Environmental Hearing Board

Adjudications
and
Opinions

1995

Volume II

COMMONWEALTH OF PENNSYLVANIA
George J. Miller, Chairman

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OF THE

ENVIRONMENTAL HEARING BOARD

1995

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FOREWORD

This volume contains all of the adjudications and opinions issued by the Environmental Hearing Board during the calendar year 1995.

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

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M. DIANE SMITH
SECRETARY TO THE BOARD

PETE CLAIM

v.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL RESOURCES

EHB Docket No. 94-125-E

Issued: April 10, 1995

ADJUDICATION

By: Richard S. Ehmann, Member

Synopsis

The Board dismisses appellant/former battery recycling operator's challenge to an order issued by the Department of Environmental Resources (DER) pursuant to, *inter alia*, section 316 of the Clean Streams Law, 35 P.S. §691.316, and sections 104(7) and 602 of the Solid Waste Management Act, 35 P.S. §6018.104(7) and 602, directing him to remediate site conditions, consisting of an abandoned lead acid battery casings pile, and soils, sediments, and surface water contaminated with lead which has migrated from the pile.

The Board finds that DER sustained its burden of proving by a preponderance of the evidence that the battery casings pile is a polluting condition in the form of leachable lead; that the abandoned battery casings pile was left from appellant's operations; and that appellant, as a former lessee, was an occupier of the site and has occupied the site to the extent of the presence of his battery casings there. Moreover, the Board finds that DER sustained its burden of proving by a preponderance of the evidence that the leachable lead from the battery casings pile has reached the surface waters of

the Commonwealth and threatens to continue to reach the surface waters in the future. Thus, we find DER's order was lawfully issued pursuant to section 316 of the Clean Streams Law.

Further, the Board finds that DER sustained its burden of proving by a preponderance of the evidence that DER's order was appropriately issued pursuant to the Solid Waste Management Act. The appellant cannot escape liability for remediating the lead pollution at the site which is being caused by battery casings he abandoned at the site on the basis that he deposited the battery casings at the site prior to the enactment of the Solid Waste Management Act. The Board concludes that the appellant continues to dispose of this hazardous waste at the site until the waste is removed from the site and it is restored to its pre-disposal condition.

BACKGROUND

Appellant Peter Claim (Claim) filed a notice of appeal on May 27, 1994, seeking this Board's review of an order issued to him by DER on April 18, 1994 with regard to property known as the Marucci site or "site", located in South Union Township, Fayette County. DER's order found, *inter alia*, that Claim had occupied a portion of the Marucci site to operate a lead acid battery recycling establishment, and that battery casings were disposed of on the site on a pile adjacent to a tributary to Coal Lick Run. DER's order also alleged that the results of sampling conducted by DER on soils, sediment, surface waters, and battery casings, among other things, show that the battery casings and soils contain leachable lead and are a hazardous waste pursuant to DER's regulations at 25 Pa. Code §261.3, and that pollution is reaching and threatens to reach surface waters of the Commonwealth. DER's order additionally states that the results of sampling conducted by DER show that

the surface waters in the unnamed tributary and in drainage channels at the toe of the battery casings pile contain pollutants, including lead, and that the sediments in the drainage channels and the soils at the toe of the battery casings pile contain excess levels of lead.

Pursuant to sections 5, 316, 402, and 610 of the Clean Streams Law (Clean Streams Law), Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §§691.5, 316, 402, and 610; sections 104(7) and 602 of the Solid Waste Management Act (SWMA), Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §§6018.104(7) and 602; and section 1917-A of the Administrative Code (Administrative Code), Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-17, DER directed Claim to take action with regard to remediation of the site.

We received Claim's First Motion For Summary Judgment, For Judgment on the Pleadings, and/or to Dismiss Administrative Order on September 2, 1994. After receiving DER's response to Claim's motion, we denied that motion in an Order issued September 23, 1994.

On October 3, 1994, we received the parties' First Joint Stipulation. Subsequently, on October 12, 1994, we received both Claim's First Motion in Limine and DER's response to this motion. We then, on October 12, 1994, received the parties' Second Joint Stipulation.

A merits hearing was held on October 12-13, 1994 before Board Member Richard S. Ehmann. Upon our receipt of the transcript of the merits hearing, we directed the parties to file their post-hearing briefs. We received DER's post-hearing brief on November 28, 1994. Along with its post-hearing brief, DER also filed a Motion to Reopen the Record and Enter a Stipulation. After receiving Claim's response, we denied DER's motion to reopen the record by an

order issued on December 13, 1994. We received Claim's post-hearing brief on December 13, 1994. DER filed its reply post-hearing brief on December 21, 1994.

The record before us consists of a transcript of two volumes and numerous exhibits, including the parties' First Joint Stipulation which contains stipulated facts. (Since the parties' Second Joint Stipulation did not stipulate to any additional facts, it was not made an exhibit.) Any arguments not raised in the parties' respective post-hearing briefs are deemed waived. Lucky Strike Coal Co. v. Commonwealth, DER, 119 Pa. Cmwlth. 440, 547 A.2d 447 (1988). After a full and complete review of the record, we make the following findings of fact.

FINDINGS OF FACT

1. Appellant is Claim, an individual with an address of 28 Princeton Avenue, Uniontown, PA 15401. (Notice of appeal)

2. Appellee is DER, the agency of the Commonwealth with the duty and authority to administer and enforce the SWMA; the Clean Streams Law; and section 1917-A of the Administrative Code. (B Ex. 1)[1]

3. Jacob Marucci, Beatrice Marucci, Carmilla Marucci, and Mary Louise Nepa (the Maruccis) own a parcel of property located in South Union Township, Fayette County. (B Ex. 1)

4. Claim was a sole proprietor in the junk business. (N.T. 303-304) Claim began to occupy the site in the late 1950s, when he used the property to store pipe as part of his junk business. (N.T. 304, 306-307)

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[1] "B Ex. 1" is a reference to Board exhibit 1, which is the parties' Joint Stipulation. "C Ex." is a reference to an exhibit offered by DER, while "A Ex. " is a reference to an exhibit offered by Claim. "N.T." indicates a reference to the transcript of the merits hearing.

5. Claim leased a portion of the Marucci site to recycle lead acid batteries. At some time before 1961, the lead acid batteries were recycled at the site in order to reclaim the lead for off-site reuse. (N.T. 363; B Ex. 1) Claim also leased a portion of the Marucci site, in 1980 and 1981, for the storage of heavy equipment. (B Ex. 1)

6. Lead acid batteries were brought to the site, where the casings were broken open with an ax, the tops of the batteries were removed, and the lead cores were removed from the waste batteries. The lead cores were sold off-site. (N.T. 55; B Ex. 1; C Ex. 4)

7. Claim admitted to DER personnel on two occasions that he was responsible for the battery casings at the site. (N.T. 51-55, 69, 163)

The Marucci Site

8. David Planinsek is employed by DER as a Waste Management Specialist in DER's Greensburg District Office. (N.T. 25) His duties include inspecting permitted waste disposal facilities, industries, and businesses that generate hazardous and/or residual waste; he also responds to citizen complaints alleging illegal disposal. (N.T. 25)

9. After Planinsek received a complaint over the phone from the Fayette County Solid Waste Director Vincent Vicites on March 31, 1992, Planinsek drove to the Marucci site with Vicites, parked and walked the Marucci site. (N.T. 29)

10. Planinsek found, through conducting a phone investigation, that the Fayette Equipment Company had had a building on a portion of the site; so, at first, he referred to the entire site as the Fayette Equipment site for identification purposes only. (N.T. 30)

11. When Planinsek first visited the Marucci site in person on March 31, 1992, he observed a large pile of battery casings and debris. (N.T. 38) The photograph which is C Ex. 2A is a fair and accurate depiction of a portion of the battery casings pile Planinsek observed. (N.T. 38) There are thousands of battery casings on the pile. (N.T. 36) Planinsek estimates the battery casings pile to be 120 feet wide and 20 feet high. (N.T. 36)

12. An unnamed tributary to Coal Lick Run flows diagonally across the Marucci site from northwest to southeast, as depicted on the map which is C Ex. 1. (N.T. 32) C Ex. 1 is a fair and accurate depiction of the site. (N.T. 28)

13. The battery casings pile is adjacent to the unnamed tributary. The battery casings and other materials are uncovered and exposed to the elements. (B Ex. 1) As shown in the photographs offered by DER, the battery casings in the pile are broken and their lead cores have been removed. (N.T. 43-44; C Exs. 2C and 2D) Since the battery casings pile is porous, any surface water or precipitation which falls on the pile runs through the pile. (N.T. 87-90)

14. North of the battery casings pile and the unnamed tributary to Coal Lick Run is a vacant lot and the remnants of the Fayette Equipment Company building, as depicted on C Ex. 1. (N.T. 30-32)

15. Empty drums, copper wire, scrap metal, partially burned paint cans and ash residue, tires, and other materials have been disposed of on the Marucci site. Some of these materials have fallen into the unnamed tributary and are along the tributary's bank. (B Ex. 1) The paint cans and paint waste are located approximately 15 feet from the battery casings pile. (N.T. 34-36, 176-177; C Ex. 2B)

16. Portions of the Marucci site were formerly used for surface mining activities. (B Ex. 1)

17. An abandoned surface mine, which has been revegetated, is located southwest of the battery casings pile, as depicted on C Ex. 1. (N.T. 33-34) A serpentine area labeled "3-to 4- foot berm" on C Ex. 1 is a berm which was installed as part of the mining reclamation. (N.T. 34)

18. To the east of the battery casings pile lies a spring and potential wetland area, as depicted on C Ex. 1. (N.T. 34) U.S. Route 119 is located to the west of the site and is off of the C Ex. 1 map. (N.T. 32)

19. The topography of the area marked on C Ex. 1 as "former junkyard area", "crushed battery casings and debris", and "5-gallon paint containers" is fairly level. (N.T. 34-36, 176-177; C Exs. 2A and 2B)

20. Planinsek has observed acid mine drainage (AMD) which appears to be discharging from an intermittent stream that flows from the area labeled "heavily wooded area" south of the battery casings pile, as indicated on C Ex. 1. (N.T. 35, 138, 198; C Ex. 1) This AMD discharge is downgradient from the battery casings pile. (N.T. 101) There are no other known discharges of AMD at the site. (N.T. 35, 198)

21. There is a steep slope from the "battery casing pile" area to a stream in the area marked "spring/potential wetland" on C Ex. 1. (N.T. 34; C Ex. 2C) This stream and wetland area is at the base of the battery casings pile. DER has observed surface water emerging from the base of the pile, as is depicted in DER's photographs of the battery casings pile. (N.T. 36, 40-41, 46; C Ex. 1, and C Exs. 2A, 2B, 2C, and 2D)

22. There were no battery operations or other manufacturing activities conducted in the area west of the unnamed tributary. (N.T. 201)

23. The flow of water in the spring/potential wetland area is generally from northeast to southwest. (N.T. 140) There is no evidence of erosion or any evidence that water flows from the paint cans toward the battery casings pile. (N.T. 88)

DER's 1992 Site Investigation

24. DER conducted a site investigation of the Marucci site. This involved DER's devising a sampling plan and collecting samples so that DER could look for the potential wastes on the site and determine whether there is contamination and whether the contamination has to be removed from the site. (N.T. 112)

25. Planinsek returned to the Marucci site on April 6, 1992, accompanied by DER soil scientist Edward Bates, to collect soil and sediment samples in order to determine whether the battery casings were causing any contamination. (N.T. 47, 105; B Ex. 1) Planinsek assisted Bates in collecting two soil samples. (N.T. 47-48; B Ex. 1)

26. The soil sample collected by Bates on April 6, 1992 was a three-point composite.[2] The three areas marked "SX' in green on C Ex. 1 indicate the three areas at the base or the toe of the battery casing pile where Bates collected this three-point composite. (N.T. 122)

27. Bates collected the soil sample at a depth of 0 to 6 inches because he believed that if organic substances were present in the soil, they would be on the surface or just below the surface. (N.T. 123-124) He selected a three-point composite from the base of the battery casings pile in order to

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[2] A three point composite means that three subsamples were individually collected, placed in a ziploc bag, then mixed or broken up in an effort to homogenize the sample. (N.T. 121-122)

determine if surface runoff was carrying materials or contaminants from the battery casings to locations downgradient or below the pile. (N.T. 123, 194)

28. The water/waste quality report which accompanied the April 1992 three-point soil composite (sample no. 920205) and laboratory analysis for this sample is C Ex. 6. (N.T. 126)

29. The sediment sample which Bates collected in April of 1992 was collected from one of the intermittent streams on the site marked "SD" in green on C Ex. 1. (N.T. 124) This sediment sample was collected approximately 15 feet downstream from the toe or base of the battery casing pile. (N.T. 124) This sediment sample was collected at a depth of 0 to 6 inches in order to determine whether there was any inorganic contamination migrating from the battery casings pile. (N.T. 123-125)

30. The water/waste quality report which accompanied the sediment sample collected in April of 1992 and the laboratory analysis of this sample (no. 920206) is C Ex. 7. (N.T. 127)

31. Bates requested DER's Erie lab analyze both the soil and the sediment samples for total lead[3], total cadmium, TCLP lead[4], and TCLP cadmium. (N.T. 128-129; B Ex. 1; C Exs. 6, 7) Bates requested these analyses because lead and cadmium typically are associated with batteries, and he was attempting to determine whether lead or cadmium was present at the site at

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[3] A total metals analysis measures the concentration of metals present in the material. It is an indication of the quantity of the metal available in the sample. (N.T. 216)

[4] A TCLP (Toxicity Characteristic Leachate Procedure) analysis is the method established under DER's regulations for determining whether a material meets the regulatory definition of characteristic hazardous waste. (N.T. 215) The TCLP test evaluates the ability of a waste material to leach toxic heavy metals into the environment, and evaluates the mobility of heavy metals in the waste material. (N.T. 215, 245)

levels above background. Bates also was attempting to determine if the soil or sediment would be characteristic hazardous waste. (N.T. 128-129)

32. The soil and sediment samples collected on April 6, 1992 were analyzed using the hazardous waste characterization test for toxicity set forth at 25 Pa. Code §261.24. (B Ex. 1)

33. The laboratory analyses for the April 1992 soil sample showed that total lead was present at 2980 mg/kg (milligrams per kilogram), and that the leachate extracted from the sample using the TCLP method contained 44.4 mg/l (milligrams per liter) lead. The soil sample showed this site's soil is characteristic hazardous waste because leachable lead is present in the leachate in excess of the regulatory limit of 5 mg/l. (N.T. 218; C Ex. 6)

34. The laboratory analyses for the sediment sample showed that total lead was present at 1050 mg/kg and TCLP lead was 1.94 mg/l. (N.T. 218; C Ex. 7)

35. Members of the Marucci family, DER representatives, and Claim attended a meeting which was held in May of 1992 at the Marucci site. (N.T. 48, 51) At this meeting, Claim stated he was responsible for the battery casing pile. (N.T. 48, 51-55, 163)

36. The photographs which are C Exs. 2B, 2C, and 2D were taken by Terry Goodwald in May of 1992 and depict portions of the battery casing pile. (N.T. 40-47)

37. DER sent Claim a notice of violation (NOV) on November 19, 1992, regarding the batttery casings. (N.T. 55-56; B Ex. 1) The NOV cited violations of the SWMA and requested Claim to cease disposal activities at the site and to provide information to DER concerning the waste battery disposal

operations; it also identified actions to be taken by Claim to remove the battery casings pile from the site. (B Ex. 1; C Ex. 3)

38. DER received a reply letter, dated November 23, 1992, from Claim through his former counsel, Joseph George, in which Claim described how he recycled batteries at the site and admitted responsibility for the battery casings. (N.T. 56; C Ex. 4)

DER's 1993 Site Investigation

39. A meeting was held in January of 1993 at DER's office which was attended by DER representatives, the Maruccis, Claim, and Attorney George. At this meeting, Claim stated that he had operated a battery recycling operation and had opened many of the batteries with an ax. (N.T. 61, 69)

40. DER's Planinsek, Bates, Bob Musser, and Mike Watson inspected the Marucci site on July 22, 1993, collecting samples from the soils, the sediment, the battery casings, the unnamed tributary, and from paint chips from the burned paint cans disposed of at the site. (N.T. 69, 130; B Ex. 1) Bates supervised this sampling and personally collected the soil and sediment samples. (N.T. 69, 129) DER conducted this sampling to determine the extent of the lead contamination indicated by the April 1992 sampling and to determine whether the battery casings were contaminated with lead. (N.T. 182; B Ex. 1)

41. Watson randomly collected fragments of battery casings from across the surface of the pile. Watson did not collect any battery casing fragment samples from inside the pile because he did not want to injure himself on the fragments. (N.T. 131)

42. The water/waste quality report which accompanied the battery casing chip samples and DER's laboratory analysis of these samples is C Ex. 8, Lab

No. 930489. (N.T. 142-146, 221) The battery casing fragments were ground before they were analyzed. (N.T. 182) DER's laboratory analyzed the battery casing chips using the method for TCLP metals and the method for sulfate analysis. (N.T. 157; C Ex. 8) The results of DER's laboratory analysis show that the battery casings samples contain leachable lead at 50.8 mg/l, and that the pH of the leachate from the water leach test was 5.17. (N.T. 221; C Ex. 8)

43. The paint chip samples were collected from out of the paint cans and from the surface of the ground adjacent to the paint cans at the Marucci property. (N.T. 194) The paint chips were solid pieces of various sizes. (N.T. 133) DER requested a TCLP metals analysis for these paint chip samples. (N.T. 159)

44. The water/waste quality analysis report and DER's laboratory results for sample no. 2563059, collected from the paint cans on top of the battery casings pile, is C Ex. 9. (N.T. 158) These analytical results show that the paint chips contained leachable lead at 11.3 mg/l. A duplicate sample of the paint chips contained leachable lead at 4.28 mg/l. (N.T. 221-222; C Ex. 9) The duplicate sample was just below the regulatory limit for hazardous waste. (N.T. 223)

45. Soil samples were taken at the toe of the battery casings pile on July 22, 1993. (N.T. 130; B Ex. 1) The soil sample was a five-point composite, and the orange "S"s on C Ex. 1 indicate the points where the sampling was collected. (N.T. 134) This five-point sampling was conducted to encompass the entire lower side of the battery casings pile adjacent to the intermittent stream and wetland area. (N.T. 134) The soil sampling was collected at a depth of from 0 to 6 inches and was conducted in order to

determine whether any lead was migrating from the battery casings. (N.T. 133-135)

46. The water/waste quality report which accompanied DER's five-point soil composite sampling and DER's laboratory analysis for sample no. 2563058 is C Ex. 10. (N.T. 158) DER requested its laboratory use the method for TCLP metals, the method for sulfate analysis[5], and the method for total metals analysis on these soil samples. (N.T. 162; C Ex. 10)

47. The analytical results for the soil sample showed that the five-point composite of soils contain leachable lead at 12.3 mg/l, total lead concentration of 4350 mg/kg, and that the pH of the leachate for the water leach test was 5.12. (N.T. 224; C Ex. 10)

48. Three sediment samples were collected on July 22, 1993 at the site. (N.T. 135-137) One sample (no. 2563054) was collected from the toe of the battery casings pile in one of the intermittent streams that emanates at the base of the pile; another (no. 25630566) was collected in an intermittent stream downgradient from the battery casings pile but upgradient from the AMD discharge, approximately thirty feet upstream of where the AMD flows (indicated by "AMD" in orange on C Ex. 1). (N.T. 135) These two sampling points are indicated by "SD" in orange on C Ex. 1. (N.T. 135) The third sediment sample (no. 2563061) was collected in the unnamed tributary at a point upgradient of the battery casings pile near Route 119. (N.T. 135-137) The sediment samples were collected at a depth of 0 to 6 inches. (N.T. 140)

[5] Sulfate analysis uses a water leach test and is similar to the TCLP analysis in that it measures the concentrations of contaminants in the leachate that has been extracted from a sample of waste material. The main difference between the water leach test and TCLP analysis is that the water leach test uses neutral extraction fluid, whereas the TCLP test uses an acidified extraction fluid. The leachate in a water leach test is analyzed for pH, as acidic waste materials leach acidic leachate. (N.T. 218-219)

49. DER requested its laboratory use the total metals and TCLP metals and sulfate analyses for the sediment samples. (N.T. 160-162; C Exs. 11, 12, 13) The water/waste quality analysis reports and DER's laboratory analysis for sample no. 2563061 is C Ex. 11. (N.T. 159) The water/waste quality report and laboratory analysis for sample no. 2563054 is C Ex. 12. (N.T. 159) C Ex. 13 contains the water/waste quality report and laboratory analysis for the sample no. 25630566. (N.T. 160)

50. The analytical results for the sediment collected downgradient from the battery casings pile contained leachable lead at less than .100 mg/l, total lead at 17.8 mg/kg, and the pH of the leachate for the water leach test was 7.71. (C Ex. 13)

51. The analytical results for the sediment sample collected upgradient of the site contained leachable lead at less than .100 mg/l, total lead at concentrations less than 26 mg/kg, and the pH of the leachate for the water test was 7.57. (N.T. 229-230; C Ex. 11)

52. The analytical results for the sediment sample collected at the toe of the battery casings pile contained leachable lead at .605 mg/l, total lead at 943 mg/kg, and the pH of the water leach test was 5.4. (C Ex. 12)

53. DER also collected four samples of the surface water on July 22, 1993 from the sampling points indicated by an orange "SW" on C Ex. 1. (N.T. 138) One sample (no. 2563060) was collected upgradient of the unnamed tributary, at the same location as sediment sample reflected in C Ex. 11, in a column of flowing water. The second sample (no. 2563053) was collected from the intermittent stream at the toe of the battery casings pile, at the same location where the sediment sample reflected in C Ex. 12 was collected. A third sample (no. 2563055) was collected from an intermittent stream

downgradient from the battery casings pile but thirty feet upstream from the AMD discharge, at the same location as the sample reflected in C Ex. 13. The fourth sample was collected from an intermittent stream downstream from the battery casings pile and downgradient from the AMD. (N.T. 139-140, 160, 195; C Ex. 1)

54. DER requested its laboratory use a total metal analysis for the surface water samples. (N.T. 160-162)

55. The analytical results for the surface water sample collected upstream of the site (no. 2563060) contained less than 50 ug/l lead. (C Ex. 15) The analytical results of the surface water sample collected downstream of the battery casings pile and upstream from the AMD (no. 2563055) contained less than 50 ug/l lead. (C Ex. 16) The analytical results for the surface water sample collected at the toe of the battery casings pile (no. 2563053) contained 1420 ug/l lead. (C Ex. 17)

56. DER did not collect any samples from the area which was used by Fayette Equipment Company because that portion of the property lies on the opposite side of the unnamed tributary, and the tributary would act as a barrier to any inorganic contamination which might be present in that area. (N.T. 175)

DER's Expert Testimony

57. Gary Manczka has been Chief of DER's Erie Soil and Waste Testing Laboratory since 1988, and has been employed by DER for 23 years, previously having served as an environmental chemist and a lab chemist. (N.T. 202-203) Manczka is responsible for administering DER's Erie Soil and Waste Testing lab, supervising a staff of DER chemists in performing hazardous waste determinations, various inorganic analyses of soils and waste materials, and

physical and organic testing of soils. (N.T. 203-204) Manczka supervised DER's analytical testing of the samples collected at the site. (N.T. 238)

58. The parties stipulated to the quality assurance and quality control for the surface water samples collected at the site in July of 1993. (N.T. 22)

59. Manczka testified as a stipulated expert in the areas of laboratory analysis and interpretation of laboratory data. (N.T. 211, 213) His curriculum vitae is C Ex. 14. (N.T. 214)

60. Lead is the best indicator of contamination from batteries because other metals present in batteries, such as tin and antimony, are present at such low levels that they will be detected at or near background levels in the environment, if at all. (N.T. 249)

61. Lead is found at significant concentrations of .1 percent to .4 percent near the battery casings pile and downgradient of the pile, which indicates to Manczka that there are between two and eight pounds of lead for every ton of soil over an area of 100 feet by 200 feet. (N.T. 252-253)

62. It is Manczka's expert opinion that the lead in the battery casings is the source of lead in the soils, sediments and the surface water at the Marucci site. He bases this opinion on his knowledge of the construction of lead acid batteries, which contain lead, lead oxide, lead sulfate, and concentrated sulfuric acid. (N.T. 235) Manczka also bases his opinion on the elevated levels of lead in the TCLP leaching tests DER performed on the battery casings; the results of soil samples at the base of the battery casings pile, which contained elevated levels of lead in total form; and the surrounding sediments, particularly the sediment sample collected downgradient from the battery casing pile, which also contained elevated levels of lead in

total form; and on the analysis of the surface water collected from downgradient of the battery casings pile. (N.T. 235)

63. It is Manczka's expert opinion that the battery casings will continue to leach lead into the soils, surface water, and sediment. He bases this opinion on analytical data which indicates that the battery casings are continuing to leach lead at an elevated concentration, as shown by the TCLP test. (N.T. 236)

64. Based on the pH results for the water leach test on the samples of soils and sediment, which indicate that the soils and sediments at the base of the pile are acidic, and based on the analytical results of the TCLP leaching test, which indicate the lead in the leachate is mobile, Manckzka also opines that the acidic materials in the soils and battery casings will continue to contribute a potential for the soil to leach lead into the surrounding environment. (N.T. 238)

65. There is no evidence to support the contention that the volume of lead found at the site could have come from the small number of paint cans abandoned at the site when compared to the large number of battery casings which continue to leach lead.

DER's Challenged Order

66. DER issued an order to Claim, Beatrice Marucci, Jacob Marucci, Carmilla Marucci, and Mary Louise Nepa on April 18, 1994. (B Ex. 1) DER has stipulated that its order deals only with Claim's responsibility as to the battery casings. (N.T. 168)

67. Anthony Orlando is the Regional Manager of DER's Waste Management Program, Field Operations, at DER's Southwestern Regional Office, and has been

employed by DER for 20 years. (N.T. 279-280) Orlando signed DER's April 18, 1994 order. (N.T. 281)

68. DER's order requires Claim to remove the battery casings because they are an accumulation of hazardous waste on the site which is releasing hazardous constituents into the environment. (N.T. 284-285) This order also directs Claim to evaluate the extent of lead contamination in soils in and around the battery casings pile after the casings are removed. (N.T. 285; C Ex. 19) The order also requires that Claim analyze the soil samples for lead, and directs Claim to remove all soils contaminated with leachable lead above 5 mg/l. (C Ex. 19)

69. DER's order also requires Claim to perform a site assessment to evaluate the extent of groundwater, surface water, and sediment contamination. This assessment was ordered because DER is concerned that lead is migrating to the groundwater. (N.T. 285; C Ex. 19)

70. Paragraph 12 of DER's order requires, as part of the site assessment, that Claim conduct groundwater monitoring, in accordance with DER's regulations for interim status facilities for hazardous waste. (N.T. 285-286; C Ex. 19) DER is considering the battery casings pile to be a hazardous waste facility. (N.T. 286, 289)

71. At paragraphs 15 and 16 of DER's order, DER requires Claim to submit a closure plan, including a detailed groundwater remediation plan consistent with DER's hazardous waste regulations, if the site assessment shows that groundwater or sediment at the site is contaminated with lead in excess of background levels. (N.T. 286; C Ex. 19) DER requires this closure plan because it considers the battery casings pile to be a hazardous waste facility. (N.T. 287)

72. Paragraph 17 of DER's order requires the lead in the soil, sediments, and groundwater to be remediated in compliance with DER's regulations. (N.T. 287-288; C Ex. 19)

73. As of October 6, 1994, Planinsek's last visit to the site before the merits hearing, the battery casings were still on the site. (N.T. 71)

DISCUSSION

There is no question that DER bears the burden of proof in this appeal. 25 Pa. Code §21.101(b)(3). In order to sustain this burden, DER must prove by a preponderance of the evidence[6] that its April 18, 1994 order to Claim was a lawful and appropriate exercise of its discretion. Kerrigan v. DER, 1993 EHB 453, reversed on other grounds, Kerrigan v. Commonwealth, DER, __ Pa. Cmwlth. __, 641 A.2d 1265 (1994); 25 Pa. Code §21.101(a). DER's order was issued pursuant to provisions of the Clean Streams Law, the SWMA, the Administrative Code, and DER's regulations pursuant thereto. If DER's order is sustainable under any of these authorities, we need not examine the other authorities. Kerrigan, 1993 EHB at 470 (reversed on other grounds).

Is DER's Order Sustainable Pursuant to §316?

In order to meet its burden of proving its order was lawful pursuant to Section 316 of the Clean Streams Law, 35 P.S. §691.316,[7] DER must prove that a

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[6] We note DER asserts that its burden is to present "substantial evidence" to support its order (citing A.H. Grove & Sons, Inc. v. Commonwealth, DER, 70 Pa. Cmwlth. 34, 452 A.2d 586 (1982)). DER is incorrect. It is the Board's findings of fact necessary to support DER's order which must be supported by substantial evidence. See Department of Environmental Resources v. Borough of Carlisle, 16 Pa. Cmwlth. 341, 330 A.2d 293 (1974); Al Hamilton Contracting Co. v. DER, EHB Docket No. 92-471-E (Adjudication issued July 18, 1994).

[7] Section 316 of the Clean Streams Law, 35 P.S. §691.316, provides:

> Whenever [DER] finds that pollution or a danger of pollution is resulting from a condition which exists on land in the Commonwealth [DER] may order the landowner

polluting substance (condition) existed on land occupied by Claim and that this condition has reached or threatens to reach the waters of the Commonwealth. McKees Rocks Forging, Inc. v. DER, EHB Docket No. 90-310-MJ (Consolidated) (Adjudication issued March 2, 1994) (citing Philadelphia Chewing Gum Co., et al. v. DER, 1976 EHB 269, 297, aff'd in part and reversed in part on other grounds, 35 Pa. Cmwlth. 443, 387 A.2d 142 (1978), aff'd in part and dismissed in part sub nom., National Wood Preservers, Inc. v. Commonwealth, DER, 489 Pa. 221, 414 A.2d 37 (1980)).

Does a Polluting Condition Exist on the Site?

"Pollution" is broadly defined in section 1 of the Clean Streams Law, 35 P.S. §691.1, to include any type of contamination to waters of the Commonwealth which renders them detrimental to the public health, to legitimate beneficial uses, and to animals. Charles W. Shay, et al. v. DER, 1993 EHB 800, aff'd *sub nom.* Herzog v. Department of Environmental Resources, ___ Pa. Cmwlth. ___, 645 A.2d 1381 (1994). It is DER's position that the battery casings and soils beneath them are the polluting condition at the site. DER contends that the evidence shows that lead levels, measured as concentrations of total lead, are present in the soils and sediments at the site at levels substantially exceeding background levels, as measured upgradient and downgradient of the battery casings pile.

DER offered analytical results of sampling it conducted on the soils near the battery casings pile and sediments the site. DER's April 1992 samples of the soil were collected downgradient of the battery casings pile.

> or occupier to correct the condition in a manner satisfactory to [DER] ....

DER's April 1992 sediment sample was collected from an intermittent stream approximately 15 feet downstream from the toe or base of the battery casing pile. The analytical results of this soil sampling showed the presence of lead in the soil and in leachate extracted from the soil. The analytical results of the April 1992 sediment sampling also showed the presence of lead in the sediment and the leachate extracted from the sediment.

DER also offered evidence of the analytical results of sampling it conducted in July of 1993 on the soils, sediments, and surface water in an unnamed tributary at the site. The analytical results of this soil sampling, which was conducted to encompass the entire lower side of the battery casings pile adjacent to the intermittent stream and wetland area, showed leachable lead was present at 12.3 mg/l, total lead concentration of 4350 mg/kg, and that the pH of the leachate from the water leach test was 5.12.

The analytical results of the July of 1993 sediment sample, which was collected downgradient of the battery casings pile, showed it contained leachable lead at less than .100 mg/l, total lead at 17.8 mg/kg, and the pH of the leachate for the water leach test was 7.71. The analytical results for the sediment sample collected upgradient of the site contained leachable lead at less than .100 mg/l, total lead at less than 26 mg/kg, and the pH of the leachate for the water test was 7.57. The analytical results for the sediment sample collected at the toe of the battery casings pile contained leachable lead at .605 mg/l, total lead at 943 mg/kg, and the pH of the water leach test was 5.4.

We find DER has shown by a preponderance of the evidence that a polluting condition, in the form of the battery casings pile and the soil underlying this pile, exists on the site.

Does This Polluting Condition Reach or Threaten to Reach Waters of the Commonwealth?

Turning to the issue of what DER must show in order to prove that the pollution is reaching or threatens to reach waters of the Commonwealth, DER contends we should follow the Commonwealth Court's decision in Herzog. Claim, on the other hand, argues that the Commonwealth Court's decision in Kerrigan should lead us to conclude DER has not sustained its burden of proof. Moreover, Claim contends that DER must show that there is evidence that the lead contamination is moving off-site to affect nearby properties.

In the Kerrigan appeal before the Board, DER had attempted to show, through the results of soil sampling conducted at the site and expert testimony, that the soil had a great potential to leach metals into the groundwater. The Commonwealth Court concluded, *inter alia*, in Kerrigan, that this Board's determination, that lead contamination on a tract of land (to which the Kerrigans disputed that they had ownership rights) posed a danger of pollution to waters of the Commonwealth, was not supported by substantial evidence and competent expert testimony. The Court concluded that there was not substantial evidence to support the Board's finding that the lead contamination on the tract posed a danger to the waters of the Commonwealth, pointing to a lack of evidence to establish the composition of the soil at a depth of below 12 inches and to the absence of any testimony to establish the location of the groundwater.

After we issued our adjudication in Kerrigan, but before the Commonwealth Court rendered its decision in Kerrigan, we found in Shay that where samples of fill material collected at the appellant/landowners' (Shays) property reflected high levels of lead, the presence of this hazardous

material on a site close to, and upgradient of, the Delaware River posed a sufficient "danger of pollution" to justify DER in activating the provisions of section 316 of the Clean Streams Law in an order issued to the appellants citing them for unpermitted disposal of solid waste on the site and directing remedial action. The Commonwealth Court affirmed our finding, stating:

> [T]here is evidence to support the finding that high levels of lead were found in fill samples of the site in July 1989.... The site is upgrade of the Delaware River bed and from certain wells in which high lead and other inorganic toxicity levels were found. Although the Shays and Herzog protest that DER failed to show any causal connection between that contamination and the activity on the site, they admitted in their notice of appeal to the EHB that the material brought in contained high levels of lead compared to background samples. We therefore see sufficient evidence for a finding that "pollution or a danger of pollution is resulting from a condition which exists on land."

Id. at ___, 645 A.2d at 1395.

The Commonwealth Court's decision in Herzog was rendered nearly three months after the Commonwealth Court issued its Kerrigan opinion, yet the Court did not comment on the applicability of Kerrigan to the matter before it in Herzog. We thus reject Claim's contention that the Court's decision in Kerrigan sets forth evidentiary guidelines which DER must meet in order to establish its case here, and we do not agree with Claim that the court's ruling in Kerrigan controls the outcome of the instant appeal or that DER must show evidence that the pollution is flowing onto nearby properties.

DER contends that the evidence shows that total lead is present in intermittent streams immediately downgradient of the battery casings in excess of background levels, as measured upgradient and downgradient of the battery casings pile. The analytical results of the surface water sampling collected in July of 1993 showed that the surface water sample collected upstream of the

site contained less than 50 ug/l of lead; the surface water sample collected downstream of the battery casings pile contained less than 50 ug/l of lead; and the surface water sample collected at the toe of the battery casings pile contained 1420 ug/l of lead.

Claim argues that DER offered no evidence that its sample collected at the toe of the battery casing pile was collected from "waters of the Commonwealth", as defined at section 1 of the Clean Streams Law, 35 P.S. §691.1, asserting that the location from which the sample was taken makes a difference. We disagree. Under section 1 of the Clean Streams Law, "waters of the Commonwealth" include both surface and groundwater. See Shay, supra.

Pointing to the similarity in the lead levels shown by the analytical results of the upstream and downstream water samples, Claim asserts that DER could have made an error as to the water sample taken at the toe of the battery casings pile, which showed elevated lead levels. He offers no evidence or testimony to support the argument that an error was made. The parties' Second Joint Stipulation, filed on October 12, 1994, provided "[q]uality assurance and quality control for laboratory results, exclusive of sampling in the field, for samples of surface water collected by [DER] on July 22, 1993" would not be challenged. DER's sampling and laboratory analysis were supervised by Bates and Manczka. Both Bates and Manczka testified that the sampling procedures followed by DER were proper and that no laboratory error occurred. (N.T. 122-129, 238) In view of their testimony, and without Claim offering any evidence of an error on DER's part in conducting the sample collection or laboratory analyses, Claim's argument fails.

Asserting that the lead in the battery casings is present in leachable form, DER claims that the acidic nature of the battery casings and

contaminated soil has exacerbated the leachability and mobility of lead into the surface water, soils, and sediment at the site. DER contends that the lead has migrated from the battery casings and will continue to migrate from the battery casings into the soils, surface water, and sediments. In support of this argument, DER points to the testimony of its expert witness, Gary Manczka.

DER's evidence shows that the battery casings pile is uncovered and exposed to the elements, and, since it is porous, any surface water or precipitation which falls on the pile flows through the pile. There is a steep slope from the battery casings pile area to a stream in the area marked "spring/potential wetland" on C Ex. 1, which lies to the east of the battery casings pile. This stream area is at the base of the battery casings pile. DER has observed surface water emerging from the base or toe of the pile. The flow of water in the spring area is generally from a northeast to southwest direction toward the tributary. DER presented evidence of analytical results of sampling it collected in July of 1993 from the battery casings themselves. The analytical results of the battery casings fragments, which had been randomly collected from the surface of the pile and then ground up in the laboratory, showed the battery casings fragments contained leachable lead at 50.8 mg/l and had a pH of 5.17.

Claim argues that DER failed to properly analyze the leaching characteristics of lead from the battery casings, contending that the mechanical processing of the battery casings to increase the surface area of the samples prior to performing leaching measurements of lead had the effect of increasing the surface area of the battery casings and proportionately

increasing the likelihood that the battery casings would leach lead. Claim offered no testimony on its own behalf to support his assertions.

In July of 1993, DER also collected samples of paint chips from paint cans disposed of on the site. The analytical results of the paint chip samples showed the paint chips contained leachable lead at 11.3 mg/l, which is above the regulatory limit for hazardous waste, but, a duplicate paint chip sample analysis showed the paint chip contained leachable lead at 4.28 mg/l, which was just below the regulatory limit for hazardous waste.

Manczka, who is Chief of DER's Erie Soil and Waste Testing Laboratory, testified on behalf of DER as a stipulated expert in the area of laboratory analysis and interpretation of laboratory data. It is Manczka's expert opinion, based on the sampling conducted by DER and the laboratory analyses of these samples, that the lead in the battery casings is a source of lead in the sediments, the surface water, and the soils at the base of the battery casings pile. Manczka opines that lead has leached from the battery casings, soils, and sediments, and that the battery casings will continue to leach lead into the soils, surface water, and sediment. Manczka further opines that the acidic materials in the battery casings and soils will continue to contribute a leaching potential for soil to leach lead into the surrounding environment.

Claim contends Manczka's expert opinion should be given little or no weight, arguing this testimony went beyond the scope of the area in which he was admitted as an expert and into the area of site investigation. As support for this argument, Claim urges that DER had to extend the reach of Manczka's expert testimony because Bates, when he was offered as an expert witness in the area of site investigation on behalf of DER, was not admitted as an expert.

The standard for admission of expert testimony in Pennsylvania is liberal. <u>Dambacher by Dambacher v. Mallis</u>, 336 Pa. Super. 22, 485 A.2d 408, 418 (1984)(where the scope of witness's experience and education embraces the subject in question in a logical or fundamental sense, the witness is qualified to testify even though he has no particularized knowledge of the subject). Manczka was offered and admitted as a stipulated expert in the areas of laboratory analysis and interpretation of laboratory data. His qualifications were fully stated on the record. Manczka testified that as part of his experience in the area of laboratory data interpretation, he assists DER's field staff in interpreting data in the sense of the possible sources of contamination, and the potential for that contaminant to migrate through the environment based on the contaminant involved and its concentration levels. (N.T. 210) Manczka has also attended a number of training courses relating to laboratory chemistry and the application of that data to environmental fields. (N.T. 211) We find that Manczka's expert testimony was within the scope of his education and expertise. We do not agree with Claim that Manczka's testimony went beyond his expertise.

Claim also argues that Manczka's testimony was improper because of his: failure to visit the site and personally observe site conditions; failure to correctly measure the size of the battery casings pile; failure to view photographs of the site prior to the day of the merits hearing; failure to have access to a proper map to analyze site conditions; and failure to properly analyze the leaching characteristics of the lead from the battery casings.

Manczka could rely on measurements, made by DER personnel, of the pile, photographs of the pile, and descriptions of the site. <u>See</u>, <u>e.g.</u>, <u>Milan v.</u>

Commonwealth, DOT, 153 Pa. Cmwlth. 276, 620 A.2d 721 (1993) (experts may rely on reports of others, even those not admitted into evidence). Further, it is sufficient that the evidence of record tends to establish facts assumed by Manczka. Vernon v. Stash, 367 Pa. Super. 36, ___, 532 A.2d 441, 449 (1987).

Claim also argues that there are other parties who may be partially responsible for lead contamination on the site. Claim contends that Manczka admitted on cross-examination that other sources for the lead contamination exist at the site, suggesting that the paint cans are a potential source of the lead contamination. A review of Manczka's testimony does not support Claim's assertion.

On cross-examination, Manczka opined that the paint cans are not the source of the lead because it is unlikely that the relatively small number of paint cans at the site containing dried paint could amount to the thousands of pounds of lead at the site. (N.T. 252-253) Manczka stated that he based his expert opinion on the source of the lead contamination on the volume of the lead present in the soil, the location of the lead-contaminated soil in relation to the battery casings pile, the size of the battery casings pile compared to the limited number of paint cans, and the flow of water from the battery casings pile toward the intermittent streams near the base of the pile. (N.T. 252, 257-259)

DER's order describes the battery casings pile as being 240 feet by 120 feet and 12 feet in height at its highest point. Planinsek testified that the battery casings pile is about 120 feet wide and 20 feet high. He did not testify to the length of the pile. Claim testified that he used his own 100-yard tape measure and determined the battery casings pile is 110 feet long, 12 feet high, and 20 feet deep. (N.T. 337-338) When Claim attempted to

introduce as an exhibit a document reflecting measurements of the battery casings pile allegedly made by the United States Environmental Protection Agency (EPA), DER raised a hearsay objection; this document's admission was denied by the presiding Board Member. (N.T. 332-337) Claim testified, however, that he was aware that the Environmental Protection Agency's (EPA) measurements of the battery casings pile were almost the same as his own measurements. (N.T. 338) Thus, EPA's measurements are not in evidence.

Claim argues in his post-hearing brief that DER incorrectly measured the battery casings pile. Claim asserts that EPA's measurement of the pile is 16 times smaller than the measurement in DER's order, and that EPA's measurements were corroborated by Claim. Claim states that this is important because it bears on Manczka's expert testimony regarding the source of the lead contamination.

According to the evidence, there are thousands of battery casings on this pile. The photographic exhibits show that the pile of battery casings is very large. (C Exs. 2A, B, C, and D) If we compare the measurements Claim testified he made with the measurements contained in DER's order, DER's measurement of the pile's size appears to be 13 times larger. (Claim's measurements reflect that the battery casings pile is 26,400 cubic feet, as opposed to the 345,600 cubic feet estimated in DER's order.) On cross-examination, Manczka testified that his expert opinion was based on the battery casings pile being 120 feet by 240 feet in size, and that the area covered by the battery casings is significantly larger than that covered by the paint cans. (N.T. 252, 254) Manczka further testified that were EPA to have measured the size of the pile as 20 feet by 115 feet, and were that EPA measurement shown to be correct, this smaller size might have some impact on

his testimony. (N.T. 255) He also testified that, if the battery casings pile is 12 times smaller than he had believed, "the smaller pile would likely contribute proportionately less lead", and that "a factor of 12 is still a sizeable pile in relation to the number of paint containers that are present." (N.T. 254-255) We find Claim has failed to prove that the battery pile size he is advancing is correct and would change Manczka's expert opinion that the battery casings pile is the source of the lead at the site.[8]

Even assuming Claim's argument that the C Ex. 1 site map does not properly reflect the distance between the paint cans and other waste materials at the site from the alleged lead contamination, and that the paint containers are closer to the toe of the battery casings pile, as Claim contends, this would not affect Manczka's expert opinion that the battery casings pile is the source of the lead contamination. (N.T. 267) There is no evidence of erosion or any evidence that water flows from the paint cans toward the battery casings pile. The topography of the area marked on C Ex. 1 as " former junkyard area", "crushed battery casings and debris", and "5-gallon paint containers" is fairly level. There is ample evidence that the lead at the toe of the battery casings pile migrated there from the battery casings. We conclude that water emanating from the pile will, by its nature, carry the sediments containing lead contaminants away from the battery casings pile, and that sediment containing the lead material then drops out of the water, as is reinforced by the sample analysis DER conducted on the sediments at the site

[8] Claim's argument that DER's order cannot be enforced because of DER's vagueness as to the size of the pile was not raised in Claim's notice of appeal. Thus, it is waived. See Cmwlth., Pennsylvania Game Comm. v. Cmwlth., Dept. 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); Croner, Inc. v. Cmwlth., Dept. of Environmental Resources, 139 Pa. Cmwlth. 43, 589 A.2d 1183, 1187 (1991); Wikoski v. DER, 1992 EHB 642.

and Manczka's testimony. Even if the evidence supported our making a finding that some small percentage of the lead at the toe of the battery casings pile could have come from the paint cans, that small amount of lead would be indistinguishable from the large amount which the evidence shows migrated from the battery casings. Thus, we disagree with Claim's assertion that the evidence shows the battery casings pile is not the source of the lead on the site responsible for the flow of lead into the surface water.

Is Claim an Occupier of the Site?

Claim argues that DER has not proven that the battery casings on the site were left from his operations. Claim asserts that in Commonwealth v. Harmar Coal Co., 452 Pa. 77, 306 A.2d 308, 319 (1973), the Supreme Court stated that "[t]he present Clean Streams Law does not attach liability for past operations which resulted in the pollution of the underground water." Claim argues that this statement in Harmar Coal protects him from liability under section 316 of the Clean Streams Law simply because he conducted his operations in the past. Claim further asserts that he was not on the site for many years, and that during his absence, "anything could have occurred to affect site environmental conditions". In his post-hearing brief, he suggests that these other activities could have included mining activities, or industrial and/or disposal activities conducted by third parties, or activities conducted by the Maruccis. In support of his argument, Claim specifically points to his own testimony that Fayette Equipment operated on the same site as the battery recycling operations, and that he observed battery casings on the site when he entered it in the 1950s. (N.T. 304, 309) Claim then points to the federal District Court's opinions in Quaker State Corp. v. U.S. Coast Guard, 681 F. Supp. 280 (W.D. Pa. 1988), and Quaker State

Corp. v. U.S. Coast Guard, 32 BNA 1623 (W.D. Pa. 1990). He argues that if the federal District Court was unwilling "to assign liability to the prior occupier when there was only the possibility of activities that could have affected environmental conditions, then the Environmental Hearing Board should remember that it is now being asked by [DER] to extend liability to Mr. Claim in an even more untenable situation where it is acknowledged that wide spread dumping has occurred by third-parties at the Marucci Property."

Quaker State involved the question of whether Quaker State Corporation (Quaker State), an oil company, could be held liable under the federal Clean Water Act, 33 U.S.C. §1251 et seq., for cleanup of oil that allegedly leaked from property Quaker State formerly leased. The federal court for the Western District of Pennsylvania stated that the U.S. Coast Guard's burden of showing that Quaker State was the "sole cause" of the discharge was heavy because "[t]hird-party liability under §311(g) of the Clean Water Act, 33 U.S.C. §1321(g), is extremely narrow." Quaker State, supra, 32 BNA at 1626. The District Court ruled that it could not reach a determination, pursuant to the facts in that matter, that Quaker State was the sole cause of the discharge there. Quaker State is not dispositive of the instant matter, as it was rendered pursuant to the federal district court's interpretation of the federal statute, not section 316 of the Clean Streams Law.

Additionally, the evidence in the appeal before us supports a finding that the battery casings on the pile were placed there by Claim in the course of his operations. Claim unquestionably operated a junk business on the site beginning in the late 1950s. He leased a portion of the site at some time before 1961 to recycle lead batteries in order to reclaim the lead for off-site use. Claim brought lead acid batteries to the site, where the casings

were broken open with an ax, the tops of the batteries were removed, and the lead cores were removed from the waste batteries. The lead cores were then sold off-site. The battery casings pile consists of thousands of broken and whole battery casings, with their lead cores removed, in a pile adjacent to an unnamed tributary to Coal Lick Run. As of DER Waste Management Specialist Planinsek's last visit to the site before the merits hearing, which was October 6, 1994, the battery casings were still on the site.

At the merits hearing, Claim testified that when he first entered the site in the late 1950s, he had observed steel conveyors and many battery casings at the site. (N.T. 304, 306, 309, 363) Claim testified that the large battery casings appeared to him to be from mine batteries. (N.T. 309-310) Claim also testified that in 1979, he removed waste material and other debris, including battery casings, from the site at the request of the counsel for Gallatin Fuels. (N.T. 347-348; A Ex. 4)

But, in Claim's verified answers to interrogatories, he responded to a request that he "describe with specificity the waste material removed by Claim from the Marucci property at the request of legal counsel for Gallatin Fuels", that he removed "a crane, trucks, bailer, and other debris." (C Exs. 21-22) Moreover, when Claim met with DER representatives early in the investigation, he did not mention removing materials from the site in 1979, nor did he inform DER that mine batteries had been on the site when he first arrived. (N.T. 84) Rather, Claim admitted to DER personnel on two occasions that he was responsible for the abandoned battery casings at the site. Contrary to Claim's assertion, the testimony of the DER employees on this point was not inadmissible hearsay testimony, and the presiding Board Member so ruled at the merits hearing. (N.T. 52, 67) <u>See</u> <u>DeFrancesco v. Western Pennsylvania Water</u>

Co., 329 Pa. Super. 508, 478 A.2d 1295 (1984)(party admissions admissible under exception to hearsay rule).

In Claim's verified answers to interrogatories, he responded to the question which asked him to "[p]lease identify and describe with specificity the environmental conditions at the site which are not the result of any activities conducted by Claim," that "[b]atteries are believed to have been dumped at the Marucci Property after Claim's departure from the site." (C Exs. 20-22) Claim produced only his own testimony that when he last visited the site on October 8, 1994, he observed additional waste materials had been dumped at the site since his departure from the site in 1981. (N.T. 323-325; A Ex. 2)

It is our function, as factfinders, to resolve the conflicts in the evidence, witness credibility, and evidentiary weight. See Staffaroni v. City of Scranton, 153 Pa. Cmwlth. 188, 620 A.2d 676 (1993); Commonwealth, Pennsylvania Game Commission v. Commonwealth, Department of Environmental Resources, 97 Pa. Cmwlth. 78, 509 A.2d 877 (1986), affirmed, 521 Pa. 121, 555 A.2d 812 (1989). The "credibility" of a witness is that quality "which renders his evidence worthy of belief". Jones v. Workmen's Compensation Appeal Board, 25 Pa. Cmwlth. 546, 360 A.2d 821 (1976). The "weight" of the evidence depends on its effect in inducing belief. Hessler v. Suburban Propane Natural Gas Co. of Pa., 402 Pa. 128, 166 A.2d 880 (1961). A witness' interest may be considered when judging credibility, but that interest does not render him incompetent to testify. See Bates v. Commonwealth, 40 Pa. Cmwlth. 426, 397 A.2d 851 (1979); College Watercolor Group, Inc. v. William H. Newbauer, Inc., 468 Pa. 103, 360 A.2d 200 (1976). As factfinders, we may, and occasionally must, believe the testimony of one witness over another. G.M.P.

Land Co. v. Bd. of Supervisors of Hegins Township, 72 Pa. Cmwlth. 591, 457 A.2d 989 (1983); Snyder v. Railroad Borough, 59 Pa. Cmwlth. 385, 430 A.2d 339 (1981).

We are not persuaded that we should disregard the testimony given by Planinsek and Bates as to Claim's admission, as Claim asserts, simply because they both gave similar testimony that Claim had admitted that the battery casings were from his operations. We find Planinsek and Bates gave credible testimony regarding the admissions by Claim to DER that the battery casings on the site were left from his operations. Claim's former counsel, Attorney George, in a letter dated November 23, 1992 to Planinsek, represented that Claim engaged in battery disposal operations at the site from the mid-1950s until 1961, and that Claim has not engaged in battery recycling operations at the site since 1961. (C Ex. 4) Attorney George further stated in this letter that Claim had retained some of the battery casings at the site, and that he would only be responsible for clean-up of the items left on the site. (C Ex. 4) Attorney George's letter supports the testimony offered by the DER employees. As we have previously ruled, DER employees' status as public employees endows them with no adverse interest to Claim. Gerald W. Wyant, v. DER, et al., 1988 EHB 986. Claim obviously has an interest in having us find that he is not responsible for the battery casings, and he has now changed the statement he initially made to the DER employees regarding whether the battery casings are left from his operations. We find Claim's testimony at the hearing, that he had removed all of his battery casings from the site in 1979 and that the battery casings are from mine batteries which were on the site when he first entered or additional battery casings brought to the site after his departure, is incredible. We reject any inference a reader may try to

draw, however, that DER's witnesses are always correct or that their testimony is given greater weight. Our adjudications in other matters before us show that this is not so. As to this conflicting testimony, our conclusion is to disbelieve Claim on this point.

Moreover, we reject Claim's argument that, pursuant to the Board's decision in Shay which was affirmed by the Commonwealth Court in Herzog, that only the Maruccis, as owners of the site, may be held liable under section 316 and that his activities on the site did not give him control commensurate with an owner of the property. Claim, as a lessee of the site, occupied the site for battery recycling operations, and this occupier status is sufficient for DER to impose section 316 liability on him. We have stated in previous opinions that for purposes of section 316 of the Clean Streams Law, occupier status is sufficiently established where the alleged occupier has leased the site. See, e.g., Adams Sanitation Company, Inc. v. DER, EHB Docket No. 90-375-W (Consolidated Docket) (Opinion issued April 5, 1994); Adams Sanitation Company, Inc. v. DER, 1991 EHB 249. Clearly, to the extent this pile remains at the site, Claim remains an occupier of this site.

Pursuant to the foregoing, we find DER has shown by a preponderance of the evidence that a polluting condition, in the form of the battery casings pile and the soil underlying this pile, exists on land occupied by Claim, and, thus, that DER's order directing Claim to remediate the battery casings condition at the site was appropriate pursuant to section 316 of the Clean Streams Law.

Was DER's Order Lawful Pursuant to the SWMA?

DER's order cites Claim for violations of sections 104(7) and 602 of the SWMA, 35 P.S. §§6018.104(7) and 602. In order to meet its burden of proving its order was lawful pursuant to the SWMA, DER must show that its action is supported by a preponderance of the evidence and not arbitrary, capricious, or unreasonable. Max L. Starr v. DER, 1991 EHB 494, aff'd 147 Pa. Cmwlth. 196, 607 A.2d 321 (1992).

DER is authorized by section 104(7) of the SWMA to issue orders and abate public nuisances to implement the purposes and provisions of the SWMA and the rules, regulations, and standards adopted pursuant to the SWMA. 35 P.S. §6018.104(7). Pursuant to section 602 of the SWMA, DER is authorized to issue orders to persons as it deems necessary to aid in the enforcement of the SWMA, including orders requiring persons to cease unlawful activities or operations of a solid waste facility which in the course of its operation is in violation of the SWMA, or any rule or regulation of DER. 35 P.S. §6018.602. Section 601 of the SWMA provides that any violation of the SWMA, any rule or regulation of DER, or any DER order, constitutes a public nuisance. 35 P.S. §6018.601.

Pursuant to section 401(a) of the SWMA, 35 P.S.§6018.401(a), it is unlawful for any person to store or dispose of hazardous waste within the Commonwealth unless such storage or disposal is authorized by the rules and regulations of DER, and no person may own or operate a hazardous waste storage or disposal facility unless the person has first obtained a permit for the storage and disposal of hazardous waste from DER. Further, pursuant to section 401(b) of the SWMA, 35 P.S.§6018.401(b), the storage and disposal of hazardous waste are declared to be activities which subject the person

carrying on those activities to liability for harm although he has exercised utmost care to prevent harm, regardless of whether such activities were conducted prior to the enactment of this section.

DER argues that Claim operated a battery recycling operation at the site and then ceased that operation, leaving the battery casings on a pile at the site. DER contends that the abandoned battery casings on the pile contain levels of leachable lead in excess of the regulatory level established at 25 Pa. Code §261.24 for lead, making the battery casings themselves characteristic hazardous waste, and that the soils beneath them are also hazardous waste. DER takes the position that the battery casings pile is a hazardous waste disposal area, and that Claim must either remediate the pile in accordance with DER's regulations at Chapter 265 of 25 Pa. Code or obtain a permit from DER pursuant to the SWMA. Additionally, DER asserts that the disposal of hazardous waste at the site is a public nuisance pursuant to section 601 of the SWMA.

Are the Battery Casings and Soils Hazardous Waste?

"Solid waste" is defined at section 103 of the SWMA as "Any waste, including but not limited to, municipal, residual or hazardous wastes, including solid, liquid, semisolid or contained gaseous materials...." 35 P.S. §6018.103. "Solid waste" is similarly defined in DER's regulations at 25 Pa. Code §260.2. "Waste" is defined at §260.2 of 25 Pa. Code, *inter alia*, as:

...

> (C) Material that is abandoned or disposed, including abandoned or disposed products or coproducts.
>
> (D) Contaminated soil, contaminated water or other residue from the dumping, deposition, injection, spilling or leaking of a material into the environment.

"Hazardous waste" is defined at section 103 of the SWMA as "Any ... discarded material including solid, liquid, semisolid or contained gaseous material resulting from municipal, commercial, industrial, institutional, mining, or agricultural operations...." 35 P.S. §6018.103. Further, DER's hazardous waste regulations at 25 Pa. Code §261.3 provide:

> (a) A solid waste is a hazardous waste if:
>
> > (1) It is not excluded from regulation as a hazardous waste under §261.4 (relating to exclusions).
> >
> > (2) It meets one or more of the following criteria:
> >
> > > (i) It exhibits one or more of the characteristics of hazardous waste identified in Subchapter C (relating to characteristics of hazardous waste).

Claim does not point to any exclusions from regulation as hazardous waste at §261.4 which apply to the battery casings, nor do we see any exclusions which would apply here. As to the characteristics of hazardous waste, DER asserts that it is the toxicity characteristic of hazardous waste, as defined at 25 Pa. Code §261.24, which applies in this matter. Section 261.24 of 25 Pa. Code provides: "A solid waste exhibits the characteristics of toxicity if, using the test method described in §261.34(b) [the TCLP method], the extract from a representative sample of the waste contains a contaminant listed in Table I at a concentration equal to or greater than the respective value given in the table...." Table I reflects that for lead, the regulatory level is 5 mg/l.

The evidence in this matter shows that the battery casings at the site and adjacent soil are hazardous wastes. DER analyzed the samples of the battery casings and soil using the TCLP method. The analytical results for the three-point composite of soil collected at the base of the battery casings

pile in April of 1992 show that the leachate extracted from the soil contained lead in excess of the regulatory limit. The analytical results of the five-point composite of soil collected at the base of the battery casings pile in July of 1993 show that the leachate from the soil sample contained lead in excess of the regulatory limit, as did the leachate from the representative sample of the battery casings. As the evidence is only that there is lead contamination in the soil adjacent to the battery casings pile, and there is no evidence as to the soil beneath the battery casings pile, we cannot conclude that the soil beneath the pile is hazardous waste.[9]

Did Claim Dispose of Hazardous Waste?

Section 103 of the SWMA defines "disposal" as: "The incineration, deposition, injection, dumping, spilling, leaking, or placing of solid waste into or on the land or water in a manner that the solid waste or a constituent of the solid waste enters the environment, is emitted into the air or is discharged to the waters of the Commonwealth." Section 260.2 of 25 Pa. Code similarly defines "disposal", adding that the term "also includes the abandonment of the solid waste with the intent of not asserting or exercising control over, or title or interest in the solid waste."

Claim asserts, citing New Castle Junk Co. v. DER, 1992 EHB 579, that the Board has held that the SWMA does not apply retroactively, and thus, that we should find DER's order is improperly attempting to have Claim remediate

[9] To the extent DER's order requires Claim to conduct a site assessment, the lack of evidence regarding the soil beneath the battery casings pile does not adversely impact DER's order. If the site assessment shows the soil there is contaminated, that soil will have to be addressed by Claim.

wastes which were disposed of on the site prior to the enactment of the current SWMA in 1980.[10]

It is DER's position that the issue of whether the SWMA applies to hazardous waste which has been deposited prior to the enactment of the SWMA, where the hazardous waste and its constituents have migrated and leached, and continue to migrate and leach, from the waste to the soils, sediments, and surface water, has not been decided by this Board, although the issue was previously addressed in New Castle Junk, supra, and DER v. CBS, Inc., 1993 EHB 1610. We agree.

New Castle Junk involved appellant/former battery processor's appeal from a DER order, issued pursuant to the SWMA, which found that the lead acid battery wastes at the appellant's site had leaked contaminants into the soils and groundwater at the site. DER's order directed the appellant, New Castle Junk, to take certain actions with regard to closure of the site. New Castle Junk argued that it was not engaged in any activities regulated by the SWMA at the time that the SWMA went into effect, and argued that the SWMA had no retroactive application to New Castle Junk's activities prior to its effective date. Upon New Castle Junk's motion for summary judgment, we denied the motion, because of questions as to material facts, without ruling on the issue which is raised in the instant appeal.

[10] Claim also argues in his post-hearing brief that DER is attempting to expand the SWMA's scope rather than applying the Hazardous Sites Cleanup Act, Act of October 18, 1988, P.L. 756, No. 108, 35 P.S. §6020.101 et seq., and that if DER is permitted to do so, "there will be no vitality to the Hazardous Sites Cleanup Act and the clear intent of the Legislature will be frustrated." This objection to DER's order was not raised in Claim's notice of appeal. It thus has been waived. See Game Comm., supra; Croner, supra; Wikoski, supra.

In CBS, we addressed, *inter alia*, the defendant's, CBS, Inc. (CBS), petition to strike Count I of DER's complaint for assessment of civil penalty against CBS, pursuant to section 605 of the SWMA. At issue was whether CBS was required to notify DER, under section 501(c) of the SWMA, of the existence of a lagoon known as Lagoon Y, which DER alleged was one of two lagoons used for the disposal of industrial and hazardous wastes on the CBS site. CBS contended, *inter alia*, that section 501(c) did not apply because Lagoon Y was non-operational and abandoned when CBS took over. We stated in CBS, that the meaning of "disposal" under the SWMA was central in determining whether DER's complaint alleged ongoing disposal or merely historic contamination (occurring prior to 1980). We concluded that this issue could not properly be resolved by a demurrer, and we thus denied CBS' petition to strike Count I of DER's complaint.[11] Thus, the issue is one of first impression before the Board.

The legislative purpose behind the SWMA expressed at section 102(4) of the SWMA, 35 P.S.§6018.102(4), is to protect the public health, safety and welfare from the short and long term dangers of transportation, processing, treatment, storage, and disposal of all wastes. Moreover, section 901 of the SWMA, 35 P.S. §6018.901, provides "[t]he terms and provisions of [the SWMA] are to be liberally construed, so as to best achieve and effectuate the goals and purposes hereof." The battery casings abandoned on the site in this matter prior to the enactment of the SWMA in 1980 continue to affect and contaminate the environment today, and will continue to affect the environment until properly remediated through closure. It would frustrate the purpose of the General Assembly in passing the SWMA if the SWMA's application is limited

[11] We reached a similar conclusion as to CBS' petitions to strike Counts II and IV of DER's complaint.

only to circumstances where the act of dumping is presently occurring. We thus conclude that to the extent that Claim dumped the battery casings at the site and left them, in a manner in which the hazardous waste constituents of the battery casings entered and continue to enter the environment, and were discharged and continue to discharge into waters of the Commonwealth, he has disposed of the battery casings within the meaning of the SWMA, and this disposal continues until the battery casings and contaminants are removed. We therefore conclude that DER's order is not retroactively applying the SWMA to Claim.

Claim's failure to obtain a permit from DER in compliance with section 401 of the SWMA, 35 P.S. §6018.401, or to close the battery pile disposal site constitutes a public nuisance pursuant to section 601 of the SWMA, 35 P.S. §6018.601. We therefore hold that DER's order to Claim was authorized by section 104(7) of the SWMA and section 602 of the SWMA 35 P.S. §6018.104(7) and 602.

Is DER Improperly Imposing Joint and Several Liability on Claim?

Asserting that there are a number of sources on the site which might possibly be causing the lead contamination there (including the paint cans), Claim argues that DER improperly seeks to impose joint and several liability on him. Claim objects to DER's order requiring him to remediate lead contaminated soil at the site if that soil is located near the paint cans and other wastes because Claim had no part in placing paint cans or other wastes on the site. Claim argues that DER should instead impose strict liability on the Maruccis, as they are owners of the site, and that the Maruccis could then seek contribution from responsible parties in proportion to their responsibility for site conditions.

We find it is appropriate for DER to order Claim to remediate the battery casings pile and the lead which has migrated from that pile into adjacent soils. There is no evidence before us to support Claim's assertion that the lead has migrated from the paint cans and other debris at the site. The paint cans are located north of the battery casings pile in an area which is fairly level, and there is no evidence of erosion or any evidence that water flows from the paint cans toward the battery casings pile. While DER's Order required Claim to clean up the entire site, including the paint cans, DER's case-in-chief only linked Claim to the battery casings at the site. As there is no evidence to suggest that any lead contamination near the paint cans came from the battery casings pile, DER cannot hold Claim responsible for cleanup of the paint cans. When the presiding Board Member raised this issue at the merits hearing, DER stipulated that its order to Claim is limited to the battery casings. (N.T. 166-169) Contrary to Claim's assertion that DER should instead have issued its order to the Maruccis, as they are the property owners, we point out that we have ruled: "[l]iability for violation of the [SWMA] does not attach simply by reason of ownership of the land on which the violations took place. Some affirmative participation in the violations must be shown." Ernest Barkman, et al. v. DER, 1993 EHB 738, 749 (citations omitted). As to whether DER should seek to hold the Maruccis, as owners of the site, responsible for cleanup of the site pursuant to section 316 of the Clean Streams Law, rather than Claim, we point out that that is within DER's prosecutorial discretion. Margaret C. and Larry Gabriel, M.D. v. DER, 1990 EHB 526; Ralph D. Edney v. DER, 1989 EHB 1356; Downing v. Commonwealth, Medical Education & Licensure Board, 26 Pa. Cmwlth. 517, 364 A.2d 748 (1976).

We thus reject Claim's contention that DER is improperly imposing joint and several liability on him.

Finding DER's order was appropriately issued pursuant to the Clean Streams Law and the SWMA, we do not address DER's authority pursuant to section 1917-A of the Administrative Code. Accordingly, we make the following conclusions of law and enter the following order dismissing Claim's appeal.

CONCLUSIONS OF LAW

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

2. DER has the burden of proving by a preponderance of the evidence that its April 18, 1994 order was lawful and an appropriate exercise of its discretion.

3. Claim is an occupier of the Marucci site within the meaning of section 316 of the Clean Streams Law.

4. The lead contamination from the battery casings on the site has reached surface waters of the Commonwealth and poses a danger of pollution to the waters of the Commonwealth.

5. DER's April 18, 1994 order was lawful under section 316 of the Clean Streams Law and an appropriate exercise of DER's discretion.

6. In order to meet its burden of proving its order was lawful pursuant to the SWMA, DER must show that its action is supported by a preponderance of the evidence and not arbitrary, capricious, or unreasonable. Max L. Starr, supra.

7. The evidence in this matter shows that the battery casings and the adjacent soil at the site are hazardous wastes. 35 P.S.§6018.103; 25 Pa. Code §261.3; 25 Pa. Code §261.24.

8. To the extent that Claim abandoned the battery casings at the site and left them, in a manner in which the hazardous waste constituent of the battery casings entered the environment, was discharged into waters of the Commonwealth, and continues to do so, he is disposing of the battery casings, and this disposal continues until the battery casings are removed. 35 P.S. §6018.103; 25 Pa. Code §260.2.

9. DER's order is not retroactively applying the SWMA to Claim.

10. Claim's failure to obtain a permit from DER in compliance with section 401 of the SWMA, 35 P.S. §6018.401, or to close the battery pile disposal site constitutes a public nuisance pursuant to section 601 of the SWMA. 35 P.S. §6018.601.

11. DER's order to Claim was authorized by section 104(7) of the SWMA and section 602 of the SWMA. 35 P.S. §6018.104(7) and 602.

12. DER's order does not improperly impose joint and several liability on him.

ORDER

AND NOW, this 10nth day of April, 1995, it is ordered that Claim's appeal at Docket No. 94-125-E is dismissed.

ENVIRONMENTAL HEARING BOARD

ROBERT D. MYERS
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: April 10, 1995

cc: **DER Bureau of Litigation:**
(Library: Brenda Houck)
For the Commonwealth, DER:
Barbara J. Grabowski, Esq.
Western Region
For Appellant:
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Pittsburgh, Pa.

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M. DIANE SMITH
SECRETARY TO THE BOA

MONTGOMERY TOWNSHIP, *et al.* :
:
v. : EHB Docket No. 93-091-W
: (consolidated with 93-093.
COMMONWEALTH OF PENNSYLVANIA, : 93-275, and 93-289)
DEPARTMENT OF ENVIRONMENTAL RESOURCES :
and BOROUGH OF MERCERSBURG, Intervenor : Issued: April 12, 1995

ADJUDICATION

By: The Board

Synopsis

Consolidated appeals from a Department of Environmental Resources (Department) order to a municipality requiring it to revise its official sewage facilities plan and from the Department's approval of an official plan revision are dismissed.

The Department may not approve an official plan revision unless all municipalities affected by that plan revision have also revised their official plans accordingly. The Department is authorized by the Sewage Facilities Act, the Act of January 24, 1966, P.L. (1965) 1535), *as amended*, 35 P.S. §750.1 *et seq.*, and the Clean Streams Law, the Act of June 22, 1937, P.L. (1987), *as amended*, 35 P.S. §691.1 *et seq.*, to order a municipality to revise its official sewage facilities plan.

In approving an official plan revision, the Department need not determine that a proposed method of sewage treatment and disposal is 100% certain, but rather only that the proposed method is capable of satisfying the

technical standards and regulations applicable to such methods of treatment and disposal. When the record indicates that a spray irrigation facility is capable of satisfying applicable standards and regulations, the Department does not abuse its discretion in approving the official plan revision containing that facility.

The Board cannot find that the Department's approval of an official plan revision violated §8(4) of the Historic Preservation Act, the Act of May 26, 1988, P.L. 414, 37 Pa.C.S. §508(4), if the appellant fails to specifically allege inadequate Department policy or procedure, and instead challenges the effects of the plan revision on historic resources. Similarly, the Board cannot find that the Department's approval of an official plan revision violated Article I, §27, of the Pennsylvania Constitution if the appellant does not support its argument with specific examples of the effects the Department failed to consider.

INTRODUCTION

This matter has its origins in two separate Department actions. On March 18, 1993, the Department issued an order to Montgomery Township, Franklin County (Township), requiring the Township to revise its official sewage facilities plan to accommodate the changes proposed for the sewage facilities of a neighboring municipality, the Borough of Mercersburg, Franklin County (Order). The Borough proposed to replace its aging and allegedly overloaded sewage treatment plant, which was located in Montgomery Township and discharged to Johnston Run, with a brand new spray irrigation facility located on a farm in both the Township and an adjoining municipality, Peters Township, Franklin County.

The Township, along with several Township residents, filed a notice of appeal from the Order on April 15, 1993, which the Board docketed at No. 93-091-W. The Township claimed primarily that the Order exceeded the scope of the Department's authority under applicable law and that the Borough's proposed plan revision ignored the Township's sewage facilities needs. A second group of appellants, led by Kenneth and Betty Lee (hereafter referred to as Lee), filed a notice of appeal from the Order on April 16, 1993, which the Board docketed at No. 93-093-W. Lee raised similar objections to the Order and further claimed that the Order impermissibly infringed on the Township's authority over land-use planning within its boundaries. On May 10, 1993, the Borough requested permission to intervene in the Township's appeal at No. 93-091-W, which the Board granted on May 13, 1993. These two appeals were then consolidated at Docket No. 93-091-W on July 8, 1993.

The Township filed a petition for supersedeas on April 26, 1993. A hearing on the Township's petition was initially scheduled for May 14, 1993, but was cancelled after the parties advised the Board that they had reached a settlement regarding the petition. Pursuant to the terms of the settlement, which the Board approved on June 16, 1993, the Township agreed to comply with the Order and adopt the Borough's proposed plan revision, and the Borough agreed not to proceed with construction until the Board issued a final adjudication on the merits. The parties further agreed that the Township would rescind its adoption of the Borough's plan revision if its appeal of the Order were sustained.

On August 26, 1993, after securing the Township's approval, the Department approved the proposed revision to the Borough's official plan (Plan Revision). The Township filed a notice of appeal from the approval on

September 27, 1993, which the Board docketed at No. 93-275-W. In this notice of appeal, the Township objected to the nature of the proposed sewage facilities and the burden they would place on the Township. On October 7, 1993, the Board denied as moot the Borough's petition to intervene, because the Borough was already a party to the Township's appeal pursuant to 25 Pa.Code §21.51(g). Lee filed a notice of appeal from this approval on October 15, 1993, which the Board docketed at No. 93-289-W. In its notice of appeal, Lee raised primarily the same objections as the Township. These two appeals were consolidated at Docket No. 93-091-W on November 9, 1993.

A hearing on the merits of the Township's and Lee's appeals was held before Board Chairman Maxine Woelfling[1] in the Board's Harrisburg Office on June 6-10 and 15-16, 1994. The parties submitted their post-hearing briefs on August 29 and 30, 1994, and the Township, Lee, and the Borough filed reply briefs on September 14, 1994. Any issue not raised by the parties in their post-hearing briefs has been waived. Lucky Strike Coal Co., 119 Pa.Cmwlth. at ___, 546 A.2d at 449.

On March 20, 1995, the Township filed with the Board a letter discussing the effect on this proceeding of the Board's recent decision in Cesar Munoz, *et ux.* v. DER, EHB Docket No. 93-373-MR (Opinion issued February 16, 1995). The Department filed a response to the Township's letter on March 21, 1995.

The record in this matter consists of a transcript of 1,521 pages; the parties' May 31, 1994, Joint Stipulation; and 156 exhibits. After a full

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[1]Chairman Woelfling resigned from the Board on February 17, 1995. The Board will proceed to adjudicate the merits of these appeals from a cold record. *See*, Lucky Strike Coal Co., *et al*. v. Cmwlth., Dept. of Environmental Resources, 119 Pa.Cmwlth. 440, ___, 547 A.2d 447, 449 (1988).

and complete review of this record, the Board makes the following findings of fact.

FINDINGS OF FACT

The Parties

1. Appellants in this matter are Montgomery Township, Franklin County, a township of the second class; Mr. and Mrs. C. Richard Fries, residents of Peters Township; and Mrs. and Mrs. Garry Martin, residents of Montgomery Township (J.Stip. 2-4).[2]

2. Appellants in this matter are Kenneth and Betty Lee, residents of Montgomery Township and owners of real property in the Borough; Kirby and Barbara Reese, residents of Montgomery Township; and Donald and Connie Stuff, residents of Montgomery Township (J.Stip. 6-8).

3. Appellee in this matter is the Department, the administrative agency with the responsibility and authority to administer and enforce the Clean Streams Law; the Sewage Facilities Act; §1917-A of the Administrative Code, the Act of April 9, 1929, P.L. 177, *as amended*, 71 P.S. §510-17; and the rules and regulations promulgated thereunder.

4. Intervenor/Permittee is the Borough of Mercersburg, a political subdivision pursuant to the Borough Code, the Act of February 1, 1966, P.L. (1965) 1656, *as amended*, 53 P.S. §45101 *et seq.* (J.Stip. 17).

The Borough's Sewerage System

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[2]References to the record are as follows: "J.Stip. ___" refers to the parties' May 31, 1994, Joint Stipulation;, "N.T. ___" refers to the notes of testimony; and "Jt.Ex. __," "Twsp.Ex. __," "Lee Ex. __," and ""Bor.Ex. __" refer to the parties' joint exhibits, the Township's exhibits, Lee's exhibits, and the Borough's exhibits, respectively. The Department did not move any exhibits into evidence.

5. The Borough has a population of 1,640 and is approximately .6 square miles in area (N.T. 800).

6. The Borough operates a sewage collection and treatment system to provide sanitary sewage collection and disposal service within the Borough (J.Stip. 18).

7. The Borough's sewerage[3] system includes a sewage treatment plant (STP) with a capacity of 220,000 gallons per day (gpd) (J.Stip. 19, 22; Jt.Ex. 2).

8. The STP is located in the Township between Mercersburg Academy and Johnston Run (J.Stip. 19, 22; Jt.Ex. 2).

9. The STP discharges treated effluent to Johnston Run (J.Stip. 22; Jt.Ex. 2).

10. The Borough's sewerage system has approximately 800 customers (N.T. 803-804).

11. The Borough's sewerage system is owned by the Mercersburg Borough Authority (Authority), a municipal authority under the Municipality Authorities Act of 1945, the Act of May 2, 1945, P.L. 32, *as amended*, 53 P.S. §301 *et seq.*, and leased to the Borough for operation and use (J.Stip. 20).

12. The Borough is responsible for operation and maintenance of the sewerage system (N.T. 802).

Problems with the Borough's STP

13. On February 26, 1987, the Department issued the Authority a Notice of Violation, which stated that discharges from the STP exceeded the

[3]Under the Department's regulations, a "community sewerage system" is [a] community sewage system which uses a method of sewage collection, conveyance, treatment and disposal other than renovation in a subsurface absorption area, or retention in a retaining tank." 25 Pa.Code §71.1.

biochemical oxygen demand (BOD) limits set forth in the STP's NPDES permit[4] (J.Stip. 21; Jt.Ex. 7).

14. On October 20, 1987, the Department issued the Borough NPDES Permit No. PA0022179, which authorized the discharge of treated sewage from the STP into Johnston Run and established a schedule of compliance for the upgrade of the STP (J.Stip. 22; Jt.Ex. 8).

15. On December 10, 1987, the Department and the Authority executed a letter agreement that required the Authority to pay a civil penalty for violating the effluent limits set forth in the NPDES permit (J.Stip. 23; Jt.Ex. 9).

16. On August 28, 1989, the Department issued the Authority a Notice of Violation for exceeding the effluent limits for suspended solids set forth in the NPDES permit (J.Stip. 30; Jt.Ex. 13).

17. The Department issued the Borough a Notice of Violation on June 15, 1992, for discharges from the STP in excess of the effluent limit for fecal coliform set forth in the NPDES permit (J.Stip. 66; Jt.Ex. 60).

18. As a result of overloading at the STP, the Department has limited the Borough to 14 connections to its sewerage system per year (N.T. 582).

The Township's Use of the Borough's Sewerage System

19. Montgomery Township does not have an intermunicipal agreement with the Borough (N.T. 369).

20. Mercersburg Academy is connected to the Borough's sewerage system (N.T. 391).

[4]An NPDES (National Pollutant Discharge Elimination System) permit is required for all discharges from a point source into navigable waters. 25 Pa.Code §92.3; 33 U.S.C. §1342.

