our supersedeas order does not change that conclusion either. We have withheld judging the merits of either of Herr's filings because, if we lack jurisdiction because this appeal is now moot, we have lacked it since DER withdrew its Order on April 4, 1994, and the question of whether we continued to have jurisdiction over this matter or not had to be answered before the merits of either of those filings could be reached. Once we concluded the appeal was moot, Herr's Motion and Petition no longer had to be reached.

Deciding Reconsideration Issues

Herr also asserts we should act on his Petition For Reconsideration before we address mootness, but his Response to Rule To Show Cause is less than clear as to why. We have already stated above that DER may moot an appeal by withdrawing the action which was appealed, and neither this Board nor Mr. Herr may stop it from doing so. Thus, we again reject his assertion that somehow as a party intervenor he has a right to defend DER's order which includes a right to prevent DER's withdrawal thereof. We also reject Herr's suggestion that there is a settlement of this appeal contrary to 25 Pa. Code §21.120 and that this is a reason to adjudicate the issues in his Petition. While section 21.120 of our rules governs settlement, we have no settlement before us. DER and Pequea agreed with each other that Pequea would not seek attorneys fees from DER and DER would withdraw its Order to Pequea. Those are not actions this Board was asked to approve or act on in any fashion, and thus do not constitute any settlement which falls within 25 Pa. Code §21.120.

Herr also avers we abuse our discretion if we fail to reconsider the Opinion and Order Sur Petition For Supersedeas. While we will not say there could not be circumstances in an appeal where reconsideration of such an Opinion and Order prior to consideration of mootness was appropriate, Herr fails to show why that is so here. Wishing does not make it so, and saying the Board should do so does not establish an abuse of discretion where we decline to do so.

Within this portion of his Response, Herr also argues the denial of his request to DER to order Pequea to revise its Plan, coupled with their Stipulation and DER's withdrawal of its order, deprives Herr of a vested property right. Herr contends he has this right because he filed his Plot on

July 10, 1990 and Pequea failed to appeal the Lancaster County Planning Commission's final approval thereof on September 28, 1993. His authority for this assertion is 53 P.S. §10508(4)(i).

In response Pequea argues this Petition is moot because DER's order is withdrawn. However, we do not decide that claim here. To the extent Herr has rights as to Pequea's Official Plan and DER's denial deprives Herr of that right, he has filed an appeal with us which provides him a hearing thereon. The same is true as to DER's Order, although we expect we will need to address that action's appealability in that appeal.[3]

As to his claims that his rights under 53 P.S. §10508(4)(i)[4] are affected we lack jurisdiction to entertain this claim. This Board is one of limited jurisdiction according to the Environmental Hearing Board Act, Act of July 13, 1988, P.L. 530, No. 94, as amended, 35 P.S. §7511 *et seq*. Under this statute we may hear appeals as to sewage facilities planning actions and decisions by DER, but we cannot hear appeals dealing with land use and zoning issues. Lorraine Andrews and Donald Gladfetter v. DER, et al., EHB Docket No. 87-482-W (Opinion issued April 23, 1993) affirmed, No. 1142 C.D. 1993 (Opinion issued May 13, 1994 not reported). 53 P.S. §10508(4) is a section of the Pennsylvania Municipalities Planning Code, Act of July 31, 1968, P.L. 805, as amended, 53 P.S. §10101 *et seq*. ("MPC"). It deals with land use planning.

---

3 There is an apparent question as to whether this is an exercise of DER's prosecutorial discretion. If it is, then it would appear not to be appealable. Frank Columbo d/b/a/ Columbo Transportation Services and Northeast Truck Center, Inc., et al. v. DER, et al., 1991 EHB 370; Westtown Sewer Company v. DER, 1992 EHB 979, affirmed, No. 1858 C.D. 1992 (Opinion issued December 17, 1993 not reported).

4 There is no section 53 P.S. §10508(4)(i), so we assume Herr meant to reference 53 P.S. §10508(4).

Nothing in the MPC or the Environmental Hearing Board Act, *supra*, empowers us to address allegations as to violations of rights arising therefrom. Such allegations are addressable in another forum. Based on this analysis, we reject this contention as well and thus conclude we have not abused our discretion by addressing mootness before considering Herr's Petition.

Exception To Mootness Doctrine

The third major segment of Herr's Response To Rule To Show Cause asserts exceptions to the mootness doctrine exist and are applicable to this appeal, so there should be no dismissal even if the appeal is otherwise moot. Of course, this argument contains within itself the implicit admission that the appeal is moot.

Specifically, citing Strax v. Commonwealth, Department of Transportation, Bureau of Driver Licensing, 138 Pa.Cmwlth. 368, 588 A.2d 87 (1991) ("Strax"), Herr argues that this appeal contains exceptional circumstances, is a matter of great public importance or is one that is of a recurring nature yet capable of evading review. Strax does state that in rare situations an otherwise moot appeal will be decided if it fits into one of these exceptions.

In response, Pequea says that since this Board is not a Court of general jurisdiction, our powers are limited and we can only hear appeals from DER actions. Pequea says that where DER withdraws its action there is no action we can review even if we believe an exception to the mootness doctrine exists. It also argues the exceptions do not exist here, and since we agree with it in that regard, we do not address its first argument.

Clearly this is not an appeal the issues of which are likely to be repeated and escape review. Under 25 Pa. Code §71.14, when Herr asked DER to

order Pequea to amend its Official Plan, DER had two options open to it. It could agree to do so or reject Herr's request. Initially, DER did accede to Herr's request but thereafter changed its mind and rejected same. Under our rules an appeal lies to this Board either for Pequea, if, under Section 71.14, DER accedes to Herr's request and issues an Administrative Order, or for Herr, when it rejects Herr's request and refuses to take such action. The instant appeal is the former scenario. Herr's appeal of DER's refusal to issue the order at Docket No. 94-090-E is the latter scenario. In either case, there is review of the parties' assertions by this Board and, where sought in an appeal therefrom, by the Commonwealth Court. Accordingly, Board and judicial review cannot be evaded.

Based in part on allegations in an affidavit by Herr which is attached to Herr's Response but which, as a result, is *dehors* the record, Herr sets forth eighteen assertions of allegedly exceptional circumstances requiring we consider this appeal's merits. Many of these assertions are identical to his arguments addressed above. Herr fails to state how these assertions constitute such exceptional circumstances that they are requiring adjudication of this moot appeal. He merely lists them. More importantly, he fails to explain why these assertions are not addressable in his pending appeal of DER's rejection of his request under 25 Pa. Code §71.14 to order Pequea to amend its Official Plan. We can see no reasons these issues, to the extent Herr has raised them in that appeal and are reviewable by this Board, are not reviewable there. Since that is true, they cannot be exceptional circumstances here.

As to Herr's assertion that there are issues here of such great public importance that they require us to adjudicate this otherwise moot

appeal, we are mindful that in Strax the Commonwealth Court suggested that Courts rarely invoke this exception, and consider that to be good counsel to us in this appeal. As the Court there noted, consideration of the merits of an otherwise moot proceeding only occurs in rare cases. While every party arguing against mootness wants its appeal to fit within this exception, that desire does not of itself create a reason to do so. Here, these issues of great public importance (apparently the interrelationship of the MPC and the Pennsylvania Sewage Facilities Act, Act of January 24, 1966, P.L. (1965) 1535, No. 537, as amended, 35 P.S. §750.1 *et seq.*)[5] will also apparently be before this Board in Herr's new appeal; thus, they will be promptly adjudicated and create no reason for us to ignore the mootness of this appeal.

Accordingly, we enter the following order.

O R D E R

AND NOW, this 27th day of May, 1994, it is ordered that this appeal is dismissed as moot.

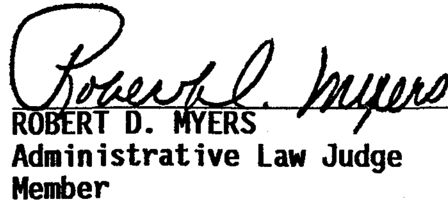
ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

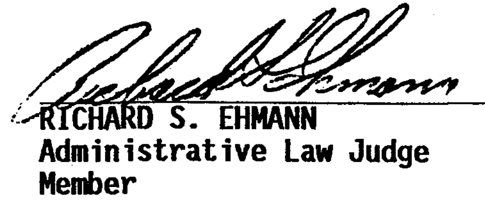
MAXINE WOELFLING
Administrative Law Judge
Chairman

---

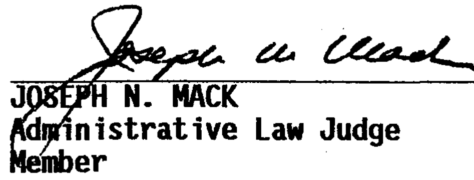
5 We say "apparently" because Herr's Response says this relationship between the statutes is of great impact, but does fail to say which two statutes he means. We thus guess these are the two statutes from the nature of his allegations.



ROBERT D. MYERS
Administrative Law Judge
Member



RICHARD S. EHMANN
Administrative Law Judge
Member



JOSEPH N. MACK
Administrative Law Judge
Member

DATED: May 27, 1994

cc: **Bureau of Litigation**
Library: Brenda Houck
For the Commonwealth, DER:
Marylou Barton, Esq.
Carl Schultz, Esq.
Central Region
For Appellant:
Eugene E. Dice, Esq.
Harrisburg, PA
Gilbert G. Malone, Esq.
York, PA
For Appellant/Intervenor:
G. Allen Keiser, Esq.
Harrisburg, PA

med

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
2nd FLOOR — MARKET STREET STATE OFFICE BUILDING
400 MARKET STREET, P.O. BOX 8457
HARRISBURG, PA 17105-8457
717-787-3483
TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOARD

LEHIGH GAS & OIL COMPANY	:	
	:	
v.	:	**EHB Docket No. 91-552-MR**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Dated: June 1, 1994**

ADJUDICATION

By Robert D. Myers, Member

Syllabus:

Gasoline contamination occurred in a section of Hometown, Rush Township, Schuylkill County, within 2,500 feet of a gasoline service station where underground tanks were owned by Appellant. A release of gasoline had occurred at the station. After a preliminary investigation of potential sources, DER focused on Appellant and Appellant proceeded to do a site characterization. This characterization, which exonerated Appellant and implicated a company having a pipeline intervening between the service station and the contaminated area, was unacceptable to DER which issued the Order from which the appeal was taken. DER requested the pipeline company to do an additional test and, after that indicated the pipeline was sound, retained its own consulting firm to do a hydrogeologic investigation. The consulting firm concluded that the groundwater was influenced by preferential permeability pathways, directing it from the service station site to the contaminated area. A plume of contamination emanating from the site followed these pathways.

The Board held that the presumption of liability in Section 1311(a) of the Storage Tank Act (STA) applied, that DER had carried its burden of proof, and

that Appellant had not overcome the presumption. The Order, therefore, was lawfully issued under the STA. The Board also held that DER's remediation requirements were not an abuse of discretion.

Procedural History

On December 17, 1991 Lehigh Gas & Oil Company (LG & O) filed a Notice of Appeal seeking Board review of an Order issued by the Department of Environmental Resources (DER) on December 10, 1991. The Order directed LG & O to take remedial action in connection with the discharge of a regulated substance (petroleum products) at the Hartranft Service Station at the intersection of Routes 54 and 309 in the village of Hometown, Rush Township, Schuylkill County.

LG & O filed a Petition for Supersedeas with the Notice of Appeal. A hearing on the Petition, scheduled for January 3, 1992 was cancelled to permit the parties to engage in settlement negotiations. These negotiations proved fruitless and the parties proceeded with discovery and the filing of pre-hearing memoranda. A hearing on the appeal commenced on June 7, 1993 in Harrisburg before Administrative Law Judge Robert D. Myers, a Member of the Board, and continued on June 8, 9, 10, 14, 15, 16, 17 and July 6, 1993. Both parties were represented by legal counsel and presented evidence in support of their respective legal positions.

DER filed its post-hearing brief on September 7, 1993. LG & O filed on November 22, 1993. DER filed a reply brief on December 10, 1993. The record consists of the pleadings, a partial stipulation of facts, a transcript of 1,576 pages and 156 exhibits. After a full and complete review of the record, we make the following:

FINDINGS OF FACT

1. LG & O is a Pennsylvania Corporation with a registered office and

mailing address at 80 Broad Street, Beaver Meadows, PA 18216 (Stip.)[1]

2. DER is an administrative department of the Commonwealth of Pennsylvania and is responsible for administering the provisions of the Storage Tank and Spill Prevention Act (STA), Act of July 6, 1989, P.L. 169, 35 P.S. §6021.101 *et seq.*; the Clean Streams Law (CSL), Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 *et seq.*; the Solid Waste Management Act (SWMA), Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 *et seq.*; Section 1917-A of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-17; and the rules and regulations adopted pursuant to these statutes.

3. LG & O owned the following underground storage tanks containing the listed regulated substances at the Hartranft Service Station, facility I.D. #54-50327 (Hartranft Site), located at the intersection of Routes 309 and 54, Hometown, Rush Township, Schuylkill County, until they were removed on January 27-31, 1992 (Stip.):

Tank#	Capacity (gal.)	Regulated Substance
01	4000	gasoline
02	4000	gasoline
03	4000	gasoline
04	3000	gasoline
05	3000	kerosene
06	2000	diesel

4. The Hartranft Site is about at the center of Hometown. Route 309 (Clearmont Avenue) which runs in a north-south direction rises in elevation toward the north. Route 54 (Lafayette Street) runs in an east-west direction on fairly level terrain. Commercial establishments exist at the intersection of these two major routes and toward the north along Route 309. Residential uses

[1]The partial stipulation of facts included in the Joint Stipulation of the Parties.

predominate in other areas (N.T. 99-100; Exhibit C-80, figure 2).

5. The Hartranft Site is owned by Clarence D. Hartranft and Lee Grace Hartranft and was operated by Clarence D. Hartranft until product was removed from the tanks (Stip.).

6. Releases occurred at the Hartranft Site. In 1987, LG & O was notified by the operator that a truck accident occurred and LG & O repaired diesel and unleaded gasoline pumps. In November 1990, LG & O was notified by the operator of a gasoline discrepancy and LG & O repaired a leak to the conveyance system for the gasoline storage tanks in December 1990. The leak was not reported to DER. LG & O estimated that up to 5,000 gallons may have been released. Clarence D. Hartranft claimed an amount in excess of that figure (Exhibit Q-107; Stip.).

7. On January 7, 1991 Leonard C. Insalaco, the Emergency Response Program Manager for DER's Northeast Field Office, received a call from a Rush Township Supervisor reporting what appeared to be gasoline odors in homes and in the sanitary sewer system in Hometown (N.T. 11-15, 96-97; Stip).

8. Robert A. Gadinski and John M. Hannigan, hydrogeologists in the Emergency Response Program, were dispatched to Hometown to investigate the report. While there on January 7, 1991, they

(a) examined three residences where the odors were reported to be the strongest - the Hess residence on the north side of Holland Street just west of Ardmore Avenue; the Ryan residence on the north side of Holland Street east of Ardmore Avenue; and the Gogal residence on the south side of Lafayette Street east of Ardmore Avenue (all of which are in a quadrant south of Route 54 and east of Route 309);

(b) determined that the odors were gasoline-like in nature and were entering through basement floor drains;

(c) removed the manhole covers of the sanitary sewer system and found gasoline-like odors concentrated in manholes 137 through 141 (located in the same quadrant as the residences);

(d) found no odors in manholes in the quadrant north of Route 54 and east of Route 309; and

(e) detected gasoline-like odors near McMullin pond (located south of Holland Street and east of Ardmore Avenue) and took 3 water samples, following DER's standard procedures for collecting and handling
(N.T. 94-100, 102-113, 226-227; Exhibits C-1, C-2 and C-3; Stip.).

9. Gadinski and Hannigan returned to Hometown on January 8, 1991. While there, they

(a) performed a comprehensive investigation looking for potential responsible parties; and

(b) took 2 water samples in manhole 137 (located on Ardmore Avenue south of Holland Street), one from the main sewer and one from a lateral that discharged into the manhole from the McMullin property, following DER's standard procedures for collecting and handling
(N.T. 113-117, 226-227; Exhibits C-4 & C-5; Stip.).

10. The water samples taken on January 7 & 8, 1991 reflected the presence of benzene, toluene, ethylbenzene and xylene, all of which are components of gasoline and are often referred to as BTEX (N.T. 94-95, 106, 119; Exhibits C-1 through C-5).

11. Based on the initial investigation, DER identified two potential sources of the gasoline contamination: the Hartranft Site and a pipeline owned and operated by Sun Pipe Line Company (Sun) which runs in a north-south direction through Hometown on Cumberland Avenue, parallel to and east of Route 309 (N.T.

161, 393; Exhibit C-80, figure 7; Stip.).

12. Sun's pipeline, originally placed in service in 1931, is a 6-inch pipeline running northward from Icedale, Chester County, Pennsylvania, to Syracuse, New York. It is 36 inches deep, transports all grades of gasoline and No. 1 and No. 2 fuel oils and operates 24 hours a day unless shut down for maintenance. (N.T. 393-394).

13. In response to a request by DER, Sun conducted a product integrity pressure test of the pipeline on January 14, 1991. This test

(a) is meant to be a quick test rather than one where more sophisticated testing procedures and instruments are used;

(b) was conducted with pressures ranging from 600 psi to 700 psi (well below the normal operating pressure in the Hometown area of 1,000 psi to 1,100 psi) because of policies of the U.S. Department of Transportation regarding tests conducted while product is in the line;

(c) consisted of isolating sections of the line, once the desired pressure was reached, by closing valves at four pump stations - two south of Hometown and two north of Hometown - and monitoring pressure readings at those four locations every 10 minutes from 8:10 p.m. to 11:40 p.m.;

(d) anticipates a certain amount of pressure decline (referred to as pressure decay) over time because of such factors as cooling of the product and absorption of vapor and air back into the liquid;

(e) looks to see if the pressure decay in each pipeline section produces a similar trend to each of the others (suggesting that the line is sound) or whether one section has a different trend that stands out from the others (suggesting that a problem exists in that section of the line); and

(f) revealed similar trends of pressure decay on all four sections of

the line and no decay at all during the last hour of the test, leading Sun's engineering department to conclude that there was no leak (N.T. 395, 402-403, 472-479; Exhibits C-58 & C-59).

14. Sun also used their environmental consultant, Geraghty & Miller, to do a preliminary soil gas survey on January 15, 1992. This survey

(a) was performed by having Sun personnel determine the location of the pipeline (within 1 foot either way) beneath Cumberland Avenue between Pine Street on the north and Dennison Street on the south, a distance of approximately 850 feet;

(b) involved drilling 5/8-inch holes through the blacktop and, using a slide hammer bar, deepening the holes to 40 inches;

(c) utilized a Bacharach TLV (total limited volatile) meter which, when inserted into a hole and sealed, measures the volume of anything in the soil that is ignitible or combustible;

(d) considers concentrations of 1,000 ppmv (parts per million by volume) or more to reflect the presence of combustion material such as petroleum or any other kind of solvent;

(e) drilled 17 holes located as follows:

(1) Nos. 1, 2, 3 and 4 on the western side of the pipeline along Cumberland Avenue between Pine Street and Dennison Street;

(2) No. 5 on Elmore Street north of Pine Street (about 100 feet west of the pipeline) intended to provide a background concentration;

(3) Nos. 6 through 15 on the eastern side of the pipeline along Cumberland Avenue between Pine Street on the north and Lynwood Avenue on the south, a distance of about 125 feet; and

(4) Nos. 16 and 17 on the western side of Ardmore Avenue, 16 at

Pine Street and 17 at Holland Street;

(f) revealed concentrations along the pipeline in Cumberland Avenue ranging from 90 ppmv to 600 ppmv and concentrations in Ardmore Avenue of 90 ppmv and 50 ppmv;

(g) also revealed a concentration of 1,000 ppmv at hole No. 5 (which had been intended to provide background information), located near to, and downgradient from, the Hartranft Site; and

(h) convinced Geraghty & Miller that no petroleum products were present in the area adjacent to the pipeline

(N.T. 403, 418-426, 430-432, 436-439, 443-444; Exhibits C-58 & C-59).

15. Sun routinely tracks product and reconciles product in its pipeline according to industry procedures and standards set by the American Petroleum Institute. Sun meets these procedures and standards by

(a) metering the product in the pipeline constantly and reconciling it hourly; and

(b) achieving reconciliations with an accuracy of .0001 of 1% on the average

(N.T. 467-470, 503-504).

16. Sun's records of product reconciliation and historic records of pipeline leaks do not reveal any leaks in the pipeline through Hometown (N.T. 396-401, 467-471, 501-508).

17. On January 15, 1991 Gadinski spoke by telephone with Roman Baran of LG & O. During the conversation, Baran confirmed a recent release at the Hartranft Site. On January 23, 1991 DER issued a Notice of Violation (NOV) to LG & O setting forth LG & O's responsibility to do a site assessment and integrity testing of lines and systems (N.T. 160-161; Exhibit S-1; Stip.).

18. Upon receipt of the NOV, LG & O contacted Quad Three Group, Inc. (Q3G), consulting architects, engineers and environmental scientists in Wilkes-Barre, Pa., and requested it to check out the suspicion of a leak at the Hartranft Site (N.T. 967, 979-980).

19. Q3G's Robin Townley, a geoenvironmental scientist, went to Hometown in January 1991, talked with Mr. Hartranft, walked around the area and made observations (N.T. 967-968, 980-981).

20. As a result of this visit, Townley requested LG & O to send a letter to Q3G requesting a proposed scope of work for a site assessment. The request was made and the proposed scope of work was submitted in January 30, 1991 (N.T. 982).

21. LG & O gave oral authorization to Q3G to proceed with the work and Q3G retained Dr. Peter P. Brussock III, Vice President and Director of Technical Operations for Environmental Liability Management, Inc. (ELM) of Princeton, N.J. (N.T. 982-983, 1325-1326, 1367-1368).

22. After Brussock visited Hometown, he and Townley prepared a Proposed Site Characterization plan for the Hartranft Site, dated February 8, 1991. This was submitted to DER on or about February 8, 1991 (N.T. 983-984; Exhibit Q-71; Stip.).

23. After conversations between Townley and Gadinski, the Proposed Site Characterization plan was amended on February 18, 1991 (N.T. 985-987; Stip.).

24. On March 1, 1991, DER approved the Proposed Site Characterization plan, as amended, subject to certain additional amendments, and directed implementation within 14 days (N.T. 988-990; Exhibit S-2; Stip.).

25. Q3G installed an exhaust fan at manhole 137 in an effort to alleviate vapors in the sewer system. Q3G also proceeded with conducting vapor surveys in

homes, sampling residential wells and recovering free product from the surface of McMullin pond (N.T. 990-994).

26. On April 23, 1991 DER sampled the water in a well at the Paul Rice residence in Hometown at the corner of Route 309 and Pine Avenue (about 3/10 of a mile north of the Hartranft Site). The analysis disclosed the presence of weathered gasoline or a mixture of weathered gasoline and other petroleum products. The results of this sampling were not provided to Townley but she learned from other sources during May 1991 that Paul Rice's well was contaminated. Townley later found the sampling results during a review of DER's files (N.T. 995-999, 1313; Exhibit Q-35).

27. Townley sampled Paul Rice's well on May 6, 1991. After receipt of the analysis, she forwarded it to DER on May 29, 1991. The analysis disclosed the presence of benzene, ethylbenzene and toluene (N.T. 1005-1006; Exhibit Q-66).

28. Gasoline contamination existed in the Paul Rice well as early as 1975. Concentrations diminished gradually in succeeding years until 1990 when they rose again (N.T. 1312-1319).

29. Subsequent to a public meeting on May 2, 1991, Gadinski instructed LG & O to submit an additional amendment to the Proposed Site Characterization plan. An amendment dated May 10, 1991 was submitted on or about May 20, 1991 (N.T. 993-995, 999-1000; Exhibits S-3 and Q-67; Stip.).

30. LG & O drilled four boreholes at the Hartranft Site. Gadinski obtained a groundwater sample from borehole #1 on May 8, 1991, the day it was drilled, and followed DER's standard procedures for collection and handling. The borehole was emitting strong hydrocarbon odors. The analysis disclosed the presence of gasoline. These boreholes, at DER's request, were converted to shallow monitoring wells. (N.T. 120-122, 1003; Exhibits C-6 and Q-67; Stip.).

31. At the request of DER to conduct a more quantitative study, Sun had Geraghty & Miller conduct another soil gas survey on May 7 and 9, 1991 using a Photovac 10S50 portable gas chromatograph (GC). The GC is capable of differentiating volatile organic compounds (VOCs) and of measuring their concentrations in vapor (N.T. 403, 426, 433, 450-452; Exhibit C-59).

32. This second soil gas survey

(a) was performed at ten of the points used in the January 15, 1991 survey (along the pipeline in Cumberland Avenue); at a point at the corner of Cumberland Avenue and Route 54; and at three points north of Route 54 (in proximity to the Paul Rice residence);

(b) was conducted by drilling a hole through the road surface and, using a slide hammer bar, deepening the hole to 36 inches;

(c) utilized the GC to read the VOCs in the soil gas captured from the hole;

(d) found no concentrations of VOCs at any of the points surveyed; and

(e) convinced Geraghty & Miller that the pipeline had not leaked (N.T. 426-427, 432-433, 452-463; Exhibits C-58 and C-59).

33. Because of the contamination found in the Paul Rice well, Gadinski was directed to do additional sampling of residential wells in the area north of Route 54. He sampled wells on May 23, 1991 at the Sleifer, Mehalscheck, Hafer and Boris residences following DER's standard procedure for collecting and handling. No VOCs were found in the first three wells; 1, 1, 1 - trichloroethane was found in the Boris well (N.T. 122-125; Exhibits C-7 through C-10).

34. DER conducted a comprehensive soil gas survey of potential sources of contamination during the period June 24-28, 1991. Of the 149 samples, most were located in the vicinity of the Hartranft Site and areas east of there. The

others were generally north of the Hartranft Site. (N.T. 313-317; Exhibit C-20).

35. This survey

(a) obtained soil gas samples in Tedlar bags using DER's standard procedures and methodologies previously described;

(b) involved the use of DER's Mobile Analytical Unit which was parked in Hometown during the survey;

(c) was performed by delivering the samples to the Mobile Analytical Unit where, following DER's standard procedures, they were analyzed with the use of a triple quadripole mass spectrometer for concentrations of BTEX and MTBE (a gasoline additive);

(d) disclosed four distinct areas of contamination: the Hartranft Site; Hometown Sales and Service (across Route 309, reportedly the location of a former gasoline service station); Silverline Company (north along Route 309, a manufacturer of aluminum coating products); the McMullin pond area;

(e) disclosed no significant contamination along Sun's pipeline; and

(f) convinced DER that the Hartranft Site was the most likely source and that the affected area was within 2500 feet of the Hartranft Site (N.T. 314-321, 614-619; Exhibit C-20).

36. On June 7, 1991 DER commented on the latest amendment to the Proposed Site Characterization plan, taking issue with certain preliminary findings. Townley responded to this letter on June 25, 1991 (N.T. 1006-1009; Exhibits S-4 and Q-63).

37. On July 17, 1991, after being informed that a substance with a different appearance had surfaced in McMullin pond, Townley and DER's John Diehl (who had replaced Gadinski) took samples from the pond. The analysis indicated that the closest match was gasoline (N.T. 125-126, 1012-1013; Exhibit C-11).

38. During this period, LG & O continued to conduct vapor surveys in residences and to take water samples (N.T. 1007, 1009-1012, 1014; Exhibits C-17 and Q-107).

39. After Brussock had determined the locations, LG & O began drilling five bedrock monitoring wells and one more shallow monitoring well in September 1991 (N.T. 1011-1015).

40. Prompted by odor complaints at the McMullin residence, DER wrote to LG & O on September 20, 1991 requesting the construction of an interceptor trench on the McMullin property. LG & O responded on October 2, 1991 declining the request for a number of reasons, including doubt that the contamination at the McMullin pond was caused by leakage at the Hartranft Site (N.T. 1018-1022; Exhibits Q-60 and S-6; Stip.).

41. LG & O claimed that, during this period, the shallow monitoring wells on the Hartranft Site were either dry or had too little water to sample (N.T. 1020-1021, 1023).

42. LG & O submitted to DER on December 3, 1991 a Site Characterization and Partial Remediation Plan. The Plan, prepared by Q3G and ELM, claimed that the Site Characterization proved conclusively that the Hartranft Site was not the source of the contamination and stated that LG & O would take no remedial action other than removal of the tanks on the Hartranft Site (N.T. 149-150, 1027-1028; Exhibits C-17 and Q-107; Stip.).

43. After reviewing the Plan, DER concluded that it did not adequately define the vertical and horizontal extent of groundwater contamination between the Hartranft Site and McMullin pond. The principal reasons for this conclusion were

(a) the absence of any water quality data from the shallow water table

which existed about 20 feet below ground surface;

(b) contradictory contour maps for groundwater flow; and

(c) failure to consider the presence of fractures and their influence on groundwater flow

(N.T. 285-303, 924-925; Exhibits C-17, C-97 through C-99 and Q-107).

44. During November and December 1991, DER responded to odor complaints from the Evans, Bowe and Ryan residences along Holland Street east of Ardmore Avenue, 1300-1600 feet from the Hartranft Site (N.T. 545-556, 584-594; Exhibits C-61, C-62 and C-91; Stip.).

45. On December 10, 1991 DER issued the Order from which the appeal was taken, alleging that LG & O was responsible for the contamination and directing the taking of remedial action (N.T. 1028; Stip.).

46. On December 12, 1991 DER met with LG & O and directed it to provide bottled water to five households on Holland Street, Ardmore Avenue and Cumberland Avenue, confirming the oral directive by a letter dated December 23, 1991. LG & O refused to do so (N.T. 1031-1033; Exhibit S-9; Stip.).

47. On December 9, 1991 DER began a comprehensive sampling of residential wells east of Route 309 and south of Route 54. This program continued until February 19, 1992 at which point 31 wells had been sampled, following DER's standard procedures for collection and handling (N.T. 373-384; Exhibits C-25, C-27 through C-57; Stip.).

48. On December 18-20, 1991, Sun conducted another integrity test of the pipeline, witnessed, evaluated and certified by FB&D Technologies, Inc., a pipeline testing contractor based in Houston, Texas (N.T. 479-480; Exhibit C-60).

49. The test

(a) involved a four-mile section of the pipeline between the Tamaqua

Pump Station (about one mile south of Hometown) and a main line valve (about three miles north of Hometown);

(b) was started on December 18, 1991 by injecting 100 barrels of water into the pipeline at the Tamaqua Pump Station and pumping it north until it surrounded the main line valve, at which point a block of ice was formed just south of the valve by the use of refrigerant coils and the pipeline was disconnected and plugged at the pump station;

(c) allowed the line to stabilize overnight;

(d) proceeded by pumping up the pipeline pressure to 1208 psi (which produced a test pressure in the Hometown area greater than the normal operating pressure) at 8:40 a.m. on December 19, 1991 and continuously recording pressure and temperature data until 8:30 a.m. on December 20, 1991;

(e) calculated temperature/volume corrections based on changes in temperature of the buried pipeline during the course of the test;

(f) produced a .003% variation in volumes, well within the acceptance criteria of ± .02%; and

(g) convinced Sun and FB & D Technologies, Inc. that the pipeline was sound

(N.T. 480-500; Exhibit C-60).

50. Q3G's James P. Palumbo, Jr. challenged the accuracy of Sun's integrity tests and contended they do not show the pipeline to be bubble tight. He was unable to say whether the pipeline was leaking, however (N.T. 1145-1163).

51. On January 6, 1992 Diehl took samples from the four shallow wells on the Hartranft Site (MWS-1, MWS-2, MWS-3 and MWS-4). Although these wells had been in existence for about eight months, DER knew of no water samples having been taken by LG & O. Diehl's samples, which were collected and handled in

accordance with DER's standard procedures, reflected the presence of toluene and xylene in all four wells, of benzene in three of them, and of ethylbenzene in one of them (N.T. 303-309; Exhibits C-21 through C-24; Stip.).

52. Unknown to DER, Townley had taken samples from MWS-1, MWS-2, MWS-3 and MWS-4 on December 23, 1991. The sample analyses, which were sent to DER on January 14, 1992, showed the presence of benzene and toluene in all four wells (N.T. 150-151, 1034, 1040-1042; Exhibits C-69 and Q-75).

53. On January 10, 1992 LG & O submitted to DER a Proposed Phase II Site Characterization for the Hartranft Site. This proposal, prepared by Q3G and ELM, included, *inter alia*, additional nested shallow and deep monitoring wells (N.T. 1035-1037; Exhibit Q-31).

54. Also on January 10, 1992 LG & O submitted to DER a Proposed Tank Removal and Site Remediation Plan, prepared by Q3G and ELM and pertaining to the underground tanks and systems on the Hartranft Site (N.T. 1037-1039; Exhibit Q-30).

55. DER commented on LG & O's Proposed Tank Removal and Site Remediation Plan by letter dated January 24, 1992 (N.T. 1043-1044; Exhibit Q-29).

56. Removal of the underground tanks at the Hartranft Site began on January 27, 1992. Since the Site is only 85 feet by 100 feet and covered for the most part by the service station building, the excavation and removal had to be done carefully (N.T. 228, 231, 1042, 1046).

57. In the course of removing the tanks

(a) the overburden (which was presumed to be uncontaminated) was removed and stockpiled;

(b) the piping was exposed, disconnected and sealed off;

(c) the soil surrounding the tanks (which was presumed to be

contaminated) was removed;

(d) the tanks were lifted out and taken off Site;

(e) the soil beneath the tanks (which was presumed to be contaminated) was removed;

(f) the excavation was deepened to about 18 feet;

(g) the soil (approximately 1500 tons) was hauled to another LG & O facility about four miles away, stockpiled temporarily, and then disposed of at an approved site;

(h) soil samples were taken by LG & O and DER;

(i) strong odors of gasoline were present throughout the removal process; and

(j) the area was backfilled and repaved

(N.T. 227-239, 254-257, 1042-1054; Exhibit Q-28).

58. Of the 28 soil samples taken by LG & O during tank removal, total petroleum hydrocarbon was found in all 28 in concentrations ranging from 12 parts per million (ppm) to 266 ppm; BTEX was found in 25 in concentrations varying from less than 5 ppm to more than 200 ppm; toluene, ethylbenzene and xylene were found in 2 (where benzene was not detected) in concentrations ranging from 34 ppm to 139 ppm; and BTEX was not detected in 1 (Exhibits C-16, C-70 and C-87).

59. Of the 2 soil samples taken by DER during tank removal, total petroleum hydrocarbons, MTBE and xylene were detected in both and toluene was detected in 1 (Exhibits C-18 and C-19; Stip.)

60. On January 29, 1992 DER sent to LG & O a review and comment letter on the Proposed Phase II Site Characterization for the Hartranft Site. Because of a dispute over the location of screening in the shallow wells, LG & O filed an amendment to the Proposed Phase II at a meeting with DER on February 19, 1992.

Details were worked out at that meeting and a further amendment setting forth the procedure agreed upon was filed on February 20, 1992 (N.T. 1044, 1054-1059; Exhibits Q-26, Q-27 and Q-29).

61. Some of the deep monitoring wells had been completed at that time but other deep monitoring wells and additional shallow monitoring wells remained to be installed. Work on these wells began during February 1992 and was completed in April, 1992 (N.T. 1059-1060; Exhibits C-71 and Q-24).

62. Odor complaints had been received by DER from 16 residents of Hometown from January 1991 on and were all investigated by DER with the use of instruments such as photoionization meters, explosimeters and charcoal tubes. If readings on the explosimeter reached 25% of the lower explosive limit (LEL), emergency measures were taken to eliminate the threat. Beginning in 1992, health-based limits were established. Thereafter, emergency measures were employed whenever a particular residence had concentrations exceeding 3 ppm on three separate occasions (N.T. 15-29, 536-562, 584-605; Exhibits C-63, C-64, C-91 through C-94; Stip.).

63. Concentrations exceeding 25% of the LEL were found at the Bowe, Evans and Ryan residences along the north side of Holland Street in 1991 and in the Keane Rudolph residence along the south side of Lynwood Avenue in 1992. Vapor extraction systems were installed in these four residences by DER (N.T. 25-26).

64. Concentrations exceeding 3 ppm were found on three separate occasions at the Gogal residence along the south side of Lafayette Street in 1992, at the Nestor residence along the north side of Lynwood Avenue in 1992, and at the Hess residence along the North side of Holland Street in 1993. Vapor extraction systems were installed in these three residences by DER (N.T. 26-31, 240-249; Exhibit C-94).

65. The homes where odor complaints were investigated are all east of Cumberland Avenue and south of Route 54 (N.T. 576; Exhibit C-80, figure 4).

66. Odor complaints were more numerous during rainy weather (N.T. 573).

67. During April 1992 DER provided bottled water to the five homes mentioned in Finding of Fact No. 46 (N.T.; Stip.).

68. DER performed additional sampling of residential wells during May and June 1992. Some were north of Route 54 and the others were south of Route 54. The collection and handling of the samples conformed with DER's standard procedures (N.T. 562-573; Exhibits C-65 through C-68).

69. On April 20, 1992 LG & O forwarded to DER boring logs, as-built drawings, vapor detector readings, soil sample analyses and soil mechanical analyses for deep and shallow monitoring wells installed since February 1992 (N.T. 1061-1064; Exhibit Q-24).

70. In April 1992, LG & O had a soil gas survey performed by Rare Earth Envirosciences, Inc. at 37 locations on Holland Street, Lynwood Avenue, Route 54 and Oxford Street. The results were non-detect except near McMullin pond (N.T. 1202-1205, 1232-1236).

71. On May 7, 1992 LG & O submitted to DER analytical results from water samples taken on March 24-25, 1992 from McMullin pond and springs, MW-1 through MW-7 and MWS-1 through MWS-10 (N.T. 1064-1067; Exhibits C-72 and Q-23).

72. Because of problems with the laboratory that performed the analyses mentioned in Finding of Fact No. 71, LG & O retained a different laboratory to do the analyses on water samples taken on May 8, 1992 from MW-8 through MW-10 and MWS-11 through MWS-13. The results, dated May 19, 1992, were received by LG & O on or about that date, but Townley was not sure if they were forwarded to DER (N.T. 1066-1068; Exhibits C-73 and Q-3).

73. LG & O took water samples during May 20-22, 1992 from these same wells. The results, dated June 10, 1992, were forwarded to DER (N.T. 1081-1082; Exhibit Q-4).

74. During May 1992 DER decided to have a GETAC (General Environmental Technical Assistance Contractor), R.E. Wright Associates, Inc. (REW), do a hydrogeologic site characterization in the affected area of Hometown to determine the source and extent of hydrocarbon impact to McMullin pond and residences south of Route 54 and east of Route 309 (N.T. 693, 768-769, 1069-1071; Exhibits Q-41 and Q-42).

75. DER had also decided to extend the public water system eastward along Holland Street so that the residents with hydrocarbon contamination in their wells could switch to public water. On June 1, 1992 DER's contractor (Worth, Inc.) began the construction work (N.T. 34, 127, Exhibit C-12; Stip.).

76. The contractor started trenching at the eastern terminus of the project and worked westward toward Ardmore Avenue. No problems were encountered until June 3, 1992 when the trenching had reached a point between the McMullin and Featherstone properties. There, groundwater began entering the trench from the west having an odor of gasoline. Trenching was halted temporarily until a groundwater and soils management plan was formulated (N.T. 35, 127-128; Exhibits C-12, C-13(a) & (b)).

77. The groundwater and soils management plan

(a) provided for removal and proper disposal of all contaminated soils;

(b) provided for the discharge of contaminated water from the trench into McMullin pond where the contaminants would be removed with a vac truck; and

(c) involved the placement of clay plugs in the trench to prevent the eastern migration of contaminated water

(N.T. 35-36, 128-134; Exhibit C-12, C-13(c), (d) & (e)).

78. When trenching resumed, three terra cotta pipes were encountered in the vicinity of the Ryan residence along the north side of Holland Street. Two of them ran from north to south and carried groundwater away from the residence toward McMullin pond. The third, at the driveway, was a sewer lateral running from the residence south to the street and carrying significant amounts of groundwater (N.T. 141-142, 144; Exhibit C-12, C-13(f), (g) & (h)).

