Environmental Hearing Board

Adjudications and Opinions

2001 Volume III

COMMONWEALTH OF PENNSYLVANIA
George J. Miller, Chairman

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OF THE

ENVIRONMENTAL HEARING BOARD

2001

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FOREWORD

This volume contains all of the adjudications and opinions issued by the Environmental Hearing Board during the calendar year 2001.

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

ADJUDICATIONS

OPINIONS

2001 DECISIONS

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LISA AND STEVEN GIORDANO and TOWNSHIP OF ROBESON, Intervenor	:	
v.	:	**EHB Docket No. 99-204-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and BROWNING-FERRIS INDUSTRIES, NEW MORGAN LANDFILL COMPANY, INC. and CONESTOGA LANDFILL	:	**Issued: September 17, 2001**

OPINION ON POST-HEARING MOTIONS

By Bernard A. Labuskes, Jr., Administrative Law Judge

Synopsis:

The Board denies four requests for post-hearing relief. The petitioner failed to show that the grounds for reconsideration of a final order are present, and instead, has made arguments that are appropriate in an appeal. The petitioner's attempt to reopen the record on the basis of an assertion that it would pay a local municipality an additional benefit is rejected. There is no surprise or new evidence, and therefore, no basis for reopening the record. The Board's original decision to defer the effective date of its Order to accommodate the petitioner was, if anything, overly generous and will not be extended. Finally, petitioner has failed to show that the criteria justifying a stay pending appeal have been satisfied.

OPINION

On August 22, 2001, this Board issued an Adjudication and Order (the "Order") rescinding the permit modification that the Department of Environmental Protection (the

"Department") had issued to Browning-Ferris Industries ("BFI") for the Conestoga Landfill in New Morgan Borough, Berks County (the "Landfill"). The permit modification had authorized BFI to increase its average daily tonnage from 5,210 tons per day to 7,210 tons per day. We found that the Giordanos and Robeson Township (hereinafter collectively referred to as the "Giordanos") proved "by a preponderance of the evidence that the benefits to the public of the volume increase permitted by the modification do not clearly outweigh the known and potential environmental harms. Accordingly, the modification may not be granted under 25 Pa. Code § 271.127(c)." (Conclusion of Law 9, slip. op. at 36.) We made our Order effective in thirty days in order to give BFI a reasonable opportunity to adjust to the effect of our ruling.

BFI has filed four post-hearing requests for relief. It asks that we (1) reconsider our Order and reverse the result, (2) vacate the Order and reopen the record to allow BFI to put on new evidence, (3) modify the Order to provide that it is not effective for 145 (instead of 30) days, or (4) stay the Order pending an appeal and/or the Department's review and approval of a new permit modification. The Department takes no position regarding the motion for reconsideration and opposes the request to reopen the record. The Giordanos and the Township oppose all four requests.

Motion for Reconsideration

Reconsideration is within the discretion of the Board and will be granted only for compelling and persuasive reasons. 25 Pa. Code § 1021.124.[1] The two primary reasons why we might grant reconsideration of a final order are the following:

1. The final order rests on a legal ground or a factual finding which has not been proposed by any party.
2. The crucial facts set forth in the petition:

[1] The Giordanos correctly point out that BFI's motion was filed one day late. In the interest of a just determination, we will overlook the late filing. 25 Pa. Code § 1021.4.

(i) Are inconsistent with the findings of the Board.
(ii) Are such as would justify a reversal of the Board's decision.
(iii) Could not have been presented earlier to the Board with the exercise of due diligence.

25 Pa. Code § 1021.124(a).

BFI's primary basis for requesting reconsideration is that several of the Board's finding are "not supported by substantial evidence." It argues that substantial evidence does not support our findings that (1) the Giordanos and the Township have standing, (2) there is no cause-effect relationship between the volume increase and the social/economic benefits provided by the Landfill, and (3) the increase has increased malodors over the short term. BFI goes into voluminous detail on why we should have found the opposite of each of these findings. There is nothing new, however, in BFI's materials. BFI simply repeats in angrier tones the very same evidentiary arguments that it made in its post-hearing brief. For example, BFI argues that the Board should never have found the testimony of the Giordanos, Township representatives, and an independent citizen to be credible regarding the harms that they have experienced as a result of the volume increase. BFI put a tremendous amount of effort during the hearing into proving that these witnesses were untrustworthy extortionists. We rejected that effort then and we reject it now. BFI's rehashing of the evidence defines the sort of effort that has no place in a motion for reconsideration.

BFI next argues that the Board should have given more weight to the increased value of municipal host benefit fees in performing the harms/benefits analysis. BFI goes so far as to argue that we "discounted [the host fees] to nothing." (Petition at 24.) Again, BFI's argument is not that the Board missed something, it is that the Board's conclusion was wrong. Again, such an argument may form the basis for an appeal, but it has no place in a motion for reconsideration.

But putting that aside, BFI has mischaracterized our holding. We not only accepted BFI's

factual argument that the faster payment of fees would increase the net present value of those fees to the recipients (F.F. 81-83), we stopped short of stating that that increased value is not a benefit (slip op. at 30, 34). Rather, we held that that benefit did not necessarily so clearly outweigh the concomitant harms that the permit modification was warranted under 25 Pa. Code § 271.127(c).

To the extent that BFI asserts that we reached our conclusion regarding the relative value of accelerated fees and accelerated landfill usage and harms based primarily upon policy considerations, BFI is entirely correct. But that policy is not ours, it is public policy as expressed by the Legislature. As the Giordanos reminded us in their post-hearing brief, the overriding purpose of the sometimes overlooked Municipal Waste Planning, Recycling and Waste Reduction Act, 53 P.S. § 4000.101 *et seq.* ("Act 101"), was and is to preserve and protect valuable landfill capacity. (Slip op. at 30.) What BFI would have us do is use a fee created by Act 101 consistent with that policy and subvert it into a controlling mechanism for depleting at an accelerated rate the very landfill capacity that the Act was designed to protect. We are not willing to endorse such an inappropriate use of the consideration given by the Legislature to local governments. In the end, the increased fee value is unquestionably a benefit, but here, that benefit, combined with the other benefits, does not clearly outweigh the harms. If BFI disagrees, it needs to convince the Commonwealth Court, not ask us to reconsider what we have already considered at great length.

BFI's final argument in support of reconsideration is that the Board "reformulated" the regulatory balancing test in 25 Pa. Code § 271.127(c). To the contrary, we quoted it verbatim repeatedly. (See, e.g., Conclusion of Law 9.) Our opinion in no way attempts to change or even interpret the regulation. (See especially fn. 7 (this is not a regulatory interpretation case)). Rather, our opinion represents an application of a regulatory standard that all of the parties and this Board agreed should be applied to a given set of facts and circumstances. BFI's real

complaint is that it is understandably not happy with the result. This is the stuff of an appeal, not reconsideration.

Motion to Vacate and Accept New Evidence

BFI argues that it could not have known that the Board would only look at the benefits and harms of the Landfill modification as opposed to the Landfill as a whole. (See, e.g., petition paragraph 134.) Therefore, it has promised that, if we reopen the record and reverse our prior decision, it will pay a local township $50,000 a year.

The motion has no merit. Such motions are generally not acceptable after an Adjudication has issued. 25 Pa. Code § 1021.122. In any event, a party cannot litigate a case through hearing on a given set of facts, lose the case and then, *post facto*, add something new to the set of facts, and, on that basis, have the record reopened. That is certainly not what a motion to reopen is all about. If it were, hearings would be a never ending process since parties who lose at hearing would simply add the fact or facts they did not have at hearing or either do or say they will do the key things they had not done for hearing and have the record reopened. If BFI would like to add new benefits to the mix, it has the right to re-apply for a modification. The new benefits would likely be relevant in such a setting.

In addition, we do not accept BFI's claim of surprise. The regulations themselves, 25 Pa. Code § 126(c), an earlier opinion of this Board in this appeal, *Giordano I,* 2000 EHB at 1192, and dialogue during the hearing where this precise issue was discussed (T. 1202-1203) all made it very clear that the Board would only consider the harms and benefits of the modification. Indeed, we are surprised that BFI would want it any other way. We would not expect that BFI would endorse a procedure by which challengers could reopen the question of the validity of the landfill as a whole every time there is a permit modification.

We need not address the Department's contention that this Board lacks the authority to reopen the record.

Motion for Modification

BFI asks that we make our Order effective in 145 instead of 30 days. It does not explain why exactly 115 additional days are necessary.

Although BFI minimizes our holding in its motion, we specifically concluded that the Giordanos and other local citizens are suffering as a result of the volume increase. The fact that we directed our focus on the greater public in applying the harms/benefits test does not distract from our localized conclusion regarding the Giordanos. In fact, the Giordanos' lives have been disrupted for years.