21. The sewage line from Mercersburg Academy to the Borough's sewerage system belongs to the Academy (N.T. 584).

22. Approximately one-half of the buildings on the grounds of the Mercersburg Academy are located in the Township (N.T. 564).

23. Approximately one-half of the sewage flow from Mercersburg Academy into the Borough's sewerage system comes from buildings located in the Township (N.T. 566).

24. The Township never approved Mercersburg Academy's connection to the Borough's sewerage system (N.T. 370).

25. One residence located within the Township is connected to the Borough's sewerage system (N.T. 586).

The Borough's Official Plan Revision

26. On July 27, 1988, the Department approved the Borough's May 1988 revision to its official plan (J.Stip. 23A).

27. The Borough's 1988 official plan revision proposed upgrading the STP from a filter system to an activated sludge system and increasing capacity from 220,000 to 300,000 gallons per day (N.T. 303).

28. In early 1989, a resident of the Borough introduced John R. Sheaffer of Sheaffer & Roland, Inc. (Sheaffer & Roland), to members of the Borough Council, and Mr. Sheaffer suggested that the Borough consider a spray irrigation system to meet its wastewater disposal needs (J.Stip. 24).

29. Spray irrigation is a method of sewage treatment and disposal in which semi-treated sewage effluent is used as a source of moisture and nutrients for agricultural crops (Jt.Ex. 2).

30. In a spray irrigation system, final renovation of the sewage effluent occurs in the soil (N.T. 52, 1219, 1224, 1230).

31. The Borough requested that the Department determine whether spray irrigation was a viable alternative to the upgraded STP and increased discharges proposed in the 1988 plan revision (J.Stip. 26).

32. The Borough retained Sheaffer & Roland to perform a feasibility study on spray irrigation, which Sheaffer & Roland submitted to the Borough in April 1989 (J.Stip. 27-28; Jt.Ex. 11).

33. On July 11, 1989, the Department issued Amendment No. 1 to the STP's NPDES permit, which revised the October 20, 1987, schedule of compliance to allow the Borough to examine the use of "innovative and alternative technology" (J.Stip. 29; Jt.Ex. 12).

34. By letter dated November 20, 1989, the Department informed the Borough that it considered the concept of spray irrigation/land disposal to be a viable alternative to the discharge of treated sewerage, and that it would again amend the schedule of compliance established in the STP's NPDES permit (J.Stip. 31; Jt.Ex. 14).

35. The second amendment to the schedule of compliance required the Borough to complete, adopt, and submit to the Department by May 15, 1990, a revision to its official plan for the chosen alternative technology (J.Stip. 33; Jt.Ex. 15).

36. In 1990, the Borough was presented with and considered an agreement with Future Water of Pennsylvania, Inc. (Future Water), a Pennsylvania corporation formed for the purpose of designing, constructing, and operating wastewater reuse systems (J.Stip. 36-37).

37. Future Water proposed that the project be located on a farm situated in both Montgomery and Peters Townships, which was owned by Larry and Sharon Smith (Barnhart Farm) (J.Stip. 40).

38. Using consulting services provided by Future Water, the Borough proposed a revision to its official plan, which provided for the construction of a new spray irrigation facility on the Barnhart Farm (J.Stip. 44; Jt.Ex. 2).

39. The Borough served the Township's Board of Supervisors with a copy of the Borough's proposed plan revision on May 21, 1991 (J.Stip. 45; Jt.Ex. 27).

40. The Borough served the Board of Supervisors of Peters Township with a copy of the Borough's proposed plan revision on May 22, 1991 (J.Stip. 46; Jt.Ex. 28).

41. On July 29, 1991, the Borough adopted and submitted to the Department a revision to its official plan (Plan Revision) (J.Stip. 53).

42. The Franklin County Planning Commission approved the Plan Revision on July 30, 1991 (J.Stip. 54).

43. The Borough served the Boards of Supervisors of the Township and Peters Township with copies of the Plan Revision on August 14, 1991 (J.Stip. 55; Jt.Ex. 42).

44. On August 15, 1991, the Franklin County Conservation District notified the Borough that the proposed spray irrigation project satisfied the requirements of 25 Pa.Code §102.1, *et seq.*, concerning erosion and sedimentation control (J.Stip. 56; Jt.Ex. 43).

45. The Department wrote to the Township's Board of Supervisors on November 14, 1991, to request that the Township schedule a public hearing on the Plan Revision and consider adopting the Plan Revision (J.Stip. 57; Jt.Ex. 46).

46. The Department informed the Borough on January 28, 1992, that the Plan Revision was technically complete and feasible (J.Stip. 60; Jt.Ex. 50).

47. On January 28, 1992, the Department also provided the Borough with a table of allowable spray rates for the project's two proposed spray fields (J.Stip. 60; Jt.Ex. 50).

48. The Borough and the Department executed a Consent Order and Agreement on June 17, 1992, which further adjusted the schedule of compliance established in the STP's NPDES permit, in order to allow additional time for Montgomery and Peters Townships to adopt revisions to their official plans consistent with the Plan Revision (J.Stip. 67; Jt.Ex. 63).

49. On November 5, 1992, the Pennsylvania Historical and Museum Commission, Bureau for Historic Preservation, notified the Borough that the proposed spray irrigation project would, in their opinion, have no effect on archaeological resources or historic structures (Jt.Ex. 71).

50. The Department advised the Township's Board of Supervisors by letter dated December 2, 1992, that the Department would order the Township to adopt a plan consistent with the Plan Revision if no agreement was reached with the Borough by January 29, 1993 (J.Stip. 73; Jt.Ex. 74).

51. The Township informed the Borough on December 4, 1992, that no basis existed for executing an intermunicipal agreement because the Plan Revision failed to consider the Township's needs (J.Stip. 74; Jt.Ex. 75).

52. On or about January 29, 1993, Peters Township adopted a revision to its official plan that was consistent with the Plan Revision (J.Stip. 76).

53. On March 18, 1993, the Department issued the Township the Order, which required the Township to adopt the Plan Revision as a revision to its own official plan, or to reach an agreement with the Borough on an alternate plan for sewage disposal (Notice of Appeal).

54. On August 26, 1993, the Department approved the Plan Revision (Notice of Appeal).

The Spray Irrigation Site

55. The proposed spray irrigation system is to be located on the Barnhart Farm, approximately two miles to the east/southeast of the Borough and to the east and north of the West Branch of the Conococheague Creek (N.T. 37; Jt.Ex. 136).

56. Sewage in the Borough's sewerage system will continue to be conveyed to the STP, where it will be macerated and then pumped 12,500 feet through an eight inch force main to the spray irrigation facility (Jt.Ex. 2).

57. As described in the Plan Revision, the spray irrigation facility will consist of a three-phase deep aerated lagoon system and two spray areas (N.T. 38; Jt.Ex. 2).

58. The lagoon system will provide for 14 days of detention, during which time basic oxygen demand (BOD), suspended solids, and pathogens will be reduced (Jt.Ex. 2).

59. After being retained in the lagoons, the wastewater will be disinfected with chlorine to ensure that the sprayed effluent is essentially free of fecal coliforms and enterococci organisms (Jt.Ex. 2).

60. The western spray area (west field) depicted in the Plan Revision is approximately 37 acres in size, with several additional acres in reserve, and lies to the west of Findley Road (N.T. 38).

61. The eastern spray area (east field) depicted in the Plan Revision is approximately 18 acres in size and lies across Findley Road, to the southeast, of the west field (N.T. 38).

62. The geology beneath the site is not uniform, but instead consists of bands or belts of different rock units, which are oriented north/south or north-northeast/south-southwest (N.T. 40).

63. From west to east, the geologic units underlying the site are the Martinsburg Formation, which is under a portion of the lagoons and the area west of the west field, and consists mostly of shales with some interbedded limestones; the Chambersburg Formation, an impure, irregular embedded limestone; the Saint Paul Group, which consists mainly of limestones with a few interbedded dolomites; the Pinesburg Station Formation, which lies beneath Findley road and most of the east field, and is essentially a series of dolomites with interbedded limestones; and the Rockdale Run Formation, which is a series of limestones (N.T. 40-41; Jt.Ex. 102, Figure 2).

64. Both the Martinsburg Formation and the Chambersburg Formation have relatively low transmissivity and permeability[5], compared to the more permeable limestone to the east, and would tend to act like a groundwater dam on the western side of the west field (N.T. 42).

65. There is a swale between the west field and Findley Road that extends to the south of the site (N.T. 78; Jt.Ex. 104).

66. Groundwater flow beneath the west field is from the north/northwest to the south/southeast (N.T. 1196; Jt.Ex. 124, Figures 6 & 7).

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[5]"Permeability" is defined as "[t]he rate at which liquids pass through soil or other materials in a specified direction." C.C. Lee, *supra*.

67. Groundwater flow beneath the east field is to the west and slightly southwest (N.T. 1197; Jt.Ex. 124, Figures 6 & 7).

68. Some of the groundwater from beneath the east and west fields flows into the area beneath the swale (Jt.Ex. 124, Figures 6 & 7).

69. Groundwater flow is not depicted as perpendicular to the groundwater contour lines because of a property known as anisotropy, in which the transmissivity of bedrock is higher along the bedding planes (N.T. 1488, 1508).

70. While groundwater flow in an isotropic situation is generally perpendicular to the gradient, in an anisotropic situation groundwater flow is refracted toward the direction of the bedding (N.T. 1488).[6]

71. In depicting the direction of groundwater flow, an anisotropic permeability of 2:1 was assumed, meaning the transmissivity of the aquifer is two times greater along the bedding planes than across the bedding planes (N.T. 1488, 1508-1509; Jt.Ex. 124, Figure 6).

<u>The Potential for Groundwater Mounding</u>

72. A groundwater mound is a localized area of elevated groundwater levels that occurs when water from a spray irrigation system infiltrates the ground, reaches the water table as recharge, and causes a rise in the water table beneath and adjacent to the spray area (Jt.Ex. 102).

73. Jeffrey Peffer, President of Peffer Geotechnical Corporation, is a registered Professional Engineer and Professional Geologist, a Certified Hydrogeologist with the American Institute of Hydrology, and a Certified

[6]"Isotropic" is defined as "[a] condition or process of which the propoerties are independent of direction," while "anisotropic" means the properties are dependent on direction. C.C. Lee, *supra*.

Professional Geological Scientist with the American Institute of Professional Geology (N.T. 32).

74. Mr. Peffer has over 22 years of experience and has been involved in reviewing approximately 30 spray irrigation sites (N.T. 33).

75. Mr. Peffer is of the opinion that the proposed site, as depicted in the Plan Revision, is too small for the disposal of 300,000 gallons of wastewater per day (N.T. 71).

76. Mr. Peffer performed a groundwater mounding analysis on the west field depicted in the Plan Revision to simulate the effect of an additional 70-80 inches of irrigation per year (N.T. 47-49).

77. Mr. Peffer ran his computer model to a steady-state condition, which simulated irrigation over a period of years (N.T. 49)

78. Mr. Peffer determined that a groundwater mound would develop along the western edge of the west field (N.T. 49-50).

79. According to Mr. Peffer, the result of this groundwater mound would be a breakout of springs along the western slope, which would essentially be a rejection or runoff of applied wastewater (N.T. 50).

80. Stephen M. Snyder is a Professional Geologist and consulting hydrogeologist and the Vice President of Earth Sciences with R. E. Wright & Associates, Inc. (N.T. 1182).

81. Mr. Snyder has performed five or six spray irrigation investigations and evaluations for the purpose of selecting spray field sites (N.T. 1185).

82. Mr. Snyder concluded the Plan Revision is technically feasible from a geologic and hydrogeologic standpoint, subject to his and Mr. Willman's recommendations (N.T. 1215).[7]

83. Mr. Snyder installed 11 of his own wells surrounding and within the west field and surrounding the east field (N.T. 1196).

84. Mr. Snyder prepared a groundwater mounding model using data from the 11 additional wells in addition to the 5 wells that were onsite initially (N.T. 1196, 1199).

85. Mr. Snyder calibrated his model to the groundwater levels observed on November 23, 1993, and utilized the spray rates recommended in Mr. Willman's report (N.T. 1200).

86. The groundwater levels on November 23 were representative of the annual average (N.T. 1290, 1497-1498).

87. In exploring the sensitivity of his model, Mr. Snyder performed 77 runs to determine how the model would react to actual storm events, such as a series of storms in November and December 1993 (N.T. 1496).

88. Mr. Snyder's model generally predicted groundwater height to within one foot of the groundwater levels actually recorded (N.T. 1491; Jt.Ex. 124, Table 3).

89. Mr. Snyder ran his model to a steady state, which was reached after about three simulated years (N.T. 1202).

90. Using the west field depicted in the Plan Revision, Mr. Snyder's model predicted a groundwater mound near the west side of the field,

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[7]Bruce Willman is a consulting soils scientist with R.E. Wright & Associates, Inc. (N.T. 1034).

close to the Chambersburg Formation, that came close to and possibly approached the surface (N.T. 1200).

91. After moving the western edge of the west field to the east, away from the Chambersburg Formation, Mr. Snyder's model predicted a groundwater mound of approximately ten feet in height, but only five feet high on the eastern side of the field (N.T. 1201).

92. Mr. Snyder prepared an isopac map for the smaller west field that showed between 7 to 30 feet of unsaturated soil from the ground surface to the groundwater table (N.T. 1201; Jt.Ex. 124, Figure 14).

93. Mr. Peffer did not perform a groundwater mounding analysis on Mr. Snyder's reconfigured west field.

94. Mr. Snyder's model calculated the transmissivity beneath the west field to be 2,900 gallons per day per foot (N.T. 1209).

95. Based on recession of the groundwater table after rain events in November and December 1993, the actual transmissivity beneath the west field was calculated to be approximately 13,000 gallons per day per foot (N.T. 1204-1205; Jt.Ex. 124, Appendix B).

96. The calculated transmissivity was higher than the model's because the model did not recognize that permeability of the underlying rock increases as the water level rises (N.T. 1207-1208).

97. Permeability of the underlying rock increases as the water level rises because of weathering within ten feet above the mean water table (N.T. 1207).

98. Because the actual transmissivity beneath the west field is higher than that calculated by the model, groundwater mounding beneath the

proposed west field would not be as severe as predicted by Mr. Snyder's model (N.T. 1208).

99. Some of the groundwater flows from beneath the west and east fields would commingle beneath the swale and result in an increase in groundwater levels there (N.T. 1272, 1485).

100. The aquifer beneath the swale appears to be more permeable, and flow through there will be greater, than under the spray fields (N.T. 1272, 1486, 1506).

101. Commingling of groundwater flows beneath the swale will not result in a higher groundwater mound beneath the west field under spray conditions (N.T. 1487).

Bedrock Outcrops

102. J. Craig Rockwell is a registered Professional Engineer and the President of Future Water of Pennsylvania, Rockwell Construction Co., Inc., and Rockwell Civil Engineering (N.T. 607).

103. Rockwell Construction and a subcontractor conducted rock removal from the spray fields around May 15, 1991 (N.T. 959).

104. To remove bedrock, it is necessary to use a ripper bar, dynamite, or a hydraulic hammer (N.T. 963).

105. The Department informed Future Water that the rocks could be removed from the spray fields only by nondestructive means - no digging around the outside; hydraulic/pneumatic breaking; or excessive banking or force (N.T. 957).

106. When Mr. Rockwell looked into the holes left behind by the removed rocks, he saw soil (N.T. 997).

107. C. Richard Fries and his brother, Thomas, own the two farms located along the northern boundary of the spray area (N.T. 464-465; Jt.Ex. 2).

108. For about two weeks in April or May 1991, Mr. Fries observed rocks being removed generally from the middle of the west field (N.T. 472-474, 485).

109. Mr. Fries was able to observe the rock removal operation approximately three times per day (N.T. 485).

110. To remove the rocks, the workers used two big high lifts, a bulldozer, and several trucks (N.T. 472).

111. The workers dug a trench approximately four feet deep and 200 yards long on one side of the west field and used that soil to cover the areas from which the rocks were removed (N.T. 474).

112. Some of the soil was used to cover the rocks that could not be removed (N.T. 474).

113. Mr. Peffer believed that bedrock outcrops were removed from the spray fields, but did not personally witness the rock removal or know whether the equipment used was capable of removing bedrock without blasting (N.T. 52-60, 110-112).

114. The soil in the area around bedrock outcrops is generally very shallow (N.T. 52).

115. In a spray irrigation system, renovation of the wastewater occurs in the first few feet of soil (N.T. 52, 1219, 1224, 1230).

116. Removing bedrock outcrops can disturb the remaining bedrock and create a permeable zone through which wastewater can easily flow (N.T. 54).

117. As long as the soil is deep enough, it is appropriate to spray wastewater on soil that was placed over an area from with bedrock was removed (N.T. 1224, 1229-1230).

Sinkholes and Closed Depressions

118. On April 14, 1992, the Department informed Sheaffer & Roland that a certain closed depression on the west field would not be permitted to receive spray (J.Stip. 64; Jt.Ex. 55).

119. Garry Martin is a self-employed farmer, whose farm borders the entire south side of the east field (N.T. 422).

120. Mr. Martin identified the location of two sinkholes on the Barnhart Farm that have been filled in, one of which was in the swale between the west field and Findley road, the other of which was to the southwest of the east field (N.T. 440-441; Lee Ex. 39).

121. There was no evidence of these two sinkholes or any other subsidence in the locations identified by Mr. Martin (N.T. 1220-1221, 1223; Lee Ex. 39).

122. The swale between the west field and Findley Road would be an excellent location for a sinkhole to occur and it is possible a sinkhole occurred there in the past (N.T. 1223; Lee Ex. 39).

123. Mr. Martin identified the location of four additional sinkholes on the Barnhart Farm, three of which were to the east of the east field, the other of which was to the north of the east field (N.T. 443-445; Lee Ex. 39).

124. B. Ross Barnhart owned and farmed the Barnhart Farm for 44 years and filled in a sinkhole that was located to the south of the east field (N.T. 467, 486-488).

125. Sinkholes are not suitable to receive spray irrigation because they allow wastewater to funnel quickly into the bedrock without renovation or filtration from the soil (N.T. 64, 1218).

126. Because soil is the renovating medium, it may be permissible to apply spray irrigation to a repaired sinkhole (N.T. 1219).

127. A closed depression is a type of sinkhole that is formed as a result of some solutioning activity in the underlying rock (N.T. 154).

128. Closed depressions are also not suitable to receive spray irrigation because there would be rapid movement of wastewater from the surface to the water table (N.T. 157; Jt.Ex. 94, §2.2.1.2).

129. There are two closed depressions in the west field, one of which was already deleted from the spray area (N.T. 62; J.Stip. 64; Jt.Ex. 55).

130. There a number of other sags or "near closed depressions" on the south side of the west field (N.T. 62).

131. The risk of sinkholes and closed depressions is common in all limestone areas (N.T. 117).

132. The potential for sinkhole development is related to spray application rates (N.T. 148).

133. A uniform application rate spread over a wide area is less likely to cause sinkhole development than a community subsurface system (N.T. 148).

134. The Plan Revision proposes a spray application rate of one-quarter inch every six hours (Jt.Ex. 122).

135. Thomas G. Kelso is a Project Manager and Senior Project Planner with Tatman & Lee, a diversified engineering firm specializing in

environmental planning, and wastewater and water supply facilities (N.T. 1293).

136. Mr. Kelso has been responsible for preparing or supervising the preparation of approximately 20 municipal wastewater facility plans, approximately 15 of which involved spray irrigation (N.T. 1294-1295).

137. Mr. Kelso has experience planning spray irrigation facilities in limestone conditions (N.T. 1303).

138. Mr. Kelso has not observed any sinkholes nor does he know of any sinkholes that have developed on a spray site after the irrigation system began operation (N.T. 1304).

Groundwater Contamination - Total Dissolved Solids

139. Total dissolved solids (TDS) in the groundwater beneath the site are already elevated, generally above 400 mg/l (N.T. 66).

140. Mr. Peffer testified that the proposed spray project will raise TDS in the groundwater beneath the site even further because sewage contains certain salts that will not be filtered out (N.T. 66).

141. Assuming the TDS in the treated sewage will be in excess of 500 mg/l, Mr. Peffer further testified that the proposed spray project will result in TDS rising to a level in excess of 500 mg/l both beneath the site and off-site (N.T. 66-67).

142. Even if TDS in the treated sewage was less than 500 mg/l, Mr. Peffer continued to believe TDS beneath the site would rise to a level in excess of 500 mg/l because evaporation and transpiration would cause water loss of 35-40%, which would concentrate the TDS in the wastewater (N.T. 145).

143. On March 10, 1994, the TDS level in the Borough's wastewater was 312.2 mg/l (N.T. 142; Jt.Ex. 142).

144. Bruce P. Willman is a consulting soils scientist with R. E. Wright & Associates (N.T. 1034).

145. With respect to wastewater disposal by spray irrigation, Mr. Willman has evaluated sites from a soils perspective, including hydrogeologic evaluations (N.T. 1036).

146. Mr. Willman has experience with the preparation and review of official plans and revisions (N.T. 1038).

147. Mr. Willman reviewed the proposed spray irrigation project to determine whether the sites were technically feasible from a soils perspective (N.T. 1041).

148. Mr. Willman does not believe the spray irrigation project will adversely impact TDS levels beneath the spray fields (N.T. 1069-1079).

149. Because evapotranspiration/year at the site is approximately 12 inches less than precipitation/year, and 70 inches of wastewater will be added, Mr. Willman testified there will never be excess evapotranspiration to create salt crusting or TDS accumulation (N.T. 1076-1077).

150. TDS is composed of nutrients such as nitrogen and phosphorous that will be taken up by plants (N.T. 1077,1097).

151. Mr. Peffer did not account for the TDS that will be taken up by plants (N.T. 1077).

152. Mr. Willman also testified that even if all of the TDS percolates to the groundwater, it will mix with rain water and percolate at a lower concentration than what already exists (N.T. 1077).

153. Mr. Kelso of Tatman & Lee has never found elevated TDS to be a problem with other spray irrigation systems (N.T. 1308).

The Soils

154. Mark Stanley Mills is a professional soil scientist with Soil Resources, Limited (N.T. 189).

155. Mr. Mills has reviewed approximately 20-30 spray irrigation systems from a soils standpoint (N.T. 190).

156. Mr. Mills reviewed Appendix D of the Plan Revision, concerning soils information (N.T. 189; Jt.Ex. 2).

157. On May 7, 1993, Mr. Mills dug seven test probes on the site at locations selected by Mr. Peffer (N.T. 192).

158. The probe sites were deliberately located near rocks to confirm whether they were bedrock outcrops (N.T. 216).

159. The two soil series generally at the site are the Buchanan Series, which makes up approximately two-thirds to three-quarters of the west field, and the Hagerstown Series (N.T. 193; Jt.Ex. 106).

160. Buchanan soils are generally poor to moderately well-drained soils composed of colluvium or transported material (N.T. 193).

161. Hagerstown soils are generally deep, well-drained soils that formed in material weathered from relatively pure limestone (N.T. 193; Jt.Ex. 106).

162. The Buchanan soils at the site show mottling at 22-30 inches below the surface, indicating they are moderately well drained (N.T. 194, 1042).

163. The Hagerstown soils at the site are generally well-drained, except in some areas where limestone bedrock was encountered at a depth as shallow as ten inches (N.T. 195, 1042, 1090).

164. Mr. Willman supervised a conductivity test performed at the five Mills and Department permeability test locations and performed his own tests at ten additional locations (N.T. 1043; Jt.Ex. 122, Figure 3).

165. A hydraulic conductivity test measures the vertical flow through the most limiting soil horizon in a certain amount of time (N.T. 1043, 1044).

166. The limiting factor for spray rates on the west field is the loading rate from the hydraulic loading assessment (N.T. 1111).

167. Mr. Willman performed a land-limiting constituent analysis, which resulted in a recommendation that the amount of spray applied to the west field should initially be reduced (N.T. 1050, 1110; Jt.Ex. 94, §6.4).

168. To compensate for this initial reduction in spray area, Mr. Willman performed additional hydraulic loading assessments and came up with additional area on the east field (N.T. 1060).

169. Mr. Willman performed a nutrient loading analysis as part of the land-limiting constituent analysis, but did not assess the nitrogen loading because that will not exceed crop uptake (N.T. 1062).

170. Based on the soil permeability results, hydraulic loading assessments, and nitrate general loading assessments, Mr. Willman believed that loading on the west field and east field will accommodate the proposed 300,000 gallons per day (N.T. 1063).

171. Mr. Willman further believed that additional capacity of up to 14% over the proposed 300,000 gpd will be available from unused capacity on the west and east fields, reserved areas adjacent to the west field, and the initially reduced spray on the west field (N.T. 1063-1064).

172. Subject to his recommendations, Mr. Willman testified that spray irrigation is technically feasible at this site (N.T. 1065).

The Spray Rates

173. The spray rates projected in the Plan Revision and the Department's January 28, 1992, letter exceed the spray rates recommended in the Department's 1993 *Manual for Land Application of Treated Sewage and Industrial Wastewater* (1993 *Spray Manual*) (N.T. 197-199; Jt.Exs. 2, 94).

174. Mr. Mills believed that the Hagerstown soils, where not restricted by bedrock, should not receive more than two inches of spray per week per acre and that the Buchanan soils should not receive more than one inch of spray per week per acre (N.T. 198; Jt.Ex. 94).

175. Mr. Mills testified that the factors limiting the application rates for the Hagerstown soils are sinkholes, irregular depth to bedrock, and the possibility of groundwater contamination (N.T. 206).

176. In evaluating the maximum application rates, Mr. Mills did not take into account evapotranspiration, which would increase the possible application rate (N.T. 222).

177. Edward J. Corriveau is Chief of the Planning and Finance Section of the Department's Southcentral Regional Office (N.T. 506).

178. Mr. Corriveau's responsibility as Planning and Finance Chief is to review the general technical feasibility of a project, not the construction drawings or permit application (N.T. 520).

179. In order to determine whether the Plan Revision was technically feasible, it was necessary to first determine the maximum capability of the spray fields (N.T. 1382).

180. The spray rates set forth in the Department's January 28 letter were established only to show the capacity of the site to receive spray irrigation (N.T. 1367; Jt.Ex. 50).

181. The maximum allowable spray rates will be determined at the permitting stage using a land-limiting constituent analysis (N.T. 221, 526, 552, 1366; Jt.Ex. 50).

182. Mr. Willman testified it is appropriate in this case to exceed the two inch per week per acre maximum spray rate established in the 1993 *Spray Manual* (N.T. 1066).

183. Factors in favor of increasing the spray rate include evapotranspiration and an application rate of one-quarter inch per every six hours, both of which are specifically referenced in the Department's 1993 *Spray Manual* (N.T. 1067; Jt.Ex. 122).

Historical and Archaeological Resources

184. The Fries Farm, which is adjacent to the northern boundary of the spray fields, was owned at one time by President James Buchanan, who sold it to his Secretary of State, Jeremiah Black (N.T. 483).

185. The Reese Farm, which is located about one mile south of the proposed spray irrigation site, is a former slave plantation, containing a main house, two log slave quarters, and a mill house (N.T. 767-770, 781).

186. The West Branch of the Conococheague Creek flows through the Reese Farm for about one-half mile (N.T. 767-770, 782).

187. The Reese Farm is downstream from both the proposed spray irrigation site and the Borough's STP (N.T. 767, 780).

188. Barbara Reese believes the mill house on the Reese Farm was used by John Brown to hold meetings prior to his raid on Harper's Ferry, West Virginia (N.T. 772-773).

DISCUSSION

Burden of Proof

The first issue raised by the parties is the burden of proof. With respect to the Department's approval of the Plan Revision, the Board has repeatedly held that third-party appellants, such as the Township and Lee, bear the burden of proof when they file an appeal from the Department's approval of an official plan revision. *See*, 25 Pa.Code §21.101(c)(3); Loraine Andrews and Donald Gladfelter v. DER, *et al.*, 1993 EHB 548, 554. In order to satisfy their burden, the Township and Lee must prove, by a preponderance of the evidence, that the Department's approval of the Plan Revision was an abuse of discretion, arbitrary, capricious, or contrary to law. *See*, 25 Pa.Code §21.101(a); *Id.*

With respect to the Order, both the Township and Lee contend the burden of proof rests with the Department, while the Department and the Borough respond that the burden rests with the appellants. In support of their position, both the Department and the Borough cite the Board's decision in South Huntingdon Twsp. Bd. of Supervisors v. DER, 1990 EHB 197, 204, in which the Board found that a municipality bears the burden of proof when it appeals from a Department order requiring it to revise its official plan. In addition, the Borough cites 25 Pa.Code §71.12(f), which places the burden of proof on a municipality in an administrative action under 25 Pa.Code Ch. 71.[8]

[8]25 Pa.Code §71.12(f) states: "In a civil or administrative action taken under this chapter, the municipality shall have the burden to establish that its official plan or proposed revision complies with the requirements of this

The Borough's reliance on the provisions of 25 Pa.Code §71.12(f) is without merit. As the Board stated in Morton Kise, *et al.* v. DER, 1992 EHB 1580, 1604, this provision is inapplicable to a proceeding before the Board. The type of "action" referred to in §71.12(f) concerns implementation of the provisions of Chapter 71. While a proceeding before the Board can seek review of an "action taken under" Chapter 71, the proceeding itself cannot be such an action.

The Borough's and Department's reliance on the Board's decision in South Huntingdon Twsp. is, likewise, without merit. The issue in South Huntingdon Twsp. was whether a municipality bears the burden of proof when the Department orders it to revise its official plan pursuant to a private landowner request under 25 Pa.Code §71.14. The current appeal, however, is not from an order pursuant to a private landowner request. It is, instead, from an order pursuant to a Department finding that the Borough's existing STP, which treats sewage from the Township, is inadequate to effectively protect the waters of the Commonwealth. This matter, therefore, is more analogous to the situation faced by the Board in Carroll Twsp. Bd. of Supervisors v. DER, 1993 EHB 1290, *aff'd*, ___ Pa.Cmwlth. ___, 646 A.2d 738 (1994).

In Carroll Twsp., a municipality appealed from a Department order that required it to adopt an ordinance prohibiting final subdivision approval and the issuance of building permits before the Department approves its official plan revisions. 1993 EHB at 1291. Because the Department order required the municipality to take certain corrective actions, the Board placed the burden of proof in that appeal on the Department under 25 Pa.Code

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chapter."

§21.101(b)(3), which states that the Department shall have the burden of proof "[w]hen it orders a party to take affirmative action to abate air or water pollution . . . ." *Id.* at 1295.

In the present matter, the Department has ordered the Township to revise its official plan in order to correct unlawful discharges from the Borough's sewage treatment plant. The Order, therefore, requires the Township to take affirmative action, i.e. revise its official plan, to abate water pollution, i.e. the discharges from the STP. Accordingly, under 25 Pa.Code §21.101(b)(3), the burden of proof with respect to the Order must be on the Department.

The Borough nevertheless contends §21.101(b)(3) is inapplicable here because the Township is not causing the unlawful discharges from the Borough's STP, which is the pollution at issue in this proceeding. This response is without merit, however, because it overlooks the plain language of 25 Pa.Code §21.101(b)(3), which does not distinguish between an order directed at a party causing pollution and an order directed at a party not causing pollution. This provision, instead, focuses on the purpose of the Department's order, and whether it is concerned with abating pollution. Because the Order requires the Township to take some action to abate water pollution, the burden of proof must be on the Department.

The Order

The second issue raised by the parties is whether the Department exceeded the scope of its authority by ordering the Township to revise its official plan. Although ostensibly on the same side of this controversy, the Department and the Borough take surprisingly different views of the Order. According to the Borough, the issue here is not whether the Department acted

within the scope of its authority, but rather whether the Order was necessary in the first place. Surprisingly, the Borough does not cite any support for the Department's authority to issue the Order, but instead contends the Township's approval of the Plan Revision was not a prerequisite to Department approval of the Plan Revision and is irrelevant to the validity of the Plan Revision. The Department, on the other hand, admits the Township's approval was a prerequisite to approval of the Plan Revision and argues the Order was authorized by §10(1) of the Sewage Facilities Act, §203(b) of the Clean Streams Law, and the regulations promulgated thereunder.

The Township and Lee, meanwhile, both agree that the Department lacks the authority under the Sewage Facilities Act, Clean Streams Law, or regulations to order the Township to revise its official plan. They both also argue that the Order was an abuse of discretion because the Borough's proposed Plan Revision did not address the Township's "needs." In addition, Lee argues the Order impermissibly infringed on the Township's authority over land-use planning under the Municipalities Planning Code, 53 P.S. §10101 *et seq.*

- Was the Township's Approval Required?

The Borough argues the Department could have approved the Plan Revision without first securing the Township's approval, because §5(a) of the Sewage Facilities Act only gives the Township authority over sewage facilities planning within its own jurisdiction. Since the Township's current official plan already contemplates utilizing the Borough's sewerage system for a portion of the Township's sewage flows, the Borough contends there is no need for the Township to revise its official plan. Using this rationale, the Borough apparently believes the Township's official plan would be satisfactory if it merely stated that sewage flows from within the Township are collected

and conveyed to the Borough for treatment and disposal. This argument is without merit.

Under §5 of the Sewage Facilities Act, every municipality is required to adopt an official plan that provides for sewage services for areas within its jurisdiction. 35 P.S. §750.5. Contrary to the Borough's position, this official plan may not merely state that sewage flows are collected and conveyed to another municipality for treatment and disposal. Rather, under §5(d)(3), an official plan must provide for "adequate sewage treatment facilities," which includes the "system for sewage collection, conveyance, treatment and disposal." 35 P.S. §750.5(d)(3); 25 Pa.Code §71.1. To satisfy this requirement, the Department's regulations specify that an official plan must include, among other things, the location of treatment plants, their size, capacity, point of discharge, and the drainage basin they serve. 25 Pa.Code §71.21(a)(2)(i)(A).

Because sewage from within the Township is currently being collected and conveyed to the Borough's sewerage system for treatment and disposal (N.T. 391, 566, 586), and the Plan Revision proposes to change the method by which the Township's sewage is treated and disposed of, the Township's official plan must be revised. If the Township's official plan is not revised, it will not accurately describe the collection, conveyance, treatment, and disposal of sewage from areas within its jurisdiction.

The Board's position is supported by the Department's regulations, which anticipated this and similar situations. Under 25 Pa.Code §71.32(d)(7),

the Department must consider, in approving or disapproving an official plan revision:

> Where the official plan or official plan revision includes proposed sewage facilities connected to or otherwise affecting sewage facilities of other municipalities, whether the other municipalities have submitted necessary revisions to their plans for approval by the Department.

"Sewage facilities" are defined to be "[a] system of sewage collection, conveyance, treatment and disposal . . . ." 25 Pa.Code §71.1. Because implementation of the Plan Revision will affect the manner in which the Township's sewage is treated and disposed of, the Department could not approve the Plan Revision until the Township revised its official plan to reflect these proposed changes.

- The Department's Authority to Order Plan Revisions

Having determined that the Department could not approve the Plan Revision until the Township also revised its official plan, the next issue to consider is whether the Department had the authority to issue the Order, which required the Township to adopt the Plan Revision as a revision to its own official plan. In arguing the Department lacked the authority to order a municipality to revise its official plan, the Township and Lee attempted to overlook the express language of §10(1) of the Sewage Facilities Act and §203(b) of the Clean Streams Law. Their position is without merit.

Section 10(1) authorizes the Department "[t]o order municipalities to submit official plans and revisions thereto within such time and under such conditions as the rules and regulations promulgated under this act may provide." 35 P.S. §750.10(1). The regulations promulgated under this act provide that a municipality "shall review and revise [its] official plan[] whenever the municipality or the Department determines that the plan is

inadequate to meet the existing or future sewage disposal needs of the municipality or portion thereof." 25 Pa.Code §71.12(a). Section 203(b) of the Clean Streams Law, meanwhile, authorizes the Department to "issue appropriate orders to municipalities where such orders are found to be necessary to assure that there will be adequate sewer systems and treatment facilities to meet present and future needs or otherwise to meet the objectives of this act." 35 P.S. §691.203(b). Given the express language of these statutory provisions, the Board finds that the Department had the authority to order the Township to revise its official plan.

Both the Township and Lee further contend the Order was an abuse of discretion because the Plan Revision failed to address the Township's "needs." This position is also without merit. In making this argument, the Township and Lee overlook the fact that sewage from the Township is currently being conveyed to the Borough's sewerage system, and that the Borough's STP is unable to adequately to treat the sewage flows it receives. Because the Plan Revision proposes the spray irrigation system in order to adequately treat and dispose of all of the sewage flows in the Borough's sewerage system, the Plan Revision meets the Township's "needs." Although the Township and Lee would like the Plan Revision to take into account the Township's *future* sewage facilities needs, this responsibility falls on the Township under §5(a) of the Sewage Facilities Act and §§71.12(a) and 71.21(a)(3) and (4) of the Department's regulations. If the Township believes certain areas within its jurisdiction need public sewage services, the Township may amend its official plan to provide such services. *See*, 35 P.S. §750.5(a) (a municipality may at any time initiate and submit to the Department revisions of its official

plan). The Borough has no responsibility to plan for the Township's future sewage facilities needs.

Lee further argues that the Order was an abuse of the Department's discretion because it preempted the Township's authority over local land-use planning under the Municipalities Planning Code, 53 P.S. §10101 *et seq.* According to Lee, the Department's duty under the Sewage Facilities Act extends only to the proposed method of treatment and disposal, and the Department may not interfere with a municipality's authority over land-use planning. This position is also without merit. Even if the Board were to accept Lee's legal argument concerning the relative authority of the Department and the Township, there is no evidence in the record to show that the Order actually interfered with the Township's land-use planning, or that application of the Township's land-use planning ordinances would conflict with the Order. Without such evidence, the Board cannot conclude that the Order should not have been issued or that it should have been issued under different terms. If the Board cannot reach either of those conclusions, the Board cannot find that the Order, in its present form, was an abuse of discretion.

In conjunction with Lee's argument regarding land-use planning, the Township last argues that the Order was an abuse of discretion because it infringed on the Township's authority, under §8 of the Sewage Facilities Act, over the content of its own official plan. Section 8, however, does not authorize a municipality to specify the content of its official plan, but instead authorizes a municipality to administer the permitting provisions of §7. 35 P.S. §750.8(a). Moreover, even if the Board were to agree that a municipality is ultimately responsible for the contents of its official plan, the Order would not have been an abuse of discretion because it allows the

Township to reach a different agreement with the Borough regarding sewage services. In other words, if the Township was unhappy with the terms of the Plan Revision, it could have reached a separate agreement with the Borough. The Township, therefore, cannot complain that the Department has specified the contents of the Township's official plan.

Because the Department has the express authority to order the Township to revise its official plan and neither the Township nor Lee have offered any evidence that the Order was an abuse of discretion, the Order is affirmed and the Township's and Lee's appeals from the Order are dismissed.

The Plan Revision

Having determined that the Department could not approve the Plan Revision without it first being adopted by the Township, and that the Department had the authority and did not abuse its discretion in ordering the Township to approve the Plan Revision, the Board must now consider whether the Department abused its discretion in approving the Plan Revision. In their post-hearing briefs, the parties raised several issues for the Board's consideration: 1) What standard must the Department apply in determining whether to approve an official plan revision? 2) Did the Plan Revision satisfy that standard? 3) Did the Department's approval of the Plan Revision violate the Historic Preservation Act or Article I, §27, of the Pennsylvania Constitution?

- Planning vs. Permitting

The primary issue for the Board to resolve in this adjudication is the standard the Department must apply in approving an official plan revision. In order to resolve this issue, the Board begins with a short review of the

planning and permitting requirements imposed by the Sewage Facilities Act and the Clean Streams Law.

It is well established that the regulation of sewage facilities in the Commonwealth involves multiple stages of Department approval. Estate of Charles Peters, *et al.* v. DER, 1992 EHB 358. With respect to a spray irrigation system, such as the one proposed by the Plan Revision, both planning and permitting approvals must be secured. Under the Sewage Facilities Act, a municipality proposing to use a spray irrigation facility must first revise its official sewage facilities plan to reflect its intent to use this method of sewage treatment and disposal. After the Department has approved the official plan revision, the permittee may then apply for a Part II (Water Quality Management) Permit under the Clean Streams Law for permission to construct and operate the system (Jt.Ex. 94). *See*, Cesar Munoz, *et ux.* v. DER, EHB Docket No. 93-373-MR (Opinion issued February 16, 1995).

The Board has found, on numerous occassions, that issues related to the siting of a sewage facility must be resolved at the planning stage. *See*, *e.g.*, Cesar Munoz, *supra.*; Bobbi Fuller v. DER, 1990 EHB 1726; Dwight Moyer v. DER, 1989 EHB 928. Because the location and siting of a sewage facility is to be resolved at the planning stage, the Township and Lee contend the Department's approval of the Plan Revision was an abuse of discretion. Given the nature of spray irrigation, in which the site itself provides the means by which the sewage is treated and disposed of, the Township and Lee argue the exact configuration of the spray fields must be resolved when the site is chosen.

Both the Borough and the Department respond that the exact configuration of the spray fields is not an issue related to the siting of the

facility, but rather to the operation of the facility, which is resolved at the permitting stage. The issue at the planning stage, the Borough and the Department argue, is whether the selected site is generally suitable for the proposed method of sewage treatment and disposal.

In support of this position, the Borough cites the Board's decision in Eagle's View Lake, Inc. v. DER, 1978 EHB 44, in which the Board was faced with an appeal from a Department denial of an official plan revision. There, the Department denied the revision because it proposed the use of on-lot disposal systems in an area deemed to be unsuitable for such use. *Id.* In reviewing the Department's decision, the standard employed by the Board was "whether the evidence . . . indicates that the tract is so clearly unsuitable that any plan for its use for residential purposes with on-lot sewage disposal should be blocked at the planning stage." *Id.* at 51. After reviewing the evidence, the Board found that the plan revision should not have been rejected on the basis of overall or general suitability. *Id.* at 53.

The Borough also cites the Board's decision in Haycock Twsp. v. DER, 1985 EHB 321, in which the Board was faced with an appeal by a municipality from a Department order requiring it to revise its official plan. There, the Board stated that the Department's review of an official plan does not have to determine with 100% certainty that the proposal will be successful, but rather whether the site is generally suitable for the method of treatment and disposal chosen and has a reasonable chance for success. *Id.* at 331. Given this standard, the Board found that "[i]n order to overturn a DER approval of a plan revision, an appellant must show that a site is clearly

unsuitable for the method of sewage disposal that the plan revision indicates." *Id.*

While these opinions seem, at first glance, to support the Borough's position, the Borough fails to recognize that they were decided before the Department promulgated the current version of its planning regulations. *See*, 19 *Pa.B.* 2429. Of particular interest here are the requirements contained in 25 Pa.Code §71.61(d), which states:

> Approval of official plans and revisions shall be based on:
> (1) The technical feasibility of the selected alternative in relation to applicable regulations and standards.
> (2) The feasibility for implementation of the selected alternative in relation to applicable administrative and institutional requirements.

Given the express language of §71.61(d), the standard for approving or disapproving a plan revision can no longer be general site suitability.

The Township and Lee rely on the language of §71.61(d) to support their position that the Department could not have approved the Plan Revision unless the spray fields depicted in the Plan Revision were capable of accepting the amount of spray contemplated for this system. This position, however, is without merit. Although the plan revision must demonstrate "technical feasibility," this does not mean, as the Township and Lee argue, that the Department could not approve the Plan Revision unless it was 100% certain the proposed spray irrigation system could be implemented. Such a construction of the Department's regulations would be absurd, since it would make the application for a Water Quality Management Permit meaningless. Because the rules of statutory construction apply to regulations as well as statutes, F.O.P. Lodge No. 5 v. Philadelphia, 590 A.2d 384, 139 Pa.Cmwlth. 256 (1991), *alloc. denied*, 529 Pa. 670, 605 A.2d 336, *alloc. granted*, 530 Pa. 634,

606 A.2d 904, *appeal dismissed*, ___ Pa. ___, 632 A.2d 873, the Board must presume that the Department did not intend an absurd result or a result that effectively ignored other portions of its regulations. *See*, 1 Pa.C.S. §1922(1) and (2).

The Department's use of the term "feasibility" suggests that the Plan Revision need not be absolutely certain. *See*, *Webster's Ninth New Collegiate Dictionary* (the term "feasible" is defined as "capable of being done"). This position is supported by other provisions within the Department's planning regulations. For example, under 25 Pa.Code §71.21(a)(5)(vi), a plan revision must, among other things, determine whether each of the discussed alternative methods of sewage treatment and disposal are able to be implemented. Similarly, under 25 Pa.Code §71.32(d)(4), the Department must consider, in approving or disapproving an official plan revision, whether the revision is able to be implemented. Given the express language of the Department's planning regulations and the fact that site selection occurs at the first stage of the sewage facilities process, the Board finds that in order to gain plan approval, a proposed spray irrigation facility must be capable of satisfying the technical regulations and standards applicable to spray irrigation facilities.

This standard, of course, merely begs the question - what information must be provided to the Department at the planning stage? Is it, as the Township and Lee claim, necessary to specifically define the configuration of spray fields, spray rates, crop patterns, etc.? Or, must a municipality, as the Borough claims, merely provide a general outline of the site selected for a proposed spray irrigation facility? Unfortunately, because the characteristics of a site are absolutely critical to the success

of a spray irrigation facility, this issue must be resolved on a case-by-case basis. As much as the Board would like to draw a bright line to provide guidance for future planning situations, it simply is not possible. Where a site is so obviously suitable for spray irrigation,[9] a municipality might not have to provide much information to prove that its official plain revision is technically feasible (capable of satisfying the technical standards and regulations applicable to spray irrigation systems). On the other hand, in situations where there is grave concern about the suitability of a particular site, because of preliminary findings concerning soils, geology, hydrogeology, etc., a municipality might have to provide much more detailed findings. There simply is no way for the Board to adopt a clearer standard.

However, because this is just the planning stage, in no instance will the Board require a municipality to submit all of the information necessary to receive a Water Quality Management Permit. As long as the evidence indicates that a proposed site is capable of renovating the volume of flow in the sewage system, the configuration of the spray fields, the spraying seasons, the spray rates, and the crop pattern may all be adjusted at the permitting stage.

Having somewhat clarified the applicable standard for review, the Board now turns its attention to whether this Plan Revision is capable of satisfying the technical standards and regulations applicable to spray irrigation facilities. The Township and Lee contend the Plan Revision is unacceptable (and the Department's approval of the Plan Revision was, therefore, an abuse of discretion) for the following reasons: potential for

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[9]The Board can imagine such an instance where the preliminary site investigation reveals deep, well drained soils over the entire site and no limiting geological or topographical formations.

groundwater mounding; bedrock outcrops in the spray fields; sinkholes and closed depressions; potential for groundwater contamination; soils at the site and spray rates; and storage capacity.[10] The Township and Lee also raise several challenges based on the proposed system's impact on historical resources.

- Potential for Groundwater Mounding

A groundwater mound is a localized area of elevated groundwater levels that occurs when water from a spray irrigation system infiltrates the ground, reaches the water table as recharge, and causes a rise in the water table beneath and adjacent to the spray area (Jt.Ex. 102). The Township and Lee contend the Department's approval of the Plan Revision was an abuse of discretion because use of the proposed spray irrigation system would cause excess groundwater mounding beneath the west spray field. In support of this position, the Township offered the testimony of Jeffrey Peffer, an expert in geology and hydrogeology. Mr. Peffer was of the opinion that the spray fields depicted in the Plan Revision would be too small to meet the stated need for disposal of 300,000 gallons of wastewater per day (N.T. 32, 71). Using a computer model, Mr. Peffer determined that the annual addition of 70-80 inches of spray irrigation would lead to the development of a groundwater mound along the western edge of the west field (N.T. 47-50). According to Mr. Peffer,

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[10]In its post-hearing brief, Lee argues it is entitled to an inference that the testimony of John Sheaffer of Future Water, and Mark Sigouin and Lester Rothermel of the Department, would have been adverse to the Borough's and Department's positions, because none of them were called to testify at the hearing. *See, e.g.*, Downey v. Weston, 451 Pa. 259, ____, 301 A.2d 635, 640 (1973). In Downey, however, the court reiterated that this inference will be granted only if the party claiming it can show that the witness was unavailable to be called at the hearing. *Id.* Having failed to make such a showing, Lee's argument is rejected.

such a groundwater mound would result in a breakout of springs consisting essentially of untreated wastewater (N.T. 50).[11]

In response, the Borough offered the testimony of Stephen M. Snyder, an expert in geology and hydrogeology (N.T. 1182). Mr. Snyder also modeled the effects of spray irrigation on the west field, and determined, as had Mr. Peffer, that application of spray over the west field depicted in the Plan Revision would cause a groundwater mound to form beneath the western edge of the west field (N.T. 1200). However, after moving the western edge of the west field to the east, Mr. Snyder's computer model predicted a much smaller groundwater mound of approximately ten feet in height on the western edge and only five feet in height on the eastern edge (N.T. 1201). An isopac map of the reconfigured west field showed between 7 to 30 feet of unsaturated soil from the ground surface to the groundwater table (N.T. 1201; Jt.Ex. 124, Figure 14). Given the size of the groundwater mound beneath this smaller west field, Mr. Snyder was of the opinion that the Plan Revision was technically feasible (N.T. 1215).[12]

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[11]Although not necessary for the resolution reached by the Board, it is interesting to note that Mr. Peffer's model was based on the addition of 350,000 gallons per day of wastewater, 50,000 gallons or 1.2 times more than the design load of the proposed spray irrigation system (N.T. 104-106).

[12]Lee solicited the testimony of Alan M. Jacobs, Ph.D., who was qualified by the Board as an expert in the field of geology (N.T. 657, 666). Dr. Jacobs performed no independent studies of the potential for groundwater mounding beneath the west field and his opinions were limited to criticisms of the mounding analyses contained in the Plan Revision and conducted by Mr. Snyder. After reviewing Mr. Snyder's groundwater mounding analysis and reworking the calculations performed by Mr. Snyder, Dr. Jacobs predicted that operation of the spray irrigation system on the reduced west field would result in a groundwater mound of 36 feet or more in as little as 30 *days* (N.T. 1419-1421). In contrast, Mr. Peffer and Mr. Snyder offered groundwater mound predictions of 20 and 10 feet, respectively, over the course of several *years* (N.T. 49, 1201-1202; Jt.Ex. 102). Because Dr. Jacobs' opinions were not based on his own analyses and appear to be somewhat exaggerated, the Board must accord more weight to the testimony of Mr. Peffer and Mr. Snyder.

The Township and Lee argue that Mr. Snyder's groundwater mounding analysis supports their position that the spray fields depicted in the Plan Revision would be inadequate to handle the flows from the Borough's sewerage system. While it is true that Mr. Snyder's analysis has demonstrated that the west field depicted in the Plan Revision should not receive spray over its entire area, the Department's approval of the Plan Revision was not an abuse of discretion. The Township and Lee assume that the exact configuration of the spray fields was established in the Plan Revision. As the Board explained above, a plan revision need not be 100% certain. Instead, a plan revision need only demonstrate that the proposed method of sewage treatment and disposal is capable of satisfying the technical standards and regulations applicable to such methods. With respect to the proposed spray irrigation system, the exact configuration of the spray fields will be determined at the permitting stage. Because the configuration of the west field can be manipulated to reduce the effect of groundwater mounding, Mr. Snyder's testimony shows that the proposed spray irrigation system is capable of satisfying the technical standards and regulations applicable to such systems.[13]

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[13]In its post-hearing brief, Lee makes a vague reference to its concerns about what the Department considers to be the "site" of this project. In support, Lee cites the testimony of Edward Corriveau, Chief of the Planning and Finance Section of the Department's Southcentral Regional Office, who considered the site to be the entire 285 acre Barnhart Farm even though the Borough would only purchase 100 acres and use 55 acres for spray fields. This argument is without merit, though, because the burden of proof in this appeal is on Lee to show that the Department's approval was an abuse of discretion. If Lee did not believe the reconfigured spray fields would fit on the land purchased by the Borough, Lee must present evidence to support that position. Finding no such evidence in the record, the Board declines to pursue this argument any further.

- Bedrock Outcrops

The Township also offered the testimony of Mr. Peffer to show that the spray fields, as depicted in the Plan Revision, would be too small because they were littered with bedrock outcrops which were removed by the Borough's contractor. According to Mr. Peffer, spray irrigation should not take place over areas from which bedrock outcrops have been removed because the soil there is generally too shallow to properly renovate the wastewater and the removal process often disturbs the underlying bedrock, creating a permeable zone through which wastewater can easily flow (N.T. 52, 54).

The evidence in the record does not conclusively establish whether bedrock outcrops were removed from the area of the depicted spray fields. None of the witnesses at the hearing testified that Rockwell Contracting Co., the contractor hired to remove rocks from the spray fields, used means typically required to remove bedrock outcrops (N.T. 110-112, 464-465, 1224). However, even assuming that Mr. Peffer is correct, and bedrock outcrops were removed, the Department did not abuse its discretion in approving the Plan Revision.

What the evidence in the record does show is that the alleged bedrock outcrops did not occur throughout the site (Jt.Ex. 96 (Rock Location Plan)). The evidence further shows that the soils on the site were generally not too shallow, as Mr. Peffer feared. Given the evidence regarding bedrock outcrops and shallow soils, the Board finds that the configuration of the spray fields may have to be adjusted at the permitting stage to account for areas over which no spray will be allowed. As the Board explained above, the exact configuration of the spray fields is not determined in the Plan Revision, but will instead be established at the permitting stage.

- Sinkholes and Closed Depressions

The record clearly shows that spray irrigation should not occur over sinkholes or closed depressions because these features allow wastewater to funnel quickly into the bedrock without adequate renovation or filtration from the soil (N.T. 64, 157, 1218; Jt.Ex. 94, §2.2.1.2). The Township and Lee contend the Department's approval of the Plan Revision was an abuse of discretion because the site is predisposed to sinkhole activity.

The evidence is clear that sinkholes and closed depressions exist on and around the spray fields depicted in the Plan Revision. The Department, in fact, already specified one closed depression on the west field over which no spraying would be allowed (Jt.Ex. 55). In addition to these existing features, Mr. Peffer was of the opinion that the site was subject to a fair amount of sinkhole activity and that a change in the hydrogeologic regime resulting from spray irrigation could lead to additional sinkhole development (N.T. 62, 65). Mr. Peffer later admitted, though, that the risk of sinkholes and closed depressions is common in all limestone areas and that the potential for sinkhole development is diminished by a uniform application rate spread over a wide area (N.T. 117, 148).

None of this evidence establishes that the Department abused its discretion in approving the Plan Revision. The final configuration of the spray fields and spray patterns will account for the presence of existing sinkholes or closed depressions. The Department's *Manual for Land Application of Treated Sewage and Industrial Wastewater* (*Spray Manual*) expressly prohibits spray irrigation over these features (Jt.Ex. 94). Furthermore, the Plan Revision proposes that wastewater be applied at a rate of one-quarter inch every six hours, as opposed to all at once (N.T. 148, 1068; Jt.Ex. 122). And

finally, any sinkholes that do develop in the spray fields may be repaired, since wastewater is renovated by the soil and not the underlying limestone (N.T. 1219).

- Groundwater Contamination

Another area of concern raised by the Township and Lee is the possibility that the proposed spray irrigation system will cause groundwater levels of total dissolved solids (TDS) to exceed 500 mg/l.[14] TDS levels in the groundwater beneath the site already exceed 400 mg/l (N.T. 66). In support of their position, the Township again elicited the testimony of Mr. Peffer, who stated that application of the volumes of wastewater contemplated by the Plan Revision would result in TDS levels both on- and off-site in excess of 500 mg/l (N.T. 66-67). Even if TDS levels in the Borough's wastewater were only about 300 mg/l, Mr. Peffer maintained that evaporation and transpiration would cause a 35-40% loss of water in the wastewater, thereby concentrating TDS levels in the wastewater that remained (N.T. 142, 145; Jt.Ex. 145).

In response, the Borough offered the testimony of Bruce Willman, a consulting soils scientist with R.E. Wright & Associates (N.T. 1034). Mr. Willman did not believe that the proposed spray irrigation system posed a threat to TDS levels beneath the spray fields (N.T. 1069-1079). As Mr. Willman pointed out, Mr. Peffer did not account for the uptake of certain TDS, such as nitrogen and phosphorous, by plants, which would dilute the effect of water lost due to evaporation and transpiration (N.T. 1077, 1097). Finally, Mr. Willman testified TDS cannot accumulate in the groundwater because the

[14]The secondary maximum contaminant level for TDS in public water supplies is 500 mg/l. 25 Pa.Code §109.202(b); 40 C.F.R. §143.3.

site already receives 12 inches more in precipitation than it annually loses to evapotranspiration. Total dissolved solids cannot accumulate under these conditions because excess water from precipitation will further dilute the wastewater (N.T. 1076-1077).[15]

Because Mr. Peffer failed to take into account the uptake of TDS by plants and did not explain how there could be an accumulation of TDS when precipitation at the site already exceeds evapotranspiration, the Board finds Mr. Willman's testimony to be more persuasive than Mr. Peffer's. Accordingly, the Township and Lee have failed to show that the potential for groundwater contamination is a basis for finding the Department's approval of the Plan Revision to have been an abuse of discretion.

The Township also contends the Department's approval was an abuse of discretion because the Plan Revision did not contain a dispersion plume analysis as required by the Department's *Spray Manual* (Jt.Ex. 94). This position is also without merit. At §2.2.4, the *Spray Manual* states:

> The applicant must conduct a dispersion plume analysis for any parameters that are not adequately removed by the soil for industrial waste or sewage effluent land application systems. For example, because the nitrate-nitrogen of domestic sewage is not removed by the soil, the applicant must estimate its concentration at the property line. Also, the applicant must estimate the extent and shape of the dispersion plume, including the mixing and buffer zones. This must be estimated for normal precipitation and drought years.

(Jt.Ex. 94). The Township offers the Board no reason why this information must be considered at the planning stage to show that the proposed spray irrigation facility is capable of satisfying the technical standards and

[15]In contrast, if evapotranspiration exceeded precipitation, some of the moisture in the wastewater would be lost to evapotranspiration and the TDS not taken up by plants could become more concentrated.

regulations applicable to spray irrigation. Because groundwater flow beneath the site is not in one uniform direction (Jt.Ex. 124), the dispersion plume in this and many other situations will depend upon the configuration of the spray fields.[16] This issue, therefore, is more appropriately resolved, along with other operation issues, at the permitting stage.

- Soils and Spray Rates

On January 28, 1992, the Department sent a letter to the Borough informing the Borough that the Department had reviewed the Plan Revision and found it to be "technically complete and feasible" (Jt.Ex. 50). The letter also explained that the Department was prepared to discuss the preliminary permitting requirements for the proposed spray irrigation system, and outlined the general parameters of the project (*Id.*). In particular, the letter stated:

> In general, the west field utilizing approximately 36.9 acres may receive a total annual application of 80 million gallons of treated wastewater. The proposed spray area known as the east field which includes approximately 18 acres may utilize approximately 45 million gallons. The Department has assessed the spray rates based upon a monthly flow and application rate. As you know, we have spent time researching and analyzing your proposed spray methodology and rates. A table for the fields and seasonal or monthly application rates are as follows:

	West Field (36.88 Ac)	
Time Period	Rate	Maximum Gallons Applied Entire Period
March	1.75 in.	
April	1.75 in.	21,154,490
May	1.75 in.	

[16]We are not willing at this juncture to eliminate the possibility that, in a given situation, the dispersion plume will be an appropriate subject at the planning stage.

June	3.0 in.	
July	3.0 in.	39,479,700
August	3.0 in.	
September	1.75 in.	
October	1.75 in.	21,154,490
November	1.75 in.	

<u>East Field (18.14 Ac)</u>

March	2.0 in.	
April	2.0 in.	11,891,615
May	2.0 in.	
June	3.5 in.	
July	3.5 in.	22,654,845
August	3.5 in.	
September	2.0 in.	
October	2.0 in.	11,891,615
November	2.0 in.	

(*Id.*). The letter was signed by Edward Corriveau, Chief of the Planning and Finance Section of the Department's Southcentral Regional Office (N.T. 506).

The Township and Lee contend this letter established the maximum spray rates for the proposed spray irrigation project and that these maximum rates are too high for the soils on the site. This position is without merit. Mr. Corriveau's responsibility as Planning and Finance Chief is to review the general technical feasibility of a project, not the construction drawings or permit application (N.T. 520). The spray rates set forth in the January 28 letter were only established to determine whether the site could receive the amount of spray irrigation proposed by the Plan Revision (N.T. 1367; Jt.Ex. 50). The maximum allowable spray rates will, instead, be determined at the permitting stage using a land limiting constituent analysis, much like the one performed by Mr. Willman (N.T. 221, 526, 552, 1051, 1110, 1366; Jt.Exs. 50, 94, 122). *See*, <u>Cesar Munoz</u>, *supra*. (the Water Quality Management Permit specified spray rates for the spray irrigation system).

The Township further contends the Department's approval of the Plan Revision was an abuse of discretion because it did not contain a groundwater module, as required by the Department's 1972 *Spray Irrigation Manual* (1972 *Spray Manual*) (Jt.Ex. 4). This argument, too, is without merit. The 1972 *Spray Manual* states that each spray irrigation facility will require a permit from the Department under the Clean Streams Law and that "[a] permit application, design report, plans and specifications are required for consideration of a facility. As part of the design report, the Department will require completion of the Ground Water Module 5-A and Spray Irrigation Module 22-A" (Jt.Ex. 4). The groundwater module to which the Department referred, therefore, is only required when the applicant applies for a spray irrigation permit under the Clean Streams Law. It is not required for the Department to consider an official plan revision under the Sewage Facilities Act. This position is supported by the appendix to the 1972 *Spray Manual*, which states that "Sections I thru V and VII of Phase I [of Ground Water Module 5-A] must be submitted when applying for a spray irrigation permit." Given this language, the Board finds that even if the 1972 *Spray Manual* is applicable to these proceedings, the Department did not abuse its discretion in approving the Plan Revision without a groundwater module.[17]

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[17]Citing the Board's decision in Franconia Twsp. v. DER, 1991 EHB 1290, the Township contends the Board should look only to the 1972 *Spray Manual* for the Department's policy regarding spray irrigation facilities. In Franconia Twsp., the Board found that the regulations in effect on the date of the Department's decision were controlling. 1991 EHB at 1295. The Township requests the Board now find that the Department's policies in effect on the date of the Department's decision also be controlling. Since the 1993 *Spray Manual* was not published until August 1993 and the Department issued the Order to the Township in March 1993, the Township argues the 1972 *Spray Manual* should be controlling. The Board disagrees. The Department action at issue here is the August 26, 1993, approval of the Plan Revision, not the March 18 Order to the Township. Accordingly, the policy in effect when the Department approved the Plan Revision was the 1993 *Spray Manual*.

The Township also contends the Department's January 28 letter allowed the proposed spray irrigation facility to exceed the recommended rates set forth in the 1993 *Spray Manual* without a land limiting constituent analysis. As the Board has already explained, the maximum allowable spray rates for this spray irrigation facility will be set forth in its Water Quality Management Permit and will be determined through the use of the land limiting constituent analysis to which the Board has previously referred.

- Storage Capacity

In a final challenge to the merits of the Plan Revision, Lee contends the Department's approval was an abuse of discretion because the proposed spray irrigation facility lacks adequate storage capacity to handle the Borough's sewage flows. This position is without merit. In support of this argument, Lee relies on the flow rates set forth in the Department's January 28 letter and on the assumption that no spraying will be allowed during the months of November, December, and January. As the Board has already stated, these issues have not yet been finally determined. They will be resolved at the permitting stage. Until the flow rates and spray seasons are conclusively established, there is no evidence for the Board to review to determine whether Lee's assertion has merit. Accordingly, Lee's challenge to the storage capacity of the proposed system must fail.

Given the Township's and Lee's challenges to the Plan Revision and the evidence in the record, the Board finds that the proposed spray irrigation facility is capable of satisfying the technical standards and regulations applicable to spray irrigation systems.

The Historic Preservation Act

In addition to challenging the technical feasibility of the Plan Revision, Lee also raises two non-technical challenges. Lee first argues the Department's approval of the Plan Revision violated §8(4) of the Historic Preservation Act, 37 Pa.C.S. §508(4), because the Department failed to ensure, through its policies and procedures, that this action would preserve and enhance the historic resources of the Commonwealth. Lee is concerned, in particular, about the effects of the proposed spray irrigation facility on the Reese farm, which is located approximately one mile downstream from the spray site.

Under §8(4) of the Historic Preservation Act, all Commonwealth agencies shall "[i]nstitute procedures and policies to assure that their plans, programs, codes, regulations and activities contribute to the preservation and enhancement of all historic resources in this Commonwealth." 37 Pa.C.S. §508(4). Although §8(4) focuses on the Department's policies and procedures, Lee focuses its challenge on the effects of the proposed spray irrigation system on the Commonwealth's historic resources. In other words, Lee does not identify for the Board which Department procedures and policies were inadequate in light of the requirements of §8(4). Contrary to what Lee must believe, the Board will not assume the responsibility to review every Department policy and procedure applicable to sewage facilities planning. If Lee had certain policies or procedures in mind, the burden was on Lee to present them and show how they did not satisfy the requirements of §8(4). Having failed to do so, the Board will not consider Lee's argument any further.

Even if the Board were to review the Department's regulations in light of §8(4), the Board would be satisfied that they fulfill the Department's responsibilities under §8(4). The Department's regulations expressly require a proposed plan revision to evaluate the consistency between each alternative method of sewage treatment and disposal with the objectives and policies of §7 of the Historic Preservation Act, 37 Pa.C.S. §507 (relating to cooperation by public officials with the Pennsylvania Historical and Museum Commission). 25 Pa.Code §71.21(a)(5)(i)(K). Under §7, Commonwealth agencies, including the Department, must cooperate fully with the Pennsylvania Historical and Museum Commission (Historical Commission) in the "preservation, protection and investigation of archaeological resources." 37 Pa.C.S. §507(a). As applied to the Department's approval of an official plan revision, §7(a)(1)-(3) requires that the Historical Commission be notified if a project may affect archaeological sites and be provided with information concerning the project. *See*, 37 Pa.C.S. §507(a)(1)-(3). If the Historical Commission receives such notification, it is authorized under §7(b) to conduct a survey or otherwise investigate the archaeological resource in question. 37 Pa.C.S. §507(b).

This procedure apparently also satisfies the Historical Commission. On November 5, 1992, the Historical Commission's Bureau for Historic Preservation notified the Borough that the proposed spray irrigation project was reviewed for its potential effects upon both historic and archaeological resources. In the Bureau's opinion, the project will not have any effect on either archaeological resources or historic structures (Jt.Ex. 71). Accordingly, the Board finds that the Department did not violate §8(4) of the Historic Preservation Act by approving the Plan Revision.

Article I, §27 of the Pennsylvania Constitution

In conjunction with the argument concerning the Department's failure to satisfy the requirements of the Historic Preservation Act, the Township and Lee also contend the Department's approval of the Plan Revision violated Article I, §27, of the Pennsylvania Constitution[18] because the Department failed to review the effects of the proposed spray irrigation facility on the scenic, aesthetic, and historic resources of the surrounding area.

The Township first argues that the Department may not just rely on the findings of the Historical Commission concerning the effects of the proposed spray irrigation facility on historical resources, but must instead exercise its own independent judgment. In support, the Township cites the Board's decision in Twsp. of Heidelberg, *et al.* v. DER, 1977 EHB 266. The Township's reliance on this decision is misplaced. In Twsp. of Heidelberg, the Board found that the Department, in reviewing an official plan revision, had simply accepted the municipality's decisions regarding the merits of that revision instead of exercising its own independent judgment. *Id.* at 273. Because the Department is vested with oversight authority under the Sewage Facilities Act and applicable regulations, the Board held that the Department's failure to exercise any discretion in approving the official plan revision was itself an abuse of discretion. *Id.*

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[18]Article I, §27, states: "The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and aesthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of the people."

In the situation currently before the Board, the Department has not simply accepted the findings of a municipality that has already adopted an official plan revision, but is instead deferring to the judgment of another Commonwealth agency with superior expertise in the field of historical and archaeological resources. While the Department has the authority under the Sewage Facilities Act to approve or disapprove a proposed sewage treatment facility, the Historic Preservation Act has authorized the Historical Commission to take a range of actions to survey, recover, or preserve the archaeological and historical resources of the Commonwealth. *See*, 37 Pa.C.S. §502, 507, and 508. To require the Department to conduct its own investigation of archaeological and historical resources would be a waste of Department time and energy, especially in light of the requirement in 25 Pa.Code §71.21(a)(5)(i)(K), which the Board described in detail, above. Accordingly, the Board finds that Article I, §27, does not require the Department to conduct an independent investigation of archaeological and historical resources if the Historical Commission has already determined that a spray irrigation facility proposed in an official plan revision will not adversely affect the Commonwealth's archaeological and historical resources.[19]

The Township further argues the Department's approval of the Plan Revision violated Article I, §27, because the Department failed to balance the

[19]Given the result reached here, there is no need to resolve the Borough's motion *in limine*, which was raised at the hearing and renewed in the Borough's post-hearing brief, to disallow the testimony of the Township's expert on archaeological and historical resources.

benefits of this project against its costs.[20] Although this project will result in the elimination of a surface discharge to Johnston Run, the Township contends this benefit is achieved at the cost of groundwater contamination beneath the site. This position is without merit. First and foremost, the Township offered no evidence, in the form of testimony by Department personnel or otherwise, to show that the Department had not balanced these interests. The evidence of record, in fact, would seem to point to the opposite conclusion, since the Department had expressed repeated concerns about water quality in Johnston Run and had expressed hope that spray irrigation was a viable alternative to a surface discharge (Jt.Exs. 7-9, 12-14, 50, and 60).

Even if the Board were to find that the Department failed to balance these interests, the record shows that the costs of the project, as alleged by the Township, do not outweigh its benefits. *See*, Morton Kise, *et al.* v. DER, 1992 EHB 1580, 1620 (when the Department fails to conduct the balancing of interests required by Article I, §27, the Board may conduct its own balancing). As discussed above, the Township and Lee have failed to prove that the proposed spray irrigation would cause groundwater levels of TDS to exceed 500 mg/l. Since neither the Township nor Lee have offered evidence of any other type of groundwater contamination, the Board must conclude there are

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[20]In Payne v. Kassab, 468 Pa. 226, ___, 361 A.2d 263, 273, the Supreme Court stated that in order to determine whether there has been compliance with Article I, §27, the court needs to consider the following:

1) Has there been compliance with all applicable statutes and regulations relevant to protecting the environment?

2) Has there been a reasonable effort to reduce environmental incursion to a minimum?

3) Does the environmental harm so clearly outweigh the benefits so that to proceed would be an abuse of discretion?

In making this argument, the Township is taking the position that the Department failed to satisfy the third prong of the Payne test.

no environmental costs from this project and any balancing of the interests would weigh in favor of allowing the project to proceed.

The last argument raised by the Township and Lee is that the Department's approval of the Plan Revision violated Article I, §27, because the Department failed to assure that the proposed spray irrigation project will not harm the scenic, aesthetic, and historic values of the area. In support of this position, the Township and Lee cite the Board's decisions in Loraine Andrews and Donald Gladfelter v. DER, *supra*, and Morton Kise v. DER, *supra*. This argument is without merit.

In both Andrews and Gladfelter and Morton Kise, the appellants argued that the Department did not satisfy its duties under Article I, §27, because it failed to consider the effects of proposed residential subdivisions on surrounding areas. In rejecting these arguments, the Board found that the Department's duties under Article I, §27, were limited to the particular statutes under which it was acting. With respect to the plan revisions at issue in Andrews and Gladfelter and Morton Kise, the Board held that the Department's duties under Article I, §27, were limited to the effects of the proposed sewage treatment facilities on surrounding areas.

Based on these decisions, the Township and Lee now argue that under Article I, §27, the Department must consider all of the effects of the proposed spray irrigation facility on the surrounding areas. Although the Board will not dispute this argument in general terms, neither the Township nor Lee offer any specific effects that the Department failed to consider.[21]

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[21]The sum total of the Township's argument on this issue is as follows: "The Department failed to establish that the plan that is the subject of its Order will not unreasonably harm the scenic, aesthetic and historic values of the area." Unfortunately, Lee's argument on this issue is no more incisive.

Apparently, the Township and Lee would, instead, leave it to the Board to imagine all of the possible consequences of siting a spray irrigation facility on the Barnhart Farm. As the Board found above, the burden of proof falls on the Township and Lee with respect to their appeals from the Department's approval of the Plan Revision. They cannot satisfy this burden merely by making general legal arguments, but must also offer specific facts in support. Having failed to offer any examples of the types of effects the Department allegedly failed to consider, the Board refuses to further consider the Township's and Lee's Article I, §27, challenges to the Department's approval of the Plan Revision.

Because the spray irrigation facility proposed in the Plan Revision is capable of satisfying the technical standards and regulations applicable to spray irrigation systems, and the Department violated neither the Historic Preservation Act nor Article I, §27, in approving the Plan Revision, the Board finds that the Department's approval of the Plan Revision was not an abuse of discretion. Accordingly, the Department's approval of the Plan Revision is affirmed and the Township's and Lee's appeals from that approval are dismissed.

CONCLUSIONS OF LAW

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

2. The Department bears the burden of proving, by a preponderance of the evidence, that its Order to the Township was not an abuse of discretion, arbitrary, capricious, or contrary to law.

3. The Township and Lee bear the burden of proving, by a preponderance of the evidence, that the Department's approval of the Plan

Revision was an abuse of discretion, arbitrary, capricious, or contrary to law.

4. The Department could not have approved the Plan Revision before it was adopted by the Township as a revision to the Township's official plan.

5. The Department was authorized by the Sewage Facilities Act and the Clean Streams Law to order the Township to revise its official plan.

6. The Department's Order to the Township was not an abuse of discretion, arbitrary, capricious, or contrary to law.

7. In approving the Plan Revision, the Department did not have to determine that the proposed spray irrigation system is 100% capable of being implemented, but rather that the system is capable of satisfying the technical standards and regulation applicable to such systems.

8. The spray irrigation facility proposed in the Plan Revision is capable of satisfying the technical standards and regulations applicable to such systems.

9. The Department's approval of the Plan Revision was not a violation of §8(4) of the Historic Preservation Act.

10. The Department's approval of the Plan Revision did not violate Article I, §27 of the Pennsylvania Constitution.

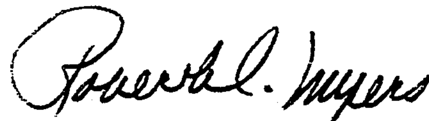
ORDER

AND NOW, this 12th day of April, 1995, it is ordered that:

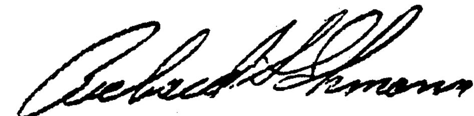
1) The Department's March 18, 1993, Order to the Township and the Department's August 26, 1993, approval of the Plan Revision are affirmed; and

2) The Township's and Lee's appeals from the Department's Order and approval of the Plan Revision are dismissed.

ENVIRONMENTAL HEARING BOARD



ROBERT D. MYERS
Administrative Law Judge
Member



RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: April 12, 1995

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M. DIANE SMITH
SECRETARY TO THE BOARD

KEVIN SWEENEY	:	
v.	:	EHB Docket No. 95-019-E
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES and ENLOW FORK MINING COMPANY, Intervenor	:	Issued: April 13, 1995

OPINION AND ORDER SUR
DEPARTMENT OF ENVIRONMENTAL RESOURCES'
MOTION TO DISMISS

By: Richard S. Ehmann, Member

Synopsis

A Motion To Dismiss an appeal filed with the Board 31 days after actual written notice to appellant is granted. Where the Department of Environmental Resources ("DER") does not normally publish notice of orders issued under the Coal and Gas Resource Coordination Act in the Pennsylvania Bulletin, the date of receipt of actual notice by the appellant commences the 30 day period for timely appeals set forth in 25 Pa. Code §21.52(a).

The doctrines of waiver, laches and estoppel do not bar DER from raising this jurisdictional issue based on DER's participation in this appeal in the two months since it was filed. Subject matter jurisdiction issues may be raised at any time in appeals before this Board. A timely mailing of an appeal to this Board does not excuse the untimely receipt of the appeal by the Board, because the Board's rule specifies filing with the Board.

The fact that this Board's mail passes through a DER-operated mailroom in the building housing the central offices of both DER and this

Board does not excuse timely filing of this appeal. An offer of proof that DER held up delivery of mail to this Board, as opposed to allegations that this could have occurred, would be necessary before appellant can proceed with allegations that DER prevented the timely filing of its appeal.

OPINION

On January 24, 1995, this Board received an appeal on behalf of Kevin Sweeney ("Sweeney") from two DER administrative orders to Enlow Fork Mining Company ("Enlow") to plug Wells Nos. 690 and 695 respectively on Sweeney's land in East Findlay Township, Washington County. These administrative orders were issued by DER under the authority of section 13(c) of the Coal and Gas Resource Coordination Act, Act of December 18, 1984, P.L. 1069, No. 214, 58 P.S. §513(c) ("Coal and Gas Act").

On February 17, 1995, Enlow petitioned to intervene in Sweeney's appeal. Accompanying the petition was Enlow's Motion To Dismiss appeal. We granted Enlow's petition since it was unopposed, but, in an Opinion and Order dated March 2, 1995, denied Enlow's Motion To Dismiss.

While Enlow's Motion was still before the Board and on March 1, 1995, DER filed its own separate Motion To Dismiss. DER's Motion takes the position that Sweeney's appeal was untimely filed and thus must be dismissed because of a lack of jurisdiction in this Board over untimely appeals. Enlow has adopted no position as to DER's Motion.

On March 17, 1995, the Board received Sweeney's Response to DER's Motion. In it, Sweeney takes the position that this Board has personal jurisdiction over the parties and the subject matter of this appeal; that the "doctrine of latches", by DER's untimely delay in raising this issue and voluntary submissions to the Board's jurisdiction, causes a waiver of DER's

right to raise this issue; and that DER is estopped from claiming a lack of jurisdiction.

Sweeney's Response to DER's Motion admits notice to Sweeney of DER's orders on December 23, 1994. It recites that Sweeney's Notice Of Appeal was deposited in the mails on January 19, 1994 (which we read to be 1995 because the date of the DER action appealed from makes 1994 an impossibility) and does not dispute that the Board received this appeal 31 days after Sweeney received this notice.

Under 25 Pa. Code §21.52(a), jurisdiction of this Board does not attach to an appeal unless the appeal is filed with this Board within 30 days after the appellant has written notice of the action. Where the appellee is a third party appellant who does not routinely receive a written notice of DER's action (as a permit applicant does when a permit application is denied), and the action of DER is not of the type normally published in the Pennsylvania Bulletin, the 30 day period begins to run when that party receives written notice. Doreen V. Smith and Evelyn Fehlburg v. DER, et al., 1992 EHB 226, and New Hanover Township, et al. v. DER, et al., 1991 EHB 1234. DER's Motion states that DER does not routinely publish a notice of orders like these in the Pennsylvania Bulletin, and Sweeney does not deny this allegation. If this is so, the 30 day period began running on December 23, 1994, and ended on January 23, 1995 (one day before the Board received Sweeney's appeal).

It has long been the law that where we would otherwise have subject matter jurisdiction over an appeal, the untimely filing of it deprives us of that jurisdiction. Rostosky v. Commonwealth, DER, 26 Pa. Cmwlth. 478, 364 A.2d 761 (1976). Thus, while we agree with Sweeney that this is the type of matter over which we would normally have jurisdiction, we must also agree with

DER that by filing this appeal with us on January 24, 1995, Sweeney has taken an untimely appeal and this untimeliness divests our subject matter jurisdiction.