79. A 4-foot, field-slotted galvanized sump was installed in the trench in front of the Ryan residence in order to aid in dewatering the trench (N.T. 143-144; Exhibits C-12, C-13(i)).

80. When trenching resumed west of the Ryan residence, groundwater seeps diminished and the trench remained dry to the point of connection on Ardmore Avenue (Exhibit C-12).

81. Water and soil samples were taken during the trenching operations, following DER's standard procedure for collection and handling. Concentrations of BTEX and MTBE were found at most locations with higher levels in the western portion of the trench. The highest levels were in front of the Ryan residence (N.T. 131-137; Exhibit C-12).

82. As part of its contract with DER, REW conducted a survey to delineate residential well locations in the Lynwood Avenue/McMullin pond area and, between June 10 and 17, 1992, constructed 8 additional shallow monitoring wells (MW-100 to MW-107). These wells, placed at locations selected by DER, were installed to define the hydrogeology and groundwater quality at various Hometown locations (N.T. 693, 714-716, 740-742; Exhibit C-80).

83. During installation of the 8 additional monitoring wells, REW evaluated the presence of hydrocarbons in the subsurface through field screening of soil

cuttings with a photoionization detector (PID) and through laboratory analysis of soil samples by gas chromotography/mass spectrometry (GC/MS). The PID results showed measurements elevated above background levels in MW-100, MW-102 and MW-105 and hydrocarbon odors in MW-103 and MW-105. The GC/MS analysis of soil samples revealed non-detectable concentrations of hydrocarbons in MW-100, MW-102, MW-106 and MW-107 and low concentrations of benzene, toluene, and MTBE in MW-101, MW-103 and MW-105 (N.T. 742-746; Exhibits C-77 and C-80).

84. On June 17-19, 1992 REW obtained water samples from MWS-1 through MWS-13 (shallow monitoring wells installed by LG & O), MW-1 through MW-10 (deep monitoring wells installed by LG & O) and MW-100 through MW-107 (shallow monitoring wells installed by REW). These same wells were sampled again during July 21-23, 1992, at which time samples were also obtained from McMullin pond, the sump along the water line in Holland Street and a hand-dug well (N.T. 694-702; Exhibits C-78 and C-80).

85. On June 17-18, 1992 REW collected water level information in shallow wells MWS-12 and MWS-13 while pumping deep wells MW-9 and MW-10. MW-9 and MWS-12, as well as MW-10 and MWS-13, are considered "nested" wells because they are close together and measure different aquifers. The fact that water levels dropped in the shallow wells while water was being pumped from the deep wells indicates groundwater communication between the two aquifers (N.T. 702-710; Exhibits C-79 and C-80).

86. With respect to geologic setting, REW

(a) determined that the area is in a valley trending northeast-southwest with Broad Mountain on the northwest and Nesquehoning and Locust Mountains on the southeast;

(b) observed a drainage divide trending east-west along the north side

of Route 54 with drainage north of the divide flowing east into the Lehigh River Basin and drainage south of the divide flowing west into the Little Schuylkill River Basin;

(c) found that the area lies within the upper Mississippian- and Pennsylvania-aged rocks of the Valley and Ridge Physiographic Province of the Appalachian Mountain section;

(d) found that bedrock underlying the area has been mapped as the middle member of the Mauch Chunk Formation, deposited as a thickly-bedded sequence of deltaic sandstones, siltstones and shales; moderately well-bedded, thin and flaggy; low to moderately resistant to weathering; having poor effective porosity but with secondary fractures allowing for a moderately productive water-bearing potential;

(e) determined that the area lies along the southern limb of the Broad Mountain anticlinorium, the fold axis of which strikes approximately North 68° East and plunges approximately South 10°;

(f) measured exposed bedrock outcrop along the east side of Route 309 about 1500 feet south of the area and found bedding strike to be North 70° East, dipping North 60°, and North 45° West, dipping Northeast 73°, respectively;

(g) found the intersection formed by the bedding and the dominant fractures at the outcrop to be trending North 83° East and plunging at an angle of 5°;

(h) found soils in the area to be mapped as the Leck Kill Channery silt loam, Meckesville loam, Kendron silt loam, and Urban Land-Udults complex; and

(i) concluded (as did Q3G and ELM) that the area east of Ardmore Avenue contained unconsolidated material (fill) deposited through human activity (N.T. 716-718, 770-773; Exhibits C-80 and C-96).

87. REW's geologic findings confirmed those of DER (N.T. 100-102, 268-278).

88. LG & O's geologist/hydrogeologist consultants, Douglas G. Beaver and Ronald M. Kaiserman of Rare Earth Envirosciences, Inc., criticized some of these geologic findings on the ground that they were not supported by adequate investigation (N.T. 1163-1191, 1205-1208, 1211, 1220-1223).

89. REW obtained groundwater level measurements on July 1, 1992 from 30 monitoring wells, 3 residential wells and the hand-dug well in order to evaluate the hydraulic gradient and construct a groundwater elevation contour map. This map shows the groundwater table south of the divide to slope south-southeast from the Hartranft Site to McMullin pond and the groundwater table north of the divide to slope toward the east (Exhibit C-80).

90. REW also determined that groundwater flow direction is influenced by preferential permeability pathways present in the bedrock (fractures, bedding planes and joints), causing a bias from the potentiometric gradient toward the fracture orientation direction (Exhibit C-80).

91. As a result of the determinations in Findings of Fact Nos. 86, 89, and 90, REW concluded that groundwater flow from the Hartranft Site would compromise between the south-southeast direction suggested by the groundwater contour map and the east direction suggested by the fracture frequency diagram. This would direct it east-southeast in the consolidated materials between the Hartranft Site and Ardmore Avenue and in a more southerly direction in the unconsolidated material east of Ardmore Avenue (N.T. 778-781; Exhibit C-80).

92. Kaiserman disagreed with REW's conclusions on the presence of a groundwater divide and on the presence of preferential permeability pathways in the bedrock on the ground that the data was not adequate to support these conclusions (N.T. 1208-1219, 1223-1232).

93. REW utilized the analytical results of the June 17-19, 1992 well samplings (see Finding of Fact No. 84) to construct a BTEX isoconcentration map illustrating the distribution of dissolved gasoline in the groundwater. This map, using concentration contours of 10 micrograms per liter (ug/l), 1000 ug/l and 10,000 ug/l, shows a plume of contamination originating at the Hartranft Site, following the groundwater flow directions discussed in Finding of Fact No. 91 and terminating at McMullin pond (N.T. 780-785; Exhibit C-80).

94. A plume of contamination, utilizing only the data from the monitoring wells installed by LG & O, would look much the same as the map discussed in Finding of Fact No. 93 (N.T. 783, 1236-1238).

95. REW could not confirm the presence of a measurable accumulation of free-phase hydrocarbon but noted the following: (a) a hydrocarbon sheen was apparent on McMullin pond; (b) groundwater samples from MWS-7 and MW-105 have dissolved concentrations of BTEX high enough to suggest the presence of free-phase hydrocarbons nearby; and (c) DER and Q3G have reported measurable accumulations of free-phase hydrocarbons at McMullin pond, sewer manhole No. 137, and the water line trench on Holland Street (N.T. 797-798, 910; Exhibit C-80).

96. REW also did not precisely locate the fractures creating the preferential pathways for groundwater flow (N.T. 922-923).

97. REW dismissed Sun's pipeline as a source because (a) no petroleum products other than gasoline have been found, despite the fact that the pipeline transports other petroleum products, and (b) no elevated concentrations of VOCs have been found along the pipeline during the soil gas surveys (N.T. 755-787).

98. REW dismissed other potential sources because the data was isolated and inconclusive whereas the data pointing to the Hartranft Site as the source was overwhelming (N.T. 824-831).

99. In its August 1992 report, REW concluded that, based on a documented release of gasoline at the Hartranft Site, the direction of groundwater flow from that Site, the existence of a plume of BTEX contamination following the groundwater flow direction, and the surfacing of that contamination at McMullin pond, the Hartranft Site was the source (N.T. 778-790; Exhibit C-80).

100. On July 23, 1992 LG & O took additional water samples. The results, dated August 21, 1992, were forwarded to DER (N.T. 1114-1115; Exhibit Q-5).

101. Based on its own investigation, the investigation of LG & O and the investigation of REW, DER concluded

(a) that gasoline released at the Hartranft Site migrated vertically through the soil into the groundwater;

(b) that the contamination followed the groundwater flow east-southeast from the Hartranft Site to the vicinity of Ardmore Avenue;

(c) that the groundwater east and southeast of Ardmore Avenue rises in the unconsolidated material to within 2 feet of the surface;

(d) that the sewer lines in that same area are lower than the water table, permitting the contamination to follow the sewer lines;

(e) that these factors cause the groundwater east of Ardmore Avenue to flow in a south-southeast direction across Holland Street to McMullin pond; and

(f) that residences closer to the Hartranft Site have not experienced odor problems because the sewer lines in that area are higher than the water table

(N.T. 157-159, 166-169, 278-283, 336-357).

102. Brussock disputed the accuracy of REW's BTEX isoconcentration map because of the absence of data sufficient, in his opinion, for REW to conclude that the contamination is one continuous plume emanating at the Hartranft Site

and terminating at McMullin pond. Brussock's reasoning proceeds as follows:

(a) since no monitoring wells west of Sun's pipeline show concentrations as high as 10,000 ug/l, REW has no basis for extending the 10,000 ug/l contour west of the pipeline up to the edge of the Hartranft Site;

(b) although three monitoring wells west of the pipeline show concentrations in the 1000 ug/l - 5000 ug/l range, REW has no basis for drawing the 1000 ug/l contour to include these wells;

(c) because of the direction of groundwater flow, the concentrations west of the pipeline represent one plume of contamination in the vicinity of the Hartranft Site and the concentrations east of the pipeline represent another plume of contamination from a different source, probably the pipeline itself; and

(d) the existence of multiple plumes of contamination from multiple sources is common

(N.T. 1446-1448, 1457-1460, 1471-1477, 1541-1547; Exhibits Q-108 and Q-109).

103. Brussock disagreed with REW's conclusions for the following reasons:

(a) the absence of sufficient data to show the presence of a groundwater divide running north of Route 54;

(b) the failure to locate the fractures creating the preferential pathways;

(c) the absence of sufficient data to show that fractures have a dominant orientation in the vicinity of the Hartranft Site;

(d) the failure to give proper consideration to environmental fate and transport which would suggest that the highest concentrations should be nearest the source;

(e) the failure to find free-phase hydrocarbons; and

(f) the BTEX isoconcentration map as discussed in Finding of Fact No.

(N.T. 1385, 1390-1394, 1414, 1449, 1452, 1471-1484).

104. While it may be unusual for the highest concentrations of contaminants to be found away from the source, it can and does happen (N.T. 890-892).

105. The concentrations of contaminants on the Hartranft Site, while not the highest, are exceeded only by those in monitoring wells MWS-7 and MW-105 and in the water line trench in Holland Street, all of which are east of the Hartranft Site (N.T. 1517).

106. REW agreed with DER that LG & O's Site Characterization and Partial Remediation Action Plan did not adequately refine the horizontal and vertical extent of contamination (N.T. 924-926).

107. After LG & O learned that DER had contracted with REW to do a site characterization, it ceased further investigations of its own (N.T. 1425).

108. Without admitting responsibility for the contamination, LG & O submitted to DER in October 1992 a proposed Remedial Action Plan which, *inter alia*, proposed to continue the recovery of free product from McMullin's pond and the trench sump, to continue operation of the vapor extraction systems in residences, and to continue venting the sewer system, as needed (N.T. 1117-1121, 1484-1487; Exhibit Q-2; Stip.)

109. DER disagreed with the proposed Plan for the following reasons:

(a) the procedures proposed to determine the presence and distribution of free product in the vicinity of McMullin pond did not include soil and groundwater sampling to better define the horizontal and vertical extent of contamination in the Holland Street area;

(b) the proposed location of a two-well cluster to characterize the aquifer was in a zone where the aquifer was surfacing and where discharge

barriers would affect the validity of the data;

(c) the proposed Plan did not include remediation of contaminated soils; and

(d) the proposed Plan did not include remediation of contaminated groundwater either to background levels or to maximum contaminant levels (MCLs) (N.T. 155, 170-181; Exhibits C-75 and Q-2).

110. The proposed Remedial Action Plan did not satisfy DER's Interim Guidance-Protective Levels for the Excavation, Treatment, Cleanup and Disposal of Virgin Fuel Contaminated Soils, October 18, 1991 (N.T. 178-179; Exhibit C-90).

111. The proposed Remedial Action Plan did not satisfy DER's Ground Water Quality Protection Strategy, February 1992 (N.T. 947-948; Exhibit C-82).

112. On November 3, 1992 DER met with LG & O and discussed its disagreements with the proposed Remedial Action Plan. These comments were summarized in a letter dated November 5, 1992 (N.T. 181-183, 946; Exhibit S-10).

113. Cleaning up soils to the degree specified in Exhibit C-90 is important for protection of the public health because fuel contaminated soils give off potentially dangerous vapors and have a tendency to leach into groundwater (Exhibit C-90).

114. The MCLs for BTEX, as set by the U.S. Environmental Protection Agency (EPA) for public drinking water systems, are .005 ppm for benzene, .7 ppm for ethylbenzene, 1 ppm for toluene and 10 ppm for xylene. BTEX concentrations exceed these levels in the groundwater affected by the gasoline leak on the Hartranft Site (N.T. 310-313; Exhibits C-21 through C-24 and C-80).

115. Cleaning up groundwater to public drinking water standards is important because the Mauch Chunk Formation has been characterized as the most important aquifer in the region; there is communication between the shallow groundwater

(where most of the contamination appears) and the deep groundwater; and the shallow groundwater rises to become surface water at McMullin pond (N.T. 799-800).

116. Technology exists to remediate the soils and the groundwater to the levels demanded by DER (N.T. 361-362, 800-803).

117. The remediation measures demanded of LG & O by DER are similar to those generally required by DER in other fuel contamination cases (N.T. 800-803, 946-949, 953-959).

118. Passive remediation measures are not as effective as the active remediation measures technologically available (N.T. 802).

119. Although LG & O disputed the necessity of preparing and submitting one, it filed with DER in October 1992 the Closure Report - Underground Storage Tanks - Hartranft Service Station, prepared by Q3G (N.T. 1105-1110, 1115-1117: Exhibits Q-1, Q-20 and Q-21; Stip.).

120. Of the five items required of LG & O in DER's December 10, 1991 Order (from which the appeal was taken), three have been performed by DER or REW, one has been performed by LG & O and the remaining item is ongoing (N.T. 183-185).

121. All of the contaminated area south of Route 54 and east of Route 309 is within 2,500 feet of the Hartranft Site (Exhibit C-80, figure 7).

DISCUSSION

DER has the burden of proof when it issues an Order like the one in this case: 25 Pa. Code §21.101(b)(3). To carry the burden, DER must show by a preponderance of the evidence that the Order was lawful and an appropriate exercise of its discretion: 25 Pa. Code §21.101(a). DER is aided in this task by a presumption in §1311(a) of the STA, 35 P.S. §6021.1311(a). That statutory provision reads as follows:

> (a) General Rule - Except as provided in subsection (b), it shall be presumed as a rebuttable presumption of law in civil and administrative proceedings that a person who owns or operates an aboveground or underground storage tank shall be liable, without proof of fault, negligence or causation, for all damages, contamination or pollution within 2,500 feet of the perimeter of the site of a storage tank containing or which contained a regulated substance of the type which caused the damage, contamination or pollution. Such presumption may be overcome by clear and convincing evidence that the person so charged did not contribute to the damage, contamination or pollution.

The parties have stipulated, and we have found, that LG & O owned underground storage tanks containing regulated substances (gasoline, kerosene and diesel) at the Hartranft Site (see Finding of Fact No. 3). We also have found that gasoline contamination occurred and exists within 2,500 feet of the Hartranft Site (see Findings of Fact Nos. 10, 30, 37, 51, 52, 58, 59, 63, 64, 65, 81, 83, 93 and 121). This triggers the presumption[2] Unless rebutted, the presumption will carry DER's burden of proof on the liability issue but not on the reasonableness of the remediation measures demanded of LG & O.

In order to overcome the presumption, LG & O must affirmatively prove, by clear and convincing evidence, one of the following:

> (1) The damages, contamination or pollution existed prior to the use of any storage tank at the facility to contain an accumulation of regulated substances, as determined by surveys of the site and within 2,500 feet of the perimeter of the storage tank or facility.
>
> (2) An adjacent landowner refused to allow the owner or operator of a storage tank at a new facility access to property within 2,500 feet of the perimeter of a storage tank facility to conduct a survey.
>
> (3) The damage, contamination or pollution was not within 2,500 feet of the perimeter of a storage tank.

---

[2]While it is unnecessary as far as the presumption is concerned, the parties have stipulated, and we have found, that releases occurred on the Hartranft Site (see Finding of Fact No. 6).

> (4) The owner or operator did not contribute to the damages, contamination or pollution. (Section 1311(b) of the STA, 35 P.S. §6021.1311(b))

In its evidence and in its post-hearing brief, LG & O focused only on item (4). Accordingly, issues relevant to items (1), (2), and (3) are deemed waived: *Lucky Strike Coal Co. and Louis J. Beltrami v. Commonwealth, Dept. of Environmental Resources*, 119 Pa. Cmwlth. 440, 547 A.2d 447 (1988). To overcome the effect of the presumption, then, LG & O must "affirmatively prove" by "clear and convincing evidence" that it did not "contribute" to the contamination.

None of the quoted words is defined in the STA but "affirmatively prove" and "clear and convincing evidence" are familiar legal phrases. *Black's Law Dictionary*, Revised Fourth Edition, 1968, defines "affirmative proof" as "such evidence of the truth of matters asserted as tends to establish them, regardless of character of evidence offered." The "clear and convincing" standard of proof in Pennsylvania is an intermediate standard, falling between "preponderance of the evidence" and "proof beyond a reasonable doubt." In order to meet the "clear and convincing" standard the witnesses must be credible, have a precise command of the facts and their testimony must be so clear, direct, weighty and convincing that the factfinder can come to a clear conviction, without hesitation, of the truth of the precise facts in issue: *Broida, to Use of Day v. Travelers' Ins. Co.*, 316 Pa. 444, 175 Atl. 492 (1934); Packel and Poulin, *Pennsylvania Evidence* (1987), §303.2.

LG & O's burden, it should be noted, is greater than that imposed on DER to show by a preponderance of the evidence the lawfulness and appropriateness of the Order. And LG & O must prove that it did not "contribute" to the contamination. *Webster's Ninth New Collegiate Dictionary* (1987) defines "contribute" as "to give or supply in common with others." Thus, LG & O must

present clear and convincing evidence that the gasoline released at the Hartranft Site was no part of the gasoline contamination that occurred south and east of there.

LG & O's burden was made more difficult by the extensive investigations carried out by DER, Sun and REW. These investigations clearly established contaminated soils and shallow groundwater at the Hartranft Site, gasoline odors and shallow groundwater contamination south of Route 54 and east of Route 309, and surfacing of the contaminant at the McMullin pond. They confirmed the basic integrity of Sun's pipeline through Hometown and negated other potential sources of contamination.

Even more crucial for our purposes were DER's and REW's interpretations of geologic and hydrogeologic conditions. They constructed groundwater potentiometetric lines reflecting a groundwater divide north of Route 54 and a south-southeast groundwater flow direction south of the divide in the vicinity of the Hartranft Site. They also measured bedding planes and fractures in the bedrock and determined that the dominant direction was almost due east. They concluded from this data that fractures, bedding planes and joints were creating preferential permeability pathways in the bedrock, influencing groundwater to flow east-southeast from the Hartranft Site to Ardmore Avenue where, entering unconsolidated fill material, it would turn to a more southerly direction. This conclusion demonstrated a groundwater connection between the Hartranft Site and the area of contamination.

REW's isoconcentration map of BTEX contamination supported its theory of groundwater flow direction. This map was based upon two series of water samplings in 31 monitoring wells, McMullin pond, the trench sumps in Holland Street and a hand-dug well west of the Hartranft Site. BTEX concentrations were

found in 8 of the monitoring wells in both samplings and in 3 of the monitoring wells in one sampling (the first). BTEX concentrations were found in McMullin pond and the trench sumps on the one occasion when they were sampled (the second). No concentrations were found in the hand-dug well.

The 11 monitoring wells with BTEX concentrations surround the Hartranft Site (MWS-1, MWS-2, MWS-3, MWS-4 and MWS-6) and follow a narrow corridor (200 feet wide) to McMullin pond. The direction of that corridor from the Hartranft Site almost to Ardmore Avenue follows the direction of the bedding planes and dominant fractures. East of there it turns more southerly toward McMullin pond. REW drew three concentration lines encompassing the contaminated monitoring wells, an inner ring of 10,000 ug/l, a middle ring of 1,000 ug/l and an outer ring of 10 ug/l.

LG & O disagreed, not so much with the data compiled in these investigations (which often duplicated its own) but with the interpretations placed upon them. It challenged Sun's integrity tests, arguing that they did not show the pipeline to be bubble tight. Yet, its experts were unable to say affirmatively that the line was leaking in the Hometown area. It attacked the geologic and hydrogeologic interpretations of a groundwater divide and of preferential permeability pathways on the basis that existing data did not support them. It denounced the BTEX isoconcentration map for the same reason.

Data gaps always exist in groundwater investigations. It usually is not practical or economically feasible to install the number of monitoring wells necessary to narrow these gaps. And, even if it were, it would still be necessary to make interpretations of groundwater levels between the wells. The presence of factures or other bedrock features creating preferential permeability pathways is difficult to prove with scientific certainty. For these reasons, the

task of determining the direction of groundwater flow (especially in an area of this size) is left to the experts - hydrogeologists who interpret the available data on the basis of their education, training and experience.

LG & O's experts disagreed with the interpretations made by experts for DER and REW but their opinions, at the most, were only of equal weight. And where the BTEX isoconcentration map is concerned, the opinions fell short of that level. LG & O's expert criticized the map for depicting the 10,000 ug/l (inner) line as coming to the edge of the Hartranft Site when no concentrations of that magnitude were found to the west of Cumberland Avenue. He acknowledged, however, that concentrations were found on and adjacent to the Hartranft Site to support the drawing of the 1,000 ug/l (middle) line and the 10 ug/l (outer) line in that area. Nonetheless, he refused to concede that those concentrations were connected in any manner to similar concentrations east of Cumberland Avenue.

He advanced a two-plume theory. One completely circled the Hartranft Site and extended about 100 feet toward the east-southeast to encompass MWS-6, a point of known concentrations in Elmore Street. The other plume began in Cumberland Avenue in the vicinity of MW-105, another point of known concentrations, and extended toward McMullin pond. He refused to connect the plumes because of the absence of any point of known concentrations between MWS-6 and MW-105.

The distance between these two monitoring wells is only about 125 feet. The witness had no objection to including MWS-6 in his first plume, even though it is about 100 feet away from the four monitoring wells on the Hartranft Site with no intervening points of known concentration, but found the 125 feet between MSW-6 and MW-105 too great to justify a connection. Although the witness didn't refer to it as a basis for his opinion on the two-plume theory, the presence of Sun's pipeline in Cumberland Street, intervening between MWS-6 and MW-105, was

obviously a major factor. All of the contamination east of Cumberland Street would be within a plume originating at the pipeline. The contamination generated at the Hartranft Site would end about 75 feet west of there.

We accept the fact that multiple plumes of contamination are possible. Nonetheless, we are convinced that, in this instance, the more persuasive interpretation of the data produces a single plume of contamination emanating from a known source (the Hartranft Site) and extending to a known destination (McMullin pond) without any other known sources intervening between these two points. Obviously, if there were evidence of a pipeline leak, a two-plume theory would carry more weight. In the absence of such evidence, the theory lacks adequate factual support.[3]

We have carefully considered the entire testimony of LG & O's experts, especially the opinions pointing out anomalies in DER's conclusions, and have found them to be of only slight significance. The first deals with the fact that the highest BTEX concentrations are not found on the Hartranft Site. They show up in MW-105 in Cumberland Avenue and MWS-7 in Pine Street. These monitoring wells are within 250 feet of the Hartranft Site in the center of the plume of contamination. The BTEX concentrations nearest to the Hartranft Site in MWS-6, MWS-1 and MWS-2 are next to MW-105 and MWS-7 in order of magnitude. While the highest concentrations of contaminants generally are found closest to the source, that is not always the case. Geologic and hydrogeologic conditions specific to the site may produce a different result. We don't know what mechanism exists here to produce lower concentrations at the Hartranft Site but we do know that

[3]While our conclusion is based on LG & O's statutorily-imposed standard of proof - clear and convincing - it would not change if the evidence were held to the lower - preponderance - level.

the groundwater is being diverted into preferential permeability pathways. That, in and of itself, is capable of producing anomalous results.[4]

The next anomaly concerns "free-phase hydrocarbon." When gasoline contamination reaches the water table, part of it will break down into its components - BTEX - and part of it will float on the surface as free-phase hydrocarbon. While BTEX was found in the soil and monitoring wells on the Hartranft Site and in certain monitoring wells east of there, free-phase hydrocarbon was found in measurable quantities only on or in the vicinity of McMullin pond. LG & O's experts opined that, because of this, the contamination at the pond cannot be coming from the Hartranft Site.

REW's expert pointed out that the BTEX concentrations in MW-105 and MWS-7 (which are closer to the Hartranft Site than to McMullin pond) are high enough to suggest the presence of free-phase hydrocarbon in close proximity. He assigned two other reasons why free-phase hydrocarbon was not found elsewhere. The first had to do with the monitoring wells installed by LG & O in which the screened interval was placed below the surface of the water table. Since free-phase hydrocarbon floats on the surface of the water table, it would not have been able to enter these wells. The second reason is well placement. Since the contamination is flowing through preferential permeability pathways, the free-phase portion may be confined to one or more very narrow channels until it reaches the unconsolidated material near McMullin pond. Drilling a well to hit one of these channels would be extremely difficult.

---

[4]We note that the concentration levels closest to the Hartranft Site also increase as one progresses toward the east. MWS-3 and MWS-4, on the western part of the Site have only minor concentrations. MWS-1 and MWS-2, farther east on the Site, have concentrations exceeding 1,000 ug/l. MWS-6, about 100 feet east of the Site has concentrations in the 2,900 ug/l to 4,700 ug/l range.

The evidence does not fully explain these anomalies. Nonetheless, when placed within the context of all the other facts and opinions, these aberrations are not controlling.

When reduced to its essential elements, the evidence shows (1) an undisputed source of gasoline contamination at the Hartranft Site, (2) the undisputed presence of measurable concentrations of gasoline components in 7 monitoring wells off the Hartranft Site with groundwater elevations lower than on the Hartranft Site, (3) the undisputed locations of these 7 monitoring wells along a path leading to McMullin pond, (4) the undisputed presence of gasoline contamination on and in the vicinity of McMullin pond, and (5) the undisputed absence of any other known source of gasoline contamination. While a host of unanswered questions may relate to exactly how all of this occurred in the subterranean environment, they cannot change the elemental facts and the conclusion that LG & O caused the contamination. Accordingly, LG & O is liable under the STA. Having reached this conclusion, we find it unnecessary to discuss liability under the CSL, the SWMA or Section 1917-A of the Administrative Code, *supra*.

LG & O concedes that DER has the authority under the STA to order the owner of underground storage tanks to take corrective action in a manner satisfactory to DER, but maintains that DER must confine itself to action that will prevent, mitigate, abate or remedy damages to public health, safety or welfare. "Corrective action" is defined in Section 103 of the STA, 35 P.S. §6021.103, to include the following:

> (1) Containing, assessing or investigating a release.
>
> (2) Removing a release or any material affected by a release.

(3) Taking measures to prevent, mitigate, abate or remedy releases, pollution and potential for pollution, nuisances and damages to the public health, safety or welfare, including, but not limited to, waters of this Commonwealth, including surface water and groundwater, public and private property, shorelines, beaches, water columns and bottom sediments, soils and other affected property, including wildlife and other natural resources.

(4) Taking actions to prevent, abate, mitigate or respond to a violation of this act that threatens public health or the environment.

(5) Temporarily or permanently relocating residents, providing alternative water supplies or undertaking an exposure assessment.

(6) Does not include the cost of routine inspections, routine investigations and permit activities not associated with a release.

LG & O submitted a proposed Remedial Action Plan in October 1992 (Exhibit Q-2). On November 3, 1992 DER met with LG & O and discussed its disagreements with the proposed Plan. The comments were summarized in a November 5, 1992 letter (Exhibit S-10). LG & O disputes only 2 of the 10 comments in the letter - comment 8, requiring remediation to be conducted to Best Technology Available (BTA) standards which are levels protective of human health; and comment 10, requiring installation of an active vapor recovery system at the Hartranft Site to remediate soils contamination to acceptable levels.

It is LG & O's position that remediation of the soils at the Hartranft Site has been accomplished by the removal of contaminated soils to the point where active remediation measures are no longer necessary. It proposes the monitoring of contamination residuals to determine if concentrations decrease due to natural attenuation/degradation processes. If they fail to decrease and pose a threat to public health and the environment, LG & O would then propose an active remediation system.

This proposal overlooks the contaminants still present on the Site and adversely affecting the groundwater under the Site months after the underground tanks and a great deal of contaminated soil were removed. DER could reasonably conclude from this that the soils beneath the Site still contained much more than residual contamination. That conclusion, combined with the fact that technology exists to actively remediate the soils, justified DER in mandating installation of a vapor recovery system on the Hartranft Site. That mandate came within the scope of Section 103, items (3) and (4), of the STA, 35 P.S. §6021.103.

LG & O also contends that the contaminated soils near McMullin pond are not its responsibility because contamination from the Hartranft Site never reached that point. We rejected the basis for that contention earlier in this Discussion and will not reconsider it here. Remediating the contaminated soils near McMullin pond is necessary for the protection of public health and the environment because groundwater rises through these soils and surfaces in and adjacent to the pond. So long as the soils are contaminated, the groundwater and surface water also will be contaminated and capable of giving off potentially dangerous vapors. Technology exists to remediate these soils to acceptable levels. DER did not abuse its discretion in requiring it to be done.

The proposed Remedial Action Plan stated that it was not feasible to remediate groundwater to MCLs. DER insisted that remediation measures must be conducted to levels protective of public health, citing 5 parts per billion (ppb) of benzene as an example. This is EPA's MCL for benzene in public drinking water systems (see Findings of Fact No. 114). Remediating groundwater to this level is important in the Hometown area because the Mauch Chunk Formation is an important aquifer and because the groundwater surfaces at McMullin pond. Technology exists to accomplish this and DER was justified in requiring it.

The remediation measures insisted on by DER are within the scope of the STA and do not amount to an abuse of discretion. Since we have not discussed the legality of DER's Order under statutory provisions other than the STA, we will not discuss the reasonableness of the Order under those other provisions either.

DER raises two procedural issues, disputed by LG & O, dealing with that of LG & O's expert witnesses and with claimed admissions by LG & O. In view of our disposition of the case, we reject DER's requests without discussing them.

CONCLUSIONS OF LAW

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

2. DER has the burden of proving by a preponderance of the evidence that the Order was lawful and an appropriate exercise of its discretion.

3. LG & O, being the owner of underground storage tanks containing gasoline at the Hartranft Site, is presumed to be liable for gasoline contamination within 2,500 feet of the Site unless LG & O affirmatively proves, by clear and convincing evidence, that it did not contribute to the contamination.

4. Proof by clear and convincing evidence is a higher standard than preponderance of the evidence but lower than proof beyond a reasonable doubt.

5. DER proved, by a preponderance of the evidence, that the gasoline released on the Hartranft Site entered the groundwater and, influenced by preferential permeability pathways, flowed east-southeast from the Site to the vicinity of Ardmore Street where, entering unconsolidated fill material, it turned to a more southerly direction and flowed toward McMullin pond.

6. DER proved, by a preponderance of the evidence, that LG & O's tanks were the only source of contamination.

7. LG & O did not prove, either by clear and convincing evidence or by a preponderance of the evidence, that it did not contribute to the contamination.

8. The existence of unanswered questions relating to exactly how the contamination got from the Hartranft Site to McMullin pond does not change these conclusions.

9. DER's Order was lawfully issued under the provisions of the STA.

10. The remedial measures required by DER fall within the scope of the STA and were not an abuse of discretion.

ORDER

AND NOW, this 1st day of June, 1994, it is ordered that the appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

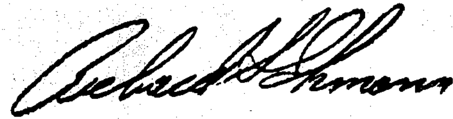
Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

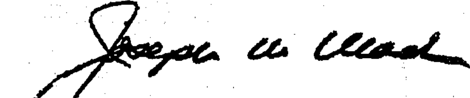
Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

EHB Docket No. 91-552-MR



RICHARD S. EHMANN
Administrative Law Judge
Member



JOSEPH N. MACK
Administrative Law Judge
Member

DATED: June 1, 1994

cc: **For the Commonwealth, DER:**
Barbara Smith, Esq.
Northeast Region
For Appellant:
Anthony J. Mazullo, Esq.
Doylestown, PA

sb

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
2nd FLOOR — MARKET STREET STATE OFFICE BUILDING
400 MARKET STREET, P.O. BOX 8457
HARRISBURG, PA 17105-8457
717-787-3483
TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOARD

PHILADELPHIA ELECTRIC COMPANY, et al.	:	
	:	
v.	:	EHB Docket No. 88-309-E
	:	Consolidated with
COMMONWEALTH OF PENNSYLVANIA	:	88-312-M, 88-314-M and
DEPARTMENT OF ENVIRONMENTAL RESOURCES,	:	88-315-M
et al.	:	Issued: June 9, 1994

OPINION AND ORDER SUR
MOTION TO DISMISS APPEALS FOR MOOTNESS

By Richard S. Ehmann, Member

Synopsis

A motion to dismiss two of four consolidated appeals because those appeals have become moot is granted. Where the appeals challenge the terms of an NPDES permit and, since that permit's issuance, DER has issued the permittee a new superseding NPDES permit which has not been timely appealed, the new NPDES permit has become final and challenges to the superseded permit are moot. The instant appeal is not saved from dismissal based upon mootness by the argument that the issues here are of a recurring nature of public interest or are capable of avoiding review. The imposition of sanctions by this Board upon the attorney for the Environmental Defense Fund and other Appellants based upon his conduct at the merits hearing in this appeal was not Board ordered restraint of these appellants and did not in any fashion restrict their right to timely appeal DER's issuance of the new NPDES permit.

Where the Appellants timely respond to the Motion and subsequently file an out-of-time Supplemental Brief raising a new issue in violation of

this Board's procedures, the subsequent filing will be disregarded. Good Cause to allow this untimely filing is not shown where it is based on counsel's vacation, his busy schedule, and a trial of one week's duration since Appellants made no effort to seek an extension of the filing deadline for submission of this Brief.

Background

This consolidated appeal consists of four separate appeals dealing with NPDES permits issued to Philadelphia Electric Company ("PECO") and the North Penn-North Wales Water Authority for portions of the Point Pleasant Project. As was stated by the then presiding Board member in his Order of February 15, 1989, consolidating these appeals, this project "has been the subject of continuous litigation before this Board and the civil courts for many years." We echo this 1989 conclusion now in 1994.

Presently before us is PECO's motion to dismiss two of the four appeals consolidated at our Docket No. 88-309-E. PECO initially appealed to us from the Department of Environmental Resources' ("DER's") issuance to it of NPDES Permit No. 0052221 for its discharge into the East Branch Perkiomen Creek from a facility in Bedminster Township, Bucks County. That appeal bears EHB Docket No. 88-309-E. In it PECO challenges some of the permit's requirements.

The Environmental Defense Fund, leading a coalition of national and local environmental organizations (collectively "EDF"), also appealed to this Board from issuance of that NPDES permit to PECO. That appeal (prior to consolidation) bore Docket No. 88-315-E.

On March 11, 1994, this consolidated appeal was reassigned to Board Member Richard S. Ehmann after it was returned to us from the Commonwealth Court in an appeal there that is discussed below. On March 28, 1994 PECO

filed the instant motion to dismiss. In it, PECO alleges that the challenged NPDES permit states that it is to expire on July 14, 1993 subject to renewal. PECO's motion asserts that on July 29, 1993, DER issued PECO a new NPDES permit (Exhibit A to PECO's Motion) for its discharge to East Branch Perkiomen Creek, which permit has in it substantially different terms. It then asserts that notice of issuance of this permit was published at 23 *Pennsylvania Bulletin* 4254 (September 4, 1993) and that there was no timely appeal as measured from either permit issuance or this publication. PECO then concludes the permit is final and advises that it is operating in accordance therewith. Citing New Jersey Zinc Company v. DER, 1986 EHB 1199 ("Zinc")[1] for authority, PECO concludes the appeals at Dockets 88-309-E and 88-315-E must be dismissed as moot since there is no meaningful relief which we may now grant either PECO or EDF herein on that superseded permit.

Upon receipt of this motion and in accordance with our standard procedure, by letter dated April 4, 1994, we notified the other parties that their responses, if any, to this motion had to be filed with us by April 25, 1994. Only EDF has responded in opposition to the motion.[2]

In its response, EDF argues this appeal is not moot because the Board restrained EDF from participation until March of 1994. It next argues "the Board can grant effective relief within the terms of the City of Chester case" because DER is applying the same conditions to the same discharge and pursuant

---

[1]The parties are advised that the correct legal citation is as set forth above not 1986 Envirn. Lexis 15 and correct citations will be appropriate and appreciated in the future.

[2]Pursuant to a Board Order for reports on each party's perception of the status of this consolidated appeal, DER and North Penn-North Wales Water Authorities both acknowledged the existence of PECO's motion but took no position thereon. However, by a subsequent letter dated April 25, 1994 DER joined in PECO's Motion.

to "Sections 402(b) and 304(i)(2)(c) of the Clean Water Act, 33 U.S.C. 1314(i)(2)(c) and 1342(b) adequate procedures must be provided". Next, EDF asserts a failure to give it notice of the permit's issuance. From these arguments it asserts the Board has the ability to afford it further relief and that there are reasons to do so. EDF next asserts that the appeals should not be dismissed because the issues raised by them are of public interest and are capable of repeatedly avoiding review, citing Metro Transportation Company v. Pennsylvania PUC, 563 A.2d 228 (Cmwl 1989).[3] Finally EDF asserts Pennsylvania's program "requires adequate procedures and federal law is preemptive if state law limits remedies to defeat the purposes of the CWA."[4]

Also on April 4, 1994, the Board ordered the parties to each file a report of their respective positions on the status of this appeal. The order directed that these reports be submitted by April 15, 1994. On April 13, 1994 we received a letter from EDF's counsel requesting that both the status report submission date and the response filing date be made April 25, 1994 because of his absence from the "jurisdiction on vacation, the overlapping nature of the Motion and direction to answer by April 25, with the notice and request for status report, the research required to be performed to make an adequate response to both and the redundancy of the two request [sic] and directions." On April 18, 1994, we issued an order granting EDF's request. On April 25, 1994, EDF filed its Response To Board's Order of April 4, 1994 which responded both to PECO's Motion and to our Order for a status report.

---

[3]See Footnote 1 concerning proper citations which is equally applicable here.

[4]With the exception of the case and statute citations above, EDF fails to offer any legal citations to support these assertions or to discuss or explain them in any fashion. It filed no brief and its response merely makes these assertions without offering further explanation thereof.

In a telephonic conference with the parties' counsel on May 4, 1994, EDF's counsel advised the Board and the other parties that he was planning to supplement his client's Response To Board's Order of April 4, 1994. In response, the Board advised him to include therein any legal authority he had supporting his client's right to make such a supplemental filing.