BFI asserts that complying with our order will result in business disruptions. BFI's motion is built on the premise that it may be difficult to keep all of its customers. We are not without sympathy, but BFI was obviously aware that its permit was under appeal and subject to rescission, and it should have planned accordingly. Just as we rejected the Giordanos' request to make our ruling retroactive, we reject BFI's request to delay its effect for five months. Arguably, BFI should not have been given *any* grace period once it was determined that its permit (as modified) was invalid.

Motion to Stay

BFI's final request is that, assuming we do not grant any of the other relief that it has requested, we stay our Order pending an appeal to Commonwealth Court. In *DEP v. Whitemarsh Disposal Corporation*, 2000 EHB 922, we discussed the circumstances under which we will grant a stay pending appeal as follows:

> When ruling upon an application for stay pending appeal, the Board is guided by the criteria that it uses in ruling upon petitions for supersedeas. *Heston*

> *S. Swartley v. DEP*, 1999 EHB 160, 163. *See also Pennsylvania Public Utility Commission v. Process Gas Consumers Group,* 467 A.2d 805 (Pa. 1983). Thus, we consider the irreparable harm to the petitioner, the likelihood of the petitioner prevailing on the merits, and the likelihood of injury to the public or other parties. *Id.; see also* 35 P.S. § 7514(d) and 25 Pa. Code § 1021.78.

2000 EHB at 923.

With regard to BFI's likelihood of success on appeal, it should come as no surprise that, for all of the reasons set forth in our Adjudication and the discussion above, we view its likelihood of success to be slight. With regard to irreparable harm to BFI, one could read all 102 pages of BFI's papers without remembering that BFI is still entitled to accept as much total waste into the Landfill as it could prior to our ruling; it just needs to do so at an earlier permitted daily rate. For this reason and the reasons discussed above, we are not convinced that BFI will suffer irreparable harm. Again as discussed above, we believe that the Giordanos have been made to suffer long enough. Now that they have prevailed, it would be brutally unfair to hold that – even though they were vindicated – they need to wait months or years while appellate review proceeds to conclusion. Depriving the Giordanos of the fruits of their victory while BFI applied for a new modification makes even less sense to us. Finally, for all of the reasons discussed in our Adjudication, we cannot say with any degree of comfort that it is, in fact, in the public interest to allow BFI to use the Landfill at an accelerated rate during the appeal process.

Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

LISA AND STEVEN GIORDANO and TOWNSHIP OF ROBESON, Intervenor	:	
v.	:	**EHB Docket No. 99-204-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and BROWNING-FERRIS INDUSTRIES, NEW MORGAN LANDFILL COMPANY, INC. and CONESTOGA LANDFILL	:	

ORDER

AND NOW, this 17th day of September, 2001, BFI's petitions to modify, vacate, reconsider, and/or stay our August 22, 2001 Adjudication and Order are **DENIED.**

ENVIRONMENTAL HEARING BOARD

GEORGE J. MILLER
Administrative Law Judge
Chairman

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: September 17, 2001

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

LISA AND STEVEN GIORDANO and TOWNSHIP OF ROBESON, Intervenor	:	
v.	:	**EHB Docket No. 99-204-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and BROWNING-FERRIS INDUSTRIES, NEW MORGAN LANDFILL COMPANY, INC. and CONESTOGA LANDFILL	:	

DISSENTING OPINION OF
ADMINISTRATIVE LAW JUDGE, MICHAEL L. KRANCER

I do not disagree with the essence of legal discussion outlined in the Opinion. However, this case deals with landfill space as a function of time and I would, therefore, not proceed with this Opinion before I asked the parties whether the consequences of the events which transpired in New York City last Tuesday, September 11, 2001, should constitute any input to our deliberations. Specifically, whether the situation may have resulted in a higher short term need for landfill space at a faster rate which this Landfill could help satisfy within the parameters of the increased daily volumes allowed by the permit modification which is the subject of this appeal. If not, then I would have no qualms about issuing this Opinion as is. If so, then I would want to consider such information in determining whether to reopen the record and/or stay or revise the Order accompanying our Adjudication.

ENVIRONMENTAL HEARING BOARD

MICHAEL L. KRANCER
Administrative Law Judge
Member

DATED: September 17, 2001
See next page for service list.

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SECRETARY TO THE BOA

JACQUES KHODARA,	:	
EAGLE ENVIRONMENTAL LP	:	
	:	
v.	:	**EHB Docket No. 2001-046-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	**Issued: September 18, 2001**
PROTECTION and JEFFERSON COUNTY,	:	
Intervenor	:	

OPINION AND ORDER ON MOTION TO COMPEL

By George J. Miller, Administrative Law Judge

Synopsis:

The Board grants a motion to compel the discovery of documents related to Departmental actions in its mining program. Although the relevance of the evidence to this appeal involving a solid waste permit is not obvious, it is also not absolutely clear that the information is totally irrelevant or will fail to lead to the discovery of relevant evidence.

OPINION

Jacques Khodara and Eagle Environmental, L.P. (collectively, Permittee) filed an appeal from a letter of the Department of Environmental Protection dated February 12, 2001, which informed the Permittee that the solid waste permit for its Happy Landings Landfill was void because no waste had been disposed of within five years of the

issuance of the permit. Additionally, the letter revoked related air quality, NPDES and encroachment permits. These permits were in a suspension status which was affirmed by the Board in 1998[1] and which has been awaiting a decision by the Commonwealth Court after oral argument before that court en banc in June, 2000.

The parties commenced discovery. The Permittee served the Department with interrogatories which sought, among other things, the identification of permits and supporting documentation which were terminated by the Department under mining regulations which it contends are similar to the language of the solid waste regulation which served as a basis for the Department's position on the Permittee's permit. The Department declined to answer the interrogatories or produce the documents on the ground that information sought was not relevant or reasonably likely to lead to relevant evidence.

In its motion the Permittee argues that the information concerning the Department's interpretation of 25 Pa. Code § 77.128(b)[2] and 25 Pa. Code 86.40(b)[3] of the mining regulations is relevant because the language of those regulations is substantially similar to that found in 25 Pa. Code § 271.211(e). The Department strongly disagrees and also contends that acquiring the information sought is unduly burdensome.

On one hand, we do not agree with the Permittee that these termination provisions are similar. The regulations under the mining laws, permit the Department to give the permittee an opportunity to secure an extension of time if the permittee can not begin mining within three years of the issuance of the permit if "the extensions of time are

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[1] *Eagle Environmental, L.P. v. DEP*, 1998 EHB 896.
[2] Non-coal mining regulation.
[3] Coal mining regulation.

necessary if litigation precludes the commencement or threatens substantial economic loss to the permittee . . . ."[4] or if there are other reasons beyond the permittee's control. In contrast, the Department's regulation under the solid waste regulation renders the permit automatically void after five years regardless of the circumstances.[5]

On the other hand, our disposition of this motion must be guided by the principles of discovery and the Rules of Civil Procedure. We are instructed to apply the rules in favor of more discovery.[6] Specifically, "a party may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . ."[7] The measure of relevance in discovery is not the same as the level of relevance necessary for admission at trial.[8] Relevance is to be construed broadly; it is enough that the evidence sought *might be* relevant.[9] With this in mind, we believe that the treatment given to this subject matter under the mining laws may be relevant to the reasonableness of the Department's treatment of this subject matter under the solid waste regulation as applied in this case.

Further, the proceedings in this matter have not progressed significantly, and the Permittee's argument in support of its ultimate position concerning the voiding of its permit have not been fully developed. We can not say for certain that the Department's interpretation of similar regulations in its mining program is so clearly irrelevant that

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[4] 25 Pa. Code § 77.128(b) and 25 Pa. Code 86.40(b).
[5] 25 Pa. Code § 271.211(e).
[6] *T.W. Phillips Oil and Gas Co. v. DEP*, 1997 EHB 608, 610.
[7] Pa. R.C.P. No. 4003.1(a).
[8] Pa. R.C.P. No. 4003.1(b).
[9] *City of Harrisburg v. DER*, 1992 EHB 170.

discovery should be precluded on that issue.[10] However, we are not unmindful of the burden on the Department in acquiring the information sought. Accordingly, we will grant the Permittee's motion to compel, but limit the timeframe to Department decisions in the last five years. We therefore enter the following:

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[10] *See T.W. Phillips Oil and Gas Co. v. DEP*, 1997 EHB 608 (although the Board could not determine the relevancy of data sought in discovery at such an early point in the proceedings, discovery was permitted).