On this issue, after asserting that the Board has *in personam* jurisdiction over DER and Enlow, Sweeney asserts DER is estopped to raise this subject matter jurisdiction issue, is barred by the doctrine of laches from raising it, or has waived the right to do so. There is no argument or dispute between the parties that this Board is aware of as to whether we have *in personam* jurisdiction over DER and Enlow. We have jurisdiction over them as parties in this appeal, but *in personam* jurisdiction and subject matter jurisdiction are different types of jurisdiction. One is the Board's jurisdiction over the party and the other is jurisdiction over the controversy between the parties. As in this appeal, we can have one but still not have the other.

We reject the assertions of estoppel, laches, or waiver by DER of its right to challenge our jurisdiction because it has participated in this appeal as a party. DER has participated in this appeal during the roughly two months since the appeal was filed as Sweeney asserts, but subject matter jurisdiction questions may be raised at any time. As we recently stated in Green Thornbury Committee, et al. v. DER, et al., EHB Docket No. 93-271-W (Opinion issued February 17, 1995):

> The Appellants argue in their response to the motion to dismiss that the Permittees waived any objections regarding the timeliness of filing by failing to raise the timeliness issue in their pre-hearing memoranda or otherwise before the hearing on the merits. The Permittees maintain, however, that the timeliness of filing the notice of appeal is a jurisdictional issue and may be raised at any time.
>
> The Permittees did not waive their objection to the

> timeliness of the appeal by failing to raise it sooner. As we have noted above, the timeliness of filing a notice of appeal goes to the Board's subject matter jurisdiction. It is well settled that objections to a tribunal's subject matter jurisdiction cannot be waived. See, *e.g.*, Drummond v. Drummond, 414 Pa. 548, 200 A.2d 887 (1964), Civil Service Commission of Borough of Jim Thorpe v. Kuhn, 85 Pa. Cmwlth. 85, 480 A.2d 1327 (1984). Indeed, objections to subject matter jurisdiction can be raised for the first time even on appeal. See, *e.g.*, *Pennsylvania Appellate Practice 2d*, §302:47.

Applying this law here requires our rejection of these arguments on Sweeney's behalf. DER is not barred by any of these doctrines from raising this jurisdictional issue at this time in this appeal.

Sweeney also asserts that since his appeal was mailed timely, it would routinely be delivered in timely fashion according to hearsay statements from the Postmaster of the town where Sweeney's counsel maintains his office (see the affidavit of Ruth Anne Edwards attached to Sweeney's response saying that mail from that town is usually delivered in two days). He then asserts, apparently only on this basis, that since this Board's mail passes through a DER-operated mailroom in the office building in Harrisburg where both maintain their central offices, DER (through its central mailroom) received this appeal in timely fashion on behalf of this Board even though the Board itself did not do so, and thus the Board has jurisdiction.

We reject this argument for two central reasons. The most obvious, of course, is that Sweeney's Response does not say that DER's mailroom received his appeal in timely fashion. Sweeney's Response says Sweeney believes that that mailroom would have timely received his Notice Of Appeal and that Sweeney believes the delay in the receipt by the Board of his appeal was thus occasioned by a delay in DER's processing of this mail, but he offers no factual assertion that it was timely received there (and no affidavit or

verification on this point in his response). The possibility of a routine two day delivery period in mail from Confluence to points in Harrisburg is insufficient as a point on which to hang this entire argument. Sweeney offers a conjectural belief or hope that this is the cause of his untimeliness. That is simply not enough.

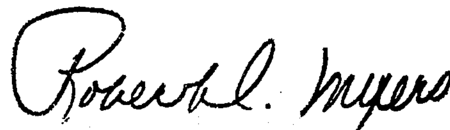
The second reason we reject this argument is that it clearly runs contrary to our rules. 25 Pa. Code Section 21.52(a) says that the appeal must be filed with this Board. It does not provide that deposit in the mails is sufficient. Peter Tinsman v. DER, 1986 EHB 1153. The same is true as to delivery to DER. Borough of Youngwood v. DER, 1986 EHB 1070.[1] As only a timely filing with the Board is adequate under these rules, an appellant who fails to comply therewith must bear the consequences thereof.

Accordingly, we enter the following order.

ORDER

AND NOW, this 13th day of April, 1995, DER's Motion To Dismiss is granted, and Sweeney's appeal is dismissed.

ENVIRONMENTAL HEARING BOARD



ROBERT D. MYERS
Administrative Law Judge
Member

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1 The failure of the post office to deliver an appeal is also no defense to this type of Motion. Kayal v. DER, 1987 EHB 809; Gorham v. DER, et al., 1987 EHB 767.

RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: April 13, 1995

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M. DIANE SMITH
SECRETARY TO THE BOARD

BLACK ROCK EXPLORATION COMPANY, INC.

v. : **EHB Docket No. 93-070-E**

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL RESOURCES : **Issued: April 20, 1995**

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

By: Richard S. Ehmann, Member

Synopsis

The Department of Environmental Resources' (DER) assessment of a civil penalty against appellant, a surface coal mine operator, is affirmed. DER has sustained its burden of proving by a preponderance of the evidence that the appellant failed to comply with DER's regulations at 25 Pa. Code §87.97 (regarding topsoil) and the terms of its permit at its surface coal mine permit site, which is a violation of the Clean Streams Law and the Surface Mining Conservation and Reclamation Act. The appellant has not raised the issue of the reasonableness of the amount of DER's civil penalty assessment in its post-hearing brief, and there is no evidence before us which mitigates against DER's findings as to the severity of the violation and the appellant's culpability which would cause us to find DER's assessment is unreasonable. We thus affirm DER's assessment of a civil penalty against the appellant in the total amount of $3,500 pursuant to section 605(b) of the Clean Streams Law, 35 P.S. §691.605(b), and section 18.4 of the Surface Mining Conservation and Reclamation Act, 52 P.S. §1396.18d.

BACKGROUND

Appellant, Black Rock Exploration Company, Inc. (Black Rock) initiated the instant appeal, challenging DER's March 10, 1993 issuance of a civil penalty assessment, on March 25, 1993 by means of a skeletal appeal pursuant to 25 Pa. Code §21.52(c). DER's civil penalty assessment asserts that Black Rock violated 25 Pa. Code §87.97(a) and (c) (pertaining to topsoil removal and storage) at its Brownsville II Strip surface coal mine located in Redstone and Brownsville Townships, Fayette County. DER's civil penalty is assessed in the total amount of $3,500 pursuant to section 605(b) of the Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.605(b), and section 18.4 of the Surface Mining Conservation and Reclamation Act (SMCRA), Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.18d. By an order issued March 31, 1993, we directed Black Rock to file the information necessary to perfect its appeal by April 15, 1993. On April 15, 1993, Black Rock provided this missing information, depositing a bond in escrow with DER on that date.

We initially granted DER's motion to dismiss this appeal in an opinion and order issued September 20, 1993, finding that Black Rock had not timely escrowed the amount of the civil penalty pursuant to section 18.4 of SMCRA, 52 P.S. §1396.18(d). Upon Black Rock's appeal of our decision to Commonwealth Court, the Court concluded that Black Rock had timely perfected its appeal, and the matter was remanded to us for further consideration consistent with the Court's opinion issued July 20, 1994.[1]

We then scheduled a hearing on the merits, which was held on October 31, 1994 before Board Member Richard S. Ehmann. After receiving the transcript of

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[1] See Black Rock Exploration Co., Inc. v. Department of Environmental Resources, ___ Pa. Cmwlth. ___, 646 A.2d 56 (1994).

the merits hearing, we issued an order on November 15, 1994 directing the parties to file their respective post-hearing briefs. We received DER's post-hearing brief on December 14, 1994 and Black Rock's post-hearing brief on December 28, 1994.

The record before us consists of a transcript of 235 pages and a number of exhibits. Any arguments not raised by the parties' post-hearing briefs are deemed waived. Lucky Strike Coal Co. v. Commonwealth, DER, 119 Pa. Cmwlth. 440, 547 A.2d 447 (1988). After a full and complete review of the record, we make the following findings of fact.

FINDINGS OF FACT

1. Appellant is Black Rock, a corporation with a business address of 273 Main Street, Greenville, PA 16125, whose business includes the mining of coal by the surface method. (B Ex. 11)[2] The principals and persons responsible for the daily operations of Black Rock are David J. Immonen, President and Treasurer, and Michael Halliday, Vice-President and Secretary. (B Ex. 11)

2. Appellee is DER, the agency of the Commonwealth authorized to administer and enforce the Clean Streams Law; SMCRA; section 1917-A of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-17 (Administrative Code); and the rules and regulations promulgated thereunder. (B Ex. 11)

[2] "B Ex." is a reference to a stipulated Board exhibit. B Ex. 11 is the parties' joint stipulation of facts.

The Brownsville II Site

3. Black Rock has operated a surface mine in Redstone and Brownsville Townships, Fayette County, known as the "Brownsville II Strip" or "mine". The mine is the subject of Surface Mining Permit (SMP) No. 26920101. (B Ex. 11)

4. The Brownsville II Strip is a "remining" operation commenced in September or October of 1992. (B Ex. 11) The process is called "remining" because the operator is removing the remaining coal from an area which was once part of a deep coal mine. (B Ex. 11) The Brownsville II site was also previously disturbed by the construction of the Monongahela Railroad (Railroad). (N.T. 47)[3]

5. Before Black Rock began its mining operations on the Brownsville II Strip, Black Rock had completed a similar mining operation at an adjacent site known as "Brownsville I". (N.T. 48)

6. Black Rock completed mining on Brownsville I in late 1991 or early 1992. The Brownsville I site is identified on the map which is C Ex. 5.[4] (N.T. 48)

7. On the Brownsville I site, Black Rock mined beneath the Railroad bed. (N.T. 47)

8. Dale McCandless was the superintendent for Black Rock's operations at both Brownsville I and II. (N.T. 19, 48; B Ex. 11)

9. Mark Frederick has been a DER Surface Mine Conservation Inspector (SMCI) for the past 15 years. (N.T. 16) He is responsible for inspecting the mine sites to ensure compliance with applicable statutory and regulatory

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[3] "N.T." indicates a reference to the notes of testimony from the October 31, 1994 merits hearing.

[4] "C Ex." is a reference to a Commonwealth exhibit. "BR Ex." indicates one of Black Rock's exhibits.

requirements. (B Ex. 11) Frederick was responsible for inspecting the Brownsville II site from the time of the permit application until December of 1993. (N.T. 18) Frederick was also the inspector responsible for inspecting the Brownsville I site. (N.T. 18, 48)

10. The Brownsville II site is a long site which runs in a north to south direction. (N.T. 31; C Ex. 5) The limits of SMP 26920101 are shown in red on C Ex. 5. (C Ex. 5) Brownsville II is bounded by Dunlap Creek on its west side. (C Ex. 5)

11. Black Rock was allowed permission to install erosion and sedimentation controls within 25 feet of Dunlap Creek because of the unusual terrain at the site. (N.T. 36)

12. Module 21 of Black Rock's permit provided for the removal of topsoil at the site, describing the manner in which it would be removed and stored. The three elongated brown circles on the map which is C Ex. 5 indicate the areas where the top soil was to be stored according to Module 21. Black Rock's permit met the requirements of DER's regulations at Chapter 87 of 25 Pa. Code regarding storage of topsoil. (N.T. 26-29) The purpose of topsoil removal is to properly conserve the topsoil so it can be used in post-mining final reclamation of the site as a final cover, once the site has been rough grade backfilled, so that vegetative cover can be established. (N.T. 28)

13. Black Rock's permit provided that Black Rock would conduct its mining by the block cut method. (N.T. 33; B Ex. 1 at Module 10)

14. Pursuant to Module 21 of Black Rock's permit, Black Rock was to remove topsoils or the top 12 inches of material prior to commencement of mining, and this material was to be stored in an area cleared of vegetation

and other materials. The material was to be stored in a manner which would prevent excessive compaction and degradation of the soil material. (N.T. 25; B Ex. 1) Module 21 also provided that Black Rock's topsoil storage areas were chosen to eliminate the need for rehandling or disturbance of the topsoil prior to its final distribution during site reclamation. (B Ex. 1)

DER's October 29, 1992 Inspection of Brownsville II

15. Frederick inspected the Brownsville II site on October 29, 1992. (B Ex. 11) He spent three and a half hours walking the site. (N.T. 29-31) Frederick's inspection report for his October 29, 1992 inspection is B Ex. 2. (B Ex. 2)

16. During his October 29, 1992 inspection, Frederick noted that Black Rock had made its first cut into the coal approximately 300 feet north of treatment basins AA and AB along the coal's cropline. This first cut is noted by a black pen square on C Ex. 5. (N.T. 24)

17. The area underlying the railbed where Black Rock made its first cut consisted of railroad ballast and rubble from the railbed. (N.T. 145)

18. Frederick observed on his October 29, 1992 inspection that Black Rock was conducting its mining pursuant to the contour method, pushing the material from the pit downslope toward the creek. (N.T. 40) Frederick noted that the top layer of railroad ballast and rubble was approximately a foot deep at Black Rock's highwall. Frederick also observed in Black Rock's highwall 12 feet of unconsolidated material[5] or clay material, and immediately below the clay, 12 feet of black shale material which was on top of the coal exposed in the pit. The coal had not been mined. (N.T. 42; B Ex. 2)

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[5] "Unconsolidated material" is material which is amorphous in structure, such as clay. (N.T. 43)

Frederick observed that below Black Rock's low wall and Black Rock's erosion and sedimentation controls there was a mass of overburden material which was a blend of the materials he had observed in the highwall, i.e., clay, shale, and, to a lesser degree, railroad ballast, which had been pushed below the pit. (N.T. 40-42)

19. Frederick noted during his October 29, 1992 inspection that there was no topsoil stored at the area indicated on C Ex. 5 for topsoil storage in the southernmost area of the site. (N.T. 34, 43) Frederick measured the amount of topsoil or top strata which Black Rock should have conserved at the site. (N.T. 41) He noted there had been no attempt by Black Rock to segregate the top strata materials, and he did not observe any distinct piles of material or evidence that the topsoil or top strata material had been conserved. (N.T. 43)

20. There was no topsoil marker or sign at the Brownsville II site. (N.T. 46) Topsoil markers are important in that they help the operator to locate the stored topsoil. (N.T. 44-46)

21. Frederick believes that at the Brownsville II site, it would have been proper for Black Rock to have made an effort to remove the clay material or unconsolidated material beneath the railbed in a separate layer, transport it to the storage area, and conserve it. (N.T. 51)

22. Frederick did not want Black Rock to conserve the top 12 inches of ground at the site, as this material contained the limestone of which the railbed had been constructed and materials which had been left from spillage over the years. (N.T. 51) This also had been the situation at the Brownsville I site. (N.T. 51) At the Brownsville I site, Frederick and McCandless had agreed that because of the topography of the site and because

the top 12 inches of material at that site was not suitable soil material, Black Rock would conserve material at a greater depth, i.e., clay or topsoil. Black Rock complied with this agreement at Brownsville I. (N.T. 49)

DER's Issuance of Compliance Order

23. DER issued Black Rock Compliance Order (CO) No. 92G219 on October 29, 1992, citing Black Rock for its failure to remove and store at least a 12-inch layer of topsoil and/or top strata from the area where the initial cut was made on Brownsville II, in violation of 25 Pa. Code §87.97(a) and (c). This CO directed Black Rock to remove and stockpile at least a 12-inch layer of topsoil and top strata at the stockpile area designated in the permit on or before November 16, 1992. (N.T. 70; B Ex. 6) Black Rock did not file an appeal of this CO with this Board.

24. Frederick attempted to reach McCandless but was unable to do so, and did not speak to McCandless until he inspected the site on November 17, 1992. (N.T. 70)

25. Frederick received a letter from McCandless, dated November 13, 1992, on November 17, 1992. (N.T. 70; BR Ex. 1) This letter stated that because of recent wet, rainy conditions and minor equipment breakdowns, Black Rock was having difficulty transporting top strata to the designated area. Black Rock further stated that it needed to build suitable roads in order to run its trucks safely. McCandless then stated, "I feel that we can save and store the necessary top strata by Dec. 1 weather permitting. We can comply with the regulations and the terms of the permit but we need a little more time to do the work safely." (BR Ex. 1)

26. Frederick responded to this request by extending the deadline for compliance with his October 29, 1992 CO until December 1, 1992. (N.T. 73)

27. Frederick's inspection report for his November 17, 1992 site inspection is B Ex. 3. (N.T. 74) As of Frederick's November 17, 1992 inspection, none of the topsoil had been hauled to the topsoil storage area. (B Ex. 3) When Frederick next inspected the site on November 19, 1992, Black Rock had stored about 300 yards of topsoil/top strata at the topsoil storage area, and Frederick lifted the CO. (N.T. 83; B Ex. 4)

28. John Matviya is a regional program manager for the Environmental Cleanup Program in DER's Pittsburgh Regional Office. At the times relevant to this appeal, Matviya was the compliance manager of the Greensburg District Office. (N.T. 119)

29. Matviya accompanied Frederick on a site inspection of the Brownsville II site in the end of January of 1993. (N.T. 119-120) During this visit, Matviya spoke with McCandless, who asked him to reconsider DER's position on the violation. McCandless stated that he had stored the topsoil by pushing it below the pit, where it was mixed with shale, ballast, and other materials at the site, and that he hoped to be able to retrieve the topsoil. (N.T. 119-123) B Ex. 5 is a copy of Frederick's inspection report for the January 20, 1993 inspection. (N.T. 124)

DER's Assessment of Civil Penalty

30. William Stroble is currently an environmental protection specialist for DER. At the time of the alleged October 29, 1992 violation by Black Rock, Stroble was a mining compliance specialist at DER's Greensburg District Office, and he was responsible for assessing civil penalties for COs issued by DER's inspectors at the Greensburg District Office. (N.T. 98)

31. Stroble prepared a civil penalty assessment (B Ex. 7) against Black Rock for its alleged October 29, 1992 violation, calculating the amount assessed and reviewing the document for correctness. (N.T. 100-101)

32. In preparing this civil penalty assessment, Stroble followed DER's civil penalty assessment policy (B Ex. 2), which is based on DER's regulations at 25 Pa. Code Chapter 86 and SMCRA. (N.T. 101-102)

33. C Ex. 1 is Stroble's worksheet which he used on November 4, 1992 in arriving at the amount of the civil penalty to be assessed against Black Rock. (N.T. 104)

34. In arriving at the amount of the civil penalty assessment, Stroble determined that the seriousness of the violation was severe because it involved loss of some topsoil. According to DER's policy at page 4 of C Ex. 2, loss of some topsoil is a low level of severity, and the amount to be assessed ranges between $2,501 and $3,500. (N.T. 105, 112; C Exs. 1 and 2) Stroble determined that an assessment of $2,500 for seriousness was appropriate because Black Rock's alleged violation was in connection with its first cut and not much of the permit area had been exposed yet. (N.T. 105)

35. In arriving at the assessment of culpability, Stroble decided that the degree of culpability on Black Rock's part was high negligence, because Black Rock should have been aware that its permit and DER's regulations provided for saving the topsoil. (N.T. 105-108) DER's policy at page 6 of C Ex. 2 provides for an assessment ranging from $801 to $1,500 for high negligence culpability. Stroble determined that an assessment of $1,000 for culpability was reasonable. (N.T. 106; C Ex. 1)

36. Stroble did not assess any additional amount for cost to the Commonwealth of investigating the violation or for savings to the violator

from the violation. He did not give any credit against the penalty or assess any added penalty amount based on Black Rock's speed of compliance with the CO. (N.T. 108; C Ex. 2)

37. The total amount of DER's civil penalty asessment was $3,500. (N.T. 111; B Ex. 7) Stroble believes this amount is reasonable. (N.T. 110)

38. At a meeting held on December 17, 1992, at which representatives of DER and Black Rock were present, McCandless argued that DER should give Black Rock credit for speed of compliance. (N.T. 108) Stroble determined that Black Rock would not be given credit for speed of compliance because the violation was not corrected by the original compliance date stated in the CO. (N.T. 108)

39. DER's civil penalty assessment, dated March 10, 1993, was issued pursuant to DER's authority under section 18.4 of the SMCRA, 52 P.S. §1396.18d, and section 605(b) of the Clean Streams Law, 35 P.S. §691.605(b), in the amount of $3,500 for Black Rock's failure to store at least a 12-inch layer of topsoil and top strata at the stockpile area designated in the Brownsville II Strip Permit on October 29, 1992. (Notice of appeal; B Ex. 7) Black Rock then filed the instant appeal.

DISCUSSION

Although Black Rock did not challenge DER's issuance of CO 92G219, dated October 29, 1992, with an appeal to this Board, it may challenge the fact of the October 29, 1992 violation in this appeal from DER's issuance of this civil penalty assessment. Kent Coal Mining Co. v. Commomwealth, DER, 121 Pa. Cmwlth. 149, 550 A.2d 279 (1988). DER bears the burden of proof in appeals of its assessment of civil penalties. C&K Coal Co. v. DER, 1992 EHB 1261. DER must prove by a preponderance of the evidence that action was lawful and not

an abuse of DER's discretion. Warren Sand and Gravel v. Commonwealth, DER, 20 Pa. Cmwlth. 186, 341 A.2d 556 (1975); 25 Pa. Code §21.101(a). In order to sustain its burden, DER must show Black Rock has committed the violations for which the civil penalty was assessed. We must also review whether there is a "reasonable fit" between the violations and the amount of the penalties. Chrin Brothers v. DER, et al., 1989 EHB 875 (citing Refiner's Transport and Terminal Corp. v. DER, 1986 EHB 400, 447-448, Trevorton Antracite Company v. DER, 42 Pa. Cmwlth. 84, 400 A.2d 240, 243 (1979)).

Was DER's Action Lawful and an Appropriate Exercise of DER's Discretion?

Section 315(a) of the Clean Streams Law, 35 P.S. 691.315(a), requires a mine operator to obtain a permit from DER, and this permit is required by section 315(f) to set forth the manner in which the operator plans to comply with, *inter alia*, SMCRA. Section 1396.4(a) of SMCRA, 52 P.S. §1396.4(a), also provides that an operator must obtain a permit to mine coal by the surface mining method before proceeding to mine. This permit application is required by section 1396.4(a)(2)(C) to include a description of the manner in which the operator will segregate and conserve topsoil and, if necessary, suitable subsoil to establish on the areas proposed to be affected, a vegetative cover. DER's regulations at 25 Pa. Code §86.13 provide that coal mining activities must be conducted in compliance with the terms and conditions of the permit, the requirements of Chapter 86 and Chapters 87-90 and the statutes under which these chapters were promulgated.[6]

Regarding topsoil, DER's regulations at 25 Pa. Code §87.96 provide "[a]ll topsoil and, if necessary, suitable subsoil shall be separately

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[6] Chapters 86 and 87 of 25 Pa. Code were promulgated pursuant to the provisions of the Clean Streams Law and SMCRA.

removed, segregated, conserved and redistributed on areas affected by surface mining activities." Section 87.97(a) directs that all topsoil shall be removed from the areas to be disturbed in a separate layer prior to mining or other surface disturbance. This section further provides that a vegetative cover which would interfere with the removal and use of the topsoil shall be removed prior to topsoil removal. 25 Pa Code. §87.97(a). Section 87.97(c) of 25 Pa. Code requires:

> (c) If topsoil is less than 12 inches, a 12-inch layer which includes the topsoil and the unconsolidated materials immediately below the topsoil shall be removed, segregated, conserved and replaced as the final surface soil layer. If the topsoil and the unconsolidated material measure less than 12 inches, the topsoil and all unconsolidated material shall be removed, segregated, conserved and replaced as the final surface soil layer.

Additionally, DER's regulations at 25 Pa. Code 87.97(d) direct "[o]n areas that have been previously affected by mining and which have no available topsoil or subsoil, sufficient material best suited to support vegetation shall be segregated, conserved and redistributed as the final surface layer."

Module 21 of Black Rock's permit provided for the removal of topsoil at the site. Pursuant to Module 21, Black Rock was to remove topsoils or the top 12 inches of material prior to commencement of mining, and this material was to be stored in an area cleared of vegetation and other materials in a manner which would prevent excessive compaction and degradation of the soil material. Module 21 also provided that Black Rock's topsoil storage areas were chosen to eliminate the need for rehandling or disturbance of the topsoil prior to its final distribution upon reclamation.

During SMCI Frederick's October 29, 1992 inspection, Frederick noted that Black Rock had made its first cut into the coal approximately 300 feet north of treatment basins AA and AB along the coal's cropline. Black Rock was

using the contour method of mining, not the block cut method which its permit had specified would be used. The area underlying the railbed where Black Rock made its first cut consisted of railroad ballast and rubble from the railbed. The top layer of railroad ballast and rubble was approximately a foot deep at the highwall of Black Rock's cut. Frederick also observed in Black Rock's highwall 12 feet of unconsolidated material or clay material, and immediately below the clay, 12 feet of black shale material which was on top of the coal exposed in the pit. Frederick measured the amount of topsoil or top strata which Black Rock should have conserved at the site. Frederick observed on his October 29, 1992 inspection that Black Rock, in conducting its mining pursuant to the contour method, was pushing the material from the pit downslope, i.e., toward the creek. Frederick observed that below Black Rock's low wall, and outside the area protected by Black Rock's erosion and sedimentation controls, there was a mass of overburden material which was a blend of the materials he had observed in the highwall, i.e., clay, shale, and, to a lesser degree, railroad ballast, which had been pushed below the pit. This material was in the area between the mine and the creek. The coal had not yet been mined.

According to SMCI Frederick's observations on October 29, 1992, there was no topsoil stored at the area indicated on C Ex. 5 for topsoil storage in the southernmost area of the site. He noted no attempt by Black Rock to segregate the top strata materials, and he did not observe any distinct piles of material or evidence that the topsoil or top strata material had been conserved. There was no topsoil marker or sign at the Brownsville II site.[7]

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[7] Topsoil markers are important in that they help the operator to locate the stored topsoil. Topsoil markers are required by 25 Pa. Code §87.92(e), which provides, "[w]hen topsoil or other vegetation-supporting material is segregated

Frederick believes that at the Brownsville II site, it would have been proper for Black Rock to have made an effort to remove the clay material or unconsolidated material beneath the railbed in a separate layer, transport it to the storage area, and conserve it. Frederick did not want Black Rock to conserve the top 12 inches of ground at the site, as this material contained the limestone of which the railbed had been constructed and materials which had been left from spillage over the years. This also had been the situation at the Brownsville I site.

Black Rock argues that this matter involves a misunderstanding by DER's Frederick of what was occurring at Brownsville II when he made his October 29, 1992 inspection and cited Black Rock for the topsoil storage and removal violations. Through testimony of McCandless offered by Black Rock and photographs he took of the Brownsville II site, the company asserts that the Brownsville II site was more difficult to work with regarding topsoil removal than had been Brownsville I. McCandless testified that at Brownsville I, there was approximately 400 feet between the first block and the creek, and that it had been easier to gather and truck topsoil at Brownsville I because there was a lot of room and the site was dry. (N.T. 136-137) McCandless testified that the Brownsville II site was located along a steep creek bank, with less than 50 feet between the bottom of the spoil and the creek bank. (N.T. 136-137) Additionally, McCandless testified that at Brownsville II the silt fence and hay bales which Black Rock installed below its cut put its mining over a steep bank when mining commenced. (N.T. 137) In his testimony, McCandless stated that when Black Rock made its first cut, there was old mud,

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and stockpiled as required under §87.98 (relating to topsoil: storage), the stockpiled material shall be clearly marked."

clay, and topsoil mixed in with the fill material that the railroad had used for the railbed. (N.T. 137) Within the top 12 inches of strata, which was the railroad ballast, there were limestone boulders, tree stumps, limbs and roots, old tires, and some railroad ties. (N.T. 138-139) McCandless testified that he saved the top 12 inches of strata, including the tree roots, and that it was not until he got farther down the hill and into the original hillside that he discovered that there was better quality material at that depth. (N.T. 151) He testified that he saved this top strata in a windrow along the lower edge of the cut. (N.T. 158) However, this testimony was rebutted by testimony by Frederick, who stated that no top strata was saved at this area, and if it had been, he could not have failed to see it. (N.T. 220)

According to McCandless' testimony, this area on Brownsville II was unstable and had no rock base, creating a safety problem for trucks. (N.T. 137-138) McCandless further testified that because the road was too steep for his bulldozer to climb, he pushed the top material down over the hill when he opened the mine pit. (N.T. 138-139) McCandless testified that although there was a roadway to the topsoil pile, there was no roadway over this bank to the mining pit. (N.T. 137) McCandless, however, also admitted his bulldozer could climb the roadway out of the pit; it just could not push loads uphill while climbing it. (N.T. 140)

We expressly reject McCandless' offered excuses as to why Black Rock violated the requirements of its permit. Black Rock knew of the mine site's steep terrain and railroad road bed before it started to mine, and, despite this knowledge, applied for a permit to mine this site in a specific fashion. DER issued Black Rock its permit based on the representations in the permit application as to how the site would be mined. This obligated Black Rock to

mine in accordance with the permit or to obtain DER's approval of a variance therefrom or modification thereof prior to Black Rock's varying from the terms of that permit. When it failed to do this, Black Rock violated its permit and exposed itself to the instant civil penalties. (N.T. 203)

The same conclusion applies to McCandless' suggestion that it needed to build a road into the pit for its trucks, and needed to excavate for stone for the road on the Brownsville II site. Again, Black Rock's operations on that mine site had to be conducted in accordance with its permit. If it could excavate stone or other site materials for its road while complying with its permit, it would not be exposed to penalties, but if it could not, then road materials from off-site were an option, as was a modification in the permit's terms. What was not an option was simply to mine the site without regard to what the permit said.

Finally, we note that instead of segregating the suitable final cover materials for use as the final layer in site restoration at the place specified in the permit, McCandless took this material and pushed it over the mine's low wall, placing it adjacent to the creek. This is not the location specified in Black Rock's permit and is not a place protected by erosion and sedimentation controls. Moreover, McCandless mixed the soil material with the ballast, vegetation, and debris from the railbed, so it was no longer suitable as final cover. Nothing in Black Rock's permit authorized these operations.

The evidence shows that Black Rock failed to conserve the first 12 inches of unconsolidated material suitable for reclamation at the site. Black Rock's initial cut exposed well over 12 inches of unconsolidated material which could have been conserved. Black Rock, by pushing overburden material from its initial cut down slope, without making any attempt to remove and

separately segregate available unconsolidated material or remove the vegetative cover before making its first cut into the coal, failed to comply with DER's topsoil conservation regulations at 25 Pa. Code §87.97(a) and (c). We find that DER has sustained its burden of proving that on October 29, 1992, Black Rock committed the violation of DER's regulations upon which DER is basing its civil penalty assessment.

Amount of the Civil Penalty Assessment

Section 605(b) of the Clean Streams Law states in relevant part:

> (b) Civil penalties for violations of this act which are in any way connected with or relate to mining and violations of any rule, regulation, order of [DER] or condition of any permit issued pursuant to this act which are in any way connected with or relate to mining, shall be assessed in the following manner and subject to the following requirements:
>
> > (1) [DER] may make an initial assessment of a civil penalty upon a person or municipality for such violation, whether or not the violation was wilful, by informing the person or municipality in writing within a period of time to be prescribed by rules and regulations of the amount of the penalty initially assessed....

Section 18.4 of SMCRA[8] likewise states in pertinent part:

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

Further, DER's regulations at 25 Pa. Code §§86.191 through 86.194 provide for DER's assessment of civil penalties pursuant to section 605(b) of the Clean Streams Law and section 18.4 of SMCRA. DER specifically points to its regulations at 25 Pa. Code §§86.194 and 193(b). Section 86.193(b) mandates that DER assess a civil penalty if the violation is assessable in an

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[8] Section 18.4 of SMCRA, 35 P.S. §1396.22, was renumbered as 35 P.S. §1396.18d in 1993.

amount of $1,000 or more under the system for assessment described in §86.194. Section 86.194(b) requires civil penalties to be assessed, *inter alia*, based on the seriousness of the violation (up to the statutory maximum) and culpability (up to $1,500 depending on the degree of negligence on the part of persons working on the surface mining site).

DER's William Stroble, who was a mining compliance specialist at DER's Greensburg District Office, prepared a civil penalty assessment (B Ex. 7) against Black Rock for its October 29, 1992 violation, calculating the amount assessed and reviewing the document for correctness. (N.T. 98-101) Stroble determined that an assessment of $2,500 for seriousness was appropriate because Black Rock's alleged violation was in connection with its first cut and not much of the permit area had been exposed yet. This was as low an amount as was allowed in the low severity range under DER's policy on assessments. (N.T. 105, 112) In arriving at the assessment of culpability, Stroble decided that the degree of culpability on Black Rock's part was high negligence, because the Black Rock should have been aware that its permit and DER's regulations provided for saving the topsoil. (N.T. 105-108) DER's policy provided for an assessment ranging from $801 to $1,500 for high negligence culpability. Stroble determined that an assessment of $1,000 for culpability was reasonable. (N.T. 106) The total amount of DER's civil penalty asessment was $3,500. (N.T. 111, B Ex. 7)

Citing 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), DER argues that Black Rock has waived any objection it may have to the reasonableness of the amount of the civil penalty assessed by DER by failing to raise this as a ground in its

notice of appeal. We remind Black Rock that as we have previously stated in this adjudication, any arguments not raised by the parties' post-hearing briefs are deemed waived. Lucky Strike, supra. Black Rock has not challenged the reasonableness of the amount of the civil penalty assessment in its post-hearing brief; thus, it has waived any objection on this ground even if we could construe its notice of appeal as raising such a challenge.[9]

Further, Black Rock's evidence does not mitigate the severity of the violation proven by DER or show a lack of negligence on Black Rock's part. We have no basis upon which we could conclude that the penalties sought by DER are not a reasonable fit for Black Rock's violations. We accordingly make the following conclusions of law and enter the following order dismissing Black Rock's appeal.

CONCLUSIONS OF LAW

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

2. Black Rock may challenge the fact of the October 29, 1992 violation in this appeal from DER's issuance of this civil penalty assessment. Kent Coal Mining Co., supra.

3. DER bears the burden of proof in appeals of its assessment of civil penalties. C&K Coal Co., supra. DER must prove by a preponderance of the evidence that action was lawful and not an abuse of DER's discretion. Warren

[9] To the extent that Black Rock contends in its post-hearing brief that its topsoil removal and storage actions were proper because Black Rock believed it had until December 1, 1992 (the extension date given by Frederick for compliance with the CO) to segregate and store the top 12 inches of strata, this argument does not preclude DER from assessing the civil penalty for Black Rock's October 29, 1992 violation. Rather, that extension was for the period for Black Rock to come into compliance with DER's regulations. See sections 18.4 of SMCRA, 52 P.S. §1396.18d, and section 605 of the Clean Streams Law, 35 P.S. §691.605.

Sand and Gravel, supra; 25 Pa. Code §21.101(a). In order to sustain its burden, DER must show Black Rock has committed the violations for which the civil penalty was assessed. We must also review whether there is a "reasonable fit" between the violations and the amount of the penalties. Chrin Brothers, supra.

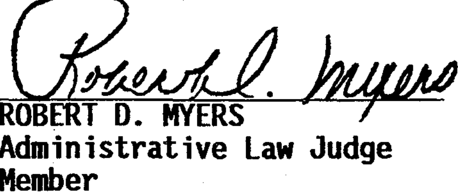
4. DER has proven by a preponderance of the evidence that Black Rock failed to comply with DER's topsoil conservation regulations at 25 Pa. Code §87.97(a) and (c).

5. Black Rock has not challenged the reasonableness of the amount of the civil penalty assessment in its post-hearing brief; thus, it has waived any objection on this ground even if we could construe its notice of appeal as raising such a challenge. Lucky Strike, supra. We have no basis upon which we could conclude that the penalties sought by DER are not a reasonable fit for Black Rock's violations; thus, these civil penalty assessment amounts are affirmed.

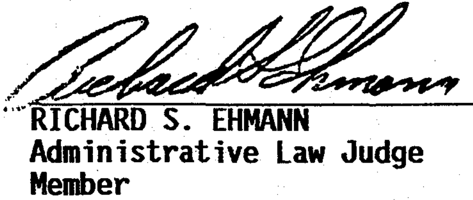
ORDER

AND NOW, this 20th day of April, 1995, it is ordered that the appeal filed by Black Rock Exploration Company, Inc., is dismissed.

ENVIRONMENTAL HEARING BOARD



ROBERT D. MYERS
Administrative Law Judge
Member



RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: April 20, 1995

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M. DIANE SMITH
SECRETARY TO THE BOARD

COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
v.	:	**EHB Docket No. 94-226-CP-E**
CSX TRANSPORTATION, INC.	:	**Issued: April 21, 1995**

OPINION AND ORDER SUR MOTION FOR LEAVE TO AMEND COMPLAINT FOR CIVIL PENALTIES

By: Richard S. Ehmann, Member

Synopsis:

DER's Motion for Leave to Amend its Complaint for Civil Penalties to add three additional counts is granted. In accordance with Pa. R.C.P. 1033 and prior decisions of this Board and the courts, amendments to pleadings are to be liberally allowed except where it will result in prejudice to the opposing party. Any prejudice to CSX resulting from DER's amending its Complaint will be eliminated by allowing CSX the opportunity to conduct additional discovery related to the three counts which DER seeks to add.

OPINION

On August 23, 1994, the Department of Environmental Resources ("DER") filed a Complaint for Civil Penalties against CSX Transportation, Inc. ("CSX"). Counts I through IV of the Complaint dealt with an alleged discharge on August 23, 1989 in South Huntingdon Township, Westmoreland County. Count V of the Complaint dealt with an alleged discharge of crankcase oil at CSX's railroad yard in Rockwood, Pennsylvania on September 14, 1990 ("Rockwood Incident"). CSX filed

an Answer and New Matter to the Complaint on October 17, 1994. Discovery in this matter was ordered to be completed on March 20, 1995.

On March 17, 1995, DER filed a Motion for Leave to Amend Complaint for Civil Penalties along with a proposed Amendment To Complaint For Civil Penalties. DER seeks leave to amend its Complaint for Civil Penalties by adding three new counts with respect to the Rockwood Incident. On April 10, 1995, CSX filed a response and memorandum of law in opposition to DER's Motion. CSX opposes the Motion on the grounds that it is untimely and will result in prejudice to CSX.

Rule 1033 of the Pennsylvania Rules of Civil Procedure deals with the amendment of pleadings. It states as follows:

> A party, either by filed consent of the adverse party or by leave of court, may at any time...amend his pleading. The amended pleading may aver transactions or occurrences which have happened before or after the filing of the original pleading, even though they give rise to a new cause of action or defense. An amendment may be made to conform the pleading to the evidence offered or admitted.

The decision of whether to allow the amendment of a pleading is within the discretion of the trial court. Kenney v. Southeastern Pennsylvania Transportation Authority, 122 Pa. Cmwlth. 1, 551 A.2d 614, 615 (1988), allocatur denied, __ Pa. __, 577 A.2d 892 (1990). The policy of the courts in Pennsylvania is that amendment of pleadings should be liberally allowed. See Bata v. Central-Penn National Bank of Philadelphia, 448 Pa. 355, 293 A.2d 343, 356 (1972); Tanner v. Allstate Insurance Co., 321 Pa. Super. 132, 467 A.2d 1164, 1167 (1983). This policy has also been adopted by the Board in DER v. Petro-Tech, Inc., 1986 EHB 490, 492. The only exception is where allowing a party to amend its pleading would result in undue prejudice to the other party or would violate a rule of law, such as any applicable statute of limitations. Bata, 448 Pa. at ___, 293 A.2d at 356-57; Tanner, supra; Petro-Tech, supra.

In its response and memorandum in opposition to the Motion, CSX asserts a number of reasons as to why it will be prejudiced by allowing DER to amend its Complaint. CSX first argues that DER's request to amend its Complaint is untimely since DER could have included the three additional counts in the original Complaint, but instead waited until CSX had completed its deposition of relevant DER witnesses before seeking to add these new counts. Citing the Superior Court's decision in Brooks v. McMenamin, 349 Pa. Super. 436, 503 A.2d 446 (1986) "Brooks", CSX argues that such unnecessary delay is prejudicial to CSX's ability to prepare its defenses and trial strategy and constitutes undue surprise. The decision of the Superior Court in Brooks does not, however, support CSX's argument. In Brooks, the appellants sought to amend their answer to a complaint six months after the filing of the answer. The trial court denied the petition to amend based on the "appellant's [sic] failure to explain their 'unreasonable delay' of six (6) months since the filing of the answer." 349 Pa. Super. at ___, 503 A.2d at 447. The Superior Court reversed, holding that the trial court had abused its discretion by denying the appellants' petition to amend their answer based on nothing more than unreasonable delay. In so holding, the Superior Court stated, "Although the time of the amendment is a factor to be considered, it appears that it is to be considered only insofar as it presents a question of prejudice to the opposing party." Id.

Here, CSX argues that DER's six-month delay in amending its Complaint is prejudicial because CSX has completed its discovery of DER's witnesses. Any prejudice to CSX caused by the filing of DER's amendment at this time can be resolved, however, by granting CSX an opportunity to conduct additional discovery related to the new counts which DER seeks to add. In addition, CSX will have an opportunity to file an answer to the Amendment. As to CSX's argument that reopening the pleadings and discovery is not an efficient use of the Board's or

the parties' resources and will result in an unnecessary delay of the trial of this matter, we disagree. As DER notes in its Motion, if leave is not granted to amend its Complaint, DER intends to file a separate Complaint for Civil Penalties based on the three counts in question. This will give rise to a separate appeal before the Board, involving a new round of discovery. Such a result would be an even less efficient use of both the Board's and the parties' time and resources and would simply result in delaying a resolution of these issues.

CSX next argues that DER's Motion should be denied since the Amendment is not based upon additional information obtained through discovery but, rather, was available to DER when it filed its initial Complaint. While we do not condone DER's apparent delay in seeking to amend its Complaint, we find nothing in either Pa. R.C.P 1033 or the relevant caselaw which limits the amendment of pleadings to only those matters which are brought to light through discovery. Nor does CSX direct us to any authority for this.

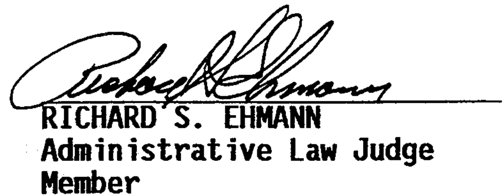
Finally, CSX argues that since the Amendment is not necessary "to conform the [Complaint] to the evidence", as set forth in Pa. R.C.P.1033, it should not be allowed. However, Pa. R.C.P. 1033 states only that an amendment <u>may</u> be made for this reason; it does not limit the filing of amendments for this purpose only.

In conclusion, because amendments to pleadings are to be liberally allowed where no prejudice will result to the opposing party, and because we have determined that CSX will suffer no prejudice if granted an opportunity to conduct additional discovery, we find no reason why DER should not be granted leave to amend its Complaint to add the three counts in question. Therefore, we enter the following order:

ORDER

AND NOW, this 21st day of April, 1995, upon consideration of DER's Motion to Amend Complaint for Civil Penalties and CSX's response and memorandum in opposition thereto, it is hereby ordered that the Motion is granted. DER's Amendment To Complaint For Civil Penalties is deemed to have been filed with this Board and served on CSX as of this date. CSX shall file an Answer to the Amendment To Complaint For Civil Penalties on or before May 10, 1995. It is further ordered that CSX and DER are granted 95 days from the date of this order in which to conduct additional discovery, limited solely to matters related to the three additional counts set forth in DER's Amendment To Complaint For Civil Penalties.

ENVIRONMENTAL HEARING BOARD



RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: April 21, 1995

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mw

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M. DIANE SMITH
SECRETARY TO THE BOARD

MARSOLINO COAL & COKE, INC.	:	
	:	
v.	:	EHB Docket No. 94-285-E
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: May 1, 1995

**OPINION AND ORDER SUR
DEPARTMENT OF ENVIRONMENTAL RESOURCES
MOTION FOR SUMMARY JUDGMENT**

By: Richard S. Ehmann, Member

Synopsis

The Department of Environmental Resources' ("DER") Motion For Summary Judgment in this appeal from DER's forfeiture of mining bonds posted by Marsolino Coal & Coke, Inc. ("Marsolino") is granted. Where the facts of record establish that there are no material facts in dispute, the sole question is movant's entitlement to a judgment as a matter of law. Where the facts show two separately bonded areas within the mine drainage permit discharge untreated mine drainage to two different streams, the miner's failure or refusal to continue treating this mine discharge, despite orders from DER to do so (and permit requirements mandating it) and the miner's bonds being conditioned on compliance with SMCRA and the Clean Streams Law, forfeiture of the bonds is justified. Where SMCRA mandates general liability insurance coverage for the mine site by the miner and the evidence establishes no such coverage, bonds conditioned on compliance with SMCRA may be forfeited by DER based on this lack of coverage. It is no defense to forfeiture that the miner alleges he is eligible for partial

bond release and the evidence establishes both a failure to seek bond release and a failure to qualify therefor.

OPINION

Background

On October 26, 1994, Marsolino filed its appeal with this Board from DER's letter to it declaring forfeiture of eight surety bonds posted with DER by Marsolino under Mine Drainage Permit No. 3374SM6 for its mine in Springfield Township, Fayette County.

Thereafter, DER undertook discovery through Interrogatories, Requests For Admissions and a Request For Production Of Documents. When Marsolino filed no response to this discovery, on February 2, 1995, DER filed a Motion To Compel. Marsolino filed no response to DER's motion, and we granted it in our Order dated February 17, 1995. Our Order directed Marsolino to file answers with DER's counsel to the Requests For Admissions, Request For Documents and Interrogatories by March 3, 1995. Marsolino failed to do so according to the affidavit of DER's counsel. The Board's records reflect that Marsolino's responses to DER's discovery were not received by this Board until March 10, 1995. (The certificate of service attached thereto and signed by Marsolino's counsel shows they were not mailed to this Board or DER until March 9, 1995). Thus, pursuant to Pa.R.C.P. 4014, DER's proposed Admissions in DER's Request For Admissions are all deemed conclusively established for purposes of this appeal.[1] Manor Mining & Contracting Corp. v. DER, 1992 EHB 66; Kerry Coal Company v. DER, 1991 EHB 73.

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[1]While Marsolino might have moved this Board to permit it to amend or modify these deemed admissions under Pa.R.C.P. 4014(d), it has not done so. Moreover, in its late filed Answers, Marsolino admitted all the proposed Admissions save one.

After discovery, DER and Marsolino both filed their respective Pre-Hearing Memoranda. Simultaneously with DER's filing of its Pre-Hearing Memorandum, it filed a Motion to Limit Issues and the instant Motion For Summary Judgment.[2] On April 3, 1995, Marsolino filed Appellant's Brief Opposing Department's Motion To Limit Issues and Motion For Summary Judgment. Enclosed therewith is an affidavit of L. P. Marsolino, the former vice president of Marsolino, which will be discussed below. Other than this Brief and affidavit, however, Marsolino made no reply to DER's Motion (which is accompanied by a Brief, two lengthy affidavits, and numerous exhibits).

Motions for Summary Judgment before this Board are governed by our numerous cases thereon. The requirements of Pa.R.C.P. 1035(b) provide that 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", we may grant such motions. Robert L. Snyder, et al. v. Department of Environmental Resources, 138 Pa. Cmwlth. 534, 588 A.2d 1001 (1991), appeal dismissed, 534 Pa. 276, 632 A.2d 308 (1992) ("Snyder"). However, we grant such motions only where the circumstances are clear and free from doubt, Cambria CoGen Company v. DER, EHB Docket No. 92-308-MJ (Opinion issued February 10, 1995) ("CoGen"), and we view them in a light most favorable to the non-moving party, RESCUE Wyoming, et al. v. DER, EHB Docket No. 91-503-W (Opinion issued March 30, 1994).

The facts on which DER bases its Motion are not in dispute. Indeed, in paragraph No. 6 of L. P. Marsolino's affidavit he even states:

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[2]Because we grant DER's Motion For Summary Judgment in the order attached to this opinion, we do not address its Motion To Limit Issues.

> The only outstanding Compliance orders and Assessments of Civil Penalties relating to the so-called "Chanin Strip" are those listed in the Facts in Support of the Department's Motion to Limit Issues on Appeal and Motion For Summary Judgment."

The facts established that on April 29, 1974, DER issued Mine Drainage Permit No. 3374SM6(A) to Marsolino for its "Chanin" surface mine (hereafter "Chanin Strip") (Request For Admissions No.1, Affidavit of C. R. Greene). A true and correct copy of the Chanin mine's current permit is Exhibit A (Affidavit of C. R. Greene). Pursuant to its statutory obligations concerning bonding this mine site in regard to its mining activities, Marsolino posted with DER surety bonds issued by American States Insurance Company. These bonds are identified in DER's forfeiture notice and C. R. Greene's affidavit as follows:

Bond No.	Bond Amount	Acreage	Mining Permit No.
EX452337	$46,550.00	127.0	71-25
EX465152	27,500.00	55.0	71-25A
EX465153	23,000.00	23.0	71-25A2
EX483656	10,500.00	25.0	71-25A3
EX500244	3,000.00	6.0	71-25A4
EX432073	19,200.00	9.6	71-25A6
EX396709	55,500.00	74.0	71-27
EX500254	1,100.00	1.1	71-27

As set forth in Greene's affidavit, copies of these bonds are attached to DER's Motion as Exhibits B-1 to B-8 (Greene's Affidavit). Each bond specifically provides that it is for the Chanin Strip and states on its face:

> NOW THE CONDITION OF THIS OBLIGATION is that if the principal shall faithfully perform all of the requirements of (1) [the Surface Mining Conservation and Reclamation Act, Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1 *et seq.* ("SMCRA")], (2) [the Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 *et seq.* ("Clean Streams Law")], (3) the applicable rules and regulations promulgated thereunder, and (4) the provisions and conditions of the permits issued thereunder and designated in this bond (all of which are hereafter referred to as "law"), then this obligation shall be null and void, otherwise to be and remain in full force and effect in accordance with the

provisions of the law.[3]

On September 19, 1994, DER forfeited these Marsolino surety bonds. Its forfeiture letter recites the following reasons for this action:

1. Failure to maintain adequate treatment facilities.
2. Failure to maintain liability insurance as required by the regulations.
3. Failure to comply with an order of the Department.
4. Failure to show a willingness or intention to comply with the applicable laws and regulations.
5. Failure to pay outstanding civil penalties.
6. Such other violations identified in the numerous Inspection Reports, Letters and Notices of Violation which have been sent to you.

Liability Insurance

Paragraph 21 of Greene's affidavit and DER's Motion state that Marsolino does not maintain liability insurance for its Chanin Strip. Neither L.P. Marsolino's affidavit nor Marsolino's Brief deny this.

Buck Run Discharge

Greene's affidavit and DER's Motion aver there is a discharge of mine drainage on the surface of the Chanin Strip known as the Buck Run discharge that arises within the area covered by the Mine Drainage Permit and Mining Permit No. 71-27 and flows to an unnamed tributary of Buck Run. It avers, as does DER's Motion, that this discharge violates the effluent limits in 25 Pa. Code §87.102 because its pH is less than 6.0, acidity exceeds alkalinity and its manganese content is in excess of 4.0 mg/l. The motion and affidavit both then state this discharge flows through Marsolino's mine drainage treatment plant known as the Buck Run Treatment System, but that at least since May 13, 1994, Marsolino has

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[3]Bond No. EX500254 (Exhibit B-8) includes all of this language and adds citations to both the Air Pollution Control Act, Act of January 8, 1960, P.L. 2119, as amended 35 P.S. §4001 *et seq.*, and the Water Obstruction Act, Act of June 25, 1913, P.L. 555, as amended, 32 P.S. §681 *et seq.*, as acts with which Marsolino must comply; however, compliance therewith is not an issue here.

failed to treat this discharge. DER then asserts (as again supported by Greene's affidavit) that it has issued orders to Marsolino to operate this Buck Run treatment system but that Marsolino has neither appealed these orders or complied therewith. The DER Requests for Admissions confirm DER's two orders to Marsolino and its failure to appeal or to treat this discharge. Marsolino's affidavit speaks of its treatment of discharges at this site from 1981 to 1994 and the cost thereof to it, but the affidavit offers no facts disputing DER's allegations. True and correct copies of DER's orders attached to its Motion (according to DER's affidavits) show they were issued pursuant to the Clean Streams Law and SMCRA.

The Requests for Admissions and the Affidavits of C. R. Greene and Steven Lachman further establish (as stated in the Motion) DER's issuance of two separate civil penalty assessments to Marsolino under SMCRA and the Clean Stream Law for failure to operate these treatment facilities and treat this Buck Run discharge. Further, also as set forth in the Motion, the DER affidavits show no appeal from the assessments by Marsolino but no payments of the amounts assessed, either. Again, the Marsolino affidavit does not dispute these facts, although it does point out that from 1981 until the present there were no other notices or assessments by DER as to the Chanin Strip.

71-25A Discharge

DER's Motion and its supporting affidavits, and Requests For Admission also reference a second mine drainage discharge arising on the Chanin Strip. This one is known as the 71-25A discharge because it arises within Mining Permit 71-25A (one of the mining permits on which bond is posted within Mine Drainage Permit No. 3374SM6). This discharge is stated to drain to an unnamed tributary of Indian Creek.

What was true as to the Buck Run discharge is also true as to the 71-25A discharge and is supported by the affidavits, exhibits and Requests for Admission. Here again, Marsolino has a discharge with a pH of less than 6.0, acidity exceeding alkalinity, and manganese in excess of 4.0 mg/l. The discharge flows through Marsolino's 71-25A treatment system, but at least since May 10, 1994 Marsolino has not operated this system or treated this mine drainage. Also again, DER has issued Marsolino administrative orders under SMCRA and the Clean Streams Law to maintain the 71-25A treatment plant, and Marsolino has neither complied therewith nor appealed those orders to this Board. Further, DER has issued two separate civil penalty assessments to Marsolino as to the 71-25A discharge under these statutes, and again, Marsolino has neither appealed therefrom nor paid the assessments. Finally, as to these factual assertions in DER's Motion, as supported in the fashion stated above, L.P. Marsolino's affidavit does not offer another "spin" or otherwise place them in dispute.

Pa.R.C.P. 1035(d) provides in part that: "When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him." See Knecht v. Citizens & Northern Bank, 364 Pa. Super. 370, 528 A.2d 203 (1987); Envyrobale Corporation v. DER, EHB Docket No. 94-148-E (Opinion issued December 6, 1994). Applying this rule to this appeal, we have neither a response through factual allegations and denials setting DER's facts in dispute, nor affidavits as to specific facts showing a genuine factual issue for trial. As pointed out above,

while Marsolino has filed a Brief and the affidavit, it has filed no response to the averments in DER's Motion. DER's facts are thus uncontroverted.[4]

Accordingly, we next turn to the question of whether DER is entitled to judgment in its favor in this appeal as a matter of law. It is clear that based on these facts, DER has shown Marsolino's Chanin Strip produces two discharges of mine drainage. Apparently, from 1981, when coal removal was completed, until early 1994, Marsolino treated each discharge at its own treatment facility but in 1994, treatment ceased. DER ordered Marsolino to recommence treatment but it did not do so. DER also assessed civil penalties against Marsolino for failing to treat this mine drainage but Marsolino did not pay those penalties. Thus, today we have the Chanin Strip discharging untreated mine drainage and Marsolino neither complying with DER's orders nor paying the penalties assessed against it for non-compliance therewith.[5]

Pursuant to 25 Pa. Code §§87.101 and 87.102 as promulgated under the Clean Streams Law and SMCRA, as the miner, Marsolino is obligated to prevent the discharge of water from its mines where the water's pH is less than 6.0, acidity exceeds alkalinity, and manganese exceeds 4 mg/l. In other words, Marsolino must

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[4]To the extent that the legal arguments in Marsolino's Brief are underpinned by facts averred and established by DER's filings or its own affidavit, they are factually supported, but, to the extent essential supporting factual allegations are not made in a response to DER's Motion or are inferences from the Brief, Marsolino's legal arguments are deficient. See County of Schuylkill v. DER, 1990 EHB 1370; Ernest Barkman, et al. v. DER, 1993 EHB 738; and Cogen.

[5]DER's motion correctly points out that it is too late for Marsolino to challenge DER's orders to it or the penalty assessments against it. Commonwealth, DER v. Wheeling-Pittsburgh Steel Corp., 22 Pa. Cmwlth. 280, 348 A.2d 765 (1975), *aff'd* 473 Pa. 432, 375 A.2d 320 (1977), cert. denied 434 U.S. 969 (1977); and Specialty Waste Services, Inc. v. DER, 1992 EHB 382. Issues which could have and should have been raised in appeals, then, cannot be raised here. Kelly Run Sanitation, Inc. v. DER, EHB Docket No. 94-270-E (Opinion issued March 25, 1995).

treat or not discharge, and so these untreated discharges violate the regulations and these statutes.

Moreover, 25 Pa. Code §§86.67, 86.144 and 86.168 all recognize the requirement in Subsection (c) of Section 3.1 of SMCRA (52 P.S. §1396.3a(c)) that requires Marsolino have "in force a public liability insurance policy issued by an insurance company authorized to do business in Pennsylvania covering all surface mining operation of [Marsolino] in the State and affording personal injury and property damage protection." The factual record shows that there is no such policy and is thus a second separate violation by Marsolino of SMCRA.

We need not go further to review other violations of these statutes by Marsolino.[6] Sections 307 and 315 of the Clean Streams Law (35 P.S. §§691.307 and 691.315) prohibit these discharges. Section 611 of the Clean Streams Law (35 P.S. §691.611) makes it unlawful to comply with a DER order issued under the statute.

Since Conditions 10 and 12 of Marsolino's Mine Drainage Permit prohibit discharges of mine drainage with a pH of less than 6 or with acidity exceeding alkalinity, Marsolino has also violated its permit conditions by allowing this discharge and, in turn, thus has violated section 18.6 of SMCRA (52 P.S. §1396.18f).

Under these circumstances, bond forfeiture must be sustained. As pointed out in Morcoal Company v. Commonwealth, DER, 74 Pa. Cmwlth. 108, 459 A.2d 1303 (1983) ("Morcoal"), the language in Section 4(h) of SMCRA (52 P.S. §1396.4(h)) is mandatory. Where Marsolino fails or refuses to comply with SMCRA, DER must forfeit its bonds. Similar mandatory language exists in Section 315(b) of the

[6]DER's Motion avers others, including another discharge which is also untreated.

Clean Streams Law (35 P.S. §691.315(b)). Both Acts say that when Marsolino does not comply with the requirements of these statutes in any respect for which liability is charged in the bond, the bond shall be forfeited. Since the bonds require Marsolino to comply with the statute, regulations, and its permit, and it has not, the DER forfeiture decision is clearly statutorily mandated.

As to the bonds posted for Mining Permit 71-27, DER has shown the discharge to Buck Run and a lack of liability insurance. As to the bonds posted for Mining Permit 71-25A, DER has shown the discharge to Indian Creek and the lack of insurance.

Under our many bond forfeiture decisions, including John R. Miller v. DER, 1988 EHB 538, and James E. Martin, et al. v. DER, 1988 EHB 1256, this is more than enough to sustain forfeiture.

As to the other 6 bonds, DER has failed to show any physical conditions on the areas under those bonds warranting forfeiture or a hydrogeologic connection of those areas to these discharges. Nevertheless, it has shown no general liability insurance for any of the segments of Marsolino's Chanin Strip. Since the bonds are premised on Marsolino's compliance with SMCRA, which includes the insurance requirement, under Morcoal, we sustain the forfeiture.

In so doing, we expressly reject the arguments in Marsolino's Brief In Opposition To DER's Motion. There, Marsolino says it does not dispute DER's facts (Marsolino's Brief page 7), but challenges DER's legal conclusions. Marsolino's Brief then makes a series of factual statements which, as pointed out above, are not supported by affidavits or similar fact sources of the type recognized in Pa.R.C.P. 1035(d), and thus constitute the type of assertions we cannot consider. Marsolino then asserts that for thirteen years, it complied with all of DER's directives and only got into this proceeding when it questioned

responsibility for the actions DER was directing it to take. Marsolino's Brief then asserts forfeiture is inappropriate because: (1) it is entitled to partial bond release "under 52 P.S. §1396.4(g.2) 2i and ii", (2) the discharges are minimal impact discharges, and; (3) the lack of any application by Marsolino for bond release does not change the impropriety of forfeiture. It then concludes this release issue precludes summary judgment. Finally, since DER has the burden of proof, this Board must find evidence in the record to sustain DER's forfeiture, so Marsolino says a hearing is necessary and summary judgment cannot be granted.

We agree with Marsolino, that, as to forfeiture, DER has the burden of proof, but we do not agree that merely because it has that burden, a hearing must be held and therefore summary judgment must be denied. As the Commonwealth Court instructed in Snyder (which is another bond forfeiture matter where summary judgment was granted), the rule in Nanty Glo v. American Surety Co. (citation omitted) does not apply before this Board, so we may use testimonial affidavits to form a basis for such judgments where they are uncontradicted. Thus, where that is the case as it is here, no merits hearing is mandatory as long as there are adequate undisputed material facts to support the Motion.

We also reject Marsolino's other argument. As Marsolino itself points out, Marsolino has not sought bond release from DER and, on DER's denial of such a release request, appealed the denial to this Board. Indeed, Marsolino has not even applied to DER for bond release. Since Marsolino has not sought release and DER could not have acted on a Marsolino request for release and without a DER decision or action, this Board lacks jurisdiction over issues relating to release. See Section 4 of the Environmental Hearing Board Act, Act of July 13, 1988, P.L. 530, 35 P.S. §7514; County of Clarion v. DER, et al., 1993 EHB 573.

Further, to the extent this Brief constitutes Marsolino's attempt to obtain declaratory relief on this issue from us, we have no power to grant such relief. Elephant Septic Tank Service, et al. v. DER, 1993 EHB 590. In short, we cannot determine any "entitlement to bond release" issue in this proceeding and, even if we overlooked this conclusion, Marsolino has failed to establish a factual basis on which to assert its right to such a release as a legal defense to summary judgment as to forfeiture. The Marsolino affidavit does not address this contention and the Brief cites us to no other location where there are facts of record to support this argument.

Further, as DER points out, to be entitled to bond release under section 4(g.2)(2) of SMCRA, 52 P.S. §1396.4(g.2)(2), Marsolino must apply for such a release, and set up a trust fund to cover maintenance of a passive treatment system on site. As DER's Motion (again supported by C. R. Greene's affidavit and not rebutted by other facts established by Marsolino) points out, Marsolino has not applied for such a release from DER nor established any trust fund. Thus, the undisputed facts before us show that Marsolino currently fails to qualify for release under this section of SMCRA. This being true, a right to release under Section 4 (g.2)(2) could not be an issue before us now, and is no bar to DER's Motion.

Finally, Marsolino's Brief asserts that the discharges are minimal impact discharges. The Brief contains no citation to where the facts needed to support this assertion can be found. They are not in L.P. Marsolino's affidavit nor the affidavits or other filings on behalf of DER. Without factual support for this assertion, there is no basis to conclude this is true or that it forms a defense to DER's Motion.

Accordingly, we enter the following Order.

<u>**ORDER**</u>

AND NOW, this 1st day of May, 1995, it is ordered that the Department of Environmental Resources' Motion For Summary Judgment is granted, the merits hearings in the above captioned appeal are cancelled and the appeal is dismissed.[7]

ROBERT D. MYERS
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: May 1, 1995

cc: **DER Bureau of Litigation:**
(Library: Brenda Houck)
For the Commonwealth, DER:
Steven F. Lachman, Esq.
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[7]In coming to this conclusion, we have not considered other possible defenses on Marsolino's behalf. For example, its Notice Of Appeal denies a lack of liability insurance coverage for the Chanin Strip and its Pre-Hearing Memoranda suggest evidence will show that some of the discharges are not on the mine site. Had Marsolino raised such factual assertions in its response to DER's Motion and supported them, a different result might have occurred. It made its choice as to how to respond, however, and in its Brief, even states its election not to respond to each individual paragraph of DER's motion but merely to summarize its position. Accordingly, we limited ourselves in similar fashion.

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M. DIANE SMITH
SECRETARY TO THE BOARD

SKY HAVEN COAL COMPANY, INC.

v.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL RESOURCES

EHB Docket No. 94-241-E

Issued: May 2, 1995

OPINION AND ORDER SUR
MOTION FOR CLARIFICATION

By: Richard S. Ehmann, Member

Synopsis:

DER's Motion for Clarification, seeking clarification of the Board's March 17, 1995 Opinion and Order which dismissed Sky Haven's appeal for untimeliness, is granted. This Opinion amends the March 17, 1995 Opinion, which incorrectly stated the date on which Sky Haven's appeal was filed with the Board. However, because the actual date of filing is still beyond the thirty-day appeal period, this appeal is dismissed for the reasons set forth in our March 17, 1995 Opinion.

OPINION

This matter involves an appeal filed by Sky Haven Coal Company, Inc. ("Sky Haven") from a compliance order issued by the Department of Environmental Resources ("DER") and received by Sky Haven on August 8, 1994. In an Opinion and Order issued on March 17, 1995 ("March 17 Opinion"), the Board dismissed this appeal on the basis that it was filed more than thirty days after the receipt of DER's compliance order and was, therefore, untimely. The March 17 Opinion recited that the appeal was filed on September 12, 1994.

On March 30 and 31, 1995, we received from DER a Motion and Amended Motion for Clarification (hereinafter, collectively referred to as "Motion"), seeking

clarification of the March 17 Opinion.[1] In its Motion, DER states that Sky Haven's notice of appeal was filed on September 8, 1994, and not September 12, 1994 as recited in the Board's Opinion. Based on DER's Motion, we issued an Order withdrawing our March 17, 1995 Order dismissing this appeal, in order to evaluate the merits of the Motion. Sky Haven was given an opportunity to respond to DER's Motion on or before April 14, 1995, but elected to file no response.

A review of the Board's records reveals that, while we received Sky Haven's notice of appeal by mail on September 12, 1994, a copy of the appeal was filed by facsimile on September 8, 1994. Thus, the date of filing was, in fact, September 8, 1994. However, this does not alter the outcome of this matter since September 8, 1994 is still more than thirty days beyond August 8, 1994, the date on which Sky Haven received DER's compliance order. Therefore, the appeal is untimely and must be dismissed for the reasons set forth in our March 17 Opinion.

Accordingly, we enter the following Order:

ORDER

AND NOW, this 2nd day of May, 1995, it is ordered as follows:

1) DER's Motion for Clarification is granted. To the extent the March 17 Opinion recites the date of filing of Sky Haven's appeal as September 12, 1994, it is incorrect and is amended to read **September 8, 1994**.

2) Sky Haven's appeal at Docket No. 94-241-E is hereby dismissed for the reasons set forth herein and in the March 17 Opinion, as corrected.

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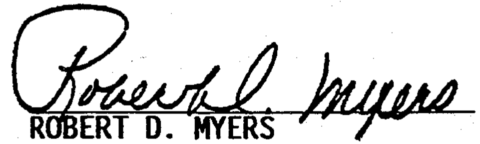
[1]The caption of both DER's Motion and its Amended Motion incorrectly refer to this appeal as Docket No. 94-335-E. Although the appeal filed at Docket No. 94-335-E also involved Sky Haven as the appellant, it is a separate appeal wholly unrelated to the matter at hand.

ENVIRONMENTAL HEARING BOARD



ROBERT D. MYERS
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: May 2, 1995

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M. DIANE SMITH
SECRETARY TO THE BOA

WILLIAM FIORE

v. : EHB Docket No. 94-341-M

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL RESOURCES : Issued: May 2, 1995

OPINION AND ORDER SUR
MOTION FOR SUMMARY JUDGMENT

By Robert D. Myers, Member

Synopsis

The Board's denial of summary judgment to the Department with respect to another appeal dealing with the revocation of Appellant's Water Quality Management Permits does not constitute a final decision on that issue which Appellant can use as a basis for summary judgment in the present appeal involving the forfeiture of bonds. Moreover, Appellant has not alleged that the bonds forfeited in this proceeding, posted in connection with the solid waste permit, also covered the Water Quality Management Permits.

OPINION

This appeal was filed on December 12, 1994, challenging the Department's November 18, 1994 forfeiture of bonds posted pursuant to the Solid Waste Management Act (SWMA), the Act of July 7, 1980, P.L. 380, *as amended*, 35 P.S. §6018.101 *et seq.*, in connection with a site in Elizabeth Township, Allegheny County. This site has been the subject of much litigation, as recounted in the Board's February 2, 1994, opinion at Board Docket No. 91-063-W regarding the Department's motion for summary judgment and will not be recounted here. That

opinion granted the Department's motion with regard to the appeal by William Fiore, d/b/a Municipal and Industrial Disposal Company, of the Department's denial of Fiore's application to renew a National Pollutant Discharge Elimination System (NPDES) permit for a solid waste disposal facility at the same site in Elizabeth Township, Allegheny County.[1] In doing so, the Board held that Fiore had committed numerous violations 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), which violations were established by reason of collateral estoppel, and that the Department's denial of the renewal application was justified under §609 of the Clean Streams Law. The Department's motion made no reference to its revocation of Fiore's water quality management (WQM) permits, which was also the subject of Fiore's appeal at 91-063-W, and, as a result, the Board did not - and could not - dismiss Fiore's appeal in its entirety. The Department having subsequently filed a second motion for summary judgment dealing with the revocation of the WQM permits, the Board on November 2, 1994 issued another opinion denying the Department's motion because the Department failed to demonstrate that it was entitled to judgment as a matter of law.

On January 3, 1995, Fiore filed a motion for summary judgment regarding his appeal of the bond forfeiture, alleging that the Department abused its discretion and acted arbitrarily and capriciously by erroneously commencing the bond forfeiture action since it is predicated on the Consent Order and Agreement[2],

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[1] On March 9, 1995, Commonwealth Court affirmed the Board's opinion on appeal.

[2] On January 25, 1983, the parties entered into a Consent Order and Agreement (CO&A) requiring Fiore, *inter alia*, to remove the waste in the temporary pit, to submit a closure plan, to refrain from expanding the hazardous waste facility or constructing a facility which is not permitted, and to pay various civil penalties.

which had been previously adjudicated and has failed to afford him a hearing on this matter.[3] However, Fiore does not make these same contentions in his memorandum in support of his motion. Rather, Fiore argues that *res judicata* and collateral estoppel preclude the Department from forfeiting bonds because the Board's denial of the Department's motion for summary judgment regarding the revocation of the WQM permits means that the permits are still in Fiore's hands. On February 8, 1995, the Department filed its response, along with exhibits, in opposition to the motion, asserting, *inter alia*, neither res judicata nor collateral estoppel establish that there are no material facts at issue.

Summary judgment may be granted when "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. No. 1035(b); *Robert L. Snyder, et al. v. Dept. of Environmental Resources, 138 Pa. Cmwlth. 534, 588 A.2d 1001 (1991), petition for allocatur dismissed as improvidently granted*, ____ Pa. ____, 632 A.2d 308 (1993). In ruling on a motion for summary judgment, we must view the evidence in a light most favorable to the non-moving party. *Michael Strongosky v. DER and Resource Conservation Corp.*, 1993 EHB 412. The burden rests on the moving party to demonstrate it is entitled to judgment as a matter of law. *Estate of Charles Peters et al. v. DER et al.*, 1992 EHB 358, 370.

Fiore presumes that our denial of summary judgment to the Department on the matter of revocation of the WQM permits amounts to a final judgment in favor of Fiore on that issue, from which the Department had to take an appeal in order to

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[3] Neither party raises arguments on this issue in their supporting memorandum. Therefore, we will not address it in this motion.

avoid issue preclusion under *res judicata* or collateral estoppel. The Department, of course, did not take an appeal. The correct legal status is quite different from Fiore's presumption. Our denial of the Department's motion did not confer any advantage upon Fiore, the non-moving party. It simply left the issue to be resolved by a hearing or other device leading to a final decision. In *Bensalem Township School District v. Commonwealth*, 518 Pa. 581, 544 A.2d 1318 (1988), the Supreme Court held,

> A motion for summary judgment under Rule 1035 is radically different [from a motion under Rule 1034] because the issue is whether the moving party has *established*, by virtue of a developed pretrial record,the cause of action or defense he has pleaded; or, alternatively, whether there is a genuine issue of fact for decision. The motion, however, does not concede that the adversary's case can be proved; and because the movant does not concede the converse facts a non-movant has received no benefit and is not entitled to a judgment under the plaintiff's motion. Therefore, in a motion for summary judgment only the moving party can prevail, because if he fails, a dispute continues on the facts themselves.
> (Emphasis by the Court)
> (544 A.2d 1318 at 1321 (1988)).

This ruling was followed by the Supreme Court in *Sidkoff, Pincus, Greenberg & Green, P.C. v. Pennsylvania National Mutual Casualty Insurance Company*, 521 Pa. 462, 555 A.2d 1284 (1989), where the Court said,

> There is no appeal from a summary judgment denied a moving party. Such a ruling is interlocutory as the party remains in court.
> (555 A.2d 1284 at 1288 (1989)).

Based on these principles, it is clear that the validity of the Department's revocation of the WQM permits is still in issue at Board Docket No, 91-063-W and affords no basis for granting summary judgment to Fiore in the bond forfeiture appeal.

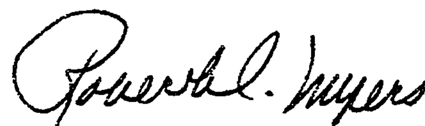
We also fail to see how a resolution of the dispute surrounding revocation of the WQM permits, even if resolved in Fiore's favor, would determine the outcome of the present appeal. The bonds forfeited were posted in connection

with the solid waste permit. Fiore makes no allegation that the same bonds covered the WQM permits and we find no evidence at this stage of the proceedings to establish that critical fact.

ORDER

AND NOW, this 2nd day of May, 1995, it is ordered that William Fiore's motion for summary judgment is denied.

ENVIRONMENTAL HEARING BOARD



ROBERT D. MYERS
Administrative Law Judge
Member

DATED: May 2, 1995

cc: DER Bureau of Litigation:
Library: Brenda Houck
Harrisburg, PA
For the Commonwealth, DEER:
Edward S. Stokan, Esq.
Southwest Region
For the Appellant:
William Fiore (Pro Se)
Pittsburgh, PA

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M. DIANE SMITH
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GERALD BOLING :
:
v. : EHB Docket No. 95-015-E
:
COMMONWEALTH OF PENNSYLVANIA, :
DEPARTMENT OF ENVIRONMENTAL RESOURCES : Issued: May 2, 1995

OPINION AND ORDER SUR
MOTION TO DISMISS

By Richard S. Ehmann, Member

Synopsis:

A Motion to Dismiss an appeal from the Department of Environmental Resources' ("DER") refusal to take action against a property owner who allegedly discharges sewage into Buffalo Creek is granted. A DER decision not to act is an exercise of its prosecutorial discretion rather than being an action or adjudication of DER, and, as such, this Board lacks jurisdiction to hear a challenge to the propriety of DER's decision not to act.

OPINION

On January 23, 1995, this Board received a Notice of Appeal from Gerald W. Boling ("Boling"), who resides in Blaine Township, Washington County. According to this Notice of Appeal, DER has informed Norm George ("George"), who is Blaine Township's Sewage Enforcement Officer, that it would not support George in any action he might take against one of Boling's neighbors. The Notice of Appeal recites that the neighbor (Joe Scandale) discharges sewage directly into Buffalo Creek and that this has been proven through two dye tests conducted in 1994 (one

conducted by George and Township Supervisor Mary Jo Keenan in May of 1994, and a second conducted in June of 1994). Boling's Notice of Appeal then goes on to say the discharge is intentional, rather than being one occurring as an unintended discharge from a malfunctioning septic system, and that Boling's well is now contaminated. Finally, Boling lists the sections which he contends empower DER to act on this problem as found within the Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §691.1 *et seq.*, and the Pennsylvania Sewage Facilities Act, Act of January 24, 1966, P.L. 1535, *as amended*, 35 P.S. §750.1 *et seq.*, and states why DER should take actions under these statutes.

On March 24, 1995, DER filed its Motion To Dismiss and a supporting Memorandum of Law. Upon its receipt, we notified Boling's counsel[1] of the Motion by letter and indicated therein that Boling had until April 18, 1995 to respond to DER's Motion. No response has been received from Boling by this Board. This Board will not grant DER's Motion based on Boling's failure to oppose it. Instead, we will address it on its merit.

DER's Motion is based on the concept that this Board has only limited jurisdiction. When this Board was created by the General Assembly's passage of the Environmental Hearing Board Act, Act of July 13, 1988, P.L. 530, 35 P.S. §7511 *et seq.*, the General Assembly established limits on the Board's powers. The Board may review DER's "adjudications," as defined in 2 Pa.C.S. §101, and its "actions," as defined in 25 Pa. Code §21.1(a).

Under 2 Pa.C.S. §101, an Adjudication is defined as:

> Any final order, decree, decision, determination or ruling by an agency affecting personal or property

---

[1] His counsel is listed in Boling's Notice of Appeal, although he has not formally entered an appearance.

> rights, privileges, immunities, duties, liabilities or obligations of any or all of the parties to the proceeding in which the adjudication is made. The term does not include any order based upon a proceeding before a court or which involves the seizure of property, paroles, pardons or releases from mental institutions.

Under 25 Pa. Code §21.1(a) of this Board's rules, a DER action is defined as:

> An order, decree, decision, determination or ruling by the Department affecting personal or property rights, privileges, immunities, duties, liabilities or obligations of a person, including, but not limited to denials, modifications, suspensions and revocations of permits, licenses and registrations; orders to cease operation of an establishment or facility; orders to correct conditions endangering waters of the Commonwealth; orders to construct sewers or treatment facilities, orders to abate air pollution and appeals from civil complaints for the assessment of civil penalties.

DER's activity here does not fall within either the definition of action or of adjudication. What appears to have happened here is that DER has taken the position that it will not take action as to the discharge of sewage from the Scandale property into Buffalo Creek despite the sections of the Clean Streams Law and Sewage Facilities Act cited by Boling which would authorize it to do so if the facts are as Boling alleges. DER has exercised its prosecutorial discretion in deciding not to tackle this problem at this time. Regardless of the merit or lack of merit in this decision, the issue raised is whether we may hear an appeal from it, and the answer is no. As DER points out, we have long held that our jurisdiction does not extend to appeals from a DER decision not to take action. These decisions are not adjudicatory actions subject to quasi-judicial or judicial review. Ralph D. Edney v. DER, 1989 EHB 1356; Downing v.

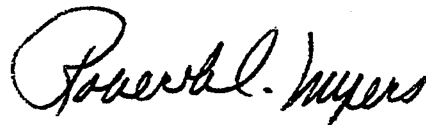
Commonwealth, Medical Education and Licensure Board, 26 Pa. Cmwlth. 517, 364 A.2d 748 (1976); Edward Simon v. DER, 1991 EHB 765.[2]

Accordingly, we enter the following order.

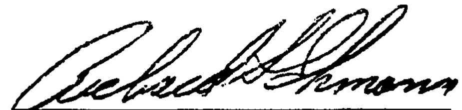
O R D E R

AND NOW, this 2nd day of May, 1995, it is ordered that DER's Motion To Dismiss is granted and Boling's appeal is dismissed.[3]

ENVIRONMENTAL HEARING BOARD



ROBERT D. MYERS
Administrative Law Judge
Member



RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: May 2, 1995

cc: **DER Bureau of Litigation:**
(Library: Brenda Houck)
For the Commonwealth, DER:
Katherine S. Dunlop, Esq.
Southwest Region
For Appellant:
Edward Morascyzk, Esq.
Washington, PA

bl

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[2] DER also argues that we lack jurisdiction because the statements of DER's position were oral. We do not reach this issue but note that we have not held that oral statements could never be appealable, only that they rarely are.