On May 6, 1994, EDF filed its Supplemental Brief In Opposition To Dismissal And Request For Leave To File Same ("Supplement"). The other parties were notified by the Board to file their responses thereto, if any, by May 16, 1994. DER has filed a Response To Supplemental Brief In Opposition To Dismissal And Request For Leave To File Same. On May 11, 1994, PECO advised the Board by letter that it did not believe a response was necessary. Thereafter, by letter dated May 19, 1994, PECO advised this Board that it joined in DER's Response.[5]

---

[5]On May 25, 1994, EDF submitted to us a document captioned Reply To Department's Response To Supplemental Brief. In full it states:

> The Environmental Defense Fund et al respond to the Department's arguments in their Reply Brief. The EDF et al requests that the Board re-evaluate its previous grant of Summary Judgment. This grant explains why the NEPA issues did not appear in the Prehearing Memorandum. In any event, the tortuous history of this case is such as to make it unfair to require additional specification in the prehearing memorandum.
>
> As to the new source issue, that was clearly raised.
>
> As to the whole of the Department's response, it should be noted that the extent that these prior decisions are considered by the Board as dispositive, the case is not appropriately dismissable as moot, but on the basis of those previous decisions, so that on appeal in the court, the validity of the Board's conclusive actions may be reviewed, since the contrary decision on those issues would preclude mootness.

We have been unable to decipher the meaning of this unsolicited enigma.
(footnote continue)

Response To PECO's Motion To Dismiss

Based upon PECO's Motion and EDF's Response and also its Supplement, there is no dispute that the appeals now before us arose from DER's issuance of an NPDES permit to PECO in July of 1988. There is also no dispute that that permit was for a finite period which expired last year and DER issued a NPDES Permit No. 0052221 to PECO on July 29, 1993. EDF also does not dispute that notice of this permit's issuance in July of 1993 was published in the *Pennsylvania Bulletin* in September of last year. Finally, it is clear that there has been no timely appeal of DER's decision to issue this new permit by either PECO or EDF.

The law on the issue of timely appeals and our jurisdiction is clear. See Rostosky v. Commonwealth, DER, 26 Pa. Cmwlth. 478, 364 A.2d 761 (1976); Gerald C. Grimaud et al. v. DER et al., EHB Docket No. 93-344-E (Opinion issued March 9, 1994) ("Grimaud"); and 25 Pa. Code §21.52(a). Based on these decisions, we lack jurisdiction over any appeal from that permit which might be filed at this time.

Moreover, as we held in Zinc, and William Fiore, d/b/a Municipal and Industrial Disposal Company v. DER, 1991 EHB 785, issuance of the renewed NPDES permit in 1993 does make this appeal moot. The key to why this is so is in the question of whether we can grant any meaningful relief to EDF as to the 1988 permit. That permit (attached to PECO's Notice of Appeal) states on its face that it expires on July 14, 1993. That date has past, and with the 1993 NPDES permit's issuance, any extension of the 1988 permit during DER's review of PECO's application for this 1993 permit has expired as well. The fact this

(continued footnote)
Accordingly, in reaching the conclusions set forth herein, we have disregarded it.

is an NPDES permit before us as opposed to some other DER action has no effect on this mootness issue. When we have had before us an appeal from the renewal of a limited duration operating permit for an incinerator, the appeal became moot when the period of time in the operating permit expired. See Specialty Waste Services, Inc. v. DER, 1992 EHB 382. The same is true when an extension of an air quality plan approval expired. See Borough of Glendon v. DER et al., EHB Docket No. 92-071-W (Opinion issued October 26, 1993), and Max Funk et al. v. DER et al., 1990 EHB 161. When the 1988 NPDES permit expired, even if every allegation in EDF's Notice of Appeal is true and every objection meritorious, we lost ability to do anything for EDF by way of meaningful relief on that permit. To grant it meaningful relief today would require us to resurrect the permit and then to sustain EDF's objections and declare the resurrected permit to be invalid. It is this process which in and of itself best displays why there is no meaningful relief we can grant EDF, i.e., why these appeals are moot.

Response To PECO's Motion To Dismiss

EDF's claim of a lack of mootness because this Board restrained it from participation lacks any credibility. This Board did not restrain EDF in any fashion, either as to the filing of appeals from DER actions such as issuance of the 1993 permit or EDF's proceeding in this appeal. EDF cannot point to such a Board Order and none exists. Moreover it is clear this Board is not a court of equity and we have so held. Bellefonte Lime Company, Inc. v. DER, 1990 EHB 913; Westinghouse Electric Corp. v. DER, 1990 EHB 515. Since this is true, we lack the power to issue injunctions to restrain EDF or any other party.

Further, the facts before us do not show restraint of EDF. On March 30, 1992, the Board issued an Order that suspended EDF's counsel from

participating in further hearings in this appeal because of his conduct during the merits hearings. That order also stayed proceedings in this appeal and gave EDF the opportunity to secure replacement counsel. Rather than pursuing that option or proceeding *pro se*, EDF appealed the Board's Order to the Commonwealth Court. In an unreported opinion dated December 20, 1993, the Commonwealth Court vacated our Order. It found our Order was too broad because it failed to limit counsel's suspension to the hearing in which his contemptuous conduct occurred as is set forth in 1 Pa. Code §31.27, but rather suspended him as to all hearings in these consolidated appeals. However, nothing in the Board's Order or the Commonwealth Court's subsequent Opinion and Order restrained EDF. Indeed it was the EDF's decision to take the appeal to the Commonwealth Court which removed the record of this appeal proceeding from this Board until it was returned to us in March of this year.[6] Accordingly EDF's argument is factually unsupported, too, and we reject it.

EDF next asserts we may grant relief under "the City of Chester case". No full case name or citation is provided for this contention by EDF. Since PECO cites in its Motion a case with "City of Chester" in its caption, rather than merely ignoring EDF's assertion, we will assume EDF references that opinion. PECO's citation is to Cox v. City of Chester, 76 Pa. Cmwlth. 446, 464 A.2d 613 (1983) ("City of Chester"). Apparently EDF contends that because DER has put some of the same effluent limits in the new permit that

---

[6]Another party to this EHB proceeding had sought to quash EDF's appeal to the Commonwealth Court but that attempt was rejected by the Court. When that occurred, this Board then issued an Order dated January 11, 1993 rescinding the March 30, 1992 Order sanctioning EDF's counsel so that this appeal might proceed to final disposition. However, dismissal of the appeal before the Commonwealth Court based on this January 11, 1993 Order was opposed by EDF, so the Commonwealth Court proceeded to the conclusion reflected in the aforementioned unreported decision. In this regard, therefore, EDF directly contributed to the Commonwealth Court's retention of this appeal from early in 1993 to March of 1994.

were in the expired permit, certain language on mootness in City of Chester allows this appeal to continue. City of Chester says that where a party voluntarily discontinues certain allegedly illegal activity, that does not make a proceeding moot unless there is no reasonable basis to expect a repeat thereof. It then goes on to say that to make this decision, the court must look at the good faith of the announced discontinuance, the effectiveness thereof and the character of the past violation. As this is the holding in City of Chester, it is clear that that opinion is not applicable here. City of Chester does not deal with the scenario before us. Here the permit expired, a new permit was issued and EDF took no appeal therefrom. There is no voluntary discontinuance of conduct by DER or concern over repeat conduct by DER. Here, to the extent we have conduct by DER, it is in two discrete and separate DER actions of issuing permits to PECO in response to PECO's applications. One was issued in 1988 and expired; the next was issued in 1993. Each bore a separate right of appeal for both EDF and PECO. Moreover, DER has not voluntarily discontinued its past conduct. Issuance of the permit to PECO shows that it continues to receive and process permit applications for NPDES permits. DER has not announced that it will discontinue doing so. It could not do so in light of its duties as to water pollution control. City of Chester is thus inapplicable to this appeal and we reject EDF's argument based thereon.

EDF also asserts a lack of notice to it of the permit's issuance as a reason not to dismiss this appeal. The need to give notice to parties of DER subsequent issuance of permits is covered in Grimaud. We need not rehash here all that was said there. Notice by publication in the *Pennsylvania Bulletin* is adequate notice to EDF, so we reject this argument as well.

EDF's next argument is that dealing with the issue of whether this appeal creates an exception to the mootness doctrine which requires consideration of the appeal's merits rather than dismissal. Metro Transportation Company v. Pennsylvania Public Utility Commission, 128 Pa. Cmwlth. 223, 563 A.2d 228 (1989) ("Metro") cited by EDF, states that where a case becomes moot, dismissal is not an absolute. According to the Court there, where there is an issue of a recurring nature, one of important public interest or one capable of repeatedly avoiding review, an otherwise moot case will not be dismissed.

The issues raised by EDF in the instant appeals will not avoid review. At the same time EDF appealed the issuance of the NPDES permit to PECO at Docket No. 88-315-E, it also appealed DER's issuance of NPDES permit 0054909 to the North Penn-North Wales Water Authorities ("NP-NW"). That appeal is assigned Docket No. 88-314-E. It is one of the appeals now consolidated at Docket No. 88-309-E with EDF's appeal of PECO's permit. In the Notices of Appeal filed by EDF in both of these appeals, EDF raises exactly identical issues. Thus, dismissal of the PECO appeal does not prevent review of these issues but merely eliminates their review as to PECO while leaving them still pending before us in the appeal at Docket No. 88-314-E. Moreover, EDF fails to even assert some need to review these issues specifically as to PECO. Both of EDF's appeals challenge the DER issued permits for diversion of water from the Delaware River (the Point Pleasant Diversion) with discharges thereof at two separate locations (one each for NP-NW and PECO). If the issues are identical in both appeals, and by this Order we dismiss one, then the other appeal nevertheless remains before us for

adjudication, and EDF points out no reason to need Board review of these identical issues as to PECO, where Board review thereof will still occur as to NP-NW's permit.

While EDF may argue that by raising the same issues in each appeal this shows the issues are of a recurring nature, this only shows that EDF has raised them twice. More is needed because as pointed out above, the issues will be addressed as to the still pending NP-NW appeal. Unfortunately, from EDF's standpoint, it fails to offer more. Its Response merely recites the exception's existence. Further, we observe that the issues raised in this appeal are clearly not capable of repeatedly avoiding review. This appeal would have been heard no later than 1992 had the issues involving the conduct of EDF's own counsel not arisen. Clearly, such a situation, coupled with the five year duration of this permit, caused the appeal's mootness but is unlikely to be repeated. This is confirmed by EDF's inability to point to any similar situation occurring before this Board since it came into existence in 1972. Thus, while EDF's appeals raise identical issues, we conclude there is no likelihood they will avoid review much less repeatedly avoid review.

We also reject any implicit suggestion in this citation to Metro that the issues are of such public import as to PECO's permit that we cannot review them only in the context of NP-NW's appeal. Certainly EDF suggests none, and it bears the responsibility for its failure to do more than merely announce its own conclusion and cite Metro. See footnote 2 on page 43 in Larry D. Heasley, et al. v. DER, et al., EHB Docket No. 90-311-MJ (Opinion issued May 13, 1994). This is especially true since Commonwealth Court has indicated that consideration of the merits of otherwise moot appeals is only to occur on rare occasions, and the courts even more rarely use the "important public interest" concept to allow this to occur. Strax v. Commonwealth, Department

of Transportation, 138 Pa.Cmwlth. 368, 588 A.2d 87 (1991). We see no reasons to conclude this is such a rare case, and so conclude Metro does not bar dismissal of this appeal.

Finally, EDF's Response asserts "Pennsylvania's Program requires adequate procedures and federal law is preemptive if state law limits remedies to defeat the purpose of the CWA". We assume that the reference to the CWA is a reference to the Clean Water Act even though again EDF does not say so. However, this does not help us understand what EDF is asserting in this sentence and EDF offers no explanation. We interpret this quote to be EDF's assertion that it has federal rights to appeal which come into existence where state actions occur which defeat its challenge to this NPDES permit's issuance by DER. Thus, if we understand EDF's statement correctly, it is asserting that if we dismiss these appeals for mootness, EDF's "CWA" federal rights "preempt" our dismissal and give EDF some federal appeal rights. If EDF is asserting that it has federal appeal rights as to this permit's issuance in the event its appeal is dismissed as moot, no voice is raised against its assertion of those rights. Nevertheless, we are a Board of limited authority according to the Environmental Hearing Board Act, Act of July 13, 1988, P.L. 530, No. 94, as amended, 35 P.S. §7511 *et seq.* We are not empowered by this statute to address such preemptive federal rights and we can find nothing in the Clean Water Act vesting us with such authority. Clearly, we are not a federal forum. Moreover, EDF fails to explain how we could adjudicate those rights since they only come into existence if we dismiss the appeals, i.e., if we end our jurisdiction over these matters.

EDF's Supplemental Brief

We have taken pains to set forth above the procedural history of how EDF Supplemental Brief came to have been received by this Board because the

question we must address before we get to the merits of that Supplemental Brief's contentions is: Should the untimeliness of EDF's filing thereof bar our consideration of the merits of any issues therein?

The procedure for filing of Motions and timely responses thereto with this Board has remained unchanged since long before this appeal's commencement. When EDF's appeal was first filed we issued our standard Pre-Hearing Order No. 1 dated August 19, 1988, which provided in paragraph 8:

> 8. Any party desiring to respond to a petition or motion filed by another party must do so within 20 days of receipt of the petition or motion. 1 Pa. Code §35.179. A party will be deemed to have waived the right to contest any motion or petition to which a timely response has not been filed. The Board will notify the parties that a response may be due.

Here, pursuant to that procedure this Board notified EDF and the other parties that their responses to PECO's Motion were due on April 25, 1994 and EDF gave us its timely Response which we have addressed above.

Importantly, EDF submitted no request to this Board to modify that deadline to allow it to subsequently supplement its timely filing. We underscore this omission because 25 Pa. Code §21.17(a) states:

> The time fixed or the period of time prescribed for the filing of a document required or permitted to be filed under this chapter may be extended by the Board for good cause upon motion before expiration of the time for filing.

Thus, to have this Board's approval and consideration of the merits of this Supplemental Brief EDF had to submit a request to this Board before April 25, 1994 for an extension or postponement of this deadline for the period necessary to prepare and file its Supplemental Brief. EDF failed to do so, and we are not at liberty to ignore this rule and overlook EDF's omission, especially where DER raises that challenge.

The impact of EDF's omission is spelled out in 25 Pa. Code §21.64(d), which provides in relevant part:

> A party failing to respond to a ... motion shall be deemed in default and at the Board's discretion sanctions may be imposed under section 21.124 (relating to sanctions); the sanctions may include treating relevant facts stated in the pleading or motion as admitted.

Reading these sections together compels the conclusion that absent a timely extension of the deadline for filing EDF's response, we cannot consider its untimely Supplement. These Rules are put together for the purpose of establishing a mechanism within which a movant suggests a course of action to this Board by motion and the non-moving party is given a period of time within which to make his or her response before the Board decides the merits of the motion. There is no procedure for unlimited serial supplements to motions or responses because the effect thereof would be the Board's inability to decide the issues raised by the Motion and Response. This appeal constitutes its own example of why this cannot occur. In this appeal the Board had prepared a draft of its opinion on the issues raised by PECO's Motion and EDF's response. Before it could issue same, we were notified of EDF's intention to file its Supplemental Brief and then we received it. In turn, this necessitated allowing EDF's opponents the opportunity to respond thereto, and together they then generated this portion of this opinion while simultaneously lengthening the decision rendering process.

Our conclusion in this regard is not modified by EDF's reasoning as to why it filed this untimely response. EDF asserts its counsel was in a one week trial, on vacation, in a long-standing complex closing and otherwise too busy to address the issue sooner. Even if we were to subscribe to these excuses as valid reasons to ignore our filing deadline (and we do not), they are no justification for EDF's failure to seek a postponement of this deadline

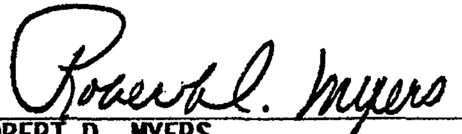
pursuant to Section 21.17 as EDF did with success in this same period of time with regard to its status report deadline. EDF also asserts its counsel's assistants were no longer available to him, so he was required to do the reflective legal theorizing on this appeal (with its supportive research) on his own. While this may also be true, it again provides no justification for the Board to ignore its own rules and we decline to do so. In drawing this conclusion, we point out that we have not treated EDF any differently than others where this issue of untimely filings is raised. For example, see Al Hamilton Contracting Company, Inc. v. DER, EHB Docket No. 92-471-E (Adjudication issued __ __ 1994)[7]

Accordingly, we enter the following Order.

O R D E R

AND NOW, this 9th day of June, 1994, it is ordered that PECO's Motion To Dismiss Appeals For Mootness is granted. It is ordered that the appeals at Docket No. 88-309-E and 88-315-E are unconsolidated from the remaining appeals at Docket Nos. 88-312-E and 88-314-E which will remain consolidated at Docket No. 88-312-E, and the appeals at 88-309-E and 88-315-E are dismissed.

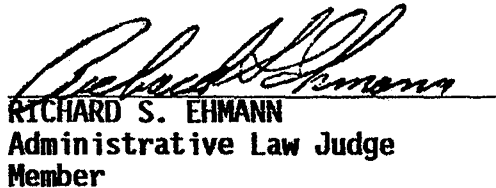
ENVIRONMENTAL HEARING BOARD



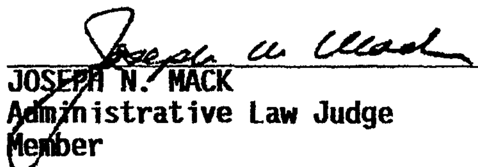
ROBERT D. MYERS
Administrative Law Judge
Member

---

[7]In reaching this conclusion, we do not address DER's argument that EDF cannot raise this issue now because it failed to assert it in its Notice Of Appeal. Had we reached it, we would have sustained DER on this ground because EDF failed to raise the "Section 306 and 511 of the Clean Water Act" argument there which is raised in the Supplement and thus EDF is barred from raising it here. Pennsylvania Game Commission v. Commonwealth, DER, 97 Pa.Cmwlth. 78, 509 A.2d 877 (1986), *aff'd* 521 Pa. 121, 555 A.2d 812 (1989).



RICHARD S. EHMANN
Administrative Law Judge
Member



JOSEPH N. MACK
Administrative Law Judge
Member

Board Chairman Maxine Woelfling did not participate in this decision.

DATED: June 9, 1994

cc: **Bureau of Litigation**
Library: Brenda Houck
For the Commonwealth, DER:
Martha Blasberg, Esq.
Southeastern Region
Counsel for Environmental Organizations:
Robert J. Sugarman, Esq.
Philadelphia, PA
For Philadelphia Electric Company:
Jeffrey S. Saltz, Esq.
William G. Frey, Esq.
Philadelphia, PA
For NP-NW Water Authority:
Jeremiah J. Cardamone, Esq.
Ann Thornburg Weiss, Esq.
Fort Washington, PA

ar/med

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
2nd FLOOR — MARKET STREET STATE OFFICE BUILDING
400 MARKET STREET, P.O. BOX 8457
HARRISBURG, PA 17105-8457
717-787-3483
TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOARD

STEPHEN HAYDU	:	
	:	
v.	:	EHB Docket No. 92-154-MJ
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
and PBS COALS CO., INC., Permittee	:	Issued: June 15, 1994

ADJUDICATION

By Joseph N. Mack, Member

Synopsis

An appeal from the Department of Environmental Resources' ("Department") Authorization to Mine is dismissed. The appellant is a third party challenging the Authorization because he believes the mine operator has not provided an adequate replacement water supply pursuant to §4.2(f) of the Surface Mining Conservation and Reclamation Act, the Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.4b(f)(1). To be an adequate replacement, the new water supply must be of adequate quantity and quality; must not be unreliable; must not require excessive maintenance; and must provide the person whose supply is being replaced with at least as much control as his previous supply. A replacement water supply is not unreliable merely because it is located above two abandoned deep mines if there is little or no risk that subsidence in those mines will affect its ability to function as a permanent water supply.

An appellant is deemed to have waived objections not raised in his notice of appeal unless he reserves the right to later raise objections that are determined through discovery and provides good cause for his delay in raising those objections.

Introduction

This matter comes before us on Stephen Haydu's (Haydu) April 13, 1992, notice of appeal from the Department's issuance of Authorization to Mine Permit No. 1-00222-56803089-04 (Bonding Increment No. 04 or BI-04) to PBS Coals Co., Inc. (PBS) on March 16, 1992, permitting PBS to surface mine 217.2 of the 268 acres encompassed by Surface Mining Permit No. 56803089, also known as Job 24, in Shade Township, Somerset County. The Department, in issuing BI-04, had approved PBS' proposal to replace Haydu's water supply wells with a single well located on land owned by PBS. Haydu objects to the Department's issuance of BI-04 because he believes PBS has not provided a reliable replacement water supply.

On May 1, 1992, PBS filed a motion to dismiss or in the alternative to strike a portion of Haydu's appeal, which we denied by an opinion and order dated May 29, 1992. See Haydu v. DER and PBS Coals Co., 1992 EHB 682. PBS then filed a motion *in limine* on November 2, 1992. In our November 12, 1992 order, we granted PBS' motion in part and prohibited Haydu from introducing any testimony or evidence concerning the possibility of expanding his existing water supplies.

A hearing on the merits was held on November 17, 18, and 19, 1992 before Board Member Joseph N. Mack in Indiana, Pennsylvania. Haydu filed a post-hearing brief on January 25, 1993, while PBS and the Department filed post-hearing briefs on February 22, 1993. Any issue not raised in the

post-hearing briefs is deemed to be waived. Lucky Strike Coal Co. and Louis J. Beltrami v. Commonwealth, Department of Environmental Resources, 119 Pa. Cmwlth. 440, ___, 547 A.2d 447, 449 (1988).

The record in this matter consists of a transcript of 410 pages, 45 exhibits, and a joint stipulation of facts. After a full and complete review of this record, we make the following findings of fact.

FINDINGS OF FACT

1. Appellant is Stephen Haydu, an individual who resides in Shade Township, Somerset County, with an address of R. D. 1, Box 324, Central City, Pennsylvania (Notice of Appeal).

2. Appellee is the Department, the agency of the Commonwealth with the duty and authority to administer and enforce the Surface Mining Act; the Coal Refuse Disposal Control Act, the Act of September 24, 1968, P.L. 1040, as amended, 52 P.S. §30.51 *et seq.*; the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 *et seq.*; Section 1917-A of the Administrative Code of 1929, the Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-17; and the rules and regulations promulgated thereunder.

3. Permittee is PBS Coals Co., Inc., a Pennsylvania corporation with an address of P. O. Box 260, Friedens, Pennsylvania, and the holder of Surface Mining Permit No. 56803089 in Shade Township, Somerset County, which authorizes it to conduct surface coal mining at a site also known as Job 24 (J. Stip. 3, 4).[1]

---

[1] The parties' joint stipulation of facts will be referred to as "J. Stip. __", Haydu's exhibits as "Exh. H-__", the Department's exhibits as "Exh. D-__", and PBS' exhibits as "Exh. P-__".

4. The Department originally issued Mine Drainage Permit No. 56800109 (MDP 56800109) to PBS in 1982 (Exh. P-1).

5. MDP 56800109 was renewed in October 1984 as Surface Mining Permit No. 56803089 (SMP 56803089) (Exh. P-2).

6. SMP 56803089 was renewed in May 1990 (J. Stip. 6; Exh. P-3).

7. As renewed in 1990, SMP 56803089 covered 268 acres in Shade Township, Somerset County (Exh. P-3).

8. Pursuant to Condition 2 of SMP 56803089, PBS may only mine those areas of the permit authorized for mining by the Department and shown on the bond approval and mining authorization maps contained in Part C of the permit (Exh. P-3).

9. When the Department renewed SMP 56803089 in 1990, it added Special Condition No. 12, which states:

> No area west of township road T-792 shall be bonded until the permittee has demonstrated to the satisfaction of the Department that a suitable replacement exists for private water supplies that may be affected by mining. Any request (bonding increment) by the permittee to bond area west of T-792 must be accompanied by a complete analysis of the potential impacts of the proposed bonding increment on downgradient water supplies and a demonstration that a suitable replacement exists for supplies which may be impacted by mining.

(J. Stip. 8; Exh. P-3).

10. PBS applied for authorization to mine a total of 217.2 acres of SMP 56803089 on September 9, 1991 (J. Stip. 7).

11. Before the Department would authorize PBS to mine this area, it required PBS to replace the water supplies on properties owned by Haydu, Paul Bateman, and William Kalaha (J. Stip. 11).

12. The replacement water supplies were required to be equal or superior in quality and quantity to Haydu's, Bateman's, and Kalaha's existing supplies, for the purposes they served (J. Stip. 11).

13. Haydu currently uses two water supply wells: SP-12 to supply water to his house; and SP-15 to supply water to his barn (J. Stip. 13; T1. 19, 20).[2]

14. PBS proposed to replace Haydu's water supply with a well designated RW-63 and located on property owned by PBS (J. Stip. 15 and 19; T2. 102, 134).

15. RW-63 is 83 feet deep and constructed with steel casing, PVC pipe, PVC screening, a sand pack, and bentonite seals (T2. 155-157; Exh. P-7).

16. Rw-63 is drilled into an aquifer above the E, or Upper Freeport, coal seam (E-seam aquifer) (T2. 187-188; T3. 9-10; Exhs. H-5, P-6).

17. The E-seam is approximately 85 feet beneath the surface of RW-63 (Exhs. H-5, P-6).

18. RW-63 was designed and built to stabilize it from outside forces, including deep mine subsidence (T3. 37-38).

19. RW-63 was constructed for long-term longevity because its four inch casing from top to bottom is designed to prevent any outside forces from sealing off the well bore (T2. 158).

20. A typical private, home water supply well is an open bore hole with approximately 20 feet of surface casing and lacks a gravel pack, a well screen, and a bentonite seal (T2. 122).

---

[2] References to the transcript will be as follows: "T1. __" to testimony taken on November 17, 1992; "T2. __" to November 18, 1992; and "T3. __" to November 19, 1992.

21. Haydu's existing wells used an open hole type of construction, which uses the well bore itself, instead of PVC pipe or well screening, to hold the well in place (T2. 157-158).

22. PBS granted Haydu an easement over a portion of its property to give Haydu access to the well, pipes, and other associated installations (J. Stip. 31; T2. 136; Exh. D-7).

23. Haydu's easement over PBS' land was filed with the Recorder of Deeds in Somerset County (T2. 136).

24. PBS transferred to Haydu all ownership and title to the replacement well, pump, and distribution system (J. Stip. 29; T2. 136; Exh. D-8).

25. The annual operation and maintenance costs of Haydu's existing wells total $409 (J. Stip. 24; Exh. D-10).

26. The annual operation and maintenance costs of RW-63 total $440 (J. Stip. 24; Exh. D-10).

27. PBS entered into a trust agreement with United States National Bank to provide the funds to compensate Haydu for the additional operation and maintenance costs of RW-63 (J. Stip. 25 and 26; T2. 137, 138; Exh. D-11).

28. Under the terms of the trust, the corpus of the trust may be increased to account for greater expenses incurred by Haydu (J. Stip. 27).

29. Paragraph number 2 of the trust agreement reads as follows:

> This Trust is for the sole purpose of providing that the present and future owners of the benefited property shall not have any maintenance (which as used in this Agreement shall mean ordinary maintenance, repair and replacement of the water system) or operation obligations or responsibility for the water system in excess of the cost of maintenance and operation of the existing water

> supply (including any water treatment systems) for the benefited property under the same use by owner...
>
> (Exh. C-11)

30. RW-63 is equipped with a locking cap to prevent damage from vandalism (J. Stip. 32; Exh. D-9).

31. Based upon 24 hour pump tests, the yield of RW-63 was calculated as 27.5 gpm, the yield of SP-12 was calculated as 5.2 gpm, and the yield of SP-15 was calculated as 3.6 gpm (J. Stip. 39; T2. 166-167; Exhs. P-15, P-24, and P-25).

32. The yield of RW-63 is greater than the combined yields of SP-12 and SP-15 (J. Stip. 22; T2. 167; Exhs. P-15, P-24, and P-25).

33. The quality of water from RW-63 was analyzed at least 21 times between July 29, 1991, and August 6, 1992 (Exhs. D-3 and P-8).

34. The quality of water from SP-12 and SP-15 was analyzed at least seven times and four times, respectively, between September 4, 1991, and January 28, 1992 (Exh. D-3).

35. The quality of water from RW-63 is comparable to the quality of the water from Haydu's existing supplies (T2. 104, 158).

36. Special Condition No. 18 to SMP 56803089 restricts surface mining activities within the recharge area for RW-63 (T2. 110; Exh. P-39).

37. The Department issued Authorization to Mine Permit No. 1-00222-56803089-04, also known as Bonding Increment No. 4 or BI-04, to PBS on March 16, 1992 (J. Stip. 38; Exh. D-2)

38. RW-63 is located above abandoned deep mines in the Upper Kittanning or C′ coal seam (the C′ seam mine) and the Lower Kittanning or B coal seam (the B seam mine) (T1. 135; Exh. H-5).

39. The C′ seam mine and B seam mine are located approximately 200 and 300 feet, respectively, beneath the surface in the area of RW-63 (Exh. P-6).

40. When the Department issued BI-04, there were no deep mines beneath either of Haydu's wells (T1. 170).

41. Subsidence is the failure of material overlying a mine and, from an engineering standpoint, can be either induced or prevented (T3. 80).[3]

42. Subsidence can be prevented over the long term by leaving 50 percent or more of the coal in place or by achieving a safety factor of two or greater on the pillars (T3. 80).

43. Farley Wood is a mining engineer and the Vice President of Engineering at Rox Coal, Inc., PBS' sister company (T3. 77-78).

44. The parties stipulated to Mr. Wood testifying as an expert in mining engineering (J. Stip. 3).

45. For the purpose of determining the stability of the C′ seam mine and the B seam mine, Mr. Wood used the standards set forth in the Department's regulations concerning mine subsidence at 25 Pa. Code §89.143(b)(3)(i) (T3. 95-96).

46. The support area in a deep mine for a point on the ground is determined by projecting a 15 degree angle of draw from the surface to the coal seam, beginning 15 feet from either side of the point (T3. 95).

---

[3] Although not entirely clear from the record, when Mr. Wood testified concerning subsidence "prevention", we understood him to be discussing whether the effects of subsidence will be felt at the surface or at areas somewhat removed from the mined-out coal seam.

47. Mr. Wood developed a support core beneath RW-63 by projecting a 15 degree angle of draw from a 30 foot circle, centered on RW-63, to the deep mines below (T3. 95-96; Exh. P-6).

48. The support area in the C′ seam mine is a circle with a radius of 68 feet and in the B seam mine is a circle with a radius of 95 feet (T3. 96; Exh. P-6).

49. Mr. Wood used maps of the C′ seam mine and B seam mine to determine the extent of mining beneath RW-63 (T3. 86; Exhs. P-4A,-4B,-5A, and -5B).

50. The evidence demonstrates that the map of the B seam mine is accurate (T3. 132).

51. There is no evidence concerning the accuracy of the maps of the C′ seam mine.

52. Within the support area of the C′ seam mine, 44.33% of the coal was extracted, and within the support area of the B seam mine, 39.41% of the coal was extracted (T3. 96-97).

53. The pillar sizing formula is a calculation to determine the load bearing capacity of a pillar of coal in relationship to the area supported by that pillar, and is a function of the depth of the overlying cover, the coal seam thickness, and the dimensions of the pillar (T3. 97-98).

54. In the area beneath RW-63, the B seam is 3.7 feet thick and the C′ seam is 3.1 feet (T3. 95).

55. The safety factor in the C′ seam mine is 3.2 and in the B seam mine is 8.4 (T3. 98).

56. A safety factor of two is intended to prevent the surface manifestations of subsidence from ever occurring (T3. 151-152).

57. The thickness of the coal seam will affect the safety factor (T3. 135-136).

58. The thickness of the B seam can change rapidly over short distances (T3. 134).

59. Doubling the thickness of the B seam in the safety factor calculation will reduce the safety factor of the B seam mine from 8.4 to 5.5-6.0 (T3. 136).

60. The thickness of the C′ seam tends to remain around three feet (T3. 137).

61. Subsidence is likely to occur in a deep mine even if the percentage of coal extraction is fairly low, because a deep mine is a vacuum underground that is likely to be filled by falling rock (T1. 177).

62. It is highly unlikely that the effects of subsidence in the C′ seam mine and the B seam mine will ever reach the surface or other areas remotely removed from the mines (T3. 99).

63. Subsidence can also involve the failure of the roof material immediately above the void (T3. 80, 112).

64. Even if a safety factor of two is achieved, it is still possible for the immediate roof material to fall into the void (T3. 81-82).

65. The failure of immediate roof material will not cause subsidence effects at the surface or at areas remotely removed from the seam (T3. 111-112).

66. Failure of the roof material in the C′ seam mine is not likely to extend upward more than 13 or 14 feet from the roof of the mine (T3. 82).

67. A pressure ellipse exists in the strata overlying a void, such as an entry in a coal mine (T3. 124).

68. Materials in the bottom of the ellipse, directly above the void, are in tension and will tend to fall into the void, while materials higher in the ellipse are in compression and will tend to remain in place (T3. 123-124, 126).

69. The height of a pressure ellipse above a deep mine is determined by the width of the mine's entries (T3. 135).

70. The height of the pressure ellipse is approximately two times the width of the entry (T3. 102).

71. An entry is the area from where the coal has been removed (T3. 116).

72. The size of a pressure ellipse does not increase over time or as a result of material in tension falling into the void (T3. 125).

73. The thickness of the coal seam does not affect the height of the pressure ellipse (T3. 135-136).

74. Entries in the C' seam mine generally range between 28 and 30 feet wide (T3. 105).

75. Entries in the B seam mine are generally narrower than in the C' seam mine (T3. 105).

76. At most, no more than 60 feet of material above the C' seam mine should subside and no more than 50 feet of material above the B seam mine should subside (T3. 104-105).

77. Observation well OW-8 is located approximately 500 feet to the northwest of RW-63 (Exh. H-1).

78. In drilling observation well OW-8, the driller noted that a void existed between 76 and 76.5 feet below the surface (T1. 130; Exh. H-4).

79. Where the void exists in OW-8, groundwater was flowing at a rate of 20 gpm (Tl. 141; Exh. H-4).

80. Robert Deason was a senior hydrogeologist with PBS when it applied for BI-04 (Tl. 107).

81. The parties stipulated to Mr. Deason testifying as an expert in hydrogeology (J. Stip. 2).

82. Mr. Deason concluded that the void in OW-8 was an area where limestone had dissolved or where a gooey mud had been washed out (Tl. 133).

83. Mr. Deason testified that subsidence underground sometimes causes voids in layers of rock above the subsidence, but further explained that he did not believe the void in OW-8 was related to deep mine subsidence because any subsidence would have occurred over 100 feet below it (Tl. 133-134).

84. Teresa Kaktins is a hydrogeologist and owns her own consulting firm (Tl. 154).

85. The parties stipulated to Ms. Kaktins testifying as an expert in hydrogeology (J. Stip. 2).

86. Ms. Kaktins concluded that the void in OW-8 was caused by partial subsidence in the C′ seam mine or B seam mine (T2. 8).

87. Ms. Kaktins does not believe the void in OW-8 was caused by dissolution of limestone because none of the limestones in other wells showed any voids; there is no limestone noted at that location in the drill log for OW-8; and freshwater limestones are hard to completely dissolve because they are high in clay (T2. 7-8).

88. Neither Ms. Kaktins' nor Mr. Deason's testimony is more compelling than the other's since neither has demonstrated that he or she possesses superior knowledge or experience.

89. The void encountered in OW-8 was caused by either partial subsidence or by dissolved limestone or gooey mud (T1. 133; T2. 8).

90. Mr. Wood used the drill log for RW-64 and the highwall on Job 24 to determine the lithology beneath RW-63 (T3. 85).

91. Strata noted in the drill log of RW-64 that will protect the E seam aquifer include the following: gray clay above and below the E seam; various layers of gray shale between the E and D seams; gray shale beneath the D seam; a 41 foot thick sandstone layer between the D seam and C' seam mine; and gray shale immediately above the C' seam mine (T2. 187-193; Exhs. P-64 and H-5).

92. RW-64 is located approximately 1000 feet southwest of RW-63 (T2. 184; Exh. H-1).

93. The E coal seam is underlain by plastic clay and significant shale layers that would tend to act as an aquitard in the event of deep mine subsidence (T1. 152-153).

94. Gray clay is an effective aquitard that will swell to heal fractures in strata caused by subsidence (T2. 188).

95. The clay strata that act as aquitards beneath RW-63 are not in tension and will not fall into any void created by subsidence (T3. 126).

96. Gray shale is also an effective aquitard, though not as effective as gray clay, and will react to and mend fractures caused by subsidence below (T2. 188, 189).

97. Shales act as a good fill material and can stop subsidence as they fill a void (T3. 84).

98. When shale subsides into a void, it swells by 30%, or, in other words, occupies 30% more volume than it did prior to subsidence (T3. 82).

99. Shales that have swelled, and thereby fill a mine void, are also self-supporting (T3. 83).

100. The D, or Lower Freeport, coal seam is located approximately 146 feet beneath the surface at RW-63 (Exhs. H-5, P-6).

101. Sandstones are much stronger than shales and have the ability to bridge an area of subsidence and stop it from spreading further towards the surface (T3. 83-84).

102. A sandstone layer may fail along a fracture trace and not bridge subsidence into a void below (T3. 117).

103. A fracture is more likely to affect the stability of material overlying a mine void if it is oriented along the mine entries (T3. 121).

104. RW-63, RW-65, and RW-66 are located on a fracture trace (T1. 109-110; Exh. H-1).

105. The fracture trace is generally oriented perpendicular to the deep mine entries, an angle that is least likely to affect stability (T3. 121-123)

106. There is no evidence that the fracture trace extends beneath the E seam because the aquifer acts as a confined aquifer (T3. 23-25).

107. Fractures have a more detrimental effect on materials in tension than on materials in compression because fractures are forced closed by materials in compression (T3. 124).

108. There is no evidence that the sandstone encountered in RW-64 is affected by the fracture trace on which RW-63 is located (T3. 117-118).

109. Ms. Kaktins testified that the clays above and below the E seam may not protect the E seam aquifer, depending on the extent of vertical displacement and the characteristics of the innerburden between the C′ seam mine and the E seam (T1. 176). However, Ms. Kaktins offered no evidence on the extent of vertical displacement or on the characteristics of the innerburden between the C′ seam mine and the E seam.

110. Subsidence in the C′ or B mines will not reach the bottom of the E seam (T3. 102-103).

111. Subsidence in the C′ and B mines will not cause any loss of water in the E seam aquifer (T3. 108).

DISCUSSION

As a third party appellant, Haydu bears the burden of proving by a preponderance of the evidence that the Department abused its discretion in issuing BI-04 to PBS. See, 25 Pa. Code §21.101(c)(3); George M. Lucchino v. DER and Robinson Coal Co., EHB Docket No. 91-117-MJ (Adjudication issued March 16, 1994). To satisfy this burden, Haydu attempts to show that PBS failed to provide him with an adequate replacement water supply as required by §4.2(f) of the Surface Mining Act, 52 P.S. §1396.4b(f)(1), and Special Condition No. 12 of SMP 56803089.

Under §4.2(f) of the Surface Mining Act:

> Any surface mining operator who affects a public or private water supply by contamination or diminution shall 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...

52 P.S. §1396.4b(f)(1).[4] Special Condition No. 12 was added to SMP 56803089 to implement the requirements of §4.2(f). It denied PBS authorization to mine the area covered by BI-04 until PBS proved it could provide suitable replacements for downgradient private water supplies that would be affected by such mining.

Our first opportunity to review the standards of §4.2(f) came in Gioia Coal Co. v. DER, 1986 EHB 82, in which the appellant challenged a Department order requiring it to replace a private water supply. In dismissing the appeal, we found that in order to satisfy §4.2(f), the replacement supply must have an adequate quantity and quality; must not be unreliable; must not require excessive maintenance; and must provide the person whose supply is affected with as much control as he exercised over his previous supply. 1986 EHB at 91-95. We reiterated these standards in Buffy and Landis v. DER and PBS Coals Co., 1990 EHB 1665, a case similar to the one currently before us, in which the appellants challenged the Department's approval of a bonding increment because they believed replacement water supplies were inadequate. We most recently applied the Gioia test in Carlson Mining v. DER, 1992 EHB 1401, aff'd, ___ Pa. Cmwlth. ___, ___ A.2d ___ (No. 2083 C.D. 1993 Pa. Cmwlth. April 4, 1994).