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

JACQUES KHODARA,	:	
EAGLE ENVIRONMENTAL LP	:	
	:	
v.	:	**EHB Docket No. 2001-046-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION and JEFFERSON COUNTY,	:	
Intervenor	:	

ORDER

AND NOW, this 18th day of September, 2001, the Permittee's motion to compel answers to Interrogatory Nos. 30, 31, 32, 33 is granted as follows:

1. The Department shall disclose all actions taken under 25 Pa. Code § 77.128(b) and 25 Pa. Code § 86.40(b), including any documents underlying those actions which are not attorney-client work product or otherwise confidential.
2. The Permittee's request is limited to those Departmental actions taken within five years of February, 2001, the date of the Department action appealed at this docket.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

DATED: September 18, 2001

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WILLIAM T. PHILLIPY IV
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WALTER SCHNEIDERWIND	:	
	:	
v.	:	**EHB Docket No. 2000-113-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: September 28, 2001**
	:	
	:	

OPINION AND ORDER ON THE DEPARTMENT'S MOTION TO BAR EXPERT TESTIMONY

By George J. Miller, Administrative Law Judge

Synopsis:

Appellant is barred from presenting expert testimony at the hearing on the merits for failure to meet the Board's pre-hearing orders with respect to the timely exchange of expert reports.

BACKGROUND

This appeal is from a Department's Order issued under the provisions of the Non-Coal Surface Mining Conservation and Reclamation Act, Act of December 19, 1984, P.L. 1093, *as amended*, 52 P.S. §§ 3301- 3326, which was filed on May 23, 2000. The Notice of Appeal claims that the Department arbitrarily failed to require a replacement water source for water depleted by mining contrary to a regulation under this Act at 25 Pa. Code § 37.533. This regulatory provision requires an operator of a non-coal mine whose surface mining activities

affects a public or private water supply to restore or replace the affected water supply with an alternate source of water adequate in quantity and quality for the purpose served by the supply. This specifically includes an existing source of water for agricultural or other uses.

The Appellant, Walter Schneiderwind, filed a complaint with the Department claiming that his water supply had been adversely affected by surface mining activities at the Delaware Valley Concrete Quarry in that decreased water supply had decreased the crop yield at the Appellant's farm. On April 17, 2000, the Department advised the Appellant that its investigation conducted by hydrogeologists from July, 1999 to December, 1999 did not establish a correlation between these surface mining activities and the alleged decrease in the Appellant's crop yield at his farm.

The Notice of Appeal is from this finding by the Department of no effect on water use. The Notice of Appeal specifically charges that the Department improperly determined that there would be no proven effect on crops. The Notice of Appeal also refers to permit application requirements contained in the regulation. One such provision, 25 Pa. Code § 70.407, required the application to identify the extent to which the proposed surface mining activities may result in diminution of underground or surface sources of water within the proposed permit or adjacent area for agricultural or other legitimate uses. In addition, 25 Pa. Code § 77.532 provides that when non-coal mining activities may affect ground water supplies the levels of those supplies must be monitored by the applicant.

The Board's initial pre-hearing order dated May 28, 2000 directed the Appellant to serve his expert report on the Department by September 28, 2000. After the time for the completion of discovery designated by this order had passed, the Board granted the Appellant's request to reopen discovery and extended his deadline for serving his expert reports to November 13, 2001.

On January 18, 2001, the Board again extended the time for the completion of discovery at the Appellant's request to February 20, 2001, but required that expert reports be exchanged by March 22, 2001.[1] Thereafter, the Board gave the parties additional extensions of time to enable them to engage in settlement discussions. The meetings established for those discussions were cancelled by Appellant's attorney.

In a conference call held by the Board on August 16, 2001, the Board scheduled a hearing on the merits in view of the inability of counsel to resolve the case by settlement. At that conference call, the Appellant's counsel indicated that he did not know whether or not he would be presenting an expert at the hearing, but agreed to promptly advise the Board as to whether or not he would present such an expert. After the Appellant's counsel advised the Board that he would have such an expert, the Board gave the Appellant an additional chance to present expert testimony by its Order of August 22, 2001, even though the time for the exchange of expert reports by the parties had long since passed. This order directed the Appellant to serve his expert report on the Department by September 5, 2001, and the Department to serve its responsive expert report on September 19, 2001. This was a compressed schedule to accommodate the Appellant which enabled the parties to prepare and serve their pre-hearing memorandum as scheduled and proceed to a hearing commencing on October 30, 2001.

When the Appellant failed to serve an expert report on the Department as required by the Board's Order, the Department filed the present motion on the date the Department was required to file its responsive expert report to preclude the Appellant's expert report and to obtain an extension of time to file its expert report. This extension was requested in the Department's

[1] This request was granted for the limited purpose of allowing the Appellant to review the Department's files.

proper belief that the Board's Order was designed to give the Department 15 days in which to serve its expert reports from the time the Department should have received the Appellant's expert report.

The Board held a conference call on September 21, 2001, in response to those motions and indicated that it was not willing to permit the Appellant to present expert testimony because of his failure to supply an expert report to the Department. In that conference call, Appellant's counsel stated that the expert that he had previously been dealing with was not able to testify and asked for an extension of time in which to file his pre-hearing memorandum from September 24, 2001 to September 25, 2001, so that he would have some opportunity to see whether or not he could obtain another expert to testify.

On September 25, 2001, the Appellant faxed his pre-hearing memorandum and the resume for an expert to the Board. On the same day, the Appellant's counsel sent a letter to the Board making an emergency request for an extension of time to file his expert report because he had just been informed that his expert, Kenneth Siet, had been stricken with a series of kidney stones which have kept him out of the office on heavy pain medication since Friday, September 21, 2001.

At the conference call held by the Board with counsel on Thursday, September 27, 2001, the Presiding Administrative Law Judge ruled that he would not permit the Appellant to present expert testimony at the hearing by reason of the Appellant's failure to meet the requirements of the Board's previous orders. Since the Appellant's counsel indicated that he would file promptly a Motion for Reconsideration, the Presiding Administrative Law Judge issued an Order following the conference call explaining that this Opinion and Order would follow promptly. This Order granted the Department's motion to preclude expert testimony at the hearing as well as the

Department's motion for an extension of time to October 1, 2000 in which to serve its expert report on the Appellant.

Under the Board's pre-hearing order of August 16, 2001, the Department must file its pre-hearing memorandum by October 10, 2001.

OPINION

The Board's Rules of Procedure at 25 Pa. Code §1021.125 with respect to sanctions provides as follows:

> The Board may impose sanctions upon a party for failure to abide by a Board order or Board rule of practice and procedure. The sanctions may include dismissing an appeal, entering adjudication against the offending party, precluding introduction of evidence of documents not disclosed, barring the use of witnesses not disclosed, or other appropriate sanctions including those permitted under Pa. R.C.P. 4019 (relating to sanctions regarding discovery matters).

The Board has exercised its authority to sanction parties by barring expert testimony where an expert was not properly identified during discovery,[2] or expert reports were not served on a timely basis.[3] Therefore exclusion of the Appellant's expert in this case is hardly novel.

The Board's Rules of Practice and Procedure at 25 Pa. Code § 1021.81 provide for a staged procedure of completion of discovery, the exchange of expert reports and, if the parties desire to, the filing of a dispositive motion. After the Board resolves any dispositive motions, a hearing on the merits is to be scheduled by Order which will call for, among other things, the filing of pre-hearing memoranda at least 20 days before the scheduled hearing date.[4] Under this rule of procedure, the party with the burden of proof must serve its expert reports and answers to

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[2] *Midway Sewerage Authority v. DER*, 1990 EHB 1554.

[3] *Maddock v. DEP*, EHB Docket Nos. 2000-145-L, 2000-164-L (Opinion issued September 12, 2001).

[4] 25 Pa. Code § 1021.81(d).

all expert interrogatories 30 days after the close of discovery.[5] The opposing party is ordinarily required by this rule to serve its responsive expert reports and answers to all expert interrogatories within 30 days thereafter.

Because the issues raised by appeals before the Board ordinarily involve complex expert testimony in the fields of geoscience, including groundwater hydrology, as well as complex issues of air quality and water supply contamination or diminution, the critical part of preparation for a hearing is the exchange of expert reports so that the parties will know what testimony to expect on critical issues at the hearing on the merits. This pre-hearing procedure adopted by the Board is specifically aimed to prevent the last minute disclosure of expert witnesses which may invariably lead to the unwarranted delay of the scheduled hearing.

In this case the Board has all along been liberal in extending time for the parties to either resolve the dispute amicably or prepare properly for a hearing. This liberality was also extended to permit this Appellant to call an expert even after the time for the exchange of expert reports had passed, and the hearing on the merits had been scheduled. Even though the Appellant's counsel expressed in prior conference calls an uncertainty as to whether or not he had an expert, the Board was met with the contention by the Appellant's counsel at the conference call on September 27, 2001 that all along it had two experts, one of whom told him in late August that he would not be able to testify and the second expert who was at that time available to the Appellant. There is, therefore, no basis for the contention that the proposed expert's gallstone pain in late September prohibited the Appellant from serving his expert report on September 5,

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[5] 25 Pa. Code § 1021.81(a)(2). The exchange of expert reports is required at this early stage because Rule 1035.1(c) presents an opportunity to obtain a summary judgment based on an expert report through the filing of a dispositive motion. It also facilitates the parties' preparation for the hearing on the merits.

2001 as required by the Board's order.