[3] Boling may not be without a remedy. He retains his rights as to this discharge set forth in Sections 601(c), (e) and (f) of the Clean Streams Law, 35 P.S. §691.601(c), (e) and (f).

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M. DIANE SMITH
SECRETARY TO THE BOARD

DAVID TESSITOR and ED L. STEWART	:	
	:	
v.	:	**EHB Docket No. 94-352-E**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES and PORT AUTHORITY OF ALLEGHENY COUNTY, Permittee	:	**Issued: May 4, 1995**

OPINION AND ORDER SUR
MOTION TO DISMISS

By: Richard S. Ehmann, Member

Synopsis

The Department of Environmental Resources' (DER) motion to dismiss this appeal for lack of standing is granted. Although one of the appellants has alleged an interest which is, at least, arguably "substantial", neither appellant has alleged that he will suffer any "direct" and "immediate" injury as a result of the action which has been appealed.

OPINION

This matter was initiated by the December 23, 1994 filing of a skeleton notice of appeal by David Tessitor and Ed L. Stewart (appellants). The appeal, which was perfected on January 12, 1995, challenges DER's November 23, 1994 issuance of Water Obstruction and Encroachment Permit No. E02-1084 (permit) to the Port Authority of Allegheny County (PAT). The permit in question was issued pursuant to DER's authority under the Dam Safety and Encroachments Act, Act of

November 26, 1978, P.L. 1375, as amended, 32 P.S. §693.1 et seq.; the Flood Plain Management Act, Act of October 4, 1978, P.L. 851, as amended, 32 P.S. §679.101 et seq.; the Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 et seq.; and the Administrative Code, Act of April 9, 1929, P.L. 177, 71 P.S. §510-17, as amended. Specifically, the permit authorizes:

> 1) the rehabilitation and maintenance of the existing stone arch culvert in Oakwood Run in the Borough of Crafton, Allegheny County;
>
> 2) the rehabilitation and maintenance of an existing structure which has three spans in Chartiers Creek in the Borough of Rosslyn Farms and the City of Pittsburgh, Allegheny County;
>
> 3) the construction and maintenance of interchange ramps in the floodplain of Chartiers Creek in the left bank of the creek at the Penn-Lincoln Parkway in the Borough of Carnegie, Allegheny County;
>
> 4) the removal of existing structures and construction and maintenance of two bridges across Chartiers Creek in the Borough of Carnegie, Allegheny County; and
>
> 5) the construction and maintenance of a bridge across the Monongahela River in the City of Pittsburgh.

In their appeal, Tessitor and Stewart request this Board to reverse DER's issuance of the permit to PAT on several grounds and award them attorney's fees and costs. The appellants' objections stated in their notice of appeal are as follows:

> 2. The permit application by ... PAT fails to disclose alternatives analysis as required by 25 Pa. Code Section 105.101 et seq., the Intermodal Surface Transportation Efficiency Act ("ISTEA").
>
> 3. [DER's] approval of the permit in question is an abuse of discretion and error of law in that [DER] failed to require compliance with Article 1 Section 27 of the Pennsylvania Constitution generally and more particularly as follows:
>
> > a. In permitting the construction of a Busway which will degrade air quality in

violation of the Pennsylvania and Federal law.

b. In failing to require compliance with the statutes and regulations set forth in the previous numbered paragraph.

c. Accepting the Federal Environmental Impact Statement as an adequate analysis of a rail transit alternative.

4. [DER] certification under Section 401 of PL 92-500 that the project will not violate the Clean Water Act is an error of law in that the Permittee has not submitted an NPDES permit application for operating the project and [DER] lacks the necessary information to make the certification.

5. [DER] committed an abuse of discretion and error of law in accepting as a transit and historical alternatives analysis the FEIS submitted by PAT to [DER] and the Pennsylvania Museum and Historical Commission ("PHMC") for its approval.

6. The FEIS is incomplete in that it fails to adequately consider alternative modes of transportation as required by [DER] and fails to consider alternative impacts or use of historic properties.

7. The permit was changed by [DER] after the permit was signed and returned by PAT and was not subsequently accepted by PAT in writing.

After the parties engaged in some discovery, we received from DER a motion to dismiss this appeal and an accompanying memorandum of law on March 20, 1995. We received the appellants' response to DER's motion on April 12, 1995. It is this motion which is presently before us.

As we stated in City of Scranton, et al. v. DER, et al., EHB Docket No. 94-060-W (Consolidated Docket) (Opinion issued January 25, 1995),

> At this stage in the proceedings, we treat motions to dismiss the same way we treat motions for judgment on the pleadings: we will dismiss the appeal only where there are no material factual disputes and the moving party is clearly entitled to judgment as a matter of law. The facts for purposes of the motion are those framed in the notice of appeal. All of the factual

> averments in the notice of appeal are viewed as true, and only those facts specifically admitted in the notice of appeal may be considered against the appellant.

Id. at 5 (citations omitted). We view the motion in the light most favorable to the non-moving party. Solar Fuel Company, Inc. v. DER, EHB Docket No. 93-353-E (Opinion issued May 16, 1994).

Do Tessitor and Stewart Have Standing to Appeal?

Citing, *inter alia*, William Penn Parking Garage v. City of Pittsburgh, 464 Pa. 168, 346 A.2d 269 (1975), DER asserts that the appellants lack standing to appeal DER's issuance of the permit to PAT. DER also argues that the Board lacks jurisdiction over the federal statutes involved in the appellants' challenges.

While a notice of appeal need not allege material facts showing the appellants have standing, City of Scranton, supra, the appellants here alleged such facts in their notice of appeal. The notice of appeal states at paragraph 1: "Tessitor is a resident of Allegheny County and a user of public transportation and is adversely affected by the grant of the permit[.] ... Stewart is adversely affected by the permit and project, and is a resident of Crafton, Allegheny County, a community adversely affected by the approval of the permit in question." The appellants' response to DER's motion further alleges that Tessitor uses the streams and property affected as a hiker, bird watcher, fisherman, and outdoorsman. Their response also asserts: "Stewart is the Mayor of Crafton, PA and will be affected directly by the permit issued as his community is in the path of this project and he will be adversely affected by the environmental degradation caused by the permit issuance and [DER's] failure to comply with Article I, Section 27 of the Pennsylvania Constitution."

We have explained that in order to have standing to challenge a [DER] action:

> the appellant must be "aggrieved" by that action, that is, a party must have a direct, immediate and substantial interest in the litigation challenging that action. Empire Sanitary Landfill, Inc. v. DER, et al., EHB Docket No. 94-114-W (Opinion issued September 30, 1994); *see also*, William Penn, [supra]. A "substantial" interest is "an interest in the outcome of the litigation which surpasses the common interest of all citizens in procuring obedience to the law." South Whitehall Twsp. Police Service v. South Whitehall Tswp., 521 Pa. 82, ____, [555] A.2d 793, 795 (1989); Press-Enterprise, Inc. v. Benton Area School District, 146 Pa. Cmwlth. 203, ___, 604 A.2d 1221, 1223 (1992). For an interest to be "direct", it must have been adversely affected by the matter complained of. South Whitehall Tswp. Police Service, supra. An "immediate" interest means one with a sufficiently close causal connection to the challenged action, or one within the zone of interests protected by the statute at issue. Empire Sanitary Landfill, Inc. v. DER, et al., supra.

Fred McCutcheon and Rusmar, Inc. v. DER, EHB Docket No. 94-096-W (Opinion issued January 5, 1995) at 2-3.

Do the Appellants Have a Substantial, Direct, and Immediate Interest?

DER first argues that the appellants lack a substantial interest because they "have expressed only a vague, abstract interest in preserving clean air," and their interest is not distinguishable from "the interest of the general public in clean air." DER further asserts that the appellants lack an immediate interest in DER's action because they have not claimed any harm to interests protected by the Dam Safety and Encroachments Act. DER also advances, "[a]ppellants have made no factual allegations that establish a causal connection between [DER's] issuance of a Water Obstruction and Encroachment Permit and degradation of air quality where Appellants reside", so they lack a direct interest. DER asserts that the permit at issue does not authorize any air emissions, and any increase in air emissions caused by construction of the busway is only related in an extremely indirect way to the permit's issuance.

The appellants respond, "[t]he factual allegations of the degradation of the air quality is [sic] found in the Draft Transitional Air Quality Conformity Determination for the Pittsburgh Transportation Management Area which is a companion document to the 1995-1996 Transportation Improvement Program by the Southwestern Pennsylvania Regional Planning Commission which compares the build vs. no-build option for the busway." The appellants claim that this document states that the build option would "increase transit emissions for VOC and NOx emissions." They argue, "[t]he direct link between the permit issuance and the air quality degradation is that the permit would allow the building of the busway and the subsequent air degradation." The appellants state that as an example of their argument, they have attached a copy of Table 13 of the conformity assessment to their response.

We see no substantial interest in the outcome of this litigation on Stewart's part. Although Stewart alleges that he is the mayor of Crafton, he did not take his appeal in that capacity or on behalf of the Borough. Thus, we do not deal with whether he has representational standing in ruling on this motion. James E. Wood v. DER, et al., 1993 EHB 299. Stewart's assertions, that he resides in Crafton, that his community lies in the path of this project, and that he will be adversely affected by some environmental degradation he suggests will be caused by the permit's issuance, show only a general interest in the environment. This is not sufficient to establish a substantial interest. See Environmental Outreach v. DER, 1992 EHB 904; Snelling v. Department of Transportation, 27 Pa. Cmwlth. 276, 366 A.2d 1298 (1976). The same is true as to his assertion that he has standing to challenge DER's issuance of the permit because DER failed to satisfy its duties as trustee of the environment under Article I, Section 27. This amounts to only an allegation of an interest equal

to that of the general public in ensuring compliance with that section of our constitution, which is insufficient for standing to challenge DER's issuance of the permit under Article I, Section 27. See, Sequa Corporation v. DER, et al., 1993 EHB 1589, 1599; Sierra Club v. Hartman, 529 Pa. 454, 605 A.2d 309 (1992).

As to Tessitor, it is less clear that he lacks a substantial interest in this matter. According to the notice of appeal, Tessitor is a resident of Allegheny County and a user of public transportation and is adversely affected by the grant of the permit. Insofar as Tessitor has appealed because he rides the permittee's buses, his interest does not surpass the common interest of all citizens in procuring obedience to the law. But, insofar as Tessitor has appealed because he uses the streams and property affected as a hiker, bird watcher, fisherman, and outdoorsman, and he is concerned about the construction of the culverts on the streams, he may have a substantial interest in this litigation. See James Wood, supra.[1]

Even if we assume, *arguendo*, that both appellants have an interest which is substantial, neither of the appellants in this matter has asserted an interest in this litigation which is direct. In order to show a direct interest, the aggrieved party must demonstrate causation of the harm to his interest by the matter about which he complains. McCutcheon, supra; Roger Wirth v. DER, 1990 EHB 1643. "The prospective litigant should demonstrate that there is a 'substantial probability' that the result he seeks would materialize." McCutcheon, at 3 (citing Ferri Contracting Co., Inc. v. DER, 1985 EHB 339; Warth v. Seldin, 422 U.S. 490, 504 (1975)).

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[1] We note that Tessitor has not attached any affidavits to the notice of appeal or response to verify that this information is true and correct.

The appellants are not complaining about air pollution resulting directly from the installation and rehabilitation of the bridges, culverts, ramps, and other structures which are allowed by the permit at issue. Rather, the appellants' argument is that PAT's decision to build the busway resulted from its selection of an option which the appellants believe will increase transit emissions; that DER's issuance of the Water Obstruction and Encroachment Permit will promote PAT's decision to build the busway and, thus, increase the transit emissions; and that the appellants are thus aggrieved by DER's decision to issue this permit. The appellants have not alleged a substantial probability that DER's issuance of the Water Obstruction and Encroachment Permit will cause increased air pollution in the form of emissions from vehicles using the as yet unbuilt busway, which pollution's prevention is their goal. We can only speculate as to whether DER's issuance of the permit in question will cause the air pollution problems about which they complain. Neither appellant has demonstrated that he will suffer harm which is direct as a result of DER's issuance of the permit to PAT.

Again, even if it is assumed, *arguendo*, that the appellants' interests are directly affected, we find that the appellants have also failed to show that their asserted interest is immediate. We address the immediacy prong under both the zone of interests and the causal connection standards because the courts seem to have accepted both standards. Sequa, supra. "To qualify the interest as immediate rather than remote, the party must show a sufficiently close causal connection between the challenged action and the asserted injury." Sequa, at 1595 (citations omitted). The appellants obviously have not shown a close causal connection between DER's issuance of the Water Obstruction and Encroachment Permit and the air quality degradation. They are not objecting to any air

pollution resulting from the installation of these structures, but rather, they are complaining that operation of transit vehicles on the busway after it is constructed will cause air pollution. This causal connection is more than one step removed from DER's issuance of the permit, and is, thus, too remote to provide an immediate interest. See Empire Coal Mining & Development, Inc. v. DER, 154 Pa. Cmwlth. 296, 623 A.2d 897 (1993); Sequa, supra.

Nor do the appellants here assert an interest which is within the zone of interests protected by the statutes DER relied upon in issuing the permit. DER's permit here was issued pursuant to the Dam Safety and Encroachments Act, 32 P.S. §693.1 et seq.; the Flood Plain Management Act, 32 P.S. §679.101 et seq.; and the Clean Streams Law, 35 P.S. §691.1 et seq. A careful review of these statutes and the regulations promulgated pursuant to them does not reveal that the zone of interests they seek to protect includes air quality. Rather, their zones of interests are our water resources. Although DER does have the responsibility to ensure protection of our air resources pursuant section 2 of to the Air Pollution Control Act (APCA), Act of January 8, 1960, P.L. (1959) 2119, as amended, 35 P.S. §4002, the instant situation is not one where DER has issued any permit or approval, pursuant to the APCA, for PAT to operate a mass transit system and in which the appellants are asserting that this APCA permit will result in an increase in the level of air pollution. Here, the APCA and the regulations promulgated thereunder are not before us for review because DER's action was not taken pursuant to the APCA. We therefore conclude that the appellants lack an immediate interest under the zone of interests test. See Sequa, at 1596-97 (citation omitted).

Thus, we conclude that Tessitor and Stewart lack standing to challenge DER's issuance of the permit to PAT. See, e.g., McCutcheon, supra. Having

reached this conclusion, it is unnecessary for us to address DER's arguments regarding our lack of jurisdiction over the appellants' arguments involving the federal statutes cited in the notice of appeal. We accordingly enter the following order granting DER's motion.

ORDER

AND NOW, this 4th day of May, 1995, it is ordered that DER's motion to dismiss the appeal by Tessitor and Stewart for lack of standing is granted.

ENVIRONMENTAL HEARING BOARD

ROBERT D. MYERS
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: May 4, 1995

cc: **DER Bureau of Litigation:**
(Library: Brenda Houck)
For the Commonwealth, DER:
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Western Region
For Appellant:
Lee R. Golden, Esq.
Pittsburgh, PA
For Permittee:
Dennis L. Veraldi, Esq.
Steven F. Faeth, Esq.
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M. DIANE SMITH
SECRETARY TO THE BOAR

PETE CLAIM	:	
v.	:	EHB Docket No. 94-125-E
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: May 8, 1995

OPINION AND ORDER
SUR MOTION FOR RECONSIDERATION

Synopsis

The Board denies reconsideration of our adjudication which dismissed the appellant/former lead acid battery recycling operator's appeal. Appellant has not met the standard for reconsideration set forth at 25 Pa. Code §21.122.

OPINION

This matter was initiated by the appellant Peter Claim (Claim) filing a notice of appeal on May 27, 1994. Claim's appeal sought this Board's review of an order issued to him by DER on April 18, 1994, which attributed to Claim responsibility for lead acid battery wastes on property known as the Marucci site or "site", located in South Union Township, Fayette County, and lead contamination to the soil, sediments, and surface water from these wastes at the site. DER's order directed Claim to take certain action with regard to investigating and remediating these battery wastes and this lead contamination.

We issued an adjudication on April 10, 1995, in which we found that DER had sustained its burden of proving by a preponderance of the evidence that the battery casings pile, consisting of thousands of battery casings, is a polluting condition in the form of leachable lead; that the abandoned battery casings pile was left from appellant's lead acid battery recycling operations, which the

parties stipulated were conducted at the site prior to 1961; and that appellant, as a former lessee at the site, was an occupier of the site and has occupied the site to the extent of the presence of his battery casings there. Additionally, we found that DER sustained its burden of proving by a preponderance of the evidence that the leachable lead from the battery casings pile has reached the surface waters of the Commonwealth and threatens to continue to reach the surface waters in the future. We thus concluded that DER's order was lawfully issued pursuant to section 316 of the Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.316. Moreover, we found that DER had sustained its burden of proving by a preponderance of the evidence that DER's order was appropriately issued pursuant to sections 104(7) and 602 of the Solid Waste Management Act (SWMA), Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §§6018.104(7) and 602. We concluded that Claim continues to dispose of the lead acid battery waste (which is hazardous waste) at the site until the waste is removed from the site and it is restored to its pre-disposal condition.

In reaching our conclusions, we considered and rejected Claim's assertion that the evidence shows abandoned paint cans and other wastes at the site are a potential source of the lead contamination; that there are other persons who may be jointly responsible for the lead contamination on the site; and, thus, that DER's order should not have been issued solely to him.

We received from Claim a motion for reconsideration or rehearing and a memorandum in support of this motion on May 1, 1995. We received DER's response to this motion, along with a supporting memorandum of law, on May 5, 1995. It is this motion which is presently before us.

Claim asserts in his motion that in our adjudication, we incorrectly assumed crucial facts which were not supported by the evidence presented at the

hearing. He claims that we "mistakenly interpreted an important fact concerning the location of the lead contaminating materials located on the Marucci property". Claim asserts that our finding of fact no. 15 appears to find that the paint cans and paint waste are physically separated <u>from</u> the battery casing pile when, "[i]n fact, the paint cans and paint waste, along with the empty drums, copper wire, scrap metal, partially burned paint cans and ash residue, tires and other materials have been disposed of <u>on or within</u> the battery casing pile." See Claim's motion for reconsideration at p. 1. In support of this assertion, Claim cites the notes of testimony (N.T.) from the merits hearing in this matter at pages 36, 41, and 323, as well as the photographic exhibit which is Commonwealth Exhibit (C Ex.) 2B. He then argues "[i]t was demonstrated at the hearing that the paint cans and paint waste constitute sources of leachable lead, causing contamination that is emanating into the soil and surface water at the Marucci Property" (citing N.T. 221-222, C Ex. 9). Following this assertion, Claim points to paragraph 10 of DER's April 18, 1994 order, which he says states in pertinent part:

> 10. Within 180 days of the issuance of this Order, Claim shall submit to the Department a Site Assessment Plan, to evaluate the extent of any groundwater contamination at the Marucci site.

Claim argues that DER stipulated at the merits hearing that DER's order would be limited to the battery casings and would not include the other waste materials found on the Marucci property (citing N.T. 169). Claim then advances in his motion:

> [DER's] order requires [Claim] to prepare a Site Assessment Plan to evaluate "contamination" at the Marucci site even though there are sources of lead contamination, i.e. paint cans and paint waste, that are not attributable to the Appellant. The attribution of liability to the Appellant for site conditions that were the responsibility of others constitutes joint and several liability. Under the statutory theories asserted by the Department, the imposition of joint and several liability is simply not permitted.

See Claim's Motion for Reconsideration at p.2.

Should Reconsideration Be Granted?

The Board's rules of practice and procedure at 25 Pa. Code §21.122 provide that reconsideration may be granted "only for compelling and persuasive reasons" and will generally be limited to the following instances:

> (1) The decision rests on a legal ground not considered by any party to the proceedings and that the parties in good faith should have had an opportunity to brief such question.
>
> (2) The crucial facts set forth in the application are not as stated in the decision and would justify a reversal of the decision. In such a case reconsideration would only be granted if the evidence sought to be offered by the party requesting the reconsideration could not with due diligence have offered the evidence at the time of the hearing.

25 Pa. Code §21.122. See New Hanover Corporation v. DER, 1990 EHB 1447.

The finding of fact in our adjudication to which Claim points states in full:

> 15. Empty drums, copper wire, scrap metal, partially burned paint cans and ash residue, tires, and other materials have been disposed of on the Marucci site. Some of these materials have fallen into the unnamed tributary and are along the tributary's bank. (B Ex. 1) The paint cans and paint waste are located approximately 15 feet from the battery casings pile. (N.T. 34-36, 176-177; C Ex. 2B)

This finding of fact is supported by the evidence admitted at the merits hearing. On direct examination by DER, DER's David Planinsek, who is a Waste Management Specialist in DER's Greensburg District Office, responded to questioning by DER's counsel about the map which is C Ex. 1, as follows:

> Q. What is the topography of the area?
>
> A. The area on the left marked abandoned strip mine gently slopes towards the center of the map. Of course, the diagonal that's on the map which is the unnamed tributary to Coal Lick Run runs from the northwest to the southeast. The area that's marked former junkyard, crushed battery casings and debris, five-gallon paint containers is relatively level. And then when you approach the area marked battery casing pile, it's a very large pile of battery

casings, which if you go to the end of it, there's a considerably steep slope down to the stream, potential wetland area marked on the map.

...

Q. I'd like to have you talk in a little more detail about the portion of the site where there are crushed battery casings and debris, the paint containers and the battery casings pile. What can you tell us about the junkyard area?

A. The junkyard area is relatively level. There's miscellaneous waste present, that being white goods, old stoves, refrigerators, that type of thing. There's some scrap materials. There's some construction demolition waste.

Q. And the area that's identified on the map as crushed battery casing and debris?

A. That also is very level and there's bits and pieces of battery casings, very small fragments.

Q. And what about the area that's noted on the map as five-gallon paint containers?

A. In that area there's approximately 50 five-gallon paint containers.

Q. And then what about the area that's marked as a battery casing pile?

A. That's where the majority of the battery casing are located. And it's at least 120 feet wide and approximately 15 to 20 foot high. And as I said, as you walk past the paint containers, the top of the pile is level and then there's a fairly steep slope that goes down to the wet area, as I described before.

Q. Any idea of how many battery casings are in that time[sic]?

A. They're too numerous to count. Thousands and thousands.

(N.T. at 34-36.)

At page 41 of the notes of testimony, Planinsek (still on direct examination) described what the exhibit admitted as C Ex. 2B depicts. He identified C Ex. 2B as a photograph of a portion of the battery casing pile taken with the paint cans in the foreground. According to Planinsek's testimony, this photograph was taken "approximately 15 foot from the small oval which is

designated as the five-gallon paint container area looking at the battery casing pile." (N.T. 41) C Ex. 2B shows there is some distance between the battery casing pile in the background of the photo and the paint containers in the foreground. DER's Soil Scientist Ed Bates, when questioned on cross-examination by Claim's counsel, responded:

> Q. [W]e have five-gallon paint containers located adjacent to what's identified as the battery casing pile. Can you tell me what the orientation is in terms of distance, one to the other?
>
> A. I'd say approximately 15 to 20 feet of space is between those cans and the top edge of the pile.

(N.T. at 176-177)

The testimony at page 323 of the transcript of the merits hearing is that of Claim, on direct examination by his counsel, responding to questioning about the changes he allegedly noted at the site between his visit in October of 1981 and his October 8, 1994 visit to the site. There is no mention of the abandoned paint cans at that page of the transcript. At page 324 of the transcript, however, Claim testified (still on direct examination):

> A. Well, there was all types of an [sic] appliances, stoves, refrigerators, washing machines, TVs, driers, old tires. There was paint cans with dry lead, approximately 100 cans, metal turnings, wood of all sizes, wire cable. There was burnt electrical insulation all over the place. There was silicone from motors that laid on the battery pile.

This testimony by Claim does not show that our finding of fact no. 15 regarding the distance between the battery casings pile and the abandoned paint cans was unsupported by the record. In fact, although Claim now is asserting that our finding of fact is not supported by the record, he proposed a very similar finding of fact in his post-hearing brief:

> 10. Paint cans and paint waste were among the waste materials observed at the Marucci Property by Mr. Claim and the Department. The paint cans and paint waste were located approximately fifteen to twenty feet from the battery casing pile. (Trans. Vol. 1, pages,

34, 35, 36, 176, and 177; Department's Post-Hearing Brief, Proposed Finding of Fact No. 12, page 2).

See Claim's Post-Hearing Brief at Proposed Finding of Fact No. 10. Further, at page 22 of his post-hearing brief, Claim asserted that the facts show that the paint cans and paint wastes were fifteen feet from the battery casings pile. We cannot understand how Claim can make this proposed finding of fact in his post-hearing brief and base its argument on this fifteen foot distance, then assert that our finding is unsupported by the record when we make a nearly identical finding of fact. As DER points out in its response to Claim's motion, these facts were before the Board at the time of the hearing and were addressed by the Board and, thus, do not provide sufficient grounds for reconsideration. Michael Strongosky v. DER, 1993 EHB 758.

As to Claim's argument that "the paint cans and paint waste constitute sources of leachable lead, causing contamination that is emanating into the soil and surface water at the Marucci Property", citing N.T. 221-222, C Ex. 9, we considered and rejected this argument in rendering our adjudication. The testimony at pages 221-222 of the transcript of the merits hearing is DER's direct examination of DER's Gary Manczka, who is Chief of DER's Erie Soil and Waste Testing Laboratory, regarding DER's sampling and laboratory analysis of paint chips collected by DER on July 22, 1993 from the abandoned paint cans at the site (C Ex. 9). Based on Manczka's testimony and C Ex. 9, we made our finding of fact no. 44, which states:

> 44. The water/waste quality analysis report and DER's laboratory results for sample no. 2563059, collected from [burnt] paint cans on top of the battery casings pile, is C Ex. 9. (N.T. 158) These analytical results show that the paint chips contained leachable lead at 4.28 mg/l. (N.T. 221-222; C Ex. 9) The duplicate paint chip sample was just below the regulatory limit for hazardous waste. (N.T. 223)

Thus, we recognized in our finding of fact no. 44 that there are at least some paint cans on top of the battery casings pile.[1] We concluded, however, that the evidence did not support Claim's argument that the battery casings pile is not the source of the lead contamination and that the paint cans and other wastes at the site are responsible for lead contamination there. We stated:

> There is ample evidence that the lead at the toe of the battery casings pile migrated there from the battery casings. We conclude that water emanating from the pile will, by its nature, carry the sediments containing lead contaminants away from the battery casings pile, and that sediment containing the lead material then drops out of the water, as is reinforced by the sample analysis DER conducted on the sediments at the site and Maczka's testimony. Even if the evidence supported our making a finding that some small percentage of the lead at the toe of the battery casings pile could have come from the paint cans, that small amount of lead would be indistinguishable from the large amount which the evidence shows migrated from the battery casings. Thus, we disagree with Claim's assertion that the evidence shows the battery casings pile is not the source of the lead on the site responsible for the flow of lead into the surface water.

(Pete Claim v. DER, EHB Docket No. 94-125-E (Adjudication issued April 10, 1995) at 30-31)

Claim's motion for reconsideration is merely an attempt to re-argue the same position he took in his post-hearing brief. This is not an adequate ground for reconsideration. New Hanover Corporation, supra. He has failed to show that the crucial facts set forth in his motion for reconsideration are not as stated in our adjudication and would justify a reversal of the decision.

Moreover, Claim's argument, that our dismissal of his appeal amounts to an affirmance of DER's April 18, 1994 order and flies in the face of DER's stipulation at the merits hearing that Claim was only being held responsible for the battery casings at the site, likewise does not present a ground for

---

[1] If Claim wished to have additional evidence admitted concerning paint cans on top of or within the battery casing pile, he has not shown that he could not have with due diligence offered such evidence at the time of the hearing.

reconsideration of our adjudication. We addressed this argument at page 44 of our adjudication, where we stated:

> While DER's Order required Claim to clean up the entire site, including the paint cans, DER's case-in-chief only linked Claim to the battery casings at the site. As there is no evidence to suggest that any lead contamination near the paint cans came from the battery casings pile, DER cannot hold Claim responsible for cleanup of the paint cans. When the presiding Board Member raised this issue at the merits hearing, DER stipulated that its order to Claim is limited to the battery casings. (N.T. 166-169) Contrary to Claim's assertion that DER should instead have issued its order to the Maruccis, as they are the property owners, we point out that we have ruled: "[l]iability for violation of the [SWMA] does not attach simply by reason of ownership of the land on which the violations took place. Some affirmative participation in the violations must be shown." Ernest Barkman, et al. v. DER, 1993 EHB 738, 749 (citations omitted). As to whether DER should seek to hold the Maruccis, as owners of the site, responsible for cleanup of the site pursuant to section 316 of the Clean Streams Law, rather than Claim, we point out that that is within DER's prosecutorial discretion. [Citations omitted.]

Claim, supra at 44. Where an issue was briefed by the parties and rejected by the Board, there is no showing of an adequate ground for reconsideration. See Fry Communications, Inc. v. DER, 1991 EHB 1895. We therefore find Claim has failed to satisfy the standard for reconsideration set forth at 25 Pa. Code §21.122 here, and we enter the following order denying his motion.

ORDER

AND NOW, this 8th day of May, 1995, it is ordered that Claim's motion for reconsideration or rehearing regarding our Adjudication issued April 10, 1995 is denied.

ENVIRONMENTAL HEARING BOARD

ROBERT D. MYERS
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: May 8, 1995

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M. DIANE SMITH
SECRETARY TO THE BOARD

CITY OF SCRANTON and BOROUGHS OF TAYLOR and OLD FORGE

v.

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES and EMPIRE SANITARY LANDFILL, Permittee

EHB Docket No. 94-060-E (Consolidated)

Issued: May 11, 1995

OPINION AND ORDER SUR
MOTION FOR LEAVE TO AMEND NOTICE OF APPEAL

By: Richard S. Ehmann, Member

Synopsis

A Motion for Leave to Amend Notice of Appeal on the basis of new information obtained through discovery is denied where it appears that the Appellants were aware or should have been aware of the information prior to discovery and waited nearly one year before seeking leave to amend their appeal based on the allegedly new information.

OPINION

This matter consists of three consolidated appeals filed on March 24, 1994 by the City of Scranton, the Borough of Taylor, and the Borough of Old Forge (hereinafter collectively referred to as "the Appellants"), challenging the Department of Environmental Resources' ("DER's") issuance of a permit modification to Empire Sanitary Landfill, Inc. ("Empire") on February 25, 1994. The permit modification authorizes Empire to accept for disposal municipal incinerator ash residue from the Union County Utilities Authority ("UCUA").

The matter now before the Board is a Motion for Leave to Amend Notice of Appeal filed by the Appellants on April 3, 1995. In their Motion, the Appellants state that in May 1994 they served on DER and Empire the Appellants' First Set of Interrogatories and Request for Production of Documents. DER filed its answer on July 15, 1994 and, in response to one of the interrogatories, directed the Appellants to review the file, exhibits, and testimony from another appeal involving Empire at Docket No. 94-114-W. The Appellants aver that, upon reviewing the file, exhibits, and testimony at that docket, they discovered (1) that the permit modification was issued pursuant to a Memorandum of Understanding entered into between DER and Empire and (2) that various instruments forming a Contract between Empire and UCUA demonstrate that Union County is the real owner of the property on which the ash is to be disposed. The Appellants assert that they should be permitted to amend their appeal to add new grounds based on these findings. On each of their notices of appeal, the Appellants reserved the right to add new grounds for appeal which might come to their attention through discovery.

On April 24, 1995, Empire filed an Answer and Brief in Opposition to the Appellants' Motion.[1] Empire opposes the Motion on three grounds: First, it asserts that the Appellants knew or should have known of the existence of the aforesaid documents prior to discovery. Second, Empire argues that the Motion is untimely. Finally, it asserts that the new grounds which the Appellants seek to add to their appeal lack merit.[2]

Section 21.51(e) of the Board's rules states in relevant part as follows:

---

[1]By letter dated April 24, 1995, DER advised the Board that it did not intend to file a response to the Appellants' Motion.

[2]Because we deny this Motion based on the first two issues, we do not address this third issue herein.

> An objection not raised by the appeal shall be deemed waived, provided that, upon good cause shown, the Board may agree to hear the objection. For the purpose of this subsection, good cause shall include the necessity for determining through discovery the basis of the action from which the appeal is taken.

25 Pa. Code §21.51(e). In Pennsylvania Game Commission v. DER, 97 Pa. Cmwlth. 78, 509 A.2d 877 (1986), aff'd on other grounds, 521 Pa. 121, 555 A.2d 812 (1989), the Commonwealth Court likened the amendment of a notice of appeal to the filing of an appeal nunc pro tunc and held that "the Board need not grant the petition [for leave to amend] absent a showing of good cause." 97 Pa. Cmwlth. at __, 509 A.2d at 886. The Court went to say, "[T]his is not a case like a civil suit, where leave to amend should be liberally granted absent an error of law or prejudice to the opposing party." Id.

Thus, in accordance with the Commonwealth Court's holding in Game Commission, an appellant does not have an automatic right to amend its notice of appeal, but must demonstrate good cause for the amendment. As the movants herein, the Appellants have the burden of demonstrating that good cause exists for allowing amendment of their appeal. Helen Mining Co. v. DER, 1992 EHB 1205. Reviewing the allegations set forth in the Appellants' Motion and Empire's Answer, we cannot find that the Appellants have met their burden of proof.

The Appellants contend that they learned of the Memorandum of Understanding and Contract through discovery, specifically DER's answer to Interrogatory No. 21 which directed them to Docket No. 94-114-W. DER's answers to the Interrogatories and Request for Production of Documents were filed on July 15, 1994. However, the Board has serious doubt as to whether the Appellants, in fact, obtained the information in question through discovery. The appeal at Docket No. 94-114-W was filed by Empire on May 13, 1994. The Appellants were granted leave to intervene in that appeal on May 20, 1994. On May 23 and 24,

1994, a supersedeas hearing was held in that proceeding. All three of the Appellants were represented at the hearing through their attorneys. The contents of the Memorandum of Understanding between DER and Empire were discussed at the supersedeas hearing (Ex. J)[3] and the document was introduced into the record as Commonwealth Exhibit B (Ex. K). The Contract between Empire and UCUA was also discussed and produced at the supersedeas hearing and appears to have been admitted at the hearing as Commonwealth Exhibit A (Ex. K). In addition, the Borough of Taylor filed a Motion to Dismiss or, Alternatively, for Summary Judgment on June 13, 1994 in that same appeal. The basis for the Motion was the Contract between Empire and UCUA. (Ex. K) Finally, in that appeal's merits hearing, held on June 14, 1994, the Contract between Empire and UCUA was discussed. (Ex. K) All of these events took place one month or more before DER's response to the Appellants' interrogatories in the present appeal. If the record of what occurred in the appeal at Docket No. 94-114-W is correct, it establishes that the Appellants learned of the Contract and Memorandum of Understanding after they filed the instant appeals but not through discovery herein. As the Appellants have based their Motion solely on allegations that they became aware of these documents via discovery, we can rule on its merits only on that basis and only by considering the allegations in the Motion and Empire's Answer.

Moreover, the Appellants provide no explanation in this appeal as to why they waited until April 3, 1995, nearly one year after the above-described events took place and approximately nine months after DER's response to their discovery request, before seeking leave to amend their notices of appeal. Even though DER's answer required the Appellants to conduct a search of the file, exhibits,

[3]"Ex. ___" refers to an exhibit submitted by Empire with its Answer and Brief in Opposition to the Appellants' Motion.

and testimony recorded at Docket No. 94-114-W, we find it difficult to imagine that the undertaking of such a search was not begun until nearly nine months later or, alternatively, that it took nine months to complete. Moreover, as we have noted above, it is apparent from the record at Docket No. 94-114-W that the Appellants were aware or should have been aware of this information at least one month prior to the date of DER's response. In either case, the Appellants failed to act in a timely manner in seeking leave to amend their notices of appeal. As we have noted above, seeking leave to amend a notice of appeal is equivalent to filing an appeal nunc pro tunc. Game Commission, supra. Just as a party seeking leave to appeal nunc pro tunc must not delay in filing its petition with the Board,[4] likewise, a party seeking leave to amend its appeal based on information revealed through discovery has an obligation to act promptly in bringing this matter to the Board's attention.

We recognize that this position was not adopted in James and Margaret Arthur v. DER, et al., 1992 EHB 1185, which rejected the permittee's argument that the appellants' petition for leave to amend their appeal should be denied because it was "tardy". However, there is no discussion in that opinion as to the amount of time which lapsed between the completion of discovery and the filing of the petition to amend. It is impossible, therefore, to know that the factual situations in these two appeals are identical and, thus, warrant similar outcomes. However, to the extent that Arthur is read to stand for the principle that a motion for leave to amend an appeal based on new facts obtained through

---

[4]See, Stanton v. Commonwealth, Department of Transportation, 154 Pa. Cmwlth. 350, 623 A.2d 925, 927 (1993) (Petitioner in an appeal nunc pro tunc must proceed with reasonable diligence once he knows of the necessity to take action); American States Insurance Co. v. DER, 1990 EHB 338 (Board denied petition for leave to appeal nunc pro tunc filed fourteen months after the expiration of the appeal period).

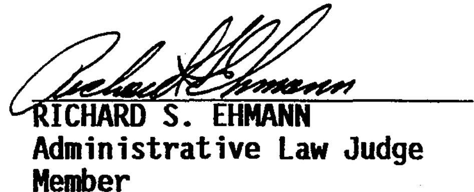
discovery need not be pursued diligently and filed in a timely manner, that principle is hereby rejected. To hold otherwise would conceivably allow the amendment of an appeal at any stage of the proceeding, up to and including the commencement of the merits hearing, so long as the appellant asserts that the new information was obtained through discovery.

Based on the Appellants' unexplained delay in filing their Motion for Leave to Amend and, further, on the fact that it appears that the information was known to the Appellants prior to discovery, contrary to the averments in their Motion, we find that the Appellants have failed to carry the burden of convincing the Board that they are entitled to the relief requested in their Motion. Accordingly, we enter the following order:

ORDER

AND NOW, this 11th day of May, 1995, it is ordered that the Motion for Leave to Amend Notice of Appeal filed by the Appellants is denied.

ENVIRONMENTAL HEARING BOARD



RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: May 11, 1995

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M. DIANE SMITH
SECRETARY TO THE BOAF

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
v.	:	EHB Docket No. 94-226-CP-E
CSX TRANSPORTATION, INC.	:	Issued: May 16, 1995

OPINION AND ORDER SUR
MOTION FOR LEAVE TO REOPEN DISCOVERY

By: Richard S. Ehmann, Member

Synopsis

Where a party answers timely filed interrogatories after the close of discovery, has its answers verified solely by its senior in-house attorney, and those answers list this attorney as the only person who prepared the answers, a motion for leave to reopen discovery for purposes of deposing this attorney concerning these answers will be granted since other discovery in this civil penalty proceeding continues as to recent amendments to DER's Complaint. However, no inquiry for the purposes of assisting "the Department in its ongoing attempts to arrive at a settlement in this case" is authorized as part of its discovery deposition.

OPINION

In this civil penalty suit, this Board issued an Order on October 24, 1994 that provided for the completion of discovery in this appeal by January 3, 1995. Thereafter, at the parties' request and by Order dated December 29,

1994, the Board extended the deadline for discovery's completion until March 20, 1995. In conformance therewith the Department of Environmental Resources'("DER") second set of interrogatories was sent to CSX Transportation, Inc. ("CSX") on February 15, 1995. CSX then secured two extensions of the deadline for answering same from DER. While this extended answering time period was still running, the March 20, 1995 deadline for discovery completion passed, and ten days later, on March 30, 1995, DER received CSX's answers to DER's interrogatories.

According to CSX's answers to DER's interrogatory, Keith Meiser ("Meiser"), a senior CSX in-house attorney, was the sole person preparing CSX's answers. Moreover, the only verification of the truthfulness of CSX's answers comes from Meiser.

It is on the basis of Meiser's efforts at answering and verifying the answers to these interrogatories on CSX's behalf that DER filed its instant Motion For Leave to Reopen Discovery. The Motion was filed with the Board on April 17, 1995. It seeks leave to depose Meiser with regard to CXS's answers to these interrogatories. In these circumstances, it is clear that DER could not have taken Meiser's deposition with regard to these answers any sooner than some point after March 30, 1995, because until then, it had no way of knowing of Meiser's role with regard thereto. Because DER twice granted CSX extensions of time to answer these interrogatories, thus extending the time for answering these interrogatories beyond the March 30 discovery completion deadline, CSX has, by seeking these extensions, put DER in the position of having to make this motion. Thus, CSX has at least contributed to this situation and the circumstances from which it claims prejudice. To now deny this motion in this situation would work a greater injustice to DER than

granting it works on CSX. Moreover, the period for other discovery continues in this civil penalty proceeding because in an Opinion and Order dated April 21, 1995, this Board granted DER's Motion to amend its Complaint by adding three new counts and, in doing so, gave the parties a period of time to conduct discovery with regard thereto. Clearly, since that discovery period is currently occurring, there is little prejudice to CSX if DER deposes Meiser on this limited topic within that same period. Accordingly, we will grant this motion.

In so ruling, the Board is not addressing any issue of whether Meiser's information is in part privileged, confidential, and not subject to discovery. CSX has not raised this issue as to DER's Motion, although it appears that it previously advised DER that it believed this was true. Such an issue does not appear to be a valid defense to the question of whether DER's motion should be granted, but rather appears to be a defense raisable as to questions occurring in the deposition, once the motion is granted. However, the Board has addressed a similar issue previously in New Hanover Corporation v. DER, et al., 1991 EHB 1395. See also New Hanover Corporation v. DER, et al., 1991 EHB 1185, and Lawrence W. Hartpence, et al. v. DER, 1991 EHB 641. The parties are advised thereof so that they may consider the positions they should adopt on this issue in the event it arises.

CSX does raise an issue which deserves further comment, however. DER's Motion seeks discovery in part because it will assist in DER's efforts to arrive at a settlement of this appeal. What DER means by this statement is not explained in any of DER's filings. However, the Board is unaware of any rule of discovery or case law which suggests this is a proper purpose of discovery, and DER has failed to point out authority for this contention.

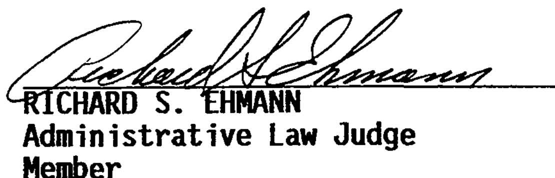
Moreover, to the extent information is sought from Meiser dealing with CSX 's position on any settlement proposals, a series of valid objections thereto could be raised by CSX depending on the question asked and its context. Under these circumstances and with DER being the moving party, i.e., the party with the burden of convincing the Board of the merit of its motion, we can see no bases for granting this motion to the extent it would authorize discovery by DER of Meiser dealing with settlement related issues.

As so limited, the discovery sought does not appear unreasonably burdensome (all discovery involves some effort and hence some burden) or unlikely to have the potential to produce relevant evidence (or lead to the production thereof); accordingly, the Board enters the following Order.

ORDER

AND NOW, this 16th day of May, 1995, it is ordered that DER's Motion For Leave To Reopen Discovery is granted to the extent that DER may depose Meiser providing that this deposition occurs before July 1, 1995, at a mutually agreeable date, time, and place. It is further ordered that DER's Motion is denied to the extent DER seeks to depose Meiser as to any settlement related issues and the subject matter of Meiser's deposition is confined to the subject matter areas covered by DER's interrogatories.

ENVIRONMENTAL HEARING BOARD



RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: May 16, 1995

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M. DIANE SMITH
SECRETARY TO THE BOAF

WILLIAM FIORE	:	
	:	
v.	:	EHB Docket No. 94-341-MR
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: May 19, 1995

OPINION AND ORDER SUR
MOTION FOR RECONSIDERATION

Robert D. Myers, Member

Synopsis:

A motion to reconsider the denial of a motion for summary judgment is denied where the movant has failed to present extraordinary and compelling reasons. Arguments rejected previously do not provide such reasons and new factual allegations, even if true, do not provide a basis for the entry of summary judgment.

OPINION

William Fiore (Fiore) filed a motion on May 17, 1995 seeking reconsideration of the Board's May 2, 1995 Opinion and Order denying Fiore's motion for summary judgment. The Board denied the motion for summary judgment on the grounds that the Board's denial of an earlier Department summary judgment motion concerning the revocation of Fiore's water quality management permits in another proceeding did not constitute a final order in that proceeding.

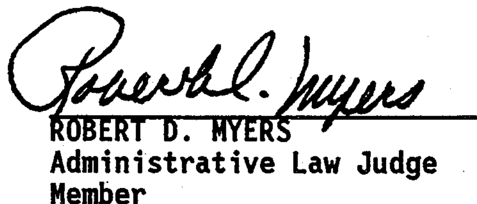
The Board has long held that interlocutory orders, such as this one, will only be reconsidered in exceptional circumstances. *Concord Resources Group of Pennsylvania, Inc. v. DER, et al.*, 1993 EHB 156; *Magnum Minerals v. DER*, 1983 EHB 589. Fiore fails to present any exceptional circumstances. His arguments on

res judicata and issue preclusion are simply a rehash of arguments rejected in our May 2, 1995 Opinion and Order. His allegations that the bonds forfeited by DER covered not only the solid waste management permits but the NPDES and water quality management permits also, even if true, do not afford a basis for entering summary judgment in Fiore's favor, because it does not change the pending status of the other proceeding.

O R D E R

AND NOW, this 19th day of May, 1995, it is ordered that William Fiore's motion for reconsideration is denied.

ENVIRONMENTAL HEARING BOARD



ROBERT D. MYERS
Administrative Law Judge
Member

DATE: May 19, 1995

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M. DIANE SMITH
SECRETARY TO THE BO

GREEN THORNBURY COMMITTEE, et al.

v.

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES and MARK STEPHEN and HELEN McGINLEY, et al.

EHB Docket No. 93-271-W
(Consolidated with 92-441-MR)

Issued: May 25, 1995

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

By the Board

Synopsis

The Board dismisses appeals of a revision to an official sewage facilities plan, National Pollution Discharge Elimination System (NPDES) sewage permits, and water quality management permits.

The Department need not require a preliminary hydrogeologic evaluation under 25 Pa. Code §71.64(c)(3) before approving a revision to an official sewage facilities plan where single residence sewage treatment plants (SRSTPs) will discharge to a streambed which is not usually dry. Subsection (c)(3) provides that such evaluations are required only where SRSTPs will utilize a "dry stream channel discharge," and the Department interprets that phrase as referring only to discharges to streambeds which are not *usually* dry.

Nor need the Department require documentation under 25 Pa. Code §71.64(c)(4) that drinking water uses will be protected and that effluent will not create a public health hazard or nuisance, where SRSTPs will discharge to a streambed which is not usually dry. Documentation under subsection (c)(4) is required only where a hydrogeologic evaluation is required under subsection

(c)(3).

To show that a particular sewage treatment system is the "best environmentally acceptable alternative" within the meaning of 25 Pa. Code §71.64(c)(8), one need only show that that system is the best alternative from those which are environmentally acceptable. One need not show that that system is the best of the alternatives from an environmental standpoint.

Under 25 Pa. Code §71.31(c), municipalities need only submit proof of publication of notice regarding plan revisions in one newspaper of general circulation in the municipality. The notice need not necessarily state when the planning modules will be available for public review, nor need the municipality actually possess the planning modules at the time the notice is published.

The Department need not impose a phosphorus limit on effluent under 25 Pa. Code §95.6 (a) unless the effluent will be discharged to waters tributary to a lake, pond, or impoundment with a residence time of 14 days or more and the phosphorus limit is necessary to control eutrophication.

The Board will not select and develop a theory of law for appellants where they bear the burden of proof and neglect to formulate their own theory of law.

Appellants waive objections not included in their notice of appeal.

One cannot prove that the Department violated Article I, §27, of the Pennsylvania Constitution by considering the cost and difficulty of maintaining alternative sewage systems or by failing to assess the impact on wetlands without showing that the Department violated a statute or regulation applicable to the protection of Commonwealth natural resources, that the Department failed to make a reasonable effort to reduce the environmental incursion to a minimum, or that the environmental harm resulting from the Department's action outweighs the benefit to be derived.

OPINION

These consolidated appeals were initiated with the September 28, 1992, filing of a notice of appeal by New Brinton Lake Club (New Brinton), challenging the Department's August 26, 1992, approval of a revision to Thornbury Township's (Thornbury) official sewage facilities plan. The revision authorized the installation of SRSTPs with stream discharges (single residence stream discharge systems) on a lot owned by Mark and Helen McGinley (McGinleys), a lot owned by Charles and Jeanne Marie Pagano, and a lot owned by Peter Pagano (collectively, the Permittees), all of Thornbury, Delaware County. The appeal was docketed at EHB Docket No. 92-441-MR.

A related appeal was filed on September 23, 1993. Green Thornbury Committee (GTC), Paul Crits-Christoph (Crits-Christoph), and Robert G. and Amelia L. Sokalski (Sokalskis), and Roger Clarke (Clarke) appealed the Department's August 25, 1993, issuance of NPDES sewage permits and water quality management permits for the single residence stream discharge systems which are the subject of the plan revision. The Department had issued one of each type of permit to McGinleys, to Charles and Jeanne Marie Pagano, and to Peter Pagano. The appeal of the permits was docketed at EHB Docket No. 93-271-W.

The appeal of the NPDES and water quality management permits and the appeal of the plan revision were consolidated here, at EHB Docket No. 93-271-W, on November 2, 1993. The Board has issued one previous decision involving the consolidated appeals; on February 17, 1995, we granted a motion to dismiss the appeal to the extent the appeal challenged the NPDES permit issued to McGinleys. See, Green Thornbury Committee, *et al.* v. DER, EHB Docket No. 93-271-W (Opinion issued February 17, 1995). We held that the Board did not have jurisdiction over that aspect of the appeal because the appeal of the NPDES and water quality

management permits had been filed more than 30 days after notice of the issuance of McGinley's NPDES permit had been published in the *Pennsylvania Bulletin*.

A hearing was held in Harrisburg on August 15-17, 1994, before former Board Chairman Maxine Woelfling, at which the parties were represented by legal counsel. Ms. Woelfling resigned from the Board before preparing an adjudication; therefore, we will issue this adjudication after review of a "cold record," Lucky Strike Coal Company and Louis J. Beltrami v. Department of Environmental Resources, 119 Pa.Cmwlth 444, 547 A.2d 447 (1988).

On October 14, 1994, New Brinton, GTC, Crits-Christoph, Sokalskis, and Clarke (collectively, the Appellants) filed their post-hearing memorandum. With respect to the approval of Thornbury's plan revision, the Appellants argued that the Department abused its discretion or acted contrary to law because the plan revision did not comport with several of the criteria at 25 Pa. Code §71.64(c) for plan revisions proposing the use of small flow treatment facilities, because the notice regarding the planning modules was deficient, and because the approval violated Article I, §27, of the Pennsylvania Constitution.

The Appellants incorporated their arguments with respect to the approval of the plan revision in their objections to the issuance of NPDES and water quality management permits. In addition, they argued that the Department abused its discretion or acted contrary to law with respect to the issuance of the permits because the permits authorized each single residence stream discharge system to discharge up to 500 gallons per day (gpd), rather than 400 gpd, the limit in the planning modules; because the permits did not contain phosphorus or nitrate limits, authorized by 25 Pa. Code §95.6(a); and, because the Department did not adequately consider the failure rate of single residence stream discharge systems and the potential effects on the environment.

The Permittees filed their post-hearing memorandum on December 12, 1994. With respect to the approval of Thornbury's plan revision, they argued the Department did not abuse its discretion or act contrary to law because the Department complied with the applicable criteria under §71.64(c), the Appellants had adequate notice with respect to the planning modules, and the Department adequately assessed the potential environmental impacts of the systems it approved. As with the Appellants, the Permittees incorporated the arguments they raised with respect to the plan revision in their discussion of the NPDES and water quality management permits. They also argued: (1) that the plan revision authorized discharges of 500gpd, not 400 gpd; (2) that, even if the plan revision had authorized discharge volumes of 400gpd, the Department would not have abused its discretion or acted contrary to law by increasing the limit to 500gpd in the NPDES and water quality management permits; (3) that the Department need not impose effluent limits on phosphorus and nitrates where, as here, there is no indication those nutrients will pose a threat to the watershed; and (4) that the Department correctly determined that single residence stream discharge systems were the best--and only--sewage treatment option available here.

The Department filed its post-hearing memorandum, supplementing the arguments raised by the Permittees, on December 27, 1994. With respect to the approval of the plan revision, the Department argued that the plan revision comported with §71.64(c)(8) because single residence stream discharge systems were the "best alternative which is environmentally acceptable," and that the Appellants cannot object to the potential harm to natural resources in the area because they failed to raise that issue in their notice of appeal. With respect to the NPDES and water quality management permits, the Department argued

that the Appellants had waived objections to the alleged increase in the discharge volume limit because they failed to raise that issue in their notice of appeal and that the Department need not have imposed effluent limits on phosphorus or nitrates here because there was no indication that nutrient enrichment is a problem in the watershed.

Any issues not raised in the post-hearing memoranda are deemed waived. Lucky Strike Coal Co. and Louis J. Beltrami v. Department of Environmental Resources, 119 Pa. Cmwlth. 440, 546 A. 2d 447 (1988).

The record consists of a transcript of 704 pages, a joint stipulation of facts, and 59 exhibits. After a full and complete review of the record, we make the following findings of fact.

FINDINGS OF FACT

1. Appellant Clarke is a resident of Thornbury Township, Delaware County, and resides at 10 Highpoint Drive, Thornton, PA. (Ex. B-1, para. 1)[1]

2. Appellants GTC and New Brinton are unincorporated associations organized and existing pursuant to the laws of the Commonwealth for the purpose of maintaining open space, including Brinton Lake. (Ex. B-1, para. 6, 8)

3. Appellant Crits-Cristoph is a resident of Thornbury Township, Delaware County, residing at 26 Abberty Road, Thornton, PA. (Ex. B-1, para. 7)

4. Appellants Sokalskis are residents of Thornbury Township, Delaware County, residing at 55 Carter Road, Thornton, PA. (Ex. B-1, para. 8)

5. The Department is the agency with the authority to administer and enforce the Pennsylvania Sewage Facilities Act, the Act of January 24, 1966, P.L. (1965) 1535, as amended, 35 P.S. §750.1 *et seq.* (Sewage Facilities Act),

[1] The Appellants' exhibits are designated as "Ex. A-___," those of the Permittees as "Ex. P-___," the notes of testimony as "N.T. ___," the stipulated exhibits as "SE-___," and the Board exhibits as "Ex. B-___."

and 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).

6. Appellee Township of Thornbury is a political subdivision organized and existing under the laws of the Commonwealth. (Ex. B-1, para. 3)

7. On May 5, 1992, Thornbury approved three planning modules revising its sewage facilities plan and adopted them for submission to the Department for approval. (Ex. B-2, B-3, B-4)

8. The planning modules pertained to three adjacent lots on Carter Road and each sought authorization for a single residence stream discharge system. (Ex. B-2, B-3, B-4)

9. Permittee Peter Pagano submitted the planning module for lot 49, the westernmost lot. (Ex. A-6, B-2)

10. Permittees Charles and Jeanne Marie Pagano submitted the planning module for lot 51, the middle lot. (Ex. A-6, B-3)

11. Permittees Mark and Helen McGinley submitted the planning module for lot 52, the easternmost lot. (Ex. A-6, B-4)

12. On May 26, 1992, the Department informed Thornbury by letter that the planning modules were incomplete and returned them. (Ex. B-2, B-3, B-4)

13. On June 18, 1992, Thornbury approved revised versions of the planning modules and adopted them for submission to the Department. (Ex. B-2, B-3, B-4)

14. On August 26, 1992, the Department approved the revision to Thornbury's sewage facilities plan detailed in the revised planning modules. (Ex. B-2, B-3, B-4)

15. The Department issued NPDES permits to Peter Pagano and

Charles Pagano on August 25, 1993. (Ex. P-2)

16. The NPDES permits authorize the discharge of wastewater from the single residence stream discharge systems on lots 49 and 51 into "an unnamed tributary to the West Branch of Chester Creek." (Ex. P-2)

17. The tributary to which the sewage facilities will discharge runs north along the western side of Peter Pagano's lot, then, roughly halfway up the lot, turns west and leaves his property. (Ex. A-6)

18. The Department issued water quality management permits to McGinleys, Peter Pagano, and Charles and Jeanne Marie Pagano for single residence stream discharge systems on their lots on August 24, 1993, September 16, 1993, and September 22, 1993, respectively. (Ex. P-6)

19. In the single residence stream discharge system the Permittees seek to install, an aerobic treatment plant receives untreated wastewater from the residence. (SE-4, p. 10, SE-5)

20. Wastewater passes sequentially through three chambers in the aerobic treatment plant: in the first, suspended solids settle out and floating solids are skimmed off; in the second, the wastewater is aerated; and in the third, the wastewater passes through a filter. (N.T. 239-40; SE-4, pp.7, 10, SE-5)

21. Wastewater passes from the aerobic treatment plant to a sand filter dosing pump station, where the wastewater is stored and periodically pumped to a sand filter. (SE-4, p. 12, SE-5; N.T. 240)

22. In the sand filter, wastewater passes through layers of sand and gravel where the wastewater undergoes additional filtration and biochemical treatment. (SE-4, pp. 14-15, SE-5)

23. From the sand filter, wastewater passes through a chlorine

contact tank, where the wastewater is temporarily stored and disinfected with soluble chlorine tablets. (SE-4, p. 17)

24. The effluent from the chlorine contact tank is discharged to the receiving stream. (Ex. A-6)

The preliminary hydrogeologic evaluation requirement

25. Preliminary hydrogeologic evaluations were not submitted with any of the planning modules. (Ex. B-1, p. 13, para. 13)

26. Crits-Christoph testified that "every now and then" over "the past couple of years" he has examined the tributary which will receive the discharges and that, while the channel has water in it on some occasions, it is dry during "particularly dry periods." (N.T. 25)

27. Crits-Christoph testified that he did not know the relative percentage of times the stream was wet as opposed to dry. (N.T. 51-3)

28. Thomas Cahill, an engineer called by the Appellants, testified that at the time he visited the site, there was a small amount of water flowing in the stream. (N.T. 295-6)

29. Mark McGinley testified that he had examined the stream at least once a week for the three years prior to the hearing--except for times he was on vacation--and that on each occasion he saw water flowing in the stream. (N.T. 525-7)

30. John Kinsey, Sewage Enforcement Officer for Thornbury, testified that he has visited the site on several occasions since 1991 and has seen water flowing in the streambed on each occasion. (N.T. 590-2)

31. The Bureau of Water Quality Management's "Guidelines for Design Installation and Operation of Small Flow Sewage Treatment Facilities" provide, "The outfall sewer must be extended to a stream or watercourse where

streamflow is available for dilution and *not* terminated in a roadside ditch or swale which is *normally* dry unless the requirements for hydrogeologic studies in Chapter 71, Section 71.64(c)(3) have been met." (emphasis in original) (SE-4, p. 18)

32. The Department's August 26, 1992, letters approving the revisions to Thornbury's official plan refer to the stream receiving the discharges only as "an unnamed tributary of Chester Creek"; they do not refer to the flow in the stream (Ex. B-2, B-3, B-4)

33. The NPDES permits provide, in pertinent part:

> The attention of the permittee is directed to the fact that the...discharge is directed to a dry stream, normally without the benefit of dilution. If the effluent creates a hazard or nuisance, the permittee shall, upon notice from the [Department], provide such additional treatment as may be required by the Department. (N.T. 331-2; Ex. P-2, p. 14, para. 5)

<u>The requirement under 25 Pa. Code §71.64(c)(4) that planning modules include documentation showing that drinking water uses will be adequately protected and that the effluent will not create a nuisance or public health hazard</u>

34. The Permittees did not submit documentation with their planning modules to show whether the proposed facilities would have an effect on drinking water uses or whether the effluent would create a public health hazard or nuisance. (N.T. 100; Ex. B-2, B-3, B-4)

35. Frank DeFrancesco, a water management compliance specialist with the Department, testified that applicants need not submit documentation pertaining to the effect on drinking water uses or the potential to create a nuisance or health hazard where the applicant is not required to submit a hydrogeologic evaluation. (N.T. 109-110)

36. The Department's guidance document, "Act 537 Planning Requirements for Treatment Plants with Flows Less Than 2,000 Gallons per Day--

Small Flow Treatment Facilities," provides, "When the proposed [small flow treatment facility] will utilize land disposal or a dry stream discharge for final disposal, a preliminary hydrogeological evaluation must be conducted by the applicant...." (SE-4, Volume V 200-39, p. 3)

The alternatives analysis under §71.64(c)(8)

37. The lots cannot use public sewers because the area is not currently served by public sewers. (N.T. 567; Ex. B-2, B-3, B-4)

38. The soil on the lots is inappropriate for subsurface sewage disposal. (N.T. 112, 570; Ex. B-2, B-3, B-4)

39. DeFrancesco testified that the Department considers holding tanks to be a possible alternative only where public sewers will be available in *two* years. (N.T. 82, 115)

40. The alternatives analysis in the planning modules states that the Department will consider holding tanks so long as public sewerage will be available within *five* years. (Ex. B-2, B-3, B-4)

41. Thornbury has no plans to install public sewers in the area. (N.T. 567)

42. A spray irrigation system requires at least 2 acres. (N.T. 115)

43. The largest of the three lots here is 1.5 acres. (N.T. 127)

44. Given the isolation distances required, insufficient area exists on all three lots combined to accommodate a community spray irrigation system. (N.T. 127-8, 660)

45. Evapotranspiration greenhouse (greenhouse) systems dispose of wastewater through evaporation and plant transpiration. (Ex. B-2, B-3, B-4)

46. In greenhouse systems, wastewater passes from the residence

into an aerobic treatment plant, similar to that used in single residence stream discharge systems, and then pumped to beds filled with sand, gravel, and topsoil, and covered with vegetation, in a greenhouse. (Ex. B-2, B-3, B-4)

47. Because greenhouse systems utilize solar energy, additional heat and/or wastewater storage capacity is required during the winter. (Ex. B-2, B-3, B-4)

48. A single residence greenhouse system costs approximately $40,000-$50,000--plus additional expenditures necessary to tailor the system to the site. (N.T. 664; Ex. B-2, B-3, B-4)

49. A single residence stream discharge system costs approximately $15,000. (Ex. B-2, B-3, B-4)

50. There are problems with single residence stream discharge systems if they are not properly maintained, but that is true of greenhouse systems as well. (N.T. 203-206)

51. Greenhouse systems are much more labor-intensive than small flow treatment facilities and maintenance of a healthy cover crop is essential. (N.T. 113-114, 125-6; Ex. B-2, B-3, B-4)

52. The only advantage that a community sewage treatment plant would have over single residence stream discharge systems, based on the evidence presented at the hearing, is that a bacterial die-off resulting from lack of use of the facility would be less likely in a community system since three residences would be using the facility rather than just one. (N.T. 656)

53. If the lots utilized a community system, additional agreements would be necessary between the owners of each lot regarding operation and maintenance of the facility. (N.T. 649)

54. In the event a community system malfunctioned, all three lots

would be affected, rather than just one. (N.T. 652)

55. A bacterial die-off will result in the discharge of pathogens only if there is a simultaneous problem with the chlorination system. (N.T. 616, 628, 654-656)

56. There is no reason to suspect that the chlorination system on the single residence stream discharge systems here will fail. (N.T. 688)

The notice inviting public comment with regard to the planning modules

57. The planning modules submitted to the Department contained photocopies of the proof of publication in two newspapers of general circulation in the Thornbury area: the *Delaware County Daily Times* and the *Daily Local News*. (Ex. B-2, B-3, B-4)

58. The photocopy of the notice printed in the *Daily Local News* was legible, but the photocopy of the notice published in the *Delaware County Daily Times* was not. (Ex. B-2, B-3, B-4)

59. It appears from the photocopy of the proof of publication that the notice may have been legible as published but rendered illegible when it was photocopied for the proof of publication. (Ex. B-2, B-3, B-4)

60. After summarizing the nature of the proposed plan revision, the notice invited the public to submit comments to the Thornbury's township supervisors, care of the municipal secretary, and provided her name and address. (Ex. B-2, B-3, B-4)

61. The Appellants introduced no evidence to show that they attempted to contact the municipal secretary to ascertain when they could review the proposed plan revision.

62. The Appellants failed to elicit evidence showing that they did not have access to the planning modules during the comment period.

Water quality limits for nitrates and phosphorus

63. Neither the NPDES permits nor the water quality management permits contain water quality limits on the discharge of nitrates or phosphorus. (Ex. P-2, P-6)

64. Cahill testified that phosphorus and nitrates "can have a significant impact on downgradient water bodies, such as a lake." (N.T. 270)

Article I, §27, of the Pennsylvania Constitution

65. The Department considered the cost and maintenance required for various systems as part of its alternative analysis. (Ex. B-2, B-3, B-4)

66. Greenhouse systems dispose of household waste through evaporation and plant transpiration; there is no direct discharge to land or water. (Ex. B-2, B-3, B-4)

67. The discharges from the single residence stream discharge systems proposed here would be small and would not exert a deleterious effect on the receiving stream. (Ex. B-2, B-3, B-4)

68. The single residence stream discharge systems approved here can discharge only 500gpd apiece at a maximum. (Ex. P-2)

69. The single residence stream discharge systems will typically discharge only around 250gpd. (N.T. 250)

70. So long as the single residence stream discharge systems are maintained and operated in accordance with the Operations and Maintenance Agreements incorporated in the planning modules, they will cause no degradation to the receiving stream. (Ex. B-2, B-3, B-4)

71. The line connecting the sand filter and chlorine-contact tank in Peter Pagano's single residence stream discharge system will encroach upon wetlands on Pagano's lot. (N.T. 123-5; Ex. A-6, SE-22)

72. The Appellants failed to elicit evidence concerning the nature of the wetlands on Peter Pagano's lot or the extent of harm the encroachment associated with the single residence stream discharge system will cause.

DISCUSSION

The Appellants bear the burden of proof with respect to their challenges to the Department's approval of the amendment, the NPDES permits, and the water quality management permits under 25 Pa. Code §21.101(c)(3). Dwight L. Moyer, Jr., *et al.* v. DER, 1989 EHB 928; Snyder Township Residents for Adequate Water Supplies v. DER and Doan Mining Company, 1988 EHB 1208. The scope of the Board's review is to determine whether the Department's action was an abuse of discretion or an arbitrary exercise of its duties. Warren Sand and Gravel v. DER, 20 Pa. Cmwlth. 186, 341 A.2d 556 (1975). Our review is *de novo* and, where we determine that the Department has abused its discretion, we may substitute our discretion. Residents Opposed to Black Bridge Incinerator v. DER, 1993 EHB 675, Rochez Bros., Inc. v. DER, 18 Pa. Cmwlth. 137, 334 A.2d 790 (1975).

Since a number of issues raised in the post-hearing memoranda concern particulars of single residence stream discharge systems, a brief overview of how those systems work may be helpful before we turn to the specific issues raised by the parties. In single residence stream discharge systems, untreated wastewater from the residence passes first into an aerobic treatment plant. (SE-4, p. 10, SE-5) There, wastewater passes sequentially through three chambers: in the first, suspended solids settle out and floating solids are skimmed off; in the second, the wastewater is aerated; and in the third, the wastewater passes through a filter. (N.T. 239-40; SE-4, pp.7, 10, SE-5) From

the aerobic treatment plant, wastewater passes to a sand filter dosing pump station, where it is stored and periodically pumped to a sand filter. (SE-4, p. 12, SE-5; N.T. 240) In the sand filter, wastewater passes through layers of sand and gravel, undergoing additional filtration and biochemical treatment. (SE-4, pp. 14-15, SE-5) From the sand filter, it passes through a chlorine contact tank, where the wastewater is temporarily stored and disinfected with soluble chlorine tablets. (SE-4, p. 17) From there, the wastewater is discharged to the receiving stream. (Ex. A-6)

We shall address the issues raised in the post-hearing memoranda individually below.

I. Did the Department abuse its discretion or act contrary to law by approving the amendment without requiring a preliminary hydrogeologic evaluation under §71.64(c)(3)?

All parties in this appeal have stipulated that the Department did not require preliminary hydrogeologic evaluations before approving Thornbury's plan revision. (Ex. B-1, p. 13, para. 13) The Appellants argue that those evaluations were required under §71.64(c)(3) (subsection (c)(3)) before the Department could approve the plan revision because the single residence stream discharge systems will discharge to a dry stream channel. The Permittees counter that the hydrogeologic evaluation requirement is inapplicable because their sewage facilities will *not* discharge to a dry stream channel, and that, even if the requirement were applicable, the Department's failure to enforce it would be harmless error because the Department could not have imposed more stringent conditions on the facilities than those it did in the NPDES permits. The Department did not address the issue in its post-hearing memorandum.

Subsection (c)(3) provides that plan revisions proposing the use of single residence stream discharge systems must include preliminary hydrogeologic

evaluations if the systems will use "a dry stream channel discharge." The Appellants have not established that subsection (c)(3) is applicable here because they failed to show that the Permittees' sewage systems will discharge to a "dry stream channel discharge" within the meaning of that subsection.

Four witnesses testified regarding the nature of the streambed which will receive the discharge. Crits-Christoph testified that he had examined the streambed "every now and then" over "the past couple of years" and that, while the channel had water in it on some occasions, it was dry during "particularly dry periods." (N.T. 25) He did not know the relative number of times the streambed was dry as opposed to the number it had water flowing in it. (N.T. 51-3) Thomas Cahill, one of the Appellants' expert witness, testified that at the time he visited the site, there was a small amount of water flowing in the stream. (N.T. 295-296) Mark McGinley testified that he had examined the stream at least once a week for the three years prior to the hearing--except for times he was on vacation--and that on each occasion he saw water flowing in the stream. (N.T. 525-7) John Kinsey, the Sewage Enforcement Officer for Thornbury, testified that he had visited the site on several occasions since 1991 and saw water flowing in the streambed on each occasion. (N.T. 590-2)

Even if the testimony were construed in the light most favorable to the Appellants, the most that can be said is that the Appellants showed that the streambed may *sometimes* be dry. To establish that the facilities would discharge to a "dry stream channel" within the meaning of subsection (c)(3), however, the Appellants had to do more than that; they had to establish that the streambed would *normally* be dry. The Bureau of Water Quality Management's "Guidelines for Design Installation and Operation of Small Flow Sewage Treatment Facilities" show that the Department interprets the phrase "dry stream channel"

in §71.64(c)(3) to mean a streambed which is *normally* dry--not one which is merely occasionally dry. The guidelines provide, in pertinent part, "The outfall sewer must be extended to a stream or watercourse where streamflow is available for dilution and *not* terminated in a roadside ditch or swale which *is normally* dry unless the requirements for hydrogeologic studies in Chapter 71, Section 71.64(c)(3) have been met." (emphasis in original) (SE-4, p. 18) The Department's interpretation of its own regulations is entitled to great weight and will not be disregarded unless clearly erroneous. Hatchard v. Department of Environmental Resources, 149 Pa. Cmwlth 145, 612 A.2d 621 (1992); *petition for allowance of appeal denied*, 533 Pa. 647, 622 A.2d 1378 (1993); Morton Kise, et al. v. DER, 1992 EHB 1580. It is not clearly erroneous here.

It is true that the Department did refer to the stream as a "dry stream" in the NPDES permits, calling the Permittees' attention to the possibility that the discharges may not have the benefit of dilution and that the Department may impose additional treatment requirements. (N.T. 331-2; Ex. P-2, p. 14, para. 5) Given the nature of the stream, the Department's placing of this condition in the NPDES permits was a prudent step, setting the stage for future action if that becomes necessary. The fact that the Department viewed the stream more stringently at the permitting stage than at the planning stage does not invalidate the planning approval without a showing that the planning approval was clearly erroneous. As noted above, the preponderance of the evidence shows that the stream is not a "dry stream."

II. Did the Department err by approving the amendment without ascertaining, under 25 Pa. Code §71.64(c)(4), that drinking water uses would be adequately protected and that the effluent would not create a nuisance or public health hazard?

The Appellants argue that the Department erred by approving Thornbury's plan revision because the Department did not require that the

Permittees submit documentation under §71.64(c)(4) that drinking water uses would be adequately protected and that the effluent would not create a nuisance or public health hazard. According to the Appellants, the discharge from the facilities could compromise nearby water wells and create a nuisance or public health hazard because it will contain phosphorus and nitrates and perhaps even pathogens as well. The Permittees contend that they submitted all the documentation required by law and that the Department verified that the discharge would not threaten drinking water uses or create a nuisance or public health hazard. The Department did not address the issue in its post-hearing memorandum.

Section 71.64(c) provides that plan revisions which propose the use of single residence sewage treatment systems must include "[d]ocumentation, using the information developed in subsection (c)(3) [regarding hydrogeologic evaluations], which confirms that existing or proposed drinking water uses will be protected and that effluent will not create a public health hazard or nuisance." The Permittees did not submit documentation with their planning modules to show whether their sewage systems would affect drinking water uses or whether the effluent would create a public health hazard or nuisance. (N.T. 100; Ex. B-2, B-3, B-4)

As noted with respect to our analysis of subsection (c)(3) of §71.64(c) above, the Permittees were not required to submit a hydrogeologic evaluation under subsection (c)(3). The first question we confront here, therefore, is whether, under (c)(4), a plan revision must contain *documentation* concerning a hydrogeologic evaluation even where the plan revision need not actually include the *hydrogeologic evaluation* itself under (c)(3). Neither the Permittees nor the Appellants addressed this issue in any detail in their post-

hearing memoranda. The Permittees asserted that they submitted all documentation required by law, so presumably they felt that they were not required to submit documentation under subsection (c)(4). Unfortunately, they neglected to explain why. The Appellants failed to address the issue at all.

Unlike subsection (c)(3), which is by its terms limited to plan revisions involving land disposal or a dry stream channel discharge, the documentation requirement in subsection (c)(4) never expressly states that it applies only to plan revisions involving certain types of discharges. Subsection (c)(4) is limited to those proposals by implication, however. It provides that planning modules must contain "[d]ocumentation, *using the information developed in subsection (c)(3).*" There are at least two ways to interpret this reference to subsection (c)(3). One is to construe subsection (c)(4) as providing that, where applicants develop no information pursuant to subsection (c)(3), they need submit no documentation under subsection (c)(4). The other is to construe subsection (c)(4) as providing that applicants must submit documentation from hydrogeologic studies conforming with subsection (c)(3) even where the applicants need not submit the evaluation itself under subsection (c)(3): documentation concerning hydrogeologic evaluations would have to be included in *every* plan revision evaluated under §71.64(c).

The former of these two interpretations--that one need submit documentation concerning the hydrogeological evaluation only where the evaluation must be submitted under subsection (c)(3)--is more reasonable for two reasons. The first has to do with the language in the subsections themselves. A hydrogeologic evaluation comporting with subsection (c)(3) must, among other things, identify existing groundwater uses on each side of the channel "downstream from the discharge until perennial stream conditions are reached."

25 Pa. Code §71.64(c)(3)(iii). This provision can only refer to facilities which do not discharge into perennial streams. If we read subsection (c)(4) as requiring documentation only where a hydrogeologic evaluation must be submitted under subsection (c)(3), then there is no inconsistency between subsections. But, if we read subsection (c)(4) as requiring documentation with every planning module evaluated under §71.64(c)--including those involving discharges to perennial streams--then subsection (c)(4) is difficult to reconcile with the language in subsection (c)(3) regarding the identification of groundwater uses down to the start of the perennial stream. The language in subsection (c)(3) seems to assume that hydrogeologic evaluations will only be performed on discharges which discharge *above* the start of the perennial stream.

Under the rules of statutory construction, statutes are presumed not to have interpretations which are unreasonable, Philadelphia Suburban Corp. v. Commonwealth, 144 Pa.Cmwlth. 410, 601 A.2d 893 (1992), and must be interpreted in the context in which they appear and with reference to other pertinent provisions. Bellefonte Area School District v. W.C.A.B. (Morgan), 156 Pa.Cmwlth. 304, 627 A.2d 250 (1993). Those rules of construction apply to regulations as well as to statutes. Fraternal Order of Police Lodge No. 5 v. City of Philadelphia, 139 Pa.Cmwlth 256, 590 A.2d 384 (1991). Based on the language in subsections (c)(3) and (c)(4), it is more reasonable to construe subsection (c)(4) as requiring documentation only where a hydrogeological evaluation must be submitted under subsection (c)(3) than to construe the subsection as requiring documentation in every instance.

Furthermore, this interpretation of subsection (c)(4) is consistent with the Department's interpretation of that provision. The evidence elicited at hearing shows that the Department interprets subsection (c)(4) as requiring

documentation only where an applicant must submit a hydrogeologic evaluation under subsection (c)(3). Frank DeFrancesco, a water management compliance specialist with the Department, testified that applicants need not submit documentation under subsection (c)(4) unless they are required to submit a hydrogeologic evaluation under subsection (c)(3). (N.T. 109-110) Similarly, the Department's guidance document, "Act 537 Planning Requirements for Treatment Plants with Flows Less Than 2,000 Gallons per Day--Small Flow Treatment Facilities," refers to hydrogeologic evaluations only with regard to projects proposing land disposal or a dry stream discharge. It provides, "When the proposed [small flow treatment facility] will utilize land disposal or a dry stream discharge for final disposal, a preliminary hydrogeological evaluation must be conducted by the applicant...." (SE-4, Volume V 200-39, p. 3) The fact that the guidance document only refers to the requirement that hydrogeologic evaluations be conducted in the context of discharges to dry streams or land disposal shows that the Department does not interpret the documentation requirement in subsection (c)(4) to apply unless the applicant has to submit an evaluation under subsection (c)(3). Otherwise, the applicant would have to conduct a hydrogeologic evaluation regardless of the type of discharge to obtain the information necessary to fulfill subsection (c)(4).

As we noted previously in this adjudication, the Department's interpretation of its own regulations is entitled to great weight and will not be disregarded unless clearly erroneous. Hatchard, *supra*. It is not clearly erroneous with respect to subsection (c)(4).

Since the Permittees were not required to submit documentation under subsection (c)(4), the Department did not act contrary to subsection (c)(4) by approving the Permittees' planning modules without that documentation.

III. Did the Department adequately evaluate whether single residence stream discharge systems are the best environmentally acceptable alternative here under §71.64(c)(8)?

The Appellants argue that the Department violated §71.64(c)(8) (subsection (c)(8)) of its regulations by approving the plan revision because the planning modules propose the use of single residence stream discharge systems, rather than other, more environmentally-friendly alternatives. The Permittees counter that the Department adequately evaluated all the alternatives and their environmental consequences and ascertained that single residence stream discharge systems were the only viable option here. The Department maintains that it complied with subsection (c)(8) because that subsection requires that planning modules utilize the best alternative which is environmentally *acceptable*--not necessarily the alternative which is best *environmentally*--and single residence stream discharge systems meet that criteria here.

Subsection (c)(8) provides that official plans or update revisions proposing the use of small flow treatment facilities must include "[a]n evaluation of alternatives available to provide sewage facilities which documents that the use of small flow treatment facilities is the best environmentally acceptable alternative." The Appellants and the Department differ on the construction of the phrase "best environmentally acceptable alternative." The Appellants contend the word "best" modifies "environmentally acceptable," and argue that plan revisions must propose the use of the alternative which is best from an environmental standpoint. The Department, meanwhile, maintains that the word "best" modifies "alternative" and that plan revisions need not necessarily propose the use of the alternative which is most environmentally friendly, but must propose an alternative which is

environmentally acceptable.

Given the ambiguities inherent in the phrase "best environmentally acceptable alternative"--the word "best" could modify either "environmentally acceptable" or "alternative"--both the Department and the Appellants have offered plausible constructions of subsection (c)(8). The Department's construction of the subsection is controlling, however. The Department's interpretation of its regulations is entitled to great weight, Hatchard, *supra*, and that interpretation is not clearly erroneous here. To prove that the Department erred with respect to the alternatives analysis in subsection (c)(8), therefore, the Appellants must show that single residence stream discharge systems were not the best alternative which was environmentally acceptable.