PBS has proposed to replace Haydu's two wells, SP-12 and SP-15, with a replacement well, RW-63, that is located on land owned by PBS. Haydu admits that RW-63 provides more water than both of his existing wells combined, and that the water is of better quality. He contends, however, that RW-63 is not

---

[4] This subsection has since been amended by the Act of December 18, 1992, and now applies to both "[a]ny surface mining operator" and "any person engaged in government-financed reclamation". See, 52 P.S. §1396.4b(f)(1).

an adequate replacement because it is less reliable than SP-12 and SP-15, in violation of the standards first developed in Gioia, *supra*. Haydu considers RW-63 to be less reliable because it is located above two abandoned deep mines and because it is connected by a fracture trace to two other replacement wells, designated RW-65 and RW-66.

Before we reach the merits of Haydu's appeal, we must first address PBS' argument that Haydu failed to raise in his notice of appeal the issue of RW-63's connection to the other two replacement wells, and that he has thereby waived his right to raise this issue at this time. Our rules of procedure expressly state that "[a]ny objection not raised in the appeal shall be deemed waived." 25 Pa. Code §21.51(e); Commonwealth, Pennsylvania Game Commission v. Commonwealth, Department of Environmental Resources, 97 Pa. Cmwlth. 78, 509 A.2d 877 (1986), aff'd on other grounds, 521 Pa. 121, 555 A.2d 812 (1989). Recognizing that under the Commonwealth Court's decision in Croner, Inc. v. Commonwealth, Department of Environmental Resources, 139 Pa. Cmwlth. 43, ___, 589 A.2d 1183, 1187 (1991), we must broadly construe an appellant's grounds for appeal, we still find no evidence that Haydu objected to RW-63 because it was connected to RW-65 and RW-66. Without reproducing the entire contents of Haydu's notice of appeal, we note that the closest it comes to mentioning RW-63's connection to anything is paragraph 3(A)(3)(a), which states:

> The expectations of continuation from the replacement well is not equivalent to the existing wells in quality, in that...the well is located in a wetland area and drawn [sic] down of the well represents a substantial risk of contamination by surface water which was not present in the existing well.

This, however, cannot be read to raise the issue in question. Moreover, Haydu admits in his post-hearing brief that "the specific facts of cross connection

and surface infiltration were not stated in the Notice of Appeal..." (Haydu Post-Hearing Brief, p. 15)

Haydu's failure to raise this issue in his notice of appeal is not necessarily dispositive, however, since he reserved the right to amend his appeal to include objections determined through discovery. Haydu, 1992 EHB at 683-684. We have already held that this reservation preserved Haydu's ability to add additional objections to his notice of appeal beyond the Board's 30 day jurisdictional limit. *Id.* Looking through Haydu's pre-hearing filings, we note that he never moved to amend his notice of appeal or otherwise included this issue in his pre-hearing memorandum. Haydu instead raised the issue of RW-63's connection to RW-65 and RW-66 for the first time at the merits hearing. See, T2. 12-21 (testimony of Teresa Kaktins), T2. 86-96 (testimony of Timothy Kania).

Simply because Haydu reserved the right to amend his notice of appeal does not mean that it will automatically be amended the first time he raises the issue of RW-63's connection with RW-65 and RW-66. Under the Board's rules, an appeal may be amended only upon a showing of good cause. 25 Pa. Code §21.51(e); Game Commission, 97 Pa. Cmwlth. at __, 509 A.2d at 885. Haydu, therefore, was required to seek amendment and while doing so show good cause for his delay in raising this issue. See, Envirotrol, Inc. v. DER, 1992 EHB 685, 688. In his post-hearing brief, Haydu offers no explanation for his delay in raising this issue, but instead contends it was raised in the notice of appeal, a proposition we have already rejected. Without an attempt to amend including a showing of good cause, Haydu has waived the issue of RW-63's unreliability due to its connection with RW-65 and RW-66. See, Envirotrol, 1992 EHB at 689. See also, C & K Coal Co. v. DER, 1992 EHB 1261, 1292-1293

(the Board will not allow a party to raise an issue for the first time at the merits hearing), Midway Sewerage Authority v. DER, 1990 EHB 1554, 1555-1556.

As we explained above, Haydu has challenged the Department's issuance of BI-04 because he believes replacement well RW-63 is unreliable, in violation of §4.2(f) of the Surface Mining Act, 52 P.S. §1396.4b(f)(1), and the standards we announced in Gioia, *supra*. Since we have already found Haydu waived his argument that RW-63 is unreliable because it is connected by a fracture trace to RW-65 and RW-66, we must only determine whether Haydu has shown that RW-63 is unreliable as a result of its location above two abandoned deep mines.[5]

Haydu does not contend that RW-63 is an unreliable water supply, but instead that RW-63 is less reliable, given its location above two abandoned deep mines, than his previous water supply wells, SP-12 and SP-15, which are not located above deep mines. In making this argument, Haydu urges the Board to adopt what he calls a comparative standard of reliability, as opposed to a threshold standard. In other words, Haydu believes we should compare the reliability of RW-63 with the reliability of SP-12 and SP-15, instead of merely determining whether RW-63 is a reliable water supply. If we compare the reliability of the various wells, Haydu insists we will find that RW-63 is less reliable because it faces a risk from subsidence that SP-12 and SP-15 do not.

In reaching our decision here, we do not decide which standard of reliability is correct, since Haydu has failed to show that RW-63 is either

---

[5] While Haydu raised many other issues in his notice of appeal, he abandoned them by not addressing them in his post-hearing brief. Lucky Strike, *supra*.

unreliable or less reliable than SP-12 and SP-15 as a result of its location above two abandoned deep mines. There is no evidence before us that RW-63's ability to function as a permanent water supply is adversely affected by the risk of subsidence in the C′ seam mine or B seam mine.

In determining the risk to RW-63 from subsidence in the C′ seam mine or B seam mine, we begin with the fact that some subsidence will occur in those mines.[6] Subsidence is inevitable because the removal of coal creates a pressure ellipse in the overlying strata (T3. 102, 104). Materials lower in the ellipse, and closer to the mine, are in tension and will tend to fall into the mine, while materials higher in the ellipse are in compression and will tend to remain in place (T3. 123-124). The question raised by this appeal is whether the subsidence that will inevitably occur in the C′ seam mine and the B seam mine will adversely affect RW-63 as a permanent water supply.

Although subsidence in the C′ seam mine and the B seam mine is inevitable, it is possible to limit the extent of that subsidence, as well as its effects (T3. 80).[7] To control mine subsidence and its effects, a mine

---

[6] Subsidence was defined by Farley Wood, a mining engineer and the Vice President of Mining for PBS′ sister company, Rox Coal, as the failure of material overlying a mine (T3. 80).

[7] The parties referred throughout the hearing to preventing "subsidence" forever. We understand the parties′ references to "subsidence" in this context to mean that it is possible to prevent the effects of subsidence from reaching the surface or areas remotely removed from the mine. <u>See also</u>, §4 of the Bituminous Mine Subsidence and Land Conservation Act, the Act of April 27, 1966, P.L. 31, as amended, 52 P.S. §1406.4; 25 Pa. Code §89.143(b) (requirements for preventing subsidence damage to certain structures).

operator can either leave more than 50% of the coal in place or achieve a safety factor of two on the remaining support pillars (T3. 80, 151-152).[8] Based on maps indicating the extent of mining in the C′ and B seams beneath RW-63, the evidence shows that only 44.33% of the coal was removed from the C′ seam and that even less, only 39.41% of the coal, was removed from the B seam (T3. 96-97).[9] Using these same maps, the safety factor was calculated as 3.2 for the pillars remaining in the C′ seam mine and 8.4 in the B seam mine (T3. 98).[10] Because less than 50% of the coal has been removed from the C′ seam mine and the B seam mine and the pillars of coal remaining in those mines have safety factors in excess of two, it is highly unlikely that the effects of subsidence in those mines will ever reach the surface or even areas remotely removed from them (T3. 99).

Even though extensive subsidence is unlikely, we must nevertheless determine whether RW-63 will be adversely affected by the subsidence that does

---

[8] The safety factor is calculated by the pillar sizing formula, which determines the load bearing capacity of a pillar of coal in relationship to the area supported by that pillar. It is a function of the depth of the overlying cover, the coal seam thickness, and the dimensions of the pillar (T3. 97-98).

[9] The percentage of coal extraction was determined for the support areas in the C′ seam mine and the B seam mine beneath RW-63, which was calculated by projecting a 15 degree angle of draw from a 30 foot circle that was centered on RW-63 to the coal seams below (T3. 95-96; Exh. P-6) The support area beneath RW-63 is a 136 foot circle in the C′ seam mine and a slightly larger, 190 foot, circle in the B seam mine (T3. 96; Exh. P-6).

[10] The safety factor in the B seam mine assumed a coal seam thickness of 3.7 feet (T3. 95). Because the thickness of the B seam can vary rapidly over short distances, the safety factor was also calculated as 5-1/2 or 6 for a seam thickness of 7.4 feet (T3. 136). There was no need to calculate alternate safety factors for the C′ seam mine since the thickness of the C′ seam tends to remain around three feet (T3. 137).

eventually occur. In some situations, the only subsidence that will occur is a failure of the roof material immediately overlying the mine (roof subsidence). Such subsidence is generally very limited in nature and will not spread beyond the immediate roof (T3. 82, 111-112).[11] In the C′ seam mine, if the roof were to fall the subsidence would not extend upward more than 13 or 14 feet (T3. 82). At that point, the shales that compose the roof will have swelled to approximately 130% of their original volume, allowing them to not only occupy the mine void but also fully support the overlying strata (T3. 83).[12] Since the overlying strata is fully supported, no other overlying material will subside. There is no evidence in the record concerning the amount of roof subsidence expected in the B mine.

Testimony was also taken concerning more extensive subsidence in the C′ seam mine and the B seam mine.[13] To determine the most likely maximum extent of subsidence, Mr. Wood used the rule of thumb that subsidence will extend upward to a height above the mine that is roughly two times the width of the entry beneath it (T3. 102). Because the entries in the C′ seam mine are generally 28 to 30 feet wide and even narrower in the B seam mine (T3.

---

[11] Mr. Wood, in fact, testified that roof subsidence is subsidence only in a technical sense of the word because its effects are so limited (T3. 111-112).

[12] The term "swell" means that a layer of shale above a mine will occupy more space as a pile of rubble on the mine floor than it did as a layer of strata (T3. 82).

[13] In considering more extensive subsidence, the parties only referred to "subsidence" in the C′ seam mine and the B seam mine. Since the parties never bothered to explain what they meant when they discussed the effects of "subsidence" (as opposed to a failure of the immediate roof material/roof subsidence), we take it to mean the most probable maximum amount of subsidence.

105), there should be no more than 60 feet of subsidence above the C′ seam mine and no more than 50 feet above the B seam mine (T3. 104-105).

The replacement well RW-63 is drilled into an aquifer above the Upper Freeport or "E" seam of coal (E seam aquifer) (T2. 187-188, T3. 9-10; Exhs. H-5, P-6). The bottom of RW-63 is approximately 83 feet deep, while the E seam is several feet beneath that (Exhs. H-5, P-6). The C′ seam mine and the B seam mine, on the other hand, are roughly 200 and 300 feet, respectively, beneath the surface (T3. 113-114; Exh. P-6). There is no evidence in the record, therefore, that subsidence in the C′ seam mine and the B seam mine will ever reach the E seam or the bottom of RW-63 (T3. 102-103).

Even though the E seam will not actually subside, the parties also introduced evidence concerning the effects of subsidence in the C′ seam mine and the B seam mine on the E seam aquifer and RW-63's ability to function as a permanent water supply. Haydu's expert hydrogeologist, Teresa Kaktins, testified that subsidence in the C′ seam mine and the B seam mine will fracture the rock containing the E seam aquifer and cause a long-term loss of water there (T1. 94-95). Such a result would clearly indicate that subsidence in the C′ seam mine and the B seam mine will adversely affect RW-63. There is, however, no evidence in the record to support her assertion. The evidence clearly shows, in fact, that subsidence in the C′ seam mine and the B seam mine will not result in a long-term loss of water in the E seam aquifer.

Strata noted in the drill log for replacement well RW-64, which is approximately 1000 feet southwest of RW-63 (T2. 184), indicate the E seam aquifer is well-protected from the effects of deep mine subsidence. Gray

clays directly above and below the E seam are an effective aquitard[14] and have the ability to heal fractures that may result from deep mine subsidence (T1. 152-153, T2. 187, 188; Exhs. P-64, H-5). Furthermore, the gray shales and thick layer of sandstone between the E seam and the C′ seam mine, while less able than gray clays to heal fractures, can stop subsidence in the C′ seam mine and the B seam mine from expanding (T2. 188, 192). Gray shales that fall into subsided areas not only swell to fill voids caused by subsidence, but also support the overlying strata (T3. 82-84). Sandstones, on the other hand, are extremely strong and can physically bridge a void caused by subsidence, preventing overlying strata from falling in (T3. 83-84).

Although normally extremely strong, a fractured sandstone layer may fail to bridge subsidence (T3. 117). Fractures likewise affect the stability of shales and clays in tension (T3. 124). Haydu points to the fracture trace on which RW-63, RW-65, and RW-66 are located (T1. 109-110; Exh. H-1), and argues that it extends to the C′ seam mine and affects the stability and integrity of the strata protecting the E seam aquifer. Haydu, however, has failed to show that this fracture trace has such a detrimental effect. The gray clays above and below the E seam are not in tension and will not fall into any void created by subsidence (T3. 126). The fracture trace is oriented generally perpendicular to the mine entries, an angle that is least likely to affect stability (T3. 121-123). Finally, there is no evidence that the fracture trace extends through the sandstone layer or otherwise decreases its

---

[14] Neither party attempted to define the term "aquitard". We understand it to be a "subsurface confining unit which is characterized by low permeability that does not readily permit water to pass through it..." C. C. Lee, Environmental Engineering Dictionary (Rockville, MD: Government Institutes, Inc., 1989), p. 33.

ability to bridge voids beneath it (T3. 117-118). There is, in fact, no evidence that the fracture trace extends through the E seam, since the E seam aquifer acts as a confined aquifer (T3. 23-25).[15]

Haydu also argues that the gray clays above and below the E seam may not protect the E seam aquifer from subsidence in the C′ seam mine and the B seam mine. According to Teresa Kaktins, the amount of protection they can provide depends on the extent of vertical displacement and the characteristics of the inner burden between the E seam and the C′ seam mine (T1. 176). Ms. Kaktins, however, offered no testimony on the extent of vertical displacement that could be expected if the C′ seam mine and the B seam mine subside, nor did she explain how the characteristics of the innerburden would prevent the E seams from healing any fractures. Ms. Kaktins, in fact, did not even describe the layers of strata between the E seam and the C′ seam mine. In comparison, PBS′ testimony concerning the E seam clays assumed up to 60 feet of subsidence in the C′ seam mine and 40 to 50 feet of subsidence in the B seam mine, and, furthermore, were based on the strata assumed to exist beneath RW-63. We do not, therefore, give any substantial weight to Ms. Kaktins′ opinion concerning the ability of the clays above and below the E seam to heal fractures caused by subsidence in the C′ seam mine and the B seam mine.

Haydu further contends that despite the evidence concerning the strata beneath the E seam, a void has formed in the E seam aquifer that is the result of at least partial subsidence in the C′ seam mine or the B seam mine. The void, discovered while observation well OW-8 was being drilled

---

[15] The parties, again, failed to define a "confined aquifer". We understand it to be "[a]n aquifer that carries water under pressure." Lee, p. 33.

approximately 500 feet northwest of RW-63, is six inches deep and located between 76 and 76-1/2 feet beneath the surface (T1. 130; Exhs. H-1, H-4). Robert Deason, a senior hydrogeologist with PBS when BI-04 was submitted (T1. 107), suggested the void was not caused by partial subsidence, but rather was an area where limestone had dissolved or where a gooey mud had been washed out (T1. 133). As support, he pointed to the driller's finding that groundwater was flowing within the void at a rate of 20 gpm (T1. 141; Exh. H-4). Haydu's Teresa Kaktins predictably disagreed and testified that Mr. Deason's suggestion was incorrect because no other limestone strata in the area contained similar voids, no limestone was observed around the void in OW-8, and freshwater limestones are difficult to dissolve completely since they are high in clay (T2. 7-8). Ms. Kaktins believes, instead, that the void was caused by subsidence below, but offers no further proof in support of this opinion (T2. 8). Although Mr. Deason admits deep mine subsidence can cause voids in overlying strata, he doubts that is the case with the void in OW-8 because it is too far above the C' seam mine to be affected by them (T1. 133-134).

Neither Ms. Kaktins nor Mr. Deason were able to provide conclusive evidence to support their respective opinions. Because both are expert hydrogeologists, we do not find either's testimony more compelling on the basis of superior knowledge or experience. We are unable to conclude, therefore, that the void in OW-8 is evidence of at least partial subsidence in the C' seam mine or the B seam mine, or that it is evidence such subsidence will eventually cause a loss of water in the E seam aquifer.

In addition to showing that the E seam aquifer is protected from the effects of deep mine subsidence, the evidence also shows that PBS constructed

RW-63 to stabilize it from the effects of outside forces, including deep mine subsidence (T3. 37-38). Unlike many private wells, including Haydu's SP-12 and SP-15, which are merely open bore holes (T2. 122, 157-158), RW-63 is lined from top to bottom with a combination of steel casing, PVC pipe, and PVC screening (T2. 155-157; Exh. P-7). This top-to-bottom lining will prevent RW-63's bore hole from being sealed off or pinched shut (T2. 158).

Based on the foregoing, we cannot conclude that RW-63 will be adversely affected by the presence of the C' seam mine and the B seam mine beneath it. Not only has Haydu failed to prove his contentions, but the evidence as a whole shows that the presence of the C' seam and B seam mines will not affect RW-63's ability to function as a replacement water supply. The coal from both mines was extracted to minimize the amount of subsidence that will occur. Any subsidence that does occur will fall far short of reaching the E seam aquifer or RW-63. Both the E seam aquifer and RW-63, furthermore, are well-protected from the effects of subsidence below. Moreover, should any repair work or replacement be required for RW-63, this is provided for by the trust agreement. (F.F. 29) Because we find that there is no risk that subsidence will affect RW-63's ability to function as a replacement water supply, we cannot conclude that RW-63 is unreliable under either the comparative or threshold standards. Haydu, therefore, has failed to show that the Department abused its discretion in issuing BI-04 to PBS. Haydu's appeal must be dismissed.

CONCLUSIONS OF LAW

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

2. Haydu bears the burden of proving that the Department abused its discretion in issuing BI-04 to PBS. 25 Pa. Code §21.101(c)(3).

3. Section 4.2(f) of the Surface Mining Act, 52 P.S. §1396.4b(f)(1), requires a surface mining operator to replace a private water supply, which it affects by contamination or diminution, with an alternate source of water adequate in quantity and quality for the purposes served by the affected supply.

4. Special Condition No. 12 was added to PBS' SMP 56803089 to implement the requirements of §4.2(f) of the Surface Mining Act.

5. Special Condition No. 12 denied PBS authorization to mine the area covered by BI-04 until PBS proved it could provide suitable replacements for downgradient private water supplies that would be affected by such mining.

6. To satisfy the requirements of §4.2(f) of the Surface Mining Act, a replacement water supply: must have an adequate quantity and quality; must not be unreliable; must not require excessive maintenance; and must provide the property owner with as much control as he exercised over his previous supply. Gioia, *supra*.

7. Objections not raised in a notice of appeal are deemed to be waived. Game Commission, *supra*.

8. An appellant may reserve the right to amend its notice of appeal to include objections only determined through discovery. *Id*.

9. Even though a party reserves the right to amend its appeal, it may do so only for good cause shown. *Id*.

10. Haydu waived the issue of RW-63's connection by a fracture trace to RW-65 and RW-66 by failing to raise this issue in his notice of appeal.

11. Haydu has failed to show that subsidence in the C′ seam mine and the B seam mine will adversely affect RW-63's ability to function as a replacement water supply.

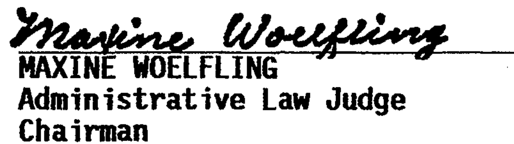
12. Haydu has failed to show that RW-63 is an unreliable water supply.

13. Haydu has failed to show that the Department abused its discretion in issuing BI-04 to PBS.

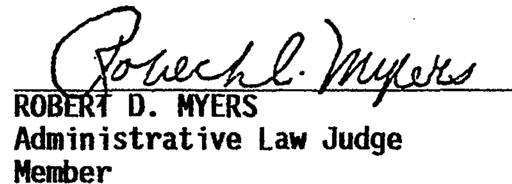
ORDER

AND NOW, this 15th day of June, 1994, it is ordered that Haydu's appeal of the Department's issuance of BI-04 to PBS is dismissed.

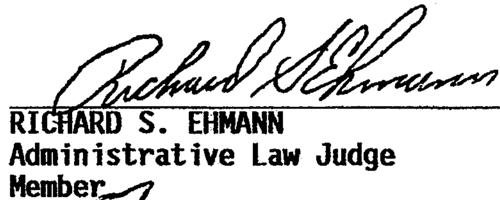
ENVIRONMENTAL HEARING BOARD



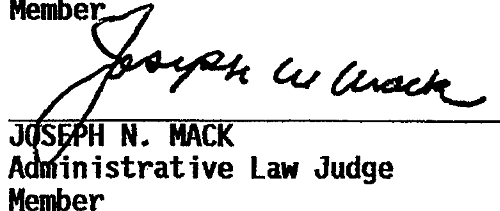
MAXINE WOELFLING
Administrative Law Judge
Chairman



ROBERT D. MYERS
Administrative Law Judge
Member



RICHARD S. EHMANN
Administrative Law Judge
Member



JOSEPH N. MACK
Administrative Law Judge
Member

DATED: June 15, 1994

cc: **DER, Bureau of Litigation**
Library: Brenda Houck
For the Commonwealth, DER:
Michael J. Heilman, Esq.
Southwest Region
For Appellant:
William Gleason Barbin, Esq.
GLEASON, DIFRANCESCO, SHAHADE, BARBIN & MARKOVITZ
Johnstown, PA
For Permittee:
Vincent J. Barbera, Esq.
BARBERA & BARBERA
Somerset, PA

ar

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
2nd FLOOR — MARKET STREET STATE OFFICE BUILDING
400 MARKET STREET, P.O. BOX 8457
HARRISBURG, PA 17105-8457
717-787-3483
TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOARD

NEWTOWN LAND LIMITED PARTNERSHIP	:	
v.	:	EHB Docket No. 93-299-E
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES and NEWTOWN TOWNSHIP	:	Issued: June 15, 1994

OPINION AND ORDER SUR
MOTION IN LIMINE

By Richard S. Ehmann, Member

Synopsis

A Motion in Limine which is a misnamed Motion To Dismiss is granted. Where prior to the merits hearing the Appellant stipulates that it limits its appeal to two specific issues, and by motion the Department of Environmental Resources ("DER") asserts these issues were not timely raised in the Notice Of Appeal, the Motion is in fact a Motion To Dismiss. Where the limited issues were not raised in the Notice Of Appeal and Appellant failed to reserve the right to amend same based on subsequent discovery, under Commonwealth, Pennsylvania Game Commission v. Commonwealth, DER, 97 Pa.Cmwlth. 78, 509 A.2d 877 (1986), *aff'd*, 521 Pa. 121, 555 A.2d 812 (1989) ("Game Commission"), the Motion must be granted. The fact that these issues were discovered via discovery in this appeal and disclosed by Appellant in its Pre-Hearing Memorandum may show a lack of prejudice to the appellee but does not vest this Board with jurisdiction over these issues in light of Game Commission.

Background

The instant appeal arose when Newtown Land Limited Partnership ("NLLP") appealed the September 3, 1993 DER administrative Order that approved a revision

o Newtown Township's ("Township") Official Plan for sewage facilities within the ownship. NLLP challenged the approval because under the revision, the tract of and it owns and on which it proposes to operate a mobile home park would not be rovided any municipal sewerage services but would have to rely on on-lot sewage ystems.

On December 6, 1993, Trafalgar House Residential New Jersey ("Trafalgar") iled a Petition To Intervene in this appeal. On December 8, 1993, the Township iled its Petition To Intervene. By Order dated December 10, 1993, we denied the ownship's Petition because it was already a party to this appeal pursuant to 25 a. Code §21.51(g). By Order dated December 21, 1993, and over the opposition f NLLP, the Board granted Trafalgar's petition.

Thereafter, at least NLLP engaged in discovery and the parties filed their espective Pre-Hearing Memoranda. (Trafalgar filed none but NLLP, the Township nd DER did). After a telephonic conference with the parties, this matter was scheduled for a merits hearing to begin on May 2, 1994.

In late April and early May, the parties filed a factual Stipulation with this Board and we held two telephonic conferences with the attorneys for the parties. We received DER's instant Motion In Limine on April 29, 1994. These conferences and the parties' prior discussions produced an agreement that this appeal could be submitted to this Board for adjudication on a stipulated record subject to resolution of the issues raised by DER's Motion. As a result, we issued our Order of May 2, 1994 which cancelled the merits hearings, directed the parties to file their stipulated record by May 13, 1994, directed NLLP to file its response to DER's Motion, and set a schedule for submission of the parties' Post-Hearing Briefs. Thereafter Trafalgar advised us by letter that it joined in DER's Motion.

On May 16, 1994, NLLP filed its Answer To Appellee's Motion To Dismiss and Cross-Motion to Strike Motion To Dismiss or In The Alternative, For Leave To Amend Notice Of Appeal ("Answer") and a supporting Memorandum Of Law.

By letter dated May 20, 1994, Trafalgar, which had intervened in this appeal, advised the Board of its withdrawal as an intervenor/appellee and we dismissed it from the appeal.

On May 27, 1994, DER filed its Response to NLLP's Motion To Dismiss and Cross Motion To Strike Motion To Dismiss or In the Alternative For Leave To Amend Notice Of Appeal. By letter, Newtown joined in DER's Response.

OPINION

DER's Motion To Dismiss

DER's Motion In Limine is in fact a thinly disguised Motion To Dismiss. This was agreed to by the parties in one of the telephonic conferences and accounts for the choice of words in the caption of NLLP's response. We will treat DER's motion as such. DER's motion is based on NLLP's position that it has abandoned all issues in its appeal except two and DER's contention that, since these two issues were not raised in NLLP's Notice Of Appeal, an attempt to raise them now is the same as an untimely appeal on these grounds. The Motion, citing Game Commission, concludes that we cannot hear testimony on these issues and thus the appeal must be dismissed.

We start our examination of the Motion's merit with NLLP's Notice Of Appeal. In it, at paragraph 11, NLLP set forth the reasons it contends DER erred in issuing its order. Paragraph 11 provides:

> 11. The Department Action was improper and unjustified in that the Revision does not address many of the specific requirements of 25 Pa. Code §71.21. Specifically, the Revision is deficient in the following material respects:

a. The Revision designates the entire CM zoning district (which encompasses a significant percentage of Newtown Township's land) as the groundwater recharge area of Newtown Township. This designation serves as the Township's rationale for requiring that the entire CM zoning district utilize on-lot sewer systems rather than public sewers. However, the Revision does not adequately identify the available capacity of public water supplies or the aquifer yield for groundwater supplies as required by 25 Pa. Code §71.21(1)(vi). Therefore, the Revision fails to adequately establish a need for the entire CM district to be utilized for groundwater recharge purposes.

b. There is no rational basis to designate all of the land located in the CM zoning district in Newtown Township as a groundwater recharge area.

c. The Revision fails to adequately identify future areas of growth in Newtown Township, in violation of 25 Pa. Code §21(a)(3)(iii). The Revision totally ignores the fact that the designated development areas of Newtown Township have been substantially developed and that if any significant future development is to occur, it will have to occur in the area of Newtown Township encompassed by the CM zoning district.

d. The Revision does not adequately evaluate the inconsistencies between the Revision and the Joint Comprehensive Plan adopted by Newtown Township, in violation of 25 Pa. Code §71.21(a)(5)(i)(D). Newtown Township has been developed to the point where the development areas are substantially developed (there are only a few remaining undeveloped parcels). Therefore, in accordance with the Joint Comprehensive Plan, the CM zoning district is the next logical area for significant development to occur and the Joint Comprehensive Plan contemplates that when existing development areas are substantially developed the zoning of the land in the CM zoning district will be changed to permit further development within the townships regulated by the Ordinance. Since the Revision does not provide for public sewer in the CM zoning district, no significant development will be practical (or permitted) in the CM zoning district. Therefore, the prohibition of significant development in the CM district is inconsistent with the Joint Comprehensive Plan. These inconsistencies are totally ignored in the Revision.

e. The Revision does not adequately identify or discuss available alternatives to providing municipal or non-municipal sewage facilities in Newtown Township, in

violation of 25 Pa. Code §71.21(a)(4)(i). Specifically, the alternative of providing for public sewer in portions of the CM zoning district is not adequately considered or discussed. Since a substantial portion of the land in Newtown Township is located in the CM zoning district the Department's approval of the Revision without adequate consideration of the alternative of providing public sewer to the CM district was improper.

f. The Revision Plan provides for the replacement of a portion of the existing 12 inch Newtown Trunk Sewer Line (from Manhole no. 64 to RT-15) with an 18 inch sewer line (the "**Relief Line**"). The construction of the Relief Line will cure an existing capacity problem in a portion of the trunk sewer located in Newtown Borough, but the Relief Line is so small that it will not allow for any significant new development in the areas of the Township that are located above the area of Newtown Borough in which the Relief Line is to be constructed. Therefore, the size of the Relief Line will prohibit any significant development of the CM zoning district, and therefore prohibits any further substantial development to occur in Newtown Township. This is inconsistent with the Joint Comprehensive Plan and is contrary to principles for logical planning.

g. By approving the Revision which (a) provides that the entire CM zoning district will remain unsewered and (b) permits the construction of an unreasonably small Relief Line, the Department has allowed Newtown Township to insure that no growth will occur in the Township. Newtown Township has a decidedly anti-development mentality and historically, has attempted to impede development whenever possible. The Revision does not plan for the future sewage needs of Newtown Township; it prohibits any substantial development in a significant portion of Newtown Township. By approving the Revision, the Department has improperly permitted Newtown Township to achieve through sewage planning that which it is prohibited from achieving through zoning -- the exclusion of population growth.

NLLP did not reserve in it its Notice Of Appeal a right to amend it to add additional grounds for appeal which it became aware of through discovery. It also did not amend or seek to amend its Notice Of Appeal prior to the filing of DER's Motion so the question presented us is whether or not the language quoted

bove contains within it either of the grounds NLLP now admits are the only two rounds it seeks.

According to NLLP, the two grounds for challenging DER's order are found n NLLP's Pre-Hearing Memorandum as Contentions Of Law Nos. 1, 2, 5(a) and 5(b). ontentions Nos. 1 and 2 attack the DER approval of the revision to the ownship's Official Plan to the extent DER approved a revision in which the ownship specified the size (and thus the capacity) of a replacement or relief ewer line to serve the portion of the Township in which NLLP's land is located. ILLP contends that the Township may not dictate line size to a "separately onstituted sewer authority" but only the type of sewer service provided. In hese contentions, NLLP also asserts that only the Newtown Bucks County Joint lunicipal Sewer Authority is empowered to determine what is needed to provide idequate, safe and reasonable service so it is for that Authority to specify line size.[1]

Contentions Nos. 5(a) and 5(b) assert DER violated 25 Pa. Code §71.21 by ipproving a revision which failed to address many specific requirements of 25 Pa. Code §71.21 and 25 Pa. Code §71.62, but specifically §71.62(a), which requires evaluation of general site suitability for use of on-lot systems, and §71.62(c), which addresses soil permeability and hydrogeologic evaluation prior to selecting on-lot systems for use on the vast majority of vacant land in the Township.

---

[1] DER's Motion and Supporting Memorandum consistently characterize this contention as:

> Whether the Township lacked the authority to estimated the size of the Replacement Line to the Newtown Trunk Sewer Line in the [Newtown Township Bucks County Act 537 Official Plan Revision.]

This sentence makes no sense unless an omitted word which we believe to be "restricts the" or "limit the" are inserted in the first line so that it reads:

> "Whether Newtown Township lacked the authority to limit the estimated...."

Only with this addition does it fairly summarize NLLP's Contention.

Importantly, in NLLP's Memorandum Of Law in support of its Answer, it asserts its Notice Of Appeal implicitly raised issues as to deficiencies in the revision based on its failure to fulfill the requirements of § 71.62 (NLLP's Memorandum Of Law, Page 2). This assertion confirms our own reading of NLLP's Notice Of Appeal, which concluded § 71.62 issues are not explicitly raised therein.

While NLLP's Memorandum Of Law admits the approved plan which it appealed specified the trunk line size and acknowledged this line was the Authority's line, NLLP says it did not learn of DER's policy of requiring a municipality to include line size even though 25 Pa. Code Chapter 71 does not require it until NLLP undertook discovery. Thus, here too, NLLP concedes this issue is not explicitly within the Notice Of Appeal. This confirms our independent review thereof on this issue as well.

With the facts it had before it, NLLP clearly could have stated its assertions as to the impropriety of the revision's specification of sewer line size when it filed the appeal. At that time, NLLP knew the Township's approved revision showed the line size, that the line was owned by the Authority and that 25 Pa. Code Chapter 71 said what it said about revisions. All that turned up in discovery was DER's policy. Since its Notice Of Appeal Paragraph 11(f) attacks the size of the replacement line as being too small, NLLP's knowledge of these facts could not be disputed. Further, even if NLLP did not know of this DER policy's existence until after undertaking discovery, it had facts before it sufficient to reserve to itself the right to amend its Notice Of Appeal on this issue if further information uncovered in discovery created or cemented the existence of this issue. As this Notice Of Appeal neither raises this issue nor reserves NLLP the right to amend its Notice Of Appeal after discovery to add it,

t is clear that the concept verbalized in Game Commission operates to bar the ntimely raising of this issue by NLLP.

Paragraph 11 of NLLP's Notice also attacks specific inadequacies in the evision when measured against 25 Pa. Code §71.21. NLLP attacks the revision's dequacy under subsections 71.21(1)(iv),[2] 71.21(a)(3)(iii), 71.21(a)(5)(i)(D), nd 71.21(a)(4)(i), but none of them deals with soils permeability, hydrogeology r compliance with Section 71.62. In turn, this forces the conclusion that ILLP's Notice Of Appeal does not raise this issue either explicitly or implicitly, so raising it in its subsequent Pre-Hearing Memorandum is barred nder Game Commission.

In its Memorandum Of Law, NLLP also argues that its Notice Of Appeal constitutes a general attack on DER's actions and that these new objections are within the scope of the objections to DER's approval of this revision set forth in its Notice Of Appeal. In support, it cites Croner, Inc. v. DER, 139 Pa.Cmwlth. 43, 589 A.2d 1183 (1991) ("Croner"), and Wikoski v. DER, 1992 EHB 642 ("Wikoski"). NLLP is correct as to the law on this point, but is incorrect as to its application here. While the opinion in Wikoski only recites that in Wikoski's Notice Of Appeal the objections were general and while the legal objections in the Pre-Hearing Memorandum were specific, we have the exact wording of both in Croner. In Croner, Croner Inc.'s Notice Of Appeal alleged:

> "[t]he action of the Commonwealth of Pennsylvania Department of Environmental Resources in conditioning Appellant's mine drainage permit to these conditions, is otherwise contrary to law and in violation of the rights of Appellant."

Croner at ____, 589 A.2d at 1187.

---

[2] We read this as a reference to Section 71.21(a)(1)(iv) because there is no Section 71.21(1)(iv) and because Section 71.21(a)(1)(iv) deals with potable water and the Notice Of Appeal's reference is in an attack on groundwater recharge issues.

The Commonwealth Court held that such a broad "catch all" objection in the Notice Of Appeal included within it Croner, Inc.'s challenge to 25 Pa. Code §87.127(e), (h) and (i) as violating "a statutory right set forth in §1396.4(c) of the Pennsylvania Surface Mining Conservation and Reclamation Act... ." Croner at ___, 589 A.2d 1184. While this is the case law followed by this Board generally, we cannot apply it here because there is no general allegation in NLLP Notice Of Appeal within which we may tuck these two new arguments. NLLP failed to appeal in general terms, although it has multiple specific attacks on DER's approval of the revision. The fact that NLLP's appeal challenges DER's approval of this revision to Newtown's plan is not enough even where it challenged use of on-lot systems and the line's size for other specific reasons, because those other challenges were for specific, not general, reasons. Were we to hold otherwise, the mere filing of an appeal would be enough to allow the addition of new grounds for appeal, and the Croner exception would swallow the Game Commission rule. As a result we reject this argument.

NLLP's Cross Motion To Strike

In reaching this conclusion, we deny NLLP's Cross Motion To Strike Appellees' Motion To Dismiss. This Motion asserts that, since appellees did not include this timeliness/jurisdiction issue in their Pre-Hearing Memorandum and Paragraph 5 of our Pre-Hearing Order No. 1 says a party may be deemed to abandon all legal contentions not set forth in its Pre-Hearing Memorandum, we should bar appellees from raising this issue now and dismiss their Motion because they have abandoned this argument. However, as is pointed out in Game Commission, this Motion raises an issue which goes to our jurisdiction to hear these portions of NLLP's appeal. DER's Motion raises untimeliness, and where an appeal is untimely, we lack jurisdiction over it. Rostosky v. Commonwealth, DER, 26

Pa.Cmwlth. 478, 364 A.2d 761 (1976). Moreover, jurisdiction is not a waivable issue but may be raised at any time. Charles Friday v. DER, 1976 EHB 218; and Wayne McClure v. DER, 1992 EHB 212. In fact, when a jurisdictional issue appears to exist, this Board will not hesitate to raise it itself. City of Philadelphia, Streets Department v. DER, 1992 EHB 730. Since jurisdiction is the issue raised by DER's Motion, the language in Paragraph 5 of Pre-Hearing Order No. 1 is no bar to DER's Motion. As a result, NLLP's Cross Motion To Strike must be denied.

NLLP's Alternative Motion For Leave To Amend

Under this Motion, NLLP seeks leave to amend. NLLP argues that it did set forth all of the grounds for appeal in its Notice Of Appeal that it could reasonably be expected to know. It became aware of additional facts later and added the legal issues to its Pre-Hearing Memorandum. It asserts prejudice to itself if it is not allowed to amend but no prejudice to Appellee if amendment is allowed.

In Game Commission, the Pennsylvania Fish Commission discovered a new ground for appeal and sought leave to add it to its Notice Of Appeal. This Board's denial of that Petition was affirmed by the Commonwealth Court. The Court reasoned that whether such a Petition is an appeal *nunc pro tunc* or a new specific ground for appeal filed after the 30 day appeal period, it is clear that this Board need not grant such a request absent a showing of good cause. It then held good cause is fraud or breakdown in the Board's operation and that learning of a ground for appeal through discovery is not good cause unless a right to amend to add grounds found in discovery was preserved in the Notice Of Appeal. This is exactly the situation before us. We have no good cause alleged other than discovery, and a right to amend was not reserved in NLLP's Notice Of Appeal. Game Commission thus compels that we reach the same result here as was reached

there. Accordingly, we reject NLLP's alternative motion, grant DER's Motion and, since these are the only two issues on which NLLP admitted wants to proceed, enter the following Order.

ORDER

AND NOW, this 15th day of June, 1994, it is ordered that DER's Motion is granted, NLLP's Motions are denied and its appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

MAXINE WOELFLING
Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

DATED: June 15, 1994

c: **DER Bureau of Litigation:**
(Library: Brenda Houck)
For the Commonwealth, DER:
Mark L. Freed, Esq.
Southeast Region
For Appellant:
Marc B. Kaplin, Esq.
Blue Bell, PA
For Appellee:
Stephen B. Harris, Esq.
Warrington, PA

ed

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
2nd FLOOR — MARKET STREET STATE OFFICE BUILDING
400 MARKET STREET, P.O. BOX 8457
HARRISBURG, PA 17105-8457
717-787-3483
TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOARD

GEOFFREY B. TYSON	:	
	:	
v.	:	**EHB Docket No. 93-375-W**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	**Issued:** June 22, 1994

**OPINION AND ORDER
SUR REQUEST TO APPEAL NUNC
PRO TUNC AND MOTION TO QUASH**

By Maxine Woelfling, Chairman

Synopsis

The Board denies a request to appeal *nunc pro tunc* and quashes the appeal. Appellant's misimpression that filing his appeal with the Department of Environmental Resources (Department) constituted filing with the Board is not adequate grounds for allowing his appeal to be filed *nunc pro tunc*.