The Department argued in its motion and in the conference call on September 27, 2001 that permitting a delay in the filing of Appellant's expert reports will prejudice it by not having adequate time to prepare its own expert for the hearing. That undoubtedly is true. The Appellant's pre-hearing memorandum must be filed by October 10, 2001. It obviously needs time to prepare a responsive expert report before the time it's pre-hearing memorandum is due. Accordingly, it is clear that the Appellant's delay in serving its expert report would prejudice the Department if the pre-hearing scheduled were adhered to, or would require the Board to reschedule the hearing after the Department had ample time to respond to the Appellant's expert report whenever that expert report might be produced by the Appellant.

In view of the fact that the Appellant has been given ample opportunity to meet the requirements of the Board's Rules of Practice and Procedure there is no reason to further postpone the final disposition of this appeal. Since the Notice of Appeal filed in May of last year clearly set forth a contention that there was a causal relationship between the loss of water supply and the Appellant's crops, it had to be apparent to the Appellant's attorney from the very beginning of the case that the critical part of his case was expert testimony. He has been given ample opportunity to provide a report of an expert to the Board on a timely basis and has failed to meet the Board's requirements to the prejudice of the Department.

Accordingly, the Board issued the following Order[6] to the parties yesterday:

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[6] The Order set forth below deletes the statement that this Opinion and Order will be issued promptly.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

WALTER SCHNEIDERWIND	:	
	:	
v.	:	**EHB Docket No. 2000-113-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

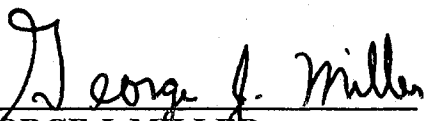
AND NOW, this 27th day of September, 2001, in consideration of the motions of the Department to preclude Appellant's expert testimony for failure to serve its expert report within the time required by the Board's orders and the Department's motion for an extension of time to file its expert report in view of the Appellant's failure to serve its expert report, IT IS HEREBY ORDERED as follows:

1. The Department's motion to preclude Appellant's expert testimony for failure to meet the deadlines established by the Board for the service of his expert report on the Department (the most recent Order being entered on August 22, 2001 requiring that Appellant's expert report be filed on or before September 5, 2001 and a previous order requiring Appellant to serve its expert report on or before March 22, 2001), the motion of the Department to preclude the presentation of expert testimony at the hearing on the merits now scheduled for October 30, 2001 and continuing through November 1, 2001, the Department's motion is **granted**.

2. In view of the failure of the Appellant to serve its expert report as required by the Board's Orders, the Department is granted an extension of time in which to serve its expert report on Appellant to **October 1, 2001**.

3. This order is entered pursuant to the Board's authority at 25 Pa. Code § 1021.125 which authorizes it to impose sanctions on a party for failure of a party to abide by a Board Order or a Board Rule of Practice and Procedure.

ENVIRONMENTAL HEARING BOARD



GEORGE J. MILLER
Administrative Law Judge
Chairman

DATED: **September 28, 2001**

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

For the Commonwealth, DEP:
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WILLIAM T. PHILLIPY II
SECRETARY TO THE BOAI

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION :

v. :

LEEWARD CONSTRUCTION, INC. :

EHB Docket No. 99-257-L-CP

Issued: October 1, 2001

ADJUDICATION

By Bernard A. Labuskes, Jr., Administrative Law Judge

Synopsis:

The Board assesses a total civil penalty of $258,500 for an earthmoving contractor's violations of the Clean Streams Law. The Board assesses $109,000 for the contractor's failure to install effective erosion and sedimentation controls and for operating without an approved E&S plan. The Board assesses $49,500 for the contractor's pollution of the waters of the Commonwealth, and $100,000 for the contractor's deliberate violations of the Department's stop-work orders.

INTRODUCTION

Leeward Construction, Inc. ("Leeward") was the earthmoving contractor and copermittee for the development of a Wal-Mart store in Texas Township, Wayne County. The Department of Environmental Protection (the "Department") issued five orders to Leeward due to excessive erosion and sedimentation ("E&S") problems at the site. Leeward appealed three of those orders to this Board. We dismissed the consolidated appeals after a hearing. *Leeward Construction, Inc.*

v. DEP, 2000 EHB 742 (*"Leeward I"*). Leeward did not appeal from that Adjudication and Order.

The instant case began with the Department's filing of a complaint against Leeward for civil penalties under the Clean Streams Law, 35 P.S. § 691.1 *et seq.* (the "Complaint"). This case is much broader in scope than *Leeward I,* but all of our findings and conclusions in that Adjudication are also relevant here. For the convenience of the parties, we will repeat many of our findings from *Leeward I.*

FINDINGS OF FACT

1. The Department is the executive agency of the Commonwealth with the duty and authority to administer and enforce the provisions of the Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended,* 35 P.S. § 691.1 *et seq.* (the "Clean Streams Law"), and the rules and regulations promulgated at Title 25 of the Pennsylvania Code. (*Leeward I,* Finding of Fact ("F.F.") 1.)

2. Leeward Construction, Inc. ("Leeward") is an excavating contractor based in Honesdale, Wayne County. (*Leeward I,* F.F. 2.)

3. On July 17, 1996, the Department issued National Pollutant Discharge Elimination System ("NPDES") Permit No. PAS107413 to Wal-Mart, which authorized the discharge of storm water from construction activities at a parcel located northeast of the intersection of SR 0006 and T 405 (Old Willow Avenue) in Texas Township, Wayne County (the "Wal-Mart Site"). (*Leeward I,* F.F. 3.)

4. The Wal-Mart Site was being developed for the construction of a Wal-Mart store. (*Leeward I,* F.F. 4.)

5. NPDES Permit No. PAS107413 required the implementation of an approved, site-

specific erosion and sedimentation pollution control plan, which included maps, plans, profiles, specifications, and any approved amendments thereto. (*Leeward I*, F.F. 5.)

6. The E&S plan that was approved for the Wal-Mart Site required the construction and maintenance of numerous E&S controls throughout the site. (*Leeward I*, F.F. 6.) The plan was developed by Michael J. Pasonick, Jr., Inc. (Commonwealth Exhibit ("C. Ex.") 206.)

7. On March 10, 1997, the Department approved a major modification to NPDES Permit No. PAS107413, which added Phillip Goyette ("Goyette") (the property owner) and Linde Enterprises, Inc. as permittees, and authorized the discharge of storm water from construction activities at the adjacent parcel of approximately 23 acres located due west from and contiguous to the Wal-Mart Site (the "Waste Site"). The major permit modification was identified as NPDES Permit No. PAS107413-01. The Waste Site was developed for the deposition of excess soil related to development of the Wal-Mart Site. (*Leeward I*, F.F. 7.)

8. NPDES Permit No. PAS107413-01 also required the implementation of an approved site-specific E&S pollution control plan, which included maps, plans, profiles, specifications, and any approved amendments thereto. (*Leeward I*, F.F. 8.)

9. The approved E&S plan for the Waste Site required the construction and maintenance of numerous E&S controls throughout the site. (*Leeward I*, F.F. 9.) The plan was developed by Goyette and Linde Enterprises. (Notes of Transcript ("T.") 93, 1472; C. Ex. 208.)

10. Part C, Paragraph 2 of NPDES Permit Nos. PAS107413 and PAS107413-01 stated as follows:

> Feasibility of the E&S Plan, structural design and proper construction methods are the responsibility of the permittee. Failure of the control measures and facilities to achieve their intended purpose may require additional or modified control measures and facilities to be designed and constructed. Any changes to the approved E&S Plan, including changes to

> control measures and facilities or the points of discharge, must be submitted to the processing entity for review and approval prior to initiating the activity.

(*Leeward I*, F.F. 10.)

11. Part C, Paragraph 2 of NPDES Permit Nos. PAS107413 and PAS107413-01 also stated the following:

> Prior to the start of operations at any spoil, borrow or other work area not detailed on the approved E&S Plan, whether located within or outside of the indicated construction limits, the permittee shall develop and have approved by the processing entity, a separate E&S Plan for each site.

(*Leeward I*, F.F. 11.)

12. Part B, Paragraph 1(f) of NPDES Permit Nos. PAS107413 and PAS107413-01 stated the following:

> The permittee shall at all times properly operate and maintain all facilities and systems of treatment and control (and related appurtenances) which are installed or used by the permittee as efficiently as possible to achieve compliance with the conditions of this permit and with the requirements of erosion and sedimentation control plans. Proper operation and maintenance includes, but is not limited to, effective performance based on designed facilities capabilities, adequate staffing and training, and adequate laboratory controls and appropriate quality assurance procedures. Proper operation and maintenance requires the operation of backup or auxiliary facilities or similar systems, installed by a permittee only when necessary to achieve compliance with the conditions of the permit.

(*Leeward I*, F.F. 12.)