The parties elicited evidence with respect to a number of possible alternatives to single residence stream discharge systems. The other single residence alternatives suggested were public sewers, subsurface sewage disposal, holding tanks, evapotranspiration greenhouse (greenhouse) systems,[2] and spray irrigation systems. In addition, three alternatives were suggested which would have utilized one community treatment facility to receive and treat wastewater generated from all three lots: a spray irrigation system, a greenhouse system, and a stream discharge system.

We can eliminate some of the suggested single residence alternatives at the outset of our analysis. The lots cannot use public sewers because the area is not currently served by public sewers. (N.T. 567; Ex. B-2, B-3, B-4)

[2] Greenhouse systems dispose of wastewater through evaporation and plant transpiration. (Ex. B-2, B-3, B-4) Wastewater passes from the residence into an aerobic treatment plant akin to that used in single residence stream discharge systems. (Ex. B-2, B-3, B-4) From there, the water is pumped to beds in a greenhouse which are filled with sand, gravel, and topsoil, and covered with vegetation. (Ex. B-2, B-3, B-4)

Nor can the lots utilize subsurface sewage disposal or holding tanks. Section 71.62(b)(2) of the regulations, 25 Pa. Code §71.62(b)(2), provides that official plans and plan revisions which propose subsurface sewage disposal must document that the soil on the proposed site is suitable for that means of disposal. The soil on the lots here is inappropriate for subsurface sewage disposal. (N.T. 112, 570; Ex. B-2, B-3, B-4) Section §71.63(c)(1) of the regulations, 25 Pa. Code §71.63(c)(1), provides that holding tanks may be used instead of other methods of sewage disposal only where "[t]he applicable official plan or revision thereto...provides for replacement by adequate sewerage services in accordance with a schedule approved by the Department." The Department's deadline for replacing tanks with sewerage services is unclear from the evidence at the hearing: Frank DeFrancesco, a water management compliance specialist with the Department, testified that the Department considers holding tanks to be a possible alternative only where public sewers will be available in *two* years, but the alternatives analysis in the planning modules states that the Department will consider holding tanks so long as public sewerage will be available within *five* years. (N.T. 115; Ex. B-2, B-3, B-4) The discrepancy is immaterial here, however, since the Appellants failed to present evidence showing that municipal sewers would be available within either time-frame. Indeed, Thornbury currently has no plans to install public sewers in the area. (N.T. 567)

Spray irrigation is not a viable alternative here given the size of the lots. A spray irrigation system requires at least 2 acres. (N.T. 115) The largest of the three lots here is 1.5 acres. (N.T. 127) Even if the Permittees had proposed a community system for the lots, there would not have been sufficient area on all three lots to accommodate spray irrigation, given the isolation distances required. (N.T. 127-8, 660)

As for the community or single-residence greenhouse systems, the Appellants failed to elicit any evidence showing that either system would be a better alternative here than single residence stream discharge systems. Instead, the Appellants devoted their attention to trying to adduce evidence about the shortcomings of single residence stream discharge systems.[3] By focusing solely on the shortcomings of single residence stream discharge systems, rather than the relative merits of those systems compared to other options, the Appellants lost sight of their burden of proof. The Appellants had to do more than simply show that the systems approved by the Department was imperfect. They had to show that a *better* alternative was available. The alleged deficiencies of single residence stream discharge systems are immaterial absent any indication that other alternatives are available which would be better. There are problems with single residence stream discharge systems if they are not properly maintained, but that is true of the greenhouse systems as well. (N.T. 203-206) Furthermore, greenhouse systems are much more labor-intensive than small flow treatment facilities and maintenance of a healthy cover crop is essential. (N.T. 113-114, 125-6; Ex. B-2, B-3, B-4) Greenhouse systems are also considerably more expensive than single residence stream discharge systems. A single residence stream discharge system costs approximately $15,000. (Ex. B-2, B-3, B-4) A single residence greenhouse system, by contrast, costs approximately $40,000-$50,000--plus additional

[3] Most of the evidence the Appellants developed pertained to the issue of whether the Department would actually compel the Permittees to abide by conditions set forth in the planning modules--not to whether the planning modules themselves were deficient. Even assuming the former issue were ripe, the Department's future decisions with respect to enforcement action fall within the Department's prosecutorial discretion and, as a result, are not subject to Board review. Downing v. Commonwealth of Pennsylvania Medical Education and Licensure Board, 26 Pa. Cmwlth. 517, 364 A.2d 748 (1976), *cert. den.* 436 U.S. 910.

expenditures necessary to tailor the system to the site. (N.T. 664; Ex. B-2, B-3, B-4) In addition, because greenhouse systems operate by harnessing solar energy, additional heat and/or wastewater storage capacity is required during the winter. (Ex. B-2, B-3, B-4) Given the differences in the cost and maintenance requirements of the systems, the Department did not err by concluding that single residence stream discharge systems were a better alternative than both types of greenhouse systems.

That leaves only one possible alternative to single residence stream discharge systems: a community sewage treatment plant with a stream discharge. Based on the evidence presented at the hearing, the only advantage to a community sewage treatment plant is that a bacterial die-off resulting from lack of use of the facility is less likely since, with the community system, three residences would be using the facility rather than just one. (N.T. 656) There would also be some disadvantages to the community system, however. If the lots utilized a community system, additional agreements would be necessary between the Permittees regarding operation and maintenance of the facility. (N.T. 649) And, in the event of a breakdown, all three lots would be affected, rather than just one. (N.T. 652) Given these disadvantages, the Department did not err by preferring single residence stream discharge systems to a community sewage treatment plant despite the fact that a community sewage treatment plant may be less likely to suffer a bacterial die-off. A bacterial die-off will result in the discharge of pathogens only if there is a simultaneous problem with the chlorination system. (N.T. 616, 628, 654-656) And, there is no reason to suspect that the chlorination system on the single residence stream discharge systems here will fail. (N.T. 688)

<u>IV. Was the notice inviting public comment with regard to the planning modules deficient?</u>

Tacked on to the Appellants' contentions about the alternatives analysis under §71.64(c)(8) is an argument about the notice given with respect to the planning modules. Why the Appellants chose to raise that argument within the context of their discussion of the alternatives analysis only the Appellants know. The notice argument is cryptic, five sentences long, and appears to have nothing to do with the alternatives analysis. The Appellants argue that the notice was "deficient" because the copy of the notice sent to the Department was illegible, because the notice did not specify when the modules would be available for public view, and because the modules were not submitted to Thornbury until after the public comment period expired. They never point to a statutory or regulatory provision which they feel was violated or otherwise explain their theory of law. Nor do they explain how their interests were harmed by the alleged shortcomings in the notice.

The Permittees counter that the notice was adequate and that the modules were available for public review and public comments were made during the comment period. The Department did not address the issue in its post-hearing memorandum.

Section 71.31(c) of the Department's regulations, 25 Pa. Code §71.31(c), provides:

> A municipality shall submit evidence that documents the publication of the proposed plan adoption action at least once in a newspaper of general circulation in the municipality. The notice shall contain a summary description of the nature, scope and location of the planning area and the plan's major recommendations. A 30-day public comment period shall be provided. A copy of written comments received and the municipal response to each comment, [sic] shall be submitted to the Department with the plan.

The planning modules submitted to the Department contained photocopies of the proof of publication in two newspapers of general circulation in Thornbury: the

Delaware County Daily Times and the *Daily Local News*. (Ex. B-2, B-3, B-4) The photocopy of the notice printed in the *Daily Local News* was legible, but the photocopy of the notice published in the *Delaware County Daily Times* was not. (Ex. B-2, B-3, B-4)

The fact that the photocopy of the notice in the *Delaware County Daily Times* was illegible in the proof of publication is immaterial. First, the Appellants presented no evidence showing that the notice was illegible as published.[4] Second, section 71.31(c) only requires that notice be published in one newspaper of general circulation, and there is no question that the photocopy of the notice published in the *Daily Local News* was legible.

Nor does the fact that the notice does not state when the modules would be available for public review render the notice defective. There is no requirement in section 71.31(c) that the notice state when modules will be available for public review. Furthermore, after summarizing the nature of the proposed plan revision, the notice invited the public to submit comments to the Thornbury's township supervisors, care of the municipal secretary, and provided her name and address. (Ex. B-2, B-3, B-4) If the Appellants wanted to determine when they could review the proposed plan revision, they could have contacted the municipal secretary. They introduced no evidence to show that they attempted to do so.

Finally, even if Thornbury did not actually have the modules during the comment period--as the Appellants assert--the Appellants would not be entitled to prevail here. Whether the modules were in the hands of the *township* during the comment period is immaterial. The question for notice purposes is

[4] It appears from the photocopy of the proof of publication that the notice may have been legible as published but rendered illegible when it was photocopied for the proof of publication. (Ex. B-2, B-3, B-4)

whether the *Appellants* had access to the modules to comment on them. The Appellants failed to elicit evidence showing that they did not.

V. Did the Department abuse its discretion by identifying the discharge volume in the NPDES and water quality management permits as 500gpd instead of 400gpd?

The Appellants argue that the Department abused its discretion by issuing the NPDES and water quality management permits to the Permittees because those permits authorize discharge volumes of 500gpd from each single residence stream discharge system whereas the planning modules identified the discharge volumes as only 400gpd. The Permittees counter that the planning modules authorized the disposal of 500 gpd--not 400gpd--and that, even if the planning modules had identified the volume of the discharge as 400gpd, the Department would not have abused its discretion by authorizing discharge volumes of 500gpd in the NPDES and water quality management permits. The Department contends that the Appellants cannot object to the alleged increase in the volume of the discharge because the Appellants failed to raise that issue in their notice of appeal with respect to the NPDES and water quality permits.

Even assuming the Appellants were correct when they aver that the discharge volume increased from the planning modules to the NPDES and water quality management permits, the Appellants could not prevail on this issue. Issues not raised by an appellant in its notice of appeal are deemed waived unless good cause is shown for raising it at a later time. 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); NGK Metals Corp. v. DER, 1990 EHB 376. Good cause may be demonstrated by fraud or breakdown in the Board's operation or by the necessity for further discovery, provided that a statement to that effect is contained in the notice of appeal. *Id.* The Appellants raised no objections

concerning the alleged increase in discharge volume in their notice of appeal to the NPDES and water quality permits. And the Appellants failed to show that good cause existed: they have not alleged fraud or breakdown in the Board's operation or averred that the discrepancy in the discharge volume came to light only during discovery. While the Appellants did reserve the right to amend their notice of appeal to add additional objections which might come to light as a result of pre-trial discovery, the Appellants never attempted to amend their notice of appeal.

VI. Did the Department abuse its discretion by failing to set water quality limits for nitrates and phosphorus when it issued the NPDES and water quality management permits?

Neither the NPDES permits nor the water quality management permits contain limits on the discharge of nitrates and phosphorus. (Ex. P-2, P-6) The Appellants argue that the Department abused its discretion by not setting water quality limits for those substances because nitrates and phosphorus discharged from the facilities will adversely impact Brinton Lake. The Appellants maintain that the Department has the discretion to impose phosphorus limits under §95.6(a) of the Department's regulations, 25 Pa. Code §95.6(a), but they advance no theory of law with regard to their position on nitrates. The Permittees and Department argue that the Department need only set nitrate or phosphorus limits where there are problems with eutrophication in the watershed.

The Appellants have failed to show that the Department abused its discretion with respect to the phosphorus limit. Section 95.6(a) provides that the Department is authorized to impose water quality limits on phosphorus if, and only if, necessary to control eutrophication in a body of water with a

detention time of 14 days or more.[5] While the Appellants allege that the discharge of phosphorus will cause eutrophication in Brinton Lake, they failed to elicit any evidence showing that the detention time in the lake was 14 days or more. Nor did they adduce evidence showing that eutrophication would result from the phosphorus discharged. The only evidence they cite in support of that proposition is testimony from engineer Thomas Cahill. Cahill never testified that phosphorus discharged from the facilities would cause eutrophication in Brinton Lake; he simply testified that phosphorus "can have a significant impact on downgradient water bodies, such as a lake." (N.T. 270) The fact that phosphorus *can* affect a lake does not show that the amounts discharged here *will* affect Brinton Lake.

The Appellants are no more successful with their argument regarding nitrates. As noted above, the Appellants neglected to advance a theory of law in support of their position. The Board will not sift through the applicable law to determine whether any support exists for their position and whether that position should prevail. The Appellants have the duty to present their best case; the Board will not do so by default. To develop a theory of law for the party bearing the burden of proof where that party advances none would not only

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[5] Section 95.6(a) provides, in pertinent part:

> *Where deemed necessary to control eutrophication*, the Department will impose phosphorus controls based upon a Department approved phosphorus-loading eutrophication response model on any new or modified point source discharges to waters that are tributary to...a lake, pond or impoundment with a detention time of 14 days or more based on average annual stream flow. *The limitations shall be no more stringent than would be necessary to control eutrophication....* (emphasis added.)

require a prodigious investment of the Board's time,[6] it would be manifestly unfair to the Permittees and the Department, who would have no opportunity to argue their positions with respect to any law the Board might unearth on the Appellants' behalf.

Furthermore, even assuming the Department does have the authority to impose a water quality limit on nitrates if nitrates will cause eutrophication, the Appellants would not prevail here. As in the case of phosphorus, the only evidence the Appellants cite in support of the proposition that nitrates would cause nutrient enrichment is testimony from Cahill that nitrates "can have a significant impact on downgradient water bodies, such as a lake." (N.T. 270) The fact that nitrates *can* affect a lake does not show that it *will* do so here.

VII. Did the Department err by issuing the NPDES and water quality management permits given the failure rate of single residence stream discharge systems and their effects on the environment?

The Appellants argue that the Department erred by issuing the NPDES and water quality management permits because single residence stream discharge systems are known to fail and other systems would have less of an adverse environmental impact.[7] The Permittees counter that the Department did consider

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[6] The law governing NPDES and water quality management permits occupies five chapters in the Department's regulations alone. See 25 Pa. Code Chapters 91, 92, 93, 95, and 97.

[7] The Appellants also argue that, by approving the NPDES and water quality management permits, the Department violated two of its own guidance documents: the "Guidelines for Design, Installation and Operation of Small Flow Treatment Facilities," and the "Implementation Guidance for Evaluating Waste Water Discharges to Drainage Swales and Ditches." Even assuming those policy documents applied to the issuance of NPDES and water quality management permits, they are immaterial here. Unlike regulations, policy documents are entitled to no weight unless supported by independent evidence. Manor Mining & Contracting Corporation v. DER, 1992 EHB 327, 340; Refiner's Transport and Terminal Corp. v. DER, 1986 EHB 400, 435-436. (Note that in our analysis of §71.64(c)(3) of the Department's regulations earlier in this opinion, we did not use the Department's policy

the failure rate of the systems and approved their use because they were the only viable option here. The Department did not address this issue in its post-hearing memorandum.

Here, the Appellants attempt to raise the same objection to the issuance of the NPDES and water quality management permits which we discussed above with respect to the alternatives analysis in the plan revision approval. Unfortunately, the Appellants fail to advance any theory of law in support of their position. As we noted in our discussion of the Appellants' argument with respect to nitrates discharged from the systems, the Board will not select and develop a theory of law for the Appellants simply because the Appellants neglected to formulate one themselves. It is the Appellants' responsibility to develop their theory of law, not the Board's.

VIII. Appellants' arguments incorporated from the planning modules and made with respect to the NPDES and water quality management permits.

After discussing the Appellants' objections to the issuance of the approval of the sewage facilities plan revision, the Appellants' post-hearing memorandum states, "The above arguments concerning the planning modules submittal and review are incorporated herein by reference thereto as they apply to the issuance of NPDES Part I and WQM [water quality management] Part II Permits." (Appellants' post-hearing memorandum, p. 14) The Appellants' discussion of the NPDES and water quality management permits contains no other reference to the objections raised with respect to the plan revision. The Permittees responded by stating in their own post-hearing memorandum that, like

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document, the "Guidelines for Design and Operation of Small Flow Sewage Treatment Facilities," to show that the Department acted contrary to law by failing to act in accordance with the document. We simply referred to the guidelines to show how the Department construed language in its regulations. It is the language in the regulations--not the guidelines--which has the force of law.)

the Appellants, *they* incorporated *their* arguments regarding the plan revision approval in their discussion of the NPDES and water quality management permits. (Permittees post-hearing memorandum, p. 15) The Department did not address the issue in its post-hearing memorandum.

To the extent that the Appellants contend that the NPDES and water quality management permits were wrongly issued *because those permits were based on an unlawful plan revision approval*, the Appellants' argument fails. We have examined the Appellants' objections to the plan revision above and found them wanting.

To the extent that the Appellants contend that the permits were wrongly issued *even if the issuance of the plan approval was proper*, the Appellants' argument fails for a different reason. All but two of the objections the Appellants raised regarding the plan revision approval pertain to whether the Department had complied with Chapter 71 of its regulations. If the Appellants, by incorporating these objections in their discussion of the NPDES and water quality management permits, mean to argue that the issuance of those permits does not comply with Chapter 71, then their position is based on a false premise. Chapter 71 does not regulate the issuance of NPDES or water quality permits; it pertains to the administration of the sewage facilities planning program. Therefore, whether the Department issued the NPDES and water quality management permits in accord with the procedure laid out in Chapter 71 is immaterial. If, on the other hand, the Appellants mean to object to the permits for some reason other than compliance with Chapter 71, then their arguments fail because the Appellants never articulated their underlying theory of law.

That leaves the two objections to the plan revision approval which

were not grounded in Chapter 71: the argument that the notice inviting the public comments was deficient, and the argument regarding compliance with Article I, §27. Since the Appellants fail to advance any theory of law with respect to their notice argument, that argument is stillborn.[8] As for the Appellants' Article I, §27, objections to the NPDES and water quality management permits, we shall address those below, together with the Article I, §27, objections to the plan revision approval.

IX. Did the Department violate Article I, §27, by approving the plan revision or by issuing the NPDES or water quality management permits?

The Appellants contend that the Department violated Article I, §27, of the Pennsylvania Constitution by approving the plan revision and by issuing the NPDES and water quality management permits because the Department: (1) failed to assess the environmental impact of the discharges on Brinton Lake or off-site wetlands, and (2) considered the cost and difficulty of maintaining the various potential alternative systems when it conducted its alternatives analysis.

The Permittees and the Department respond only to selected aspects of the Appellants' argument. The Permittees argue that the Appellants are incorrect when they assert that the Department did not assess the environmental impact of the sewage treatment systems it approved. The Department argues that the Appellants cannot object to the potential effect of those systems on nearby wetlands because the Appellants did not raise that objection in their notice of appeal.

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[8] Even assuming the argument were viable, the Appellants could not raise it with respect to the NPDES and water quality management permits because they did not object to the notice in their notice of appeal for those permits. As noted earlier in this adjudication, objections not raised in the notice of appeal are deemed waived absent a showing of good cause.

We need not determine whether the Appellants' Article I, §27, arguments are within the scope of the objections raised in their notices of appeal. Even assuming they were, the Appellants would not prevail here.

Article I, §27, states that the people have a right to clean air and water and the preservation of the "natural, scenic, historic, and esthetic values" of the environment, and provides that the Commonwealth shall conserve and maintain Pennsylvania's natural resources for the benefit of the people. The standard used to determine if the Department has complied with Article I, §27, depends on whether the Department is acting pursuant to a statute which implements Article I, §27, or one which does not. See, *e.g.*, National Solid Wastes Management Association v. Casey and DER, 143 Pa. Cmwlth. 577, 600 A.2d 260 (1991), *aff'd*, 533 Pa. 97, 619 A.2d 1063 (1993), and Jay Township, et al. v. DER, EHB Docket No. 91-401-MR (consolidated docket) (Opinion issued November 8, 1994). Where the Department acts pursuant to a statute which implements Article I, §27, the action is deemed to comply with Article I, §27, so long as the action complies with the statute and the regulations adopted pursuant to that statute. *Id.* Where the Department acts pursuant to a statute which does not implement Article I, §27, the action is deemed to comply with Article I, §27, so long as it complies with the standard enunciated in Payne v. Kassab, 11 Pa.Cmwlth. 14, 312 A.2d 86 (1973), *aff'd*, 14 Pa.Cmwlth. 491, 323 A.2d 407 (1974), *aff'd*, 468 Pa. 226, 361 A.2d 263 (1976). See, *e.g.*, Jay Township, *supra*. Under that standard, a Department action is deemed to comply with Article I, §27, so long as:

> 1. There is compliance with all statutes and regulations applicable to the protection of the Commonwealth's natural resources;
>
> 2. There is a reasonable effort to reduce environmental incursion to a minimum; and,

> 3. The environmental harm which will result from the challenged action does not so clearly outweigh the benefit to be derived that to proceed further would be an abuse of discretion.
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> Payne v. Kassab, *supra*.

We need not actually determine whether the Sewage Facilities Act or the Clean Streams Law implement Article I, §27. Since the first prong of the Payne standard requires that the Department comply with all statutes and regulations applicable to the protection of natural resources, a Department action which satisfies the Payne standard necessarily comports with the standard for actions taken pursuant to statutes which implement Article I, §27. In other words, if a Department action satisfies the Payne standard, then the action complies with Article I, §27, ***whether the action was taken pursuant to a statute which implements Article I, §27, or not.*** The Appellants have failed to prove that the Department actions at issue here violated the Payne standard.[9]

Even assuming the Appellants' allegations with respect to the

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[9] Indeed, the Appellants here fail even to allege that the criteria in the Payne test were violated. While the Appellants aver that the Department failed to adequately consider the environmental consequences of approval of the plan revision and issuance of the permits, the Appellants never actually argue that the environmental consequences clearly outweigh the social and economic benefits or that the environmental incursion could have been lessened. The distinction between alleging that the ***Department*** failed to ***consider*** one of the criteria in the Payne standard and alleging that the ***Department's action*** failed to ***comply*** with one of those criteria is significant. The Appellants bear the burden of proof. To prove that the Department failed to comply with Article I, §27, the Appellants must do more than simply prove that the Department failed to consider one of the criteria laid out in the Payne standard; they must go a step further and prove that the Department's action actually does not comport with that criteria. Thus, the Commonwealth Court has held that where the Board reviews an Article I, §27, challenge to a Department action and concludes that the Department failed to balance the social and economic benefits against the environmental harm (as required by the third prong of the Payne standard) the Board can substitute its discretion for that of the Department, balance the harms and benefits itself, and sustain the Department's action if it determines the harm does not clearly outweigh the benefit. See, *e.g.*, Swartwood v. Commonwealth, Department of Environmental Resources, 56 Pa. Cmwlth. 298, 424 A.2d 993 (1981).

Department's review were true, the Appellants would not have shown that the Department violated the first prong of the Payne standard. The Appellants never even allege that the Department violated a statutory or regulatory provision by considering the cost or maintenance requirements of the potential alternative systems or by failing to consider the environmental impact of the sewage systems on Brinton Lake.

The Appellants also failed to show that the Department did not minimize the environmental incursion. The Department did consider the cost and maintenance required of the various alternative systems. (Ex. B-2, B-3, B-4) But the fact that the Department considered these factors does not necessarily show that it selected a system which would cause more environmental harm than others. As noted above in our discussion of §71.64(c)(8), subsurface sewage disposal, spray irrigation, public sewerage, and holding tanks were not viable options here given the characteristics of the soil, the size of the lots, and the Thornbury's plans regarding public sewerage. The only alternatives the Department had to select from, then, were small flow treatment facilities or greenhouse systems.

The Appellants failed to present any evidence showing that greenhouse systems would result in less of an environmental incursion than would single residence stream discharge systems operated in accordance with the planning modules and NPDES and water quality management permit. Greenhouse systems dispose of household waste through evaporation and plant transpiration, so there is no direct discharge to land or water. (Ex. B-2, B-3, B-4) While the single residence stream discharge systems proposed here would discharge into an intermittent stream, the discharges are small and will not exert a deleterious effect on the stream. (Ex. B-2, B-3, B-4) Each system can

discharge only 500gpd apiece at a maximum, and will typically discharge only around 250gpd. (N.T. 250; Ex. P-2) So long as they are maintained and operated in accordance with the Operations and Maintenance Agreements incorporated in the planning modules, they will cause no degradation to the receiving stream. (Ex. B-2, B-3, B-4) While there are problems with small flow treatment facilities if they are not properly maintained--as we noted in our discussion of §71.64(c)(8)--that is true of greenhouse systems as well. (N.T. 203-206) Furthermore, greenhouse systems are much more labor-intensive than small flow treatment facilities and maintenance of a healthy cover crop is essential. (N.T. 113-114, 125-6; Ex. B-2, B-3, B-4) Given the degree of labor and finesse required to keep greenhouse systems operating properly, the Department did not fail to minimize the environmental incursion by selecting single residence stream discharge systems, as opposed to a greenhouse system.

Nor did the Appellants show that a community stream discharge system would result in less environmental incursion than single residence steam discharge systems. As noted in our discussion with respect to §71.64(c)(8), the only advantage to a community system is that it would be less likely to suffer a bacterial die-off. At the same time, additional agreements would be necessary between the property owners regarding operation and maintenance of the system and, in the event of a breakdown, all three lots would be affected, rather than just one. Given the disadvantages of the community system, and the fact that a bacterial die-off will result in the discharge of pathogens only when there is a simultaneous problem in the chlorination system, the Department did not fail to make a reasonable effort to minimize the environmental incursion by approving the use of single residence stream discharge systems, instead of a community stream discharge system.

That leaves the third prong of the Payne standard: Did the Appellants show that the environmental harm to Brinton Lake and nearby wetlands would clearly outweigh the social and economic benefits of the Department's actions? The evidence presented at the hearing fell far short of this mark. The only evidence even remotely connected to harm to wetlands pertained to the line connecting the sand filter and chlorine-contact tank in Peter Pagano's single residence stream discharge system. That line will encroach upon wetlands on Pagano's lot, (N.T. 123-5; Ex. A-6, SE-22) But the Appellants failed to elicit any evidence concerning the nature of those wetlands or the extent of harm the encroachment would cause. The Appellants also failed to prove that any harm would result to Brinton Lake from the Department's actions. The only evidence elicited concerning the environmental harm to the lake was Cahill's testimony that phosphorus and nitrates *could* cause problems in lakes. As noted previously in our discussion of the phosphorus and nitrates limits, Cahill never testified that those nutrients would actually cause problems at Brinton Lake.

Since no evidence was presented concerning the degree of harm to wetlands or concerning harm to Brinton Lake, the Appellants have failed to show that those harms clearly outweighed the obvious social and economic benefits associated with allowing people to develop their land and provide sewage treatment for residences.

CONCLUSIONS OF LAW

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

2. A party appealing the Department's approval of an official plan revision and permits issued by the Department bears the burden of proof. Dwight L. Moyer, Jr., *et al.* v. DER, 1989 EHB 928; Snyder Township Residents for

Adequate Water Supplies v. DER and Doan Mining Company, 1988 EHB 1208.

3. Under §71.64(c)(3) of the Department's regulations, the Department may approve a plan revision without a preliminary hydrogeologic evaluation where proposed facilities will discharge to a streambed which is sometimes--but not usually--dry.

4. Plan revisions need not, under §71.64(c)(4) of the Department's regulations, include documentation that drinking water uses will be protected and that the effluent will not create a public health hazard or nuisance, where plan revisions are not required to include a hydrogeologic evaluation under §71.64(c)(3).

5. Under §71.64(c)(8) of the Department's regulations, plan revisions need not necessarily propose the use of the sewage treatment system which is the best from an environmental standpoint; they must select the best alternative from those which are environmentally acceptable.

6. The Appellants have not shown that other, environmentally-acceptable sewage treatment systems are available which would be better for the lots here than single residence stream discharge systems.

7. The Appellants have failed to show that the notice published with respect to the planning modules did not comply with §71.31(c) of the regulations.

8. The Appellants have waived objections to the alleged increase in the discharge volume from the plan revision to the NPDES and water quality management permits because the Appellants failed to raise that issue in the notice of appeal filed with respect to the NPDES and water quality permits.

9. The Appellants failed to prove that the Department abused its discretion or acted contrary to law by not imposing a phosphorus limit on the

discharge of effluent under §95.6(a) of its regulations because they never showed that a phosphorus limit is necessary to control eutrophication or that the effluent will be discharged to waters tributary to a lake, pond, or impoundment with a detention time of 14 days or more.

10. The Board will not select and develop a theory of law for appellants where they bear the burden of proof and neglect to formulate their own theory of law.

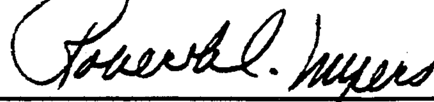
11. One cannot prove that the Department violated Article I, §27, of the Pennsylvania Constitution, without showing that the Department violated a statute or regulation applicable to the protection of Commonwealth natural resources, that it failed to make a reasonable effort to reduce the environmental incursion to a minimum, or that the environmental harm of the Department's action clearly outweighs the benefit to be derived.

12. The Appellants failed to show that the Department, by considering the cost and difficulty of alternative sewage systems, or by failing to assess the impact on off-site wetlands, violated a statute or regulation applicable to the protection of Commonwealth natural resources, that the Department failed to make a reasonable effort to reduce the environmental incursion to a minimum, or that the environmental harm resulting from the Department's action clearly outweighs the benefit to be derived.

O R D E R

AND NOW, this 25th day of May, 1995, it is ordered that the Department's approval of Thornbury's official plan revision, its issuance of NPDES permits to Peter Pagano and Charles and Jeanne Marie Pagano, and its issuance of water quality management permits to McGinleys, Peter Pagano, and Charles and Jeanne Marie Pagano are sustained and the Appellants' consolidated appeals are dismissed.

ENVIRONMENTAL HEARING BOARD



ROBERT D. MYERS
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: May 25, 1995

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M. DIANE SMITH
SECRETARY TO THE BOAR

HOPEWELL TOWNSHIP AND RONALD E. CHAMBERLIN	:	
	:	
v.	:	EHB Docket No. 95-005-MR
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: May 26, 1995
AND SNOKE'S EXCAVATING & PAVING, INC.,	:	
PERMITTEE	:	

OPINION AND ORDER SUR PETITION FOR SUPERSEDEAS

Synopsis:

The Board denies a Petition for Supersedeas, seeking to suspend operations under a noncoal surface mining permit, where the petitioners fail to establish a likelihood of prevailing on the merits and fail to present evidence of irreparable harm.

OPINION

Hopewell Township (Township), a Township of the Second Class situated in Cumberland County, and Ronald E. Chamberlin (Chamberlin), a resident of the Township with a mailing address of 100 Chamberlin Road, Shippensburg, PA 17257-9713[1], filed a Notice of Appeal on January 10, 1995 seeking Board review of the December 8, 1994 issuance by the Department of Environnmental Resources (DER) of Noncoal Surface Mining Permit No. 21940301 (Permit) and Authorization to Mine No. 301453-21940301-01 (Authorization). The Permit and Authorization were issued to Snoke's Excavating and Paving, Inc. (Permittee) for the purpose of removing shale

[1]The Township and Chamberlin, collectively, are referred to as Appellants.

from Martin's Shale Pit in the Township.

On March 28, 1995 Appellants filed a Petition for Supersedeas. DER filed its Answer to the Petition on May 8, 1995. Permittee filed a Response and Memorandum of Law on the same date. A hearing was held in Harrisburg on May 9, 1995[2] before Administrative Law Judge Robert D. Myers, a Member of the Board, at which all parties were represented by legal counsel and presented evidence in support of their legal positions. Permittee filed a post-hearing brief on May 15, 1995; Appellants filed theirs on May 16, 1995. DER chose not to file a post-hearing brief, relying on its Answer to the Petition.

The narrative that follows is based upon the pleadings, testimony and exhibits (including two depositions) that make up the record at this point.

Martin's Shale Pit, located in the southwest corner of the Township, has been operated by Permittee since 1979 under Noncoal Surface Mining Permit No. 6478NC1A1C issued by DER on March 20, 1979. Operations under the 1979 Permit were concentrated in a 4.6-acre area in the northeast portion of a 51.39-acre farm owned by Henry W. Nolt and Mary P. Nolt, husband and wife (Nolts). The shale pit was accessed by a haul road that ran south along the eastern boundary of the farm about 600 feet to an unimproved portion of Township Road T-315. Since the 1979 Permit was a so-called "large" permit, there were no annual tonnage limitations on the operation. DER made regular inspections of the shale pit and never cited Permittee for any violations.

In 1986 Chamberlin and his wife, Frances, acquired a 10-acre tract bordering the Nolts' farm on the east. The Chamberlins also acquired (at an unknown date) a 55-acre tract bordering the 10-acre tract and the Nolts' farm on

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[2]A hearing scheduled for April 12, 1995 was cancelled and rescheduled for April 25, 1995. That hearing also was cancelled and rescheduled for May 9, 1995.

the south. The unimproved portion of Township Road T-315 forms the dividing line between the two Chamberlin tracts and between the Nolts' farm and the 55-acre tract for about 500 feet. West of that point T-315 is within the confines of the Nolts' farm. An unnamed intermittent tributary to Middle Spring Creek runs in a westerly direction through or adjacent to the southern part of the Nolts' farm south of T-315.

In 1989 the Chamberlins built a substantial dwelling house on the 10-acre tract about 350 feet north of T-315 and about 75 feet east of the Nolts' farm. This placed the house within 250 feet of the shale pit and within 75 feet of the haul road. At the time the house was built and during the three prior years of the Chamberlins' ownership of the 10-acre tract, Permittee was operating the shale pit under the 1979 Permit and using the haul road and the unimproved portion of T-315 for ingress and egress of dump trucks.

Chamberlin testified that the shale pit "was quite actively mined prior to my move there and it was, subsequently to my move, mined heavily." (N.T. 31). He testified further that dust stirred up by trucks on the haul road and on T-315 covered his house and grounds, forcing him to wear goggles and a face mask when mowing the lawn. The dust problem subsided after 1992, according to Chamberlin, because no mining activity took place after that date. Chamberlin complained to DER about the dust, he contends, but received no response.

During 1993 Chamberlin became convinced that the mining operation which he thought was nearing its end[3] was seeking permission to expand. On November 7 of that year he wrote to Roger Hornberger, District Mining Manager in

[3]Chamberlin did not mention the basis of his belief. He testified that he never asked Permittee, DER or the Township what was proposed for the shale pit in the future.

DER's Pottsville office, objecting to any expansion and citing six reasons for his opposition. These included dust problems, the inadequacy of T-315 and the proximity of wetlands. On November 15 he wrote to Representative Albert H. Masland (whose district includes the Township), enclosing a copy of his letter to Hornberger and requesting Masland's help in defeating the proposed expansion. Masland forwarded the letter to DER and received a response dated December 7 informing him that no application for an expansion had yet been filed. Chamberlin maintains that he never heard back from DER or Masland.

An application was filed by Permittee on June 1, 1994 seeking to expand the shale mining operation to 44.88 acres (including the 4.6-acre area covered by the 1979 Permit). This acreage encompasses all of the Nolts' farm except for an area in the south (within 100 feet of T-315), an area in the southeast (within 300 feet of the Chamberlins' house) and an area in the northwest. In order to achieve the required setback of 300 feet from the Chamberlins' house, Permittee proposed to abandon the old haul road and to install a new one within the boundaries of the proposed permitted area at least 300 feet from the house.

The application proposed a mining operation in stages. Phase 1, composed of 2 stages, would involve the area north and west of a ravine that runs in a northeast/southwest direction completely through the farm. Mining in these stages would progress in a north-northeasterly direction. Phase II's 2 stages would involve the area south and east of the ravine with a direction of mining toward the southeast. Mining would go as deep as 38 feet and is expected to continue for more than 25 years.

A sediment storage basin is proposed to be constructed before any mining begins at the southwestern end of the ravine. Interceptor channel/berms

are to be placed inside the western boundary of Phase I and inside the southern boundary of Phase II. All surface runoff is to be directed toward these facilities and discharged eventually into the ravine about 200 feet upstream from Middle Spring Creek.

Permittee caused a notice of its application to be published in *The Sentinel*, a daily newspaper published in Carlisle, Pennsylvania, on June 3, 10, 17 and 24, 1994.[4] On June 6, 1994 DER sent a letter to the Township, advising of the application. On the same date, DER sent letters to the Pennsylvania Game Commission, Pennsylvania Fish Commission and Pennsylvania Department of Transportation soliciting comments on the application. The Chamberlins testified that they did not see any of the published notices. They learned of the application from two DER employees who were conducting a field review. While the date is uncertain, it had to occur in 1994 before the Permit was issued. Inexplicably, the Chamberlins did nothing at that point; nor did the Township. At some point, however, the Chamberlins put the 10-acre tract on the market.

With no objections from the Game Commission, the Fish Commission, PennDOT or the Township and with no current objections from the Chamberlins,[5] DER completed its review of the application and issued the Permit and Authorization on December 8, 1994. The Notice of Appeal was filed on January 10, 1995 indicating that notice of Permit issuance was received by mail on December 14, 1994. A Petition for Supersedeas was filed on March 28, 1995 after Permittee began mining activities under the Permit.

The evidence produced by Appellants at the hearing seeks to bring

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[4]The application was also advertised by DER in the *Pennsylvania Bulletin* on June 25, 1994 (24 Pa.B. 3151).

[5]The DER reviewer was in possession of, and gave consideration to, the Chamberlins' November 7, 1993 letter.

about an immediate suspension of the Permit because of the dust and noise associated with the shale pit operation, the inadequacy of the roads, the impact on adjacent wetlands, the disturbance of the ambience of the area, the two-year hiatus in mining activity and the lack of public notice. We can grant a supersedeas if Appellants show by a preponderance of the evidence (1) that they will suffer irreparable harm, (2) that they are likely to prevail on the merits, and (3) that there is no likelihood of injury to the public or other parties: §4(d), Environmental Hearing Board Act, Act of July 13, 1988, P.L. 530, 35 P.S. §7514(d); 25 Pa. Code §21.78. We will review the evidence with these principles in mind.

When Appellants filed the Notice of Appeal and the Petition for Supersedeas, they were operating from a set of plans that were not the final set on which the Permit was based. Nor did they or their witnesses study the application or the Permit. As a result, they raised some objections which they later withdrew as groundless and raised other objections which are satisfied in whole or in part by Permit conditions.

Dust and noise is one of these objections - raised in the belief that operations under the Permit would use the same haul road as was used under the 1979 Permit. In fact, the haul road approved under the Permit (and now built) is at least 300 feet from the Chamberlins' house. The area where the former haul road was located has been reclaimed and is not even a part of the permitted area under the Permit. Chamberlin admitted that the new haul road will generate less dust and noise[6], focusing his concern instead, on the unimproved portion of T-316 which passes in front of his house. While the testimony shows that dust and

[6]The new location plus a required surface of shale or stone, required treatment with water spray and required speed limit of 10 miles per hour should bring this about.

noise have been generated by trucks passing along this road, the main source of the problem has been the former haul road - prevailing winds carrying the dust and noise onto the Chamberlins' property and affecting their house 75 feet away. The Township road runs along the southern edge of the Chamberlins' 10-acre tract, is about 350 feet from their house and is about 40 feet lower in elevation. Dust and noise generated on this road is unlikely to affect the Chamberlins' property or their enjoyment of it. Moreover, as we have held in the past, *Kwalwasser v. DER et al.*, 1986 EHB 24, traffic regulation on public roads is a matter for other governmental bodies (here the Township) and not DER.

That principle also applies to the Chamberlins' concern about the adequacy of the Township Road. Not only is this a matter for the Township, the two Township Supervisors who testified by deposition said they had no concern over the impact of the mining operation on the Township roads.

In its application, Permittee responded to the requirement of Module 7: Hydrology and, specifically, 7.6(d): effects on any adjacent wetlands, by stating:

> There are no wetlands on the permit site or adjacent area according to the National Wetlands Inventory Map, Shippensburg, PA, quadrangle; of which a copy of the related area is following on next page.

The statement was true; and, as a result, DER did not insist on a field study by the Game Commission. Appellants presented as an expert witness Dr. Jay F. Davidson, a Professor of Biology at Shippensburg University, who testified that a wetlands has existed at least since the 1940s on Chamberlins' 55-acre tract just to the south of T-315 as depicted on a map dated June 8, 1990 and entitled Blue Mountain View, Phase I. This map shows the wetlands existing on both sides of Chamberlin Road extending to about 100 feet in each direction. The unnamed intermittent tributary apparently flows out of these wetlands. DER's

inspector was aware of it but the DER reviewer apparently was not.[7] Clearly, the existence of this specific wetland and the impact of mining upon it were not considered in the review of the application.

Despite this omission on DER's part, Appellants are not entitled to a supersedeas on this point because they failed to establish that the mining operation will adversely affect the wetlands. Dr. Davidson was not qualified as an expert on this aspect of the case and gave basically a layman's opinion that, when vegetation is removed and land is disturbed by surface mining, surface runoff will follow the surface topography and end up in the wetlands. If Dr. Davidson had examined the application and the plans, he would have learned that surface runoff from the southern portion of the Nolt farm, which under natural conditions would flow toward the unnamed tributary and the wetlands, will be diverted by interceptor channel/berms and directed to the west toward the sediment storage basin from which it will be discharged near Middle Spring Creek some 1,500 feet northwest of the wetlands and down gradient from the wetlands.

Thus, even though the DER reviewer was not aware of these specific wetlands, he was aware of the unnamed intermittent tributary, Middle Spring Creek and Conodoquinet Creek (all of which are depicted on the plans). In order to protect these waters from the impacts of surface mining, DER saw to it that adequate runoff facilities, as well as erosion and sedimentation control devices, were incorporated into the plan and the Permit. In the process, it also provided protection for these wetlands.

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[7]The inspector said he told the reviewer; the reviewer said he doesn't recall being told. Nonetheless, the reviewer said that he had Chamberlins' November 7, 1993 letter which mentions wetlands and considered its contents as part of his review.

A shale pit operation expanding from 4.6 acres to 44.88 acres will have some effect on the ambience of this area, which is basically rural in nature. It is doubtful that this is properly a DER consideration, since ambience has been controlled historically by zoning at the municipal level. In any event the impact will be less than at first appears. The mining operations will be done in four stages over as long as 25 years or more. The two stages of Phase I occupy the north and west portions of the farm and will be mined initially. Phase II will follow with its two stages in the southeast portion of the farm. Backfilling, regrading and revegetating will be done concurrent with mining so that, at any one time, only 2 to 3 acres will be exposed. That is an area comparable to the shale pit that has been in operation since at least 1979. This factor, in addition to the fact that no processing will be done on the site, convinces us that operations under the Permit will have no more impact on the ambience of the area than that which has existed in the past.

Appellants claim that no mining has been done on the site since 1992 and the shale pit, therefore, should have been reclaimed. They presented a videotape taken at the shale pit during December 1993, January 1995 and April 1995. This exhibit reveals a surface mining site which is not in active operation during the three subject days but fails to show that it has been closed or abandoned. Very little reclamation is obvious but there are stockpiles of topsoil and shale visible at some locations. It appears to be a mining site during the winter months when no operations are being conducted.

Glenn W. Snoke, president of Permittee, testified that he excavated and sold 95 tons of shale from the pit in 1994 and over 4,000 tons in 1993, all of which was reported to DER. James R. Leigey, the DER Mine Conservation Inspector who has inspected the shale pit at least twice a year since November

1988, testified that, since more shale can be removed from the pit, it is not yet ready for reclamation. He also testified that shale mining, by nature, is intermittent. The operator typically excavates shale only when he has a contract for it. As a result, the activity may be concentrated in a few weeks or months and be non-existent for the remainder of the year. The evidence fails to show that the shale pit has been closed or abandoned.

Finally, Appellants claim that statutory notice requirements were not met. Section 10 of the Noncoal Surface Mining Conservation and Reclamation Act (Noncoal Act), Act of December 19, 1984, P.L. 1093, 52 P.S. §3310, requires the applicant for a permit to publish notice of the filing of the application "in a newspaper of general circulation, published in the locality where the permit is applied for, once a week for four consecutive weeks." Regulations promulgated to implement this requirement at 25 Pa. Code §77.121 refer to a "local newspaper of general circulation in the locality of the proposed noncoal mining activities..."

We commented on the importance of these requirements in *James Hansloven et al. v. DER et al.*, 1992 EHB 1011, admonishing DER to make certain, when they review an application, that the notice was published in a newspaper that actually circulates in the area where the mining is to take place. Permittee in the appeal before us placed the notice in the *Evening Sentinel* , a daily newspaper published in Carlisle, Pennsylvania. Carlisle is the county seat of Cumberland County. The Township being within Cumberland County, publication in the *Evening Sentinel* must be presumed to be adequate absent any other evidence.

There is no other evidence here except the testimony of the Chamnberlins and Township Supervisor Bender. That evidence establishes that

residents of the Township prefer the *News Chronicle* and the *Public Opinion* and that the *Evening Sentinel* does not sufficiently address issues in the Township to attract local subscribers. But it falls short of proving that the *Evening Sentinel* does not circulate in the area. A newspaper "circulates" where it is sold or distributed: *Webster's Ninth New Collegiate Dictionary*, Merriam-Webster, Inc. (1988). Thus, it could be delivered to subscribers by mail or by home delivery and it could be sold in commercial establishments. As we noted in *Hansloven, supra*, it does not have to be the newspaper of preference; it only needs to be readily available to residents of the area.

Appellants also contend that notice was not given to the Township as mandated by §315(a) of the Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.315(a). That provision states that, whenever a permit is requested to operate a mine, the municipality where the mining is to occur "shall be notified by registered mail of the request at least ten days before issuance of the permit or before a hearing on the issuance, whichever is first." The evidence is clear, however, that DER sent a letter to the Township, dated June 6, 1994, advising of the filing of the application and soliciting questions or comments. This occurred more than 10 days before permit issuance on December 8, 1994 and, so far as we know, before any public hearing[3] on the matter.

This June 6, 1994 letter gave actual notice to the Township, so that any defect in publication of the notice would have been cured as to this Appellant. The Chamberlins also received actual notice - from DER personnel

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[8]The record is not clear whether a public hearing was held. However, the 30-day public comment period during which a hearing may be requested does not begin until the publication is complete. That occurred on June 24, 1994 and the 30 days extended to July 24, 1944. If a hearing was held, it would have been after this latter date. Consequently, the June 6, 1994 letter to the Township would have satisfied the timing requirement in toto.

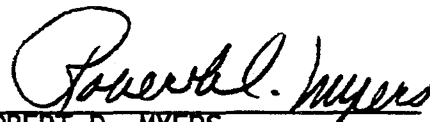
conducting a field review. The evidence does not establish when during 1994 this occurred but it could have been before the end of the public comment period. If so, the Chamberlins could have made a timely request for a public hearing. They could have made such a request even after the close of the public comment period, contending (as they do now) that publication of the notice was improper. They did not, however. They sat back and waited until the Permit was issued, then filed their appeal. For these reasons, we conclude that the Chamberlins have not shown that they were prejudiced by any defect in publishing the notice.

Appellants have not shown any likelihood of prevailing on the merits. This, coupled with a lack of evidence on irreparable harm, undercuts their request for a supersedeas.

ORDER

AND NOW, this 26th day of May, 1995, it is ordered that Appellants' Petition for Supersedeas is denied.

ENVIRONMENTAL HEARING BOARD



ROBERT D. MYERS
Administrative Law Judge
Member

DATED: May 26, 1995

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M. DIANE SMITH
SECRETARY TO THE BOARD

THE YORK WATER COMPANY
v.
COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL RESOURCES

EHB Docket No. 94-057-E

Issued: June 1, 1995

ADJUDICATION

By: Richard S. Ehmann, Member

Synopsis

The Board dismisses an appeal by a privately-owned water company which challenges the Department of Environmental Resources' (DER) denial of its requests for Certification for Tax Benefits for Water Pollution Control for certain equipment at its water preparation plant pursuant to section 602.1 of the Tax Code, 72 P.S. §7602.1, and the Commonwealth of Pennsylvania, Department of Revenue's regulations at 61 Pa. Code §155.11.

DER's determination not to certify the appellant's equipment for exemption is suppported by the facts of record and is consistent with Board's recent opinion in Cambria Cogen Company v. DER, EHB Docket No. 92-308-MJ (Opinion issued February 10, 1995). The appellant has not shown that DER, in determining that the appellant's equipment did not meet the requirements of this statute or regulation, engaged in rulemaking which violated the Commonwealth Documents Law. Moreover, the appellant has not shown that DER violated the appellant's constitutional guarantees to uniformity of taxation, equal protection, or due process by its interpretation of this statute and regulation.

Background

The York Water Company (York) commenced this appeal on March 15, 1994 by filing a notice of appeal with the Board objecting to DER's February 17, 1994 denial of York's requests for Certification for Tax Benefits for Water Pollution Control for certain equipment at its potable water preparation plant, which is located in Spring Garden Township, York County. DER based its denial of York's certification requests on section 602.1 of the Tax Code, 72 P.S. §7602.1, and the Commonwealth of Pennsylvania, Department of Revenue's regulations at 61 Pa. Code §155.11. York objected to DER's determination for a number of reasons which were set forth in its notice of appeal.

A hearing on the merits of this appeal was held on November 30, 1994 before Board Member Richard S. Ehmann. We received York's post-hearing brief on February 2, 1995, DER's post-hearing brief on February 24, 1995, and York's reply brief on March 6, 1995.

The record before us consists of one volume of transcript from the merits hearing, a first joint stipulation of the parties with attached stipulated exhibits, a second joint stipulation of the parties, and one photographic exhibit which was offered by York and admitted into evidence. Any arguments not raised in the parties' respective post-hearing briefs are deemed waived. Lucky Strike Coal Co. v. Commonwealth, DER, 119 Pa. Cmwlth. 440, 547 A.2d 447 (1988). After a full and complete review of the record, we make the following findings of fact.

FINDINGS OF FACT

1. The appellant is York, which is a public utility engaged in the business of producing, purifying, selling and delivering potable water to its customers within Pennsylvania, and is regulated by the Pennsylvania Public

Utility Commission (PUC). York maintains its principal place of business and corporate headquarters at 130 East Market Street, York, Pennsylvania 17405-7089. (Stip. 1)[1]

2. The appellee is DER, which is the agency with the duty and authority to administer and enforce the Pennsylvania Safe Drinking Water Act (Safe Drinking Water Act), Act of May 1, 1984, P.L. 206, as amended, 35 P.S. §721.1 et seq.; the Clean Streams Law (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 (Administrative Code), Act of April 9, 1929, P.L. 177, as amended, 71 P.S. §510-17; and the rules and regulations promulgated thereunder, including 25 Pa. Code §109.609. (Stip. 1)

York's Facility

3. York is an investor-owned water utility which was established in 1816; it has been in continuous operation since that time. Currently, York serves approximately 43,000 customers, or 140,000 people, in the 22 contiguous municipalities surrounding York. York does not serve all of the people living in this area, as some of these people are served by municipal authorities or municipally-owned systems, or have individual water wells. (N.T. 18)[2]

4. York, being organized under the laws of Pennsylvania, is subject to the Pennsylvania Capital Stock Tax. (N.T. 18; Stip. 1) Unlike York, the municipal authorities and municipal-owned systems are not subject to the Pennsylvania Capital Stock Tax. (N.T. 19)

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[1] "Stip. 1" is a reference to the parties' first joint stipulation.

[2] "N.T." is a reference to the notes of testimony from the November 30, 1994 merits hearing.

5. The parties stipulated that York's water treatment scheme is as follows:

> Raw water is drawn from the Codorous Creek into York's Pumping Station where it is treated with chlorine for primary bacteria disinfection and, when needed, potassium permanganate and copper sulfate is added for manganese or iron reduction. This pre-treated water is then pumped about 2 miles to York's filter plant.
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> [At York's filter plant] [t]he water enters a rapid mixer where aluminum sulfate is added to coagulate suspended solids, and if needed, activated carbon is added to absorb odors. This coagulated water then flows through clarifying units, called "flocculators," where slow turbulence, lasting several hours, helps the coagulated solids to adhere into a settled "floc" particle.
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> The floc laden water then flows into "settling basins" where gravity settles the floc to the bottom and clarified water is drawn from the top. This clarified water then flows through "dual media filters" where the water seeps downward through anthracite coal, sand, and stone layers which remove particles and pollutants too small to settle.
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> The filtered water enters a clearwell where "chemical treatment equipment" doses it with lime to adjust ph [sic], and with ammonia and chlorine in proper ratio to form a stable disinfectant called a chloramine.
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> The purified potable water then enters the "covered finished water storage basins" of York's water system where it is stored until required for distribution to consumers.

(Stip. 2)

6. York enclosed its finished water storage basins with covers constructed during 1993 through 1994. (N.T. 24) York covered its storage basins in an effort to comply with DER's regulation at 25 Pa. Code §109.609(b), which requires that all finished water reservoirs be covered by December 31, 1995. (N.T. 24, 39-40)

York's Application for Exemption From Capital Stock Tax

7. The Commonwealth of Pennsylvania, Department of Revenue (Department of Revenue) is the agency with the duty and authority to administer and

enforce the Tax Reform Code of 1971 (Tax Code), Act of March 4, 1971, P.L. 6, as amended, 72 P.S. §7101-10004; and the regulations promulgated thereunder, including but not limited to 72 P.S. §7602.1, and 61 Pa. Code §155.11, promulgated solely by the Department of Revenue. Section 602.1 of the Tax Code, 72 P.S. §7602.1, exempts the value of air and water pollution control or abatement devices from Capital Stock Tax. (Stip. 1)

8. York submitted to DER, on or about May 17, 1993, an Application and Notice of State Certification for Corporation Tax Benefits for Air and Water Pollution Control Devices, to obtain certification for exemption under Section 602.1 of the Tax Code, 72 P.S. §7602.1, of what York alleged were pollution control devices, including: a sediment treatment system. (Stip. 1)

9. The sediment treatment system is designed to treat the by-products from operation of York's water treatment system. These by-products include the sludges and any of the sediment that is removed during the treatment of water. The waste water containing these sludges and sediments is treated at York's treatment plant and the water is returned to the stream. (N.T. 61-62) Two permits, a National Pollutant Discharge Elimination System (NPDES), which allows York to discharge the treated waste water from the treatment system to Codorous Creek, and a Part II or Water Quality Management Permit under the Clean Streams Law, which is for the design and construction of the treatment system for removal of pollutants before the water is discharged, were issued to York for the sediment treatment system. (N.T. 61-62, 74) DER also issued York a beneficial use approval which allowed the solids, removed through this treatment, to be used as a soil conditioner. (N.T. 61)

10. G. Roger Musselman is the Permits Chief of DER's Water Management Program for DER's Southcentral Region. (N.T. 53) His supervisor, who is DER's Program Manager, is Leon Oberdick. (N.T. 54)

11. After receiving York's application for certification of the sediment treatment system, Musselman and his staff looked at the permit which was issued for the York facility to determine whether that facility was constructed, how it is operated, and whether it was functioning as intended. (N.T. 55) DER determined that this sediment treatment system was a pollution control device intended to remove pollutants so the environment would be protected. (N.T. 61)

12. DER certified York's sediment treatment equipment as qualifying for exemption under section 602.1 of the Tax Code on June 9, 1993. (Stip. 1)

13. York submitted to DER, on or about July 6, 1993, four (4) Applications and Notices of State Certification for Corporation Tax Benefits for Air and Water Pollution Control Devices to obtain certification for exemption under 72 P.S. §7602.1 of what York alleged were pollution control devices, including the water treatment plant's flocculators, chemical treatment equipment, dual media filters, and settling basins. (Stip. 1)

14. Upon reviewing York's application for certification for the flocculators, the chemical treatment equipment, the dual media filters, and the settling basins, Musselman and his staff felt that these devices were devices to treat raw creek water to make it into drinking water and that they were not pollution control devices. (N.T. 56)

15. Gary Hepford is a sanitary engineer in DER's Bureau of Water Quality Management, Division of Permits and Compliance, in the permits section

(Central Office). (N.T. 87) His immediate supervisor is Art B. Patel, and his division chief is Stuart Gansell. (N.T. 88)

16. Hepford's duties include, if he is requested, providing specific recommendations to DER's Regional Offices relating to tax certification questions. (N.T. 87) Hepford was asked by DER's Southcentral Regional Office to review York's tax certification application and offer a case specific recommendation. (N.T. 56-57, 88)

17. Hepford reviewed York's application for tax certification for the flocculators, the chemical treatment equipment, the dual media filters, and the settling basins. (N.T. 89)

18. Hepford drafted the memo, dated December 16, 1993, which is Stip. 1 Ex. 9 for Gansell's signature. It was DER's Central Office's recommendation to DER's Regional Office that the applications for certification for the settling basins, the dual media filters, the chemical treatment equipment, and the flocculators should be denied because these pieces of equipment were used to create saleable drinking water to be distributed to York's customers, which did not benefit the general public by providing a cleaner, healthier environment, and they were not pollution control devices. (N.T. 57, 89, 91; Stip. 1 Ex. 9) Hepford based this recommendation on section 602.1 of the Tax Code, the Department of Revenue's regulations at 61 Pa. Code §155.11, and DER's 1975 policy. (N.T. 89-90) DER's 1975 policy is Stip. 1 Ex. A. (N.T. 90)

19. Although Musselman was not bound by DER's Central Office's recommendation, he accepted Central Office's guidance because it confirmed the Regional Office's conclusions. (N.T. 58)

20. York submitted to DER, on or about December 27, 1993, another Application and Notice of State Certification for Corporation Tax Benefits for Air and Water Pollution Control Devices to obtain certification for exemption under 72 P.S. §7602.1 of what York alleged were pollution control devices, i.e., finished water storage basin covers. (Stip. 1)

21. DER's Central Office's memo was issued prior to DER's receipt of York's request for certification regarding the finished water storage basins; thus, Hepford did not review York's application for tax certification for the finished water storage basin covers. (N.T. 57, 89)

22. The finished water storage basin covers prevent debris, twigs and airborne bacteria from entering the treated drinking water. (N.T. 48) If the water were not being prepared for sale as potable water, the water would not have to be covered. (N.T. 49)

23. Using the same reasoning used for the flocculators, settling basins, dual media filters, and chemical treatment equipment, Musselman determined that the covers for the finished storage water basins were strictly for York's drinking water, which was a product to be sold, and not for pollution control devices. (N.T. 58)

24. DER, on February 17, 1994, denied York's application for Certification for Tax Benefits for the tax exemption of the alleged pollution control devices, including: the flocculators, chemical treatment equipment, dual media filters, settling basins, and the finished water storage basin covers (hereinafter referred to as the "equipment"). (Stip. 1; Stip. 1 Ex. 8)

25. Musselman and his staff concluded that York's equipment was not eligible for certification because these devices: 1) were not pollution control devices; 2) were equipment used to make drinking water, which is a

product to be sold or resold; and 3) the regulation dealing with pollution control devices is different from the regulation dealing with drinking water. (N.T. 59)

26. York then filed the instant appeal challenging DER's denial of this application.

27. Although Musselman had not visited York's facility prior to DER's denial of York's certification applications, he subsequently visited the facility when one of the basin covers was nearly completed and the other was under construction. (N.T. 68) This visit did not change Musselman's decision that the equipment was for purposes of manufacturing drinking water, and not for pollution control. (N.T. 59-60)

DISCUSSION

In its post-hearing brief, York contends that DER committed an abuse of its discretion and acted arbitrarily and capriciously, for a variety of reasons, when it determined that York's flocculators, chemical treatment equipment, dual media filters, settling basins, and finished water storage basin covers at its drinking water facility do not qualify for certification for Tax Benefits for Water Pollution Control pursuant to section 602.1 of the Tax Code, 72 P.S. §7602.1, and the Department of Revenue's regulations at 61 Pa. Code §155.11.

Section 602.1 provides:

> Notwithstanding the foregoing provisions of section 602, to the contrary, equipment, machinery, facilities and other tangible property employed or utilized within the Commonwealth of Pennsylvania for water and air pollution control or abatement devices which are being employed or utilized for the benefit of the general public shall be exempt from the tax imposed under this Article VI. The Department of Revenue shall have the power, through publication in the Pennsylvania Bulletin, to prescribe the manner and

method by which such exemption shall be granted and claimed.

72 P.S. §7602.1.

Further, section 155.11 of 61 Pa. Code provides:

> *Pollution control devices exemption.* Exemptions for pollutions control devices shall be as follows:
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> (1) *General.* An exemption will be given for water and air pollution control or abatement devices which have been employed or utilized for the benefit of the general public during the tax year in question. The pollution control devices exemption is expressed as a deduction from the Capital Stock Tax exempt assets fraction, or as a deduction from the Property Factor in the case of a Foreign Franchise taxpayer or a Capital Stock Tax taxpayer which elects to compute and pay its tax on the basis of the Three Factor Formula as provided in section 602(b) of the TRC (72 P.S. §7602(b)).
>
> (2) *Condition Precedent.* As a condition precedent to the granting by the Department to the taxpayer of the pollution control device exemption, the taxpayer is required to apply to the Department of Environmental Resources and obtain a certificate for the purpose of claiming exemption for each specific pollution control device. This certification is designated "Notice of State Certification" (DER Form ER-BWQ-21). See section 602.1 of the TRC (72 P.S. §7602.1). The taxpayer is required to file with the Department the Notice of State Certification covering the specific control device for which exemption is claimed during the tax period in question. This requirement for the filing of a Notice of State Certification may apply not only to a new device but may also apply to modifications or changes of an existing device.
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> (3) *Notice of State Certification by Department of Environmental Resources.* Notice of State Certification shall conform with the following:
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> (i) The notice of State Certification issued by the Department of Environmental Resources shall certify:
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> (A) That certain components are components to a water or air pollution device.

(B) That a device is installed and completed in place.

(C) That is employed or utilized to remove pollutants commencing in, or during, the tax year in question.

(D) That, where a plan approval or permit is required by the Department of Environmental Resources, plan approval or permit has been obtained.

(ii) The Department of Environmental Resources certification is not required to be filed annually. The exemption shall be subject to audit by the Department, or the taxpayer may be called upon by the Department to update the prior Certification upon which the particular exemption has been based.

York has the burden of proving, by a preponderance of the evidence, that DER committed an abuse of discretion or acted unlawfully in denying York's certification applications. Warren Sand and Gravel v. Commonwealth, DER, 20 Pa. Cmwlth. 186, 341 A.2d 556 (1975); 25 Pa. Code §21.101(a).

The Cambria Cogen Decision

York asserts in its post-hearing brief that as of the time York filed its post-hearing brief on February 2, 1995, there existed no Board precedent as to how this statute and regulation are to be interpreted, and so York offers its own suggestions on interpretation. Just eight days after York filed its post-hearing brief, however, we issued our opinion in Cambria Cogen Company v. DER, EHB Docket No. 92-308-MJ (Opinion issued February 10, 1995). We have already, in Cambria Cogen, examined and ruled on many of the arguments regarding DER's interpretation of section 602.1 of the Tax Code and 61 Pa. Code §155.11 which York makes in this appeal. At the merits hearing, Board Member Ehmann had notified the parties to this appeal that the Cambria Cogen opinion was forthcoming from the Board and would address the statute and regulation involved in the instant matter. (N.T. 4) Thus, when DER filed

its post-hearing brief on February 24, 1995, Cambria Cogen had been issued, and DER relied on that opinion for many of its arguments in its brief. York had the opportunity to respond to DER's arguments concerning the applicability of Cambria Cogen in its reply post-hearing brief filed on March 6, 1995. At page 11 of its reply post-hearing brief, York makes its only attempt to distinguish our decision in Cambria Cogen from the instant matter, where it argues that its finished water storage basin covers do not fall into the category of passive pollution prevention equipment discussed in that decision because they are mandated by DER's regulations.

Cambria Cogen involved an appeal by Cambria Cogen Company (Cogen) challenging DER's Regional Air Quality Control Program's denial, in part, of Cogen's applications for exemptions from the Pennsylvania Capital Stock and Franchise Tax for various pieces of Cogen's equipment under section 602.1 of the Tax Code and 61 Pa. Code §155.11(3). In our opinion in Cambria Cogen, we addressed the parties' cross motions for summary judgment, which were based on a set of stipulated facts. The components of Cogen's facility functioned to produce saleable steam and electricity through the combustion of a mixture of coal and coal refuse. (The facility's purpose was not coal refuse disposal, however, and coal refuse combustion was merely incidental to the facility's purpose.) Cogen's applications for certification for exemption had sought to have virtually all of its facility certified by DER as eligible for exemption as air and water pollution control devices, and Cogen was objecting to DER's interpretation of section 602.1 of the Tax Code and 61 Pa. Code §155.11(3) which had resulted in DER's denials.

In Cambria Cogen, we stated that statutes imposing taxes are to be strictly construed (citing 1 Pa. C.S. §1928(b)(3) and Penn Traffic Company, et

al. v. City of DuBois, 156 Pa. Cmwlth. 107, 626 A.2d 1257 (1993)). We also explained that those claiming exemptions from the statute imposing taxes "find the exempting statutes are also to be strictly construed against the expansion of exemptions under 1 Pa. C.S. §1928(b)(5), and those claiming exemption bear a heavy burden of proof," (citing In re Pittsburgh NMR Institute, et al., 133 Pa. Cmwlth. 464, 577 A.2d 220 (1990); Anthony J.F. O'Reilly, et ux. v. Fox Chapel Area School District, 521 Pa. 471, 555 A.2d 1288 (1989)).

We pointed out that section 602.1 of the Tax Code, 72 P.S. §7602.1, has existed since 1971, and, according to the Pennsylvania Bulletin, 61 Pa. Code §155.11 was promulgated by Revenue in its current form in 1977. We further pointed out that DER has administered both the statute and the regulation sections since that time without challenge. See Cambria Cogen, supra at 15. We explained in Cambria Cogen that the construction given to the statute by those charged with its execution and application (here, DER) is entitled to great weight and should not be disregarded unless clearly erroneous. Cambria Cogen at 15 (citing Starr v. Department of Environmental Resources, 147 Pa. Cmwlth. 196, ___, 607 A.2d 321, 323 (1992); Commonwealth, DER v. Washington County, 157 Pa. Cmwlth. 1, 629 A.2d 172, appeal denied, ___ Pa. ___, 631 A.2d 1011 (1993); City of Harrisburg v. DER, et al., EHB Docket No. 93-205-W (Opinion issued September 16, 1994)). We further stated that DER's interpretation of the regulations it administers is entitled to deference and is controlling "unless such interpretation is clearly erroneous or inconsistent with the regulation *or the regulation itself is inconsistent with the underlying legislative scheme.*" Cambria Cogen at 19 (quoting Ferri Contracting Company, Inc. v. Commonwealth, DER, 96 Pa. Cmwlth. 30, ___, 506 A.2d 981, 985 (1986); Baney Road Association v. DER, et al., 1992 EHB 441).

We found in Cambria Cogen that there is no legislative history as to section 602.1 to offer us guidance on the General Assembly's intent as to the "pollution control or abatement" language in the statute. Thus, in ruling on the appropriateness of DER's interpretation of the statute and regulation at issue in Cambria Cogen, we turned to the definition of "pollution control device" set forth in DER's Notice of State Certification for Corporate Tax Benefits for Pollution Control Devices,[3] and the definition for "abatement" found in the Environmental Engineering Dictionary, C.C. Lee, 1989,[4] according to 1 Pa. C.S. §1903(a).[5] We interpreted the language in section 602.1 regarding "pollution control equipment" as "equipment which alters, destroys, disposes of or stores contaminants or waste". We further interpreted the "pollution abatement" devices language in section 602.1 as "those devices which reuse waste, modify it, or eliminate it to some degree". We also concluded that section 602.1 does not include a passive pollution prevention concept within it, so that devices which passively prevent pollution from occurring (by keeping out the elements) are not eligible for tax exempt status. Additionally, we ruled in Cambria Cogen that where a device was used

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[3] This definition was: "a treatment facility which removes, alters, destroys, disposes of or stores contaminants or wastes."

[4] This definition is: "reducing the degree or intensity of or eliminating, air water or land pollution through waste reuse, process modification or pollution control."

[5] 1 Pa. C.S. §1903(a) provides:

> (a) Words and phrases shall be construed according to rules of grammar and according to their common and approved usage; but technical words and phrases and such others as have acquired a peculiar and appropriate meaning or are defined in this part, shall be construed according to such peculiar and appropriate meaning or definition.

by Cogen to help bring about the efficient generation of saleable steam or electricity by Cogen, it was not used for the benefit of the general public and was not exemptible. Likewise, operation of specific equipment for the benefit of Cogen, rather than the public, provided a basis for our sustaining DER's rejection of portions of Cogen's request for an exemption certification. We denied Cogen's motion for summary judgment. We granted DER's motion for summary judgment as to Cogen's Coal Refuse Storage Dome, Tepee and Fuel Handling Equipment, but denied DER's motion as to Cogen's Limestone Storage, Handling and Injection System, the CFB Boilers, CEMs, and Ash Storage and Handling System.[6]

Did DER Abuse Its Discretion in Denying York's Equipment Certification?

Applying what we said in Cambria Cogen regarding the "pollution control equipment" and the "pollution abatement" devices language in section 602.1, DER argues that because York's process prepares raw water from Codorous Creek for sale as drinking water and does not reduce or eliminate water pollution, York's devices (including the flocculators, the chemical treatment equipment, the dual media filters, and the settling basins) are not pollution control or abatement devices. We agree with DER that these devices do not "reuse waste, modify it, or eliminate it to some degree", nor do they "alter, destroy, dispose of or store contaminants or waste." The facilities for which York seeks these exemptions are its production facilities rather than these facilities which treat or abate pollutants created by operation of other manufacturing facilities. York's operations are no different, conceptually, from those of an oil refinery which produces saleable gasoline from crude oil

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[6] On May 30, 1995, after the parties negotiated a settlement, the Cambria Cogen matter was adjudicated as resolved pursuant to the terms of the settlement.

and, while doing so, produces sludges. On cross-examination by counsel for DER, William T. Morris, who has been President and General Manager of York since 1982 and previously has been York's Executive Vice-President and York's plant engineer, testified that aluminum sulfate is used to treat the water taken from the creek and acts as a floculation agent, causing the suspended matter in the water (the mud or silica) to come together into larger particles to facilitate it settling out during the sedimentation process. (N.T. 16-17, 48) These flocculation agents are used so that the water is brought to a level which meets drinking water standards. (N.T. 48) Morris admits there would be no need for flocculation, chemical treatment, or filtration of the water through the dual media filters to bring the water to such a high standard if it were not being used for drinking water. (N.T. 47-49)

As DER points out, there is an important difference between these four pieces of equipment which DER did not certify for exemption and York's sediment treatment equipment, which DER certified for exemption. DER determined that York's sediment treatment equipment consisted of pollution control devices intended to capture and eliminate pollutants contained in the water treatment plant's waste water so the environment will be protected. (N.T. 61) The sediment treatment system is designed to treat the by-products from operation of the water supply treatment system. These by-products include the sludges and any of the sediment that is removed during the treatment of water. This material is eliminated through use of York's sediment treatment before the treated waste is discharged back into Codorous Creek. (N.T. 61-62) Two permits, an NPDES permit, which authorizes York to discharge treated water from the sediment treatment system to Codorous Creek, and a Part II Permit under the Clean Streams Law, which approves the sediment

treatment system's design and construction, were issued to York for the sediment treatment system. (N.T. 61-62, 74) DER also issued York a beneficial use approval which allowed the pollutants removed through this treatment and now in the form of solids to be used as a soil conditioner. (N.T. 61)

Citing what we said in Cambria Cogen regarding devices which only serve to passively prevent pollution, DER argues that York's finished water storage basin covers are passive pollution prevention devices and are not pollution control or abatement devices. We agree. This equipment is not used to prevent pollutants from escaping into the waters of the Commonwealth or atmosphere and causing contamination thereof; rather, as a capped bottle keeps its contents free of outside contaminants, the finished water storage basin covers prevent the recontamination of York's cleaned water. These covers keep debris, twigs, leaves, and other possible airborne contaminants out of the water. (N.T. 49) Morris admits that if the water were not being sold for drinking purposes, there would be no need to cover it. (N.T. 49)[7] We find no abuse of DER's discretion in finding that the flocculators, chemical treatment equipment, dual media filters, settling basins, and finshed water storage basins do not function to control or abate pollution. York's sediment treatment system devices treat or abate the pollution which results from York's manufacturing process and prevent such pollution from entering the

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[7] York argues that its finished water storage basin covers are exempt pollution control devices because they were required to be installed by DER's regulations at 25 Pa. Code §109.609. We disagree. The Safe Drinking Water Act and regulations promulgated thereunder address the provision of safe drinking water to the public, not pollution abatement or control. See sections 2 and 4 of the Safe Drinking Water Act, 35 P.S. §§721.2(a)(1) and 721.4(a), and 25 Pa. Code §109.2. Thus, we reject York's contention.

environment. The pieces of equipment DER refused to certify do not function as pollution control devices.

DER also determined that York's equipment was not eligible for certification because it is not being used for the benefit of the general public. York contends in its reply post-hearing brief, *inter alia*, that DER was not delegated, by 61 Pa. Code §155.11, the responsibility or authority to determine whether the equipment is "being employed or utilized for the benefit of the general public", and that in considering this factor, DER committed an *ultra vires* act requiring reversal of its denials here. We have already rejected this argument in Cambria Cogen. York does not address the impact of our ruling in Cambria Cogen on this point in its post-hearing reply brief. Based on our reasoning in Cambria Cogen, we reject York's argument here.

We ruled in Cambria Cogen that DER has the authority to address the question of whether the pollution control or abatement device for which certification is sought is used to benefit the general public, although that is not one of the factors listed in the regulation. This is because nothing in section 602.1 explicitly prohibits DER's consideration of this issue. We stated:

> 61 Pa. Code §155.11 repeats the statute's public benefit requirement but says nothing about which agency makes the public benefit determination, although either DER or the Revenue must decide such issues. Although the regulation does prescribe requirements for a Notice of State Certification which the taxpayer is to secure from DER if it wants the device to be exempted by Revenue, and does not mention public benefit, that is not a determination that public benefit issues are not for DER. Clearly, as between DER and Revenue, it is DER, rather than Revenue, which has the environmental technological competency to determine which pollution control or abatement devices perform public benefits as opposed to benefits for the equipment's owner/operator. Moreover, DER points out in its Reply Brief that 7 Pa. Bull. 2899 is clear evidence of Revenue's intent to have DER perform any public benefit analysis needed. As quoted by DER, in

7 Pa. Bull. 2899 Revenue states in adopting its initial regulation under the statute and responding to comments to Revenue on Revenue's proposed regulation:

> Since pollution control devices are within the purview of the Department of Environmental Resources, that Department possesses the expertise and administrative ability to determine what constitutes a pollution control device and whether such a device is "employed or utilized for the benefit of the general public."

Accordingly, we conclude that DER does not exceed its authority when it considers such issues in issuing certifications to Revenue.

Cambria Cogen, supra at 26-27.

We find no abuse of DER's discretion in its determination that York's equipment is operated for the benefit of York rather than the general public. As we ruled in Cambria Cogen, where a device was used by Cogen to help bring about the efficient generation of saleable steam or electricity by Cogen, it was not used for the benefit of the general public and was not exemptible. The situation with York's equipment is similar to the coal and coal refuse storage equipment in Cambria Cogen, i.e., it is used to produce a saleable product to York's customers. The evidence shows York's equipment is used to produce drinking water which York sells to its customers. While York's customers are arguably members of the public, these customers are the only people benefited by the safe drinking water provided by York. Moreover, the fact that some members of the public consume this product does not make the facility producing it one which is operated to benefit the general public. If it were, every automotive plant or food processor would qualify. We see no abuse of DER's discretion in determining that a benefit to York and York's customers does not fall within the concept of pollution abatement for the "benefit of the general public".

York asserts that DER is improperly attempting to insert in section 602.1 a requirement that a device must be used "only" or "exclusively" for pollution control or abatement in order for the device to be exempt (citing Patton v. Republic Steel Corp., 342 Pa. Super. 101, 492 A.2d 411 (1965); and O'Boyle Ice Cream Island, Inc. v. Commonwealth, 146 Pa. Cmwlth. 374, 605 A.2d 130 (1992)). York argues, based on the language used by the Legislature in the exemptions contained in section 602(a) and (b), 72 P.S. §7602(a) and (b), that the Legislature used express language when it intended to limit the scope of an exemption in such a manner, and that the absence of any such limiting language from section 602.1 is, thus, significant.

We rejected this argument in Cambria Cogen. Discussing the same cases cited by York here, we explained in Cambria Cogen:

> Both opinions state the principle that where a legislature includes specific language in one section and excludes it in another, the language should not be implied where excluded. However, this principle is not applicable here. Sections 602 and 602.1 are two separate sections of our current tax code but they were not enacted as separate sections in the same bill. As DER's Reply points out, section 602 was enacted in March of 1971 as part of the original version of the Tax Reform Code. Section 602.1, however, was enacted not in March of 1971 but in a subsequent bill enacted on August 31, 1971. Where there are two separate enactments in this fashion, the premise cited by Cogen does not apply. In fact, the Statutory Construction Act contains many sections dealing with subsequent modifications to statutes, all of which suggest the latter in time of two conflicting provisions always prevails or at least that the two do not conflict. See 1 Pa. C.S. §§1934, 1935, 1936 and 1955. Moreover, the Statutory Construction Act, enacted in 1972, was passed after the Tax Reform Code, and 1 Pa. C.S. §1928(b)(5) imposes a burden of strict construction in interpreting Section 602.1 so as not to expand the exempting language. We cannot add concepts to the clear language of section 602.1 in the face of this limitation.

Cambria Cogen, supra at 24. We adopt this reasoning as controlling here and, based upon it, reject York's argument.

In a related argument, York argues that because DER has adopted a new definition or requirement for a pollution control device that proscribes certification of any equipment, machinery or facility used in the preparation of a product for sale, DER has engaged in informal rulemaking of a regulation, in violation of sections 201 and 202 of the Commonwealth Documents Law, 45 P.S. §§1201 and 1202. York claims "[t]his new definition or requirement has no basis in the Tax ... Code or in regulations promulgated either by DER or the Department of Revenue. Yet, this standard condition for exemptions constitutes a binding rule of general applicability and future effect." York claims DER has ministerially applied a requirement that for a device to be exempt, it must be used only for pollution control or abatement, which York says is generic in nature and is not at all related to the facts." In support of this argument, York asserts that DER also applied "the same condition" in Cambria Cogen. (See York's Post-hearing Brief at page 25.) Citing Department of Environmental Resources v. Rushton Mining Co., 139 Pa. Cmwlth. 648, 591 A.2d 1168 (1991), *allocatur denied*, 529 Pa. 626, 600 A.2d 541 (1991), York contends that because DER did not comply with the rulemaking provisions in the Commonwealth Documents Law in adopting this new regulation, "DER is precluded from giving the policy the force or effect of law as a regulation applicable to York in this case." See York's Post-Hearing Brief at pages 22-23.

We explained in Manor Mining & Contracting Corp. v. DER, 1992 EHB 327, "[i]n order to constitute a regulation, a DER policy must constitute a 'binding norm' of general applicability and future effect." Manor Mining at 341 (quoting Rushton, 591 A.2d at 1173). In Rushton, DER inserted the same "standard condition" in forty-six separate permits. In Manor Mining, DER imposed a "rounding policy", whereby DER computed water quality-based effluent

limitations by rounding the effluent limitations to the nearest .5 in accordance with DER's Guidance Manual. We explained that DER's Guidance Manual was only a policy document and not a regulation. We determined that DER's rounding policy, unlike the "standard conditions" imposed in Rushton, did not impose any additional burdens or requirements on regulated industries, but was designed for internal use by DER employees in calculating effluent limitations on a case-by-case basis, and the fact that DER attempts to apply this policy consistently does not transform this policy into a regulation. Manor Mining, supra at 341.