OPINION

This matter was initiated with the December 14, 1993, filing of a notice of appeal by Geoffrey B. Tyson (Tyson) seeking review of an October 26, 1993, compliance order from the Department directing Tyson, *inter alia*, to cease the unpermitted open burning and storage of tires at a facility in Amity Township, Bucks County.

The notice of appeal was accompanied by a letter requesting the Board to accept the appeal as an appeal *nunc pro tunc* because of extenuating circumstances. Apparently, Tyson, after calling the Board to confirm the instructions for filing a notice of appeal, filed his appeal with the Department

rather than the Board, assuming "that there was an overlap between departments and agencies."

In response to the Board's notice that any objections to Tyson's request be submitted by January 4, 1994, the Department filed a motion to quash the appeal for lack of jurisdiction. It contends the Board lacks jurisdiction because the appeal was filed beyond the mandatory 30 day filing period and that Tyson's request for an appeal *nunc pro tunc* should be denied as there is no claim of fraud or breakdown in the administrative process or no evidence of non-negligent, unique and compelling circumstances.

Tyson's January 25, 1994, response to the Department's motion admits the untimely filing and generally dwells on the merits of his objections to the Department's order.

We deny the request for an appeal *nunc pro tunc* and grant the motion to quash.

The Board has no jurisdiction over appeals which are not timely filed. Joseph Rostosky v. Comm., Dept. of Environmental Resources, 26 Pa. Cmwlth. 478, 364 A.2d 761 (1976). An appeal must be filed within 30 days after the appellant has received written notice of the action. An exception to filing within the 30 day period is via an appeal *nunc pro tunc*. 25 Pa. Code §21.53. An appeal *nunc pro tunc* will be allowed only where there is a showing of fraud, breakdown in the administrative process, or unique or compelling factual circumstances establishing a non-negligent failure to file a timely appeal. Gerald C. Grimaud v. Department of Environmental Resources, ___ Pa. Cmwlth. ___, 638 A.2d 299 (1994).

Here, it is undisputed that Tyson's appeal was untimely filed, so the Board has no jurisdiction unless we grant Tyson permission to appeal *nunc pro*

tunc. The only justification presented by Tyson is his mistaken assumption that filing with the Department constituted filing with the Board. The Board has long held that errant filing of a notice of appeal with the Department instead of with the Board does not constitute grounds for allowance of an appeal *nunc pro tunc*. Falcon Oil Co. v. Dept. of Environmental Resources, 1991 EHB 1503, aff'd 148 Pa. Cmwlth. 90, 609 A.2d 876 (1992); Bellefonte Borough v. DER, 1992 EHB 1165. Consequently, Tyson's request must be denied and his appeal quashed.

O R D E R

AND NOW, this 22nd day of June, 1994, it is ordered that:

1) Tyson's request for an appeal *nunc pro tunc* is denied; and

2) The Department's motion to quash the appeal is granted.

ENVIRONMENTAL HEARING BOARD

MAXINE WOELFLING
Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

Board Member Richard S. Ehmann does not concur in this opinion; his dissenting opinion is attached.

DATED: June 22, 1994

EHB Docket No. 93-375-W
Service List

cc: DER Bureau of Litigation:
(Library: Brenda Houck)
For the Commonwealth, DER:
Beth Liss Shuman, Esq.
Central Region
For Appellant:
Geoffrey B. Tyson
Birdsboro, PA

bl

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
2nd FLOOR — MARKET STREET STATE OFFICE BUILDING
400 MARKET STREET, P.O. BOX 8457
HARRISBURG, PA 17105-8457
717-787-3483
TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOARD

GEOFFERY B. TYSON	:	
	:	
v.	:	EHB Docket No. 93-375-W
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: June 22, 1994

DISSENTING OPINION BY BOARD MEMBER RICHARD S. EHMANN

While all parties appearing before us are entitled to equal treatment from this Board, where a *pro se* appellant appears before us this Board is inevitably faced with an untrained and unsophisticated party who for whatever reason believes (despite our advice to the contrary) that he or she can successfully appeal without the help of competent legal counsel. In these circumstances, where the Department seeks dismissal of the appeal, we should consider every potential shading of the appellant's filings before we order the appeal's dismissal.

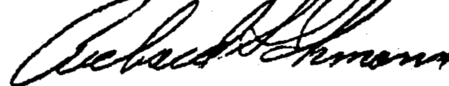
Because of this belief, the majority and I part company on their opinion. It appears from his filings that Tyson is arguing for an appeal *nunc pro tunc* based upon a break-down in the operation of this Board.

Once we get past his excess verbiage, Tyson admits his appeal was untimely. However, his letter to this Board dated December 11, 1993 says he called this Board and was told by Board personnel he only needed to file copies of his appeal with the Department, so he filed his appeal there and not with us. If the allegations Tyson has made could be proven, they would make a

case for a breakdown in this Board's operating procedures, and thus a case for an appeal *nunc pro tunc* under 25 Pa. Code §21.53(a) See C & K Coal Company v. Department of Environmental Resources, 112 Pa.Cmwlth. 505, 535 A.2d 745 (1988); and J.E.K. Construction v. DER, 1987 EHB 643.

Accordingly, I would allow this *pro se* appellant a hearing limited to this issue. In drawing this conclusion, I emphasize I do not intend to widen the Board's current case law on allowance of appeals *nunc pro tunc*. Indeed, at such a hearing, the burden of proof would be on Tyson. Moreover, he would have to prove these allegations by evidence other than his own testimony as to how he interpreted what he was told by this unnamed Board employee. In short, Tyson would need testimony from the employee or similar evidence. To allow less would cause us to be faced with the scenario where all *nunc pro tunc* appellants would make similar allegations and avoid the timeliness requirement for appeals which is found at 25 Pa. Code §21.52(a). Though such a burden is imposing, in light of his allegations and *pro se* status, I would nevertheless allow Tyson this opportunity. Since the majority opinion does not offer such a hearing, I dissent.

ENVIRONMENTAL HEARING BOARD



RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: June 22, 1994

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
2nd FLOOR — MARKET STREET STATE OFFICE BUILDING
400 MARKET STREET, P.O. BOX 8457
HARRISBURG, PA 17105-8457
717-787-3483
TELECOPIER 717-783-4738

M. DIANE SMI
SECRETARY TO THE I

RUDY BYLER

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF ENVIRONMENTAL RESOURCES

EHB Docket No. 93-001-MJ

Issued: June 27, 1994

ADJUDICATION

By Joseph N. Mack, Member

Synopsis

The Board dismisses an appeal by a landowner challenging the Department of Environmental Resources' ("DER") disapproval of his planning module for new land development which sought a revision to Turbett Township's official sewage plan to provide for his proposed Tuscarora Estates subdivision. There is no explicit deemed approval language contained in Section 5(e) of the Sewage Facilities Act, 35 P.S. §750.5(e). Further, we reject appellant's contention that it was the Legislature's intent in amending Section 5(e) to read into that statute the deemed approval remedy set forth in DER's regulations at 25 Pa. Code §71.54(e).

Additionally, appellant has failed to establish his equitable estoppel defense, as he has introduced no evidence that DER made any misrepresentation which induced him to justifiably rely thereon and act to his detriment. Further, appellant failed to show DER's bases for disapproval of the planning module set forth in its disapproval letter were inappropriate.

Appellant has also failed to establish that DER's disapproval denied his right to equal protection; the evidence does not support his claim that DER applies an unwritten policy in any uneven fashion. Finally, appellant failed to prove any taking without just compensation occurred in this matter, as he has failed to show DER's disapproval resulted in "undue oppression" under the test in Lawton v. Steele, 152 U.S. 133, 14 S.Ct. 499, 38 L.Ed. 2d 385 (1894).

Background

Appellant Rudy Byler commenced this appeal on January 4, 1993, challenging DER's disapproval of the proposed revision to Turbett Township's official sewage plan to provide for a new residential land development known as Tuscarora Estates, located in Turbett Township, Juniata County. DER's disapproval letter, dated December 7, 1992, to the Turbett Township Supervisors states that DER's reasons for disapproval are that the proposal failed to address the suitability of lots in the proposed subdivision for on-lot sewage in that:

> a. There are sink holes/closed depressions (which are not indicated on the plot plan) which are within 100 feet of the soil test sites.
>
> b. The plot plan fails to demonstrate that proper isolation distances have been maintained between the soil test sites and the streams which cross the proposed subdivision.

Byler's appeal objects to DER's disapproval, asserting that a "deemed approval" of the revision occurred because DER did not act on it within the time constraints for its review set forth in Section 5(e) of the Sewage Facilities Act, Act of January 24, 1966, P.L. (1965) 1535, as amended, 35 P.S. §750.5(e). Based on this assertion, Byler claims DER's disapproval is invalid because it occurred after the "deemed approval" and thus DER no longer had

jurisdiction to disapprove it. Byler further objects that DER is equitably estopped from disapproving the proposed revision because of this asserted deemed approval and his reliance thereon in selling lots in the proposed subdivision. Byler also objects that DER's disapproval constitutes a taking without due process of law of the property in the proposed subdivision. He further contends that DER's disapproval was issued in disregard of the applicable statutory authority, is arbitrary and capricious, and thereby denies him equal protection under the law.

A hearing on the merits of the appeal was held on July 8, 1993 before Board Member Joseph N. Mack, to whom this matter was assigned for primary handling. After receiving the transcript of the merits hearing on August 30, 1993, we ordered the parties to submit their respective post-hearing briefs. We received Byler's post-hearing brief on September 30, 1993 and DER's post-hearing brief on October 28, 1993. At the merits hearing, upon the close of the presentation of Byler's case-in-chief, DER moved for a directed adjudication in its favor based on Byler's failure to establish his *prima facie* case. (Notes of Testimony (N.T.) 97-98) Board Member Mack explained that as a single Board Member, he could not grant such a motion, 25 Pa. Code §21.86. DER then presented its case and re-raises its motion in its post-hearing brief.[1] Any arguments not raised in the parties' post-hearing briefs are deemed waived. Lucky Strike Coal Co. v. Commonwealth, DER, 119 Pa. Cmwlth. 440, 547 A.2d 447 (1988). We have elected to adjudicate the merits of this appeal since, viewing the motion in the light most favorable to Byler, it

---

[1] While DER's post-hearing brief identifies its motion as a demurrer to Byler's evidence, it is properly treated as a motion for directed adjudication. See County of Schuylkill, *et al.* v. DER, *et al.*, 1991 EHB 1, 6; Reading Co., *et al.* v. DER, 1992 EHB 195.

does not appear that we could grant DER's motion for directed adjudication as to all the issues raised therein.[2]

The record in this matter consists of a transcript of the merits hearing of 162 pages and several exhibits. After our complete and thorough review of this record, we make the following findings of fact.

FINDINGS OF FACT

1. Appellant Rudy Byler resides at R. D. 1, Box 113A, Bernville, Pennsylvania. (B-1)[3]

2. Appellee is DER, 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 *et seq.*; the Sewage Facilities Act, 35 P.S. §750.1 *et seq.*; 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. (B-1)

3. Byler is the owner of a new land development which is a 14-lot subdivision known as Tuscarora Estates, located in Turbett Township, Juniata County. (B-1; N.T. 11)

---

[2] Where the party with the burden of proof and the initial burden of proceeding fails to make out a *prima facie* case, the Board may grant a motion for directed adjudication made by the opposing party at the close of the presentation of evidence. County of Schuylkill; Empire Sanitary Landfill, Inc. v. DER, EHB Docket No. 90-158-E (Adjudication issued February 1, 1994). The motion must be viewed in the light most favorable to the non-moving party, and should be granted only where the non-moving party's case is clearly insufficient. Schuylkill, *supra*.

[3] "B-1" is a reference to Board Exhibit 1, which is the parties' joint stipulation. "N.T." is a reference to the notes of testimony taken at the hearing on July 8, 1993. "A-" indicates a reference to one of the appellant's exhibits. "J-" indicates a joint exhibit of the parties.

4. The proposed subdivision is topographically located on a sloping wooded site on the south side at the foot of the Tuscarora Mountains. (N.T. 66)

5. Byler engaged William Sarge, who is a self-employed engineer and surveyor, in the summer of 1992 regarding the Tuscarora Estates subdivision planning module. (N.T. 59-60, 64) Sarge holds a Bachelor of Science degree in civil engineering from The Pennsylvania State University and is a registered land surveyor and civil engineer in Pennsylvania. (N.T. 59-60)

6. Sarge testified as an expert in surveying on behalf of Byler. (N.T. 63) Sarge has been involved with more than 100 major subdivisions[4] in the past. (N.T. 61)

7. Sarge first researched the Tuscarora Estates property deeds and boundaries at the County courthouse, then submitted a "post card" application to DER, describing the proposed project. (N.T. 64-65)

8. DER returned planning module forms for a major subdivision. (N.T. 65)

9. Sarge then conducted his field survey and proceeded to complete the planning module. (N.T. 66)

10. The Turbett Township Sewage Enforcement Officer ("SEO") is S. Dean Stephens. (N.T. 23, 66)

11. SEO Stephens holds a degree in engineering from the Pennsylvania State University and is a registered engineer in Pennsylvania. (N.T. 23-24) He has had formal SEO training by DER and has held DER certification as a SEO since the mid-1970s. (N.T. 23-24) He has served as Turbett Township's SEO

---

[4] A major subdivision involves more than 10 lots. (N.T. 43, 65)

for the past 10 years. (N.T. 24) Stephens has been involved with conducting dozens of deep probes at sites in the past. (N.T. 26)

12. Stephens conducted deep probes and performed perc tests at Tuscarora Estates based on the proposal of Byler and Sarge. (N.T. 27) Stephens' testing pertained to limiting zones and percolation rates and dealt with the suitability of the proposed lot sites for use of on-lot sewage systems. (N.T. 66) All of the proposed lot sites were to use sand mound-type systems. (N.T. 67)

13. DER's planning module component did not require that any hydrogeologic study be conducted at the site and did not require any permeability testing beyond the standard perc test. (N.T. 53, 65)

14. Sarge acknowledges that an indication to DER that an area is limestone would trigger a requirement from DER that a hydrogeologic study be performed. (N.T. 88)

15. DER was not made aware of the limestone geology of the proposed subdivision. (N.T. 88)

16. DER's post-card application form does not include a place to indicate whether the site is a limestone area. (N.T. 91)

17. Section F of DER's planning module regarding General Site Suitability for on-lot sewage disposal systems requires information to be submitted on a plot plan of the proposed subdivision, *inter alia*, for existing and proposed water supplies and surface water, including streams. (A-1)

18. DER's planning module form did not specifically mention sink holes in Section F. (N.T. 71)

19. A "sink hole" is an area where limestone has eroded, and soil drops down into this area in a cone-shaped fashion. (N.T. 49) Undrained closed depression areas are also considered to be sink holes. (N.T. 50, 101)

20. Stephens is familiar with DER's regulations regarding the placement of on-lot sewage disposal systems and the minimum total isolation distances for sink holes and streams, i.e., the distances the systems must be placed away from sink holes and streams. (N.T. 28-30)

21. When DER indicates that a hydrogeologic study is necessary for the site, sink holes are required to be shown. (N.T. 54)

22. Stephens believes it is good practice to locate the sink holes on the plot plan for the proposed subdivision property because of the isolation distance contained in DER's regulations, even though DER's planning module form did not specifically mention sink holes. (N.T. 53)

23. Stephens took the isolation distances into account prior to conducting his testing on his test holes because he did not want to test within the required isolation distance areas. (N.T. 28)

24. Sarge located the places where Stephens performed his tests, but left the determination of isolation distances to Stephens. (N.T. 70)

25. Stephens knows of the existence of two sink holes at Tuscarora Estates; one on Lot 1 of the proposed subdivision and one on Lot 2 of the proposed subdivision. (N.T. 47, 51) He is not certain as to whether a third sink hole exists. (N.T. 51)

26. Stephens measured from his test site to at least one of the sink holes to make sure that it was at least 100 feet away from the test site. (N.T. 49) He determined none of his tests was within the 100 foot isolation distance. (N.T. 30)

27. Stephens requested Sarge indicate the locations of the sink holes on the subdivision plot plan; otherwise, DER would not have known where they existed. (N.T. 54)

28. Exhibit A-1 is the planning module for Tuscarora Estates prepared by Sarge. (N.T. 32, 69) Exhibit A-2 is the subdivision plan prepared by Sarge; it is part of the planning module and indicates the test sites. (N.T. 34, 45)

29. There is a stream located on the proposed subdivision property. (N.T. 44, 46, 77) A diversion of this stream which people use for intakes of water is also located on the property. (N.T. 44, 77) The stream ends in a sink hole. (N.T. 46, 51)

30. The subdivision plot plan did not have any line drawn on it to indicate the existence of the stream. (N.T. 45)

31. Stephens reviewed the final subdivision plot plan on August 31, 1992; he did not see any line indicating a stream. (N.T. 45)

32. Stephens was satisfied from his review of the planning module and subdivision plot plan that the information with regard to his testing showed the area was generally suitable for on-lot disposal. (N.T. 32-34) After signing the planning module, Stephens had no further involvement with making the submission to DER. (N.T. 37)

33. After reviewing Byler's planning module for the proposed subdivision and the proposed revision to Turbett Township's official sewage facility plan to provide for Tuscarora Estates, the Turbett Township Board of Supervisors ("Supervisors") approved the proposal. (B-1)

34. On behalf of the Supervisors, Byler then mailed the revision to DER's Paul Curry by certified mail, postage pre-paid, on September 16, 1992.

(B-1) The certified mail receipt dated September 16, 1992 showing the package was sent to Paul Curry at DER, One Ararat Blvd., Harrisburg, PA 17110, is Exhibit A-3. (N.T. 72; A-3)

35. On September 17, 1992, L. Cutshall, as agent for Paul Curry, signed for the receipt of the certified mail in DER's south central regional office's mail room. (B-1)

36. Exhibit A-4 is the return receipt dated September 17, 1992 reflecting delivery of Byler's package addressed to Curry; in the portion marked Signature (Agent) is L. Cutshall's signature. (N.T. 73; A-4)

37. DER's Bureau of Water Quality Management received the planning module on September 22, 1992. (B-1) Exhibit J-3 reflects the DER time-stamp for its receipt of the planning module. (N.T. 34, 136)

38. In his previous submissions of planning modules to DER, Sarge had received notification from DER that the submission was incomplete and giving him time to make corrections and resubmit the planning module. (N.T. 76)

39. Byler and Sarge determined the number and size of the subdivision's lots based on the results of testing by Stephens. (N.T. 66)

40. Sarge handled the Tuscarora Estates subdivision planning module for Byler. (N.T. 14, 19)

41. It was Sarge's understanding that DER had to act on the proposed revision within 60 days of its submission to DER, and that this 60 days would include DER's 10 day period to conduct its completeness review. (N.T. 80)

42. Byler agreed to sell four of the lots and a small piece of property adjacent to one of the lots in the proposed subdivision. (N.T. 15)

43. Byler understood that 60 days from the planning module's submission to DER on September 17, 1992 would be November 16, 1992. (N.T. 16) After consulting his legal counsel and the Township solicitor Byler set the closing dates for his lot sales as November 20, 1992, because it would be after the conclusion of this 60 day period and he had not heard anything from DER. (N.T. 15-16)

44. Byler had Sarge record the Tuscarora Estates subdivision at the County recorder's office on November 18, 1992 because of the lot transfer. (N.T. 87)

45. Once Sarge received the planning module's delivery receipt, he waited to hear from DER, but heard nothing until DER sent its December 7, 1992 letter to the Supervisors disapproving the proposed plan revision for Tuscarora Estates which is the subject of the instant appeal. (N.T. 74-75)

46. Prior to November 20, 1992, Byler received no indication from DER that the plan revision was approved, either written or oral. (N.T. 18) Neither Byler nor Sarge ever contacted DER about the planning module's approval until after they received DER's disapproval; Byler never attempted to bring an action in order to force DER to act on his planning module submission. (N.T. 18, 87)

47. Byler also sold a lot on December 3, 1992 without any written indication as to the status of the plan revision's approval. (N.T. 18)

48. DER's reasons for disapproving the plan revision for Tuscarora Estates are that the planning module fails to address the suitability of the proposed lots for on-lot sewage disposal in that a) there are sink holes/closed depressions (which are not indicated on the plot plan) which are within 100 feet of the soil test sites; and b) the plot plan fails to

demonstrate that the proper isolation distances have been maintained between the soil test sites and the streams which cross the proposed subdivision. (N.T. 41-42; A-5)

49. After receiving a copy of DER's disapproval letter on December 9, 1992, SEO Stephens wrote Byler on December 15, 1992. (N.T. 16, 38-40) Stephens and Byler spoke on the telephone after Byler received Stephens' letter, and, after that conversation, Byler has not attempted to sell any additional lots in Tuscarora Estates because he did not want to transfer title where this issue was in question. (N.T. 17) He has received a number of inquiries regarding his lots, and has one agreement of sale which is subject to the resolution of DER's disapproval. (N.T. 17-18)

50. Sarge marked the approximate location of the stream by a blue line on Exhibit A-2. (N.T. 77) The blue line on Exhibit A-2 shows the stream divides and goes two directions. (N.T. 81)

51. Sarge acknowledges that the planning module at Section F required the stream to be plotted on the subdivision plot plan and that the stream was not plotted for Tuscarora Estates. (N.T. 85) Sarge also acknowledges that the stream was not indicated in any other part of the proposed plan other than the plot plan map. (N.T. 76)

52. Sarge admits that the plot plan did not show all of the closed depressions or sink holes on the site. (N.T. 76, 82)

53. Sarge was unaware of the existence of a sink hole in the southwestern corner of Lot 1 (near the neighboring John P. Ewalt property) until a little over one month prior to the merits hearing when he walked the site with DER's Curry and Lester Rothermel. (N.T. 82; A-2) His approximate location of this sink hole is indicated by a red pen circle (without initials)

on Exhibit A-2. (N.T. 83) Sarge paced from this sink hole to Stephens' test site and believes it is located beyond 100 feet from the test site. (N.T. 83, 92)

54. Curry observed the stream and stream diversion crossing the subdivision, and he believed that the stream diversion was man-made. (N.T. 142)

55. Because Curry noted the stream had not been indicated on the plot plan, he made no determination on whether the isolation distances to the stream had been followed. (N.T. 144)

56. The observations of Curry and others were the basis for the deficiencies in the Tuscarora Estates plot plan noted in DER's December 7, 1992 disapproval letter. (N.T. 143-144; A-5)

DISCUSSION

As Byler is challenging DER's disapproval of the proposed revision, he bears the burden of proving, by a preponderance of the evidence, that DER acted unlawfully or abused its discretion in disapproving the official plan revision for Tuscarora Estates. James E. Craft, t/d/b/a Susquehanna Land Company v. DER, 1990 EHB 1607; 25 Pa. Code §§21.101(c)(1), 21.101(a).

Was There a Deemed Approval of the Plan Revision?

As we explained in Morton Kise, *et al.* v. DER, *et al.*, 1992 EHB 1580, 1605, municipalities are required by the Sewage Facilities Act to adopt an official plan designating the methods of sewage disposal to be available in specified areas of the municipality (Sewage Facilities Act, Section 5, 35 P.S. §750.5). The municipalities are required to submit the plan, as well as revisions to the plan, to DER (Sewage Facilities Act, Section 5, 35 P.S. §750.5), which is statutorily charged with approving or disapproving the plans

and seeing that they are implemented (Sewage Facilities Act, Section 10, 35 P.S. §750.10).

Amendments to the Sewage Facilities Act and Chapter 71 of the regulations were made in 1989. The amendment to Section 71.54 of 25 Pa. Code which went into effect on June 10, 1989, provides in pertinent part as follows:

> (a) No proposed plan revision for new land development will be approved by the Department unless it contains the information and supporting documentation required by the act, the Clean Streams Law and regulations promulgated thereunder.
>
> (b) No proposed plan revision for new land development will be considered for approval unless accompanied by the information required in §71.53(d) (relating to municipal administration of new land development planning requirements for revisions).
>
> ...
>
> (d) Within 120 days after receipt of a complete proposed plan revision and documentation, the Department will approve or disapprove the proposed plan revision.
>
> (e) Upon the Department's failure to act upon a proposed plan revision within 120 days of its submission, the proposed plan revision shall be deemed to have been approved, unless the Department informs the municipality prior to the end of the 120-day period that an extension of time is necessary to complete review. The additional time will not exceed 60 days.
>
> (f) In approving or disapproving an official plan or revision, the Department will consider the requirements of §71.32(d).
>
> (g) When an official plan revision for new land development is disapproved by the Department, written notice will be given to each municipality included in the plan revision, with a statement of reasons for the disapproval.

Three weeks after the effective date of this regulation, Act No. 26 of 1989 became law and amended the Sewage Facilities Act, *inter alia*, by adding the following italicized language to section 5(e), 35 P.S. §750.5(e):

> (e) The department is hereby authorized to approve or disapprove official plans for sewage systems submitted in accordance with this act within one year of date of submission and revisions of official plans within such lesser time as the regulations shall stipulate, *except that the department shall approve or disapprove revisions constituting residental subdivision plans within ninety days of the date of a complete submission, for the period of one year from the effective date of this amendatory act, and within sixty days of the date of a complete submission thereafter. The department shall determine if a submission is complete within ten working days of its receipt.*

The provision became effective in 90 days--September 29, 1989. See Barry D. Musser v. DER, *et al.*, 1990 EHB 1637.

Byler argues that Section 5(e) of the Sewage Facilities Act, as amended in 1989, by implication incorporated the deemed approval remedy from DER's regulations[5] by using the language "time as the regulations shall stipulate". From this argument, Byler advances that DER failed to determine whether his planning module was complete within 10 working days of its receipt and to approve or disapprove the revision within 60 days of its receipt of the submission, so that the revision was approved by operation of law. We have previously ruled that no deemed approval occurs where there is no explicit provision for a deemed approval for DER's delay in giving its approval or

---

[5] The regulations to which Byler refers are 25 Pa. Code §§71.32 and 71.54. Section 71.32 of 25 Pa. Code deals with DER's review of official plans and official plan revisions. As we have previously explained in this Opinion, it is 25 Pa. Code §71.54 which specifically deals with DER's review of planning modules for new land development.

disapproval contained in either DER's regulations or their enabling statute. Grand Central Sanitary Landfill, Inc. v. DER, EHB Docket No. 92-111-E (Adjudication issued March 29, 1993); Franconia Township v. DER, *et al.*, 1991 EHB 1290; S. A. Kele Associates v. DER, *et al.*, 1991 EHB 854.

In each of these decisions, we relied on the Commonwealth Court's decision in D'Amico v. Board of Supervisors, Township of Alsace, 106 Pa. Cmwlth. 411, 526 A.2d 479 (1987). At issue in D'Amico was whether a deemed approval of the appellant's application for an individual sewage disposal system for a residence occurred because of the SEO's failure to act on the application in a timely manner under Section 7(b)(2) of the Sewage Facilities Act.[6] The Court held that where a township SEO failed to act on an application for an individual sewage disposal system permit within the required time period, deemed approval of the application was not warranted in the absence of a specific deemed approval provision in the Sewage Facilities Act. The D'Amico Court stated:

> We have previously recognized, however, that in order for a deemed approval to occur "there must be an express legislative declaration of deemed approval in the statutory...provision in order to have such a substantive result produced by procedural tardiness."
>
> ...Since the Act does not include a deemed approval provision, this Court cannot supply such a provision through statutory construction.
>
> (Citations and footnote omitted).

---

[6] Section 7(b)(2) of the Sewage Facilities Act, 35 P.S. §750.7(b)(2), provided, with certain exceptions, that such permits shall be issued or denied within seven days of receipt of the application.

D'Amico at ___, 526 A.2d at 480. In a footnote, the Court pointed out that its ruling did not mean the appellant was without a remedy, as delay beyond the seven day time period provided by the Sewage Facilities Act would form the basis for a mandamus action to compel the SEO to perform his duties.

Byler attempts to distinguish the Commonwealth Court's decision in D'Amico. He argues that D'Amico involved the interpretation and application of Section 7(b)(2) of the Sewage Facilities Act, 35 P.S. §750.7(b)(2), whereas Section 5(e) contains its own deemed approval remedy by implication.

In accordance with D'Amico and the Board's precedent, we stated in Lobolito, Inc. v. DER, *et al.*, EHB Docket No. 92-147-E (Adjudication issued April 8, 1993), that despite DER's failure to review Lehigh Township's planning module for new land development involved in that matter within the 60 day period specified in Section 5(e), 35 P.S. §750.5(e), the section contains no deemed approval language for such a failure. We did not rule on the appellant's deemed approval argument as to Lehigh Township's plan revision based on 25 Pa. Code §71.54(e), however, because DER had returned Lehigh Township's planning module within 120 days of Lehigh Township's submission of the module to DER for approval, and thus the 120 day period described in §71.54(e) had not expired. Likewise, in the instant appeal, it is clear that the 120 day time period set forth in §71.54(e) had not run when DER disapproved Byler's planning module, as even using the September 17, 1992 date as DER's receipt of the planning module, only 81 days had expired by the time DER gave its disapproval on December 7, 1992.

It is DER's position that there is nothing in Section 5(e) which either demonstrates any legislative intent to incorporate the deemed approval remedy from DER's regulations at 25 Pa. Code §71.54(e) into the statute or any

explicit deemed approval remedy set forth in that section of the Sewage Facilities Act. We ordinarily defer to DER's interpretation of a statute it administers unless DER's interpretation is clearly erroneous. Carlos R. Leffler, Inc. v. DER, EHB No. 91-210-W (Consolidated Docket) (Adjudication issued June 23, 1993). In this case, we agree with DER's position insofar as it pertains to the approval of residential subdivision plans.

It must be presumed that, in amending the Sewage Facilities Act, the Legislature had before it the deemed approval language contained in 25 Pa. Code §75.54(e) and could have included a similar provision in its amendment to the statute. It elected not to do so. As the Commonwealth Court explained in Borough of Glendon v. DER, 145 Pa. Cmwlth. 238, 603 A.2d 226 (1992), allocatur denied, __ Pa. ___, 608 A.2d 32 (1992):

> [W]here the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit. 1 Pa. [C.S.] §1921(b). Only if a statute is unclear may a court embark upon the task of ascertaining the intent of the legislature by reviewing the necessity of the act, the object to be obtained, the circumstances under which it was enacted, and the mischief to be remedied. 1 Pa. C.S. 1921(c); Coretsky v. Board of Commissioners of Butler Township, 520 Pa. 513, 517-518, 555 A.2d 72, 74 (1989).

The words of Section 5(e) are clear and unambiguous. They do not provide for a deemed approval remedy.

In amending the statute, the Legislature has created a situation where the statute and the regulation cannot be read together consistently. Where there is conflict between a statute and regulation, the statute controls. Tiani v. Commonwealth, Department of Public Welfare, 86 Pa. Cmwlth. 640, 486 A.2d 1016 (1985). This means that there is no longer a 120 day

deemed approval concept applicable to residential subdivisions, which now must be reviewed by DER within 60 days instead of 120 days. There is, however, no penalty imposed upon DER by the statute when it fails to complete this review within 60 days.[7] In so ruling, however, we point out that, while there is no deemed approval for residential subdivisions in Section 5(e), this Section's amendment applies only to residential subdivisions, and, therefore, 25 Pa. Code §71.54(e) continues to be valid as to non-residential subdivisions. Having drawn this conclusion, we reject Byler's argument that in amending Section 5(e) of the Sewage Facilities Act, the Legislature intended to incorporate the deemed approval remedy from 25 Pa. Code §71.54(e) as to residential subdivisions. *Id.* at ___, 603 A.2d at 235.

We likewise reject Byler's argument that the amendment to Section 5(e) demonstrates a legislative intent to modify DER's regulation at 25 Pa. Code §71.54(e) as to the time constraints set forth therein regarding deemed approvals of plan revisions for new land development. The Legislature does not "modify" a DER regulation by amending its enabling statute, as Byler argues. Rather, it is the Environmental Quality Board (EQB), as DER's

---

[7] In reaching this conclusion, we are not holding that the Environmental Quality Board (EQB) lacks the power to promulgate a regulation providing for deemed approval of residential subdivision plans should DER fail to act within 60 days, but merely that the existing regulation cannot be read consistently with the subsequent amendment to the Sewage Facilities Act. Nothing, therefore, prevents the EQB from enacting a regulation providing for deemed approval consistent with the amended statute as to residential subdivisions, just as Section 71.54(e) now does as to nonresidential subdivisions.

We also note that in our opinion in Pequea Township v. DER and E. Marvin Herr, EHB Docket No. 94-044-E (Opinion and Order Sur Petition for Supersedeas issued March 25, 1994), we found that DER's failure to approve or disapprove a proposed revision to the Pequea Township Official Plan within 120 days amounted to deemed approval under 25 Pa. Code §71.32(c). In that appeal, however, there was no evidence that a residential subdivision was involved, and the appellant did not raise the issue of whether a sixty-day deemed approval concept existed.

legislative arm, which is authorized by the Legislature at Section 9 of the Sewage Facilities Act, 35 P.S. §750.9, to adopt regulations setting standards for the "preparation, review and acceptance" of plans for sewage systems. Thus, the case law and rules of statutory construction cited by Byler in his post-hearing brief do not support this argument. We accordingly find no deemed approval of the Tuscarora Estates planning module occurred in this matter.

Was There a Lack of DER Jurisdiction?

Since we have concluded that no deemed approval occurred we need not address Byler's contention that DER lacked jurisdiction on December 7, 1992 to disapprove the planning module and that Cutshall served as DER's agent with regard to the date DER received the submission.

Was There an Equitable Estoppel?

Byler next contends that DER was under a duty to determine whether the Tuscarora Estates planning module was complete within 10 days of DER's receipt of the planning module and had 60 days to conduct its review of the planning module. Byler argues that DER's silence during this review period and the "deemed approval" provision in the regulations served as a misrepresentation to Byler that he had received approval of the planning module. He asserts that he justifiably relied on this DER silence and deemed approval provision to his detriment by selling lots in the subdivision which now cannot be developed because of DER's disapproval of the planning module. Byler contends the doctrine of equitable estoppel should prevent DER from taking away the deemed approval after he has justifiably relied on it.

In our recent Adjudication in Benco, Inc. of Pennsylvania v. DER, EHB Docket No. 91-554-W (Adjudication issued February 17, 1994), we stated:

> In order to apply the doctrine of equitable estoppel to a Commonwealth agency, the party to be estopped (1) must have intentionally or negligently misrepresented some material facts; (2) knowing or having reason to know that the other party would justifiably rely on the misrepresentation; and (3) induced the party to act to his or her detriment because of a justifiable reliance upon the misrepresented facts.

Id. at 26 (quoting Foster v. Westmoreland Casualty Co., 145 Pa. Cmwlth. 638, ___, 604 A.2d 1131, 1134 (1992)).

Byler's evidence fails to establish the elements for an equitable estoppel here. First, there is no evidence of any intentional or negligent misrepresentation by DER that Byler's planning module had been approved. As we have previously found in this Adjudication, the Sewage Facilities Act did not provide for any deemed approval upon DER's failure to meet the time constraints set forth in Section 750.5(e). Thus, silence by DER as to its decision on Byler's planning module cannot amount to an intentional or negligent misrepresentation where DER could not have anticipated that Byler believed his planning module had been deemed approved. The evidence shows Byler did not attempt to contact DER to find out whether the planning module would be approved before December 7, 1992. (N.T. 18, 87) Thus, DER had no reason to know that Byler was relying on DER's silence as amounting to a misrepresentation of approval. *Cf.* Benco, *supra*. Additionally, Byler has not established the third element of estoppel; i.e., he has not shown DER induced him to act to his detriment because of a justifiable reliance upon the misrepresented facts. He entered the lot sales because of his own misunderstanding of the existence of a deemed approval, not because of any inducement made by DER.

Was There a Denial of Equal Protection?

Byler contends that DER denied him equal protection under the law (as to both the United States Constitution and the Pennsylvania Constitution) by disapproving the planning module when the revision had already been deemed approved, was in compliance with law, and by following unwritten internal policies.[8] We have already found in this Adjudication that no deemed approval occurred; thus, Byler's equal protection argument based on deemed approval likewise fails. We will proceed to consider his other bases.

Byler contends that the planning module was complete and in full compliance with Chapter 71 of DER's regulations when it was submitted to DER. Byler further contends that Sarge and Stephens testified that the subdivision plan attached to and incorporated into the revision clearly noted sink holes/closed depressions and stated the minimum horizontal isolation distances for features including streams.

Section 73.13 of 25 Pa. Code sets forth the minimum horizontal isolation distances which must be maintained between the sewage disposal

---

[8] We note DER asserts that Byler has waived any arguments pertaining to DER's bases for disapproval of the planning module by his failure to raise these arguments in his notice of appeal. We reject this assertion because Byler's objections in his notice of appeal, *inter alia*, state at paragraph 18:

> 18. The Disapproval was issued in disregard of the applicable statutory authority, is capricious and arbitrary, and thereby denies Appellant equal protection under the law.

We find this language sufficiently challenged DER's bases for disapproval. <u>See</u> <u>Croner, Inc. v. Commonwealth, DER</u>, ___ Pa. Cmwlth. ___, 589 A.2d 1183 (1991).

system and certain itemized features. The minimum horizontal isolation distance between the perimeter of the absorption area and a stream is 50 feet and 100 feet for sink holes. 25 Pa. Code §73.13(c).

There is no question that there is a stream which crosses the proposed Tuscarora Estates Subdivision site. This stream also has a diversion which people use for intakes of water. (N.T. 44) It is Byler's position that the presence of this stream was indicated on the plot plan, as required by Section F of the planning module. Sarge testified that the stream was not shown in the body of the plan, but its presence would be indicated by means of the contours, showing a low area, on the plot plan map. (N.T. 76-78) He admitted, however, that Byler failed to plot the stream or its diversion on the plot plan map by a line such as the blue line drawn on Exhibit A-2. (N.T. 77, 85) Moreover, Sarge testified that none of Stephens' tests was conducted within the 50 foot minimum horizontal isolation distance from this stream. (N.T. 72) One of the reasons for DER's disapproval of the planning module was Curry's observation that the stream was not noted on the plot plan regardless of whether the isolation distance had been observed in testing. (N.T. 144)

We do not accept Byler's position that his planning module was improperly rejected by DER for this reason. Clearly, DER can make no determination from a plot plan which does not even indicate the presence of the stream, as required by Section F of the planning module, as to whether the proper isolation distance from that stream has been maintained. Thus, Byler has failed to prove that DER's reason for disapproving the planning module set forth at paragraph (b) of its disapproval letter was improper.

As Byler has failed to prove DER's reason for disapproving the planning module at paragraph b of its disapproval letter was inappropriate, we

need not address DER's second reason for disapproval. See Willowbrook Mining Company v. DER, 1992 EHB 303.

Byler next contends DER violated his right to equal protection because it did not handle the planning module in a manner consistent with its handling of other planning modules and revisions, pointing to testimony by Sarge and Stephens that in their previous experience, DER has returned incomplete planning modules or requested additional information rather than disapproving the planning modules. Since this is an affirmative defense being raised by Byler, he bears the burden of proving by a preponderance of the evidence that DER's action was violative of his right to equal protection. 25 Pa. Code §21.101(a); McKees Rocks Forging, Inc. v. DER, EHB Docket No. 90-310-MJ (Consolidated) (Adjudication issued March 2, 1994), p. 52.