13. Part B, Paragraph 1(g) of NPDES Permit Nos. PAS107413 and PAS107413-01 stated the following:

> Upon reduction, loss or failure of any BMP [Best Management Practice] or treatment facility, in order to maintain compliance with its permit, the permittee shall

> control the construction activities and any associated discharges to ensure that there is no pollution discharged to surface waters of the Commonwealth until the BMP or treatment facility is provided. This requirement is applicable in situations where the BMP or treatment facility is rendered ineffective, whether the cause or source of the reduction, loss or failure is within or beyond the control of the permittee.

(*Leeward I*, F.F. 13.)

14. Part C, Paragraph 7(e) of the NPDES permits provided as follows:

> Sediment shall at no time accumulate in control measures or facilities to a depth sufficient to limit storage capacity or interfere with the settling efficiency or functioning of the device. Sediment shall be removed and stabilized in a manner that will not create pollution.

(*Leeward I*, F.F. 14.)

15. Wal-Mart secured the services of Milnes Construction Co. as general contractor to develop the Wal-Mart Site. (*Leeward I*, F.F. 15.)

16. Milnes secured the services of Leeward to conduct earthmoving work at the Wal-Mart Site, Waste Site, and a third site west of the Waste Site from which Leeward extracted earthen materials for use on the Wal-Mart Site (the "Borrow Site"). (*Leeward I*, F.F. 16.) (Hereinafter we will frequently refer to all three sites as the "site" or the "project.")

17. Leeward executed a copermittee application for NPDES Permit No. PAS107413 on or about July 22, 1997. (*Leeward I*, F.F. 17.)

18. Leeward also executed a copermittee application for NPDES Permit No. PAS107413-01 on or about July 22, 1997. (*Leeward I*, F.F. 18.)

19. Leeward certified on the copermittee application as follows:

> "I certify, under the penalty of law that this transfer agreement was prepared by me or under my direction and supervision. I also acknowledge and agree that the Best Management Practices (BMPs), including the Erosion and Sedimentation

> (E&S) Control Plan, the Preparedness, Prevention and Contingency (PPC) Plan, and other storm water pollution prevention and minimization strategies already installed for or on behalf of the current permittee will continue to be implemented and maintained. I further acknowledge, under penalty of law, that I have read, understand, and agree to abide by the terms and conditions of the Individual or General NPDES Permit requirements, as applicable, to ensure that water quality standards and effluent limits are attained. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for known violations."

(*Leeward I*, F.F. 19.)

20. Leeward also executed and submitted Copermittee Agreements, which provided in the pertinent part as follows:

> LEEWARD CONSTRUCTION, INC., HONESDALE, PA. hereby assumes joint and severable responsibility, coverage, and liability under the permit for any obligations, duties, responsibilities and violations under said permit.

(*Leeward I*, F.F. 20.)

21. The Department has delegated nonexclusive authority to the Wayne County Conservation District (the "Conservation District" or the "District") to implement the erosion and sedimentation control program in Wayne County. (*Leeward I*, F.F. 21.)

22. The site discharged to an unnamed tributary to Holbert Creek (the "Unnamed Tributary"), wetlands adjacent to Holbert Creek, and Holbert Creek itself. Holbert Creek flows after a short distance into the Lackawaxen River. (T. 161, 174; Leeward Exhibit ("L. Ex.") 87; Board Exhibit 1.) These waterways have been designated as "High Quality, Cold Water Fishery, Migratory Fishery Waters," and as such, are entitled to special protection. *Leeward I*, 2000 EHB at 762; 25 Pa. Code § 93.9b.

23. The project involved the movement of almost 900,000 cubic yards of silty soils and

other earthen materials in areas immediately adjacent to the special protection waters. *Leeward I* at 763.

24. The Wal-Mart Site was developed on what had been the side of a hill. As such, thousands of yards of material were cut out of one side, and thousands of yards were used as fill on the other side in order to build a flat plateau for the store. (T. 74-75; C. Ex. 206.)

25. Thousands of yards of excess material from the Wal-Mart Site needed to be taken to the Waste Site. (T. 92; C. Ex. 206, 208.) Leeward needed to excavate rock from the Borrow Site to repair a slope on the Wal-Mart Site. (T. 531-532, 1417, 1561.)

26. The Wal-Mart Site had numerous E&S controls, including but not limited to Sediment Basin No. 1 ("SB 1"), Sediment Traps 1 and 3 ("ST 1" and "ST 3"), a surge basin, the Rite-Aid trap (due to its proximity to a Rite-Aid store), Swale #2 ("Swale 2"), and swales along the base of the eastern slope (the "eastern swales"). (C. Ex. 206.) Swale 2 ran between the Wal-Mart and the Waste Sites. The primary control at the Waste Site was planned to be a sediment basin. (C. Ex. 208.)

27. Work began at the site in July, and earthmoving began in earnest in September 1997. (T. 1311, 1313.)

28. From September 1997 through January 1998, Leeward failed to install and/or maintain numerous E&S controls on the Wal-Mart Site. (C. Ex. 130-135.)

29. A Department and Conservation District inspection of the Wal-Mart Site on January 7, 1998 revealed that there were numerous ineffective E&S controls at the site. The site was discharging sediment laden water to waters of the Commonwealth. *(Leeward I,* F.F. 22.)

30. The Department issued a compliance order (Compliance Order 649801) to Leeward and Wal-Mart on January 16, 1998 due to numerous inadequate controls and ongoing pollution

at the Wal-Mart Site. Leeward did not appeal the order. (*Leeward I*, F.F. 23-25.)

31. The Department also issued a compliance order (Compliance Order 649802) to Leeward and Goyette on January 16, 1998 regarding the Waste Site due to several inadequate controls and ongoing pollution. Leeward did not appeal the order. (*Leeward I*, F.F. 26-28.)

32. The January 16 orders did not contain a stop-work order. (*Leeward I*, F.F. 29.)

33. The January 16, 1998 orders required Leeward to submit revisions to address the inadequacies of and deviations from the approved E&S plans for the Wal-Mart and Waste Sites. (*Leeward I*, F.F. 25, 28.)

34. Leeward did not contest the need to revise the plans. It submitted proposed revisions to both plans. A lengthy series of correspondence between the District and Leeward followed, with the District repeatedly identifying deficiencies in Leeward's proposals and Leeward sending in further revisions. (Stipulation of the Parties ("Stip.") 30-37, 42, 43, 46, 47.)

35. Leeward's revised plan for the Wal-Mart Site was approved on April 27. (Stip. 48)

36. Leeward's revised plan for the Waste Site was approved on July 9. (Stip. 49.)

37. Additional inspections of the Wal-Mart and the Waste Sites by Department and Conservation District personnel between January 16 and February 18 revealed that Leeward's continuing failure to implement effective E&S controls was resulting in potential and actual sediment pollution of Holbert Creek and the Unnamed Tributary. (*Leeward I*, F.F. 30-31.)

38. On February 20, 1998, the Department issued Compliance Order No. 649703 to Leeward and Wal-Mart for the Wal-Mart Site due to several inadequate E&S controls and ongoing pollution of the waters of the Commonwealth. The order included a stop-work order. (*Leeward I*, F.F. 32-54, 61.)

39. In addition, the Department issued an order (Compliance Order 649704) to Leeward

and Goyette on February 20, 1998 for violations on the Waste Site due to inadequate controls and ongoing pollution of the waters of the Commonwealth. The order included a stop-work order. (*Leeward I*, F.F. 55-60, 65.)

40. On April 15, 1998, the Department issued a compliance order to Leeward and Goyette for the Borrow Site (Compliance Order 649805). The order found that Leeward had failed to implement an E&S plan for the site, which created a danger of pollution, and directed Leeward to stop work, take certain interim stabilization measures, and submit a plan to the Conservation District for approval. (*Leeward I*, F.F. 68-76.)

41. On the dates listed in Appendix A to this Adjudication, the Department and/or the District documented through videotapes, photographs, inspection reports, notices of violation, and other documents numerous examples of Leeward's failure to install and/or maintain adequate E&S controls at the site. (C. Ex. 2-4, 6-11, 13-16, 18, 19, 21-24, 28, 32, 36-43, 46, 48-53, 56-57, 60-67, 70-72, 74-77, 80-83, 94, 99, 105, 107, 111, 113, 117, 118, 120, 121, 150-154, 158-162, 164, 165, 168-171, 173, 174, 178-195, 218.)