There is no evidence to support York's contention that DER "ministerially" applies a policy regarding pollution control or abatement to every application for tax exemption certification before it. In fact, Hepford testified that DER reviews each application for pollution control exemption certification on its own merits according to the facts involved. (N.T. 92) DER reviewed the statute, the regulation, and York's equipment, and it concluded that the equipment as used by York did not qualify for exemption certification. DER did not decide that all solids treatment equipment is not exemptible, only that certain of York's equipment is not exemptible. DER certified York's sediment treatment system (which removes solids from the waste water) because it found that the sediment treatment system was a pollution control or abatement device. DER did not certify the equipment at issue in the instant appeal because it determined this equipment did not control or abate pollution. We see no violation of the Commonwealth Documents Law by DER in the instant appeal since DER only applied the statute and regulation to York's plant, and DER did not informally promulgate any regulation.

Further, we reject the argument raised in York's reply post-hearing brief that DER has changed the basis for its denial of York's certifications from the reason stated in its denial letter as this appeal has proceeded before the Board. While DER's denial letter might not have been as clear as York would have liked, DER's denial was soundly based on section 602.1 of the Tax Code.

Did DER Violate the U.S or Pennsylvania Constitutions?

Further, York argues that DER's refusal to certify York's equipment violates both the Pennsylvania and United States Constitutions, with regard to uniformity of taxation,[8] equal protection,[9] and due process.

The Commonwealth Court, in Equitable Life Assurance Society v. Murphy, 153 Pa. Cmwlth. 338, 621 A.2d 1078 (1993), laid out the necessary elements of a uniformity clause analysis, quoting Allentown School District Mercantile Tax Case, 370 Pa. 161, 167-68, 87 A.2d 480, 483 (1952), as follows:

> [The uniformity clause] means that the classification by the legislative body must be reasonable and the tax must be applied with uniformity upon similar kinds of business or property and with substantial equality of the tax burden to all members of the same class.... Uniformity requires substantial equality of tax burden. While taxation is not a matter of exact science and perfect uniformity and absolute equality in taxation can rarely ever be attained, the imposition of taxes which are to a subtantial degree unequal in their operation or effect upon similar kinds of business or property, or upon persons in the same classification is prohibited. Moreover, while reasonable and practical classifications are justifiable, where a formula or method of computing a tax will, in its operation or effect,

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[8] The requirement of uniformity in the imposition of taxes is found in Article VIII, §1 of the Pennsylvania Constitution, which provides: "All taxes shall be uniform, upon the same class of subjects, within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws."

[9] The Equal Protection Clause of the United States Constitutional Amend. XIV, §1, provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws."

> produce arbitrary or unjust or unreasonably discriminatory results, the constitutional provision relating to uniformity is violated. 'A tax to be uniform must operate alike on the classes of things or property subject to it.' (Citations omitted.)

Equitable Life Assurance at ___, 621 A.2d at 1086.

We explained in Al Hamilton Contracting Co. v. DER, 1992 EHB 1458, 1506, that where a state does not treat persons differently, the equal protection clause is not implicated:

> 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.
>
> New York City Transit Authority v. Beazer, 440 U.S. 568, at 587-588 (1979).

Id. at 1506.

Further, the Commonwealth Court explained in Equitable Life Assurance:

> [i]n matters of taxation, allegations of violations of the equal protection clause of the United States Constitution and the uniformity clause of the Pennsylvania Constitution are analyzed in the same manner, requiring equality of burden upon classes or things subject to the tax in question. (Citations omitted.)

Id. at ___, 621 A.2d at n. 12.

York asserts that DER, by its interpretation of the statute and regulation, has created two arbitrary classes of taxpayers and is imposing unequal tax burdens among similarly situated taxpayers. These two classes of taxpayers, according to York, are: 1) those which invest in machinery, equipment, or facilities used to control or abate water pollution where the resulting product (or by-product) is not being sold; and 2) those which invest in machinery, equipment, or facilities used to control or abate water pollution where the resulting product (or by-product) is being sold. York argues that because we should find a violation by DER of the Uniformity

Clause, we should likewise find a violation of the Equal Protection Clause by DER.

In order for York to show that DER is unconstitutionally creating classes of taxpayers, York must first have proved its argument that DER, by its interpretation of section 602.1 of the Tax Code, is making the exemption unavailable to taxpayers solely on the basis that they use the equipment to produce a product for sale. We have explicitly rejected in this Adjudication York's argument that DER is interpreting the statute as unavailable to taxpayers solely on the basis that they use the equipment in making a product for sale. Thus, there has been no showing by York that DER is unlawfully creating classes of taxpayers. We accordingly find no violation by DER of either of these constitutional guarantees has been proven by York.

York also contends that DER's denial of its certification applications violated the Due Process Clause of the United States Constitution, Amend. XIV, §1.[10] York contends that DER failed to give proper notice to York (and other taxpayers) of DER's internal policy regarding certification of exempt pollution control devices. York's argument is that DER has "changed the tax exemption rules in mid-stream", after York invested in pollution control devices which York argues meet all the requirements for exemption, by "unforeseeably imposing a separate administrative standard which is considerably different and stricter than that imposed under the statutory provision enacted over 20 years ago." See York's Post-Hearing Brief at 30-31.

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[10] The Due Process Clause of the United States Constitution, Amend. XIV, §1 provides that no state shall deprive any person of life, liberty, or property without due process of law.

York then cites caselaw for the proposition that the Due Process Clause operates against both penal and retroactive lawmaking.

We find no violation of York's guarantee to due process occurred in the instant matter. York has not proven that DER is imposing a separate administrative standard here, nor that DER's interpretation of section 602.1 was unforeseeable by York when York decided to purchase the equipment for its facility. As we explained in Cambria Cogen, those claiming exemptions from the statute imposing taxes "find the exempting statutes are also to be strictly construed against the expansion of exemptions under 1 Pa. C.S. §1928(b)(5), and those claiming exemption bear a heavy burden of proof." Cambria Cogen, supra at 16. York has not produced any evidence to support its due process argument or to support its contention that DER engaged in retroactive lawmaking. Thus, we reject York's due process argument.

Having found no abuse of DER's discretion in determining that York's equipment does not meet the requirements of section 602.1 of the Tax Code or the regulation at 61 Pa. Code §155.11, we accordingly make the following conclusions of law and enter the following order dismissing York's appeal.

CONCLUSIONS OF LAW

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

2. York has the burden of proving by a preponderance of the evidence that DER's denial of its applications for certification for tax exemption for its equipment pursuant to section 602.1 of the Tax Code, 72 P.S. §7602.1, was not unlawful or an abuse of DER's discretion. Warren Sand and Gravel, supra;, 25 Pa. Code §21.101.(a).

3. The construction given to the statute by those charged with its execution and application (here, DER) is entitled to great weight and should not be disregarded unless clearly erroneous. Cambria Cogen, supra at 15.

4. DER's interpretation of the regulations it administers is entitled to deference and is controlling "unless such interpretation is clearly erroneous or inconsistent with the regulation or the regulation itself is inconsistent with the underlying legislative scheme." Cambria Cogen at 19.

5. York's devices (including the flocculators, the chemical treatment equipment, the dual media filters, and the settling basins) are not pollution control or abatement devices, as they do not "reuse waste, modify it, or eliminate it to some degree", nor do they "alter, destroy, dispose of or store contaminants or waste." See Cambria Cogen.

6. DER has the authority to address the question of whether the pollution control or abatement device for which certification is sought is used to benefit the general public, although that is not one of the factors listed in the regulation. Cambria Cogen, supra at 26-27.

7. DER did not commit an abuse of its discretion when it determined that York's equipment was not eligible for certification because it is not being used for the benefit of the general public.

8. The use of language by the Legislature in the exemptions contained in section 602(a) and (b), 72 P.S. §7602(a) and (b), to limit the scope of those subsections, and absence of any such limiting language from section 602.1, does not mean DER is improperly attempting to insert in section 602.1 a requirement that a device must be used "only" or "exclusively" for pollution control or abatement in order for the device to be exempt. Cambria Cogen, supra at 24.

9. York has failed to prove that DER has effectively adopted a new definition of pollution control device, and that this constitutes informal rulemaking by DER in violation of sections 201 and 202 of the Commonwealth Documents Law, 45 P.S. §§1201 and 1202.

10. York has failed to show that DER, by its interpretation of the statute and regulation, has created two arbitrary classes of taxpayers and is imposing unequal tax burdens among similarly situated taxpayers.

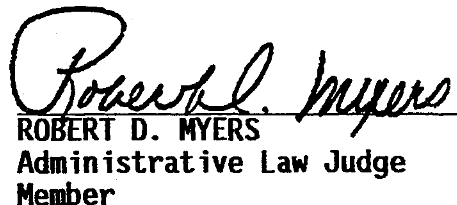
11. York has not proven a violation of either the Uniformity Clause of the Pennsylvania Constitution or the Equal Protection Clause of the U.S. Constitution by DER in denying York's applications for certification.

12. York has not proven that DER violated its guarantee to Due Process under the U.S. Constitution.

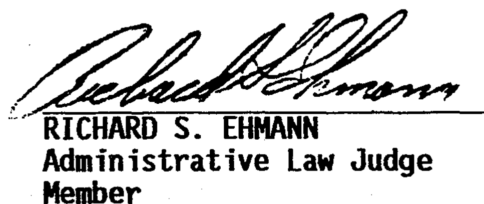
ORDER

AND NOW, this 1st day of June, 1995, it is ordered that the appeal of York Water Company at EHB Docket No. 94-057-E is dismissed.

ENVIRONMENTAL HEARING BOARD



ROBERT D. MYERS
Administrative Law Judge
Member



RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: June 1, 1995

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M. DIANE SMITH
SECRETARY TO THE BOARD

JOSEPH J. KRIVONAK, JR.	:	
	:	
v.	:	EHB Docket No. 94-247-E
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES and	:	
NEW ENTERPRISE STONE & LIME CO., INC.,	:	
Permittee	:	Issued: June 1, 1995

OPINION AND ORDER
SUR MOTION TO DISMISS

By: Richard S. Ehmann, Member

Synopsis

Permittee's Motion To Dismiss For Lack Of Jurisdiction, seeking to dismiss this *pro se* appeal because under 25 Pa. Code §21.52(a) it was untimely filed, is denied. Movant has failed to set forth allegations in its Motion which show it is entitled to dismissal based on untimeliness.

OPINION

On September 19, 1994, this Board received an appeal by Joseph J. Krivonak, Jr., ("Krivonak"). Krivonak's Notice Of Appeal says he challenges the Department of Environmental Resources' ("DER") issuance of Surface Mining Permit No. 250946 to New Enterprise Stone and Lime Co., Inc. ("New Enterprise") on August 15, 1994. According to his Notice Of Appeal he

received notice of DER's action on August 17, 1994. It also states the dam of the water supply company he owns and its property lie adjacent to the tract to be mined.

Thereafter, the Board issued an Order to Krivonak dated September 23, 1994, directing that he file a copy of the DER action he is challenging with us by October 10, 1994. On October 14, 1995, the Board received from Krivonak a copy of DER's letter to him dated August 15, 1994 concerning the issuance of Surface Mining Permit No. 56920302 to New Enterprise.

Thereafter, on April 27, 1995, New Enterprise filed the motion which is the subject of this opinion alleging the Board lacks jurisdiction under 25 Pa. Code §21.52 to hear this appeal. The motion contends Krivonak filed his appeal more than 30 days after he received notice of DER's issuance of this permit and so it is untimely.

By letter dated May 1, 1995, we advised DER and Krivonak of our receipt of this Motion and informed them that their responses thereto were due for filing with us on or before May 21, 1995. Neither Krivonak nor DER has responded to New Enterprises' Motion.

For this Board to have jurisdiction over this appeal, it must have been filed within 30 days of when notice of DER's permit issuance action was published in the *Pennsylvania Bulletin*. See Lower Allen Citizens Action Group, Inc. v. Department of Environmental Resources, 119 Pa. Cmwlth. 236, 538 A.2d 130 (1988) affirmed on reconsideration ___ Pa. Cmwlth. _____, 546 A.2d 1330 (1988) ("Lower Allen").

The situation in Lower Allen is remarkably similar to that in the instant appeal. There, as here, the appellants challenged a DER action in the form of a permit's issuance to its applicant. There, as here, the appellants

failed to file their appeal within 30 days of their receipt of written notice from DER of issuance of the permit. (Here, Krivonak would have had to have had his appeal filed by September 16, 1994, to be timely under that standard.) In Lower Allen, the Permittee sought to dismiss the appeal as untimely based on this written notice, just as New Enterprise has done here. In reversing the Board's order granting such a motion in Lower Allen, the Commonwealth Court held that appellants like Lower Allen Citizens Action Group, Inc. and Krivonak are not parties under 25 Pa. Code §21.2 but are "interested person[s]" under 25 Pa. Code §21.36 and thus receive notice of DER actions via publication of its actions in the *Pennsylvania Bulletin*. Accordingly, the Commonwealth Court concluded that the 30 day appeal period for such interested persons runs from the publication of notice of DER's issuance of the permit in the *Pennsylvania Bulletin*, and an appeal filed within 30 days of that publication by an interested party is timely.

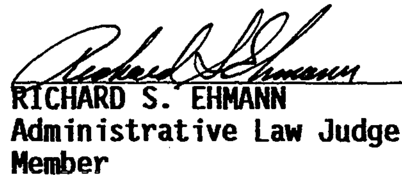
New Enterprises' Motion does not mention Lower Allen in any fashion it fails to offer any distinction between it and this appeal, or to discuss the rationale for the Court's conclusion in Lower Allen as applied to the instant motion. Further, its motion makes no references to the date on which notice of issuance of this permit was published in the *Pennsylvania Bulletin* - from which we might determine the timeliness issue based on Lower Allen. Instead it makes the same untimeliness argument rejected in Lower Allen. Accordingly, this Board cannot determine from the face of New Enterprises' Motion that it has sufficient merit to warrant granting it, thereby dismissing this appeal. Since New Enterprise, as movant, bears the burden of convincing

the Board of the merit of its motion, this omission requires our denial thereof even though Krivonak has not responded thereto.[1] Accordingly, we enter the following Order.

ORDER

AND NOW, this 1st day of June, 1995, New Enterprise's Motion To Dismiss Appeal For Lack Of Jurisdiction is denied.

ENVIRONMENTAL HEARING BOARD



RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: June 1, 1995

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[1]The Board's independent review of the *Pennsylvania Bulletin* shows notice of this permit's issuance is found at 24 *Pa. Bull*. 4633 and appears in the *Pennsylvania Bulletin* dated September 10, 1994. This fact is *de hors* the record, so we have denied this Motion for the reason set forth. Had it appeared of record, it would seem to compel a conclusion that the appeal is timely filed and the Motion is without merit.

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M. DIANE SMITH
SECRETARY TO THE BOARD

CARE AND MOOSIC LAKES HOMEOWNERS ASSN.	:	
v.	:	EHB Docket No. 95-084-MR
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES AND SCRANTON LACKAWANNA INDUSTRIAL BUILDING CO., PERMITTEE	:	Issued: June 9, 1995

OPINION AND ORDER SUR MOTION TO DENY PETITION FOR SUPERSEDEAS WITHOUT A HEARING

By Robert D. Myers, Member

Synopsis:

A Petition for Supersedeas is denied without a hearing when it fails to allege facts sufficient to show entitlement to the supersedeas. When, in answer to a Motion to Deny the Petition Without a Hearing, petitioners admit that they are not challenging the validity of the permit forming the basis of their appeal but are only seeking to halt construction activities until federal approval is given, the Board has no power to grant the requested relief.

OPINION

On May 8, 1995, CARE and Moosic Lakes Homeowners Assn. (Appellants) filed a Notice of Appeal, seeking Board review of the issuance by the Department of Environmental Resources (DER) on April 27, 1995 of NPDES Permit No. PA S10N012 (Permit) for the discharge of storm water from construction activities on a 1124.54-acre site in Jessup and Olyphant Boroughs, Lackawanna County. The Permit was issued to Scranton Lackawanna Industrial Building Co. (SLIBCO), Permittee,

for what Appellants allege is the construction of an industrial park and federal prison at the top of the Moosic Mountain Range. They object to the Permit issuance, *inter alia*, because of the impact of the stormwater discharge upon the environment, including tree cutting, grading, earth disturbance and groundwater contamination (the latter resulting in polluting the domestic water sources of one of the Appellants). They claim that, because of the environmental impact, the project will never receive federal approval - suggesting that issuance of the Permit was premature.

On the same date when they filed their Notice of Appeal, Appellants also filed a Petition for Supersedeas (Petition). A hearing on the Petition was tentatively scheduled for May 25, 1995 but was postponed until June 8, 1995 because of a conflict with the schedule of Appellants' legal counsel. On May 17, 1995 DER filed a Motion to Deny the Petition Without a Hearing. The Board advised the other parties that responses to this Motion had to be filed by May 26, 1995. Permittee filed its own Motion to Dismiss Petition for Supersedeas[1] on May 25, 1995. On that same date Appellants' legal counsel informed the Board that he could not respond to DER's Motion by May 26 but would do so by June 2.

Not having received any response from Appellants on June 2, the Board issued an Order on June 5, 1995 granting DER's Motion and denying the Petition without a hearing. Later that same day, the Board received Appellants' Answer to DER's Motion which, although tardy, has been considered in drafting this Opinion and Order.

DER contends in its Motion that we should dismiss the Petition without a hearing, as we are empowered to do under our procedural rules at 25 Pa.

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[1]Because of the Board's action on DER's Motion, Permittee's Motion is moot and will be disregarded.

Code §21.77(c), because of Appellants' failure to comply with the other provisions of §21.77. Those provisions require the petitioner to (1) plead facts with particularity and to support them by appropriate affidavits or an explanation why affidavits have not been filed (§21.77(a)); and (2) to cite with particularity the legal authority supporting the grant of a supersedeas (§21.77(b)). Failure to comply with these provisions or to state grounds sufficient for the granting of a supersedeas empowers the Board, upon motion or *sua sponte*, to deny a Petition for Supersedeas without a hearing (§21.77(c)).

The Petition, unverified and unsupported by affidavits, identifies the petitioners as the Appellants, refers to the Notice of Appeal where Appellants claim the issuance of the Permit was improper and premature, identifies DER, alleges the issuance of the Permit, alleges Permittee's commencement of construction activities before issuance of the Permit, alleges that a final Environmental Impact Statement (EIS) has not been issued by the federal government, alleges that the Permit does not excuse Permittee from obtaining federal approval, and alleges that Permittee continues to construct a roadway to the top of the mountain. Then, in the last paragraph, the Petition alleges that Appellants will be irreparably harmed by Permittee's construction activities in that tree cutting, grading, earth disturbance and groundwater contamination will result - especially when the project is unlikely to receive federal approval.

We are authorized to grant a supersedeas when petitioners show, by a preponderance of the evidence, that (1) they will suffer irreparable harm, (2) they are likely to prevail on the merits, and (3) 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: §4(d), Environmental Hearing Board Act, Act of July 13, 1988, P.L. 530, 35 P.S. §7514(d); 25 Pa. Code §21.78.

Obviously, a petition for supersedeas must demonstrate by allegations of facts (supported by affidavits) and citations of legal authority that the requirements for a supersedeas can be met. Foremost among these is irreparable harm - the major ingredient necessary to invoke this extraordinary remedy while the case proceeds to adjudication. Appellants' allegation of irreparable harm is conclusory - the underlying facts are missing. Where do Appellant reside with respect to this project? How will tree cutting and grading bring about groundwater contamination? How will groundwater contamination harm Appellants? Why is that harm irreparable? All of these essential allegations are left to conjecture.

There is a similar lack of factual allegations sufficient to suggest that Appellants are likely to prevail on the merits of the appeal. If, as alleged, the Permit does not excuse Permittee from gaining federal approval and if, as alleged, Permittee is going ahead without federal approval, how does that void the issuance of the Permit? It may well be a violation of the Permit giving DER the right to impose penalties or even revoke the Permit, but post-issuance violations have no bearing on the validity of the initial issuance: *North Pocono Taxpayers' Association et al. v. DER et al.*, Board Docket No. 92-409-E, Adjudication issued April 4, 1994.

In their belated Answer to DER's Motion, Appellants candidly admit that they are not challenging "the legal authority or factual basis for DER's issuance of the NPDES permit to SLIBCO," and are not challenging "the environmental impact of the storm water construction activities within the limited scope of review of DER in issuance of a NPDES permit." What they are

seeking is a halt to "construction activities until the approval of the U.S. Department of Justice in a final environmental impact statement which will address the environmental concerns of Appellants *outside the jurisdiction of DER and the Environmental Hearing Board*" (Emphasis added).

On the basis of these statements, it is clear that Appellants are seeking relief in the wrong forum. This Board can only suspend the Permit at this juncture and can only void it in a final action. But we can do those things only if we are convinced that the Permit issuance was unlawful or an abuse of discretion. Appellants' prayer to stop Permittee's construction activities by superseding a validly issued Permit is beyond our powers to grant. If the construction activities are a violation of the Permit prior to federal approval, Appellants can request DER to exercise its enforcement powers to bring them to a halt. If DER refuses, the Appellants can seek an injunction in a court with equity powers. This Board has none.

For the foregoing reasons, among other deficiencies in the Petition, we deny the Petition for Supersedeas Without a Hearing.

<u>O R D E R</u>

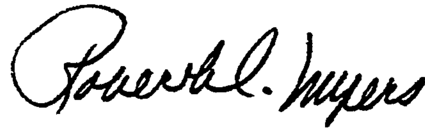
AND NOW, this 9th day of June, 1995, we reaffirm our Order of June 5, 1995 and order as follows:

1. DER's Motion to Deny Petition for Supersedeas Without a Hearing is granted.

2. The Petition for Supersedeas is denied without a hearing.

3. The hearing scheduled for June 8, 1995 is cancelled.

ENVIRONMENTAL HEARING BOARD



ROBERT D. MYERS
Administrative Law Judge
Member

DATED: June 9, 1995

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M. DIANE SMITH
SECRETARY TO THE BOARD

FORWARDSTOWN AREA CONCERNED CITIZENS COALITION, et al.	:	
v.	:	EHB Docket No. 94-046-E
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES, and LION MINING COMPANY, Permittee	:	Issued: June 12, 1995

OPINION AND ORDER SUR APPELLANT'S MOTION FOR SUMMARY JUDGMENT AND PERMITTEE'S CROSS-MOTION FOR SUMMARY JUDGMENT

By Richard S. Ehmann, Member

Synopsis

A motion for summary judgment by third party appellants, contending that the Department of Environmental Resources ("DER") failed to make a written finding in the issuance of a revision to a mining permit that the applicant has demonstrated that there is no presumptive evidence of potential pollution to the waters of the Commonwealth, is granted. There is no material issue of fact because DER admits it only made a written finding of this type pursuant to 25 Pa. Code §86.37(a)(3) when the permit was first issued and not a second time when it was revised to add additional acreage. The language of §86.37(a)(3) requires the DER to make a written finding when the original permit is issued and a second time when a permittee seeks a revision to a permit.

Permittee's argument, that DER's conduct amounts to only a *de minimus* violation of this regulation, is rejected because the violation is not shown to be *de minimus* and because DER is not authorized to violate its regulations in *de*

minimus fashion. DER's argument, that its single written determination complies with Section 86.37(a)(3) because DER checks for compliance with this regulation before issuing permit revisions, is also rejected because checking for compliance with the regulation is not what is called for in the regulation and DER may not ignore the regulation's requirement.

Permittee's cross-motion for summary judgment on the issue of whether appellants raised this Section 86.37(a)(3) issue in their notice of appeal is denied. Where the Notice of Appeal broadly challenges the propriety of DER's action under 25 Pa. Code §86.37, it will be read to include the narrower issue set forth above.

OPINION

This matter was initiated with the filing of a notice of appeal by Forwardstown Area Concerned Citizens Coalition, et al. (FACCC) on March 2, 1994, challenging DER's approval of the revision of Mining Activity Permit 56841306 sought by Lion Mining Company (Lion Mining). The revision authorizes the addition of 350 acres of coal to area covered by the permit issued for Lion Mining's underground coal mine known as the Grove #1/E Seam Mine, located beneath Jenner Township, Somerset County.

On November 17, 1994, FACCC filed the motion for summary judgment and supporting memorandum now before us. DER filed its response on January 18, 1995. On January 26, 1995, Lion Mining filed its response in opposition to FACCC's motion and a cross-motion for summary judgment against FACCC.

Presently before the Board for disposition are FACCC's motion for summary judgment and Lion Mining's cross-motion for summary judgment.

Summary judgments are granted only in circumstances which are clear and free from doubt. Hayward v. Medical Center of Beaver County, 530 Pa. 320, 608

A.2d 1040 (1992); MacCain v. Montgomery Hospital, 396 Pa. Super. 415, 578 A.2d 970 (1990). Moreover, we view each of the motions in a light most favorable to the non-moving party. RESCUE Wyoming, et al. v. DER, et al., EHB Docket No. 91-503-W (Opinion issued March 30, 1994). In deciding a motion for summary judgment, we will grant it 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); Summerhill Borough v. Commonwealth, DER, 34 Pa. Cmwlth. 574, 383 A.2d 1320 (1978). Where triable issues of fact exist, summary judgment may not be granted. Brodheads Protective Association v. DER, 1992 EHB 628, 630.

We will address each of the grounds on which the parties seek summary judgment.

FACCC Did Not Waive This Issue

In its cross-motion, Lion Mining contends that FACCC waived its right to argue that DER failed to make a written finding mandated by 25 Pa. Code §86.37(a)(3). Lion Mining argues, *inter alia*, that FACCC failed to raise this issue in its Notice of Appeal and, therefore, it is precluded from raising it in its motion.

It is clear that the Commonwealth Court has concluded that issues not timely raised in a Notice of Appeal are deemed to be waived except where amendment is sought and properly allowed. Commonwealth, Pennsylvania Game Commission v. Commonwealth, Department of Environmental Resources, 97 Pa. Cmwlth. 78, 509 A.2d 877 (1986), affirmed on other grounds, 521 Pa. 121, 555 A.2d 812 (1989) ("Game Commission"). However, that Court has also made it clear in Croner, Inc. v. DER, 139 Pa. Cmwlth. 43, 589 A.2d 1183 (1991), that this

instruction should not be read too literally. There, where the appellant raised in general terms the issue of compliance with the law by saying imposition of a condition in a permit was otherwise contrary to law, the Court found that allegation barred application of Game Commission to a challenge to DER action under a specific regulation not expressly set forth in the Notice of Appeal. See Concerned Residents of the Yough, Inc. v. DER, *et al.*, EHB Docket No. 92-106-MJ (Opinion issued January 12, 1995).

Applying the rationale of Croner to this appeal requires denial of Lion Mining's motion because FACCC's Notice of Appeal states at paragraph 46, "the application as a whole does not demonstrate compliance with 25 Pa. Code §86.37," and, at paragraph 58 states, "the application taken as a whole fails to demonstrate that there is no presumptive evidence of potential for pollution contrary to 25 Pa. Code §86.37(a)." Further, FACCC's Notice Of Appeal generally alleges the permit's issuance is violative of the statutes and regulations promulgated thereunder, under which DER acted to issue this permit. These broad statements of challenges to DER's action must be read under Croner to include the issue raised in FACCC's motion. Newtown Land Limited Partnership v. DER, ___ Pa. Cmwlth. ___, ___ A.2d ___ No. 1734 C.D. 1994, (Opinion issued June 1, 1995). Accordingly, Lion Mining's Motion must be denied.

Interpretation of 25 Pa. Code §86.37(a)(3)

There are no material facts at issue in this appeal on the issue raised by FACCC's motion because DER personnel admitted that no written finding under this regulation was made anew by DER when it issued the permit revision, and a written finding was only made when DER issued the original permit (although the affidavit of Joseph Leone from DER says it checks for compliance with Section 86.37 before approving an amendment.)

Thus, the issue before us is whether FACCC is entitled to judgment as a matter of law on the question of whether §86.37(a) requires DER to make this finding when it revises permits to increase the acreage therein, as was done here. This is a question of first impression before this Board.

Section 86.37(a) states:

> A permit or revised permit application will not be approved unless the application affirmatively demonstrates and the Department finds, in writing, on the basis of the information in the application or from information otherwise available, which is documented in the approval, and made available to the applicant, that the following exist:
>
> (1) The permit application is accurate and complete and that all the requirements of the acts and this chapter have been complied with....
>
> (3) The applicant has demonstrated that there is no presumptive evidence of potential pollution of the waters of the Commonwealth....

25 Pa. Code §86.37(a) (emphasis added).

FACCC and DER take opposite positions on this regulation's meaning and, thus, the obligation imposed on DER. DER and Lion Mining say they read the regulation as allowing DER to make this finding when it first issues such a permit, and it is that finding that applies to the original permit and all subsequent revisions thereof without the need for new written findings. FACCC, on the other hand, reads the regulation as mandating a written finding by DER when the permit is originally issued and a second written finding by DER when DER issues a revised permit to Lion Mining adding this acreage.

This Board is obligated to give great weight to the interpretation of a statute or regulation by DER, since it is DER which is charged with its administration, unless DER's interpretation is clearly erroneous. Baney Road Association v. DER, et al., 1992 EHB 441; Cambria Cogen Co. v. DER, EHB Docket

No. 93-308-MJ (Opinion issued February 10, 1995); and Ferri Contracting Company, Inc. v. Commonwealth, DER, 96 Pa. Cmwlth. 30, ___, 506 A.2d 981, 985 (1986). Thus, if we did not find DER's interpretation to be clearly erroneous, as we do, we would have to deny this motion.

The first problem with the DER/Lion Mining interpretation of this regulation is that it flies in the face of the express language of §86.37(a)(3), which states, "A...revised permit application will not be approved unless...the Department finds, in writing..." Thus, the language quite clearly requires DER to make written findings not only when it approves the original permit, but also when it approves a revised permit application. To read this regulation as these two parties do is to read out of it the words "a revised permit application". Nothing in this regulation or the statute under which it was adopted gives any indication this section is intended to be read in this fashion.

Moreover, to read the regulation as Lion Mining and DER do is to ignore the rules of construction applicable to interpreting same. Rules of construction applicable to statutes are also applicable to DER's regulations. Commonwealth v. Barnes & Tucker Company, 9 Pa. Cmwlth. 1, 41, 303 A.2d 544 (1973), reversed 455 Pa. 392, 319 A.2d 871, on remand 23 Pa. Cmwlth. 496, 353 A.2d 471, affirmed 472 Pa. 115, 371 A.2d 461, appeal dismissed, Barnes & Tucker Co. v. Pennsylvania, 98 S.Ct. 38, 434 U.S. 807, 54 L.Ed.2d 65; and Commonwealth, DER v. Locust Point Quarries, Inc., 27 Pa. Cmwlth. 270, 367 A.2d 392 (1976), vacated 483 Pa. 350, 396 A.2d 1205 (1979). One of these rules of construction is found at 1 Pa.C.S. §1921(a). It instructs that a statute (here regulation) is to be interpreted, if possible, to give effect to all its provisions. In turn, this language has been interpreted to mean that the legislature (here the Environmental Quality Board) did not intend its laws to contain surplusage. Donald S. Masland M.D.,

et al. v. Leonard Bachman, M.D., *et al.* 473 Pa. 280, 374 A.2d 517 (1977). Adopting DER's interpretation of this section means "a revised permit application" is surplusage. Since the regulation may be interpreted so that this phrase is not surplusage, this Board is compelled to reject the Lion Mining and DER interpretation thereof and adopt that of FACCC.

This Board also finds the DER/Lion Mining interpretation flawed from a practical standpoint. When DER issued Lion Mining its initial permit, that permit covered a specific tract of ground and acreage of coal, but it did not cover the 350 acres added to it when DER approved the revised permit application. Thus, DER's original written finding of no presumptive evidence of potential pollution covered only the land area lying within the boundaries of that original permit. There is no evidence before us at this time to suggest that when the original permit was issued, DER was asked for or made such a written finding with regard to any adjacent tracts of land which might subsequently be added to the original permit through a revised permit application. As a result, the only conclusion we can draw is that when DER made its initial finding, it gave no consideration to whether its conclusion would be the same if this 350 acres was added or not. This is significant because this Board is aware that over distance, conditions change in coal seams just as over time, a definition for what constitutes "no presumptive evidence of potential pollution" may be changed. It is precisely because "things change" that an original written finding may not fit all future conditions encountered or additional areas and, thus, that it is

more reasonable to require new written findings as spelled out in the regulation than to adopt DER's "one-size-fits-all" approach.[1]

In so concluding, we recognize that DER contends that it will not issue an amendment unless it is satisfied that 25 Pa. Code §86.37(a)(3) will not be violated. While this may be asserted to be comforting to some to hear, it is not compliance with this regulation. By analogy, no one would contend DER complies with a regulation mandating a permit for every mine site if it asserted it issued no permit but did check to see that there would be no problems if the site were mined. DER may elect to seek modification of this regulation so that a check but no written finding is adequate or is deemed to be compliance with §86.37(a)(3). However, until that occurs DER may not ignore the regulation's mandate of a written finding. Mil-Toon Development Group v. DER, 1992 EHB 209 ("Mil-Toon").

In reaching this conclusion, we also reject Lion Mining's argument that there are facts in dispute because DER says it made a written finding when it first issued the permit and that finding applies to this revision. While there is no dispute that DER made the initial finding, the issue before us is whether it made a subsequent written finding prior to approval of the amendment. On that issue, there is no dispute. DER admits no subsequent finding was made.

Finally, because of our conclusions set forth above, we reject Lion Mining's argument that DER's actions in not complying with Section 86.37(a)(3) are *de minimus* violations which should be ignored. DER's compliance with its own

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[1] We also point out that except for insignificant boundary corrections, the addition of acreage for mining is to be considered as an application for a new permit under 25 Pa. Code §86.52. Adding 350 acres of coal cannot be considered an insignificant boundary correction, so Lion Mining's revised permit application would appear to have to be treated like an application for a new permit. If this is so, then under §86.37(a), a new written finding would be required under this theory as well.

regulations is never a *de minimus* issue. Mil-Toon does not stand for the proposition that DER must only comply with the major aspects of its regulations. It may be that violations for which mining bond or forfeit may not be *de minimus* as stated in King Coal Company v. DER, 1985 EHB 604, but, that is a regulatory or statutory violation by others on which DER takes action, not a violation by DER. Moreover, we cannot conclude DER's omission here is of a *de minimus* nature. Putting aside the issue of whether DER should be allowed to start down the slippery slope created by the idea that only significant failures to comply with regulations on its part are reversible, here DER has a clear duty to make a formal written finding prior to permit issuance. This is a formal document-generating process, unlike assuring that a permit applicant's proposals comply with a given set of regulations (which might generate no document other than the permit itself.) In this circumstance, we are unable to conclude this DER omission is a *de minimus* violation.

For the reasons stated above, we grant FACCC's motion for summary judgment and enter the following order.

ORDER

AND NOW, this 12th day of June, 1995, it is ordered that:

1) Lion Mining's cross-motion for summary judgment is denied; and

2) FACCC's motion for summary judgment on the issue that DER failed to make the written finding required by 25 Pa. Code §86.37(a)(3) is granted and its appeal is sustained.[2]

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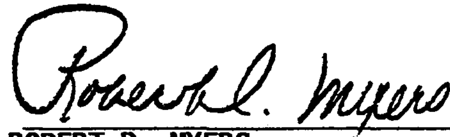
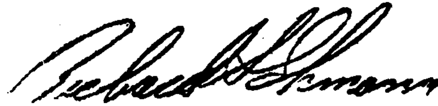
[2]Having sustained FACCC on this basis, the Board does not address the merits of the other issues raised in FACCC's motion.

ENVIRONMENTAL HEARING BOARD



ROBERT D. MYERS
Administrative Law Judge
Member



RICHARD S. EHMANN
Administrative Law Judge
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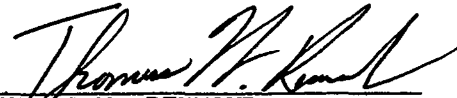

THOMAS W. RENWAND
Administrative Law Judge
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DATED: June 12, 1995

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SECRETARY TO THE BOARD

PLUMSTEAD TOWNSHIP

v.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF ENVIRONMENTAL RESOURCES
and MILLER AND SON PAVING, INC.,
Permittee

EHB Docket No. 91-214-M

Issued: June 14, 1995

ADJUDICATION

By Robert D. Myers, Member

Synopsis:

A notice of appeal from the Department of Environmental Resources' (Department) issuance of a noncoal surface mining permit, authorization to mine, NPDES permit, and three air quality plan approvals is dismissed. Objections concerning the NPDES permit and air quality plan approvals were waived as a result of Appellant's failure to raise them in its post-hearing brief. The Board will also not consider Appellant's arguments concerning the Department's violation of §8(4) of the Historic Preservation Act, the Act of May 26, 1988, P.L. 414, 37 Pa.C.S. §508(4), and Article I, §27, of the Pennsylvania Constitution because they were raised for the first time in Appellant's post-hearing brief.

Appellant failed to prove that the Department's issuance of the noncoal surface mining permit was an abuse of discretion or contrary to the requirements of the Noncoal Surface Mining Conservation and Reclamation Act, the Act of December 19, 1984, P.L. 1093, as amended, 52 P.S. §3301 *et seq.* (Noncoal Act), and 25 Pa.Code Ch. 77 (relating to noncoal surface mining) on the basis of expected changes to the hydrogeology at the site and surrounding area. Appellant

further failed to prove the Department's issuance of the noncoal surface mining permit was an abuse of discretion on the basis of operational noise or blasting. Finally, the Board finds the Department is not required by §§7 and 16 of the Noncoal Act to ensure that quarrying activities will be conducted in accordance with the requirements of a municipality's local zoning ordinance.

INTRODUCTION

This matter was initiated with the May 24, 1991, filing of a notice of appeal by the Plumstead Township Board of Supervisors (Plumstead) seeking review of various regulatory approvals issued by the Department to Miller and Son Paving, Inc. (Miller). Miller proposes to operate an argillite quarry, rock crushing plant, bituminous concrete plant, and ready-mix concrete plant at a 150 acre site within the Gardenville-North Branch Rural Historic District between the Point Pleasant Pike and the North Branch of the Neshaminy Creek (North Branch) in Plumstead Township, Bucks County. The Department approvals for which Plumstead seeks review include Noncoal Surface Mining Permit No. 09890303 (SMP) and Noncoal Authorization to Mine No. 302723-09890303 (Authorization to Mine), which together allow Miller to conduct quarrying operations at the site; National Pollutant Discharge Elimination System (NPDES) Permit No. PA 0594661, which authorizes Miller to discharge water from the quarry into the North Branch; and Air Quality Plan Approvals for applications numbered 09-310-942, 09-303-024, and 09-311-006, which authorize construction of various air contamination sources associated with the quarry, rock crusher, and concrete plants.

A hearing on the merits was held before Chairman Maxine Woelfling at the Board's Harrisburg office on January 7-8, March 12-13, and March 30, 1992.[1]

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[1]Chairman Woelfling resigned from the Board on February 17, 1995. The Board will proceed to adjudicate the merits of this appeal from a cold record. *See*, Lucky Strike Coal Co., *et al.* v. Cmwlth., Dept. of Environmental Resources, 119

In addition to the testimony taken by the Board, the record contains the pre-recorded testimony of numerous experts taken by the Plumstead Township Board of Supervisors in hearings concerning Miller's application for a curative amendment to the Plumstead Township Zoning Ordinance of 1970.[2] *See*, *In re* Appeal of Miller and Son Paving, Inc., 161 Pa.Cmwlth. 138, 636 A.2d 274 (1993). By order dated June 25, 1992, Chairman Woelfling admitted the pre-recorded testimony of Jeffrey Marshall and declined to admit the pre-recorded rebuttal testimony of Shams Siddiqui, who had already testified before the Board.[3]

Plumstead and Miller completed filing of their post-hearing briefs on November 25, 1992. The Department, pursuant to its policy concerning third party appeals, did not file a post-hearing brief. Any issue not raised in the post-hearing briefs has been waived. Lucky Strike Coal Co., 119 Pa.Cmwlth. at ___, 547 A.2d at 449.

In its post-hearing brief, Plumstead has considerably narrowed the scope of this adjudication. While the 13 pages of objections contained in Plumstead's notice of appeal raised issues concerning all of the Department's regulatory approvals, Plumstead has limited the focus of its post-hearing brief

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Pa.Cmwlth. 440, ___, 547 A.2d 447, 449 (1988).

[2]The pre-recorded testimony consists of: five volumes of testimony by Walter B. Satterthwaite (Exs. P-41 through P-45); two volumes of testimony by James Mahar (Exs. P-46 & P-47); two volumes of testimony by George Diehl (Exs. P-48 & P-49); two volumes of testimony by James Reil (Exs. P-51 & P-52); and one volume each of testimony by Robert Skaler (Ex. P-55), Michael Borsuk (Ex. P-63), E. VanRieker (Ex. P-6E), Arthur Dvinoff (Ex. A-74), and Charles Timbie (Ex. A-75). Although the transcript indicates that Mr. Diehl's testimony is comprised of three volumes, the Board received a letter from Miller on May 1, 1995, verifying that only two volumes of Mr. Diehl's testimony were entered into the record. Plumstead and Miller are to be commended for their cooperation in submitting pre-recorded testimony rather than having these witnesses testify again before the Board.

[3]*See*, the Board's discussion confirming Chairman Woelfling's ruling, *infra*.

to the hydrologic regime underlying the quarry and surrounding area, noise generated by quarry operations, and adverse effects to historic structures. Specifically, Plumstead contends the Department's issuance of the SMP and Authorization to Mine was an abuse of discretion or arbitrary exercise of power because: Miller failed to comply with regulations requiring the protection of hydrologic balance; Miller has not established that groundwater will be protected; operational noise from the quarry will unreasonably increase background noise in the area surrounding the quarry; historic structures adjacent to the quarry site have not been adequately protected from the adverse effects of blasting; the quarry will not operate in accordance with applicable statutes and regulations; the Department violated the Historic Preservation Act; and the Department violated Article I, §27 of the Pennsylvania Constitution.

The record in this matter consists of a transcript of 886 pages, 138 exhibits, and the pre-recorded testimony of Jeffrey Marshall, which was not marked as an exhibit. After a full and complete review of this record, the Board makes the following findings of fact.

FINDINGS OF FACT

1. Appellant is Plumstead, the governing body of a township of the second class located in Bucks County.

2. Appellee is the Department, the agency with the authority to administer the Noncoal Act; the Clean Streams Law, the Act of June 25, 1937, P.L. 1987, *as amended*, 35 P.S. §691.1 *et seq.*; and the rules and regulations adopted thereunder.

3. Permittee is Miller, a Pennsylvania corporation with a business address of 1371 W. Street Road, Warminster, Pennsylvania 18974 (Notice of Appeal).

4. On April 22, 1991, the Department issued to Miller Noncoal Surface Mining Permit No. 09890303, Noncoal Authorization to Mine No. 302723-09890303, National Pollutant Discharge Elimination System Permit No. PA0594661, and Air Quality Plan Approvals for applications numbered 09-310-942, 09-303-024, and 09-311-006 (Notice of Appeal).

5. Miller owns a 150 acre parcel of property (the site) in Plumstead Township between Point Pleasant Pike and the North Branch, several hundred feet southwest of the intersection of Point Pleasant Pike and Route 413 (N.T. 20; Ex. A-34).[4]

6. Miller proposes to quarry argillite[5] and operate bituminous concrete and ready-mix concrete plants at the site (Notice of Appeal).

7. The area of the site to be excavated for the quarry is approximately 68 acres (N.T. 24).

8. The elevation of the site ranges from approximately 540 feet above sea level near the Point Pleasant Pike to approximately 380 feet above sea level near the North Branch (N.T. 23).

9. Quarrying at the site will be done in 50 foot increments, or "benches," with Department approval required prior to beginning development of each 50 foot bench (Notice of Appeal).

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[4]References to the transcript of the hearing on the merits will be denoted by "N.T.__;" to Plumstead's exhibits by "Ex. A-__;" to the Department's exhibit by "Ex. C-___;" and to Miller's exhibits by "Ex. P-___." Where an exhibit represents the previously recorded testimony of a witness in the zoning proceedings before the Plumstead Board of Supervisors, the page number will also be indicated (e.g. "Ex. P-6E, p.__").

[5]*Webster's Ninth New Collegiate Dictionary* (1984) defines argillite as "a compact argillaceous rock differing from shale in being cemented by silica and differing from slate in having no slaty cleavage." "Argillaceous" is, in turn, defined as "of, or relating to, or containing clay or clay minerals."

10. The final elevation of the quarry will be 100 feet below sea level (Notice of Appeal).

Hydrogeology of the Site

11. Shams H. Siddiqui is a hydrogeologist who received his Ph.D. in hydrogeology from the Pennsylvania State University (Ex. A-4).

12. Walter B. Satterthwaite has been a hydrogeologist since 1959 and is currently President of Walter B. Satterthwaite Associates, Inc. (Exs. P-41, p. 56, and P-41A).

13. Mr. Satterthwaite provided a more complete, detailed description of the geology underlying the site than Dr. Siddiqui.

- The Lockatong Formation

14. The Lockatong Formation is part of the Newark Group, along with the Stockton and Brunswick Formations (Ex. P-41, p. 66).

15. The Stockton Formation is older than and lies beneath the Lockatong Formation, while the Brunswick Formation is younger than and lies above the Lockatong Formation (Exs. P-8, Fig. 5, and P-41, p. 66).

16. All three formations are comprised of sedimentary rocks (Ex. P-41, p. 66).

17. The Lockatong Formation is comprised primarily of a gray to black argillite, with minor quantities of calcite and pyrite (Exs. P-8, Fig. 5, and P-41, p. 72).

18. The Lockatong Formation is characterized by a very fine particle size (Exs. P-8, Fig. 5, and P-41, p. 66).

19. The "strike" of a rock formation is a horizontal line going across the rock face, which is defined by its relation to north (Ex. P-41, p. 68).

20. The "dip" of a rock formation is the number of degrees at which the formation is tilted in relation to horizontal and is always measured perpendicular to the strike (Ex. P-41, p. 68).

21. The strike and dip of the Lockatong Formation at the site are north 58 east and 15 degrees to the northwest, respectively (Exs. P-8, Fig. 9, P-41, p. 69, and P-42, p. 9).

22. There is a full sequence of the Lockatong Formation beneath the site (Exs. P-8, Figs. 3, 4, & 9, and P-41, pp. 69-70).

23. Groundwater within the Lockatong Formation is controlled by fracture porosity and permeability (N.T. 39; 671).

24. Fracture porosity and permeability means the groundwater is held in and moves through fractures in the rock (N.T. 42).

25. Yields from wells drilled into the Lockatong Formation typically are lower than wells drilled into either the Brunswick or Stockton Formations (N.T. 43; Ex. P-41, pp. 79-80).

26. Lockatong Formation well yields are affected by breaks or shears that are encountered by the well (Ex. P-41, p. 89).

<u>- Testing the Lockatong Aquifer</u>

27. Mr. Satterthwaite drilled a series of test wells at the site (Ex. P-42, p. 6).

28. Well W-1 was drilled to a depth of 200 feet in the southern corner of the site, near Point Pleasant Pike; well W-3 was drilled to a depth of 497 feet just to the north of the center of the site; and well W-2 was drilled to a depth of 200 feet to the northwest and downdip of W-3 (Ex. P-8).

29. Wells W-1, W-2, and W-3 had yields of 0.75 gallons per minute (gpm), 3.5 gpm, and 36 gpm, respectively (Exs. P-8, and P-42, pp. 16, 18).

30. Wells W-1 and W-2 have yields typical of the Lockatong Formation, while the yield from well W-3 is greater than normal (Ex. P-42, pp. 17, 18, 34).

31. A joint set is a break in the rock that can be either tight or open and water bearing (Ex. P-42, p. 36).

32. Wells OBS-1 and OBS-2 were located along the same joint set as well W-3 (Ex. P-42, p. 36).

33. The joint set on which wells OBS-1, OBS-2, and W-3 were located has a strike of north 47 east and dip of 82 degrees to the southeast (Ex. P-42, p. 36).

34. Wells OBS-1 and OBS-2 were drilled to depths of 297 feet and 197 feet, and had yields of 10.5 and 150+ gpm, respectively (Ex. P-8).

35. Wells OBS-3 and OBS-4 were located updip from well W-3 along the bedding plane (Ex. P-42, p. 39).

36. Wells OBS-3 and OBS-4 were both drilled to a depth of 197 feet and had yields of 60 gpm and 10 gpm, respectively (Exs. P-8 and P-42, pp. 41-43).

37. Given the results from these wells, Mr. Satterthwaite decided to drill more wells updip of and along the joint set from well W-3 in order to better characterize a permeable unit in the Lockatong Formation that appeared to conform with the bedding plane (Ex. P-42, p. 44).

38. Well OBS-5, located 500 feet to the northeast of well W-3 on the joint set, was drilled to a depth of 196 feet and yielded 6 gpm (Ex. P-42, p. 45).

39. Well OBS-6, located between wells OBS-3 and -4, updip of well W-3, was drilled to a depth of 122 feet and yielded 100 gpm (Exs. P-17A and P-42, p. 44).

40. Well OBS-7, located adjacent to well OBS-3, updip of well W-3,

was drilled to a depth of 225 feet and yielded 36 gpm (Exs. P-17A and P-42, p. 46).

41. Well OBS-7 was typical of a Lockatong well through 90 feet, since at that depth it had a total cumulative yield of less than 1 gpm (Ex. P-42, p. 46).

42. Well OBS-8, located near the southeastern corner of the site, was drilled to a depth of 690 feet, first encountered water at 342 feet, and eventually yielded a total of 17 gpm (N.T. 664-665; Ex. P-17).

43. Well OBS-9, located near the northwestern side of the site, was drilled to a depth of 500 feet, first encountered water at a rate of more than one gpm at 347 feet, and yielded a total of four gpm (N.T. 664-664; Ex. P-17).

44. Well P-2, located 600 feet updip of well W-3, was drilled to a depth of 120 feet and yielded 3 gpm (Ex. P-42, p. 46).

45. A camera test utilizes a television camera lowered into a well to view the bore and visually locate fractures (Ex. P-42, p. 48).

46. A packer test utilizes inflatable spacers to isolate distinct sections of a well so that the specific capacities of those sections can be calculated separately from the cumulative specific capacity of the entire well (Ex. P-42, pp. 48-49).

47. Specific capacity is the rate of yield, in gallons per minute, for each foot of drawdown (gpm/ft) (Ex. P-42, p. 48).

48. Using camera and packer tests, Mr. Satterthwaite was able to determine for wells W-3, OBS-3, and OBS-4 the location from which the majority of groundwater was flowing (Ex. P-42, pp. 52-59).

49. The majority of the yield in well W-3 was coming from a fracture 135-139 feet deep (Exs. P-8, Fig. 20, and P-42, p. 58).

50. The majority of the yield in well OBS-3 was coming from a fracture 107-110 feet deep (Exs. P-8, Fig. 20, and P-42, p. 58).

51. The majority of the yield in well OBS-4 was coming from a zone between 34 and 80 feet deep (Exs. P-8, Fig. 20, and P-42, p. 58).

52. Mr. Satterthwaite dug a trench at the surface near well P-2 and encountered the upper extent of a permeable unit within the Lockatong Formation (Ex. P-42, pp. 63-73).

- The 72 Hour Pump Test

53. Mr. Satterthwaite conducted a 72 hour pump test of well W-3 to determine how interconnected it is with other areas in the permeable zone (Ex. P-43, pp. 12-13).

54. Well W-3 was pumped at a rate of 47 gpm, or approximately 60,000 gallons per day (gpd), in order to simulate the maximum conditions of withdrawal from that well (Ex. P-43, pp. 13, 17).

55. When water is drawn from a well, a cone of depression is formed from the surface to the deepest point from which water is being drawn (N.T. 169).

56. The cone of depression from the pump test extended more to the northeast and southwest than to the northwest and southeast (Ex. P-8, Fig. 18).

57. Because well W-2 is downdip from well W-3, if it were drilled deeper than 200 feet, it would have encountered the permeable zone within the Lockatong Formation and would have experienced some drawdown during the pump test (N.T. 186; Ex. P-44, p. 71).

58. If Well W-2 were drilled into the permeable zone, the cone of depression would have extended further to the northwest (N.T. 186; Exs. P-8, Fig. 18, and P-44, p. 71).

- The Permeable Zone at the Site

59. There is a permeable zone within the Lockatong Formation beneath the site that conforms to the bedding of the formation and breaches the surface around well P-2 (Exs. P-8, Fig. 21, and P-42, p. 62).

60. The permeable zone is sandwiched between two typical layers of the Lockatong Formation, which are minimally fractured and possess very little ability to accept and yield water (Ex. P-42, p. 77).

61. The permeable zone is at most 40-50 feet thick, with the majority of permeable areas in the zone contained within a 30-40 foot thickness (Ex. P-43, p. 8).

62. The permeable zone is saturated, meaning it will discharge to the surface when it encounters a low point in the surface expression (Ex. P-44, p. 73).

63. The test scrape confirmed the variable nature of the rock in the permeable zone, with some of the open spaces being filled with clay and silt (Ex. P-42, p. 74).

64. The variable nature of the rock in the permeable zone explained the variability in yields from wells drilled into the zone (Ex. P-42, p. 74).

65. Some of the permeable areas within the permeable zone are distinct and separate, while others are hydraulically interconnected (Ex. P-43, p. 8).

66. The permeable zone functions independently of the rest of the Lockatong Formation (Ex. P-43, pp. 20-21).

67. Pumping water from the permeable zone will not affect the rest of the Lockatong Formation (N.T. 749).

68. The permeable zone extends beyond the site boundaries, but it is

unknown how far (Ex. P-43, pp. 23-24).

69. The permeable zone occupies, at most, five percent of the total volume of the quarry (Ex. P-43, p. 63).

70. Wells OBS-8 and OBS-9 confirmed the existence of only one permeable zone because they encountered no dark black or grey/black material characteristic of the permeable zone, because they did not have a yield consistent with a permeable zone, and because they did not encounter clay covering the sheer surfaces, which would indicate a less-permeable zone (N.T. 667).

71. If there is a second permeable zone in the area of the site, it does not intersect the proposed excavation (N.T. 745-751).

72. There are areas in the Lockatong Formation with well yields of 30-50 gpm that are not part of a permeable zone (N.T. 756).

- Dr. Siddiqui's Fracture Trace Analysis

73. A fracture trace analysis is used to locate fracture traces on the surface of the ground (N.T. 60).

74. Fracture traces on the surface of the ground often reflect underground fractures (N.T. 63, 68).

75. Fractures beneath the ground are expected to contain water below the regional water table (N.T. 62).

76. Over the past 18-19 years, fracture trace analyses have been successful in locating areas for the highest-yielding wells (N.T. 62).

77. A fracture trace analysis is performed using overlapping aerial photographs viewed through a stereoscope to look for visible cues such as alignment of soil color changes, topographic alignment, vegetation alignment, and straight stream segments (N.T. 60-61).

78. Dr. Siddiqui performed a fracture trace analysis and found many fracture traces at the site and surrounding area, some of which were confirmed by a field reconnaissance (N.T. 65, 69; Ex. A-5, Fig. 3).

79. Dr. Siddiqui's fracture trace map does not accurately depict the location of Valley Park Road near the northwest corner of the site (Exs. A-5, Fig. 3, and A-34).

80. Dr. Siddiqui did not try to match his fracture traces with high-yielding wells on the site or in the area, or otherwise attempt to verify that the fracture traces were actual indicators of below-ground fractures (N.T. 69).

81. A proper fracture trace analysis requires a preliminary survey of the underlying structural geology, which Dr. Siddiqui failed to perform (N.T. 673, 770).

82. Well OBS-9 was drilled at the intersection of two of Dr. Siddiqui's fracture traces and yielded a total of four gpm (N.T. 665, 666).

The Quarry's Effects on Groundwater in the Area of the Site

83. Every quarry operating below the regional water table will have to pump out water in order to operate (N.T. 411, 815-816).

84. Groundwater flows from an area of higher hydraulic gradient, to an area of lower hydraulic gradient (N.T. 41).

85. The proposed quarry will become a groundwater discharge area because it will have a lower hydraulic gradient than the surrounding area (N.T. 99, 772).

86. Groundwater will continue to move towards the quarry as long as it is being pumped out to keep the working area dry (N.T. 104).

87. If the quarry excavation intercepts a water-bearing zone, the rate at which water flows into the quarry will diminish after the water-bearing

zone is dewatered (Ex. P-44, p. 46).

88. After a water-bearing zone is dewatered, infiltration into the quarry will be limited to the water coming into that zone on a daily basis (Ex. P-44, p. 46).

89. The quarry may affect groundwater supplies offsite (N.T. 82, 185, 681-682; Exs. A-5, Fig. 10, and P-43, p. 24).

90. The effects of the quarry will only be felt by wells drilled into areas hydrogeologically connected with a water-bearing zone intercepted by the quarry (N.T. 224, 233).

- Monitoring the Effects of the Quarry

91. Special Condition 22 of the SMP requires Miller to record daily flow measurements of water pumped from the pit sump and submit this data to the Pottsville District Office on a quarterly basis (Notice of Appeal).

92. Measuring the amount of water pumped from the pit sump enables Miller to determine the amount of groundwater infiltration into the excavation (N.T. 691).

93. Special Condition 24 of the SMP requires Miller to measure the static water levels in 10 wells surrounding the site on a monthly basis and submit the data to the Pottsville District Office on a quarterly basis (Notice of Appeal; N.T. 390-398; Ex. P-53).

94. The SMP does not specify when a drop in the water level in a monitoring well or an increase in the amount of water pumped from the quarry indicates that the quarry has adversely affected neighboring water supplies (Notice of Appeal; N.T. 431).

95. The monitoring required by Special Condition 24 will allow Miller to adequately categorize static water levels surrounding the site (N.T. 687).

96. Static water levels in wells are not constant, but are, instead, affected by new land uses in the area (N.T. 688-689).

97. Monitoring static water levels will allow the Department to determine which changes in static water levels occurred as a result of quarrying and which were the result of new land uses (N.T. 689, 864).

98. When the quarry is excavated to a substantial depth, it may be necessary to relocate some of the monitoring wells to better characterize the geology of the site (N.T. 668-669).

- Availability of Alternative Groundwater Supplies

99. Special Condition 25 of the SMP requires Miller to:

> restore or replace any public or private water supply which the Department determines to be affected by contamination, interruption or diminution as the result of [Miller]'s mining activities, in accordance with 25 Pa.Code Chapter 77, Section 11(g). If the Department determines from ground-water [sic] monitoring that any water supply well will be significantly dewatered by development of the quarry to the bottom elevation of any lift, the Department may require the permittee to replace the well(s) prior to the commencement of the development of that lift.

(Notice of Appeal).

100. Special Condition 8 requires Miller to secure written authorization from the Department before beginning construction of each new 50 foot bench (Notice of Appeal).

101. Special Condition 40 requires Miller to submit either a water loss bond or proof of water loss insurance to the Department 60 days prior to activating the quarry (Notice of Appeal).

102. Miller has submitted a water loss bond in the amount of $3,500 (N.T. 822).

103. The Department will determine if a water supply is lost due to the quarry (N.T. 819).

104. The SMP contains no criteria for determining whether the Department will require Miller to replace a water supply before beginning to develop a lift (N.T. 399).

105. The Department will determine on a case-by-case basis whether Miller will be required to replace a water supply prior to developing a lift (N.T. 400).

106. Water usage of 75 gpd/person is considered to be average for a single family dwelling (N.T. 163).

107. A well that yields two or three gpm is more than adequate for a single family dwelling (N.T. 164-165; 248).

108. There is no evidence in the record specifying the yield required for a water supply well in Plumstead Township.

109. Based on a study commissioned by the Delaware River Basin Commission, the median and average yields of wells drilled into the Lockatong Formation are 6.3 gpm and 11.7 gpm, respectively (N.T. 166).

110. The yields of wells drilled into the Lockatong Formation are adequate for domestic purposes (N.T. 166).

111. Wells drilled into the Lockatong Formation in the area near the site have higher yields than wells drilled into a typical Lockatong Formation (N.T. 58, 694).

112. The saturated thickness of the Lockatong aquifer in the area of the site extends to more than 700 feet deep (N.T. 168, 222, 694).

113. When fully developed, the quarry will be less than 700 feet deep (N.T. 169).

114. It will be possible to deepen existing wells or drill new wells in the area of the site (N.T. 695, 698, 818, 862).

115. Even when the quarry is fully developed, there will be adequate groundwater in the surrounding area for existing and proposed uses (N.T. 698).

<u>Operational Noise from the Quarry</u>

116. Special Condition 32 requires Miller to design all quarry blasts for a maximum noise level of 125 dB and limits the noise level from quarry blasts to a maximum of 129 dB (Notice of Appeal).

117. Thomas Whitcomb is a hydrogeologist with the Department's noncoal program (N.T. 813).

118. Miller's permit application contained measures designed to reduce or manage the noise that might be generated by the quarry (N.T. 848).

119. The Department evaluated the noise to be generated by the quarry (N.T. 848-850).

120. The Department has measured the noise levels generated by quarry activities and has not yet found them to exceed normal, everyday noise exposures (N.T. 850).

121. Miller's quarry operation should produce less noise than the quarries studied by the Department (N.T. 850).

122. The SMP contains no limits on operational noise emanating from the quarry (Notice of Appeal).

123. George Diehl is a licensed Professional Engineer whose area of specialty is acoustics, particularly machinery noise and all phases of noise pertaining thereto (Ex. P-48, p. 120).

124. The noise produced by machinery is measured in terms of both sound power levels and sound pressure levels (Ex. P-48, p. 124).

125. Sound pressure is what the human ear hears and responds to, and is a function of location (Ex. P-48, p. 125).

126. A-weighted sound pressure levels, which are expressed as "dBA," correspond to how the human ear responds to sound (N.T. 279; Ex. P-48, p. 126).

127. Increasing the sound pressure level by 10 decibels doubles the sound (Ex. P-48, p. 134).

128. Doubling the distance from a noise source reduces the sound pressure level by 20 times the logarithm (base ten) of the distance ratio (Exs. P-48, p. 128, and P-49, p. 75).[6]

129. If multiple sources are generating noise, the total A-weighted sound pressure level is the highest A-weighted sound pressure level being generated plus 10 times the log of the number of sources (Ex. P-48, p. 145).[7]

130. If one noise source is 10 dBA less than another, it will only add four tenths of a decibel (.4 dBA) to the total A-weighted sound pressure level (Ex. P-49, p. 23).

131. In order to determine the operational noise to be generated by the quarry, Mr. Diehl measured the sound generated by the primary, secondary, and

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[6]Representing this concept mathematically: $Y = 20\log_{10}X$
where: Y is the reduction in the sound pressure level (dBA), and
X is the ratio of the distance from the noise source.
Therefore, if the distance from a noise source doubles, the A-weighted sound pressure level measured at the point further from the noise source will be six dBA less than the A-weighted sound pressure level at the point nearer the noise source (Ex. P-49, p. 75).

[7]Representing this concept mathematically: $A = B + 10\log_{10}C$
where: A is the total A-weighted sound pressure level (dBA),
B is the highest A-weighted sound pressure level, and
C is the number of noise sources.
Therefore, if one machine is operating and a second is started, the total A-weighted sound pressure will increase by approximately two dBA (Ex. P-48, p. 145).

tertiary crushers and an asphalt plant at Miller's Wrightstown Quarry (Exs. P-48, p. 127, and P-49, p. 15).

132. The sound pressure level of the crushers and asphalt plant at the Wrightstown Quarry was 115 dBA at three feet (Exs. P-48, p. 127, and P-48C).

133. The crusher at the Wrightstown Quarry was not enclosed (Ex. P-48, p. 133).

134. The conveyors at the Wrightstown Quarry may not have been working when the sound pressure level was measured, but their contribution would have been negligible (Ex. P-49, p. 23).

135. Noise mitigation measures to be implemented at the quarry include a 50 foot high berm around the northwestern third of the site and a 15 foot high berm around the remaining two-thirds of the site, as well as enclosures around the crushers (Exs. A-9 and P-48, p. 133).

136. With the enclosures, the sound pressure level generated by the crushers will be reduced by at least 7 dBA, to 108 dBA at three feet (Ex. P-48, p. 133-134).

137. The practical effect of the berm will be the same as increasing the distance between the noise sources within the quarry and the listener (Ex. P-49, p. 52).

138. In determining the amount of operational noise to be generated by the quarry, Mr. Diehl assumed the equivalent of two noise sources of 115 dBA at three feet each plus the 108 dBA at three feet generated by the crushers (Ex. P-48, p. 136).

139. Mr. Diehl assumed that one loaded truck driving out of the pit generates a sound pressure level of 110 dBA at three feet (Ex. P-48, p. 144)

140. Either of the 115 dBA equivalent noise sources assumed by Mr. Diehl could include the noise generated by one loaded truck driving out of the pit (Ex. P-49, p. 35).

141. None of the equivalent noise sources included multiple trucks moving around the quarry at the same time, which will increase the total noise level, but not by much (Ex. P-49, p. 63).

142. Mr. Diehl calculated the effect of operational noise from the quarry on nine points surrounding the site: Point A is the Capell house 400 feet from the upper northeastern side of the site boundary; Point B is the Trainer house 400 feet from the middle of the northeastern side of the site boundary; Point C is a building adjacent to the southeastern corner of the site; Point D is adjacent to the southeastern side of the site near the southeastern corner; Point E is a building adjacent to the southeastern side of the site near Point D; Point F is a building several hundred feet from the southwestern corner of the site; Point G is a house on the Kraut-Chittick Farm 500 feet from the southwestern side of the site boundary; Point H is a house 400 feet from the upper southwestern side of the site boundary; and Point I is a house on the Wismer-Myers Farm 600 feet from the northwestern side of the site boundary (Exs. A-34, A-36 thru A-67, and P-48A).

143. With all three noise sources at a point in the northwestern end of the site, Points A, H, and I will experience A-weighted sound pressure levels of 66 dBA, 65 dBA, and 68 dBA, respectively, while the other six points will experience levels of 62 dBA and below (Exs. P-48, p. 136, P-48A, and P-48B).

144. With the 108 dBA and one of the 115 dBA noise sources in the northwestern end of the site and the other 115 dBA noise source in the center of the site, Points A, B, and I will experience A-weighted sound pressure levels of

66 dBA each, while the other six points will experience levels of 64 dBA and below (Exs. P-48, p. 136, P-48A, and P-48B).

145. With the 108 dBA and one of the 115 dBA noise sources in the northwestern end of the site and the other 115 dBA noise source at the southeastern end of the site, Points B, E, and I will experience A-weighted sound pressure levels of 66 dBA, 65 dBA, and 65 dBA, respectively, while the other six points will experience levels of 64 dBA and below (Exs. P-48, p. 137, P-48A, and P-48B).

146. The projected operational noise levels at the nine points include the mitigation provided by the berm (Ex. P-49, p. 53).

147. The effectiveness of the berm will depend on the distance of the noise source from the berm, the height of the berm, and the relative height of the listener (Ex. P-49, p. 76).

148. Mr. Diehl did not compare the height of the properties surrounding the quarry with the finished height of the berm (Ex. P-49, p. 78).

149. The operational noise levels at the nine points do not include the mitigation that will be provided by the noise sources moving deeper into the quarry as excavation proceeds (Exs. P-8, Fig. 2, and P-48, pp. 142-143).

150. The operational noise levels at the nine points do not include the ambient noise levels from the Point Pleasant Pike (Ex. P-49, p. 65).

151. Factors that contribute to whether noise is annoying include the frequency of the sound, impulse noises, and duration (Ex. P-49, p. 66).

152. Michael Wong was qualified as an expert in noise and noise mitigation (N.T. 276).

153. Mr. Wong's experience has primarily been in the area of traffic noise (N.T. 273).

154. Mr. Wong has no training in mechanical engineering concerning noise suppression and noise control (N.T. 274).

155. In evaluating the potential noise to be generated by the quarry, Mr. Wong used the Federal Highway Administration's Highway Traffic Noise Prediction Model (N.T. 274; Ex. A-9).

156. Mr. Wong measured the ambient noise level at points A thru I between 7:30 a.m. and 9:30 a.m. on November 30, 1989 (N.T. 278-279, 283, 321, 349).

157. The ambient noise levels at the four sites closest to the Point Pleasant Pike (points C, D, E, and F) ranged from 65.2 dBA to 72.7 dBA, while the ambient noise levels at the five sites removed from the road were all below 50 dBA (N.T. 284-285).

158. Noise levels below 50 dBA are considered to be quiet (N.T. 285; Ex. A-9, Fig. 3).

159. Mr. Wong did not measure the ambient noise levels around the site at any other time or on any other day (N.T. 322-323).

160. In projecting noise levels at the nine sites surrounding the quarry, Mr. Wong added to the two 115 dBA and one 108 dBA equivalent noise sources: the noise generated from trucks entering and exiting the quarry; the noise generated by traffic on Point Pleasant Pike; and the ambient noise at those sites (N.T. 343-344, 347).

161. Both the Federal Highway Administration and the Pennsylvania Department of Transportation have established 67 dBA as the noise level that would generate complaints concerning traffic noise (N.T. 298).

162. As a rule of thumb, a 10 dBA drop in noise level can be expected in a house with the windows open and a 20 dBA drop can be expected in a house with the windows closed (N.T. 315).

Blasting

163. Special Condition 31 requires that all quarry blasts be designed for a maximum peak particle velocity of 0.50 inches per second and maximum noise level of 125 decibels at the nearest structure neither owned nor leased by Miller (Notice of Appeal).

164. Special Condition 31 prohibits the maximum peak particle velocity to exceed 0.75 inches per second and the maximum noise level to exceed 129 decibels (Notice of Appeal).

165. Special Condition 32 requires Miller to monitor all quarry production blasts with seismographic and sound equipment at the "Friends Meeting House" and at the nearest structure neither owned nor leased by Miller (Notice of Appeal).

166. Special Condition 33 authorizes Miller to conduct blasting activity during daylight hours between 10:00 a.m. and 3:00 p.m., Monday through Friday (Notice of Appeal).

167. Special Condition 34 requires Miller to plot and submit to the Pottsville District Office on a quarterly basis a graph of the peak particle velocity, scaled distance, frequency, and noise level of all quarry production blasts monitored pursuant to Special Condition 32 (Notice of Appeal).[8]

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[8]"Scaled distance" is defined as "[t]he actual distance (D) in feet divided by the square root of the maximum explosive weight (W) in pounds that is detonated per delay period for delay intervals of 8 milliseconds or greater; or the total weight of explosive in pounds that is detonated within an interval less than 8 milliseconds." 25 Pa.Code §211.2. "Once the safe minimum Scaled Distance has been determined, the safe maximum Charge Weight per delay for any blast can be determined . . . ." *Id.*

168. Special Condition 36 requires Miller to conduct a pre-blast survey on each structure located within 1,000 feet of the permit boundaries and on each structure located within 2,500 feet of the permit boundaries that is listed as a contributing building in the proposed Gardenville-North Branch Historic District (Notice of Appeal).

169. Special Condition 37 requires all blasts to be designed for a minimum scaled distance of 50 and limited to a maximum of 250 pounds per delay period during the period of time between the completion of the pre-blast surveys required by Special Condition 36 and the completion of the initial ramp to the initial first-lift working face (Notice of Appeal).[9]

170. Special Condition 37 also requires Miller, within 30 days of establishing the initial first-lift working face, to conduct a site specific study of the relationship between peak particle velocity and ground vibration frequency measured at a minimum of four representative structures, including at least two representative historic structures, located within 2,500 feet of the quarry, and an analysis of the relationship between ground vibration frequency and the natural resonant frequency of structures surrounding the quarry (Notice of Appeal).

171. Special Condition 37 prohibits Miller from commencing quarry development blasting until the Department determines whether the approved Blasting Plan must be modified in light of the study and analysis results, and grants written approval to commence quarry production blasting in accordance with the original or modified Blasting Plan (Notice of Appeal).

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[9]The SMP erroneously states that this limit applies during the period of time "between the completion of the pre-blast surveys required by Special Condition #34 . . . ." The reference to Special Condition 34 is obviously an error, since the pre-blast surveys are required by Special Condition 36.

172. Blasting is used to break rock off of the quarry face and drop it onto the quarry floor (Exs. A-74, p. 14, and P-51, p. 9).

173. About 95% of the energy from a blast is used to fracture the rock (Ex. P-51, p. 10).

174. The remaining energy travels away from the hole in the elastic zone[10] in the form of a wave with crests several hundred feet apart and a height of approximately the thickness of a sheet of paper (Exs. A-74, p. 14, and P-51, p. 10).

175. A seismograph measures the rate of motion that takes place as the energy from a blast travels past it (Ex. P-51, p. 11).

176. Particle velocity is the speed at which the ground surface is moving in three dimensions (Exs. A-74, p. 14-15, and P-51, pp. 12, 37).

177. Frequency is the rate at which the ground is vibrating, in oscillations per second, or hertz (Hz) (Ex. P-51, p. 16).

178. Particle velocity and frequency are two factors that govern the potential for damage from blasting (Exs. A-74, p. 58, A-75, p. 36, and P-52, p. 6).

179. There have been no conclusive studies concerning the fatigue caused by long-term blasting (Ex. A-75, p. 5).

180. Thick soils tend to vibrate at a lower frequency, while thin soils tend to vibrate at a higher frequency (Ex. P-51, p. 18-19).

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[10]This area is called the elastic zone because the material is not altered as the energy travels through it (Ex. P-51, p. 10).

181. A relatively thick soil layer is considered to be 30-35 feet in the case of a propagation velocity of 1,000 ft/sec. (Ex. P-51, p. 45).[11]

182. Higher ground vibration frequencies, in the range of 40 oscillations per second, predominate at short distances from a blast, while lower frequencies begin to predominate at approximately 1,000 feet from a blast (Ex. P-52, p. 14-16).

183. When the ground vibration frequency is the same as a structure's natural resonance frequency, the structure will experience a greater sense of vibration (Ex. P-51, p. 16).[12]

184. If the ground vibration frequency is controlled so that it does not match a structure's natural resonance frequency, the potential for damage from vibration is eliminated (Ex. P-52, p. 13).

185. Houses respond to low frequency ground vibrations, generally 3-18 Hz (Exs. A-74, p. 16, and P-51, pp. 18, 39).

186. The way in which a house responds to vibration is primarily a function of the height of the house and not the material of construction (Ex. P-51, p. 39).

187. Tall houses are more flexible and tend to respond to a lower frequency (Ex. P-51, p. 39).

188. More flexible structures are more sensitive to ground vibrations that match their natural frequencies (Ex. P-52, p. 48).

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[11]Propagation velocity is the speed at which compressional energy travels through the ground and is faster than the particle velocity, which is the speed at which the seismic signal moves through the ground (Ex. P-51, p. 37).

[12]"Resonance" is defined as "a vibration of large amplitude in a mechanical or electrical system caused by a relatively small periodic stimulus of the same or nearly the same period as the natural vibration period of the system." *Webster's Ninth New Collegiate Dictionary* (1984).

189. More massive structures tend to respond to lower ground vibration frequencies (Ex. P-52, p. 47).

190. The area surrounding the site is favorable for the transmission of low frequency vibrations (Ex. P-51, p. 21).

191. James Reil is a Certified Professional Geologist and Licensed Blaster (Ex. P-51A).

192. Mr. Reil is the Vice President of Vibra-Tech Engineers, whose main business is monitoring and measuring the seismic signals produced primarily by blasting (Ex. P-51, p. 6).

193. Mr. Reil has been involved with seismic work for about 23 years, during which time he has seen the recorded vibration signals from tens of thousands of blasts, developed techniques to analyze those signals, and developed techniques to minimize the energy contained in those signals (Ex. P-51, pp. 7-8).

194. Delay blasting divides one large blast into multiple smaller detonations, which results in increased rock fragmentation and decreased energy in the elastic zone (Ex. P-51, p. 13).

195. The sequence and timing of detonations in a delay blast can be altered to control the frequency of the resulting ground vibrations (Ex. P-51, pp. 19-20).

196. Vibra-mapping is a technique to control the effects of a blast by altering the ground vibration frequencies generated by a blast so they do not match the natural resonant frequencies of buildings in the surrounding area (Ex. P-51, p. 20).

197. The vibra-mapping technique has been used several hundred times to reduce the adverse effects of blasting (Ex. P-52, p. 38).

198. A response spectra analysis determines how a structure responds to both particle velocity and the frequency and duration of ground motion (Exs. P-51, p. 21, and Ex. P-52, pp. 9-10).

199. Using a response spectra analysis, the specific natural resonant frequency of a building can be determined (Ex. P-52, p. 12).

200. The responses of structures around the site are primarily a function of the soil layer (Ex. P-51, p. 21).

201. Vibra-Tech has been hired to perform vibra-mapping of the quarry and to institute a system to minimize ground vibration frequencies that match the natural resonance frequencies of neighboring buildings (Ex. P-51, p. 21).

202. Use of vibra-mapping will reduce the noticeability of blasting in the area surrounding the site (Exs. P-51, p. 23, and P-52, p. 64).

203. Arthur Dvinoff is a Professional Engineer in civil engineering and has more than 20 years of experience in the field of geotechnical engineering (Ex. A-74, pp. 6-7).

204. Mr. Dvinoff is not familiar with frequency dampening techniques except from a Vibra-Tech report, has not done any field testing to determine whether the technique works, and does not know how widely the technique is used in the United States (Ex. A-74, p. 57).

205. Mr. Dvinoff's complete understanding of the blasting to occur at the quarry is derived from Miller's Blasting Plan, not the SMP (Ex. A-74, p. 13).

206. Mr. Dvinoff believes the purpose of the vibra-mapping technique is to reduce the peak particle velocity generated by a blast (Ex. A-74, pp. 33-34).

207. The United States Department of the Interior's Bureau of Mines conducted two studies on the effects of blasting on residential structures in 1971 and 1980 (Ex. A-74, p. 20).

208. The 1980 study concluded that peak particle velocity should not exceed 0.75 inches per second for modern structures and 0.5 inches per second for older structures with plaster walls (Ex. A-74, p. 22).

209. Blasts with a peak particle velocity limited to 0.5 inches per second in an active quarry between 300 and 500 feet away have caused no noticeable damage to the 200 year old St. Peter's Episcopal Church in Great Valley (Ex. P-52, pp. 29-31).

210. Charles N. Timbie is a structural engineer and a registered Professional Engineer (Ex. A-75, pp. 68-69).

211. Mr. Timbie has evaluated the effects of blasting and vibration on structure failure (Ex. A-75, p. 71).

212. Mr. Timbie conducted a study of the potential effects of blasting on eight properties around the site (Exs. A-20 and A-75, p. 77).

213. Mr. Timbie admitted that peak particle velocity is reduced as distance from the blast site is increased, but could not calculate the reduction (Ex. A-75, p. 13).

214. In the Bureau of Mines study, it was concluded that with a peak particle velocity of 0.5 inches per second there is a 5% probability of threshold damage, and that with a peak particle velocity of 0.75 inches per second there is a 10-11% probability of threshold damage (Ex. A-75, pp. 99-100).[13]

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[13]"Threshold damage" is defined as loosened paint, small plaster cracks, and lengthened existing cracks (Ex. A-75, p. 96).

215. Due to their age and less-forgiving stone construction, Mr. Timbie believes the buildings surrounding the quarry will behave differently than the buildings in the Bureau of Mines study (Ex. A-75, pp. 4-5).

216. Mr. Timbie anticipates a 20% probability of threshold damage in buildings surrounding the quarry if blasts generate a peak particle velocity of 0.75 inches per second (Ex. A-75, p. 5).

217. Mr. Timbie also anticipates that most of the buildings surrounding the quarry will have suffered some damage by the time the quarry closes (Ex. A-75, p. 7).