We explained in Al Hamilton Contracting Co. v. DER, 1992 EHB 1458, 1506, that the equal protection clause of the Fourteenth Amendment of the United States Constitution provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws."[9] We further explained:

> The [equal protection] clause announces a fundamental principle: the State must govern impartially. General rules that apply evenhandedly to all persons within the jurisdiction comply with this principle. Only when a governmental unit adopts a rule that has a special impact on less than all persons subject to its jurisdiction does the question whether this principle is violated arise.

---

[9] We point out that the protection afforded by the equal protection clause of the federal constitution and the prohibition against special laws in the Pennsylvania Constitution are substantially the same. Commonwealth v. Kramer, 474 Pa. 341, 378 A.2d 824 (1977).

Id. at 1506, (quoting New York Transit Authority v. Beazer, 440 U.S. 568, at 587-588 (1979)).

As DER notes in its post-hearing brief, the basis for DER's disapproval of Byler's planning module, as set forth in DER's letter of December 7, 1992, was not simply because the plan was incomplete but because of the presence of sink holes within 100 feet of the soil test sites and, secondly, because the plot plan failed to demonstrate that proper isolation distances had been maintained between the soil test sites and streams crossing the site. Therefore, Byler's equal protection argument has no merit.

Further, Byler contends Curry's testimony shows that DER has "certain policies regarding the 10-day period for determining when a submission was complete, whether or not more information was sought or a disapproval was issued, the application of the 120, 90, or 60 day periods for approving or disapproving planning modules, plans, and revision, and just when if ever the deemed approval remedies of its regulations would be enforced." He asserts that Curry admitted that those policies were not in writing, not authorized by statute, and not contained in any of DER's regulations. From this assertion, he contends DER's application of these unwritten policies deprived him of his right to equal protection because he and other members of the public "have no idea of the requirements [DER] is demanding that they meet or the standards by which their submittals will be measured." In support of his argument, Byler points to Exhibits A-7 and A-8.[10]

---

[10] Exhibit A-7 is two flow charts Stephens received from DER indicating DER's time frame for reviewing planning modules for major and minor subdivisions. (N.T. 43) Exhibit A-8 is DER's internal route sheet for its review of the Tuscarora Estates planning module. (N.T. 121-122).

Curry's testimony does not establish Byler's claim. Curry testified that upon its receipt of a proposed plan revision, DER conducts a 10-day completeness review. (N.T. 133) During this completeness review, DER reviews the planning module submission to determine whether the required components of the module are included in the submission. Once DER determines that the submission is complete, it then conducts its review of the planning module during the 60 day period following the completeness determination. (N.T. 134) If DER determines the submission is incomplete, however, it is returned. (N.T. 133) DER's completeness review does not address the actual contents of each individual document in the submission. (N.T. 139)

On cross-examination Curry testified that it was his understanding that it was DER's policy that the 60 day review period is outside the 10 day completeness review period, but that he was not sure whether that policy was in writing. (N.T. 157) He also testified that it was his understanding that DER made its administrative completeness determination within 10 days of the date stamped on the submission for DER's receipt, but that this was not a written policy of DER, and was not set forth in DER's regulations or in any statute. (N.T. 153-155) Nothing in Curry's testimony establishes Byler's equal protection argument, nor do Exhibits A-7 or A-8 show any violation of the equal protection guarantee on DER's part.

Was There a Taking Without Just and Adequate Compensation?

Byler's next argument is that there was an unconstitutional "taking" without just and adequate compensation of the proposed Tuscarora Estates subdivision by DER's disapproval of the planning module.

We recently addressed a "takings" argument in Mr. and Mrs. Conrad Mock v. DER, 1992 EHB 537, *aff'd*, ___ Pa. Cmwlth. ___, 623 A.2d 940 (1993).

Mock, *inter alia*, involved an appeal by landowners from DER's denial of their application for an Encroachment Permit under the Dam Safety and Encroachments Act (DSEA), Act of November 26, 1978, P.L. 1375, as amended, 32 P.S. §693.1 *et seq.*, to place and maintain fill on their tract of land, contending that DER's permit denial constituted an unconstitutional taking of their property. We stated in Mock that to constitute a taking, a government regulation must deprive the owner of any reasonable use of the property and that, in order to pass constitutional muster at the federal level, the Commonwealth's exercise of the police power through the statute and regulation must satisfy the three-pronged test articulated by the U.S. Supreme Court in Lawton v. Steele, 152 U.S. 133, 14 S.Ct. 499, 38 L.Ed. 385 (1894). This test is: 1) the interests of the public must require it; 2) the means chosen must be reasonably necessary for the accomplishment of the purpose; and 3) the means chosen must not be unduly oppressive upon individuals.

Citing Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978), we noted that DER's action in Mock had not interfered with the present and historical use of the site. We pointed out that there was a lengthy history of regulation over the placement of fill such that the appellants could not have realistically been confident that they would be able to place fill on the site, and that there was no showing that they would be denied any use of the wetlands.

Byler asserts DER's action here is unduly oppressive because it denied Byler his intended use of the development as a residential subdivision, unreasonably restricting "the best and most profitable use" of the development since SEO Stephens has refused to issue individual sewage disposal permits for the development due to the disapproval. As in Mock, however, DER's regulation

of the sewage facilities area has a lengthy history, and Byler could not have been confident that he would be able to develop the site. Further, DER's disapproval here has not interfered with the present and historical use of the site. Thus, we find no undue oppression on Byler, and his takings argument cannot succeed.[11]

Was the Exclusion of Exhibit A-6 an Error?

Byler contends his Exhibit A-6 should have been admitted into evidence by the sitting Board Member. A copy of Exhibit A-6 is attached to Byler's post-hearing brief as an exhibit, and is a letter dated December 15, 1992 from Stephens to Byler. Stephens testified on direct examination by Byler that his signature appears on this letter. In the first paragraph of the letter, Stephens states that he had a telephone conversation with Curry on December 11, 1992 in which Curry stated that DER had a total of 70 days from its receipt of the planning module on September 22, 1992 to act on Byler's planning module submission. In the second paragraph of the letter, Stephens describes a telephone conversation between him and Byler on December 4, 1992, during which he stated that it was his understanding of DER's regulations that DER had only 60 days, and not 70 days, to act on Byler's submission, and Byler stated that this was his understanding and that of his counsel and that his certified mail receipt reflected DER had received the submission on September 17, 1992. In the third and fourth paragraphs of the letter, Stephens states that since the planning module was disapproved, he may not issue any septic system permits until the module is approved or this Board overturns DER's

[11] We point out that DER's disapproval letter states that Byler can have a reconsideration of his planning module by submitting a complete and updated planning module to DER. (Exhibit A-5)

decision. Board Member Mack sustained DER's objection to the relevancy of this document to the issues in this matter. (N.T. 95)

In his post-hearing brief, Byler contends Exhibit A-6 should have been admitted because it was probative of whether the planning module was deemed approved, of the estoppel issue, and of whether there was an uncompensated taking of the development, as well as corroborating Byler's testimony regarding his inability to sell any more lots in the development. We find no error in Board Member Mack's ruling.

As we recently explained in McKees Rocks Forging, *supra*., "relevant" evidence is "[e]vidence which tends to establish some fact material to the case, or which tends to make a fact at issue more or less probable." Slip op. at p. 57 (quoting Commonwealth v. Scott, 480 Pa. 50, 389 A.2d 79, 52 (1978), Packel and Poulin, Pennsylvania Evidence §401.) We stated:

> A determination of whether a particular item of evidence is relevant is a two-step analysis. It first involves a determination of whether the inference sought to be raised by the evidence bears on a matter at issue in the case, and secondly, a determination of whether the evidence renders the desired inference more probable than it would be without the evidence. Scott, *supra*.

As we have concluded that the language of Section 5(e) of the Sewage Facilities Act makes no provision for a deemed approval to occur when DER fails to comply with the time constraints on its review, the differing positions on DER's time for review reflected in Exhibit A-6 clearly has no bearing on the deemed approval issue. Moreover, there is nothing in Exhibit A-6 which would bear on the estoppel issue, as there is nothing which shows anything in addition to Byler's evidence which we addressed in this Adjudication in rejecting the estoppel argument. Finally, even if Exhibit A-6

supports Byler's argument that Stephens will not issue any permits for on-lot sewage disposal and that this affects his ability to sell his lots, this has no bearing on the takings issue, as we have concluded that such evidence would not establish a taking here.

Based on the foregoing discussion, we conclude Byler has failed to establish his case by a preponderance of the evidence. We accordingly make the following conclusions of law and enter the following order dismissing the appeal.

CONCLUSIONS OF LAW

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

2. Byler bears the burden of proving by a preponderance of the evidence that DER acted unlawfully or abused its discretion in disapproving the official plan revision for Tuscarora Estates.

3. Section 5(e) of the Sewage Facilities Act, 35 P.S. §750.5(e), contains no explicit language providing for a deemed approval to occur when DER fails to comply with the time constraints for its review of residential subdivision plan revisions set forth in that section. Lobolito, Inc., *supra*.

4. Where there is no explicit provision contained in Section 5(e) of the Sewage Facilities Act for a deemed approval to occur for DER's delay in giving its approval or disapproval for a residential subdivision plan, no deemed approval occurs. Grand Central Sanitary Landfill, Inc., *supra*; D'Amico, *supra*.

5. There is no legislative intent in Section 5(e) to modify DER's regulation at 25 Pa. Code §71.54(e) as to the time constraints set forth

therein regarding deemed approvals of plan revisions for new land development. Borough of Glendon, *supra*.

6. No deemed approval of the Tuscarora Estates planning module occurred in this matter.

7. To establish a defense of equitable estoppel against DER, Byler must prove 1) DER intentionally or negligently misrepresented some material fact; 2) knowing or having reason to know that the other party would justifiably rely on the misrepresentation, and 3) induced the party to act to his or her detriment because of a justifiable reliance on the misrepresented facts. Benco, Inc., *supra*; Foster, *supra*.

8. Byler's evidence fails to establish that DER should be equitably estopped from disapproving his planning module.

9. Byler's notice of appeal sufficiently raised the issue of whether DER's disapproval of his planning module was arbitrary and capricious, in disregard of statutory authority and a denial of his right to equal protection because his planning module was in compliance with DER's regulations. Croner, *supra*.

10. Byler has failed to prove by a preponderance of the evidence that DER's treatment of his planning module was pursuant to an unwritten policy which violates his equal protection guarantee. See Al Hamilton Contracting Co., *supra*.

11. Byler failed to prove by a preponderance of the evidence that DER's disapproval of his planning module resulted in a taking of his property without adequate compensation. He failed to show DER's regulation of his property's use constituted "undue oppression" under the test in Lawton, *supra*. See Mock, *supra*.

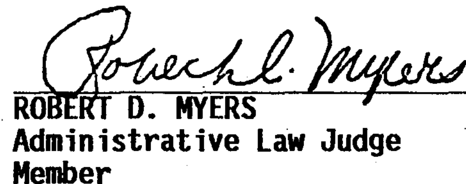
12. The sitting Board Member did not err in excluding Exhibit A-6 from evidence, as the information contained in that letter is irrelevant to the issues raised by Byler. McKees Rocks Forging, Inc., *supra*; Commonwealth v. Scott, *supra*.

O R D E R

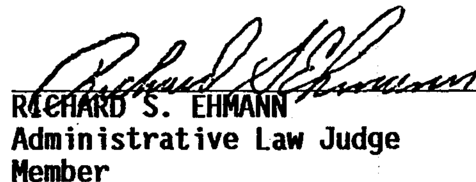
AND NOW, this 27th day of June, 1994, it is ordered that Byler's appeal at Docket No. 93-001-MJ is dismissed.

ENVIRONMENTAL HEARING BOARD

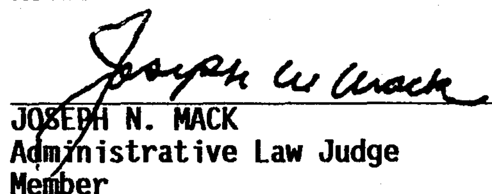
MAXINE WOELFLING
Administrative Law Judge
Chairman



ROBERT D. MYERS
Administrative Law Judge
Member



RICHARD S. EHMANN
Administrative Law Judge
Member



JOSEPH N. MACK
Administrative Law Judge
Member

DATED: June 27, 1994

cc: **DER, Bureau of Litigation**
Library: Brenda Houck
For the Commonwealth, DER:
Nels J. Taber, Esq.
Central Region
For Appellant:
Robert M. Cravitz, Esq.
Selinsgrove, PA

ar

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
2nd FLOOR — MARKET STREET STATE OFFICE BUILDING
400 MARKET STREET, P.O. BOX 8457
HARRISBURG, PA 17105-8457
717-787-3483
TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOARD

KENNETH P. KORETSKY	:	
	:	
v.	:	EHB Docket No. 93-357-W
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: July 1, 1994
and CLEAN SOILS, INC., Permittee	:	

OPINION AND ORDER SUR MOTION TO DISMISS OR, IN THE ALTERNATIVE, MOTION TO LIMIT ISSUES AND FOR MORE SPECIFIC PRE-HEARING MEMORANDUM

By Maxine Woelfling, Chairman

Synopsis

A permittee's motion to dismiss a third-party appeal as a sanction for failing to comply with the Board's pre-hearing orders is denied. The sanction of dismissal is too severe in light of the circumstances. Permittee's alternative motion to limit issues is granted in part and denied in part. In general, an appellant is not precluded from raising air quality related issues in an appeal of a solid waste permit, since the applicable regulations set forth certain air quality requirements for solid waste permit applications. The motion to limit issues is granted where the appellant failed to raise issues in his notice of appeal and later raised them in his pre-hearing memorandum. It is denied where the appellant raised issues in his notice of appeal but failed to raise them in his pre-hearing memorandum. Finally, permittee's motion for a more specific pre-hearing memorandum is granted where appellant has failed to identify his witnesses or documentary

evidence and has not provided a summary of expert testimony to be presented at the hearing on the merits.

OPINION

This matter was initiated with the December 1, 1993, filing of a notice of appeal by Kenneth P. Koretsky (Koretsky) challenging the Department's issuance of Solid Waste Permit (SWP) No. 301242 to Clean Soils, Inc. (Clean Soils). The permit, which was issued pursuant to the Solid Waste Management Act, the Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §6018.101 et seq. (SWMA), authorized Clean Soils to operate a facility for processing and treating petroleum-contaminated soil in Falls Township, Bucks County.

Presently before the Board for disposition is Clean Soils' March 31, 1994, renewed motion to dismiss or, in the alternative, motion to limit issues and for more specific pre-hearing memorandum.[1]

In its renewed motion to dismiss, Clean Soils argued the Board should dismiss the appeal as a sanction because Koretsky was not serious about pursuing the appeal, as he did not conduct discovery or prepare a pre-hearing memorandum until a motion to dismiss was filed, or in the alternative, limit the issues because Koretsky waived a number of his objections, as he either appealed the wrong permit or raised his objections in his notice of appeal, but not in his pre-hearing memorandum or vice versa. Finally, Clean Soils contended it was entitled to more specific information regarding Koretsky's witnesses and evidence before filing its own pre-hearing memorandum.

---

[1] Koretsky failed to file his pre-hearing memorandum by the February 14, 1994, deadline specified in Pre-Hearing Order No. 1, and Clean Soils filed a motion to dismiss. The motion was not ruled on because, in the meantime, the Board issued a rule to show cause to Koretsky why his appeal should not be dismissed for failure to file his pre-hearing memorandum, and the rule was discharged on March 21, 1994, when Koretsky filed his pre-hearing memorandum.

Koretsky responded to the motion on April 18, 1994, asserting inter alia, that he sufficiently enumerated his specific objections.

The Department did not respond to the motion.

Motion To Dismiss

We deny the motion to dismiss. While the Board may impose sanctions, including dismissal, against a party for failure to comply with Pre-Hearing Order No. 1, Howard G. Brooks v. DER, 1990 EHB 1132, the severe sanction of dismissal is not appropriate, especially where it is unclear why a party failed to comply with an order, James E. Wood v. DER, et al. 1992 EHB 1342, or where there is no repeated failure to comply with Board orders. Koretsky's alleged failures are not so egregious that they warrant the sanction of dismissal.

Motion To Limit Issues

Next, we will consider Clean Soils' alternative motion to limit issues. A motion to limit issues generally seeks to exclude a particular issue's consideration because of a procedural or evidentiary defect in its assertion. Willowbrook Mining Co. v. DER, 1991 EHB 507. For the reasons set forth below, Clean Soils' motion to limit issues is granted in part and denied in part.

Initially, we will address Clean Soils' contention that any issues relating to air quality should be stricken, since Koretsky only appealed the issuance of a solid waste permit. This is an overly simplistic statement of the issues in light of the requirements of the residual waste management regulations.[2] Every application for a residual waste management permit must include an environmental assessment which addresses the potential impact of

---

[2] Petroleum-contaminated soils fall within the definition of "residual waste."

the proposed facility on air quality. 25 Pa. Code §297.104(12). And, the Department cannot approve a residual waste management permit application unless the applicant demonstrates that it has satisfied the requirements of the environmental protection acts, which are defined in 25 Pa. Code §275.1 to include the Air Pollution Control Act, the Act of January 8, 1960, P.L. (1959) 2119, as amended, 35 P.S. §4001 et seq. In light of these regulatory mandates, it cannot be concluded that Koretsky is precluded from raising air quality-related issues in his challenge to the issuance of a solid waste permit, provided they are otherwise properly raised in his notice of appeal. Consequently, this portion of Clean Soils' motion to limit issues is denied.

Next, we will address whether Koretsky waived any of his objections, either by failing to raise them in his notice of appeal or failing to raise them in his pre-hearing memorandum. Clean Soils argued that Koretsky waived the issues of traffic and property values by failing to raise them in his notice of appeal.

An appellant is required to state in the notice of appeal his factual and legal objections to the Department's action. 25 Pa. Code §21.51(e). Any objection not so stated is waived. Edmund Wikoski v. DER, 1992 EHB 642. Since the proper raising of objections affects our jurisdiction, we are not at liberty to excuse an appellant from these requirements unless good cause is shown.[3] Pennsylvania Game Commission v. Cmwlth., Dept. of Environmental Resources, 97 Pa. Commw. 78, 509 A.2d 877 (1986). Koretsky has waived the issues of traffic and property values by failing to raise them in his notice of appeal, and the motion to limit issues will be granted in this regard.

---

[3] Good cause is not an issue here.

Clean Soils has also argued that the following issues set forth in Koretsky's notice of appeal are waived because he did not raise them in his pre-hearing memorandum. Those objections are as follows:

> During any period of inactivity at the facility the gaseous emission from unprocessed soil will continue without reasonable and sufficient treatment (Notice of Appeal No. 4);
>
> There is no procedure to prevent emission of large quantities of fugitive dust from the processed soil (Notice of Appeal No. 5);
>
> The issuance of this permit is against the purpose of the regulations by permitting unhealthy substances into the environment when it would be more feasible to perform the same operation at the site of the original pollution (Notice of Appeal No. 7);
>
> The equipment permitted does not meet the technological standards that should be imposed on a stationary facility as it was designed for portable operations (Notice of Appeal No. 9);
>
> The permittee is likely to violate Pennsylvania laws because the operators of this facility continually fail to honor their permit requirements in other states (Alaska) (Notice of Appeal No. 11); and
>
> The collateral security posted is insufficient (Notice of Appeal No. 12).

This part of the motion is denied. Koretsky has only filed his pre-hearing memorandum. The Board has expressed its reluctance to enforce the waiver language[4] set forth in Pre-Hearing Order No. 1, unless the refusal to waive a contention of law or fact would be prejudicial to the opposing party. Max Funk, et al v. DER, et al, 1988 EHB 1242; Reiner v. DER, 1982 EHB 183. Furthermore, although our rules of procedure do not authorize or create an

---

[4] Pre-Hearing Order No. 1 states, "A party may be deemed to have abandoned all contentions of law and fact not set forth in its pre-hearing memorandum...."

absolute right to amend a pre-hearing memorandum, the Board has stated that it generally allows amendment when there is no objection or when cause to do so is shown and there is no prejudice to other parties. Midway Sewage Authority v. DER, 1991 EHB 1445, Fn. 2. Given the procedural posture of this appeal, Koretsky may still seek to amend his pre-hearing memorandum to incorporate these issues.

Motion For A More Specific Pre-Hearing Memorandum

Finally, Clean Soils asserted that Koretsky's pre-hearing memorandum was defective because he failed to set forth a complete witness list, to identify his expert witnesses, to summarize his testimony, and to identify the documents on which he will rely. An examination of Koretsky's pre-hearing memorandum reveals that these deficiencies are present. Clean Soils is entitled to this information before being required to file its own pre-hearing memorandum. Edmund Wikoski v. DER, 1992 EHB 642. Thus, the motion will be granted.

ORDER

AND NOW, this 1st day of July, 1994, it is ordered that:

1) Clean Soils' motion to dismiss is denied;

2) Clean Soils' motion to limit issues is granted in part and denied in part consistent with the foregoing opinion;

3) Clean Soils' motion for a more specific pre-hearing memorandum is granted, and Koretsky shall supplement his pre-hearing memorandum with the information specified in this opinion on or before July 19, 1994;

4) Clean Soils and the Department shall file their pre-hearing memoranda on or before August 5, 1994.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

DATED: July 1, 1994

cc: **Bureau of Litigation**
Library: Brenda Houck
Harrisburg, PA
For the Commonwealth, DER:
Douglas G. White, Esq.
Southeastern Region
For the Appellant:
Michael Molinaro, Esq.
Broomall, PA
For the Permittee:
William H. Eastburn, III, Esq.
EASTBURN AND GRAY
Doylestown, PA

nb

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
2nd FLOOR — MARKET STREET STATE OFFICE BUILDING
400 MARKET STREET, P.O. BOX 8457
HARRISBURG, PA 17105-8457
717-787-3483
TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BO

CHRISTINE ANN CRAWFORD and COREY EICHMAN, et al.	:	
v.	:	EHB Docket No. 93-350-MJ (Consolidated)
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES and BROWNING-FERRIS INDUSTRIES OF PA, Permittee	:	Issued: July 6, 1994

OPINION AND ORDER SUR PETITION TO INTERVENE

By Joseph N. Mack, Member

Synopsis

A petition to intervene is denied where the notice of appeal and pre-hearing memorandum filed by the Appellants indicate that the petitioner's interest will be adequately represented by the Appellants. As to the petitioner's allegation of a dispute between the petitioner and the permittee over the lack of an easement allowing run-off from the permit site to discharge onto the petitioner's property, this matter is outside the Board's jurisdiction.

OPINION

This matter was initiated with the filing of two appeals: the first by Christine Ann Crawford on November 19, 1993, docketed at EHB Docket No. 93-350-MJ, and the second by Corey Eichman, *et al.*, on December 6, 1993, docketed at EHB Docket No. 93-364-MR. The latter appeal was perfected on December 27, 1993, and by order dated February 24, 1994, both appeals were

consolidated at the earlier docket number.[1] The appeals challenge the issuance of Permit No. 603301 ("permit") to Browning Ferris Industries of PA, Inc. d/b/a Ad+Soil ("BFI") on October 15, 1993 by the Department of Environmental Resources ("Department") for the application and agricultural utilization of sewage sludge on the Wheeler Aman Farm ("Aman Farm") in West Vincent Township, Chester County.

On June 6, 1994, following the close of discovery and the filing of the Appellants' pre-hearing memorandum, the Board received from Nancy K. Freenock a Petition to Intervene in this matter. The petition states that Ms. Freenock purchased lot number 8 in the Kimberbrae housing development on August 12, 1993. According to Ms. Freenock, the Kimberbrae development adjoins the Aman Farm, also known as "French Creek Farm".[2] One residential lot - lot number 9 - separates Ms. Freenock's lot from the Aman Farm. The petition then states that the Aman Farm has an extensive pipe and tile system part of which diverts storm water, groundwater, and surface water onto lot number 9 and then onto Ms. Freenock's property. Ms. Freenock states that she was unaware of the existence of the pipe and tile system until she received a letter to this effect, dated April 8, 1994, from Alan Heist, Manager of West Vincent Township. The letter from Mr. Heist explains that a drainage swale runs through the Freenock property which provides drainage for farm fields adjacent to the Kimberbrae development, although no easement exists for

---

[1] Ms. Crawford, Mr. Eichman, *et al.* are hereinafter referred to herein as "the Appellants".

[2] In her petition, Ms. Freenock refers to "French Creek Farm". In a letter faxed to the Board on June 24, 1994, Ms. Freenock identifies "French Creek Farm" as being another name for the "Aman Farm", the site of the sewage sludge application here in question. Because all of the documentation involved in this appeal refers to the site as the "Aman Farm", we too shall refer to it in that manner.

purposes of maintaining the swale. Ms. Freenock contends that, by issuing the permit, the Department has allowed sludge to run across her property without her permission. She asserts that her interest may not be adequately represented by the Appellants because she alleges that at the time the appeals were filed, it was not known by the Appellants or Ms. Freenock that a pipe and tile system existed on the Aman Farm and that, as a result thereof, drainage from the Farm would travel onto Ms. Freenock's property.

BFI filed objections to the petition on June 13, 1994. The Department also responded to the petition on that date.[3] Both assert that the petition is untimely and is an attempt to circumvent the Board's 30-day statute of limitations for filing an appeal. In addition, BFI argues that the petition fails to demonstrate that Ms. Freenock has a substantial, direct, and immediate interest in the appeal. Ms. Freenock filed a reply to BFI's and the Department's objections by letter faxed to the Board on June 24, 1994.

Section 4(e) of the Environmental Hearing Board Act, Act of July 13, 1988, P.L. 530, 35 P.S. §7511 *et seq.*, allows "any interested party" to appeal in a matter pending before the Board. 35 P.S. §7514(e). As noted in our prior decision of Concord Resources Group of Pennsylvania, Inc. v. DER, 1992 EHB 1563, there is not an automatic right of intervention under §4(e) of the Environmental Hearing Board Act; rather, a party must first establish some interest in the proceedings before the Board. *Id.* at 1566. Moreover, a petitioner may not use intervention as a means of circumventing the time constraints of 25 Pa. Code §21.52(a), requiring that appeals be filed within

[3] Rather than filing objections to the petition as instructed by the Board's letter of June 3, 1994, the Department filed a "Motion to Deny Petition for Intervention". Counsel for the Department should be aware that the proper procedure for responding to a petition is to file objections to the petition and a brief in support thereof. Parties should not respond to a petition or motion with a "motion to deny" the petition or motion.

30 days of the Departmental action in question. New Morgan Landfill Co., Inc. v. DER, 1992 EHB 1690, 1694.

Both the Department and BFI argue that Ms. Freenock is attempting to circumvent the thirty-day filing requirement of §21.52(a) by intervening in this appeal. They assert that Ms. Freenock could have filed a timely appeal from the permit issuance and, having failed to do so, should not now be permitted to intervene in this proceeding.

In her petition, Ms. Freenock states that she purchased her lot in the Kimberbrae development on August 12, 1993. Thus, she owned this property when the permit was issued to BFI on October 15, 1993 and when notice of the permit issuance was published in the Pennsylvania Bulletin on November 13, 1993. Ms. Freenock states, however, that she did not learn of the drainage from the Aman Farm onto her property until April 9, 1994 when she received Mr. Heist's letter. She states that it was not until receiving Mr. Heist's letter and through further investigation that she discovered that sewage sludge was being applied to a field of the Aman Farm closest to her home and that the sludge was being discharged onto her property as a result of the pipe and tile system on the Farm. Therefore, we reject BFI's and the Department's contention that Ms. Freenock is attempting to avoid the requirements of §21.52(a) by intervening in this appeal.

BFI also argues that Ms. Freenock has not raised any issue which has not already been raised by the Appellants. Specifically, BFI points to the fact that Ms. Freenock is listed as a fact witness in the Appellants' pre-hearing memorandum and that, under the section headed "Statement of Facts Appellants Intend to Prove", the pre-hearing memorandum discusses the location of the Kimberbrae development next to the Aman Farm, the existence of the drainage system on the Aman Farm, the alleged drainage from the Aman Farm onto

lots in the Kimberbrae development, the existence of the drainage swale on the Freenock property, and, finally, the alleged exposure of the Freenock family and neighborhood children to heavy metal concentrations in runoff from the sludge. (Appellants' Pre-Hearing Memorandum, Section I., Nos. 8-9, 12-48)

Ms. Freenock asserts that, if permitted to intervene, she will introduce evidence regarding the drainage system which exists on the Aman Farm, the alleged run-off of sewage sludge onto her property, and the alleged harmful impact that application of the sludge will have on children in the Kimberbrae development. As BFI points out, these issues are addressed at length by the Appellants in their pre-hearing memorandum as facts which the Appellants intend to prove at the hearing. Moreover, Ms. Freenock is listed as a fact witness who will presumably provide testimony at the hearing on the issues set forth above.

Although we find that Ms. Freenock has an interest in the subject matter of this appeal, it appears that this interest is adequately represented by the Appellants. Ms. Freenock's petition does not indicate that her intervention would contribute anything to the litigation of this appeal which the Appellants have not already adequately addressed. Because we find that Ms. Freenock's interests are adequately represented by the Appellants herein, we shall deny her petition for intervention. See Willowbrook Mining Co. v. DER, 1991 EHB 917 (Where prospective intervenor's interests are adequately represented by one of the parties to an appeal, its petition to intervene will be denied.)

We note that, in her petition, Ms. Freenock has raised questions regarding maintenance of the drainage swale and the lack of an easement allowing run-off from the Aman Farm to enter her property. Such issues are

outside the jurisdiction of the Board.[4] See McKees Rocks Forging, Inc. v. DER, 1991 EHB 405, 409 (The Board's jurisdiction does not extend to resolving disputes between private parties, but only to actions involving the Department.)

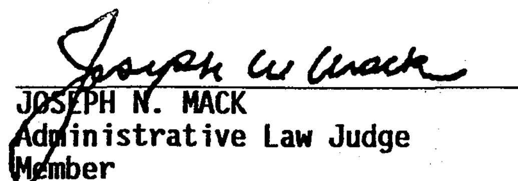
Because we have dismissed the petition for intervention on the basis that Ms. Freenock's interests are adequately represented by the Appellants herein, we need not address BFI's argument that Ms. Freenock has not demonstrated a substantial, direct, and immediate interest in the subject matter of this appeal such as would allow her to intervene herein.

Therefore, the following order is entered:

O R D E R

AND NOW, this 6th day of July, 1994, it is hereby ordered that the Petition to Intervene filed by Nancy K. Freenock in this matter is denied.

ENVIRONMENTAL HEARING BOARD



JOSEPH N. MACK
Administrative Law Judge
Member

DATED: July 6, 1994

cc: **Bureau of Litigation**
Library: Brenda Houck
For the Commonwealth, DER:
Mary Y. Peck, Esq.
Southeast Region

---

[4] In her reply, Ms. Freenock acknowledges that she does not seek to raise common law issues which must be resolved in a court of common pleas. Rather, she seeks only to demonstrate that the Department abused its discretion by issuing a permit which will allegedly allow sewage sludge run-off to discharge onto her property without her permission.

For Appellants:
Jerome Balter, Esq.
Susan Saint Antoine, Esq.
PUBLIC INTEREST LAW CENTER OF PHILADELPHIA
Philadelphia, PA
For Permittee:
Michael R. Bramnick, Esq.
John W. Carroll, Esq.
PEPPER, HAMILTON & SCHEETZ
Harrisburg, PA
For Intervenor:
Nancy K. Freenock, pro se
P. O. Box 897
Kimberton, PA 19442

ar

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
2nd FLOOR — MARKET STREET STATE OFFICE BUILDING
400 MARKET STREET, P.O. BOX 8457
HARRISBURG, PA 17105-8457
717-787-3483
TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOARD

NEW CASTLE TOWNSHIP BOARD OF SUPERVISORS :
:
v. : EHB Docket No. 92-540-W
:
COMMONWEALTH OF PENNSYLVANIA, :
DEPARTMENT OF ENVIRONMENTAL RESOURCES : Issued: July 7, 1994
AND READING ANTHRACITE COMPANY, Permittee :

OPINION AND ORDER SUR MOTION TO LIMIT ISSUES AND MOTION IN LIMINE TO EXCLUDE CERTAIN EVIDENCE

By Maxine Woelfling, Chairman:

Synopsis:

A permittee's motion to limit issues to those raised in the notice of appeal is granted where the appellant failed to raise issues in its notice of appeal and later raised them in its pre-hearing memorandum. Permittee's motion to exclude evidence as a sanction for failure to respond to discovery requests is denied where the permittee failed to first file a motion to compel responses to the discovery requests. Finally, permittee's request to conclusively establish factual matters which were deemed admitted as a result of appellant's failure to respond to a request for admissions is granted.

OPINION

This matter arises out of New Castle Township Board of Supervisors' (New Castle) December 11, 1992, notice of appeal from the Department of Environmental Resources' (Department) October 28, 1992, issuance of various permits authorizing

Reading Anthracite Company (Reading Anthracite) to conduct surface coal mining at a site in New Castle Township, Schuylkill County, known as the Wadesville P-33 stripping.

Presently before the Board for disposition is Reading Anthracite's March 10, 1994, motion to limit issues, motion in limine to exclude certain evidence[1] and request for an order to conclusively establish matters which were the subject of a request for admissions which was not responded to by New Castle. In support of its motions, Reading Anthracite argues that New Castle is precluded from raising several factual and legal contentions in its pre-hearing memorandum because it neither raised them in its notice of appeal nor filed an appeal nunc pro tunc and that any evidence, which was the subject of Reading Anthracite's discovery requests, should be excluded as a sanction because New Castle failed to respond to discovery requests.

In its March 31, 1994, response New Castle argued, inter alia, that the Pennsylvania Rules of Civil Procedure should be liberally construed and that it did not present anything new or surprising in its pre-hearing memorandum.

The Department did not respond to the motion.

Motion to Limit Issues

A motion to limit issues generally seeks to exclude a particular issue from consideration because of a procedural or evidentiary defect in its assertion. Willowbrook Mining Co. v. DER, 1991 EHB 507. An appellant is required to state his factual and legal objections to the Department's action in the notice of appeal. 25 Pa. Code §21.51(e). Any objection not so stated is waived. Edmund Wikoski v. DER, 1992 EHB 642. Since the proper raising of objections affects our

---

[1]The motion in limine is really a motion for sanctions for failure to respond to a request for production of documents and notice of deposition.

jurisdiction, we are not at liberty to excuse an appellant from these requirements unless good cause is shown.[2] Pennsylvania Game Commission v. Cmwlth., Dept. of Environmental Resources, 97 Pa. Cmwlth. 78, 509 A.2d 877 (1986).

Reading Anthracite argues New Castle waived the following issues by failing to raise them in its notice of appeal:

- The alleged planned removal of houses having an adverse impact on New Castle's tax base;

- The alleged destruction of the Rainbow Hose Company and the impact on New Castle's fire protection;

- The alleged change in location of Reading Anthracite's stripping equipment repair complex and the alleged necessity which will arise for a sanitary holding tank;

- The alleged inadequacy of Reading Anthracite's application with respect to its reclamation plan regarding the statement of the uses and productivity of the land proposed to be affected;

- Reading Anthracite's alleged failure to supply landowner consent forms pursuant to 52 P.S. §1396.4(a)(2)(F);

- Alleged mining within 100 feet of a public highway and alleged inadequate provisions to replace or relocate the public highway; and

- Reading Anthracite's alleged "long track record of violations of various statutes and regulations in New Castle Township," including allegations regarding a violation of the Air Pollution Control Act.

The notice of appeal does not contain these specific objections, nor can any of the objections raised in it be construed broadly enough to incorporate them. Croner, Inc. v. DER, 139 Pa. Cmwlth. 43, 589 A.2d 1183, 1187 (1991). Consequently, New Castle has waived these issues by failing to raise them in its notice of appeal, and the motion to limit issues will be granted.

---

[2]Good cause is not an issue here.

Motion In Limine To Exclude Evidence

Upon a motion, the rules of civil procedure authorize the court to issue an order, imposing sanctions for noncompliance with discovery requests. Pa. R.C.P. 4019(a)(i). Sanctions for noncompliance with discovery requests are generally not imposed until there has been a refusal to comply with a court order compelling compliance. Williams v. Southeastern Pennsylvania Transportation Authority, 133 Pa. Cmwlth. 55, 574 A.2d 1175 (1990), alloc. granted, ____ Pa. __, 597 A.2d 1155 (1991), aff'd, ____ Pa. ____, 633 A.2d 1090 (1993).

Reading Anthracite argues that the Board has imposed sanctions for failure to comply with a discovery request without a motion to compel, citing DER v. Chapin and Chapin, Inc., 1992 EHB 751. Furthermore, it argues that the sanction of excluding evidence is appropriate because New Castle's failure to respond is dilatory, is prejudicial to Reading Anthracite, as well as the Department, and is necessary to maintain the integrity of the discovery process.

Reading Anthracite's arguments are rejected and its motion to exclude evidence is denied. While the Board may impose sanctions against a party for failure to respond to discovery requests under Pa. R.C.P. No. 4019, the severe sanction of excluding evidence is not appropriate, especially where Reading Anthracite, as the moving party, failed to file a motion to compel, Williams, *supra*. Furthermore, the instant case is distinguishable from Chapin. Unlike Chapin, where the moving party filed a motion to compel the production of documents, Reading Anthracite has not filed such a motion. Moreover, in Chapin, defendants failed to respond to numerous notices of deposition. New Castle's alleged failure to comply with Reading Anthracite's request is not so serious that it warrants the sanction of exclusion of evidence.

Request for Admissions

Finally, we will consider Reading Anthracite's request that, if there should be a hearing on this matter, we enter an order to the effect that all of the factual matters in the request for admissions are conclusively established.

We grant the request. The Board, in its October 29, 1993, opinion denying Reading Anthracite's motion for summary judgment or in the alternative, motion to limit issues, deemed all matters set forth in the request for admissions admitted. New Castle Township Board of Supervisors v. DER, et al, EHB Docket No. 92-540-W (Opinion issued October 29, 1993). Now, Reading Anthracite requests the Board to go one step further and issue an order that these matters are conclusively established. Admissions are conclusively established unless the court, on motion, permits withdrawal or amendment of the admission. Pa. R.C.P. No. 4014(d); Dwight v. Girard Medical Center, 154 Pa. Cmwlth. 326, 623 A.2d 913 (1993). Since the Board has deemed the matters admitted and New Castle has not filed a motion for withdrawal or amendment, the matters are conclusively established, and the request is granted.

EHB Docket No. 92-540-W

ORDER

AND NOW, this 7th day of July, 1994, it is ordered that:

1) Reading Anthracite's motion to limit issues is granted;

2) Reading Anthracite's motion to exclude evidence is denied; and

3) Reading Anthracite's request that the matters set forth in its January 4, 1993, request for admissions are conclusively established is granted.

ENVIRONMENTAL HEARING BOARD

Maxine Woelfling

MAXINE WOELFLING
Administrative Law Judge
Chairman

DATED: July 7, 1994

cc: DER Bureau of Litigation:
(Library: Brenda Houck)
For the Commonwealth, DER:
Melanie G. Cook, Esq.
Central Region
For the Appellant:
Jerome R. Smith, Esq.
Reading, PA
For the Permittee:
James P. Wallbillich, Esq.
FRUMKIN, SHRALOW & CERULLO
Pottsville, PA

sb

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
2nd FLOOR — MARKET STREET STATE OFFICE BUILDING
400 MARKET STREET, P.O. BOX 8457
HARRISBURG, PA 17105-8457
717-787-3483
TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOARD

BETHENERGY MINES, INC.	:	
	:	
v.	:	**EHB Docket No. 90-050-MJ**
	:	**Consolidated with: 90-058-MJ, 90-059-MJ and 90-114-MJ**
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: July 11, 1994

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

By Joseph N. Mack, Member

Synopsis

Consolidated appeals of a compliance order issued under the Bituminous Mine Subsidence and Land Conservation Act, the Act of April 27, 1966, P.L. 31, as amended, 52 P.S. §1406.1 *et seq.*; the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 *et seq.*; and Section 1917-A of the Administrative Code of 1929, the Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-17, and of subsequent modifications to that order are sustained. The Department of Environmental Resources ("Department") may not, under 25 Pa. Code §§89.52(a), 89.143(d), and 89.145(a), order an underground bituminous coal mine operator to restore perennial flow to a stream or restrict longwall mining beneath that stream and several others, unless it first proves that the allegedly affected stream was perennial before mining began.