42. Leeward failed to construct and/or maintain adequate E&S controls at the Wal-Mart Site throughout the duration of the project in the following respects:

a. September 18, 1997 – SB 1 outlet structure not installed or functioning properly. (T. 995-998, 1276; C. Ex. 130.)

b. November 12, 1997 – SB 1 filled with excessive sediment, sediment from the eastern swales cast downslope outside of any controls. (C. Ex. 133, 143.)

c. January 7, 1998 – Numerous deficiencies, including inadequate clean-out of SB 1, SB 1 outlet not maintained, no controls at construction entrance, no protection on storm water inlets, silt fencing not maintained, ST 1 not installed, improper maintenance of Rite Aid trap,

sediment accumulated on public road, and insufficient stabilization of banks and a swale outlet. (T. 113-139, 599-600, 1562-1565; C. Ex. 2, 4-6, 8, 9, 12, 139.)

d. January 29 – No controls in area of haul road, and inadequate clean-out of SB 1 and a surge basin. (T. 237-239, 463-464, 568; C. Ex. 142.)

e. February 9 – Improper installation of ST 1, inadequate maintenance of Swale 2, inadequate storm water inlet protection, no diversion swale near haul road, no clean-up of public road, inadequate maintenance of silt fencing. (T. 163, 184-185, 257-258, 1024-1026; C. Ex. 14-16, 143, 144, 218.)

f. February 18 – Numerous deficiencies as described in *Leeward I.*

g. March 3 – Numerous deficiencies including inadequate maintenance of SB 1, eastern swales, silt fencing, ST 3, Swale 2 and crossing thereof, stream banks, construction entrance, public road, and inadequate controls in the area of soil stockpile. (T. 144-145, 189-193, 243-244, 432-433, 557, 569-570, 574-580, 592-593; C. Ex. 46-51, 53, 55, 61-64, 68a, 69a, 152.)

h. March 10 – Inadequate maintenance of SB 1, eastern swales, ST 3, stream banks. (T. 243-244, 434-436, 546-548, 581-584; C. Ex. 71, 74, 75, 153.)

i. March 20– Numerous deficiencies including inadequate maintenance of stream banks, eastern swales, silt fences, and ST 3, inadequate installation of ST 1 and inlets, and no controls for staging areas beyond permitted limits of disturbance. (T. 194-196, 216-217, 223, 436-438, 582-586, 828-830; C. Ex. 80a, 81a, 81b, 154, 218.)

j. March 27– Inadequate maintenance of stream banks, fencing, ST 3, and eastern swales, and no controls in staging areas. (T. 437-438, 595-597; C. Ex. 82b, 83, 158.)

k. April 13 – Inadequate maintenance of eastern swales and no controls in the area

of a large stockpile. (T. 561-562; C. Ex. 160.)

l. June 12 – No controls for staging area. (T. 542-544; C. Ex. 185.)

m. June 29 – Numerous deficiencies including inadequate maintenance of SB 1, eastern swales, ST 3, fencing, Swale 2, and soil stockpile near SB 1. (T. 439-441, 1002-1005, 1017-1022; C. Ex. 109b, 111, 114-116, 188.)

n. July 15 – Inadequate maintenance of SB 1, ST 3, eastern swales, and Rite Aid trap. (T. 172-173, 420-421, 442-444, 1017-1020; C. Ex. 120b, 189.)

o. August 24 – Inadequate maintenance of Swale 2. (T. 471; C. Ex. 193.)

p. September 16 – Same deficiencies as August 24. (C. Ex. 194.)

43. As of January 7 and 8, 1998, although earthmoving had been underway for several months, there were almost no E&S controls on the Waste Site. (T. 152-157, 1474; C. Ex. 10, 138, 218.)

44. In addition to the lack of controls on January 7 and 8, 1998, Leeward failed to construct and/or maintain adequate E&S controls at the Waste Site in the following respects:

a. January 29, 1998 – Silt fence not adequately installed or maintained. (C. Ex. 142.)

b. February 9 – Primary sediment basin not properly designed or installed. (T. 259-260, 1172-1175; C. Ex. 144.)

c. February 18 – Numerous deficiencies as described in *Leeward I.*

d. March 3 – Inadequate design and installation of primary sediment basin, inadequate maintenance of swale, silt fencing, inadequate stabilization, inadequate controls in area of a stockpile. (T. 191-192, 203-205, 209-212, 496, 506-509; C. Ex. 56, 65-67, 68b.)

e. March 10 – Inadequate controls in the area of a crossing of Swale 2 and

inadequate maintenance of silt fencing. (C. Ex. 153.)

f. May 15 – Inadequate stabilization, maintenance of silt fencing and construction entrance. (C. Ex. 104a, 178.)

g. May 28 – Inadequate silt fence maintenance. (C. Ex. 180.)

h. June 5 – Inadequate silt fence maintenance. (C. Ex. 183.)

i. June 29 – Inadequate stabilization of ditch and stockpile areas. (C. Ex. 188.)

j. July 15 – Inadequate maintenance of fencing and construction entrance. (T. 170-171, 598; C. Ex. 117a, 118a, 120a, 120b, 189.)

k. August 4 – Seeding of disturbed areas with red clover, which was not authorized under the plan and produced inadequate stabilization. (T. 570-571; C. Ex. 190.)

l. August 24 – Inadequate stabilization of disturbed areas (including use of red clover) and swale. (T. 215, 570-571; C. Ex. 121a, 193.)

m. September 16 – Same deficiencies as August 24. (C. Ex. 194.)

45. Leeward commenced substantial earthmoving activities at the Borrow Site on April 4, 1998, and continued that work on April 6, 7, 8, and thereafter. (C. Ex. 197.)

46. Leeward failed to construct and/or maintain adequate E&S at the Borrow Site throughout the duration of its use of that site in the following respects:

a. April 14, 1998 – Virtually no controls of any kind in place. (*Leeward I*, F.F. 71 and 2000 EHB at 764.)

b. May 6 – Failure to maintain silt fence. (T. 627; C. Ex. 173, 174.)

c. May 15 – Failure to maintain silt fence and construction entrance. (T. 536; C. Ex. 104a, 179.)

d. May 28 – Inadequate stabilization and failure to maintain silt fence. (T. 541; C.

Ex. 181.)

e. June 5 – Failure to maintain silt fence. (C. Ex. 184.)

f. June 12 – Failure to maintain silt fence. (C. Ex. 186.)

g. June 29 – Failure to properly construct ditch leading to sediment trap. (C. Ex. 188.)

h. July 15 – Failure to construct adequate controls at the access road, maintain silt fence, and properly construct ditch leading to sediment trap. (T. 481-482, 598; C. Ex. 117a, 118a, 119a, 120a, 189.)

i. August 24 – Failure to properly construct ditch leading to sediment trap. (T. 483-484; C. Ex. 193.)

j. September 16 – Failure to properly construct ditch leading to sediment trap. (C. Ex. 194.)

47. Leeward caused or allowed the discharge of excessive amounts of sediment from the sites to the Unnamed Tributary, wetlands adjacent to Holbert Creek, Holbert Creek, and/or the Lackawaxen River (as noted) on the following dates:

a. January 7, 1998 – From an area of approximately 45 percent of the 50-acre project site, resulting in severe excess sedimentation of the Unnamed Tributary and excess sedimentation of Holbert Creek. (T. 158-161, 780, 1010-1011, 1014-1017; C. Ex. 2, 3, 4, 5, 8, 12, 137, 138, 218.)

b. February 18 – From numerous areas of the Wal-Mart and Waste Sites, resulting in severe excess sedimentation of the Unnamed Tributary, and excess sedimentation of wetlands adjacent to Holbert Creek and Holbert Creek. (*Leeward I*, F.F. 32, 35, 40, 48, 50, 53, 55, 59; C. Ex. 18, 25-27, 29, 31.)

c. March 3 – From the Wal-Mart Site in the vicinity of the Unnamed Tributary and the eastern portion of the site, resulting in severe excess sedimentation of the Unnamed Tributary and excess sedimentation of the wetlands adjacent to Holbert Creek. (T. 1047-1050; C. Ex. 46, 58, 59, 69b, 152.)

d. March 10 – From the portions of the Wal-Mart Site tributary to the Unnamed Tributary, resulting in severe sedimentation of the Unnamed Tributary, and sedimentation of the wetlands adjacent to Holbert Creek. (T. 635-636, 1051; C. Ex. 71, 72, 75, 77a, 77b, 153.)

e. May 10 and May 11 – From numerous portions of the Wal-Mart and Waste Sites, resulting in severe sedimentation of the Unnamed Tributary and excess sedimentation of Holbert Creek and the Lackawaxen River. (T. 1336-1358, 1362-1374, 1378-1403; Board Ex. 1; C. Ex. 101-103, 175-177.)

f. June 12 – From various areas of the Wal-Mart and Waste Sites, resulting in excess sedimentation of the Unnamed Tributary, the wetlands adjacent to Holbert Creek, and Holbert Creek. (T. 637-638; C. Ex. 185.)

48. The excess sedimentation caused and allowed by Leeward was deleterious to fish and other aquatic species, their habitat, and the users of Holbert Creek and the Lackawaxen River. (T. 1385-1399; C. Ex. 177.)

49. The February 20, 1998 order for the Wal-Mart Site contained the following provision:

> Except as required by this Order, immediately cease all earthmoving activities, until written authorization is given by the Department to resume activities.

(*Leeward I*, F.F. 62; C. Ex. 148.) Leeward's appeal from this stop-work portion of the order was dismissed in *Leeward I,* 2000 EHB at 761-762.