218. Mr. Timbie admitted that ground vibration frequency is also very important in determining the probability of damage (Ex. A-75, p. 20).

219. The Bureau of Mines study also found that with high frequency blasts there is no probability of damage until the peak particle velocity exceeds 1.1 or 1.2 inches per second (Ex. A-75, p. 19).

220. Mr. Timbie's testimony concerning the effects of blasting at the site are based on low frequency ground vibrations (Ex. A-75, p. 37).

The Gardenville-North Branch Rural Historic District

221. A rural historic landscape is a geographic area used, shaped, or altered over time by human activity, occupancy, or intervention and which possesses a significant concentration, linkage, or continuity of landscape features, including areas of land use, buildings, vegetation, roads and waterways, and natural features (N.T. 504; Ex. P-62, p. 2).

222. The Gardenville-North Branch Rural Historic District (Historic District) was listed on the National Register of Historic Places by the United States Department of the Interior, National Park Service (Park Service) on November 7, 1991 (N.T. 500-501; Exs. A-33, A-34).

223. The Historic District was listed for its historic significance in agriculture and for the architectural significance of its contributing structures for the period 1765-1940 (N.T. 506; Ex. P-58).

224. The structures on the site were determined by the Park Service to be "noncontributing" to the Historic District (N.T. 555-556; Ex. P-55, pp. 72-73).

225. Kathryn Auerbach, a historic preservation consultant who prepared the Historic District designation application and testified on behalf of Plumstead, was of the opinion that the site exhibited early (i.e. 18th and 19th century) land division patterns, including William Penn land grant lines, and agricultural practices in the form of large rectangular fields divided by fencerows (N.T. 506, 531).

226. Ms. Auerbach did not attempt to age the trees or other vegetation in the hedgerows and fencerows on the site and had no evidence that the hedgerows and fencerows on the site, with the exception of the Miller-Trainer property line, were indicative of the Penn land grants (N.T. 559, 566).[14]

227. Michael Borsuk, a registered landscape architect in Pennsylvania, examined the hedgerows on the site (Ex. P-63, pp. 79-81).

228. Borsuk inventoried the types of plants in the hedgerows and the sizes of the trees (Ex. P-63, p. 84).

229. While conducting his inventory of the transverse fencerows on the site, Mr. Borsuk encountered a structure in the center of the vegetation which was referred to by Ed Brzostek of the Bucks County Soil Conservation Service as a "water catch" (Ex. P-63, pp. 84, 87).

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[14]We will use the terms "fencerow" and "hedgerow" interchangeably.

230. The water catches were man-made drainage and erosion control structures that ran across the slope of the site, parallel to Point Pleasant Pike and the North Branch of the Neshaminy Creek (Ex. P-63, pp. 8-9, 188).

231. The vegetation on either side of the catches was volunteer growth, i.e. indigenous plants that grew because the property was not disturbed by human activity (Ex. P-63, pp. 14, 16, 85-86).

232. Volunteer growth was not typical of the vegetation associated with fencerows of the period (Ex. P-63, p.14, 16, 85-86).

233. Based on the age of one of the largest ash trees in Hedgerow 9, the water catches and associated hedgerows date to approximately 1925 (Ex. P-63, p. 89).

234. The hedgerows on the outside of the site, particularly Hedgerows G and I, were much older than the interior hedgerows and are reflective of property boundaries (Ex. P-63, pp. 36-38).

235. The Department notified the Pennsylvania Historical and Museum Commission (Historical Commission) when Miller's permit applications were filed and solicited the Historical Commission's input (N.T. 836).

236. The Department met with the Historical Commission on April 9, 1991, to discuss Miller's permit applications (N.T. 837; Ex. A-69).

237. Subsequent to the meeting, the Historical Commission recommended to the Department that Miller's applications be denied because of adverse effects to the proposed Historic District; if the applications were to be granted, the Historical Commission recommended additional or modified permit conditions (Ex. A-69).

238. The Historical Commission recommended that a Phase I archaeological survey be conducted on the site, but the Department rejected this

recommendation because there was no evidence that the proposed permit area was an archaeological site (N.T. 838).

239. The Historical Commission recommended that a pre-blast survey be conducted for any structure within 2500 feet of the permit area which is a contributing structure in the Historic District (N.T. 838; Ex. A-69).

240. The Historical Commission's recommendation concerning a pre-blast survey was incorporated in Standard Condition 36 of the SMP (Notice of Appeal).

241. The Historical Commission recommended that as much of the tree cover around the perimeter of the permit area and the areas not proposed for quarrying and support be preserved and that new plantings be native trees and shrubs consisting of a mixture of coniferous and deciduous species (Ex. A-69; N.T. 838).

242. The Historical Commission's recommendation concerning tree cover and plantings was incorporated in Standard Conditions 12 and 13 of the SMP (Notice of Appeal).

243. The Historical Commission recommended that non-intrusive signs be placed at the entrance to the site, which is required by Standard Condition 6 of the SMP (Notice of Appeal; N.T. 838; Ex. A-69).

244. The Historical Commission recommended that any historic features that were to be destroyed by the operation be recorded photographically and that the photographs be submitted to the Historical Commission (Ex. A-69; N.T. 838).

245. The Historical Commission's recommendation concerning a photographic record of historic features became Standard Condition 39 of the SMP (Notice of Appeal).

246. At the time of the hearing on the merits the site was zoned for single family homes on 60,000 square feet lots (Ex. P-55, p. 17).

247. Miller proposes to place landscaped berms around the perimeter of the site as a visual barrier (Ex. P-55, pp. 17-18).

248. The berm and preservation of trees on the site boundary, as recommended by the Historical Commission, would have a less detrimental visual impact on the Historic District than development of the site in accordance with present zoning ordinances (Ex. P-55, pp. 21, 23).

DISCUSSION

Burden of Proof

As with all third party appeals from the Department's issuance of a permit, the burden of proof in this matter rests upon the appellant, Plumstead. 25 Pa.Code §21.101(c)(3); Jay Township v. DER, *et al.*, EHB Docket No. 91-401-MR (Adjudication issued November 8, 1994). In order to satisfy its burden, Plumstead must prove, by a preponderance of the evidence, that the Department's issuance of the SMP and Authorization to Mine was an abuse of discretion, arbitrary, capricious, or contrary to law. *See*, 25 Pa.Code §21.101(a); Jay Township, *supra*.

Dr. Siddiqui's Pre-Recorded Rebuttal Testimony

In its post-hearing brief, Plumstead contends Chairman Woelfling's June 25, 1992, order was in error insofar as it declined to admit the pre-recorded rebuttal testimony of Dr. Siddiqui. Plumstead also attempted to introduce Dr. Siddiqui's testimony through proposed findings of fact contained within Appendix A to its post-hearing brief. Chairman Woelfling had found Dr. Siddiqui's testimony to be cumulative and not the proper subject of rebuttal. Upon further review, the Board confirms this ruling.

It is well established that a trial court may properly exclude rebuttal if the testimony could have been presented during the appellant's case

in chief. Estate of Hannis v. Ashland State General Hospital, 123 Pa.Cmwlth. 390, ___, 554 A.2d 574, 577, *appeal denied*, 524 Pa. 632, 574 A.2d 73 (1989). In his proposed rebuttal testimony, Dr. Siddiqui offered additional bases to support his conclusion that there are multiple permeable zones beneath and adjacent to the site. Plumstead could have and should have presented this testimony during its case in chief. Plumstead was aware as early as 1989 that Satterthwaite believed there is only one permeable zone beneath the site.[15] Plumstead had ample time, therefore, to develop data necessary to dispute Mr. Satterthwaite's opinions. Furthermore, Plumstead's counsel admits that the data underlying Dr. Siddiqui's testimony could have been developed earlier. *See*, Plumstead's June 4, 1992, letter in support of its proposed rebuttal testimony. The Board finds, therefore, that Chairman Woelfling properly excluded Dr. Siddiqui's proposed rebuttal testimony. *See*, Estate of Hannis, 123 Pa.Cmwlth. at ___, 554 A.2d at 578.

Protection of Hydrologic Balance

Plumstead first contends the Department's issuance of the SMP was an abuse of discretion because the Department had no evidence from which to evaluate the probable impacts of the quarry on the water table and water supplies adjacent to the site. In support of its position, Plumstead cites a number of provisions from the Department's noncoal surface mining regulations, which, Plumstead contends, require an applicant to provide the Department with detailed information concerning the consequences of mining to the hydrogeology underlying surrounding areas. *See*, 25 Pa.Code Ch. 77, Subchs. H and I.

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[15]Plumstead was an active participant in the zoning proceedings before the Plumstead Township Board of Supervisors. Mr. Satterthwaite testified on direct before that body in September and October 1989 (Exs. P-41 thru P-43).

Having reviewed the Department's noncoal mining regulations, the Board agrees that an applicant must provide detailed information concerning the hydrogeology beneath the site and adjacent areas. Under 25 Pa.Code §77.457(a), an application for a noncoal surface mining permit must contain: a description of the measures to be taken to ensure the protection of the quantity and quality of surface and groundwater within and adjacent to the permit area; and a determination of the hydrologic consequences of the proposed mining activities. Furthermore, under 25 Pa.Code §77.457(b)(1) and (4),[16] an application must also include: a plan to control surface and groundwater drainage into, through, and out of the permit and adjacent areas; and a determination of the probable effects of mining activities on the hydrologic regime and the quantity and quality of water in surface and groundwater systems.

In addition to regulations governing the content of a noncoal surface mining permit application, Plumstead has also cited regulations governing the performance standards and design requirements applicable to noncoal surface mining activities. *See*, 25 Pa.Code Ch. 77, Subch. I. Under 25 Pa.Code §77.521(a) and (b), noncoal surface mining activities: must be planned and conducted to minimize disturbances to the hydrologic balance[17] within the permit and adjacent areas; and must minimize changes in water quality and quantity, depth to groundwater, and the location of surface water drainage in order to

[16]Although Plumstead cites §77.457(b)(5) in its post-hearing brief, the Board notes there is no such subsection and assumes from Plumstead's description of the regulation that it meant to cite subsection (b)(4).

[17]"Hydrologic balance" is defined as "[t]he 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. The term includes the dynamic relationships among precipitation, runoff, evaporation and changes in groundwater and surface water storage." 25 Pa.Code §77.1.

preserve the postmining land use of the permitted area. Furthermore, under 25 Pa.Code §77.533, the operator of a noncoal surface mine must restore or replace all of the public and private water supplies that are affected by contamination, interruption, or diminution.

Plumstead contends the application approved by the Department was insufficient because it did not describe the probable effects of mining on the groundwater beneath adjacent areas. Specifically, Plumstead is concerned that: Miller only supplied well data for the middle of the site; the well data that was submitted was offered only to prove the existence of a single permeable zone on the site; there are no wells in, or near, the area where mining activities will commence; Miller only monitored the effects of a pump test on one adjacent property; and data from wells in the Township was outdated. In addition, Plumstead believes it has affirmatively shown that the quarry will adversely affect groundwater beneath areas adjacent to the site.

After reviewing the evidence concerning the hydrogeology of the site and adjacent area, the Board concludes Plumstead's claim is without merit. Miller has provided sufficient information to characterize the probable effects of the quarry on the surrounding area.[18] Furthermore, Plumstead has failed to show that the proposed quarry will have adverse effects on groundwater at the site or adjacent areas.

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[18]Because the Board reviews the Department's actions *de novo*, the relevant inquiry is whether the Department's actions can be sustained on the basis of the evidence before the Board, not whether the Department had sufficient evidence when it acted. *See*, Warren Sand & Gravel Co. v. DER, 20 Pa.Cmwlth. 186, ___, 341 A.2d 556, 565 (1975); Al Hamilton Contracting Co., Inc. v. DER, EHB Docket No. 92-468-E (Adjudication issued August 10, 1994).

- **Adequacy of Miller's Test Wells**

Plumstead is first concerned with the location of Miller's test wells, claiming that they were drilled primarily in the middle of the site and, therefore, could not adequately characterize the hydrogeology underlying the perimeter of the site and adjacent areas. This position is without merit because it fails to recognize the nature of the Lockatong Formation into which the proposed quarry will be developed. The Lockatong Formation is a sedimentary rock, characterized by a very fine particle size (Exs. P-8, Fig. 5, and P-41, pp. 66, 72). Groundwater within the Lockatong Formation moves through and is stored in fractures in the rock, and, as a result, well yields in the Lockatong Formation are typically much lower than those in other formations, such as the Brunswick or Stockton, which lie above and below the Lockatong Formation, respectively (N.T. 39, 42-43, 671; Exs. P-8, Fig. 5, and P-41, p. 66, 79-80).

The Lockatong Formation beneath the site is atypical because many wells drilled there have yields several times greater than wells drilled into the Lockatong Formation elsewhere (Ex. P-42, pp. 17, 18, 34). After drilling three rock characterization wells (W-1 thru W-3), nine observation wells (OBS-1 thru OBS-9), and one pumping and observation well (P-2), and conducting a pump test, packer test, camera test, and scrape test, Miller was able to confirm that the abnormally high well yields were the result of a single, relatively permeable "zone" within the Lockatong Formation beneath the site.[19]

The permeable zone is approximately 40-50 feet thick, conforms to the bedding beneath the site, i.e. has the same strike and dip as the Lockatong Formation, and reaches the surface at roughly the center of the site (Exs. P-8, Fig. 21, P-42, p. 62, and P-43, p. 8). Although referred to as a "zone," it is

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[19]*See*, Findings of Fact 26-58.

not uniformly permeable. Only some of the permeable areas are hydraulically interconnected, while the others are distinct and separate (Ex. P-43, p. 8). Because it is relatively thin, the permeable zone occupies at most five percent of the total volume of the proposed quarry (Ex. P-43, p. 63).

Plumstead correctly asserts in its post-hearing brief that the majority of Miller's test wells were drilled in the center of the site (Ex. P-17A). This does not mean, however, that Miller was unable to adequately characterize the hydrogeology beneath and adjacent to the site. The record indicates that the Lockatong Formation has a strike and dip at the site of north 58 east and 15 degrees to the northwest, respectively, and that the permeable zone is aligned with this bedding (N.T. 28; Exs. P-8, Figs. 9 and 21, P-41, P. 69, and P-42, pp. 9, 62). Given the relatively uniform dip of the geology beneath the site, wells drilled to varying depths in the middle of the site were able to penetrate most of the formations to be excavated and, therefore, characterize approximately 90% of the proposed quarry (Ex. P-43, p. 73). Two additional wells (OBS-8 and OBS-9) were drilled in the southeastern and northwestern ends of the site, respectively, to penetrate and characterize the remaining 10% (*Id.*).

The Board finds that this evidence adequately characterizes the hydrogeology beneath the site. Although Miller's test wells were located primarily in the center of the site, Miller was able to use information concerning the nature and dip of the formation to depict the underlying hydrogeology. This information enabled Miller to calculate the quarry's probable effects on the hydrogeology underlying the surrounding area.

- The Quarry's Probable Effects on Adjacent Properties

Plumstead claims that as a result of inadequate well data, Miller cannot adequately describe the probable effects of mining on the hydrogeology underlying the surrounding area. This position is also without merit. The Board has already found that the well data developed by Miller adequately described the hydrogeology beneath the site. Because of the uniform nature of the Lockatong Formation, the Board also finds that this data is sufficient to calculate the probable effects of the quarry on the surrounding area, as required by 25 Pa.Code §77.457(a) and (b)(4).

In finding the evidence before the Board sufficient to determine the quarry's probable effects on the surrounding area, the Board begins with the understanding that the quarry will become a groundwater discharge area (N.T. 99, 772). Although the quarry may affect offsite groundwater supplies, the effects will not be uniform in every direction and will only extend to wells drilled into areas hydrogeologically connected with the water-bearing zones the quarry intercepts (N.T. 187, 189, 224, 233; Ex. P-8, Fig. 18). Data derived from a 72 hour pump test of well W-3, which is roughly in the center of the site, indicates that the quarry's effects offsite will be felt primarily to the northeast and southwest of the site (Ex. P-8, Fig. 18).

In addition to the pump test data, the well data indicates that groundwater within the permeable zone behaves independently of the rest of the Lockatong Formation (Ex. P-43, pp. 20-21). In other words, the permeable zone is an anomalous region sandwiched between two typical layers of the Lockatong Formation, which are minimally fractured and possess very little ability to accept and yield water (Ex. P-42, p. 77). Accordingly, even when the quarry does intercept the permeable zone, it will likely have no effect on the remainder of

the Lockatong Formation, either on- or offsite (N.T. 749). This position is supported by well data from wells OBS-8 and OBS-9, which were drilled in the southeastern and northwestern ends of the site and revealed a normal Lockatong Formation at those locations (N.T. 667; Ex. P-17A).[20]

Based on the evidence presented above, the Board concludes there is sufficient information on the hydrogeology underlying the site to determine the quarry's probable effects on the surrounding area.

- Dr. Siddiqui's Fracture Trace Analysis

In conjunction with its argument concerning the lack of information contained in Miller's permit application, Plumstead also contends the record indicates that the proposed quarry will adversely affect groundwater in the areas surrounding the site. In support of this position, Plumstead relies primarily on a fracture trace analysis performed by its hydrogeology expert, Dr. Shams Siddiqui. A fracture trace analysis is performed using overlapping aerial photographs viewed through a stereoscope to look for visible cues of fracture traces, such as alignment of soil color changes, topographic alignment, vegetation alignment, and straight stream segments (N.T. 60-61). Fracture traces on the surface often reflect underground fractures, which are expected to contain water below the regional water table (N.T. 62, 63, 68). Fracture trace analyses have been successful over the past 18-19 years in locating areas for drilling high-yielding wells (N.T. 62).

[20]In its post-hearing brief, Miller also refers to the extensive testimony developed concerning the use of grout to limit the amount of groundwater infiltrating the quarry from the permeable zone. While the evidence indicates such a program would be effective in limiting the amount of groundwater entering the quarry, there is absolutely no evidence that Miller will be using this process. The Board, therefore, is unable to rely on the probable effectiveness of a grout program in determining whether the quarry will affect the hydrogeology surrounding the site.

Although Dr. Siddiqui's fracture trace analysis indicates the presence of numerous fracture traces on the surface of the site, Plumstead introduced no evidence that these fracture traces reflect water-bearing fractures beneath the site. Dr. Siddiqui did not try to match his fracture traces with high-yielding wells on the site or in the area, or otherwise attempt to verify that the fracture traces were actual indicators of below-ground fractures (N.T. 69). Furthermore, Well OBS-9 was purposely drilled at the intersection of two fracture traces, but only yielded a total of four gpm, which is typical for a well drilled into the Lockatong (N.T. 665-667, 674). Because Dr. Siddiqui did not present any evidence to verify that the fracture traces located on the site reflect water-bearing fractures, the Board is unable to conclude the quarry will adversely groundwater supplies offsite.[21]

Based on the foregoing, the Board cannot find that Miller's permit application failed to comply with the applicable provisions of 25 Pa.Code Ch. 77, or that the Department's issuance of the SMP was an abuse of discretion on that basis.

Protection of Groundwater Supplies

Plumstead next contends the Department's issuance of the SMP was an abuse of discretion because Miller has not established that groundwater in the area of the proposed quarry will be protected and because the record clearly establishes that groundwater loss is inevitable. In making this argument,

[21]Where Dr. Siddiqui's testimony is at odds with the testimony offered by Mr. Satterthwaite, the Board will give more weight to that of Mr. Satterthwaite. While Mr. Satterthwaite engaged in a comprehensive study of the hydrogeology underlying the site, Dr. Siddiqui's analysis consisted primarily of examining and analyzing the work of Mr. Satterthwaite. While this may be an appropriate use of expert evidence, the Board has often given less weight to such shallow analyses. *See*, Montgomery Twsp. v. DER, EHB Docket No. 93-091 (Adjudication issued April 12, 1995).

Plumstead does not rely on any specific provision of the Noncoal Act or regulations thereunder, but instead argues those regulations establish a "regime" which requires a permittee to identify adverse effects and to provide protection of water resources prior to mining.

- Operation and Reclamation Plan

Under 25 Pa.Code §77.126(a)(2), the Department may not issue a permit unless the permit application has affirmatively demonstrated that the proposed noncoal surface mining activities can reasonably be accomplished under the operation and reclamation plan contained in the application. *See also*, 52 P.S. §3308(a)(2). Among the information to be included in the operation and reclamation plan is a description of the measures to be taken during and after mining to ensure protection of the rights of present users of surface and groundwater. 25 Pa.Code §77.457(a).

After reviewing the evidence in the record concerning the probable effects of the quarry on surrounding groundwater supplies, the Board concludes Plumstead has not demonstrated that the Department's issuance of the SMP was contrary to the requirements of the Noncoal Act or Chapter 77, or otherwise an abuse of discretion.

In the discussion concerning the probable effects of the quarry on adjacent areas, *supra*, the Board found that the quarry will only affect wells that are drilled into water-bearing zones intercepted by the excavation. A 72 hour pump test of well W-3 in the middle of the site revealed that intercepting the permeable zone affect wells primarily to the northeast and southwest of the site (Exs. P-8, Fig. 18, and P-43, pp. 23-24).

In making its argument about the probable effects of the quarry on neighboring water supplies, Plumstead relies on Dr. Siddiqui's testimony

concerning the amount of water the quarry will encounter when it intercepts the permeable zone. Dr. Siddiqui testified that when the quarry intercepts the water-bearing zone into which well OBS-2 was drilled, groundwater will infiltrate the quarry at the rate of at least 150 gpm or 216,000 gpd (N.T. 103). Such an infiltration of groundwater, Dr. Siddiqui contends, will have a much greater effect on neighboring wells, over a greater distance, than was experienced during the 72 hour pump test (N.T. 104, 106). Given the amount of water that could infiltrate the quarry, Dr. Siddiqui believed it would be possible for the quarry to completely dewater some water-bearing zones up to 6,000 feet from the site (N.T. 104).

Dr. Siddiqui's testimony, however, fails to take into account several factors which would tend to limit the amount of water that will infiltrate the quarry. The first factor is the variability of the permeable zone within the site. This means that although some permeable areas are hydraulically interconnected, others are distinct and separate (Ex. P-43, p. 8). It also means that not all of the water-bearing areas within the zone will yield the same amount of water (Ex. P-42, p. 74). The second factor overlooked by Dr. Siddiqui is that after the quarry excavation intercepts a water-bearing zone, the rate at which water flows into the quarry will eventually decrease once the water-bearing zone is dewatered (Ex. P-44, p. 46). After a water-bearing zone is dewatered, groundwater infiltration into the quarry from that zone will be limited to the daily amount of recharge (Ex. P-44, p. 46). By relying solely on the single 150 gpm well encountered on the site, Dr. Siddiqui overestimated the rate at which water would infiltrate the quarry. Dr. Siddiqui's testimony, therefore, must be read as having overestimated the possible effects of the quarry on neighboring wells.

Plumstead, apparently realizing the weakness of Dr. Siddiqui's testimony, also points out that the evidence does not have to be absolutely certain in order for Plumstead to sustain its burden of proof. In Coolspring Twsp. v. DER, 1983 EHB 151, 173, the Board found it would have been an abuse of discretion for the Department to have insisted upon enforcing a regulation that produces "unwonted" effects.[22] The Board went on to state that an appellant need not prove undesirable consequences are certain to occur or are even probable. *Id.* Certain consequences are so disastrous, such as a nuclear accident, that even the smallest chance of them occurring is intolerable. *Id.* The Board, however, also made it abundantly clear that whatever the tolerable probability, it was the appellant's burden to show this probability *will* be exceeded. *Id.* It is this burden that Plumstead has not satisfied.

Although the evidence indicates the quarry may result in a drawdown in the water level in some neighboring wells (N.T. 82, 185, 681-682; Exs. A-5, Fig. 10, and P-43, p. 24), there is almost no evidence from which to determine the likelihood or the severity of such drawdowns. Furthermore, the evidence that does exist seems to suggest there is little likelihood of a neighboring well being totally dewatered.[23] Plumstead, therefore, has not demonstrated that Miller's mining activities will exceed the tolerable probability of dewatering neighboring groundwater supplies.

- Protection of Groundwater Supplies

In the body of its second argument, Plumstead also appears to contend the Department's issuance of the SMP was an abuse of discretion because the terms

[22]*Webster's Ninth New Collegiate Dictionary* (1989) defines "unwonted" as "being out of the ordinary."

[23]*See*, the Board's discussion on the probable effects of the quarry, *supra*.

of the SMP, as well as the requirements of 52 P.S. §3311(g) and 25 Pa.Code §77.533, do not provide adequate protection for existing groundwater supplies. According to Plumstead, these provisions are retrospective, i.e. only provide for the repair or replacement of groundwater supplies after they have been affected. Such a scheme, Plumstead argues, is contrary to the "regime" established by the Noncoal Act and 25 Pa.Code Ch. 77. The Board disagrees, and is persuaded that the conditions imposed by the SMP, as well as the requirements of the Noncoal Act and regulations thereunder, provide sufficient protection to the groundwater supplies of neighboring property owners.

Special Conditions 22 and 24 of the SMP require Miller to monitor both the amount of groundwater pumped from the quarry and the static water levels in 10 wells surrounding the site (Notice of Appeal). As the quarry intercepts water-bearing zones and must be pumped out to keep the work area dry, a cone of depression will develop around the quarry that may extend to neighboring wells (N.T. 99, 104, 169, 772). Although they do not contain any performance standards, i.e. limits on the amount of water that may infiltrate the quarry or on the amount of drawdown that may occur in any well, the information provided by this monitoring will be helpful to both Miller and the Department in determining whether the quarry is adversely affecting neighboring wells (N.T. 431, 687-691, 864; Ex. P-53).

Special Condition 8 of the SMP requires Miller to secure written approval from the Department before beginning construction of each new 50 foot bench (Notice of Appeal). Under Special Condition 25, if the Department determines from groundwater monitoring that any well will be "significantly dewatered" as a result of the development of any 50 foot bench, the Department may require Miller to replace the well prior to beginning development of the

bench (Notice of Appeal). Even if the Department authorizes development to proceed, under Special Condition 25, §11(g) of the Noncoal Act, 52 P.S. §3311(g), and 25 Pa.Code §77.533, Miller must restore or replace any water supply that is contaminated, interrupted, or diminished as a result of its mining activities.[24]

Looking at all of these provisions together, the Board finds that they provide adequate protection for neighboring water supplies. Miller must conduct extensive monitoring of the groundwater infiltrating the quarry and in wells surrounding the site. If data from this monitoring indicates the quarry will affect a water supply, the Department may order Miller to replace that supply before Miller can continue mining. And finally, even if the Department is unable to detect a potential problem and Miller's mining does affect a water supply well, Miller must restore or replace it.

Although Miller's quarry will be excavated to a final elevation of 100 feet below sea level, the evidence indicates there will be an ample supply of groundwater to replace or restore any water supply wells that are adversely affected by mining. Based on a study commissioned by the Delaware River Basin Commission, the median and average yields of wells drilled into the Lockatong Formation are 6.3 gpm and 11.7 gpm, respectively (N.T. 166).[25] In addition, the Lockatong aquifer in the area of the site extends to a depth of more than 700 feet below the surface, far below the final elevation of the quarry (N.T. 168,

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[24]52 P.S. §3311(g) states, in relevant part: "Any surface mining operator who affects a public or private water supply by contamination, interruption or diminution shall restore or replace the affected supply with an alternate source of water adequate in quantity and quality for the purposes served by the supply." The language of 25 Pa.Code §77.533 is essentially the same.

[25]Because Plumstead failed to introduce any evidence about the minimum well yield required for a residence within its jurisdiction, the Board must accept Dr. Siddiqui's testimony that a well yield of two or three gpm is more than adequate (N.T. 164-165, 248).

169). Accordingly, it will be possible for Miller to replace or restore affected water supplies either by moving them to areas within the Lockatong Formation not hydrogeologically connected to the site or by drilling them deeper (N.T. 169, 695, 698, 818, 862). Given the ample supply of groundwater which will exist even after the quarry is fully developed, the quarry's development should not affect the quantity of groundwater available for future uses (N.T. 698).

Although Plumstead is concerned that a property owner may remain without a water supply while Miller challenges a Department order to replace the affected supply, this position is without merit. Under §4(d) of the Environmental Hearing Board Act, the Act of July 13, 1988, P.L. 530, as amended, 35 P.S. §7514(d)(1), "[n]o appeal shall act as an automatic supersedeas." Miller, therefore, will have an obligation to comply with the Department order and replace or restore the affected water supply while its appeal is heard.

Based on the foregoing analysis, the Board finds that Plumstead's second basis for appeal is without merit.

Operational Noise

In its post-hearing brief, Plumstead also contends the Department's issuance of the SMP was an abuse of discretion because the Department failed to limit the increase in noise generated by the quarry to 15 decibels (dBA) above background or to limit the total noise generated by the quarry to 67 dBA.[26] Although Plumstead admits there are no statutory or regulatory standards that limit operational noise generated by a quarry, Plumstead argues the Department must consider the amount of noise likely to be generated by surface mining and

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[26]The abbreviation "dBA" refers to the A-weighted sound pressure level at a given point. Sound pressure is what the human ear hears and responds to, and is a function of location, while the A-weight level is the measurement of sound pressure that best corresponds to the human ear's response (N.T. 279; Ex. P-48, pp. 125-126).

determine whether it will constitute a public nuisance. Miller agrees the Department should regulate operational noise if it determines the noise will constitute a public nuisance, but contends the noise to be generated by the quarry will not rise to that level.

In support of its position, Plumstead cites several Board decisions that establish the Department's duty to consider noise. *See*, Snyder Township v. DER, 1988 EHB 1202, Guy and Mary Seitliff v. DER, 1986 EHB 296, Robert Kwalwasser v. DER, 1986 EHB 24, and Doris J. Baughman, *et al.* v. DER, 1979 EHB 1. In Snyder Township, the most recent of these decisions, the Board acknowledged there are no regulatory standards concerning operational noise under the Surface Mining Conservation and Reclamation Act, the Act of May 31, 1945, P.L. 1198, as amended, 52 P.S. §1396.1 *et seq.* (SMCRA). 1988 EHB at 1212. Nevertheless, the Board found it would be an abuse of discretion for the Department not to consider the noise likely to be generated by a surface mine and determine whether that noise will constitute a public nuisance under §1917-A of the Administrative Code of 1929, the Act of April 7, 1929, P.L. 177, as amended, 71 P.S. §510-17. 1988 EHB at 1212. Because the appellant was unable to prove that the Department failed to consider noise in reviewing the permit application, or that the operational noise from the mine site would amount to a public nuisance, the Board had to dismiss the appeal. 1988 EHB at 1213. *See also*, Kwalwasser, 1986 EHB at 65 (because the appellant proved the Department did not evaluate noise when reviewing the permit application, the Board found the Department's issuance of a surface mining permit to have been an abuse of discretion).

As with the situation before the Board in Snyder Township, there are no statutory or regulatory standards governing the operational noise generated by a noncoal surface mine. *See*, 52 P.S. §3301 *et seq.*; 25 Pa.Code Ch. 77.

However, given prior Board precedent on the issue of operational noise and Miller's position in its post-hearing brief, the Board will find that the Department's issuance of the SMP was an abuse of discretion if Plumstead has shown either: that the Department failed to evaluate noise when reviewing the permit application; or that the noise to be generated by the quarry will constitute a public nuisance.[27]

The record indicates the Department considered the noise to be generated by the quarry when it evaluated Miller's permit application. Thomas Whitcomb, a Department hydrogeologist, testified that the Department evaluated the noise to be generated by Miller's quarry operation (N.T. 848-850). Mr. Whitcomb further explained that Miller's permit application contained measures designed to reduce or manage the noise the quarry might generate, and that the Department expected Miller's quarry to generate less noise than other quarries the Department has studied (*Id.*). Plumstead, therefore, has failed to prove that

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[27]In its post-hearing brief, Plumstead appears to be arguing that the Department's issuance of the SMP was an abuse of discretion because it contains no provisions establishing performance standards for noise at adjacent property lines. In Seitliff, the Board found the Department had abused its discretion in issuing a surface mining permit because the permit lacked conditions to ensure that noise levels from the mining activities would not rise to the level of a public nuisance. 1986 EHB at 303. This requirement was not based on any statutory or regulatory provision or prior decision of the Board or other tribunal, but instead on the belief that such permit conditions would benefit all parties to the dispute. *Id.* at 304. In addition, the Board found the Department had abused its discretion despite the appellant's failure to prove that the Department did not consider noise in issuing the permit.

In the current proceeding, Plumstead has failed to prove, through expert testimony or otherwise, what would be accceptable noise levels from the quarry's operations. As explained above, Plumstead also failed to show that the expected noise levels would amount to a public nuisance. Although the Board, in Seitliff, was able to find that the Department had abused its discretion on the basis of even less evidence than is currently available, the Board declines to follow the Seitliff decision here. The Board will, instead, follow its more recent decision in Snyder Township, *supra*.

the Department did not evaluate the noise to be generated by the quarry when it reviewed Miller's permit application.

Plumstead has also failed to prove, in the alternative, that the noise to be generated by Miller's quarry will rise to the level of a public nuisance. In Muhlieb v. City of Philadelphia, 133 Pa.Cmwlth. 133, ___, 574 A.2d 1208, 1211 (1990), Commonwealth Court adopted the provisions of the *Restatement (Second) of Torts*, §821B, as the applicable standard for determining whether an activity rises to the level of a public nuisance. *See also*, Commonwealth v. Danny's New Adam & Eve Bookstore, 155 Pa.Cmwlth. 281, ___, 625 A.2d 119, 121 (1993). According to the *Restatement*:

> (1) A public nuisance is an unreasonable interference with a right common to the general public.
> (2) Circumstances that may sustain a holding that an interference with a public right is unreasonable include the following:
> > (a) Whether the conduct involves a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience, or
> > (b) whether the conduct is proscribed by a statute, ordinance or administrative regulation, or
> > (c) whether the conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.

Restatement (Second) of Torts, §821B. The Board will apply the same standard in determining whether Miller's proposed quarry will amount to a public nuisance. *See*, Kwalwasser, 1986 EHB at 64.

In support of its position that the noise generated by Miller's quarry will be a public nuisance, Plumstead relies on the testimony of Michael Wong, an expert in predicting the noise levels to be generated by various activities. According to Mr. Wong, operational noise from the quarry will result

in an ambient noise level greater than 67 dBA on 145 acres surrounding the site and a 15 dBA increase in the ambient noise level on an additional 100 acres (Ex. A-9). Based on this information, Plumstead contends the quarry will be a public nuisance because it will materially interfere with the ordinary comforts of life and impair reasonable enjoyment on properties surrounding the site. Plumstead's argument is without merit.

As the Board stated above, the burden of proof in this appeal lies with Plumstead, which is required to prove by a preponderance of the evidence that the Department's issuance of the SMP was an abuse of discretion. In order to satisfy this burden, Plumstead must do more than offer the Board projected sound pressure levels, since these levels alone do not provide the Board with enough information to satisfy the criteria for a public nuisance. In other words, there is no way for the Board to determine whether an ambient noise level of 67 dBA or greater, or an increase in the ambient noise level of 15 dBA or greater, will unreasonably interfere with a right common to the general public. In other public nuisance cases, the court relied on testimony from the people subjected to the alleged nuisance in order to determine its effects. *See, e.g.*, Township of Bedminster v. Vargo Dragway, Inc., 434 Pa. 100, ___, 253 A.2d 659, 661-662 (1969). While Mr. Wong's testimony is helpful in determining how far away the effects of operational noise from the quarry will be felt, it does not establish how this noise will be perceived by the community. *See*, Muhlieb, 133 Pa.Cmwlth. at ___, 574 A.2d at 1212.[28]

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[28]Although Plumstead introduced studies that purport to clarify the threshold at which noise becomes annoying (Exs. A-9 thru A-13), these are not helpful in determining whether a certain noise level amounts to an unreasonable interference with a public right.

Moreover, even if this issue could be resolved solely on the basis of the competing experts, the Board would find that the testimony of Miller's expert, George Diehl, would be entitled to more weight than the testimony of Mr. Wong. Both Mr. Diehl and Mr. Wong calculated the sound pressure levels to be expected at nine points surrounding the site. Mr. Diehl's calculations resulted in expected sound pressure levels no greater than 68 dBA at any point, while Mr. Wong's resulted in expected sound pressure levels several decibels higher (N.T. 295; Exs. A-9, P-48, p. 136, P-48A, and P-48B). The difference is based on the noise sources used to determine the total sound pressure levels to be expected at each point.

In determining the total A-weighted sound pressure levels expected to occur around the site, both Mr. Diehl and Mr. Wong utilized three "noise equivalent sources" at different locations within the quarry. These noise equivalent sources were derived from a study of operational noise at another quarry (Ex. P-48, p. 136). Mr. Diehl was satisfied that these three equivalent sources would be the primary contributors to the ambient noise levels at each of the points around the site. Mr. Wong, however, added several additional noise sources to the three equivalent sources within the quarry: the noise generated from trucks entering and exiting the quarry, the noise generated by traffic on Point Pleasant Pike, and the ambient noise measured between 7:30 a.m. and 9:30 a.m. on November 30, 1989 (N.T. 343-344).

The Board finds Mr. Diehl's calculations to be more persuasive for several reasons. First, Mr. Diehl explained the calculations and assumptions used to derive his expected sound pressure levels. While both Mr. Diehl and Mr. Wong admitted to using computer programs to complete these calculations, Mr. Diehl offered testimony concerning how the results were derived. Mr. Wong, on

the other hand, offered little or no explanation of his results. Second, Mr. Diehl acknowledged the ambient noise generated by the Point Pleasant Pike, but did not add it in because it would be negligible in relation to the noise generated by the quarry (Ex. P-49, p. 65). Mr. Wong made no independent determination of whether noise from the Point Pleasant Pike would be a significant contribution. And finally, in calculating the expected sound pressure levels, Mr. Wong appears to have inadvertently twice added the noise levels generated by the Point Pleasant Pike. The ambient noise levels Mr. Wong measured on November 30, 1989, already included the noise generated by traffic on Point Pleasant Pike (N.T. 278-279, 321, 349), but Mr. Wong expressly included both the traffic noise from the Point Pleasant Pike and the November 30 ambient noise levels in determining the total sound pressure levels to be expected around the site (N.T. 278-279, 283, 321, 349). Although the Board knows that the effect of this mistake may be negligible, Mr. Wong offered no evidence concerning how these values affected *his* final calculations.

Plumstead, therefore, has failed to prove that the operational noise to be generated by the quarry will constitute a public nuisance. Because Plumstead also failed to prove the Department did not consider noise in reviewing Miller's permit application, the Board must find that Plumstead's challenge to the Department's issuance of the SMP on the basis of noise is without merit.

Blasting

Plumstead next contends the Department's issuance of the SMP was an abuse of discretion because none of the measures required by the regulations or permit will adequately safeguard the irreplaceable historic structures near the site from the adverse effects of blasting. This argument is without merit.

The SMP contains several Special Conditions designed to lessen or eliminate the effects of blasting on historical structures near the site. The most noteworthy of these Special Conditions is number 31, which states as follows:

> All quarry blasts shall be designed for a maximum peak particle velocity not to exceed 0.50 inches per second and maximum noise level of 125 decibels (linear frequency response) at the nearest structure neither owned nor leased by the permittee. At no time shall a maximum peak particle velocity of 0.75 inches per second or a maximum noise level of 129 decibels be exceeded.

(Notice of Appeal). This condition is noteworthy because it severely restricts the maximum peak particle velocity permitted at the quarry. Peak particle velocity is one of the factors governing the potential for damage from blasting (Exs. A-74, p. 58, A-75, p. 36, and P-52, p. 6). Without this condition, Miller would be allowed to detonate blasts with a peak particle velocity of 2.0 inches per second and a maximum noise level of up to 134 decibels. *See*, 25 Pa.Code §77.564(f)(1). The SMP contains other Special Conditions that impose requirements not mandated by the Department's regulations. Number 36 states, in relevant part:

> A pre-blast survey shall be conducted by the permittee, upon written notification to and subsequent request by a property owner, on each structure located within 1,000 feet of the permit boundaries, and on any structure located within 2,500 feet of the permit boundaries which is listed as a contributing building in the proposed Gardenville-North Branch Historic District.

(Notice of Appeal).[29] *See also*, Special Condition 35(b), (c), (d), and (e) (concerning the scope of pre-blast surveys) (Notice of Appeal). Because Miller

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[29]The "proposed" Gardenville-North Branch Historic District has been listed on the National Register of Historic Places by the United States Department of the Interior, National Park Service (N.T. 500-501; Exs. A-33, A-34). *See*, discussion of this Historic District, *infra*.

may not detonate blasts with a designed peak particle velocity of greater than 0.50 inches per second and actual peak particle velocity of greater than 0.75 inches per second, the regulations would have allowed Miller to forego the pre-blast surveys. *See*, 25 Pa.Code §77.562(a) (no pre-blast survey required if blasting designed to meet a peak particle velocity of less than 0.5 inches per second and does not exceed a peak particle velocity of 0.75 inches per second).

In an attempt to limit damage from blasting even further, the SMP contains Special Condition 37, which, among other things, requires Miller to conduct a site-specific study of the relationship between peak particle velocity and ground vibration frequency and to analyze the relationship between ground vibration frequency and the natural resonant frequency of structures surrounding the quarry (Notice of Appeal). Miller may not commence blasting until the Department determines whether the Blasting Plan needs to be modified in light of the study and analysis results, and then grants written approval to commence blasting pursuant to either the original or modified Blasting Plan (*Id.*).[30]

Although not expressly stated in either the original Blasting Plan or the SMP, the record indicates that Miller contemplates the use of a technique known as "vibra-mapping" to limit the effects of blasting on historical buildings in the surrounding area (Ex. P-51, p. 21). Vibra-mapping is a technique to control the effects of a blast by staggering the detonation sequence to eliminate ground vibration frequencies that match the natural resonance frequencies of neighboring buildings (Ex. P-51, p. 20). Vibration is a second factor (along with particle velocity) governing the potential for damage from blasting (Exs. A-74, p. 58, A-75, p. 36, and P-52, p. 6). When the ground vibration frequency

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[30]A Blasting Plan is required pursuant to 25 Pa.Code §77.564(a)(1). Miller's Blasting Plan was included in its permit application (Exs. P-1 and P-7).

is the same as a structure's natural resonance frequency, the structure will experience a greater sense of vibration (Ex. P-51, p. 16). If the ground vibration frequency is controlled so that it does not match a structure's natural resonance frequency, the potential for damage from vibration is eliminated (Ex. P-52, p. 13).

Vibra-Tech Engineers has been retained by Miller to conduct vibra-mapping of the area surrounding the quarry and to institute a system to minimize the effects of ground vibrations (Ex. P-51, p. 21). The record indicates that use of vibra-mapping will reduce the noticeability of quarry blasts in the surrounding area (Ex. P-51, p. 23, and P-52, p. 64). Although the effectiveness of the vibra-mapping technique was challenged by Plumstead's expert, Arthur Dvinoff, the Board concludes Mr. Dvinoff's lack of familiarity with this technique renders his testimony less persuasive than Mr. Reil's. Mr. Dvinoff's lack of familiarity is evident from his testimony that the purpose of the vibra-mapping technique is to reduce the peak particle velocity generated by a blast (Ex. A-74, pp. 33-34). Mr. Reil clearly stated to the contrary, that the purpose of vibra-mapping is to eliminate ground vibrations matching the natural resonance frequencies of surrounding structures (Exs. P-51, p. 23, and P-52, p. 64). Furthermore, Mr. Dvinoff admitted that he is not familiar with frequency dampening techniques except from a Vibra-Tech report, that he has not done any field testing to determine whether the technique works, and that he does not know how widely the technique is used in the United States (Ex. A-74, p. 57).

In addition to finding that the vibra-mapping technique proposed by Miller will be effective in limiting the effects of quarry blasts on the area surrounding the site, the Board also finds that Plumstead has failed to introduce sufficient evidence to show these limited effects will result in damage to

historic buildings in the area. Plumstead offered the testimony of Charles Timbie, a structural engineer and registered Professional Engineer, who conducted a study of the potential effects of blasting on eight properties around the site (Ex. A-20 and A-75, p. 77). Mr. Timbie concluded that there is a 20% probability of threshold damage to buildings surrounding the quarry if the quarry blasts generate peak particle velocities of 0.75 inches per second, and that most of the buildings surrounding the quarry will suffer some damage by the time the quarry closes (Ex. A-75, pp. 5, 7).

Mr. Timbie's conclusions regarding the probability of threshold damage was based on the results of studies conducted by the United States Department of the Interior, Bureau of Mines (Exs. A-75, pp. 97-100, and C-1). Mr. Timbie admitted, however, that the probabilities of damage stated in the Bureau of Mines' study were based on low frequency ground vibrations and that with high frequency vibrations the Bureau of Mines concluded there is no probability of damage until the peak particle velocity exceeds 1.1 or 1.2 inches per second (Ex. A-75, pp. 19, 37). Because the two factors governing whether blasting will damage neighboring structures are peak particle velocity and frequency, and the record indicates peak particle velocities will not exceed 0.75 inches per second and vibra-mapping will be employed to limit the amount of low frequency vibrations, Mr. Timbie's testimony does not persuade the Board that the proposed quarry blasts will result in damage to neighboring historic structures.

Based on the foregoing, Plumstead has failed to show that the Special Conditions imposed by the SMP and the Department's regulations will not adequately protect neighboring historic structures from the effects of blasting.

Zoning

Plumstead next contends the Department's issuance of the SMP was an abuse of discretion because the Department knew that the proposed quarry would not operate in accordance with applicable statutes and regulations, including Plumstead's local zoning ordinance. Miller responds that the Department gave adequate consideration to local zoning through the insertion of Standard Condition 9 in the SMP. At the merits hearing, the presiding Board Member disagreed with Plumstead's position and denied Plumstead's request to introduce any evidence concerning the Plumstead zoning ordinance and its effect on Miller's proposed operation. The Board adopts the presiding Board Member's ruling for the reasons set forth below.

Plumstead's position is based on an erroneous interpretation of §§7(a) and 16 of the Noncoal Act. Under §7(a), every person operating a noncoal surface mine must do so in accordance with the terms and conditions contained in their permit and all applicable statutes and regulations. 52 P.S. §3307(a). Under §16, the Noncoal Act expressly supersedes all local ordinances purporting to regulate surface mining except those ordinances adopted pursuant to the Municipalities Planning Code, 53 P.S. §10101 *et seq.* Plumstead contends these provisions, read together, require the Department to ensure that proposed noncoal surface mining activities will operate in accordance with applicable zoning ordinances before it may issue a noncoal surface mining permit.

After reviewing §§7 and 16 and the remainder of the Noncoal Act, the Board finds that neither provision requires the Department to determine whether a proposed noncoal surface mine will operate in accordance with applicable local zoning ordinances before it may issue a noncoal SMP. To the contrary, by preserving local ordinances adopted pursuant to the Municipalities Planning Code,

it is clear the General Assembly intended both state and local governments to play a role in regulating noncoal surface mining. *See*, 52 P.S. §3316. Each level of government has a different expertise to contribute to the regulatory process, and each regulates a different aspect of the operation. *See*, Warner Co. v. Zoning Hearing Board of Treddyffrin Twsp., 148 Pa.Cmwlth. 609, ___, 612 A.2d 578, 584-585 (1992) (reviewing which aspects of noncoal surface mining are regulated by the Noncoal Act and which by local zoning ordinances).

The Department recognized its lack of responsibility for Miller's compliance with applicable local zoning ordinances with the insertion in the SMP of Standard Condition 9, which states:

> The permittee is responsible for complying with local ordinances adapted pursuant to the Municipalities Planning Code, all zoning ordananences [sic] in existence before January 1, 1972. Nothing in this permit shall be construed to relieve the permittee from any responsivilities [sic], liabilities, or penalties to which the permittee may be subject to under any Federal, State, or Local laws.

(Notice of Appeal).[31] Because the Department is not required under §§7 and 16 of the Noncoal Act to ensure that Miller's quarrying activities will be conducted in accordance with the requirements of Plumstead's local zoning ordinance,

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[31]In City of Scranton v. DER, 1986 EHB 1223, 1230, the Board found that a similar condition inserted in a surface mining permit issued under SMCRA satisfied the Department's obligation to consider local zoning issues. The Board offered this statement in response to the appellant's argument that the Department had a duty under SMCRA to consider local zoning ordinances before it issued a surface mining permit. Although the statutory provision at issue in City of Scranton was §17.1 of SMCRA, 52 P.S. §1396.17a, it contains the same language as §16 of the Noncoal Act, 52 P.S. §3316, and both provisions have been construed in the same manner. *See*, Pennsylvania Coal Co., Inc. v. Township of Conemaugh, 149 Pa.Cmwlth. 22, __, 612 A.2d 1090, 1093 (1992), *appeal denied*, 533 Pa. 626, 620 A.2d 492. After reviewing both the Noncoal Act and SMCRA, the Board is compelled to overrule City of Scranton to the extent it may be interpreted to hold that §17.1 of the Surface Mining Act, 52 P.S. §1396.17a, and §16 of the Noncoal Act, 52 P.S. §3316, require the Department to consider local zoning issues in evaluating permit applications under those statutes.

Plumstead's challenge to the Department's issuance of the SMP on the basis of local zoning issues must be dismissed.

Historic Preservation

Plumstead next contends the Department's issuance of the SMP and Authorization to Mine violated §8(4) of the Historic Preservation Act, the Act of May 26, 1988, P.L. 414, 37 Pa.C.S. §508(4). Although Plumstead admits it did not specifically raise this provision in its notice of appeal, Plumstead argues that references to §§7 and 10 of the Historic Preservation Act, 37 Pa.C.S. §§507 and 510, provided Miller with sufficient notice that Plumstead intended to challenge the Department's actions on the basis of the entire Historic Preservation Act. In addition, Plumstead asserts it introduced evidence sufficient for the Board to resolve the Department's compliance with §8(4). For its part, Miller responds that Plumstead did not specifically raise §8(4) in its notice of appeal and, therefore, waived its ability to argue the applicability of this provision.

The Board's rules of practice and procedure expressly provide that any objection not raised in a notice of appeal is deemed to have been waived. 25 Pa.Code §21.51(e). Both Commonwealth Court and the Board have repeatedly held that this provision bars an appellant from introducing new bases for an appeal in its post-hearing brief. *See*, Cmwlth., Pennsylvania Game Comm. v. Cmwlth., Dept. of Environmental Resources, 97 Pa.Cmwlth. 78, ___, 509 A.2d 877, 885-886 (1986), *aff'd on other grounds*, 521 Pa. 121, 555 A.2d 812 (1989) (Game Commission); Benco, Inc. of Pennsylvania v. DER, EHB Docket No. 91-554-W (Adjudication issued February 17, 1994). Contrary to Plumstead's belief, the issue with respect to untimely objections is not one of notice, but rather one of jurisdiction. In other words, the Board's jurisdiction simply does not attach

to issues an appellant fails to raise in its notice of appeal. *See*, 25 Pa.Code §21.52(a); Game Commission, *supra*.[32]

In determining whether Plumstead waived the Department's compliance with §8(4) of the Historic Preservation Act, the Board is constrained by Commonwealth Court's decision in Croner, Inc. v. Cmwlth., Dept. of Environmental Resources, 139 Pa.Cmwlth. 43, __, 589 A.2d 1183, 1187 (1991), to read Plumstead's objections broadly. *See*, Benco, *supra*. In its May 24, 1991 Notice of Appeal, Plumstead raised the following objection with respect to the Department's compliance with the Historic Preservation Act:

> (5) The Department in issuing the mining permit and authorization to mine failed to comply with Sections 510 and 507 of the Historic Preservation Act.

(Notice of Appeal). Subparagraphs (a) through (i) offer specific factual and legal bases to support this objection (*Id.*).[33] Even construing paragraph 5 and subparagraphs (a)-(i) broadly, the Board cannot find any evidence that Plumstead intended to object to the Department's actions on the basis of other provisions of the Historic Preservation Act. *See*, Concerned Residents of the Yough, Inc. v. DER, EHB Docket No. 92-106-MJ (Opinion issued January 12, 1995) (although appellant's notice of appeal did not specifically cite §503(c) of the Solid Waste Management Act, the Act of July 7, 1980, P.L. 380, *as amended*, 35 P.S.

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[32]The one exception to this doctrine is where grounds exist for a notice of appeal to be amended *nunc pro tunc*. This option is available, however, only when there is a showing of fraud, breakdown in the administrative process, or unique and compelling factual circumstances establishing a non-negligent failure to file a timely appeal. Loretta Fisher v. DER, 1993 EHB 425, 428. Plumstead has not alleged in its post-hearing brief, nor could the Board find, any basis for its notice of appeal to be amended *nunc pro tunc*.

[33]In subparagraph (f), Plumstead erroneously cites "Section 501" of the Historic Preservation Act. Because this subparagraph summarizes the requirements of §10 of the Historic Preservation Act, the Board assumes Plumstead's reference to §1 was in error.

§6018.503(c) (SWMA), the Board found that appellant's general reference to §503 of the SWMA was sufficient, under Croner, to preserve the issue of compliance with §503(c)). Accordingly, Plumstead waived its claim that the Department's issuance of the SMP and Authorization to Mine violated §8(4) of the Historic Preservation Act. *See*, Benco, *supra*.

Even if the Board were able to find that Plumstead did not waive the issue of the Department's compliance with §8(4) of the Historic Preservation Act, Plumstead has failed to prove the Department's conduct did not satisfy the requirements of this subsection. Section 8(4) of the Historic Preservation Act states:

> Commonwealth agencies shall: . . . Institute procedures and policies to assure that their plans, programs, codes, regulations and activities contribute to the preservation and enhancement of all historic resources in this Commonwealth.

37 Pa.C.S. §508(4). As the Board explained in Montgomery Township v. DER, EHB Docket No. 93-091-W (Adjudication issued April 12, 1995), in order to prevail under this subsection, an appellant must prove that specific Department policies and procedures do not contribute to the preservation and enhancement of the Commonwealth's historic resources. It is not sufficient for an appellant to merely assert the adverse effects resulting from a Department action.

In support of its claim, Plumstead contends the special conditions inserted into the SMP, which require Miller to document the existence of historical resources prior to their destruction, do not contribute to the preservation and enhancement of the Commonwealth's historic resources. Plumstead, however, does not challenge any specific Department policy or procedure as inadequate to insure the preservation and enhancement of historic resources, but, instead, focuses on the effects of the Department's permitting

decision. This claim is facially deficient under §8(4) of the Historic Preservation Act and will not be considered further. *See*, Montgomery Township, *supra*.

Article I, §27, of the Pennsylvania Constitution

Plumstead last asserts the Department's issuance of the SMP and Authorization to Mine violated the Department's duties under Article I, §27, of the Pennsylvania Constitution.[34] Miller responds that Plumstead failed to raise this issue in its notice of appeal and that it is, therefore, waived. After reviewing the objections raised by Plumstead in its notice of appeal, the Board is unable to find any reference to either the Pennsylvania Constitution generally or Article I, §27, specifically. Accordingly, the Board deems Plumstead to have waived its claim that the Department's actions violated Article I, §27. *See*, Benco, *supra*.

[34] Article I, §27, states: "The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and aesthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of the people."

CONCLUSIONS OF LAW

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

2. Chairman Woelfling's June 25, 1992, order properly excluded the pre-recorded rebuttal testimony of Shams Siddiqui.

3. An appellant may not raise an objection to a Department action for the first time in its post-hearing brief.

4. Any issue not raised in the parties' post-hearing briefs has been waived.

5. Plumstead bears the burden of proving by a preponderance of the evidence that the Department's issuance of the SMP and Authorization to Mine was an abuse of discretion, arbitrary, capricious, or contrary to law.

6. Plumstead failed to prove that Miller's permit application did not comply with the provisions of 25 Pa.Code Ch. 77.

7. The terms of the SMP and the requirements of the Noncoal Act and regulations thereunder provide sufficient protection to the neighboring groundwater supplies.

8. The Department's issuance of the SMP would have been an abuse of discretion if: the Department failed to evaluate noise when reviewing the permit application; or the noise to be generated by the quarry would constitute a public nuisance.

9. The Board overrules its earlier decision in Guy and Mary Seitliff v. DER, 1986 EHB 296, to the extent it found the Department had abused its discretion: absent proof that the Department failed to consider operational noise in reviewing the permit application; or for failing to insert conditions in the permit specifying allowable noise levels.

10. Plumstead failed to prove that operational noise from the quarry would amount to a public nuisance.

11. Plumstead failed to show that the Special Conditions in the SMP and the Department's regulations would not adequately protect neighboring historical structures from the effects of blasting.

12. Sections 7 and 16 of the Noncoal Act, 52 P.S. §§3307 and 3316, did not prohibit the Department from issuing the SMP even though there was a dispute about whether the proposed quarry would comply with applicable zoning ordinances.

13. The Board overrules its earlier decision in City of Scranton v. DER, 1986 EHB 1223, to the extent it may be interpreted to hold that §17.1 of SMCRA, 52 P.S. §1396.17a, and §16 of the Noncoal Act, 52 P.S. §3316, require the Department to consider local zoning issues in evaluating permit applications under those statutes.

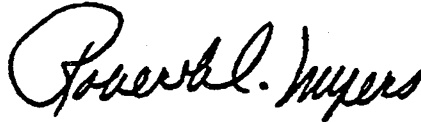
14. Plumstead waived its claim that the Department's issuance of the SMP and Authorization to Mine violated §8(4) of the Historic Preservation Act.

15. Plumstead waived its claim that the Department's issuance of the SMP and Authorization to Mine violated Article I, §27, of the Pennsylvania Constitution.

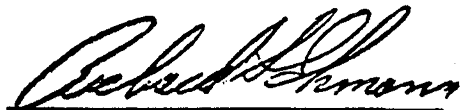
<u>ORDER</u>

AND NOW, this 14th day of June, 1995, it is ordered that Plumstead's May 24, 1991, appeal from the Department's April 22, 1991, issuance to Miller of: Noncoal Surface Mining Permit No. 09890303; Noncoal Authorization to Mine No. 302723-09890303-01-0; NPDES Permit No. PA 0594661; and Air Quality Plan Approvals of applications numbered 09-310-942, 09-303-024, and 09-311-006, is dismissed.

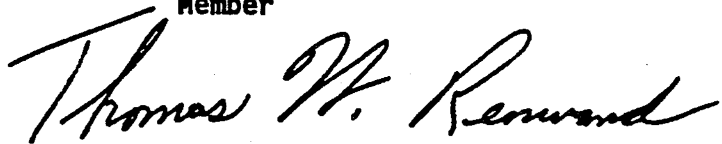
ENVIRONMENTAL HEARING BOARD



ROBERT D. MYERS
Administrative Law Judge
Member



RICHARD S. EHMANN
Administrative Law Judge
Member



THOMAS W. RENWAND
Administrative Law Judge
Member

DATED: June 14, 1995

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M. DIANE SMITH
SECRETARY TO THE BOARD

COUNTY COMMISSIONERS, SOMERSET COUNTY :
ELEANOR JEANE THOMAS and MICHAEL :
STRONGOSKY :
:
v. : EHB Docket No. 95-031-E
: (Consolidated)
COMMONWEALTH OF PENNSYLVANIA :
DEPARTMENT OF ENVIRONMENTAL RESOURCES and :
MOSTOLLER LANDFILL, INC. Permittee : Issued: June 21, 1995

OPINION AND ORDER SUR
MOTION FOR DISQUALIFICATION OF COUNSEL FOR MOSTOLLER LANDFILL

By: Richard S. Ehmann, Member

Synopsis

Appellant's Motion For Disqualification Of Counsel For Mostoller Landfill, Inc. is denied. Appellant has failed to demonstrate any violation of Rule 1.12(a) of the Pennsylvania Rules of Professional Conduct occurring through the former Board Chairman's representation of clients before this Board.

OPINION

This instant appeal arose as the County Commissioners, Somerset County's ("Somerset") challenge to the Department of Environmental Resources' ("DER") issuance of a permit to Mostoller Landfill, Inc. ("Mostoller") for construction and operation of a landfill to be located in Somerset County. Somerset's appeal was then consolidated with similar challenges to the permit by Eleanor Jeane Thomas and Michael Strongosky. The pre-hearing proceedings in these consolidated appeals have generated numerous Motions from the parties

and resulting Orders from this Board dealing with several topics. We will not address these matters further here because those matters are not relevant to the issue now before this Board.

On May 11, 1995, Somerset filed the instant Motion. It seeks the disqualification of attorneys Maxine Woelfling and Brian Clark as attorneys for Mostoller. It also seeks to bar their firm representing Mostoller in this appeal. Upon receipt of this Motion, we advised the other parties and Mostoller that their responses to this motion were due by June 5, 1995. By Order dated May 18, 1995, we also directed that Somerset file a Brief in support of its Motion with this Board by June 5, 1995.

Thereafter, Mostoller asked that it be allowed to file its Response and supporting Brief with us by June 12, 1995 so that it could respond to any Brief filed on behalf of Somerset. Our Order of June 2, 1995 granted Mostoller's request. Somerset filed no Brief and Mostoller's Response of Permittee Mostoller Landfill, Inc. To Motion of County Commissioners, Somerset County For Disqualification of Counsel was filed on June 12, 1995. No other parties have made filings in response to this Motion.

Somerset's Motion asserts that on December 31, 1994, the former Chairman of this Board, Maxine Woelfling submitted her letter of resignation effective on February 17, 1995. The Chairman's letter, which is attached to the motion, says that after her resignation became effective she would be joining the firm of Morgan, Lewis & Bockius.

The Motion then goes on to say that thereafter, on February 1, 1995, Somerset filed the instant appeal. Subsequently, on February 3, 1995, the Board issued Pre-Hearing Order No. 1, which sets the deadlines for completion of discovery and the filing of each party's Pre-Hearing Memorandum. According

to Somerset's Motion, this Order also sets forth that this appeal is assigned to the writer "for hearing and a decision." This Pre-Hearing Order No. 1 bears the signature of the then Chairman of this Board. The Motion points out that this Order was issued when the Chairman knew she would soon leave to begin work for this firm and that the firm had ties to Mostoller and its landfill permit application going back beyond the time of the submission of the Chairman's letter of resignation. According to Somerset's Motion, the Chairman thereafter resigned on February 17, 1995 and, on February 23, 1995, she and another lawyer from her firm entered their appearances in this appeal as counsel for Mostoller.

From these allegations, Somerset asserts there is substantial and personal involvement by the former Chairman in this appeal, so she should be disqualified from serving as counsel. It also asserts her former role in assigning this appeal and her current role as counsel creates actual or apparent conflict of interest and an appearance of bias or impropriety which will "impune [sic]" the integrity of the process before this Board unless cured by her disqualification. Finally, it asserts the other lawyer from this firm with an appearance entered for Mostoller and the entire firm must also be disqualified because a firm shall not knowingly represent a client when any firm member is prohibited from doing so.

Mostoller's Response and Memorandum of Law in support thereof raise a series of rebutting contentions. Factually, Mostoller asserts the case assignment occurred through longstanding instructions to the Board's Secretary and that that person stamped the former Chairman's signature on the form Pre-Hearing Order No. 1. Based on this circumstance, Mostoller contends the former Chairman did not personally issue that order and thus did not have any

substantial and personal involvement with this appeal. It also asserts both that the Motion is deficient on its face and that the appearance of impropriety test is not a valid ground for disqualification. Finally, Mostoller argues that the disqualification of any other Members of this firm or the firm itself is not shown to be necessary, and Mostoller's choice of counsel is entitled to deference.

Mostoller correctly points out the omissions in Somerset's Motion. Somerset is the movant and seeks the relief of disqualification. As such, it has the burden of establishing its right to that relief. Petition of Kenvue Development, Inc. 145 Pa. Cmwlth. 106, 602 A.2d 470 (1992). Moreover, as Mostoller asserts, Cohen v. Oasin, 844 F. Supp 1065 (E.D. Pa. 1994), does clearly state that this cannot be done by vague or unsupported assertions. Somerset's Motion is not attested to by affidavit and has no verification of it attached to it. It is devoid of any citation to any legal authority or statement of legal theory as to how it contends the alleged facts establish any basis for disqualification of Attorney Woelfling or other members of her firm. It was that omission that caused this Board to order Somerset to submit a Brief in support of its Motion. In this regard, Mostoller is incorrect when it suggests the Board "invited" Somerset to submit a Brief to support this Motion. The Board issued no invitation. Because of the Motion's omissions, the Board directed Somerset to brief this issue. Somerset did not comply with this Order. It failed to file any Brief. In light of the inadequacies of Somerset's Motion pointed out above and this noncompliance with our order, it would be quite proper to deny this Motion as a sanction under 25 Pa. Code §21.124 or because the movant has failed to meet its burden of proof.

The Board refuses to follow this path. Doing so would leave unaddressed the merits of Somerset's Motion. In turn, this would leave anyone with a need to cast mud on the adjudicatory process before this Board or Attorney Woelfling the ability to infer that something wrong occurred and that the Board elected to duck addressing the wrong. We will not do so.

In so saying, however, we recognize there are divergent views as to what constitutes proper attorney conduct. This is evident from the majority and minority opinions in such cases as American Dredging Company v. City of Philadelphia, 480 Pa. 177, 389 A.2d 568 (1978); Commonwealth v. Eastern Dawn Mobile Home Park, et al., 486 Pa. 326, 405 A.2d 1232 (1979); and City of Philadelphia v. District Council 33, 503 Pa. 498, 469 A.2d 1051 (1983). Nevertheless, the standards applicable here coupled with facts of what has occurred (as distinguished from Somerset's allegations) compel only one conclusion.

The Supreme Court adopted Rules of Professional Conduct by Order dated October 6, 1987. They replace the Disciplinary Rules under the Code of Professional Responsibility. Rule 1.12 is captioned "Former Judge Or Arbitrator Or Law Clerk." It provides in relevant part:

> (a) Except as stated in paragraph (d), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer, arbitrator or law clerk to such a person, unless all parties to the proceeding consent after disclosure.
>
> (c) If a lawyer is disqualified by paragraph (a), no lawyer in a firm with which the lawyer is associated may knowingly undertake or continue representation in the matter unless ....

(Emphasis added.)

There are no Pennsylvania cases clarifying the degree of participation needed to fall within (or without) this restriction. The only Pennsylvania guide to what is meant by this phrase is found in the Comment on Rule 1.12 which follows the Rule itself.[1] There it is suggested that where a judge exercises administrative responsibility in a court, he is not prevented as a former judge from acting as lawyer in a matter where the judge exercised remote or incidental administrative responsibility not affecting the merits. The Comment also states that a judge in a multi-member court is not barred after leaving office from representing a client before that forum in a matter in which he did not participate.

As further enlightenment on this phrase's meaning, Mostoller cites to an American Bar Association ("ABA") Committee on Professional Ethics, Opinion 302 as quoted in the ABA's Annotated Model Rule Of Professional Conduct 196 (2d ed. 1992). This citation is made because Rule 1.12 is patterned after the ABA's Model Rule 1.12. That model rule's annotations talk of "personally and substantially" as contemplating involvement to an important material degree in the investigative or deliberating processes regarding the transactions or factual disputes.[2]

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[1]The Supreme Court's Order adopting these Rules cautions, however, that these Comments "shall not be a part" of the Rules.

[2]Personal and substantial participation is also discussed in 1 G. Hazard & W. Hodes, The Law of Lawyering, §1.12:202 (2d ed. 1991 Supp.). There the following hypothetical is used to illustrate personal and substantial involvement: A panel of a multi-member court has decided a case upon a split vote. The losing party petitions for a rehearing *en banc*, but the petition is denied. L is a judge who did not sit on the original panel but who voted to deny the petition for rehearing. L subsequently leaves the court and enters private practice. L may not represent any interest in this matter at a later date since he participated personally and substantially in the court's (footnote continued)

This Board's own research reveals two reported opinions in other forums on this issue.

In Marxe v. Marxe, 238 N.J. Super. 490, 570 A.2d 44 (1989), the Superior Court of New Jersey addressed the question of what constitutes "personal and substantial participation". There, the wife in a divorce proceeding sought the disqualification of her husband's counsel or recusal of the presiding judge based on the fact that the judge's former law clerk had recently been hired by the firm representing the husband. The law clerk's duties had involved keeping track of all motions submitted to the court each week and, in some cases, summarizing the pleadings. During the law clerk's tenure with the judge, four motions and one cross-motion had been decided in connection with the divorce proceeding. Although the former law clerk was not to be involved in the representation of the husband, the wife objected on the grounds that her husband's attorney would have intimate knowledge of the court's action in the case.

The New Jersey Superior Court denied the wife's motion, holding that the former law clerk's involvement in the proceeding during her tenure with the court did not amount to personal and substantial participation in the case. Citing to an Opinion issued by the Advisory Committee on Professional Ethics, the Court defined "substantial involvement" as "making a decision regarding a matter of substance." *Id.* at 493, 570 A.2d at 45. Since at no time did anyone other than the judge decide any issue raised in the proceeding, the Court reasoned that the law clerk's involvement was not

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(continued footnote)
determination of the petition for rehearing. In order to vote on the petition for rehearing, he presumably had to familiarize himself with at least some details of the case. That makes his involvement more than "remote or incidental administrative responsibility that did not affect the merits."

substantial. As to the law clerk's responsibility for summarizing motions and pleadings for review by the judge, the Court determined that it would be unreasonable to suggest that particular or substantial participation had been given by the law clerk to any one matter over another considering the volume of litigation dealt with on a daily basis. Finally, the Court noted that the only exposure the law clerk had was to papers submitted to the court which were of public record. *Id.* at 493-494, 570 A.2d at 45.

Mississippi's Rules of Professional Conduct also prohibit an attorney from representing anyone in connection with a matter in which the attorney participated personally and substantially as a judge or other adjudicative officer. In Mississippi Commission on Judicial Performance v. Atkinson, ___Miss. ___, 645 So. 2d 1331 (1994), the Supreme Court of Mississippi held that a judge who sets a bond for a criminal defendant has acted in a "substantial way" in the judicial process. *Id.* at ___, 645 So. 2d at 1335. The dissent in that opinion defined "substantial participation" as actions which "affect the merits" of the case. *Id.* at ___, 645 So. 2d at 1338.[3]

Applying this guidance to the facts before us allows us to draw only one opinion. Here, Morgan, Lewis & Bockius represented this landfill throughout the period in which it applied to DER (not this Board) for a permit. This firm did not begin representation of its client only in the

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[3]The Board has also reviewed the March 10, 1989 Opinion of the Arizona State Bar Committee On Rules Of Professional Conduct Opinion 89-1, dealing with this same issue as applied to a government agency's hearing officer who was seeking to enter private practice within her special area of law and was concerned about Arizona's version of Rule 1.12. There the hearing officer was advised that presiding at hearings, making findings of fact and preparing draft decisions constituted personal and substantial participation. A summary of that opinion is contained in the ABA/BNA Lawyers Manual On Professional Conduct 901:1411.

appeal stage or when Attorney Woelfling joined it. After that firm undertook that representation, Attorney Woelfling submitted a letter of resignation from this Board late in December of 1994, which was effective a month and a half later. Within that time period, Somerset filed this appeal and, as this Board Member is aware, pursuant to the then Board Chairman's standing instruction, the Board's Secretary assigned this appeal to one of the only two remaining Board Members. (In February of 1995, at the time of this appeal's commencement, there were two vacancies on this five member Board plus the Chairman's position which was about to become vacant.) The presiding Board Member, who is obviously familiar with this Board's internal operating procedure, is aware that he was assigned this appeal because of Somerset County's relative proximity to the Board's Pittsburgh Office which is the location of his office. The only other Board Member at that time was Board Member Myers, whose office is in Harrisburg.

The Board's Secretary then issued Pre-Hearing Order No. 1, which is a Board-approved form Order containing standardized time periods for discovery completion and the filing of the parties' Pre-Hearing Memoranda. Thus, the amount of time for completion of discovery and the date for filing of Pre-Hearing Memoranda in Pre-Hearing Order No. 1 in this appeal is identical to that in all such standardized Orders. Finally, the Board's Secretary affixed the Chairman's signature to this Order with a stamp.

This was the extent of the Chairman's involvement in this appeal. She never participated in consideration of the merits of any of the motions filed in this appeal by any of the parties. As Chairman, she did not personally assign the appeal. She did not select the time periods in Pre-Hearing Order No. 1, either. Since there has been no merits hearing, she

could not have participated as to merits issues.[4] She never presided at any hearing, conferences or discussions involved in this case and is not even alleged to have done so.

As the record in this appeal bears out, there was virtually no activity in this appeal in the brief period between the appeal's commencement and the Chairman's final day with the Board. The record also shows that the time period for the completion of discovery and the deadline for the filing of Somerset's Pre-Hearing Memorandum was extended on May 15, 1995 at Somerset's request and over the objection of Mostoller. This occurrence is a practical rejection of any suggestion that in her current role Attorney Woelfling exercises any control over the pace at which this appeal proceeds.

Under these circumstances, we can see no evidence whatsoever that the former Chairman had any personal or substantial involvement with this appeal. She made no decisions of substance as to this appeal. We explicitly do not find her general instructions to the Secretary of the Board are decisions of any substance as to this appeal. Indeed, such instructions considering that a Board Chairman has administrative as well as adjudicative duties, could almost be argued not to even rise to the level of remote or incidental administrative responsibility. As an administrative duty, it clearly was not even responsibility exercised specifically as to this appeal and was merely generic administrative responsibility. However, even if the Chairman had actually

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[4]The motion is also in error when it says the appeal was assigned to the presiding Board Member for hearing "and decision". Assignment for the merits hearing did occur as outlined above, but in making final decisions on the merits of appeals to this Board, the Board acts *en banc*. All the presiding Board Member does is prepare a proposed or draft decision which is then evaluated by the entire Board. No Board Member acts alone to decide the merits of an appeal.

made the case assignment decision, had Pre-Hearing Order No.1 prepared and personally signed it, our conclusion would be the same. That effort, if it had occurred, is not substantial and personal involvement when that is all that occurs, particularly where the Chairman is legislatively obligated to assign appeals amongst the Board Members. See Section 6 of the Environmental Hearing Board Act, Act of July 13, 1988, P.L. 530, 35 P.S. §7516(b)(2). Accordingly, we must deny this Motion to the extent based on this theory.

We also reject Somerset's Motion to the extent it is based on a theory that disqualification should occur because Attorney Woelfling's conduct gives an appearance of impropriety. Whatever appearance it creates for Somerset is only in the eye of Somerset as beholder. The standard for disqualification in Pennsylvania may once have included an appearance of impropriety concept, but we now look to Rule 1.12 which contains no such standard. Moreover, movant's view of that alleged "appearance" is obscured by its role as a party contesting against Mostoller, so it is hardly that of a disinterested third party. Viewed from the Board's standpoint, Attorney Woelfling's conduct does not create even an appearance of impropriety.[5]

Finally, we reject the idea that Morgan, Lewis & Bockius or Attorney Brian Clark should be recused. If there is no evidence sufficient to disqualify Attorney Woelfling under Rule 1.12(b), there can be no spreading of a disqualification virus to either this lawyer or this firm.

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[5]Somerset also asserts a conflict of interest exists as Attorney Woelfling represents Mostoller here after having been Chairman of this Board. Since the Board was not her client and she has had no attorney-client relationship with it or the presiding Board Member, there can be no conflict-of-interest issue in her undertaking to represent Mostoller. Somerset apparently misapprehends what the conflict-of-interest concepts address. We cannot say more than that, however, because Somerset's Motion never explains how it concluded there was a conflict-of-interest issue.

Accordingly, the following order is entered.

ORDER

AND NOW, this 21st day of June, 1995, it is ordered that Somerset's Motion For Disqualification Of Counsel For Mostoller Landfill, Inc. is denied.

ENVIRONMENTAL HEARING BOARD

RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: June 21, 1995

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Katherine S. Dunlop, Esq.
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Michael Strongosky, *pro se*
Central City, PA
For Permittee:
Maxine M. Woelfling, Esq.
Brian J. Clark, Esq.
Harrisburg, PA
Mostoller Landfill, Inc.
Friedens, PA

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M. DIANE SMITH
SECRETARY TO THE BOARD

COUNTY COMMISSIONERS, SOMERSET COUNTY :
ELEANOR JEANE THOMAS and :
MICHAEL STRONGOSKY :
:
v. : EHB Docket No. 95-031-E
: (Consolidated)
COMMONWEALTH OF PENNSYLVANIA, :
DEPARTMENT OF ENVIRONMENTAL RESOURCES and :
MOSTOLLER LANDFILL, INC., Permittee : Issued: June 23, 1995

OPINION AND ORDER SUR
MOSTOLLER LANDFILL, INC.'S MOTION TO DISMISS

By: Richard S. Ehmann, Member

Synopsis:

Permittee's Motion To Dismiss the appeal of the *pro se* appellants for lack of standing is granted. There is no allegation or evidence that either of these appellants has any substantial interest impacted by DER's issuance of a permit to Mostoller Landfill, Inc. for a landfill to be located in the same county in which they reside or that either one of them is directly or immediately affected thereby.

OPINION

The instant consolidated appeals arose first with the February 1, 1995 filing by County Commissioners, Somerset County ("Somerset") of an appeal from the Department of Environmental Resources' ("DER") issuance to Mostoller Landfill, Inc. ("Mostoller") of Permit No. 101571 for construction and operation of a landfill in Somerset and Brothersvalley Townships, Somerset, County.

On March 1, 1995, Eleanor Jeane Thomas ("Thomas") filed her appeal from issuance of this permit and on March 6, 1995 Michael Strongosky ("Strongosky") filed his appeal of this permit. On April 7, 1995 the Board ordered these three appeals consolidated at the above docket number.

On May 10, 1995, Mostoller filed its Motion To Dismiss. It was accompanied by a Memorandum of Law. The motion applies only to the Thomas and Strongosky appeals. In it, Mostoller raises three issues as to the propriety of these appeals. One of these issues is a lack of standing to appeal the permit in either Thomas or Strongosky. It asserts that neither Thomas nor Strongosky has a substantial interest which is directly and immediately impacted by the permit's issuance and, thus, that they have no right to appeal its issuance to this Board.

While DER and Somerset have taken no position on this motion Thomas and Strongosky have. These two appellants are appearing *pro se*, and we attribute their less than completely coherent response to this motion to their lack of legal education and training.

Eleanor Jeane Thomas

Interpreting Thomas' somewhat rambling response to Mostoller's Motion as clearly as we can, it appears that Thomas asserts that she has raised questions about whether Mostoller broke the law in applying for its permit and she became aware of this breach-of-law issue through discovery. Thomas also asserts that Mostoller failed to follow the "Engineers Land Surveyor and Geologist Registration Law, Act of 1945 P.L. 913, No. 363 (amended December 16, 1992)" ("Engineer Law"), where it used notarized signatures on documents

instead of professional seals as allegedly required by this Act. Next, she asserts that the case law cited by Mostoller is null and void because discovery revealed Mostoller's violation of the law. She also argues that Article I, Section 27 of the Constitution of Pennsylvania protects the rights of all people to clean air and pure water, so she is empowered to oppose landfills on behalf of county residents who could lose this pure water and clean air if the landfill is allowed to operate. Thomas also asserts that the Constitution is superior authority to the case law cited by Mostoller. Next, she argues that because Article I, Section 27 protects all persons, regardless of proximity to the landfill, and protects unborn generations, standing constraints do not apply. Further, Thomas asserts that Article III, Section I of the Constitution mandates that DER require Mostoller to comply with "Public Law 913 No. 367 and this Board must follow this statute's directives as well". Finally, Thomas also argues that the evidence gathered by Thomas shows her interest exceeds the common interest of all citizens in seeing the law enforced. Thomas does not cite any case law for support of these arguments, she filed no Briefs or Memorandums of Law to support these contentions and, except as set forth above, she does not respond directly to the arguments advanced by Mostoller.