Background

BethEnergy Mines, Inc. ("BethEnergy") owns and operates an underground bituminous coal mine in Cambria County, known as Cambria Mine No. 33, pursuant to Coal Mining Activity Permit No. 11841301. Mining is conducted in the Upper and Lower Kittanning coal seams beneath the watersheds of Roaring Run, Howells Run, and the North Branch of the Little Conemaugh River (North Branch).

In December 1988, an area resident filed a citizen's complaint under §13 of the Bituminous Mine Subsidence and Land Conservation Act, 52 P.S. §1406.13, in the Court of Common Pleas of Cambria County against both BethEnergy and the Department concerning the flow conditions in Roaring Run. In response, the Department undertook an aquatic and hydrogeologic investigation of Roaring Run. Following completion of the study, the Department issued a Compliance Order ("C.O.") to BethEnergy on December 27, 1989, which directed BethEnergy, *inter alia*, to limit its mining activity beneath the Roaring Run and Howells Run watersheds, to submit a plan for restoring Roaring Run, and to establish a monitoring program for Howells Run and the North Branch. On January 26, 1990, BethEnergy appealed the C.O., which we docketed at No. 90-050-MJ. By letters dated January 11 and 29, 1990, and February 14, 1990, the Department modified the limitations and requirements imposed in the C.O. BethEnergy appealed these letters individually, which we docketed at Nos. 90-058-MJ, 90-059-MJ, and 90-114-MJ, respectively, and subsequently consolidated at Docket No. 90-050-MJ.

Board Member Joseph Mack, who presided over this matter, viewed the allegedly affected watersheds on May 20, 1991, accompanied by counsel for BethEnergy and the Department. A hearing was held over the course of 14 days

between June 3 and July 3, 1991. The parties filed their post-hearing and reply briefs on June 5 and July 31, 1992. In addition, we received an *amicus curiae* brief from two citizens groups, Interested Citizens for Rights and Equity ("ICARE") and Concerned About Water Loss Due to Underground Mining ("CAWLM"), whose petitions to intervene were denied on June 18, 1990. BethEnergy filed its reply to the *amicus curiae* brief on July 31, 1992. Issues not raised in the parties' post-hearing briefs are deemed to be waived. Lucky Strike Coal Co. and Louis J. Beltrami v. Commonwealth, Department of Environmental Resources, 119 Pa. Cmwlth. 440, ___, 547 A.2d 447, 449 (1988).

After a full and complete review of the record, which consists of a transcript of 1,717 pages, 69 exhibits, and a video of Roaring Run and Laurel Lick, we make the following findings of fact:

FINDINGS OF FACT

1. BethEnergy is a West Virginia corporation authorized to conduct underground coal mining operations in Pennsylvania. (Stip. 2)[1]

2. The Department is the executive agency of the Commonwealth vested with the authority and duty to administer and enforce the requirements of, *inter alia*, 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 *et seq.*; the Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 *et seq.*; Section 1917-A of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-17; and the

---

[1] "Stip. __" refers to a stipulated fact contained in Section F of the parties' Pre-Hearing Stipulation filed on February 26, 1991. "T. ___" refers to a page in the transcript of the hearing. Joint exhibits will be cited as "Ex. J-__", while BethEnergy's and the Department's exhibits will be cited as "Ex. B-__" and "Ex. D-__", respectively.

rules and regulations promulgated thereunder. (Stip. 1)

3. BethEnergy is the owner and operator of an underground bituminous coal mine in Cambria County known as Cambria Mine No. 33 ("Mine No. 33"); it is authorized to conduct mining operations at Mine No. 33 pursuant to Coal Mining Activity Permit No. 11841301. (Stip. 3)

4. The permit was issued on June 24, 1987. (Stip. 4)

5. The permit authorizes BethEnergy to conduct longwall mining in the Lower Kittanning and Upper Kittanning coal seams beneath the watersheds of Roaring Run, Howells Run, and the North Branch. (Stip. 4)

6. The Lower Kittanning and Upper Kittanning coal seams are also known as the B seam and the C prime (C′) seam, respectively. (Stip. 4)

7. At the time it received the permit, BethEnergy had been conducting underground mining at Mine No. 33 pursuant to two surface support permits which were issued in 1966 for the B seam and in 1972 for the C′ seam. (Ex. J-18, J-19; T. 1711-1712)

Longwall Mining

8. Longwall mining is a full extraction underground mining technique whereby a block of coal is systematically removed after it is isolated from the rest of the mine workings by developing entries on all four sides of the block. (T. 668) The block of coal generally measures 500 to 800 feet wide and 4000 to 8000 feet long. (T. 668-669)

9. Parallel tunnels, approximately 18 to 20 feet wide, are driven through to the area to be fully extracted. The tunnels are then connected by cross-cuts of approximately the same width. This is known as developmental mining. (T. 1354-1355)

10. The coal is removed by a cutting machine called a shearer and a type of conveyer system called a pan line. (T. 669)

11. Pillars of coal are left in place in entries on either side of the panel. (T. 670)

12. "Shields" support the strata above the coal seam while mining is taking place. (T. 669)

13. As the shields are moved forward, the strata behind the shields collapse. (T. 670)

14. The strata above a mine panel may contain various zones. (T. 674)

15. The caving zone is located immediately above the longwall panel and coal seam and contains heavily fractured strata. (T. 675-676) The strata break up into blocks and cave into the mine openings. (T. 676)

16. The fractured zone is located above the caving zone; in this zone there is a great deal of bending and fracturing of the strata. (T. 676)

17. Above the fractured zone is the bending zone, or zone of continuous deformation, where the rock strata may still undergo some fracturing but generally bend to conform with the upper limit of the caved zone. (T. 676)

18. The bending zone generally mimics the subsidence profile on the surface. (T. 676)

Department's Initial Investigation of the Koban Complaint

19. On or about July 27, 1983, the Department received a complaint from Samuel Koban concerning a loss of flow in Roaring Run. (T. 91-95, 131)

20. Mr. Koban resides in Summerhill, Pennsylvania on property adjacent to Roaring Run. (T. 84-85) He has lived there since June 1976. (T. 85)

21. Approximately 6500 feet of Roaring Run runs through his property. (T. 85)

22. From 1976 to 1983, Mr. Koban would walk daily along the stretch of Roaring Run located on his property, while gathering material for his house. (T. 80, 91)

23. Prior to 1983, the Kobans relied on a spring behind their house for their water supply. (T. 91) The spring flowed continuously until July 1980. (T. 92)

24. At that time, Mr. Koban notified BethEnergy of the water loss, and it drilled a well for the Kobans. (T. 92) The well went dry in January 1984. (T. 92)

25. On July 27, 1983, Mr. Koban observed that a portion of Roaring Run was dry from his property to the Laurel Pipeline, a distance of approximately 1000 feet. (T. 94-95) At that time, Mr. Koban observed trout in the stream in small puddles of mud and water. (T. 95)

26. Mr. Koban notified the Pennsylvania Fish Commission, the Pennsylvania Game Commission, and the Department's Ebensburg office. (T. 95)

27. In August 1983, David Hess, a hydrogeologist from the Department's Bureau of Water Quality Management, responded to Mr. Koban's complaint. (T. 96, 130-131)

28. Mr. Hess performed a general inspection of Roaring Run on Mr. Koban's property from the area where the spring channel had flowed to the area where Roaring Run meets Howell's Run. (T. 132)

29. Mr. Hess did not recall seeing any flow in that portion of Roaring Run; he did, however, observe water in a small dam area upstream near the spring channel, as well as water which was pooled in small depressions in the stream. (T. 132-133, 134)

30. In August 1983, the total monthly precipitation recorded at the Ebensburg Sewage Treatment Plant, located 1 to 1-1/2 miles north of the confluence of Roaring Run and Howell's Run, was 1.94 inches, the lowest amount of precipitation for the month of August from 1979 to 1990. (T. 381; Ex. J-9) The Ebensburg Sewage Treatment Plant is an official rainfall gauging station for the National Oceanographic and Atmospheric Administration. (T. 381)

31. In 1984, John Kernic, then a geologist trainee with the Department's Bureau of Water Quality Management, took measurements of the water levels and water wells in the general area of Roaring Run and Mine No. 33 to determine if there was a correlation between BethEnergy's mining and loss of flow in Roaring Run. However, the Department drew no conclusions from the data. (T. 172)

32. Mr. Koban observed Roaring Run go dry in late spring 1985 and again contacted the Department's McMurray office. (T. 98)

33. According to Mr. Koban, the stream remained dry until the end of October 1985. (T. 98-99)

34. Raymond Rogers, a surface mining conservation inspector with the Department's District Mining Office in Ebensburg, responded to Mr. Koban's complaint in August 1985. (T. 152, 153)

35. Mr. Rogers visited the Koban property on three occasions: August 16, 1985, with Department hydrogeologist, Myles Bayard; August 20, 1985, with mining specialist, Greg Schulick; and October 9, 1985. (T. 153)

36. On his August 16, 1985, visit, Mr. Rogers walked from Mr. Koban's house to Roaring Run where there were located the remains of an old impoundment which was the breast of a dam. (T. 153, 204)

37. The stream began to disappear approximately 150 feet downstream of the impoundment and reappeared approximately 200 feet downstream from where it disappeared. (T. 153-154)

38. Mr. Rogers walked upstream of the impoundment to a bridge at the junction of Route 160 with Roaring Run ("the Route 160 Bridge"). Water was flowing upstream of the impoundment on that date. (T. 154)

39. On Mr. Rogers' August 20, 1985, visit, the water in Roaring Run began to disappear approximately 75 feet downstream of the impoundment. The stream bed remained dry for approximately 275 feet. (T. 154)

40. On October 9, 1985, Roaring Run began to disappear approximately 75 feet below the Route 160 Bridge. (T. 155) Mr. Rogers walked downstream as far as the Laurel Pipeline Company and the stream still remained dry. He did not know the distance between these points. (T. 155)

41. The precipitation for August and October 1985 was below average for the period of 1979 to 1990. Only .75 inches of precipitation fell in September 1985, representing the lowest amount of precipitation recorded for any month from 1979 to 1990. (Ex. J-9)

42. In November 1985, Department hydrogeologist, John Kernic, and Edward Motycki, a mining engineering supervisor with the Department's McMurray office of the Bureau of Mining and Reclamation, visited Roaring Run in response to a notice from the federal Office of Surface Mining ("OSM") based on a complaint filed with OSM by Mr. Koban. (T. 167, 174, 261)

43. Mr. Kernick and Mr. Motycki observed flow in the stretch of the stream that Mr. Koban had reported to be dry. (T. 174)

44. In June 1986, Mr. Koban again observed Roaring Run going dry in a pattern similar to what he had observed in 1985, and he again contacted the Department. (T. 99, 100)

45. In response to Mr. Koban's complaint, Mr. Kernic inspected Roaring Run on July 23, 1986, and observed two sections of Roaring Run which had no visible flow. (T. 186, 187, 192)

46. The first section which Mr. Kernic observed to be dry was a stretch of fifty yards located upstream of the impoundment. (T. 187)

47. The second section which he observed to be dry began at a point approximately 20 to 30 yards from where Tributary No. 3 enters Roaring Run and ended below the Mobil Pipeline crossing, a distance of approximately 100 yards. (T. 187)

48. In July 1986, the total precipitation was above the average for July from 1979 to 1990. (Ex. J-9)

49. In response to another call from Mr. Koban, Mr. Kernic returned to Roaring Run in August 1986. He observed that a larger portion of the stream was dry than had been in the previous month. (T. 194)

50. Following his investigations in 1986, Mr. Kernic prepared a report which suggested that a more intensive investigation of Roaring Run should be conducted. (T. 197)

51. The Department implemented a flow monitoring program in Roaring Run in 1987 and 1988 to determine what was causing the stream to become dry in sections. (T. 175, 197)

52. In addition to visual observation, the Department used a crude flow monitoring instrument. The type of instrument used by the Department does not work well in low-flow conditions or in low depths of water. (T. 198)

53. On June 4, 1987, Mr. Kernic observed that only a small portion of Roaring Run was dry, beginning approximately 20 to 30 yards below the confluence of Tributary No. 3 and Roaring Run and ending at the Mobil Pipeline. (T. 200)

54. On July 16, 1987, Mr. Kernic observed the same area to be dry, but observed no other dry sections. (T. 200)

55. Mr. Kernic visited Roaring Run on September 11, 1987, and observed that the only dry section was the same stretch which was dry in June 1987. (T. 206)

56. When Mr. Kernic visited Roaring Run on July 7, 1988, he observed that a very large portion of the stream was dry, stretching from the New Germany Bridge to the Route 160 Bridge. He saw only one or two scattered pools of water. (T. 208)

57. Precipitation for July 1988 was above average, but was slightly below average for June 1988 based on figures from 1979 to 1990. (Ex. J-9)

58. After completing the monitoring of Roaring Run, Mr. Kernic contacted Jane Earle, a water pollution biologist with the Department's Bureau of Mining and Reclamation. (T. 212, 272)

59. Mr. Kernic requested Ms. Earle to examine a report on aquatic life in Roaring Run which had been prepared by James Sykora in 1982 and 1983. (T. 212)

60. Dr. Sykora had prepared the 1982-1983 study because he had been contacted by the Laurel Pipeline Company to conduct a study of the effects of a piepline break on Roaring Run. (T. 311)

61. Mr. Kernic requested Ms. Earle to conduct a stream investigation of Roaring Run. (T. 284)

62. Ms. Earle responded to Mr. Kernic's request and first visited Roaring Run in December 1988. (T. 284) All locations of Roaring Run observed by Ms. Earle at that time had flowing water.

63. Mr. Kernic requested that Ms. Earle perform an aquatic investigation to determine if aquatic life had been affected by reported flow losses in Roaring Run. (T. 287)

64. Ms. Earle performed a macroinvertebrate study and collected chemistry samples to determine water quality. (T. 287)

65. Ms. Earle sampled at three locations: Station M, upstream of the New Germany Bridge; Station F, downstream of the confluence with Tributary No. 3; and Station EX, upstream of the Laurel Pipeline. (T. 288)[2]

66. Ms. Earle sampled for macroinvertebrates for two reasons: first, to determine if there were any differences between the upstream portions of Roaring Run which appeared to have perennial flow and the downstream portions which appeared to have intermittent flow (T. 308), and, second, to determine if there were any differences from the Sykora study done in 1982 and 1983. (T. 303)

---

[2] The map attached to this adjudication at Appendix A provides the approximate location of stream flow monitoring points A-N, which correspond to Ms. Earle's sampling points. (Figure 4 to Ex. D-1) See, *infra*, footnote 3. The map does not depict sampling points EX and MX, discussed herein.

67. Comparison of macroinvertebrate communities is a method commonly employed by the Department's Bureau of Water Quality for determining changes in stream conditions. (T. 320) This method is also recognized by the Pennsylvania Fish Commission, the Environmental Protection Agency, and the U.S. Department of the Interior's Fish and Wildlife Service. (T. 320, 321)

68. Ms. Earle's study noted that three types of caddisflies were absent from Station F in comparison to Station M. These types of caddisflies require flowing water. (T. 307)

69. The community of macroinvertebrates found at Station M could not have existed in intermittent flow. (T. 309)

70. In conducting an investigation such as the one by Ms. Earle, the Department often relies on reports prepared by persons outside the Department, such as the Pennsylvania Fish Commission or private groups, to compare if there are any changed conditions. (T. 310, 311)

71. Dr. Sykora's study included sampling at a point 50 yards upstream of the Laurel Pipeline, which is the same location as Ms. Earle's Station EX sampling point. (T. 312)

72. Dr. Sykora's sampling point contained a community of macro-invertebrates similar to what Ms. Earle had found further upstream at Station M. (T. 314) These included mayflies, stoneflies, and several types of caddisflies, including the Hydropsychid caddisfly. (T. 314)

73. What Ms. Earle found at Station EX in 1988 differed from what Dr. Sykora had found in 1982-1983. (T. 314) In 1988, the Hydropsychid caddisfly was absent. (T. 314-315)

74. Ms. Earle concluded that the disappearance of the Hydropsychid caddisfly had resulted from a change in flow in Roaring Run. (T. 315)

75. Ms. Earle based her conclusion on the feeding habits of the Hydropsychid caddisfly, which needs flowing water to feed. (T. 316)

76. Ms. Earle found no other factor which could account for the differences she observed in the macroinvertebrate communities. (T. 317, 318)

Department's 1989 Roaring Run Study

77. In February 1989, Samuel Koban and his wife, Barbara Koban, filed a complaint in the Court of Common Pleas of Cambria County against the Department and BethEnergy, requesting the Court, *inter alia*, to order the Department to take enforcement action compelling BethEnergy to restore Roaring Run.

78. The Kobans and the Department subsequently entered into a settlement agreement and the portion of the lawsuit involving the Department was withdrawn. (T. 103, 396) The suit against BethEnergy was still pending at the time of this hearing. (T. 103)

79. Following the filing of the Kobans' complaint, Departmental hydrogeologist Harold Miller was assigned the task of supervising the investigation of the Koban case. (T. 958, 959)

80. Mr. Miller's task was to determine whether the Kobans' complaint was unfounded or whether enforcement action should be taken against BethEnergy. (T. 959)

81. Water pollution biologist Jane Earle was selected to act as project coordinator. She was also assigned the task of authoring a report of the Roaring Run study. (T. 276, 398, 959)

82. The Department conducted its study from April 1989 through August 1989, with two follow-up visits in October and November 1989. (T. 283, 404)

83. The study consisted of the following:

a. An aquatic study conducted by Jane Earle, which consisted of an analysis of the macroinvertebrate community of Roaring Run. (T. 278, 325)

b. A flow study conducted by Michael DiMatteo, a hydrogeologist in the Department's Bureau of Mining and Reclamation, which consisted of measuring the flow in Roaring Run. (T. 516, 555)

c. A determination of whether subsidence had occurred at the stream bed, made by Edward Motycki, a mining engineer supervisor in the McMurray office of the Department's Bureau of Mining and Reclamation. (T. 261, 705-706)

d. A terrain conductivity study conducted by Joseph Schueck, a hydrogeologist in the Department's Division of Monitoring and Compliance, for the purpose of locating any areas where water might be lost from the streambed to the subsurface. (T. 827-838, 839-840)

Department's Aquatic Study

84. Water pollution biologist Jane Earle has conducted a number of aquatic surveys throughout the bituminous coal regions of Pennsylvania for the Department and the Pennsylvania Fish Commission. These surveys involved the identification of aquatic communities. (T. 335-336)

85. In her aquatic analysis for the Department's 1989 Roaring Run Study, Ms. Earle collected macroinvertebrates and water samples in a manner similar to her 1988 work. (T. 325)

86. Ms. Earle sampled at the same locations as in her 1988 survey and also added the following new sampling points: Station N, upstream of Station M; Station MX, below the New Germany Bridge; Station J, upstream of

the Route 160 Bridge; Station FX, 75 feet downstream of Station F. (T. 327-330)

87. Ms. Earle collected samples on six occasions from April through August 1989, once each month and twice in July. (T. 331)

88. At Station M, Ms. Earle found various types of mayflies, stoneflies, caddisflies, beetles, dipterons, aquatic worms, and crayfish. This is considered to be a healthy macroinvertebrate community. (T. 336)

89. The type of macroinvertebrate community found at Station M would require continuous flow for at least one year in order to exist. (T. 337)

90. The type of community found at Station M in 1989 is similar to the one found by Ms. Earle in 1988. (T. 337)

91. The macroinvertebrate community which Ms. Earle identified at Station MX was similar to that of Station M, but had even more taxa present. (T. 338)

92. The community found at Station MX, like that of Station M, would require perennial flow. (T. 339)

93. The macroinvertebrate community which Ms. Earle found at Station J contained several more mayflies than Stations M and MX and lacked three species of caddisflies. (T. 340)

94. The particular type of caddisfly found at Station J, the diplectrona, may be able to survive short periods of intermittent flow. (T. 340)

95. At Station F, Ms. Earle found several types of mayflies, as well as several types of stoneflies which were not found upstream at Station M. (T. 342)

96. The types of taxa which Ms. Earle found at Station F are able to survive during periods of intermittent flow. (T. 342)

97. Ms. Earle also sampled the macroinvertebrate community of Tributary No. 3. She found species which are adaptable to living in very small streams with low flow conditions, but which indicated a likely perennial flow. (T. 344)

98. Ms. Earle also found some species of macroinvertebrates in Tributary No. 3 which are adapted to living in intermittent flow. (T. 345)

99. Simply because a species of macroinvertebrate is adapted to intermittent flow does not mean that it is restricted to streams of intermittent flow. Many species found in intermittent streams are also found in perennial streams. (T. 345)

100. The community of macroinvertebrates found at Station EX was similar to that of Station F. (T. 346) It differed from Station M in that it did not contain any hydropsychid caddisflies or the stonefly acroneuria, which has a two year life cycle. (T. 346)

101. Based on the macroinvertebrate sampling, Ms. Earle concluded that Stations M, N, and MX are located within an area of perennial flow, that Station J is a transition area where flow may be intermittent for a short period of time, and that the stations downstream of F have long periods of flow intermittency. (T. 347)

102. Dr. Sykora had collected hydropsychid caddisflies, diplectrona, and acroneuria stoneflies in his sampling of Station EX from November 1982 to June 1983, which would indicate perennial flow at that time. (T. 348)

103. The hydropsychid caddisfly is normally found in an area of perennial flow. (T. 351)

104. The chemistry analysis of the water samples done by Ms. Earle indicated good water quality at all sampling locations. (T. 350) There was no presence of pollutants, suspended solids were low, and the pH level ranged from low 6 to mid-7. (T. 350)

105. In addition to conducting the macroinvertebrate study, Ms. Earle also conducted a study of the fish in Roaring Run. (T. 351)

106. The types of fish which Ms. Earle found in Roaring Run were brook trout, blacknose dace, creek chubs, and sculpins. (T. 357)

107. She found a greater abundance of fish upstream at Station MX than downstream at Stations J and EX. (T. 358)

108. Ms. Earle collected one brook trout at Station MX and several at Station J. She collected no brook trout at Station EX but did collect blacknose dace, creek chubs, and white suckers. (T. 358)

109. Ms. Earle observed no conditions in the stream, other than the level of flow, which could affect the fish population. (T. 360)

110. A break in the Laurel Pipeline in October 1982 in the vicinity of Station EX resulted in the killing of approximately 950 fish. (T. 362-363)

111. In comparing the Fish Commission's report of the October 1982 fish kill with her data in 1989, Ms. Earle determined that there was a significantly higher number of fish in Roaring Run in 1982 than in 1989. (T. 364)

Flow Study

112. Michael DiMatteo, a hydrogeologist in the Department's Bureau of Mining and Reclamation, was responsible for developing and implementing the flow measurement portion of the Department's 1989 Roaring Run Study. (T. 516, 555)

113. Mr. DiMatteo first visited Roaring Run on April 11, 1989; he conducted monitoring on 10 to 20 occasions after that date. (T. 567)

114. Mr. DiMatteo established fourteen flow monitoring stations along Roaring Run, identified as points A through N.[3] (T. 568)

115. Monitoring point A was located approximately 50 feet above the mouth of Roaring Run. (T. 570-571) Mr. DiMatteo selected it as a monitoring point because it best met the conditions for recording an accurate flow measurement: It had adequate depth and smooth, consistent flow. (T. 571)

116. Monitoring point B was located approximately 1500 to 2000 feet upstream of A. (T. 572)

117. The water at point B was slightly turbulent. (T. 572)

118. Monitoring point C was located approximately 1000 feet upstream of point B, in the vicinity of an abandoned telephone line crossing. (T. 573) Its conditions were similar to those of point A. (T.573)

119. Monitoring point D was located approximately 400 to 500 feet upstream of point C, just above the confluence of Roaring Run and Tributary No. 1. (T. 574)

120. At monitoring point D, there was adequate depth for measurement and a pool the width of the stream channel. (T. 575)

121. The next monitoring point established by Mr. DiMatteo on April 11, 1989 was point F. The location of this point had been referenced by John Kernic in his earlier investigation. (T. 576-577) It was in this vicinity that Roaring Run had first been reported to go dry. (T. 577)

---

[3] Although there is no statement in the record that Mr. DiMatteo's monitoring points F, J, M, and N are the same as Ms. Earle's monitoring points F, J, M, N, the description of Mr. DiMatteo's monitoring points indicates that they are in the same location as those labeled by Ms. Earle.

122. Monitoring point G was located approximately ten feet upstream of the confluence of Tributary No. 3 and Roaring Run. (T. 577)

123. Monitoring point H was located approximately 600 to 700 feet upstream of point G and approximately 30 to 40 feet upstream of the confluence of Tributary No. 2 and Roaring Run. (T. 578)

124. Monitoring point I was located approximately 700 to 800 feet upstream of point H and 20 to 30 feet upstream of the confluence of Tributary No. 4 and Roaring Run. (T. 579) It was located on a pipeline crossing. (T. 579)

125. Monitoring point J was established at the Route 160 Bridge, upstream of the confluence of Tributary No. 5 and Roaring Run. (T. 580) Point J was established at a location referenced by John Kernic in his earlier study. (T. 580)

126. Monitoring point M was located approximately 100 feet upstream of the New Germany Bridge. During his earlier investigation of Roaring Run, Mr. Kernic had always observed flow at this location. (T. 581)

127. Monitoring point N was located several hundred feet upstream of M. (T. 581)

128. On the following day, Mr. DiMatteo established three more monitoring points along Roaring Run: points E, K. and L. (T. 581)

129. Monitoring points K and L were established in locations which Mr. Kernic had observed as being dry in his earlier investigation. (T. 582)

130. On April 11, 1989, Mr. DiMatteo took flow measurements at monitoring points A through D, F through J, and M and N. He also observed Tributary No. 1 to be dry. (T. 606)

131. On April 12, 1989, Mr. DiMatteo took measurements at monitoring points E, K, and L. (T. 608)

132. On April 20, 1989, Mr. DiMatteo found flow at all stations, except Tributary No. 1. (T. 610)

133. Mr. DiMatteo next took flow measurements on May 2, 1989. On this date, he found flow at all stations. (T. 611)

134. May 25, 1989, was the next occasion on which Mr. DiMatteo took flow measurements. On that date, he observed flow in the entire length of Roaring Run as well as in all five tributaries. (T. 613)

135. Mr. DiMatteo observed the same conditions on June 5, 1989. (T. 613)

136. On August 10, 1989, Mr. DiMatteo found continuous flow in Roaring Run at points H, I, J, K, L, M, and N. He found no flow at points B, D, E, F and G, or in Tributary No. 1. (T. 620) Monitoring point C had flow at the rate of one gallon per minute. (T. 620)

137. On August 20, 1989, Mr. DiMatteo observed no water coming from the stream substrate. (T. 622)

138. "Substrate" refers to the composition of the stream bottom. (T. 291)

139. On August 24, 1989, Mr. DiMatteo found flow at monitoring points H, I, J, K, L, M, and N. (T. 624) He found no flow at monitoring points G, F, D, and B. Flow at point E was at the rate of three gallons per minute, and there was only a trace of flow at points C and A. (T. 625-637)

140. On that date, Mr. DiMatteo observed no flow coming into the stream from the substrate. (T. 628)

Mine Subsidence Study

141. Edward Motycki is a mining engineer supervisor at the Department's Bureau of Mining and Reclamation, McMurray District Office. (T. 261) He was admitted to testify at the hearing as an expert in mining engineering. (T. 263)

142. Mr. Motycki's role with respect to the Department's 1989 Roaring Run Study was to determine whether subsidence from BethEnergy's mining had affected Roaring Run and to calculate the potential for subsidence along the stream bed. (T. 705-706)

143. Mine No. 33 lies predominantly beneath Cambria Township, Cambria County, which encompasses the watersheds of Roaring Run, Howell's Run, and the North Branch. (T. 694-695)

144. At the mouth of Roaring Run, in the vicinity of monitoring point A, the stream flows over a series of main entries separating two longwall sections of the mine. (T. 726)

145. Progressing upstream, Roaring Run flows directly over a panel in which mining began early in 1982 and ended approximately in May 1983. (T. 727) The stream could be subject to various degrees of subsidence as it crosses over the panel, but would not be subject to total collapse at the start of a panel. (T. 727)

146. Continuing upstream to point B, Roaring Run crosses directly over the center of the panel to the opposite edge, reaching a tension zone. At this location, the stream is subject to the possibility of caving and the appearance of fractures at or near the surface. (T. 727)

147. Roaring Run then flows parallel to a second panel for a great distance, covering monitoring points C, D, E, and F, at various points flowing closer to the center of the panel but never reaching it. (T. 728)

148. The Roaring Run stream channel in the vicinity of monitoring point F is adjacent to a longwall panel which was mined in 1983 and is located in a tension zone. (T. 732-733)

149. Roaring Run then moves between two panels to monitoring point G. (T. 729)

150. In the vicinity of Tributary No. 3, Roaring Run flows directly over a panel, then leaves the panel downstream of point H. (T. 729)

151. For a distance, it flows over a set of main or submain entries in the mine and passes monitoring points I and J. (T. 729)

152. As Roaring Run approaches monitoring point K, it enters above the corner of another smaller panel. (T. 729)

153. When Roaring Run reaches monitoring point L, it is directly above a relatively short panel which was mined in late 1986 and early 1987. (T. 730) Here, the stream is subject to compressive and tension stresses. (T. 730)

154. Roaring Run then runs parallel to the panel for a short distance heading toward monitoring point M at the New Germany Bridge. (T. 730)

155. No longwall mining took place beneath Roaring Run from monitoring point M to point N. (T. 730)

156. The longwall panel passed through the aforesaid area approximately two months prior to when Mr. Koban reported the stream to be dry

and three months prior to Mr. Hess' observation that the stream was dry. (T. 734)

157. Mr. Motycki concluded from his investigation that subsidence had occurred at several locations in the Roaring Run streambed. (T. 725)

158. When asked on direct examination if the reported absence of flow in Roaring Run in 1983 could have been due to subsidence from BethEnergy mining activity, Mr. Motycki replied he believed it could have been. (T. 733)

159. Mr. Motycki did not observe physical evidence on the surface that subsidence had occurred beneath Roaring Run. (T. 753)

160. The basis for Mr. Motycki's opinion that subsidence from Beth-Energy's mining could have caused a loss of flow in Roaring Run was the location of Roaring Run in relation to the longwall panel east of the stream. (T. 733)

161. Mr. Motycki determined that there are a few locations where the Howell's Run stream channel has been affected by subsidence. (T. 740) The basis for this opinion is that longwall mining occurred in a few locations in the B seam directly below Howell's Run. (T. 741)

162. The parcels under Howell's Run were mined during late 1976 and early 1977 and from December 1977 to June 1978. (T. 742)

163. Mr. Motycki was unable to determine whether mining in the C' seam had affected Howell's Run. (T. 743-744)

164. Subsidence effects in the North Branch of the Little Conemaugh would be less severe than subsidence effects from B seam mining beneath Howell's Run or Roaring Run since there is a greater amount of cover or depth of earth from the surface to the coal being mined in the area of the North Branch. (T. 745-746)

Terrain Conductivity Study

165. Joseph Schueck is employed by the Department as a hydrogeologist in the Division of Monitoring and Compliance in the Bureau of Mining and Reclamation. (T. 827-838)

166. Mr. Schueck was admitted to testify as an expert in hydrogeology and in the technique of measuring terrain conductivity. (T. 832, 835)

167. Mr. Schueck performed the terrain conductivity portion of the Department's 1989 Roaring Run Study. (T. 839) The purpose of his terrain conductivity study was to characterize the subsurface along the area of Roaring Run to see if he could locate any areas where water might be lost from the streambed to the subsurface. (T. 840)

168. Mr. Schueck conducted his study on July 6, 1989. He was assisted by Department personnel Mike DiMatteo, Harold Miller, and James Spontak. (T. 844)

169. Mr. Schueck used two instruments, referred to as an EM-31 and an EM-34, which measure conductivity at both a shallow depth, in what is referred to as the horizontal dipole mode, and a deeper depth, in what is referred to as the vertical dipole mode. (T. 842-843)

170. The readings taken by these instruments are greatly influenced by the presence or absence of water as well as the specific conductance of the water. (T. 849)

171. On the day on which Mr. Schueck took his measurements, there was flow in Roaring Run. (T. 850)

172. The deep readings at the end of the survey area, toward monitoring point C, show a general increase in conductivity compared to the readings taken at the beginning of the survey. (T. 879)

173. There were also peaks in conductivity at certain other points: in the deeper readings in the area beyond station 72 (located at monitoring point H), in the shallow reading at station 80 (slightly downstream of monitoring point H), and in the readings at station 100 (near monitoring point G), station 185 (downstream of monitoring point D), and station 200 (slightly upstream of monitoring point C). (T. 879-880)

174. In at least two areas, there is a significant rise and then drop in conductivity: between stations 80 and 85 (downstream of monitoring point H) and between stations 140 and 145 (in the vicinity of monitoring point E). (T. 880; Ex. B-5)

175. Mr. Schueck concluded that the general rise in conductivity toward the end of the survey was due to an increase in the volume of water present in the strata beneath the stream, and the isolated peaks were due to zones of greater volumes of water within the strata. (T. 881)

176. Mr. Schueck arrived at this conclusion based on his review of the geology of the area. The strata underneath the streambed lie relatively flat. (T. 881) Mr. Schueck concluded that a very significant stratigraphic change would be required to produce the kind of contrast which showed up in his readings. (T. 881)

177. Because terrain conductivity measurements are most greatly affected by the presence of water, Mr. Schueck determined that the increased readings he obtained were the result of an increase in water volume within the strata. (T. 882)

178. Mr. Schueck was aware of no other factors which could explain the measured increases in conductivity. (T. 883)

179. Mr. Schueck concluded to a reasonable degree of scientific certainty that water from Roaring Run is flowing into the strata. (T. 886)

180. Mr. Schueck did not have available to him any pre-mining terrain conductivity data. (T. 894)

181. Flow loss cannot be determined by terrain conductivity measurements. (T. 900) Nor do terrain conductivity measurements identify fractures. (T. 900-901)

182. Mr. Schueck agreed that there are conditions other than subsidence which can yield a loss in stream flow. (T. 920)

183. Mr. Schueck also agreed that many of the streams in the Appalachian coal fields naturally gain and lose flow. (T. 920) However, he did not feel that the data indicated that this was occurring in the lower sections of Roaring Run. (T. 941)

184. Mr. Schueck did not investigate whether any disturbances in the Roaring Run watershed other than mining might have affected terrain conductivity. (T. 945)

Conclusion of 1989 Roaring Run Study

185. Based on the data collected by the Department between April 11 and August 24, 1989, Harold Miller, the supervisor of the 1989 Roaring Run investigation, characterized the flow pattern of Roaring Run as follows: the segment between monitoring points N and M is continuously flowing and is gaining flow; the segment between points M and H is continuously flowing and fluctuating between gaining and losing flow; and the segment between points H and A is intermittent, with either zero flow or a trace of flow at certain times of the year. (T. 961)

186. Mr. Miller was aware of no theories in hydrogeology that would explain a drying of portions of Roaring Run as a natural condition in the geologic region in which it is located. (T. 974)

187. Mr. Miller concluded that BethEnergy's mining activity caused intermittent flow in Roaring Run. (T. 1002-1004) He formed this opinion based on the timing and sequence of BethEnergy's mining; historic reports by Department representatives Mr. Hess, Mr. Rogers, and Mr. Kernic as to the absence of flow in segments of Roaring Run; flow measurements taken during the Department's 1989 Roaring Run Study; Mr. Motycki's conclusions on impacts of mining in the stream channel; and Mr. Schueck's conclusions regarding water filled fractures. (T. 1003)

188. BethEnergy's mining passed monitoring point F just prior to May 1983. The first reported loss of flow in that portion of Roaring Run occurred in July 1983. (T. 1007-1008)

189. Mr. Miller found no other factors which could be causing intermittent flow in Roaring Run. He found no apparent land uses which would involve consumptive or excessive water use. (T. 1008)

190. There is no evidence of any surface mining which could be affecting the flow in Roaring Run. (T. 984-985)

191. The most obvious land disturbance in the area of Roaring Run is the presence of pipelines. (T. 1023) Pipelines can intercept water if positioned along a stream. (T. 1023-1024) Mr. Miller did not believe this was occurring in the area of Roaring Run based on the position of the pipelines and because the pipelines were pressurized. (T. 1024)

192. Based on the flow losses recorded by the Department at certain monitoring stations, the location of the longwall panels, and Mr. Motycki's

testimony regarding the impact of subsidence along the edges of longwall panels, Mr. Miller concluded that BethEnergy's mining activities in the B and C' coal seams resulted in net flow reduction between the Howell's Run upstream and downstream stations. He held this opinion to a reasonable degree of scientific certainty. (T. 1078-1079)

193. Based on flow measurements taken by the Department in Howell's Run, reported flow losses, and the proposed location of further mining, Mr. Miller concluded that there would be additional reduction in flow in Howell's Run if longwall mining proceeded. (T. 1082) Mr. Miller, however, could not quantify the expected loss. (T. 1083)

194. Pursuant to the Department's Order of December 27, 1990, BethEnergy monitored flow in Roaring Run and Tributary No. 3 and submitted the results to the Department. This data is compiled in Exhibit J-21-1. (T. 1063; Ex. J-21-1)

195. The reports show the results of flow monitoring at points M and N on Roaring Run and at Tributary No. 3 covering the period from June 13, 1990 through April 26, 1991. (T. 1064)

196. None of the reports showed a lack of flow at any point. (T. 1065-1066)

197. The Department conducted an aquatic study of Howell's Run in 1971. The study stated that, at that time, Howell's Run, upstream of the Ebensburg Sewage Treatment Plant, was "in marginal, biological condition, probably resulting from intermittent flow." (T. 1113) The portion of Howell's Run referenced in the study is upstream of the area subsequently mined by BethEnergy. (T. 1113-1114)

198. There are several dams, a reservoir and a lake marina located on Howell's Run upstream of the Ebensburg Sewage Treatment Plant. There are none located downstream of the sewage treatment plant. (T. 1160-1161)

BethEnergy's Aquatic Data

199. Patrick Bonislawsky, a senior environmental scientist at Michael Baker, Jr., Inc., was admitted as an expert in aquatic biology. (T. 1444, 1449)

200. Mr. Bonislawsky reviewed the Department's 1989 Roaring Run Study, Dr. Sykora's 1982 report, the Pennsylvania Fish Commission's 1982 fish kill report, and other documents relating to this matter. T. 1450)

201. Mr. Bonislawsky visited Roaring Run and walked from its mouth to an area above the New Germany Bridge. He also observed the general watershed of the stream, reviewed aerial photographs, and conducted limited aquatic and invertebrate sampling. (T. 1451)

202. Mr. Bonislawsky's sampling of macroinvertebrates in Roaring Run generated low numbers of organisms both upstream and downstream. (T. 1457)

203. The acroneuria stonefly is non-seasonal and requires one or more years to complete its cycle. (T. 1466)

204. The hydropsychid caddisfly requires flow to secure food. (T. 1466)

205. However, these organisms have been found in conditions where there is intermittent flow. (T. 1466)

206. Macroinvertebrates are not adapted exclusively for perennial or intermittent conditions; however, some types of macroinvertebrates are more

able to adapt to intermittent flow conditions than are others. The longer the period of intermittency, the lower will be the number and diversity of macroinvertebrates. (T. 1475)

207. A multivoltine organism is one which is non-seasonal and which requires at least one year to complete the nymphal stage to the adult stage. (T. 1465-1466)

208. The pteronarcys is a multivoltine stonefly which was found only in the stretch of Roaring Run reported to be dry. (T. 1479)

209. Diplectrona, which is a type of hydropsychid caddisfly, was found in the lower section of Roaring Run, which the Department characterized as having low flow. (T. 1478-1479)

210. The fishing data collected by Mr. Bonislawsky was consistent with that collected by the Department. (T. 1484)

211. Longnose dace and redside dace are often found with brook trout in perennial upstream areas. While longnose dace and redside dace were found in Howell's Run, they were not found in the upstream portions of Roaring Run. Nor is there any history of longnose dace or redside dace existing in the upstream portion of Roaring Run, which would indicate that the stream has never been perennial. (T. 1483-1484)