50. The February 20, 1998 order for the Waste Site contained the same cessation

requirement, and it was also upheld in *Leeward I.* (*Leeward I*, F.F. 66; C. Ex. 149; 2000 EHB at 761-762.)

51. The April 15, 1998 order for the Borrow Site contained the same cessation requirement, and it was also upheld in *Leeward I.* (*Leeward I*, F.F. 75; C. Ex. 163; 2000 EHB at 764-765.)

52. All three orders required Leeward to immediately implement interim stabilization measures at the sites and submit E&S plan revisions for the Wal-Mart and Waste Sites and a plan for the Borrow Site.

53. The Department lifted the Wal-Mart Site stop-work requirement on April 27, 1998. (C. Ex. 167.) The record does not indicate that stop-work requirement was ever expressly lifted for the Waste and Borrow Sites, but a revised E&S plan was approved for the Waste Site on July 9, 1998 (Stip. 48), and an E&S plan was approved for the Borrow Site on July 16, 1999 (Stip. 49). We will treat the stop-work orders as having been lifted for those sites on those days.

54. Leeward did not stop or modify its earthmoving activities at any of the three sites in any material way in compliance with the stop-work orders. Leeward completed the construction project as if the cessation portion of the orders had not been issued. Leeward's activities included substantial, continuous, and pervasive earthmoving activities in violation of the stop-work orders. (T. 197-198, 500, 606-628, 981-983, 1063-1070, 1073, 1234-1238, 1243, 1511-1514, 1575, 1661-1669; C. Ex. 78b, 79a, 79b, 83a, 85-91, 93a, 93b, 94b, 96a, 96b, 98b, 104b, 105a, 107a, 154-156, 158-160, 162, 164, 168, 169, 171, 173, 174, 189, 197-198 (see, especially, "work performed"), 204, 218; L. Ex. 71c, g, h, and j.)

DISCUSSION

I. Counts I-III, The E&S Controls

The Department seeks penalties in Count I of the Complaint for Leeward's failure to install and maintain effective E&S controls on the Wal-Mart Site. Count II is for the same violation at the Waste Site. Count III is for the same violation, as well as the failure to obtain an approved E&S control plan, at the Borrow Site. We will address these three counts together.

Our role where the Department has filed a complaint for penalties under the Clean Streams Law is slightly different than our review in an appeal from the Department's assessment of a civil penalty. In an appeal from a civil penalty assessment, we determine whether the underlying violations occurred, and then decide whether the amount assessed is lawful, reasonable, and appropriate. *Farmer v. DEP*, EHB Docket No. 98-226-L (Adjudication issued March 26, 2001) slip op. at 13. Although our review of an assessment is *de novo,* we do not start from scratch by selecting what penalty we might independently believe to be appropriate. Rather, we review the Department's predetermined amount for reasonableness. *Stine Farms and Recycling, Inc., v. DEP*, EHB Docket No. 99-228-L (Adjudication issued September 4, 2001) slip op. at 18; *202 Island Car Wash, L.P. v. DEP*, 2000 EHB 679, 690.

In contrast to an appeal from an assessment, the Board must make an independent determination of the appropriate penalty amount in a complaint action. The Department suggests an amount in the complaint, but the suggestion is purely advisory. *Westinghouse v. DEP*, 705 A.2d 1349, 1353 (Pa. Cmwlth. 1998) (*"Westinghouse I"*); *DEP v. Whitemarsh Disposal Corporation*, 2000 EHB 300, 346; *DEP v. Silberstein*, 1996 EHB 619, 637; *DEP v. Landis*, 1994 EHB 1781, 1787.

The Board may assess a penalty of up to $10,000 per day for each violation of the Clean

Streams Law. 35 P.S. § 691.605; *DEP v. Carbro Construction Corp.*, 1997 EHB 1204, 1227. In determining the penalty amount, the Board is to consider the willfulness of the violations, damage or injury to the waters of the Commonwealth or their uses, costs of restoration, and other relevant factors. *Id.* The deterrent value of the penalty is a relevant factor. *Westinghouse v. DEP*, 745 A.2d 1277, 1280-81 (Pa. Cmwlth. 2000) (*"Westinghouse II"*); *Whitemarsh*, 2000 EHB at 346. The Department bears the burden of proof. 25 Pa. Code § 1021.101(b)(1).

Leeward did not appeal from the findings of violations at the Wal-Mart and Waste Sites in the January 16 compliance orders. (F.F. 30, 31.) In addition, we concluded in *Leeward I* that Leeward's failure to install and maintain effective E&S controls on February 18 through 20 on the Wal-Mart and Waste Sites and April 15 on the Borrow Site constituted violations of the law. *Leeward I*, 2000 EHB at 765-67. As outlined in the findings of fact set forth in this Adjudication, actions and omissions identical or at least similar to those which occurred on January 16, February 18-20, and April 15 occurred on numerous dates throughout the life of the project. (F.F. 28, 29, 37, 41, 42-47.) Leeward's many failures to install and maintain effective E&S controls constituted violations of the law and the conditions of its permits. 35 P.S. §§ 691.402 and 691.611; 25 Pa. Code § 102.4; *Leeward I*, 2000 EHB at 765-67; *Carbro Construction*, 1997 EHB at 1229; *Silberstein*, 1996 EHB at 634, 636; *Frisch v. DER*, 1994 EHB 1226, 1237, *aff'd*, 2543 C.D. 1999 (Pa. Cmwlth. 1995). It remains, then, to determine the appropriate amount of penalties to be assessed for these violations.

Turning first to the willfulness of Leeward's violations, we have frequently defined the levels of culpability in the context of enforcement actions as follows:

> An intentional or deliberate violation of law constitutes the highest degree of willfulness and is characterized by a conscious choice on the part of the violator to engage in certain conduct with knowledge that a violation will result. Recklessness is demonstrated by a conscious

> disregard of the fact that one's conduct may result in a violation of the law. Negligent conduct is conduct which results in a violation which reasonably could have been foreseen and prevented through the exercise of reasonable care.

Whitemarsh, 2000 EHB at 349 (citations omitted).

Leeward's multiple failures to install and maintain controls on all three sites for the duration of the project, particularly beginning in 1998, are best characterized as reckless. Leeward may not have set out to violate the law, but on the whole, it executed the project with a conscious disregard of the fact that its lack of attention to controlling accelerated erosion and excess sedimentation would be likely to result in violations and the inevitable pollution that followed. Leeward started receiving warnings no later than September 1997. (F.F. 28.) The warnings escalated significantly when Leeward received an extensive inspection report for a January 7, 1998 inspection. The report listed numerous and serious violations. The Department was compelled to issue compliance orders on January 16 when a reinspection revealed that Leeward failed to correct the January 7 violations. Thereafter, violations occurred unabatedly for the duration of the project, including a failure to permanently stabilize the site adequately in the end. Before the project was completed, the Department and the District issued 43 inspection reports, 5 notices of violation, and 5 compliance orders. There is not a single inspection report of record in which Leeward received a clean bill of health regarding E&S control. Leeward repeated the same violations time and time again, and regularly added new ones. There was not just one or two difficult periods in the midst of general compliance. To the contrary, the record shows that Leeward *never* attained site-wide compliance.

The violations were not limited to one or two problem locations. The violations pervaded the entire project. With regard to willfulness, Leeward's actions at the Borrow Site are emblematic. The work at that site did not begin until April 1998, many months into the project.

Indeed, the project was nearing completion. Leeward had already received numerous inspection reports, notices of violation, and orders. The E&S problems were an ever-present reality of the project. Leeward had already been required to submit after-the-fact plan revisions. Yet, in the face of this history, Leeward commenced major earthmoving activity at the site without any controls and without a plan. (F.F. 45.) In doing so, it acted recklessly. *See Landis*, 1994 EHB at 1787 (violations that followed warnings precipitated by prior violations characterized as reckless).

Leeward would have us believe that it acted reasonably but was overwhelmed by the site conditions beyond its control. The record simply does not support such a scenario. Leeward did not exercise an appropriate level of care. Many violations (e.g., installing no controls at all for extended periods of time) had nothing to do with site conditions. The violations were simply too numerous, serious, and continuous to allow for a conclusion of reasonable and appropriate care.

Leeward points to the weather as an excuse for its conduct. We acknowledge that Leeward was cited for lack of temporary stabilization during winter months when it is impossible to establish vegetative cover. Mulching is a less than ideal alternative. Weather conditions, however, did not excuse the great majority of Leeward's violations. For example, even with regard to stabilization, weather conditions did not justify Leeward's attempt to cut corners on *permanent* stabilization. The weather did not justify Leeward's failure to install any controls for extended periods of time in certain locations, to obtain an approved plan on the Borrow Site, or to install effective controls in the first place. Furthermore, the record reveals that precipitation was above average, but not extraordinary, during the months of active earthmoving. (*Leeward I;* T. 393, 397-398; L. Ex. 58.) Other than a generalized claim of wet conditions, we see no evidence of particularly intense weather events justifying or even explaining particular

violations.