Before addressing the merits of this standing challenge to Thomas' appeal, however, we digress briefly to attempt to clarify the nature of the subject matter surrounding standing for these appellants. Standing has nothing to do with questions of whether Mostoller's application for permit should not have been granted by DER. Evidence to support Thomas' contentions with regard

thereto or her contentions concerning whether there is compliance with the Engineers Law does not address the standing issue. To get to those points, which go to the merits or propriety of DER's decision, we must pass the issue of standing, which is preliminary thereto. A party filing an appeal must demonstrate standing before he or she can reach the merits issues, and if that demonstration is not made, then, even if that appellant has evidence tending to show that the permit should never have been issued, a merits hearing at which such evidence could be received never occurs. Said another way, not everyone may appeal actions taken by DER. To challenge a DER action one must have "standing" to do so, i.e., must have a substantial interest which was directly and immediately impacted by the permit's issuance to Mostoller

In Roger Wirth v. DER, 1990 EHB 1643, 1645, we defined the terms used above as follows:

> In order to have standing to appeal, a person must have a substantial interest that is directly and immediately impacted by the agency action being challenged. William Penn Parking Garage v. City of Pittsburgh, 464 Pa. 168, 346 A.2d, 280-284 (1975) and Andrew Saul v. DER and Chester Solid Waste Associates, EHB Docket No. 88-436-F (Opinion issued March 21, 1990). A substantial interest is defined as one in which there is "some discernible adverse effect, some interest other than the abstract interest of all citizens in having others comply with the law." William Penn, 464 Pa. at 195, 346 A.2d at 282. "Direct" means that the person claiming to be aggrieved must show causation of the harm to his interest by the matter of which he complains. *Id.* "Immediate" means something other than a remote consequence of the judgment, focusing on and in the nature of and proximity of the action and injury to the person challenging it. *Id.* at 197, 346 A.2d at 283. Skippack Com. Ambulance Ass'n v. Skippack Twp., 111 Pa. Cmwlth 515, 534 A.2d 563 (1987).

We then analyzed the issues raised by Wirth's appeal, concluded that he lacked standing to appeal and granted DER's Motion To Dismiss. We will adopt the same procedure here. In so doing, we construe the motion in a light favorable to Thomas with all doubts resolved against Mostoller. Tri-County Industries, Inc. v. DER, et al., EHB 1139.

Recently in Fred McCutcheon and Rusmar, Inc. v. DER, EHB Docket No. 94-096-W (Opinion issued January 5, 1995), we defined these standing elements again, saying:

> [T]he appellant must be "aggrieved" by that action, that is, a party must have a direct, immediate and substantial interest in the litigation challenging that action. Empire Sanitary Landfill, Inc. v. DER, et al., EHB Docket No. 94-114-W (Opinion issued September 30, 1994); *see also*, William Penn, [*supra*]. A "substantial" interest is "an interest in the outcome of the litigation which surpasses the common interest of all citizens in procuring obedience to the law." South Whitehall Twsp. Police Service v. South Whitehall Tswp., 521 Pa. 82, ___, [555] A.2d 793, 795 (1989); Press Enterprise, Inc. v. Benton Area School District, 146 Pa. Cmwlth. 203, ___, 604 A.2d 1221, 1223 (1992). For an interest to be "direct", it must have been adversely affected by the matter complained of. South Whitehall Tswp. Police Service, *supra*. An "immediate" interest means one with a sufficiently close causal connection to the challenged action, or one within the zone of interests protected by the statute at issue. Empire Sanitary Landfill, Inc. v. DER, et al., *supra*.

Thus, eliminating the case citations, standing is the concept embracing the issue of whether a particular appellant may be a person who can file this appeal from this DER action, i.e., whether Thomas has an interest of a sufficiently great nature which is directly enough and immediately affected by the permit's issuance to fall within the group of persons who may file appeals from that action.

As to appeals to this Board, clearly a permit applicant whose application is denied by DER meets this test, but a resident of Philadelphia might well be totally unimpacted by DER's issuance of a permit to operate a landfill in Erie and thus lack standing to appeal. Here, the permit applicant is not appealing but the appellant is not some out-of-county non-resident, so the matter is neither clearly all black nor all white. It is a gray shade and we must examine the law quoted above and apply it to the facts and theories before us.

Thomas' Notice of Appeal does not establish her standing to appeal. It identifies her as a resident of Somerset County with a mailing address of R.D. #3, Box 290-A, Stoystown, PA, 15563. The Notice of Appeal then recites the following language at paragraph 3:

> My appeal maybe considered a strange way to keep a landfill from opening, as my objections are actions of the Department of Environmental Resources (DER.) in regard to a landfill in Shade Township, Somerset Co., Somerset, Penna. 15924 called Resource Conservation Corp. (RCC.) #101421.
>
> DER. did not fulfill their obligations and supervision of Permit #101421 in regard to the health and welfare of the area residents, will they also neglect the health and welfare of the area for the landfill that just received permit #101571.

After making this statement, it recites twenty paragraphs of complaints as to operations at the landfill in Shade Township, Somerset County operated by Resource Conservation Corporation. Finally, attached to Thomas' Notice Of Appeal is a copy of the first page of Mostoller's Permit showing the landfill's address to be P.O. Box 260, Friedens, PA 15541 and its location

as being in Somerset and Brothersvalley Townships in Somerset County. This establishes that Mostoller's landfill is not in the same township as the Resource Conservation Corporation's Landfill.[1]

Nothing in Thomas' response to Mostoller's motion or her Pre-Hearing Memorandum sets forth any further factual circumstances dealing with her standing to challenge this permit.

While Thomas need not make allegations sufficient to show standing in her Notice of Appeal, City of Scranton, et al. v. DER, et al. EHB Docket No. 94-060-W (Opinion issued January 25, 1995), she had that obligation after Mostoller's standing challenge was raised. Thomas has not met this challenge. Other than her apparent general opposition to the landfill's proposed location in Somerset County and her residency there, we have no allegations which show she is aggrieved or injured by DER's issuance of the permit to Mostoller. Such a general interest is only that: it is not a substantial interest. David Tessitor, et al. v. DER, et al., EHB Docket No. 94-352-E (Opinion issued May 4, 1995).

Since Thomas has not made allegations showing a substantial interest, the Board cannot find her substantial interest is directly or immediately impacted by DER's permit issuance decision. Nothing in the Notice of Appeal demonstrates a direct or immediate impact on Thomas from the Mostoller permit's issuance. Even if it is assumed that a landfill has the potential to

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1 Thomas already unsuccessfully challenged DER's issuance of the landfill permit to Resource Conservation Corporation in Eleanor Jeane Thomas v. DER, et al., 1992 EHB 389. The same is true as to Michael Strongosky. See Michael Strongosky v. DER, et al., 1993 EHB 412.

have an adverse impact on pure water or clean air in Somerset County, this potential impact does not create any interest on Thomas' behalf which exceeds the interest of all citizens in securing compliance with laws restricting such pollution. Thus, the Board must conclude there is no showing of standing.

Turning to Thomas' responses to Mostoller's Motion, we immediately reject the assertion that Article I, Section 27 of the Constitution is meant to eliminate standing issues by empowering all residents to initiate appeals. Article I, Section 27 recognizes certain environmental rights as vested in all citizens of Pennsylvania as Thomas suggests. However, this Section does not empower all citizens to bring appeals from every action by DER even when DER's actions have no impact on those citizens. There is no "private attorney general" status created in every citizen by Article I, Section 27 empowering that citizen to bring appeals as to any DER actions taken anywhere within this Commonwealth or to appeal on behalf of others including future generations. Were it so, Thomas could bring an appeal from her home in Somerset County challenging DER issued permits for landfills in Philadelphia or Erie. In reaching this conclusion, we do not disagree that Thomas has constitutionally protected rights under Article I, Section 27, but she still must show a direct immediate substantial impact on those rights, i.e., standing, to bring an appeal based on alleged violations thereof.

Most of the remainder of the arguments raised by Thomas' response to Mostoller's Motion go to merits issues rather than standing issues, so we need not address them. We do point out, however, that courts frequently interpret the meaning of the Constitution and their opinions on the meaning of

provisions of the Constitution are "case law". The Constitution is not superior to this case law as Thomas suggests. Rather, these opinions as "case law" explain and interpret the Constitution as portions of it are applied to different circumstances.

We also reject Thomas' assertion that because she has uncovered her claim that Mostoller allegedly violated the Engineer Law through discovery, this fact somehow renders null and void the case law cited in support of Mostoller's Motion. There is no legal precedent this Board can find to support such a contention. In Commonwealth of Pennsylvania Game Commission v. Commonwealth of Pennsylvania, DER, 97 Pa. Cmwlth. 78, 509 A.2d 877 (1986), aff'd on other grounds, 521 Pa. 121, 555 A.2d 812 (1989) ("Game Commission") the Court did say that where, in its Notice Of Appeal, an appellant preserves a right to amend its Notice Of Appeal to add grounds for appeal thereto of which it learned through discovery, such a request may be granted where otherwise such an untimely raised ground for appeal is deemed to have been waived. However, nothing in that opinion addressed standing to appeal or addressed this contention by Thomas. Thomas made no reservation of a right to amend in her Notice of Appeal, so the Game Commission holding does not apply. Since it does not apply, this is an untimely amendment. Untimely amendments are barred according to this Commonwealth Court opinion.

Michael Strongosky

Prior to consolidation at the instant docket number Strongosky's appeal bore Docket No. 95-054-E. His Notice of Appeal filed there is identical to that of Thomas as far as the language quoted above and the twenty allegations

of concerns regarding the landfill permitted to Resource Conservation Corporation. Unlike Thomas' appeal which indicates only that she is a resident of Somerset County, Strongosky's Notice of Appeal also indicates he is a resident of Shade Township in that county.

Neither Strongosky's Answer To Permittee Mostoller Landfill, Inc.'s Motion To Dismiss the Appeal of Michael Strongosky nor his Pre-Hearing Memorandum provides any additional information about the impact on him of the proposed construction and operation of a landfill by Mostoller pursuant to the challenged permit. In his Answer he, like Thomas, raises the Engineer Law issue. He also addresses errors he believes were committed by the Board in an EHB proceeding involving Resource Conservation Corporation. Strongosky also urges that, because of his Engineers Law claim and the documents produced by Mostoller during discovery, the cases cited in support of Mostoller's motion are null and void. Just like Thomas' response, Strongosky's Answer never says why this is so. Strongosky, like Thomas, asserts that Article I, Section 27 of the Constitution applies, giving him the right to fight a landfill which could destroy his constitutional right to clean air and pure water. Further, he asserts this Section gives him the right to fight the landfill on behalf of his fellow county residents and that the Constitution is superior to the case law cited by Mostoller. Like Thomas, he also asserts Article III, Section 3 of the Constitution imposes certain duties on DER as does Article III Section 1 (and further that this Board may not overlook this fact). Finally, he asserts his evidence against Mostoller proves he has an interest which surpasses the common interest of all citizens in seeing DER enforce the law as

to Mostoller. Other than as set forth above, however, Strongosky does not address the contentions set forth in Mostoller's Motion, and he fails to cite any case law in support of his own contentions or to explain how he reaches these conclusions.

Having discussed the concept of standing above and how it enters into the administrative appellate process before this Board as to Thomas and thus to Strongosky, we will not repeat that material here. Instead, we turn directly to Strongosky's arguments in opposition to Mostoller's Motion.

As was true with Thomas, so too our examination of Strongosky's filings (Notice of Appeal, Pre-Hearing Memorandum and his Answer to Mostoller's Motion) show no statements which allow us to conclude Strongosky has standing to bring this appeal. Strongosky has not suggested any adverse impact on him of the permit's issuance to Mostoller by DER. We know he does not live in the townships where the landfill is to be located and he does not suggest that if it is operated in accordance with the various environmental laws that it will impact on him. His focus is on contentions of alleged non-compliance in the daily operations of another landfill (located in the same township, in which he resides). Not only is the issue of whether the decision to issue this permit different from an issue of whether DER should take action as to the alleged operations violations there,[2] but in addition, there is no connection or linkage between the two landfills. Moreover, even if we stretch

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2 DER's decision on whether or not to prosecute for an operational violations of permit condition is not reviewable by this Board. Roger and Kathy Beitel, et al. v. DER, et al., 1993 EHB 332.

what he writes to read Strongosky's argument as one where this landfill permit is challenged because experience shows a type of subsequent violations at other similar landfills, that is only a ground to challenge the merit of this decision and does not show standing in Strongosky to be allowed to mount this or any other challenge.

Strongosky's other arguments fare no better. The Engineers Law argument goes to the merits, as do his Article III, Section 3 and Article III, Section 1 arguments. His Article I, Section 27 argument as to his right to pure air and clean water also is a merits, rather than a standing, argument.

Strongosky's argument, that Article I, Section 27 empowers him to defend the environmental rights of other county residents who have chosen not to appeal, fails for the reasons discussed above as to Thomas. Indeed, this type of assertion is exactly why there is a standing concept in the law in Pennsylvania. Absent legislative creation of a private attorney general concept, and this Board is unaware of any such concept applicable here, a lack of standing bars Strongosky or Thomas from appealing on behalf of those who have elected not to appeal on their own behalf.

Finally, we reject Strongosky's claims that the opinions on standing cited by Mostoller are null and void because of his Engineers Law claim and that his evidence shows his interest in seeing DER enforce the law exceeds the common interest therein. The opinions on standing cited by Mostoller go to why Strongosky never reaches the point of being allowed to raise the merits issue on the Engineers Law. They are not voided by this claim. To prevail, Strongosky must have both standing and valid merits issues, not merely one of

the two. The existence of valid challenges to the merits of DER's action does not allow us to ignore or overlook a lack of standing, just as a right to appeal and standing to do so do not mean success at the merits hearing. Finally, no matter how much evidence Strongosky gathers to prove the merits of his position on the permit's issuance, this only shows extra efforts on his behalf on merits issues, it does not show standing.

Accordingly, we must enter the same order as to both Thomas and Strongosky.

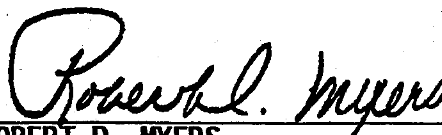
ORDER

AND NOW, this day of June 1995, it is ordered that Mostoller's Motion To Dismiss the appeals of Eleanor Jeane Thomas and Michael Strongosky for lack of standing is granted and each of their appeals is dismissed.[3] It is further ordered that Eleanor Jeane Thomas' appeal at Docket No. 95-046-E and the Michael Strongosky appeal at EHB Docket No. 95-054-E are unconsolidated herewith and the caption of this appeal is amended to read:

COUNTY COMMISSIONERS, SOMERSET COUNTY	:	
	:	
v.	:	**EHB Docket No. 95-031-E**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	
and MOSTOLLER LANDFILL, INC., Permittee	:	

3 Having granted this Motion on this basis, the Board has not addressed the other issues raised by Mostoller's Motion.

ENVIRONMENTAL HEARING BOARD



ROBERT D. MYERS
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

DATE: June 23, 1995

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M. DIANE SMITH
SECRETARY TO THE BOARD

E.M.S. RESOURCE GROUP, INC.	:	
	:	
v.	:	EHB Docket No. 93-171-CP-MR
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: July 11, 1995

ADJUDICATION

By Robert D. Myers, Member

Synopsis

The Board issues an adjudication determining the amount of civil penalty where the issue of liability has already been established by default judgment. The Board will not consider an amount proved by the Department of Environmental Resources, now the Department of Environmental Protection, at a hearing on the civil penalty that exceeds the amount the parties stipulated the evidence would show, as it would be unfair to the defendant.

Procedural History

This matter was initiated by the Department of Environmental Resources'(Department) July 2, 1993, filing of a complaint for civil penalties pursuant to the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. §691.1 *et seq* (CSL). The complaint alleged that EMS Resource Group, Inc. (EMS) violated the CSL, the rules and regulations promulgated thereunder, its NPDES permit and caused stream damage from an unlawful

discharge[1].

On November 18, 1993, the Department filed a Praecipe for Entry of Default Judgment on the issue of EMS' liability because it did not file a timely answer to the Department's complaint. By its December 1, 1993, order, the Board entered judgment against EMS on the issue of liability for the violations alleged in the complaint as well as ordered EMS to file its pre-hearing memorandum by February 14, 1994. After EMS failed to file its pre-hearing memorandum and failed to respond to the Board's March 4, 1994, Rule to Show Cause, the Board issued its March 31, 1994 order imposing sanctions on EMS by prohibiting EMS from presenting evidence at the hearing.

A hearing was held in Harrisburg on October 5, 1994 before Administrative Law Judge Robert D. Myers, a Member of the Board. The Department was represented by counsel and presented evidence in support of its position. Although EMS was notified of the hearing, it was neither represented by counsel nor in attendance at the hearing. The Department filed its post-hearing brief on December 7, 1994; EMS did not file a post-hearing brief.

Any arguments the parties did not raise in their post-hearing briefs are waived. *Lucky Strike Coal Co. and Louis Beltrami v. Commonwealth, Department of Environmental Resources*, 119 Pa. Cmwlth. 440, 547 A.2d 447, 449 (1988).

The record consists of the pleadings, a pre-hearing stipulation, a hearing transcript of 44 pages and 5 exhibits. After a full and complete review of the record we make the following:

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[1] At the commencement of the hearing the Department withdrew the damage claim. The Department asked the Board to assess penalties on the effluent violations.

FINDINGS OF FACT

1. The Department is an administrative department of the Commonwealth of Pennsylvania and the agency charged with the duty to administer and enforce the provisions of the CSL and the rules and regulations adopted pursuant to said statute. The Department is the agency of the Commonwealth with the authority to implement the National Pollutant Discharge Elimination System (NPDES) permitting program, pursuant to the Federal Clean Water Act, 33 U.S.C. § 1251.

2. EMS Resource Group, Inc. (EMS) is a corporation with a business address of 60 West Germantown Pike, Norristown, Montgomery County, Pa 19401 (Paragraph 3 of the Complaint[2]).

3. EMS owns and operates a sewage treatment plant located in Upper Pottsgrove Township, Montgomery County. The plant discharges treated sewage into an unnamed tributary of Manatawny Creek. The tributary is a water of the Commonwealth within the meaning of Section 1 of the CSL (Paragraph 4 of the Complaint).

4. The Plant receives sewage from a sewage collection system which serves a sixty-eight (68) unit residential subdivision known as the Greengate Development located in Upper Pottsgrove Township, Montgomery County (Paragraph 5 of the Complaint).

5. On June 24, 1971, the Department issued a Water Quality

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[2] References to the Department's Civil Penalty Complaint are denoted by "the Complaint." The transcript of the hearing is referred to as "Trans. ___." References to the stipulations from Stipulations Pursuant to Pre-Hearing No. 2 are labeled as "Stip. No. ____."

Management Sewage Permit[3], No. 4671408, to Pottsgrove, Inc., the original owner of the plant, authorizing the construction of the plant and the discharge of treated sewage to the unnamed tributary to Manatawny Creek (Paragraph 6 of the Complaint).

6. On September 7, 1972, the Department issued a Water Quality Management Sewage Permit, No. 4672420, to Pottsgrove, Inc., authorizing the construction of a sewage collection system and pumping station for the Greengate Development (Paragraph 7 of the Complaint).

7. On June 18, 1980, the Department issued a National Pollutant Discharge Elimination Systems Permit (NPDES), No. PA0040886, to Pottsgrove, Inc. which authorized the discharge of treated effluent to an unnamed tributary to Manatawny Creek and set effluent limits and monitoring requirements for the discharge, such as filing discharge monitoring reports (Paragraph 8 of the Complaint and Trans. p. 13).

8. On January 21, 1986, the Department transferred the NPDES Permit and Water Quality Management Permits Nos. 4672420 and 4671408 to EMS per its request (Paragraph 9 of the Complaint).

9. On July 31, 1991, the Department renewed the NPDES Permit. The current NPDES Permit expires on July 31, 1996 (Paragraph 11 of the Complaint).

10. EMS has on numerous occasions failed to meet the discharge limitations in the NPDES Permit as evidenced by the discharge monitoring reports

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[3] Prior to 1979 the Water Quality Management Permits had two parts, Part I and Part II. Part I was subsesquently replaced with an National Pollutant Discharge Elimination System (NPDES) permit when the U. S. Environmental Protection Agency delegated its authority for administering and enforcing the NPDES permit program, a national program for regulating discharges into the waters of the United States, authorized by §402 of the Federal Clean Water Act, 33 U.S.C. §1342, to Pennsylvania's Department of Environmental Resources in 1979.

(DMRs) submitted to the Department by EMS relating to the reporting periods from April, 1990 through February, 1993 (Paragraph 14 of the Complaint).

11. On July 2, 1993, the Department filed the complaint seeking assessment of civil penalties against EMS for violations of the Clean Streams Law, specifically for violations of the NPDES permit issued to EMS (Count I), and for stream damage that resulted from EMS' unlawful discharge (Count II) (Stip. No. 3).

12. By Order dated December 1, 1993, the Board entered judgment by default against EMS on the issue of liability for the violations alleged in the Complaint (Stip. No. 5).

13. On March 31, 1994, the Board issued an Order imposing sanctions upon EMS by prohibiting EMS from presenting evidence at the hearing in this matter because EMS had failed to file a pre-hearing memorandum and had failed to respond to the Board's March 4, 1994, Rule to Show Cause (Stip. No. 7).

14. The Department considered various factors under the guidelines set forth in Department policy documents regarding the calculation of civil penalties under the Clean Streams Law (Stip. No. 9).

15. The factors the Department considered in calculating the amount of the civil penalties sought included the wilfulness of the violations, damage or injury to the waters of the Commonwealth, savings resulting to EMS as a result of the unlawful conduct, the cost to the Department of enforcement against EMS, and the necessity for deterring similar unlawful conduct in the future by EMS and others similarly situated (Stip. No. 8).

16. In calculating the civil penalty amount for the effluent violations that occurred, the Department considered, for each separate effluent violation: the magnitude of the violation, the classification of the affected

stream, the duration of the violation, the size of the discharge, and the nature of the parameter exceeded (Stip. No. 10).

17. The Department's analysis resulted in a total penalty figure for effluent violations of $38,640.00 (Stip. No. 11).

18. In calculating the civil penalty amount sought for stream damage, the Department considered the use of the affected stream, and the severity and extent of the damage (Stip. No. 12).

19. A hearing on the Complaint was held on October 4, 1994.

20. At the hearing, the Department withdrew the portion of its complaint concerning the stream damage claim (Count II) (Trans. 5).

21. EMS was neither represented by counsel nor in attendance at the hearing.

22. At the hearing the Department presented evidence increasing the penalty for effluent violations to $47,131.00 (Trans. p. 36).

23. By the Board's November 2, 1994 order the parties were ordered to file post-hearing briefs which were to include a discussion of the propriety of the Department seeking a higher civil penalty at the hearing than the amount set forth in the October 3, 1994, joint stipulation (Board's November 2, 1994 Order).

24. The Department filed its post-hearing brief on December 7, 1994.

25. EMS failed to file its post-hearing brief.

DISCUSSION

The Department has the burden of proof: 25 Pa. Code §21.101(b)(1). To carry its burden regarding the civil penalty assessment the Department must prove by a preponderance of the evidence that violations of the CSL were

committed and that the amount of the assessment is reasonable and an appropriate exercise of its discretion. *Joseph Blosenski, et al. v. DER*, 1992 EHB 192.

Our December 1, 1993 default judgment order established EMS violated §§ 3, 201, 202, 401, 402(b) and 611 of the CSL and 25 Pa. Code §92.3 by discharging sewage contrary to a Department permit and for stream damage.

Having established EMS' liability for the violations, we now turn to the issue of determining the appropriate penalty amount.

Under the CSL the Board is the government body authorized to set penalties. 35 P.S. §691.605; *DER v. C. Donald Cox*, 1982 EHB 282. According to §605 of the CSL, we may assess a maximum penalty of $10,000 per day per violation of the CSL. The section also directs us to consider the wilfulness of the violation, the damage or injury to the waters or the use of the waters of the Commonwealth, the costs of restoration, and other relevant factors. *DER v. Canada-PA, Ltd.*, 1989 EHB 319. The Board has interpreted the last factor to include deterrence. *DER v. Lawrence Coal Company*, 1986 EHB 561. The amount requested by the Department in its complaint or otherwise is only advisory.

Here, the evidence presented by the Department involves wilfulness, damage to the waters of the Commonwealth, and the cost of enforcement. It does not include deterrence because the Department felt the penalty amount generated by the effluent violations as determined by Department policy[4] was sufficient. The Department's worksheet indicates that EMS committed 44 separate violations between April, 1990 and February, 1993. As to each violation the worksheet shows

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[4] The Department uses the following formula to determine effluent violations: reported value/permit limit X stream classification X duration factor X flow factor X base penalty = penalty.

a permit limit and a reported value for AMM-N, BOD5, TSS, CBOD and FECALS[5], a magnitude factor (reported value/permit limit), a duration factor for the violations (1 or 30 days), a stream classification (1), a flow factor (.10) and a base penalty of $100 (Department Exhibit 49). The Department used this information in the formula:

reported value/permit limit (R/A) x stream classification(1) x duration factor(1 or 30) x flow factor(.10) x base penalty(100) = penalty.[6]

The violations involved those for AMM-N, BOD5, TSS, CBOD and FECALS; each was considered separately. Looking at the AMM-N, there were 30 occasions where EMS exceeded its permit limit resulting in R/As ranging from 1.152 to 35.199 for a 30 day period. Based on those figures the penalties ranged from $346 to $10,560. EMS also committed 2 violations regarding AMM-N, each for the duration of 1 day, in which the R/As were 2.889 and 5.299, respectively. Using these figures, the penalties are $100 and $1,590.

Next we will consider TSS. EMS had 5 separate violations which lasted for 30 days. These violations, where the reported value exceeded the permit limit, resulted in R/As of 1.189, 1.233, 1.299, 1.399 and 1.789. Consequently, the penalties are $357, $370, $390, $420 and $537. There were also 2 violations concerning TSS, each of which lasted for 1 day. On those days the R/As were 1.433 and 1.416, respectively. The penalties for each of these

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[5] The abbreviations stand for the following: AMM-N is ammonia nitrogen; BOD5 is biochemical oxygen demand over a 5 day period; TSS is total suspended solids; CBOD is the amount of dissolved oxygen consumed from the carbonaceous portion of biological process breaking down in an effluent and FECALS is for fecal coliform bacteria.

[6] If the permit limit is .46, the reported value is .627, the duration factor is 30, the stream classification is 1, the flow factor is .10 and the base penalty is 100, then using the formula the penalty would be $409 (.627/.46 x 30 x 1 x .10 x 100 = 408.91 or 409).

violations is $100.

EMS had 2 violations regarding CBOD as well as 2 violations for FECALS, each for 30 days. The R/As for the CBOD violations were 1.019 and 1.091 Thus, these violations result in penalties of $306 and $328. As for the FECALS the R/As were 5499.999 and 200[7]. The penalty for the FECAL violations is $1200 each.

The last violation concerned BOD5. It lasted for 1 day and the R/A was 1.499. Therefore, the penalty is $100.

After considering all the evidence and performing all the calculations for each of the violations we find that the evidence supports a penalty of $47,130. However, this amount and the evidence supporting it were greater than the amount included in the stipulation.

On October 3, 1994, the parties entered into a Stipulation of Facts. One of the facts stipulated was, "The Department's analysis resulted in a total penalty figure for effluent violations of $38,640.00." (Stipulations D.11) However, at the October 5, 1994, hearing the Department presented evidence increasing the amount to $47,131 citing *inter alia*, calculation errors.

As a general rule, once a stipulation of facts has been effectively entered into, there can be no valid contention or conclusion that facts within the scope of the stipulation are unsupported by substantial evidence. *Kostecky v. Mattern*, 69 Pa. Cmwlth. 575, 452 A.2d 100 (1982). In sum facts effectively stipulated to are controlling and conclusive. *Id.*

Here, the parties effectively entered into a Stipulation of Facts. There is no evidence to indicate that either party did not knowingly, willingly

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[7] We used the 200 permit limit figure as the reported value was unable to be determined because the bacteria were too numerous to count.

or freely enter into the stipulation of facts. Both parties were represented by counsel at the time of the stipulation as each of their counsels signed the document. The stipulation that the Department's calculations amounted to $38,640 is controlling. The Board sets the penalty for violations under the CSL and can ignore the Department's calculations. But a stipulation goes to what the evidence will show. It would be unfair for the Department to prove a higher amount after it has stipulated to a lesser figure unless good cause existed and the other party was notified.

If the Department sought a change of the amount its evidence would show, it was incumbent upon the Department to seek a revision of the stipulation. The Department did not do that. We are obligated to see that the proceedings before us are fair and just even when the defendant fails to appear before the Board or fails to submit a post-hearing brief as in this case. Consequently, the Board will reduce the penalty amount to $38,640 as initially stipulated to by the Department.

CONCLUSIONS OF LAW

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

2. The Department has the burden of proving by a preponderance of the evidence that the civil penalties are appropriate.

3. The facts set forth in the Department's complaint for civil penalties have been established for the purposes of this proceeding on the basis of the default judgment entered by this Board on December 1, 1993.

4. Based on the facts so established, EMS committed violations of §§ 3, 201, 202, 401, 402(b) and 611 of the CSL, by exceeding permit effluent

limits for various items (AMM-N, BOD5, TSS, FECALS & CBOD).

5. The Board has the authority to assess civil penalties under §605 of the CSL.

6. The parties stipulated that the Department's analysis would show a penalty amount for the effluent violations of $38,640.

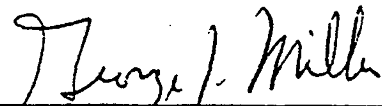
7. The Board will not consider the Department's request at the hearing to assess a penalty in an amount in excess of that stipulated to by the Department because it would be unfair to EMS.

8. Having reviewed the evidence, we assess a penalty against EMS of $38,640.

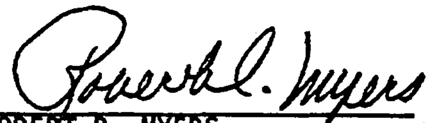
ORDER

AND NOW, this 11th day of July, 1995, it is ordered that civil penalties are assessed against EMS Resource Group in the total amount of $38,640.

ENVIRONMENTAL HEARING BOARD

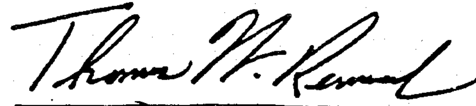


GEORGE J. MILLER
Administrative Law Judge
Chairman



ROBERT D. MYERS
Administrative Law Judge
Member

RICHARD S. EHMANN
Administrative Law Judge
Member



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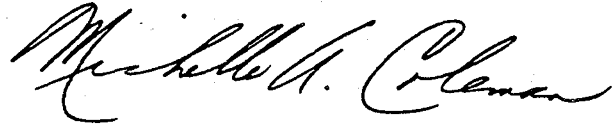
Administrative Law Judge
Member



MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: July 11, 1995

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M. DIANE SMITH
SECRETARY TO THE BOARD

LAKE RAYLEAN CORPORATION	:	
v.	:	EHB Docket No. 94-254-MR
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: July 13, 1995

OPINION AND ORDER SUR MOTION TO QUASH NOTICE OF APPEAL AND TO DISMISS FOR LACK OF JURISDICTION

By Robert D. Myers, Member

Synopsis:

The Board denies a motion to quash a Notice of Appeal and dismiss the appeal for lack of jurisdiction where the Notice of Appeal was filed on behalf of a corporation by a non-lawyer corporate officer. While reaffirming a prior Board decision invalidating the portion of a Board rule permitting corporate representation by non-lawyer officers, the Administrative Law Judge noted that the published rules still contain the invalidated language and that the General Rules of Administrative Practice and Procedure are not free from doubt on the subject. Consequently, the corporate Appellant was given thirty days to obtain legal counsel.

OPINION

This proceeding commenced on September 27, 1994 when George J. Calafut, who identified himself as President of Lake Raylean Corporation, R.D. #1, Box 151, Montrose, PA 18801, filed a Notice of Appeal challenging the August 30, 1994 issuance by the Department of Environmental Resources (DER) of Field

Order No. 94-22-234-001. This Field Order pertained to a public water system owned and operated by Lake Raylean Corporation in Bridgewater Township, Susquehanna County.

The Notice of Appeal was signed by George J. Calafut on a signature line with the following words beneath it: "Signature of Appellant, Appellant's Officers or Appellant's Counsel." Just below these words appear the following: "If you have authorized counsel to represent you, please supply the following information:" (spaces for name, address and telephone number of counsel). This part of the form was left blank.

On May 2, 1995 DER filed a Motion to Quash Notice of Appeal and to Dismiss for Lack of Jurisdiction, contending that the Board lacks jurisdiction to entertain the appeal because it was commenced by a corporation acting without legal counsel - a deficiency that was not corrected while the appeal period was still open.

Lake Raylean Corporation responded to DER's Motion on May 19, 1995 in the form of a letter signed by "George J. Calafut, President." In it, the Appellant acknowledged that it is a corporation[1] but claims it was unaware of the formalities required to file an appeal with the Board. It requested 30 days within which to retain counsel, citing similar action in the Board's decision in *Keystone Carbon and Oil, Inc. v. DER*, 1993 EHB 765.

In *Keystone* the Board reviewed its rule of procedure at 25 Pa. Code §21.21(a), which reads as follows:

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[1]The letter states, in addition, that it is a "small corporation with no paid staff and very limited resources."

> An individual may appear in his own behalf; a partnership may be represented by its members; *a corporation or association may be represented by its* officers; and an authority or governmental agency, other than the Department [DER], may be represented by an officer or employee (emphasis added).

Based on existing case law, the Board in *Keystone* invalidated the rule to the extent that it authorized corporations to be represented by their non-lawyer officers in proceedings before the Board. The invalidation of this portion of the Board's rule activated the provisions of §§31.21 - 31.23 of the General Rules of Administrative Practice and Procedure at 1 Pa Code. These rules permit a corporation to be represented by an officer "in presenting any submittal to an agency subject to these rules" but require representation by an attorney in "adversary proceedings." Since the *Keystone* decision represented a departure from prior Board practice, Keystone was given thirty days to retain legal counsel.

Lake Raylean Corporation seeks that same treatment here. DER argues, however, that filing of a Notice of Appeal (like the filing of a complaint in civil practice) institutes adversary proceedings before the Board. As such, preparation and filing of the Notice of Appeal is the practice of law and can be done only by an attorney. Since Lake Raylean Corporation's Notice of Appeal was prepared and filed by a non-lawyer, it is not legally effective and cannot serve to invoke the Board's jurisdiction. Since the time for filing a Notice of Appeal has now expired, the defect cannot be corrected and the appeal must be dismissed.

There is much merit in DER's line of reasoning. Yet, we are loath to dismiss Lake Raylean Corporation's appeal. For one thing, our rule at §21.21(a), although partly invalidated in *Keystone*, still reads the same as it did before that decision. A revision to the rule, prompted by *Keystone*, has been approved by the Board but still is not in effect (see proposed rules at 25 Pa.

Code §§1021.21 and 1021.22, 24 *Pa. Bulletin 4354, August 27, 1994*). A complete copy of the rules is sent to all persons requesting a Notice of Appeal form; and Board records show that the form and the rules were sent to George Calafut, Lake Raylean Corporation, on September 6, 1994. While no argument is made that Appellant was misled by the current language of §21.21(a), the possibility exists.

The language of 1 Pa. Code §§31.21 - 31.23 also is not free from doubt. The initial section authorizes a corporate officer to present "any submittal" to the Board but requires the use of an attorney in adversary proceedings. This requirement appears to be somewhat weakened in the second section where it states that a party "may be represented" by an attorney. It is further weakened in the third section where legal representation is required except "as otherwise permitted" by the Board "in a specific case."

The three sections can be read together to suggest that the Board has some discretion in whether or not to insist upon attorney representation and that the filing of the Notice of Appeal ("any submittal") may be done by a non-lawyer corporate officer. While we are not prepared to adopt this interpretation without consideration by the entire Board, the fact that such an interpretation is possible is enough to persuade us that we should not dismiss Lake Raylean Corporation's appeal because the initial filing was made by a non-lawyer corporate officer.

We will not permit the appeal to proceed further without legal representation, however. We will give Appellant thirty days in which to have legal counsel enter an appearance.

ORDER

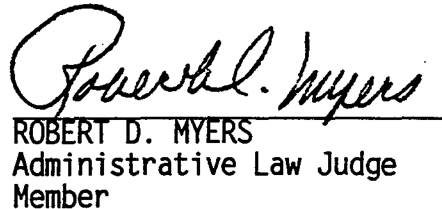
AND NOW, this 13th day of July, 1995, it is ordered as follows:

1. DER's Motion to Quash Notice of Appeal and to Dismiss for Lack of Jurisdiction is denied.

2. Appellant shall retain legal counsel and have legal counsel enter a formal appearance in the appeal on or before August 14, 1995.

3. Failure to comply with paragraph 2 shall result in dismissal of the appeal.

ENVIRONMENTAL HEARING BOARD



ROBERT D. MYERS
Administrative Law Judge
Member

DATED: July 13, 1995

cc: **DER Bureau of Litigation:**
(Library: Brenda Houck)
For the Commonwealth, DER:
Daniel D. Dutcher, Esq.
Northeast Region
For Appellant:
George J. Calafut, President
Lake Raylean Corporation
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sb

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M. DIANE SMITH
SECRETARY TO THE BOARD

JOSEPH J. KRIVONAK, JR.,	:	
v.	:	EHB Docket No. 94-247-E
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION and NEW ENTERPRISE STONE & LIME CO., INC., Permittee	:	Issued: July 20, 1995

OPINION AND ORDER SUR APPELLANT'S MOTION TO VACATE PERMIT NO. SMP250946

By: Richard S. Ehmann, Member

Synopsis

Where the Appellant's motion in part seeks a specific relief granted movant nearly a month before the motion's filing, that portion of the motion must be denied as moot.

To the extent the remainder of the motion fails to meet the minimum standards for motions for summary judgment, it must be denied as facially insufficient. Where material facts are in dispute between the parties, and movant makes no attempt to show where the pleadings, depositions, affidavits, answers to interrogatories, or admissions contain sufficient undisputed facts to support the motion, it is insufficient on its face.

OPINION

Joseph J. Krivonak, Jr.'s ("Krivonak") appeal, was received by this Board on September 19, 1994. It challenges the Department of Environmental Resources' (now the Department of Environmental Protection or "DEP") issuance

of a permit to New Enterprise Stone & Lime, Inc. ("New Enterprise") for a quarry in Shade Township, Somerset County. According to the Notice Of Appeal, Krivonak owns the Cairnbrook Water Company.[1] While it is not completely clear there, it appears this water supply is located on land adjacent to a tract of land which Krivonak contends will be quarried by New Enterprise and the stream flowing from New Enterprise's tract supplies water used by Cairnbrook.

Before the Board at this time is Krivonak's Motion To Vacate Permit No. SMP250946 For Lack Of Key Information Needed To Make A Proper Decision Concerning Mining Permit, which was filed with us on June 6, 1995. By letter, DER advised that it would file no response thereto. On June 28, 1995, we received New Enterprise's Response Of New Enterprise To Motion To Vacate. It opposes our granting Krivonak the relief he seeks.

After stating that his appeal and his amended appeal were both timely field, Krivonak's Motion states:

> The real issue that should be before this Hearing Board, is WHY DID NOT NEW ENTERPRISE ALERT "DER" THAT THEIR "ISHMAN QUARRY WOULD BE A SERIOUS THREAT TO THE BEAVERDAM RUN WATERSHED? (See, EXHIBIT C &B D) They failed to show that Central City Resivor [sic] was less than ½ mile down stream from this proposed "Mine Site)??? This document (mine site) was furnished "DER" only DAYS before the Permit No. SMP250946 was issued by J. SCOTT HORRELL, District Mining Manager, Ebensburg, PA., August 15, 1994?

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[1]Krivonak is presently appearing *pro se*. We strongly urge Krivonak to retain counsel to represent his interests here because our experience with *pro se* appeals is that parties who appear *pro se* have a much greater likelihood that they will be unsuccessful based on their lack of legal training and the fact that opponents are represented by experienced lawyers. New Enterprise has already sought unsuccessfully to dismiss this appeal and has just filed a new Motion To Dismiss (which is not addressed further in this opinion).

> Since this Appellant filed his AMENDED APPEAL, the Central City Water Authority has found out exactly how dangerous this type of mine is around a water supply, when they drilled a WELL next to the Resivor, [sic] only to get sulfur water running out of the ground just a few feet away from the Resivor; [sic] there was an old sandstone mine just on the hill above Resivor. [sic] (DER in Ebensburg can confirm this) [sic]

The motion's prayer for relief asks for denial of New Enterprise's original Motion To Dismiss For Lack of Jurisdiction.[2] It states the Board should deal with the real issue before it which is protection of the environment and protecting good water. Attached to the motion is a map, but the motion's factual allegations are unverified and there is no affidavit to support it.

There are many reasons why this Motion must be denied. The issues as to its deficiencies raised by New Enterprise constitute as good a set of reasons as any. As pointed out by New Enterprise, at least a portion of this Motion is moot to the extent that Krivonak's Motion seeks denial of New Enterprise's initial Motion To Dismiss. That Motion To Dismiss was denied by the Board almost a month before Krivonak filed his motion. As a result, the Board could grant Krivonak no further relief in regard thereto, and this creates the mootness asserted by New Enterprise. Lobolito, Inc. v. DER, et al., 1993 EHB 477.

To the extent the remainder of Krivonak's Motion may be considered a Motion For Summary Judgment, it must be denied without regard to the merit of its arguments because it is facially insufficient. Cambria CoGen Company v. DER, EHB Docket No. 92-308-MJ (Opinion issued February 10, 1995). Motions for summary judgment are construed in a light favorable to the non-moving party (here, DEP and New Enterprise). RESCUE Wyoming, et al v. DER, et al., EHB

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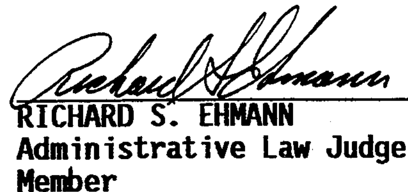
[2]New Enterprise's initial Motion To Dismiss was denied on June 1, 1995. It has since filed the Motion referenced above.

Docket No. 91-503-W (Opinion issued March 30, 1994). Moreover, in considering such motions, it is movant's obligation to make a showing that the facts supporting his motion are undisputed and can be found in the pleadings, depositions, affidavits, admission, and answers to interrogatories. Cambria CoGen; New Hanover Corp. v. DER, 1993 EHB 656 at 657; and Pa. R.C.P. 1035(b). Here no such factual showing is made or attempted, and New Enterprise's Response disputes the factual allegations raised in Krivonak's Motion. Under these circumstances, Krivonak's right to summary judgment is not only much less than clear, but also his motion is facially insufficient, so we must deny the motion and enter the appropriate order.

ORDER

AND NOW, this 20th day of July, 1995, it is ordered that Krivonak's Motion To Vacate Permit No. SMP250946 is denied.

ENVIRONMENTAL HEARING BOARD



RICHARD S. EHMANN
Administrative Law Judge
Member

DATED: July 20, 1995

cc: **Bureau of Litigation**
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For the Commonwealth, DEP:
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Central Region
For Appellant:
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For Permittee:
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M. DIANE SMITH
SECRETARY TO THE BOARD

AL HAMILTON CONTRACTING COMPANY	:	
v.	:	EHB Docket No. 94-151-E
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL RESOURCES	:	Issued: August 16, 1995

ADJUDICATION

By: Richard S. Ehmann, Member

Synopsis

Al Hamilton's appeal of DER's denial of its request for bond release on a portion of its surface mining permit is dismissed. Pursuant to 25 Pa. Code §§86.171(f)(1) and 86.172(c), DER is authorized to deny the release of bonds where the amount of bond remaining is insufficient to insure the long-term cost of treatment. Since Al Hamilton applied for the bond release, it has the burden of demonstrating that the cost of treatment will not exceed the amount of bond remaining after release. Where Al Hamilton has submitted no site-specific information demonstrating that the cost of treating the discharge does not exceed the amount of bond remaining after release, it has failed to meet its burden of proof. While the Board finds that DER erred in failing to follow a portion of its Program Guidance Manual, which contains guidelines for calculating the cost of treating a discharge where site-specific cost information has not been supplied, that failure does not rise to the level of an abuse of discretion under the facts of this appeal.

Finally, although Al Hamilton's mining activity permit for its coal processing plant overlaps a portion of the area covered by the surface mining permit, the bond posted in connection with the mining activity permit does not act to replace the surface mining bond already posted on this portion of the site.

Background

This matter involves an appeal filed on June 22, 1994 by Al Hamilton Contracting Company ("Al Hamilton"), challenging the denial of its Bond Release Application by the Department of Environmental Resources ("DER")[1] on May 26, 1994.

Al Hamilton is the permittee and operator of a surface coal mine at the Little Beth Mine site in Bradford Township, Clearfield County. Al Hamilton previously extracted coal from the site pursuant to Surface Mining Permit No. 17723164 (the "SMP"). A total of $139,430 in reclamation bonds remains posted on the site in connection with the SMP.

Al Hamilton operates a coal processing plant on a portion of the site covered by the SMP. Pursuant to a change in the surface mining regulations in 1989, Al Hamilton was required to obtain a separate permit for its coal processing operation. On September 8, 1993, Coal Mining Activity Permit No. 17911603 (the "MAP") was issued to Al Hamilton for 47.8 acres at the Little Beth site on which the coal processing facility was located. Much (but not all) of the area covered by the MAP overlaps a portion of the area covered by the SMP.

[1]As of July 1, 1995, this segment of DER became part of the Department of Environmental Protection ("DEP") through passage of the statute splitting DER into DEP and the Department of Conservation and Natural Resources. As all actions involved in this appeal were taken by DER and the record was closed before the creation of DEP, we have written this adjudication with DER as the appellee.

Al Hamilton was required to submit a bond in the amount of $146,361 in connection with the MAP.

Subsequently, Al Hamilton submitted a Bond Release Application to DER for the release of $77,020 in reclamation bonds posted on the portion of the SMP which overlapped the area covered by the MAP. By letter dated May 26, 1994, DER denied the Bond Release Application, due to, inter alia, the existence of an off-site discharge of acid mine drainage hydrogeologically connected to the SMP area.

On June 22, 1994, Al Hamilton appealed DER's decision to deny its request for bond release. A hearing on this matter was held on December 8, 1994. Post-hearing briefs were filed by Al Hamilton and DER on January 27, 1995 and February 15, 1995, respectively. Any issues not raised by the parties in their post-hearing briefs are deemed waived. Lucky Strike Coal Co., et al. v. DER, 119 Pa. Cmwlth. 440, 546 A.2d 447 (1988). The record consists of a 214 page transcript of the merits hearing ("T. __"), four Board exhibits ("Bd. Ex. __") to which the parties stipulated, six exhibits introduced by DER ("Comm. Ex. __") , and four exhibits introduced by Al Hamilton ("App. Ex. __"). Based upon a complete review of the record, we make the following findings of fact:

FINDINGS OF FACT

1. DER is the agency with the duty and authority to administer and enforce the 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"); 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 Administration Code of 1929, Act of April 9, 1929, P.L.

177, as amended, 71 P.S. §510-17; and the rules and regulations promulgated thereunder. (J.S. 1)[2]

2. Al Hamilton is a Pennsylvania corporation with its principal place of business at R.D. #1, Woodland, Clearfield County, Pennsylvania. Its business includes the surface mining, removal, and processing of coal. (J.S. 2)

3. At all times relevant hereto, Al Hamilton has been the permittee and operator of a surface coal mine and a coal processing plant located in Bradford Township, Clearfield County, known as the Little Beth operation. (J.S. 3)

4. Al Hamilton was authorized to conduct surface mining activities thereon pursuant to Surface Mining Permit No. 17723164. (J.S. 4)

5. Pursuant to a directive from the federal Office of Surface Mining, DER amended its regulations at 25 Pa. Code §86.1 to conform its definition of coal preparation activity with the federal definition effective August 25, 1989. (J.S. 5) This change brought physical, or "dry", as well as chemical, or "wet", processing plants under the definition of "coal preparation activity", thereby requiring specific permits for that activity. (J.S. 6)

6. As a result of the change in definition, Al Hamilton's processing plant at the Little Beth site was required to be permitted separately from the Little Beth SMP. (J.S. 6)

7. Al Hamilton submitted a mining activity permit application to DER for the Little Beth processing plant. On September 8, 1993, DER issued Mining Activity Permit No. 17911603 to Al Hamilton for 47.8 acres at the Little Beth site. (J.S. 7)

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[2]"J.S. __" refers to a stipulated fact under section E of the parties' Joint Stipulation filed on December 2, 1994, and admitted into the record as "Board Exhibit 1".

8. The area covered by the MAP overlaps a portion of the SMP area. (T. 57)

9. Al Hamilton posted $146,361 in reclamation bonds in connection with the MAP. (J.S. 8)

10. Thereafter, Al Hamilton submitted a Bond Release Application to DER for the release of $77,020 in reclamation bonds posted on 38.6 acres of the SMP area. (J.S. 9)

11. By letter dated May 26, 1994, DER denied Al Hamilton's Bond Release Application. (J.S. 10)

12. DER's letter set forth the following reasons for the denial of Al Hamilton's Bond Release Application: The existence of acid mine drainage discharges on or emanating from the permit area which were being treated by Al Hamilton pursuant to an order by DER; inadequate groundwater monitoring information to document that the permit area was not hydrogeologically connected to other discharges of acid mine drainage on or adjacent to the permit area; and the pollution of surface and subsurface water and the probability of future pollution. (Bd. Ex. 3)

13. In an adjudication issued on August 10, 1994 at EHB Docket No. 92-468-E, the Board upheld an order issued by DER directing Al Hamilton to treat an acid mine discharge known as the "culvert discharge", located to the north of the Little Beth site. (J.S. 11) See, Al Hamilton Contracting Co. v. DER, 1994 EHB 1148 ("Al Hamilton I"), aff'd, No. 2308 C.D. 1994 (Pa. Cmwlth., May 11, 1995).

14. In an adjudication issued on July 18, 1994 at Docket No. 92-471-E, the Board upheld an order issued by DER requiring Al Hamilton to conduct a groundwater study at the Little Beth Mine site to determine whether a hydrogeologic connection exists between the site and a discharge to the north of

the site known as the "Cowder discharge". See, Al Hamilton Contracting Co. v. DER, 1994 EHB 1027 aff'd, No. 2057 C.D. 1994 (Pa. Cmwlth., May 11, 1995).

15. Al Hamilton was treating the culvert discharge at the time of the hearing. (T. 46-47)

16. Based on DER's review, the culvert discharge is likely to persist for an extended period of time after mining is completed. (T. 40)

17. The cost of treating the culvert discharge over a fifty-year period will be approximately $270,000. (T. 80-81)

18. The cost of treatment was calculated by Michael Smith, the District Mining Manager at DER's Hawk Run office. (T. 13, 80)

19. As District Mining Manager, Mr. Smith is responsible for making decisions on applications for bond release. (T. 13) Mr. Smith made the final decision to deny Al Hamilton's request for bond release. (T. 23)

20. In calculating the $270,000 figure, Mr. Smith referred to DER's Program Guidance Manual for Bond Adjustments/Release for Post-Mining Discharges ("PGM"). (T. 80-81; Comm. Ex. 7)

21. The PGM is an internal set of policies and standard operating procedures designed to insure, inter alia, that DER has a sufficient financial guarantee to reflect the cost of long-term treatment of post-mining discharges. (T. 83; Comm. Ex. 7)

22. Al Hamilton submitted no site-specific cost data for an adjustment of the bond. (T.86)

23. Where the operator has not supplied site-specific cost information, the PGM requires that a computer program known as "REMINE" be used to calculate the annual cost of treating a discharge. (T. 80; Comm. Ex. 7)

24. Mr. Smith is experienced in the use of REMINE and played a role in its development. (T. 81)

25. Based on Mr. Smith's experience with REMINE, he determined that the minimum cost of operating and maintaining a conventional treatment system is approximately $10,000 per year. (T. 81)

26. Using the PGM to calculate the cost of treatment over a fifty-year period, Mr. Smith multiplied the $10,000 yearly figure by a factor of 27.2 (which factors in the rate of inflation and interest over a fifty-year period). This yields a minimum fifty-year treatment cost of approximately $270,000. (T. 81)

27. The amount of the reclamation bond remaining on SMP No. 17723164 is $139,420. (J.S. 12) This amount is less than the long-term treatment cost of treating the culvert discharge. (T.81)

28. In reviewing Al Hamilton's Bond Release Application, Mr. Smith considered only conditions on the SMP; he considered the obligation to treat the culvert discharge to have no relationship to the MAP. (T. 44, 82)

29. The area covered by the MAP is not hydrogeologically connected to the culvert discharge. (T. 42)

30. Even without the existence of the culvert discharge, Mr. Smith would be reluctant to approve Al Hamilton's request for bond release without the results of the groundwater monitoring study in connection with the Cowder discharge. (T. 211)

31. Al Hamilton's application was for a bond release, not a bond adjustment. (T. 41)

32. Bonds posted in connection with a surface mining permit are calculated based upon the portion of the site on which mining will occur; however, they are posted for the entire permit area. (T. 54-55)

33. Bonds posted in connection with a surface mining permit are posted to guarantee the cost of reclamation of the permit area and the cost of water treatment and replacement of water supplies affected by mining on the permit area. They may also be applied toward unpaid civil penalties. (T. 68)

34. Bonds posted in connection with a mining activity permit for a coal preparation facility are to insure the cost of reclamation and demolition of structures on the mining activities permit area. (T. 162)

35. DER did not consider the amount of the bond remaining on the SMP in calculating the bond for the MAP because the MAP was a separate permit from the SMP. (T. 163, 172-73)

36. The MAP indicates that the bond posted for it was an original bond and not a replacement bond or transfer bond. (T. 134, 169; App. Ex. 1)

37. The surety bond and the bond submittal form provided by Al Hamilton in connection with its MAP application indicate that the bond was an original bond and not a replacement or transfer bond. (T. 135, 137-38; Comm. Ex. 14, 15)

38. The issuance of the MAP for the Little Beth coal processing plant did not represent a transfer of that area from the SMP. (T. 171)

39. The bond posted for the MAP did not represent a replacement of the bond posted for the SMP for that area covered by the MAP. (T. 172)

40. If Al Hamilton ceased its coal preparation activities on the Little Beth site and fulfilled its reclamation requirements on the area covered by the MAP, it would be entitled to a release of its MAP bond despite the existence of the culvert discharge since the culvert discharge is not hydrogeologically connected to the area of the MAP. (T. 47)

41. DER requires a mining activity permit for a coal processing operation regardless of whether the coal processing operation is located on an area already covered by a surface mining permit. (T. 175)

42. A portion of the reclamation bonds posted on the SMP have been released. (T. 91-92)

43. The portion of the SMP covered by the MAP contains open highwalls and areas that have not been fully reclaimed to approximate original contour. (T. 119-20)

44. Al Hamilton's expert witness, hydrogeologist Wilson Fisher, concluded that the activities covered by the MAP, i.e. the breaking and storage of coal, in combination with the unreclaimed state of this portion of the site, creates a potential for pollution occurring from that portion of the site covered by the MAP. (T. 119)

DISCUSSION

Al Hamilton asserts that DER abused its discretion in denying its request for a release of a portion of the bonds posted in connection with the SMP for the Little Beth Mine site. As the party asserting the affirmative of an issue, Al Hamilton bears the burden of proving by a preponderance of the evidence that DER's denial was an abuse of discretion. 25 Pa. Code §21.101(a); McDonald Land & Mining Co., et al. v. DER, 1994 EHB 705, at 722.

Al Hamilton bases its argument on the premise that the bond posted for the MAP replaces the bond previously posted on that portion of the site in connection with the SMP and, therefore, the latter should be released. Leaving both bonds in place, argues Al Hamilton, results in "double bonding" of the same area. The issue which we must first address is whether the MAP bond serves as a replacement for the SMP bond covering the area of the mine site where the two bonds overlap.

In order to answer this question, it is necessary to address the types of activities covered by each bond.

The SMP authorized Al Hamilton to extract coal from the Little Beth site by the surface mining method. The bond posted in connection with the SMP serves to insure that the site is properly restored to its pre-mining state once coal extraction is completed. The SMP bond guarantees the cost of reclaiming the site to approximate original contour, the treatment of post-mining discharges, and the replacement of water supplies affected by mining. (F.F. 33)[3] If necessary, the bond may also be applied toward any unpaid civil penalties incurred in connection with the mining operation. (F.F. 33) The bonds are posted in increments as mining proceeds across the site. However, once a bond is posted, it applies not only to the section of the site where mining is occurring, but to the entire area covered by the SMP. (F.F. 32)

The MAP authorizes Al Hamilton to operate a coal processing plant. The fact that Al Hamilton elected to place a portion of the coal processing plant on the area covered by the SMP did not obviate the need for a separate permit since a mining activity permit is required for a coal processing operation regardless of whether it is located within the boundaries of a surface mining permit area. (F.F. 41) The bond posted in connection with the MAP insures that the area covered by the MAP is restored to its prior condition, that coal stockpiles are removed from the site, and that the structures associated with the coal processing operation are demolished and removed from the site. (F.F. 34)

Although there is some overlap in the types of activities insured by the two bonds where coal mining and coal preparation occur serially at the same location, such as reclamation and revegetation of the site, the bonds also cover

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[3]"F.F. __" refers to a finding of fact set forth earlier herein.

activities which apply solely to the MAP or the SMP. Whereas the SMP bond covers surface mining activities undertaken pursuant to the SMP, the MAP bond covers only those activities associated with the coal processing operation. Since the two bonds insure separate activities, one cannot serve as a replacement for the other.

Moreover, there is no evidence in the record that the MAP bond was intended to serve as a replacement for the SMP bond. In fact, the evidence is to the contrary. Both the bond submittal form and the surety bond submitted by Al Hamilton in connection with the MAP contain a space for marking the type of bond which is being submitted. Among the choices are "Original" or "Replacement". On both forms, "Original" is checked. The same is true of the MAP, which states that the bond being posted in connection with it is an original bond and not a replacement. Al Hamilton argues that all of these forms are prepared by DER. However, the section in the surety bond instrument (Comm. Ex. 14) which requests the preparer to check which type of bond is being submitted indicates that it is "To be filled in by Operator". Moreover, even if, as Al Hamilton asserts, the forms were prepared by DER, this does not change the fact that the bond submitted in connection with the MAP was intended by DER to be an original bond and not a replacement bond. Based on the record before us, Al Hamilton had no basis for believing that it was submitting a replacement bond when all of the forms submitted in connection with the bond stated that it was an "Original". Thus, we conclude that there is no basis for finding that the MAP bond was intended to serve as a replacement for the SMP bond covering that portion of the site.

Having established that the MAP bond did not replace the SMP bond, we must now determine whether DER abused its discretion in denying Al Hamilton's request for bond release. Section 86.171 of the surface mining regulations sets forth

the procedures by which a permittee may seek the release of a bond. In accordance with §86.171(a), a permittee may file an application for release of all or part of the bond liability applicable to the permit area after reclamation, restoration, and abatement work has been completed. 25 Pa. Code §86.171(a). In its review of the bond release application, DER is to consider the following:

> (i) Whether the permittee has met the criteria for release of the bond under §86.172.
>
> (ii) Whether the permittee has satisfactorily completed the requirements of the reclamation plan, or relevant portion thereof, and complied with the requirements of the acts, regulations thereunder and the conditions of the permit, and the degree of difficulty in completing the remaining reclamation, restoration or abatement work.
>
> (iii) Whether pollution of surface and subsurface water is occurring, the probability of future pollution or the continuance of present pollution, and the estimated cost of abating pollution.
>
> 25 Pa. Code §86.171(f)(1).

Section 86.172 of the regulations sets forth the criteria which must be met before DER may release all or part of a bond. Subsection (c) thereof states in relevant part as follows:

> (c) The Department will not release or adjust bonds if the release or adjustment would reduce the amount of bond to less than that necessary for the Department to complete the approved reclamation plan; achieve compliance with requirements of the acts, regulations thereunder and the conditions of the permits; and abate significant environmental harm to air, water or land resources or danger to the public health and safety which may occur prior to the release of bonds from the permit area...
>
> 25 Pa. Code §86.172(c)

According to its letter of May 26, 1994, DER denied Al Hamilton's Bond Release Application pursuant to 25 Pa. Code §§86.171 and 86.172 based on the

following conditions at the site: The existence of acid mine discharges emanating on or from the permit area which were being treated by Al Hamilton pursuant to an order from DER; the lack of sufficient groundwater monitoring data to document that the permit area was not hydrogeologically connected to other discharges of acid mine drainage; the pollution of surface and subsurface waters and the probability of future pollution.

The "acid mine discharge" referred to by DER in its May 26, 1994 letter is a discharge located on the northern edge of the Little Beth permit area, known as the "culvert discharge". At the time of the hearing, Al Hamilton was treating the culvert discharge pursuant to an order of DER. (F.F. 15) In an appeal of that order filed by Al Hamilton on October 14, 1992 at EHB Docket No. 92-468-E, the Board concluded that a hydrogeologic connection existed between the mine site and the culvert discharge and, therefore, Al Hamilton was liable for treatment of the discharge. Al Hamilton I, supra.[4] It is DER's contention that the bond release requested by Al Hamilton would leave an insufficient amount of bond remaining to insure the cost of treatment of the culvert discharge. To this, Al Hamilton responds, first, that it has met the standards for bond release set forth in the regulations and, second, that there is sufficient bond remaining to insure the cost of treating the culvert discharge.

Al Hamilton directs us to 25 Pa. Code §86.174 of the regulations which sets forth the "Standards for release of bonds". This section sets forth the reclamation standards for Stages I, II, and III bond release. Al Hamilton contends that it has complied with the relevant standards of this provision, as evidenced by the fact that a portion of the reclamation bonds on the site have

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[4]The Board's Adjudication at Docket No. 92-468-E was affirmed by the Commonwealth Court in an unreported opinion issued on May 11, 1995 at No. 2308 C.D. 1994.

already been released. (F.F. 42) As for the existence of the culvert discharge, Al Hamilton asserts that there is no testimony in the record that a discharge of acid mine drainage, particularly where it is being treated, constitutes incomplete reclamation.

We disagree with Al Hamilton's assertion that it has met the standards for bond release. The standards for a Stage I bond release are set forth in 25 Pa. Code §86.174(a). Stage I reclamation standards have been met when the area has been backfilled and regraded to approximate original contour and drainage controls have been installed. 25 Pa. Code §86.174(a). According to the testimony of Al Hamilton's own expert, Wilson Fisher, the area of the SMP which overlaps the MAP contains open highwalls and sections that have not been fully reclaimed to approximate original contour. (T. 119-20) In this Board's experience, open highwalls occur through surface mining, not coal preparation. Based on Mr. Fisher's testimony, we cannot find that Al Hamilton has demonstrated that it is entitled to bond release in accordance with the standards set forth in 25 Pa. Code §86.174.

We further disagree with Al Hamilton's contention that "[t]he record contains no testimony regarding the fact that discharge of acid mine drainage constitutes incomplete reclamation." Michael Smith, District Mining Manager of DER's Hawk Run Office and the individual at DER who made the final decision to deny Al Hamilton's Bond Release Application, testified that DER considers the treatment of acid mine drainage to be "part of the reclamation of the site." (T. 37) When asked on cross-examination whether Al Hamilton had satisfactorily complied with its reclamation plan, Mr. Smith replied that it had not, due to the ongoing culvert discharge. (T. 37) Furthermore, both the Surface Mining Act and the Clean Streams Law envision the treatment of post-mining discharges as being

part of the reclamation process by requiring a mining operator to provide adequate financial assurance to guarantee the treatment of any such discharges after the completion of mining. Section 315(b) of the Clean Streams Law requires the posting of a bond by a mine operator to guarantee compliance with the provisions of that act, including "restoration measures ... insuring that there will be no polluting discharge after mining operations have ceased." 35 P.S. §691.315(b). In accordance with §4(g.1) of the Surface Mining Act, even after a mining operator has met all other reclamation standards for Stage II bond release, DER may release only that portion of the bond which exceeds the cost of insuring the treatment of mine drainage which exceeds the effluent limits of the mining permit. 52 P.S. §1396.4(g.1). Thus, we conclude that reclamation includes the treatment of acid mine drainage.

Pursuant to 25 Pa. Code §86.172(c), DER may not release a bond or portion thereof if the amount of the bond remaining will be less than the cost to complete the approved reclamation plan, achieve compliance with the applicable statutes and regulations, and abate harm to water and land resources or danger to the public health and safety. According to the testimony of DER's Michael Smith, the treatment of acid mine drainage is required by Al Hamilton's reclamation plan. Moreover, the Board has previously held that Al Hamilton is liable for the treatment of the culvert discharge pursuant to §§4.2 and 4.3 of the Surface Mining Act, 52 P.S. §§1396.4b and 1396.4c. Therefore, DER may not release any portion of Al Hamilton's SMP bond if the release will leave an insufficient amount to insure the cost of treating the culvert discharge.

District Mining Manager Michael Smith was the individual at DER who calculated the cost of treating the culvert discharge. Mr. Smith testified that, in calculating this figure, he relied on DER's "Bureau of Mining and

Reclamation Program Guidance Manual for Bond Adjustments/Release for Post-Mining Discharges", or "PGM". The PGM is designed to insure, inter alia, that DER has a sufficient financial guarantee to reflect the cost of long-term treatment of post-mining discharges. (F.F. 20) "Long-term treatment" is defined in the PGM as fifty years, in accordance with §4(g.1)(1) of the Surface Mining Act, 52 P.S. §1396.4(g.1)(1).[5] The PGM contains guidelines for estimating the annual cost of operating and maintaining a treatment system where site-specific cost information has not been supplied by the mining operator. In this case, Al Hamilton did not submit any data with its Bond Release Application as to the cost of treating the culvert discharge. When cost information is not provided by the mining operator, the PGM requires DER's staff to utilize a computer program known as "REMINE" to calculate the annual operating and maintenance cost of a treatment system. Mr. Smith testified that, based on his previous experience with using REMINE, he has found that the minimum annual cost of operating and maintaining a conventional treatment system is approximately $10,000 per year. Therefore, he used this figure as the base annual cost of treating the culvert discharge. Mr. Smith did not actually run the REMINE program for this site, however. Once he arrived at this figure, Mr. Smith again began following the guidelines in the PGM. He multiplied the annual treatment cost by a factor of 27.2, which takes into account the rate of interest and inflation over a fifty-year period. This produces a figure of approximately $270,000, which represents DER's estimate of the minimum cost of treating the culvert discharge over a period of fifty years.

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[5]Section 4(g.1)(1) of the Surface Mining Act states that, when a mining operator has met the standards for Stage II bond release, DER may release that portion of the bond which exceeds the cost of insuring the treatment, for a period of fifty years, of discharges emanating from or hydrogeologically connected to the mine site. 52 P.S. §1396.4(g.1)(1).

In comparison, the amount of the reclamation bond remaining on the SMP is only $139,420.

Al Hamilton objects to DER's use of its PGM to calculate the cost of treating the culvert discharge as being only a "guesstimate", and contends that site-specific information should have been used to produce a more accurate result. We agree that use of site-specific data is preferable. Moreover, it was readily available here because Al Hamilton is operating facilities to treat the culvert discharge and, thus, knows what its actual costs are. With such data DER can know to the penny the amount of bond required under 52 P.S. §1396.4(g.1)(1) and 25 Pa. Code §86.172(c) to cover these costs and any remaining site reclamation activities. However, the record is clear that no such information was provided to DER. Moreover, Al Hamilton provided no such data at the merits hearing to prove DER's contentions were in error.

Al Hamilton's Brief asserts it did not provide site-specific cost information to DER because DER did not request it. The Board has no way of knowing whether this is true or not since Al Hamilton offered no evidence on this point. It is possible that DER did not request this information; however, it is equally possible that DER asked for it and Al Hamilton failed to furnish it. Where the record is silent on this point the Board cannot simply assume the facts are as alleged by an appellant, especially if it is the appellant which bears the burden of proof. As a result, there is insufficient evidence to support this argument on Al Hamilton's behalf and it must therefore be rejected. In so doing, we also note that DER's PGM infers that Al Hamilton had a duty to submit this information to DER since it states "[a]n operator seeking a bond adjustment/release must submit, along with its request, [a] statement of the costs of operation, maintenance, monitoring, analysis and capital costs for

constructing the treatment facility." (Comm. Ex. 7) We also note the testimony that such information is usually submitted in connection with a miner's request for bond adjustment. (T-84) From this limited information an inference arises that Al Hamilton's failure to submit the data was of its own doing, and this inference further demonstrates why we should not presume facts favor Al Hamilton's argument on this point.

Having rejected Al Hamilton's argument that DER erred in not requesting this data (because the record does not support it), while agreeing that where site-specific cost information is available it should be used by DER to review the bond release application, there remains the question of whether DER abused its discretion here in denying Al Hamilton's application when such data is not made available to it. Al Hamilton correctly points out that DER's decision to deny the release of Al Hamilton's bonds is discretionary. Al Hamilton argues that DER's discretion was arbitrarily exercised here. However, Al Hamilton, which bears the burden of proof, has failed to prove this in this appeal. It has argued to us that it wants site-specific data used, but where such data is not provided and DER denies bond release, this alone does not show this denial is arbitrary.[6] As we have stated previously:

> [a] mere difference of opinion, or even demonstrable error in judgment, is insufficient under Pennsylvania decisional law to constitute an abuse of discretion; such abuse comes about only where manifestly unreasonable judgment, partiality, prejudice, bias, ill-will, misapplication or overriding of the law, or similarly egregious transgressions on the part of DER or other decision-making body can be shown to have occurred. (Garrett's Estate, 335 Pa. 287, [6 A.2d 858] (1939)).

[6]Where DER's PGM provides that absent site-specific cost data DER may nevertheless consider the bond release application using other data, DER would have been arbitrary if it had simply denied the application because of Al Hamilton's failure to give it site-specific cost data.

Sussex, Inc. v. DER, 1984 EHB 355, 366. See also Lower Towamensing Township v. DER, 1993 EHB 1442.

Mr. Smith followed the PGM's instructions, except that he failed to run the REMINE program to come up with a minimum treatment cost as spelled out in the PGM. Instead, he relied on his experience with other runs of the REMINE computer program, all of which produced a minimum annual treatment cost of $10,000, and inserted that $10,000 figure into the PGM's formula to calculate the minimum bond which DER needed to retain. While Al Hamilton does not like this approach and we agree that Mr. Smith's failure to run the REMINE program could be argued to be an error in judgment, this omission does not rise to the level of abuse of DER's discretion under the test set forth in Sussex, Inc. v. DER, *supra*. The evidence before us does not show manifestly unreasonable judgment, misapplication or overriding of the law or similar transgressions by DER. It does not show an alternative reasonable option for DER with respect to Al Hamilton's application. As a result, we reject Al Hamilton's argument.[7]

In so doing, the Board does not endorse Mr. Smith's failure to follow the PGM prepared by his Bureau. Obviously, it was prepared with the intent he would follow it, but, as Al Hamilton suggests, the PGM does not carry the weight of a statute or regulation. John J. Bagnato v. DER, 1992 EHB 177, 187. As a result, non-compliance with it does not carry the same penalty for DER as non-compliance with its regulations. See Baney Road Association v. DER, et al., 1992 EHB 441.

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[7]To the extent Al Hamilton's argument implicitly suggests DER must gather site-specific cost data to address Al Hamilton's application, we reject this suggestion. It is Al Hamilton who applied to DER for a release of its bonds and therefore it has the obligation to submit to DER the information necessary to justify release of the amount sought. To suggest DER must gather this data reverses this burden and suggests there should be release-on-demand, i.e., release of what is sought unless DER can show the remaining bond is inadequate. We reject such an idea as not contemplated by the statute or regulations.

However, where DER wishes to argue that compliance with its PGM is reasonable and not an abuse of discretion, it must lose that argument when the PGM is not followed in full.

Moreover, it is clear that to the extent DER failed to follow a portion of that PGM, the Board still could not sustain Al Hamilton's appeal to the extent of releasing a portion of its bond for this site because there is no evidence before us warranting such an action. If we sustained Al Hamilton on this failure-to-follow-the-PGM argument, the Board would remand this application to DER and, absent the site-specific data, DER would then run its REMINE program in compliance with its PGM. Based on Mr. Smith's testimony this would seem likely to produce a minimum annual cost of at least $10,000 again and the same conclusion he reached previously on DER's behalf which led to this appeal. If that happened, based on the record now before the Board, we would come to the same conclusions reached above on Al Hamilton's arguments except these conclusions would be reinforced by DER's adherence to its PGM. Clearly the better approach, where Al Hamilton has cost data available to it for this site and this discharge's treatment, is for it to submit the data to DER with a new bond release application. If it shows the bond is more than adequate, then a DER failure to release the appropriate portion of the SMP bonds can be challenged here.

Al Hamilton next contends that the total amount of the bond covering the site is $285,781. It arrives at this figure by combining the bond posted for the MAP, $146,361, with the bond remaining on the SMP, $139,420. Al Hamilton contends that, since this amount exceeds DER's estimate of the cost of treating the culvert discharge, it is entitled to release. There are several problems with Al Hamilton's argument. First, even if we were to accept Al Hamilton's

figure of $285,781, a release of $77,020, as requested by its Bond Release Application, would still leave an inadequate amount of bond remaining for long-term treatment of the culvert discharge based on DER's estimated cost of treatment (i.e., $285,781 - $77,020 = $208,761). Al Hamilton asserts that it is entitled, at a minimum, to a release of $15,781, the difference between $285,781 and $270,000. However, there is nothing in the record to suggest that Al Hamilton made any application to DER for a release of $15,781, and, therefore, we do not reach this issue. Moreover, as discussed above, since Al Hamilton has submitted no treatment cost data, it has not demonstrated that a release of even $15,781 would leave a sufficient amount of bond remaining to insure long-term treatment of the culvert discharge.[8] Finally, we disagree with Al Hamilton's contention that there is a total of $285,781 available to treat the culvert discharge. As we explained earlier herein, the MAP and SMP bonds are posted for two separate permits and serve two separate functions. This is illustrated by the fact that, if Al Hamilton were to cease its coal preparation activities and reclaim the MAP area in accordance with the applicable provisions of the regulations and its reclamation plan, it would be entitled to a release of its MAP bond despite the existence of the culvert discharge, since the culvert discharge is not hydrogeologically connected to the MAP area. (F.F. 29, 40) Because the MAP bond is not available for treatment of the culvert discharge, Al Hamilton is incorrect in its assertion that a total of $285,781 in bond money is available for treatment of the discharge.

Al Hamilton contends, however, that the liability which has accrued against the SMP bonds in place will be transferred to the MAP bonds by operation of law.

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[8]DER's Michael Smith testified that his estimate of $270,000 was the <u>minimum</u> cost of treating the culvert discharge over a fifty-year period. Therefore, the long-term treatment cost could conceivably be significantly higher than $270,000.

Al Hamilton provides no argument in support of its contention, but merely cites the following statutory provisions and cases: §315(a) of the Clean Streams Law, 35 P.S. §691.315(a);[9] §4 of the Surface Mining Act, 52 P.S. §1396.4; C&K Coal v. DER, 1987 EHB 786; Penn-Maryland Coals, Inc. v. DER, 1992 EHB 12; Hepburnia Coal Co. v. DER, 1986 EHB 563; and Thompson & Phillips Clay Co. v. DER, 136 Pa. Cmwlth. 300, 582 A.2d 1162 (1990). However, the aforesaid authorities provide no support for Al Hamilton's position. The cases cited by Al Hamilton do not address the issue of bonding but, rather, the question of whether a mining operator may be held liable for a discharge off the permit area. Nor does §315(a) deal with bonding; rather, that section deals with the operation of mines. While subsection (b) of §315 addresses bonding for a mine site, we find nothing on the surface of the subsection which supports Al Hamilton's position. Likewise, we find nothing in §4 of the Surface Mining Act, 52 P.S. §1396.4, in support of Al Hamilton's position. Nor does the record provide any support for this contention. When asked on direct examination whether liability for the culvert discharge transferred from the SMP to the MAP, Mr. Smith replied that it did not because "the MAP really has nothing to do with the culvert discharge." (T. 205-06) Moreover, even if we accept Al Hamilton's assertion that liability will transfer from the SMP to the MAP, that still cannot justify a bond release of $77,000 since the remaining total of both bonds would be less than the estimated long-term treatment cost of the culvert discharge.

Finally, Al Hamilton argues that because the culvert discharge is not hydrogeologically connected to the area of the site covered by the MAP, the SMP bond covering this portion of the site should be released. The record

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[9]Although Al Hamilton's Brief cites us to "§351(a) Clean Streams Law", we assume this is a transcription error since there is no such section in the Clean Streams Law.

establishes that no hydrogeologic connection exists between the area covered by the MAP and the culvert discharge. (F.F. 29) However, the bonds posted in connection with the SMP apply to the entire permit area. (F.F. 32) Therefore, since it has been established that there is a hydrogeologic connection between the culvert discharge and a portion of the SMP site, all bonds posted in connection with the SMP are to be applied as a guarantee for reclamation of the site, including treatment of the discharges from the site.

Before concluding, we must address one final issue. In its post-hearing brief, DER suggests that the "solution" to Al Hamilton's situation is to delete from the SMP the acreage now overlapped by the MAP. (DER Post-Hearing Brief, p. 18-19) While this may be an option for Al Hamilton to consider, it is not an issue which was raised by Al Hamilton in this appeal, and, therefore, we shall not address it. Moreover, this is an illusory solution as it will cause the two permits to no longer overlap but will produce no release of the SMP bond.

In conclusion, we find that Al Hamilton has failed to meet its burden of demonstrating that DER abused its discretion in denying Al Hamilton's Bond Release Application. Because the long-term cost of treating the culvert discharge exceeds the amount of the SMP bond, we find that DER acted within the scope of its authority, pursuant to 25 Pa. Code §86.172(c), in denying bond release. Because we find that DER had sufficient grounds for denying the Bond Release Application on the basis of the cost of treating the culvert discharge, we need not address the remaining reasons stated by DER in its denial letter. We, therefore, make the following conclusions of law and enter the following order:

CONCLUSIONS OF LAW

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

2. Al Hamilton bears the burden of proving that DER's denial of its Bond Release Application was an abuse of discretion. 25 Pa. Code §21.101(a); McDonald Land & Mining, supra.

3. The bond posted in connection with the MAP does not serve as a replacement for the SMP bond already in place for that portion of the site where the two permitted areas overlap.

4. DER may not release a bond for a surface mining permit where the amount of bond remaining is less than the cost of insuring the treatment of discharges emanating on or from the site for a period of fifty years. 25 Pa. Code §86.172(c).

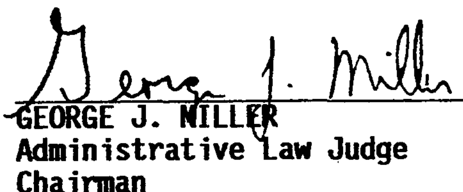
5. DER did not abuse its discretion in calculating $270,000 as the cost of treating the culvert discharge for a period of fifty years.

6. DER did not abuse its discretion in denying Al Hamilton's Bond Release Application since the release would have resulted in the remaining bond amount being less than the long-term cost of treatment of the culvert discharge.

ORDER

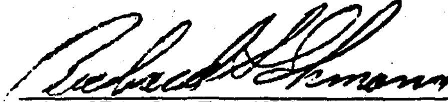
AND NOW, this 16th day of August, 1995, it is ordered that Al Hamilton's appeal at Docket No. 94-151-E is dismissed.

ENVIRONMENTAL HEARING BOARD



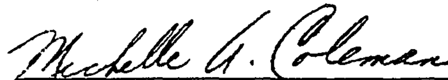
GEORGE J. MILLER
Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member



RICHARD S. EHMANN
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member



MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: August 16, 1995

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