212. The Fish Commission's investigation of the 1982 fish kill reported that the waterways patrolman found only one brook trout in the section of Roaring Run under investigation. (T. 1491)

213. There are a number of utility lines running across Roaring Run. Both installation and maintenance of utility lines can have an impact on the macroinvertebrate community and fish population of a stream. (T. 1487)

214. There are silt bars in the area of Roaring Run which could have an acute effect on the stream. (T. 1487) After heavy rains, silt can become deposited in the gravel of the streambed, preventing trout from spawning and causing smothering of macroinvertebrates. (T. 1487-1488)

215. The stream channel of Roaring Run between points N and M has been narrowed and deepened; as a result, that section of the stream is more likely to maintain flow when other parts have gone dry. (T. 1516)

216. Ms. Earle has a Bachelor of Arts degree in Biology and has completed credits toward a Master of Science in Aquatic Biology. (Ex. J-23)

217. Ms. Earle has participated in approximately 50 aquatic surveys, which generally involve collecting and tabulating data and writing a report. (T. 273)

218. Mr. Bonislawsky has a Bachelor of Science degree in Environmental Science and has completed graduate credits in Wildlife and Fisheries Biology. (Ex. A-40)

219. Mr. Bonislawsky has participated in numerous aquatic surveys while a fisheries biologist with the Kansas Fish and Game Commission and in his current position. (T. 1446-1448; Ex. A-40)

220. Ms. Earle and Mr. Bonislawsky have equivalent education and experience.

221. The hydropsychid caddisfly and acroneuria stonefly are no longer present in lower stretches of Roaring Run either because Roaring Run no longer supports perennial flow there or because of the installation and maintenance of utility lines and silt in the streambed. (T. 348-349, 1487-1488)

BethEnergy's Hydrogeologic and Geochemistry Data

222. Donald Thomas is a senior hydrogeologist with Michael Baker, Jr., Inc. (T. 1182)

223. Mr. Thomas was admitted as an expert in surface water hydrology. (T. 1188)

224. Mr. Thomas reviewed the Department's 1989 Roaring Run Study, topographic maps of Roaring Run and Laurel Lick Run, and various data pertaining to this case. In addition, he visited the site of Roaring Run. (T. 1191-1192)

225. Mr. Thomas visited Roaring Run only once and did not view the entire stream. (T. 1235, 1236) He viewed Roaring Run from the road at a distance of 100 to 150 feet. (T. 1236)

226. Mr. Thomas did not examine all of the Department's monitoring stations. (T. 1235)

227. Mr. Thomas determined from his investigation that Roaring Run did not flow continuously throughout the year during the pre-mining era. (T. 1201-1202, 1203)

228. Mr. Thomas referred to a Department manual, known as Manual 12 or "the Page and Shaw Report", to locate the number of sites in Western Pennsylvania in the vicinity of Roaring Run with drainage areas smaller than ten square miles; then, he determined the percentage of these sites where a stream had gone dry at least one year in ten. (T. 1203, 1208)

229. According to the Page and Shaw Report, approximately 50 percent of the streams with a drainage area less than ten square miles in the Roaring Run vicinity have experienced drying. (T. 1208)

230. The drainage area of Roaring Run is approximately 2.8 square miles. (T. 1208)

231. The stream gradient of Roaring Run does not follow a uniform slope throughout. (T. 1229) It is composed of a flat gradient in the mid-portion and is steep at the upper and lower ends. (T. 1229)

232. Groundwater in the steeper portion tends to flow out and become depleted more quickly than in the flat area. (T. 1229-1230)

233. It is a general hydrologic concept that streams tend to gain flow downstream of the point of first continuous flow. (T. 1231)

234. Roaring Run does not follow this general hydrologic concept because it becomes steeper at the lower end. (T. 1231) Upstream of Route 219, the gradient of Roaring Run slopes to approximately 160 feet per mile. From there to point M or N, the slope is approximately 60 feet per mile. (T. 1271) Because of this, base flow will run out more quickly and will not support flow at Roaring Run's lower end. (T. 1231)

235. Mr. Thomas could not state where he would expect Roaring Run to go dry first based on its gradient. (T. 1273-1274)

236. Donald Streib is a consulting geologist. (T. 1535)

237. Mr. Streib was admitted as an expert in hydrology and certain areas of geochemistry. (T. 1547, 1550)

238. Mr. Streib reviewed the Department's 1989 Roaring Run Study and visited Roaring Run and Tributary No. 3 in the spring and summer of 1990. (T. 1552)

239. There are no pre-mining flow measurements with which to compare the Department's measurements. (T. 1603)

240. There is no scientific evidence showing that Roaring Run was any different after longwall mining occurred than it was prior to the mining. (T. 1609)

241. Mr. Streib found no evidence on the surface that subsidence had occurred beneath Roaring Run. (T. 1609-1610)

242. It is possible, however, to have surface subsidence with no visible effects. (T. 757, 1632)

243. Roaring Run has a convex stream profile. (T. 1599)

244. A convex stream profile has a steeper segment at its headwaters and then flattens out. A concave stream profile has the opposite shape and is constantly cutting downward into the ground. (T. 1599-1600)

245. A concave profile is likely to have more continuous flow, whereas a convex profile acts more like a storm drain. (T. 1600)

Observations of Area Residents

246. William Dishart resides in Summerhill. His home is located approximately 1000 yards from Roaring Run. He has lived at this residence since 1952. (T. 8-9)

247. Mr. Dishart testified that he fished for trout in Roaring Run from the early 1950's to the late 1970's. He said he fished the entire length of Roaring Run from the New Germany Bridge to where Roaring Run empties into Howell's Run. (T. 9)

248. From 1952 to approximately 1957, Mr. Dishart worked at a sawmill located 500 yards from Roaring Run. (T. 9)

249. After that, for a period of 12 years, Mr. Dishart worked at a sawmill located on property now owned by Samuel Koban. (T. 9-10)

250. During his 17 years of work at sawmills, Mr. Dishart was frequently in the vicinity of Roaring Run. (T. 10)

251. Roaring Run flows in a northeasterly direction toward Route 160. It enters Mr. Dishart's property approximately 500 yards before reaching Route 160 and leaves Mr. Dishart's property approximately 500 yards northeast of where it enters. (T. 12)

252. From 1952 to 1986, Mr. Dishart walked the entire length of Roaring Run several hundred times. (T. 27-37)

253. Prior to 1983, Mr. Dishart never observed Roaring Run go dry. (T. 15)

254. In 1983, over a three month period, Mr. Dishart observed Roaring Run go dry in a section of the stream approximately 100 yards downstream of where Tributary No. 3 enters Roaring Run. (T. 15-16)

255. Since 1983, Mr. Dishart has observed sections of Roaring Run go dry every year, and these sections have increased in size. (T. 17)

256. Prior to 1983, Mr. Dishart relied on a 100 foot deep well for his water supply. (T. 22)

257. Prior to 1983, the well provided adequate water supply for his household. (T. 22)

258. In the early 1980's, the water level in the well changed. (T. 22-23)

259. After the change in water level, Mr. Dishart complained to BethEnergy, and BethEnergy deepened Mr. Dishart's well. After one year, the Disharts again lost water. (T. 23, 53)

260. BethEnergy then drilled another well for the Disharts, 200 feet in depth. This well has provided an adequate quantity of water for the

Disharts; however, the quality of the water changed, and they now use a water conditioner and softener. (T. 23)

261. Mr. Dishart worked for Bethlehem Steel Corporation for approximately 24 years, from 1966 until he retired in March 1991. (T. 42-43)

262. Susan Flemming lives in Cambria Township, Cambria County, approximately three quarters of a mile south of the Dishart property. (T. 57) Her property is located upstream of the Route 160 Bridge. (T. 64)

263. She has resided at this location since May 1949. (T. 57)

264. From the 1950's through the 1970's, the Flemmings relied on a spring behind their house as a water supply. (T. 60)

265. The spring discharged into a stream behind the Flemming house which flowed easterly and eventually emptied into Roaring Run. (T. 60-61)

266. Since the 1950's, Mrs. Flemming has walked along the stream weekly during summer months and less frequently during the fall. She does not walk along the stream in the winter. (T. 62, 70-71)

267. On occasion Mrs. Flemming walks along Roaring Run from the point where the stream on her property intersects Roaring Run to the Route 160 Bridge. There is no pattern to the frequency of her walks. (T. 74-75)

268. At some point, Mrs. Flemming noticed that the stream behind her house began to go dry; she thought this occurred around 1984 or 1985. (T. 69)

269. Mrs. Flemming observed Roaring Run go dry in the mid-1980's. (T. 69-70) She did not recall the pattern in which the stream went dry. (T. 70)

270. In 1985, the Flemming's spring went dry. Prior to this time, it had never gone dry. The spring returns occasionally but does not provide the same flow as before. (T. 65)

271. In July 1985, BethEnergy drilled a well for the Flemmings. (T. 66)

272. William Chappell owns a farm on property adjacent to that of Sam Koban in the vicinity of Roaring Run. He has lived at this location since 1953. (T. 1427)

273. Beginning in 1948, Mr. Chappell was employed at a sawmill which was located on the property now owned by Sam Koban. (T. 1428)

274. From 1948 to 1953, he performed lumber work in the vicinity of Roaring Run from the Route 160 Bridge to an area near Howell's Run. (T. 1428-1429)

275. In the course of his work, which included hauling timber across the stream, Mr. Chappell had an opportunity to observe Roaring Run during all seasons. (T. 1429-1430)

276. During this time period when Mr. Chappell was working alongside Roaring Run, he observed heavy flow in Roaring Run during times of heavy rain and no flow during dry periods. (T. 1430-1431)

277. Until the end of 1984 Mr. Chappell owned a timber company. Between 1980 and 1984, he sold approximately 30 percent of his output to BethEnergy. (T. 1433)

278. Roy Shroyer is employed by BethEnergy. (T. 1434)

279. From approximately June 1975 to the summer of 1986, Mr. Shroyer had occasion to cross the Route 160 Bridge over Roaring Run every day; he also hunted along Roaring Run during this time period. (T. 1435)

280. During this eleven-year period, Mr. Shroyer observed the stretch of Roaring Run from the Route 160 Bridge to Howell's Run to be dry on

different occasions, primarily in the summer but also in November of one year. (T. 1435-1436)

DISCUSSION

The burden of proof in this appeal is on the Department to show by a preponderance of the evidence that its December 27, 1989, compliance order ("C.O.") and January 11 and 29 and February 14, 1990, modifications of that C.O. were not an abuse of discretion or in violation of applicable law. 25 Pa. Code §21.101(b)(3); Midway Sewerage Authority v. DER, 1991 EHB 1445, 1476.

In issuing the C.O., the Department found that BethEnergy's mining activities at its Mine No. 33 had converted lower stretches of Roaring Run from a perennial to an intermittent stream and significantly diminished the amount of flow in Howell's Run. Pursuant to its regulations at 25 Pa. Code §§89.52(a), 89.143(d), and 89.145(a), the Department prohibited longwall mining beneath and adjacent to Roaring Run, unnamed tributary number 3 to Roaring Run ("Tributary No. 3"), Howell's Run, and the North Branch of the Little Conemaugh River ("North Branch"). Longwall mining was also prohibited in the upper recharge area of Roaring Run and the recharge area of Tributary No. 3. Any room and pillar (development) mining in those watersheds must maintain a minimum pillar strength, but may be conducted in advance of ground and surface water monitoring. BethEnergy will be permitted to resume longwall mining beneath Roaring Run, Tributary No. 3, and Howell's Run if it demonstrates to the Department's satisfaction that such mining will not adversely affect those streams and if it implements a program approved by the Department to monitor the hydrologic balances in those watersheds. BethEnergy is also required to submit a remedial plan for restoring perennial flow to Roaring Run.

The Department's regulations specifically provide for the protection of perennial streams from the effects of underground mine subsidence. Under 25 Pa. Code §89.143(d):

> (1) Underground mining activities shall be planned and conducted in a manner which maintains the value and reasonably foreseeable uses of perennial streams, such as aquatic life, water supply and recreation, as they existed prior to mining beneath streams.
>
> (2) The measures to be adopted to comply with this subsection shall be described in the application and include a discussion of the effectiveness of the proposed measures as they relate to prior mining activities under similar conditions.
>
> (3) If the Department finds that the measures have adversely affected a perennial stream, the operator shall meet the requirements of §89.145(a) (relating to surface owner protection) and file revised plans or other data to demonstrate that future activities will meet the requirements of paragraph (1).
>
> 25 Pa. Code §89.143(d)

Section 89.145(a), to which §89.143(d)(3) refers, states:

> The operator shall correct material damage resulting from subsidence caused to surface lands including perennial streams as protected under §89.143(d) (relating to performance standards), to the extent technologically and economically feasible, by restoring the land to a condition capable of maintaining the value and reasonably foreseeable uses which it was capable of supporting before subsidence.
>
> 25 Pa. Code §89.145(a).

A "perennial stream" is "a stream or part of a stream that flows continuously throughout the calendar year as a result of groundwater discharge or surface runoff. The term does not include intermittent or ephemeral streams." 25 Pa. Code §89.141(b)(2). An "intermittent stream" is "[a] body of water flowing in a channel or bed composed primarily of substrates associated with flowing

water which, during periods of the year, is below the local water table and obtains its flow from both surface runoff and groundwater discharges." 25 Pa. Code §89.5.

The Department's regulations further protect the hydrologic regime within and adjacent to the permit area. Under 25 Pa. Code §89.52(a):

> Underground mining activities shall be planned and conducted to minimize changes to the prevailing hydrologic balance in both the permit and adjacent areas.

The "hydrologic balance" is defined as: "The relationship between the quality and quantity of water inflow to, water outflow from and water storage in a hydrologic unit such as a drainage basin, aquifer, soil zone, lake or reservoir. It encompasses the dynamic relationships among precipitation, runoff, evaporation and changes in groundwater and surface water storage." 25 Pa. Code §89.5.

Based on these provisions, BethEnergy was required to conduct its mining in a manner that maintained the value and reasonably foreseeable uses of streams or parts of streams which flow continuously throughout the year and that minimized changes to the prevailing hydrologic balance. If BethEnergy "adversely affected" any, or part of any, continuously-flowing stream, it must correct the material damage to that stream which was caused by subsidence, and restore the stream or portion of stream to a condition capable of supporting its pre-mining value and reasonably foreseeable uses.

In determining the meaning of the phrase "adversely affected", we construe it with reference to all of the Department's regulations regarding subsidence. See, Cmwlth., Dept. of Environmental Resources v. Rannels, 148 Pa. Cmwlth. 182, ___, 610 A.2d 513, 515 (1992) (Principle of statutory

construction that statutory provisions must be read together, 1 Pa. C.S. §1921(a), applies to the Department's regulations as well). Because an underground mine operator must "correct material damage resulting from subsidence" caused to perennial streams it has "adversely affected", we find that the phrase "adversely affected" in 25 Pa. Code §89.143(d)(3) is synonymous with material damage caused by subsidence. See also, 25 Pa. Code §89.145(a).

To sustain its burden of proof with respect to its order requiring BethEnergy to restore perennial flow over the entire length of Roaring Run, the Department must show Roaring Run was a perennial stream prio to mining, i.e. it supported continuous flow throughout the year, over its entire length; Roaring Run no longer supports continuous flow over its entire length; and the loss of flow was caused by subsidence from BethEnergy's mining activities. With respect to the rest of its order limiting and prohibiting longwall mining and requiring BethEnergy to conduct certain studies and provide additional information, the Department must show BethEnergy's mining activities also altered the hydrologic balances of Tributary No. 3, Howell's Run, and the North Branch.

BethEnergy contends the Department failed to sustain its burden of proof because it did not show that Roaring Run ever supported continuous flow throughout the year over its entire length; it did not offer any evidence of the pre-mining flow in Howell's Run and, therefore, could not show that the amount of flow in Howell's Run has decreased since mining began; and it did not offer any evidence concerning Tributary No. 3 and the North Branch. In the alternative, BethEnergy argues that even if the Board somehow finds that BethEnergy dewatered Roaring Run and Howell's Run, the regulations at 25 Pa.

Code §§89.143(d) and 89.145(a) exceed the scope of authority of the Mine Subsidence Act and are invalid.

The Department offered several witnesses to establish that Roaring Run once supported perennial flow over its entire length. Three witnesses, Samuel Koban, William Dishart, and Susan Flemming, offered lay testimony regarding their years of living, working, and walking in the vicinity of and adjacent to Roaring Run. Mr. Koban, who brought this problem to the Department's attention, testified that he has lived in the area since 1976 and has walked along Roaring Run every day. He first noticed that a 1000 foot stretch of the stream was dry on July 27, 1983. Mr. Koban stated that Roaring Run had never run dry before then. Mr. Dishart has lived in the area since 1952 and has walked and fished the entire length of Roaring Run numerous times. He testified that he watched Roaring Run go dry for the first time over a three month period in 1983. Mrs. Flemming testified that she has lived in the area since May 1949 and has walked along a stream behind her house that empties into Roaring Run, as well as along Roaring Run itself, during the spring, summer, and fall. She first observed her stream go dry in 1984 or 1985 and Roaring Run go dry in the mid-1980's.

To counter the testimony that Roaring Run never went dry before 1983, BethEnergy offered the testimony of William Chappell and Roy Shroyer, both of whom lived and worked in the area and had numerous opportunities to observe the amount of flow in Roaring Run. Mr. Chappell testified that he has lived on property adjacent to Samuel Koban since 1953 and worked at a sawmill on the Koban property from 1948 to 1953. During the course of his work, Mr. Chappell had to haul timber across Roaring Run and recalled that it would have no flow in periods of dry weather. Mr. Shroyer testified that between June 1975 and

the summer of 1986 he crossed the Route 160 Bridge over Roaring Run daily and hunted along it on numerous occasions. He recalled Roaring Run was dry from the Route 160 Bridge to Howell's Run at different times, primarily during the summer but also in November one year.

The Department argues we should disregard the testimony of BethEnergy's lay witnesses because Mr. Shroyer is employed by BethEnergy and Mr. Chappell owned a lumber company that sold 30 percent of its output to BethEnergy. The Department contends Mr. Shroyer's and Mr. Chappell's relationships with BethEnergy establish that their testimony was biased in favor of BethEnergy. The possible bias of a witness is properly considered in determining the weight to be given to a witness' testimony. Pittsburgh National Bank v. Mutual Life Insurance Co. of New York, 273 Pa. Super. 592, ___, 471 A.2d 1206, 1210, aff'd, 493 Pa. 96, 425 A.2d 383 (1980). We accept that Mr. Shroyer, as a BethEnergy employee, has a stake in the outcome of these proceedings that may have prejudiced his testimony. However, we do not assign any less weight to his testimony than that of the Department's witnesses, since we find that the three Department witnesses may also have been biased in recalling the amount of flow in Roaring Run.

William Dishart testified that his well went dry in the early 1980's and, after Mr. Dishart complained, the well was deepened by BethEnergy. After the deepened well went dry, BethEnergy drilled another, even deeper well that currently provides an adequate quantity of water but, according to Mr. Dishart, requires the use of a water conditioner and softener. BethEnergy drilled new wells for Samuel Koban and Susan Flemming as well. We find, therefore, that the testimony of Mr. Dishart, Mr. Koban, and Mrs. Flemming may have been biased against BethEnergy, since each appears to have blamed

BethEnergy for previous water losses. In that case, we cannot assign any more weight to the lay testimony of either side.

The Department conducted numerous investigations of the Roaring Run watershed following Samuel Koban's initial complaint in 1983 that Roaring Run had gone dry. Between August 1983 and July 1988, no fewer than six Department employees visited Roaring Run on at least 12 different occasions. In August 1983, Department hydrogeologist David Hess conducted a general inspection of Roaring Run and noted that while there was no apparent flow in the stream, water was pooled in several depressions in the streambed. August 1983 was the driest August between 1979 and 1990.[4] John Kernic, a geologist trainee with the Department's Bureau of Water Quality Management, measured the water levels in wells near Roaring Run in 1984 to determine if there was a correlation between BethEnergy's mining and the alleged loss of flow in Roaring Run. The Department was unable to draw any conclusions from Kernic's data. Raymond Rogers, a surface mining conservation inspector with the Department's Ebensburg District Mining Office, visited the Koban property and Roaring Run on August 16, 1985, with Department hydrogeologist Myles Bayard; on August 20, 1985 with specialist Greg Schulick; and on October 9, 1985. Mr. Rogers noted that during all three visits Roaring Run was dry adjacent to Mr. Koban's property and that the area of dryness grew progressively larger between August 16 and October 9. Precipitation for the months of August and October 1985 was below average for the years 1979 to 1990 and for September 1985 was the lowest of any September during that period.

---

[4] All references to rainfall totals are to the National Oceanographic and Atmospheric Administration's rainfall gauging station at the Ebensburg Sewage Treatment Plant. (Ex. J-9.)

John Kernic revisited Roaring Run in November 1985, accompanied by Edward Motycki, a mining engineering supervisor in the Department's McMurray office of the Bureau of Mining and Reclamation, and found that it was flowing in the area Samuel Koban had observed to be dry in October 1985. In 1986, Mr. Kernic returned to find that Roaring Run had stopped flowing in two areas in July and that the size of these areas had grown by August.

Following Mr. Kernic's suggestion, in 1987 and 1988 the Department monitored Roaring Run's flow to determine what was causing it to become dry. Mr. Kernic revisited Roaring Run on at least three occasions, in June, July, and September 1987, and observed that only a small portion of the stream had become dry. When he returned in July 1988, Mr. Kernic saw that a much larger portion of Roaring Run was dry and contained only scattered pools of water. Precipitation for the months of June and July 1988 was below and above average, respectively, for the years 1979 to 1990.

While it is certainly commendable that the Department sent several employees to view Roaring Run, the results of these investigations do not help us determine whether Roaring Run was ever a perennial stream. These observations do nothing more than recount the conditions that existed in Roaring Run between 1983 and 1988, after the Department alleges Roaring Run was converted from a perennial stream.

John Kernic contacted Jane Earle, a water pollution biologist with the Department's Bureau of Mining and Reclamation, in late 1988 and asked her to investigate whether aquatic life in Roaring Run had been affected by the alleged loss of flow there. The baseline for her study was to be a report

prepared by Dr. James Sykora, who conducted a similar investigation between November 1982 and April 1983 to determine the effects of a 1982 pipeline spill on Roaring Run.

Ms. Earle's investigation consisted of a study of the macroinvertebrate population at three separate locations in Roaring Run, a comparison of the results upstream with the results downstream, and a comparison of her results with those of Dr. Sykora's 1982-1983 study. Ms. Earle testified that a comparison of macroinvertebrate communities is commonly used by the Department's Bureau of Water Quality to determine changes in stream conditions and is recognized by the Pennsylvania Fish Commission, the United States Environmental Protection Agency, and the Department of the Interior's Fish and Wildlife Service. Since Ms. Earle's methodology is accepted within the scientific community, it satisfies the standard for the admissibility of scientific evidence in this Commonwealth. See, Commonwealth v. Nazarovitch, 496 Pa. 97, 101, 436 A.2d 170, 172 (1981).[5]

Ms. Earle's study revealed that three types of caddisflies, including the hydropsychid caddisfly, were present in upstream areas of Roaring Run but were absent downstream. Comparing the results of her study with those of Dr. Sykora's earlier study, Ms. Earle discovered that Dr. Sykora had found the hydropsychid caddisfly in downstream areas of Roaring Run. Because this type of caddisfly requires flowing water to feed, Ms. Earle hypothesized that its

---

[5] As we pointed out in Al Hamilton Contracting Co. v. DER, EHB Docket No. 84-187-W (Adjudication issued November 24, 1993), the U.S. Supreme Court recently overturned this standard in Dawbert v. Merrell Down Pharmaceuticals, Inc., ___ U.S. ___, 113 S. Ct. 2786, ___ L. Ed. 2d ___ (1993). What effect this has on the law of the Commonwealth remains to be seen, but for the time being the Frye test is still the law in this Commonwealth. Al Hamilton, at p. 44.

demise in downstream areas of Roaring Run was the result of a change in the amount of flow there, from perennial flow to intermittent flow. She testified she could find no other factor that would account for its absence.

Jane Earle conducted a second, more comprehensive aquatic investigation as part of the Department's 1989 Roaring Run Study. The 1989 study was an attempt to determine finally whether BethEnergy's mining had caused a loss of stream flow in Roaring Run. Ms. Earle's second study consisted of six samples each from seven locations over a five month period, from April through August 1989. Based on the results of this study, Ms. Earle concluded that Roaring Run is perennial from just below the New Germany Bridge to its headwaters, goes through a transition area where there are short periods of intermittency, and is intermittent from below Tributary No. 3 to its confluence with Howell's Run. Ms. Earle based her conclusions on the absence of the hydropsychid caddisfly and the stonefly acroneuria, neither of which can survive periods of intermittent flow, in the lower reaches of Roaring Run, and on the presence of the diplectrona caddisfly, which can survive short periods of intermittency, in what she labeled the transition area. Because Dr. Sykora had reported finding the hydropsychid and diplectrona caddisflies as well as the acroneuria stonefly in lower reaches of Roaring Run, Ms. Earle hypothesized that this stretch was perennial when Dr. Sykora conducted his investigation in 1982-1983.

As part of her aquatic investigation, Jane Earle also studied the fish in Roaring Run. She found that brook trout, blacknose dace, creek chubs, and sculpins lived in the stream, that fish were present in greater abundance upstream than downstream, and that no brook trout were found at the lowest sampling station. Ms. Earle testified that there were no conditions other

than stream flow that could cause the difference in fish population between the perennial, upstream and intermittent, downstream areas of Roaring Run. Comparing the results of her study with those of the Fish Commission's October 1982 investigation into the effects of a pipeline spill on Roaring Run, Ms. Earle determined that there were more fish in the stream in 1982 than in 1989.[6]

BethEnergy countered Jane Earle's opinions regarding the aquatic community in Roaring Run with the testimony of Patrick Bonislawsky, a senior environmental scientist with Michael Baker, Jr., Inc., who was admitted as an expert in aquatic biology. His opinions were based on his review of the Department's 1989 Roaring Run Study, Dr. Sykora's 1982 report, and the Fish Commission's 1982 fish kill report, as well as his visit to Roaring Run, limited aquatic and invertebrate sampling, and review of aerial photographs.

Mr. Bonislawsky agreed with Jane Earle that the hydropsychid caddisfly requires flow to secure food and the acroneuria stonefly requires more than one year to complete its growth cycle. He disagreed with her, however, about whether either could survive periods of intermittent flow. Mr. Bonislawsky explained that macroinvertebrates are not adapted exclusively for perennial or intermittent flow. Some macroinvertebrates are better able than others to adapt to intermittent flow. Mr. Bonislawsky testified that both the hydropsychid caddisfly and the acroneuria stonefly have been found in areas

---

[6] The pipeline spill resulted in the death of approximately 950 fish. Ms. Earle did not state whether her conclusion that there were more fish in Roaring Run in 1982 than in 1989 was based on the 950 dead fish or the remaining fish, if any, that were alive in the stream. If her conclusion was based on the 950 dead fish, she failed to state whether seven years is enough time for a stream to recover from the effects of such a spill. Accordingly, we are unable to draw any conclusions of our own from this opinion.

with intermittent flow and offered two possible reasons, other than a loss of perennial flow, for their demise in the downstream areas of Roaring Run. First, they may have been affected by the installation and maintenance of utility lines crossing Roaring Run, and second, they may have been smothered by silt deposited on the streambed after heavy rainfalls.

Mr. Bonislawsky also collected data on the current fish population in Roaring Run and compared it to the data collected by the Fish Commission after the 1982 pipeline spill. He explained that longnose dace and redside dace are often found with brook trout in perennial, upstream areas. Mr. Bonislawsky noted that the Fish Commission only found one brook trout in Roaring Run in 1982 and there is no other history of these fish ever having been found there. Given their historic absence from Roaring Run, Mr. Bonislawsky concluded that it has never been a perennial stream.

We are unable to assign more weight to Ms. Earle's or Mr. Bonislawsky's testimony. Accordingly, we find their explanations equally plausible for the absence of the hydropsychid caddisfly and stonefly acroneuria in lower stretches of Roaring Run.

In addition to Jane Earle, the Department offered the testimony of hydrogeologist Michael DiMatteo, who measured the flow in Roaring Run between April and August 1989; mining engineer supervisor Edward Motycki, who investigated whether BethEnergy's mining had adversely affected Roaring Run; and hydrogeologist Joseph Schueck, who conducted a terrain conductivity study to locate areas where water might be lost from the streambed to the subsurface. Without explaining the substance of Mr. DiMatteo's testimony, we note that his studies do nothing more than summarize the conditions that existed in Roaring Run in 1989. His testimony does not support the

Department's contention that Roaring Run was once a perennial stream over its entire length. Likewise, Mr. Motycki's testimony that subsidence from BethEnergy's mining could have caused a loss of flow in Roaring Run and Mr. Schueck's testimony that water from Roaring Run is flowing into the strata beneath the streambed do not help to establish that Roaring Run was ever a perennial stream, especially since neither had any pre-mining data available for comparison. Although Schueck further stated he did not believe lower sections of Roaring Run were gaining or losing flow naturally, as is common in Appalachian coal fields, he offered no support for this testimony or even an explanation about how it supports the Department's belief that Roaring Run was once a perennial stream.

The Department last offered the testimony of Harold Miller, the Department hydrogeologist who supervised the 1989 Roaring Run Study. Mr. Miller testified he was not aware of any hydrogeologic theories that could explain why the lower stretches of Roaring Run became dry while areas upstream supported perennial flow. In other words, he concluded that since Roaring Run is perennial upstream it should be perennial downstream. Mr. Miller also testified that BethEnergy's mining caused intermittent flow in Roaring Run. He based this opinion on the timing of BethEnergy's mining, the accounts concerning a loss of flow in the stream, flow measurements, and Mr. Motycki's conclusions regarding the effects of mining beneath the stream channel. Like the testimony from Mr. DiMatteo, Mr. Schueck, and Mr. Motycki, this conclusion offers us no proof that Roaring Run was ever a perennial stream. It relates instead to the causal connection between BethEnergy's mining and the alleged loss of flow in Roaring Run.

In response, BethEnergy offered the testimony of Donald Thomas, a senior hydrogeologist with Michael Baker, Jr., Inc., who was admitted as an expert in surface hydrogeology. Mr. Thomas explained it is a general hydrologic concept that streams gain flow downstream of the point of first continuous flow, but Roaring Run is an exception to this general rule. Roaring Run is relatively flat in the middle and steeper at its upper and lower ends. Because groundwater tends to flow out more quickly and become depleted in steeper areas, Roaring Run is unable to support flow in its relatively steep lower end. According to Mr. Thomas, the lower stretches of Roaring Run never supported perennial flow. Donald Streib, a consulting geologist who testified on BethEnergy's behalf, referred to Roaring Run as having a convex stream profile and stated that streams with such profiles do not usually have continuous flow.

Referring to a Department manual known as the "Page and Shaw Report", Donald Thomas testified that approximately 50 percent of the streams in the vicinity of Roaring Run with a drainage area of less than 10 square miles had experienced drying. Based on Roaring Run's relatively small drainage area of 2.8 square miles, Mr. Thomas concluded it is likely that Roaring Run had gone dry and, therefore, was not perennial before BethEnergy began mining.

We explained above that the Department bears the burden of proving by a preponderance of the evidence that the C.O. and its modifications were not an abuse of discretion or in violation of applicable law. In Midway Sewerage Authority v. DER, we defined "preponderance of the evidence" to mean that the evidence in favor of the proposition must be greater than that opposed to it. 1991 EHB at 1476. "It must be sufficient to satisfy an unprejudiced mind as to the existence of the factual scenario sought to be established." *Id.*

As we also explained above, in order to sustain its burden of proof with respect to its order requiring the restoration of perennial flow to Roaring Run, the Department must show that Roaring Run once supported continuous flow throughout the year over its entire length. Because we find the Department's and BethEnergy's positions to be equally compelling, the Department has failed to sustain this burden. Although there is ample evidence in the record that lower stretches of Roaring Run are now intermittent, there is insufficient evidence for us to conclude they ever supported continuous flow throughout the year. Accordingly, there is no basis for the Department's order requiring BethEnergy to restore perennial flow over the entire length of Roaring Run. Furthermore, since the Department has failed to show that the hydrologic balance of Roaring Run has been altered, there is no basis for its order prohibiting longwall mining beneath and adjacent to Roaring Run and within its recharge area; requiring BethEnergy to prove the absence of adverse effects of such mining; and requiring BethEnergy to monitor the hydrologic balance in the Roaring Run watershed.

Turning our attention to the Department's orders concerning Howell's Run, we find that they too lack an adequate basis in fact. The Department's Harold Miller testified that BethEnergy's mining activities in both the Upper and Lower Kittanning coal seams resulted in a net loss of flow in Howell's Run between monitoring stations upstream and downstream of its confluence with Roaring Run. This opinion, which he held to a reasonable degree of scientific certainty, is based on recorded flow losses between the two stations, the location of longwall panels under Howell's Run, and Edward Motycki's testimony regarding subsidence along the edges of longwall panels.

We find this evidence to be insufficient for several reasons. The Department introduced no evidence concerning the pre-mining flow in Howell's Run between these two points. There is no way for us to determine, therefore, whether this loss of flow began to occur after BethEnergy mined here. Furthermore, Mr. Motycki's statements concerning subsidence beneath Howell's Run were based solely on the fact that mining occurred. He offered no other evidence to prove that Howell's Run had in fact been affected. There is, therefore, no basis for the Department's order prohibiting longwall mining beneath and adjacent to Howell's Run, requiring BethEnergy to prove that such mining will not adversely affect Howell's Run, and requiring BethEnergy to monitor the hydrologic balance in the Howell's Run watershed.

With respect to the North Branch, the Department only offered Edward Motycki's statement that subsidence effects beneath the North Branch would be less severe than those beneath Roaring Run and Howell's Run because there is a greater amount of cover beneath the North Branch. This limited evidence provides no basis for the Department's order, under 25 Pa. Code §89.52(a), prohibiting longwall mining beneath and adjacent to the North Branch.

And finally, the Department offered no evidence concerning the hydrologic balance of Tributary No. 3. There is, therefore, no basis for its order prohibiting longwall mining beneath and adjacent to Tributary No. 3 and within its recharge area; requiring BethEnergy to prove that such mining will not adversely affect Tributary No. 3; and requiring BethEnergy to monitor the hydrologic balance in the Tributary No. 3 watershed.

Accordingly, BethEnergy's appeal at Docket No. 90-050-MJ (Consolidated) is sustained and the Department's orders contained in its December 27, 1989, C.O. and letters of January 11 and 29 and February 14,

1990, are reversed. Because BethEnergy's appeal is sustained, there is no need to examine its other primary argument concerning the validity of 25 Pa. Code §§89.143(d) and 89.145(a). There is also no need to review its other arguments concerning the retroactive application of the Department's regulations; the Department's authority under §§5 and 610 of the Clean Streams Law, 35 P.S. §§691.5 and 691.610, and under §1917-A of the Administrative Code, 71 P.S. §510.17; the technological and economical feasibility of restoring perennial flow to Roaring Run; unconstitutional takings; estoppel; and the admissibility of appellant's exhibit 32.

CONCLUSIONS OF LAW

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

2. The Department has the burden of proving by a preponderance of the evidence that its December 27, 1989, compliance order and January 11 and 29 and February 14, 1990, modifications of that compliance order were not an abuse of discretion or in violation of applicable law. 25 Pa. Code §21.101(b)(3); Midway Sewerage, *supra*.

3. The possible bias of a witness is properly considered in determining the weight to be given to a witness' testimony. Pittsburgh National Bank, *supra*.

4. A "preponderance of the evidence" means that the evidence in favor of the proposition must be greater than that opposed to it. Midway Sewerage, *supra*.

5. BethEnergy was required to conduct its mining activities in Mine No. 33 in a manner that maintained the value and reasonably foreseeable uses of streams or parts of streams that flow continuously throughout the year.

6. The Department did not prove by a preponderance of the evidence that Roaring Run has ever flowed continuously throughout the year over its entire length.

7. There is no basis for the Department's order requiring BethEnergy to restore perennial flow over the entire length of Roaring Run; prohibiting longwall mining beneath and adjacent to Roaring Run and within its recharge area; requiring BethEnergy to prove the absence of adverse effects from such mining; and requiring BethEnergy to monitor the hydrologic balance in the Roaring Run watershed.

8. BethEnergy was also required to conduct its mining activities in Mine No. 33 in a manner that minimized changes to the prevailing hydrologic balances of Tributary No. 3, Howell's Run and the North Branch.

9. The Department did not prove by a preponderance of the evidence that BethEnergy's mining activities at its Mine No. 33 altered the hydrologic balances of Tributary No. 3, Howell's Run, and the North Branch.

10. There is no basis for the Department's order prohibiting longwall mining beneath and adjacent to Tributary No. 3, Howell's Run, and the North Branch, and within the recharge area of Tributary No. 3; requiring BethEnergy to demonstrate that longwall mining in Mine No. 33 will not adversely affect Tributary No. 3 and Howell's Run; and requiring BethEnergy to monitor the hydrologic balances in Tributary No. 3 and Howell's Run.

ORDER

AND NOW, this 11th day of July, 1994, it is ordered that:

1) BethEnergy's appeals at EHB Docket No. 90-050-MJ (Consolidated) are sustained; and

2) The Department's orders contained in its December 27, 1989, Compliance Order and January 11 and 29 and February 14, 1990, letters are reversed.

ENVIRONMENTAL HEARING BOARD

MAXINE WOELFLING
Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member

JOSEPH N. MACK
Administrative Law Judge
Member

Board Member Richard S. Ehmann's dissenting opinion is attached.

DATED: July 11, 1994

cc: DER, Bureau of Litigation
Library: Brenda Houck
For the Commonwealth, DER:
Marc A. Roda, Esq.
Bureau of Regulatory Counsel
For Appellant:
Henry Ingram, Esq.
Heather Wyman, Esq.
BUCHANAN INGERSOLL, P.C.
Pittsburgh, PA

ar

FIGURE 4
ROARING RUN
STREAM FLOW
IITORING STATIONS

SCALE
0 1000 2000
FEET

N

CAMBRIA

CROYLE

SUMMERHILL

U.S. 219
PA 160
NEW GERMANY ROAD (SR 20)
SR2013
ROARING RUN
HOWELLS RUN
TRIB 1
TRIB 2
TRIB 3
TRIB 4
TRIB 5
ARCO PIPELINE
TELEPHONE LINE
FLEM. SP.
LAUREL PIPELINE
MOBIL PIPELINE

1H A B C D E F G H I J K L M N 2H

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
2nd FLOOR — MARKET STREET STATE OFFICE BUILDING
400 MARKET STREET, P.O. BOX 8457
HARRISBURG, PA 17105-8457
717-787-3483
TELECOPIER 717-783-4738

M. DIANE SMITH
SECRETARY TO THE BOARD

BETHENERGY MINES, INC. :
:
v. : EHB Docket No. 90-050-MJ
: (Consolidated)
COMMONWEALTH OF PENNSYLVANIA :
DEPARTMENT OF ENVIRONMENTAL RESOURCES :

OPINION BY BOARD MEMBER
RICHARD S. EHMANN

OPINION

I must dissent from the majority's conclusion that DER has failed to prove the facts necessary to support its assertions as to the law in this appeal. While it appears that how DER's evidence was offered (or in certain situations how it came to be that certain questions were not asked of witnesses) adversely impacted DER's case, I believe the evidence taken as a whole establishes that Bethenergy's mining operations caused the now intermittent position of Roaring Run to achieve that unfortunate status. In reaching this conclusion, I specifically assign greater weight to the testimony of Earle, Dishart, Koban, and Flemming than I do to that to the contrary from Bonislawsky, Schrager and Chappell. I would also give greater weight to the testimony of Motycki and Schueck and less to that of Thomas. In coming to this conclusion, I do not suggest that DER's evidence in support of its position is overwhelming. It is not. I merely conclude it preponderates.

ENVIRONMENTAL HEARING BOARD

RICHARD S. EHMANN
Administrative Law Judge
Member

med