In support of its claim that it acted reasonably, Leeward also points to the many measures that it took to help reduce excess sedimentation, many of which went beyond plan requirements. We agree that these efforts are worthy of consideration in arriving at a penalty amount. They indicate that Leeward was not entirely indifferent to the problems that were occurring at the site. For example, Leeward installed extra silt fences along the eastern swales and at other locations. (T. 1477.) Although it is debatable whether the Rite Aid trap did any good, Leeward did make the effort. It installed extra protections around the outlet to SB 1. Although these activities indicate that Leeward was not entirely indifferent to the conditions at the site, they do not overcome the overall pattern of neglect demonstrated by the myriad of violations that occurred. They do not change our conclusion that Leeward on the whole acted recklessly, if not intentionally.

Leeward cites the opinion of its expert witness that Leeward made "an above-average effort in a very difficult situation" and that it "did what [it] could as far as I can see....they tried their best." (T. 1888-1889.) We simply do not find the opinion, lukewarm as it is, to be credible and we reject it. It is entirely inconsistent with the voluminous record evidence which indicates that Leeward acted recklessly.

Turning to damage to the waters of the Commonwealth, the amount that we assess for failing to install and maintain controls reflects the fact that the violations had the potential of causing, and did in fact in many instances cause, excess sedimentation of the waters of the Commonwealth. We have insufficient information regarding costs of restoration or costs incurred by the Commonwealth. We also do not have enough information regarding any cost savings enjoyed by Leeward as a result of the violations. There was a brief reference to a cost

incurred by Wal-Mart to do some of the permanent stabilization that Leeward should have done, but the reference is too isolated, unsupported, and unexplained to factor into our deliberations.

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

We have also considered other factors in calculating the penalty. All E&S violations are not alike. A failure to install a control tends to be more serious than a maintenance failure. A violation that is long-lasting or repeated, particularly in disregard of inspection reports or orders, merits a higher penalty. *Westinghouse II*, 745 A.2d at 1281 (penalty amount linked to number, seriousness, and duration of the violations). Multiple deficiencies on a given day should result in a higher penalty for that day. We have also factored the size and importance of the control

device at issue.

The facts in this appeal bear some resemblance to the facts in *DEP v. Carbro Construction Corp.*, 1997 EHB 1204. Although the contractor in *Carbro* deliberately pumped sediment laden water into streams and that is not alleged to have occurred here, in both cases there were numerous inspections over the life of the earthmoving project that revealed multiple problems with E&S controls, many of which resulted in pollution. *Carbro*, F.F. 16 *et seq.*, 1997 EHB at 1208 *et seq.* Applying the statutory criteria, we assessed a penalty of $195,835 for the "numerous, repetitive and, in some instances, continuous violations." *Id.* at 1228.

Leeward has distilled its defense into one basic argument: The crux of this case, as Leeward puts it, is that the E&S plans for the project were inadequate. Specifically, the site as designed was bound to erode, the E&S controls were not designed to handle that erosion, and excess sedimentation of the receiving streams was, as a result, inevitable. The inadequacy of the plans manifested itself in several ways. For example, the site design was "too extreme" because it included high, steep slopes without intermediate benches. E&S controls were inadequately sized. The plans did not adequately account for the fact that much of the earthmoving would occur over the winter months. The plans did not adequately account for the soils found at the site. Those soils were very erosive, and once they mixed with runoff, they were difficult to settle out. Leeward presented expert opinion testimony to support all of these points.

Leeward continues: All of the problems that Leeward experienced at the site were the fault of the Conservation District and the Department. The District should not have approved the plans. The District and the Department did not provide enough help and direction in the field. The District and the Department's failings are the direct result of their incompetence, including a lack of design expertise and an ignorance of applicable legal requirements. Leeward bears no

responsibility whatsoever in this matter. Because everything that went wrong at the project was the regulators' fault, no penalty is appropriate under any of the five counts of the complaint.

We are immediately struck by the fact that the plans that Leeward so viciously attacks are its own plans. It actually commissioned the original plan for the Borrow Site, and it does not appear to attack that plan. Its argument does nothing to explain the many violations at that site. The original plans for the Wal-Mart and Waste Sites were commissioned by the site owners (as well as a third party at the Waste Site), but Leeward adopted those plans as its own when it signed on as a copermittee for the sites. (F.F. 19, 20.) Leeward subsequently commissioned its own revisions of those plans, and many of the violations occurred after those revisions were submitted. (F.F. 34.) Vis-à-vis the Commonwealth, Leeward as the permittee bears full responsibility for the adequacy of the plans. *Cf. Silberstein*, 1996 EHB at 633 n.2 ("It is not relevant that Silberstein's engineer is the person who actually submitted the plan to the District Office. Obviously the engineer was acting as Silberstein's agent, and Silberstein bears responsibility for his actions.")

Leeward's argument is not so much that its engineers are to blame. Rather, it contends that the District should have caught the defects in the plans in the course of its review. Its failure to do so relieves Leeward of all responsibility.

To state the argument is to reveal its absurdity. When a permittee submits or adopts a plan, it is representing to the District, and fundamentally to the citizens of the Commonwealth, that the plans will work. The District is entitled to rely upon the truth of that representation and the accuracy of the data and the competency of the professional conclusions that are submitted in support of the representation. The District reviews the information using limited resources on behalf of the public, not the permittee. The District is not the permittee's consultant. The

District does not vouch for the plans. The District does not represent, let alone guarantee, that plans will work. Leeward cannot possibly rely upon the District's reliance upon Leeward's designs. Although this concept is so basic that it would seem to go without saying, lest there be any doubt, it was also spelled out in the permit: "Feasibility of the E&S Plan, structural design and proper construction methods are the responsibility of the permittee." (F. F. 10.)

We reject Leeward's allegation that the District and Departmental personnel involved in the project were incompetent. But even if we were to assume that the District never so much as looked at the plans before approving them, it would not mitigate Leeward's responsibility. Whether Leeward violated its duty as a permittee and whether the District violated its duty as a reviewing agency are parallel but unrelated issues. Any defect in Leeward's performance does not reduce the District's responsibility, and vice versa. Our function is to assess a penalty using defined statutory criteria based upon Leeward's own misconduct, and any dereliction on the part of the District in the performance of its role does not factor into that analysis.[1]

For example, Leeward's argument that the plan should have been based upon a more thorough investigation of soil types on the site is fundamentally a criticism of its consultants. There is no dispute that soil types on a site should be considered in a plan. (T. 681-682.) If Leeward is correct about the inadequate soils investigation and flawed assumptions based upon that investigation, then it follows that Leeward violated its responsibility as permittee to present and implement what it believed to be a plan that could handle the types of soils that were present at the site. If Leeward and/or its agents intentionally or unintentionally included inaccurate or

[1] Along the same lines, Leeward continues to allude to Wal-Mart's responsibility. Wal-Mart settled its liability in a consent order with the Department years ago. Among other things, it agreed to pay a substantial civil penalty. Even if Wal-Mart's liability were still an open issue, however, the extent of Leeward's liability would not turn on Wal-Mart's liability. Each party's misconduct would need to be assessed independently in light of the statutory criteria as they

false information regarding those soils, or did not employ due care in designing facilities capable of handling those soils, Leeward's culpability is increased, not decreased. The District was entitled to rely on the plan information regarding soils, and that reliance in no way would excuse the presentation of inaccurate information in the first place. In any event, the plans do, in fact, contain information regarding soils. (C. Ex. 216, 217.) Furthermore, Leeward's complaints regarding the plan descriptions of site soils is particularly difficult to accept because the revisions that it commissioned to the original plans long after construction had begun at the site adopted the conclusions regarding soil types that were in the original plans. (C. Ex. 210, 211, 213, 214, 215, 216, 217.)

Similarly, when Leeward committed to the steep slopes on the site, it committed that the work could be done without damage to the environment. The District was entitled to rely upon that commitment. The District did not peer-review that judgment. Its review did not in any way relieve Leeward from responsibility for the initial design or the implementation.

Leeward's theory of the case places too much emphasis on the importance of the original E&S plans for the site. Again, even if we accept Leeward's premise that the original plans were inadequate, the conclusion that Leeward responsibility in this matter is somehow reduced does not follow. Leeward's defense seems to be built upon the misapprehension that, so long as a contractor follows an approved plan, it does not matter whether excess sedimentation occurs. If the contractor follows the plan, it has no liability. In other words, Leeward followed the approved plan here, and it cannot be blamed for the problems that developed when the plan proved to be defective.

There has been so much argument in this case regarding the intricacies of individual E&S

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relate to that party.

controls that it is easy to lose sight of the fact that an NPDES permit for a construction project is designed to protect the waters of the Commonwealth. Whether a ditch was seven as opposed to eight feet wide is not nearly as important as whether the ditch worked and excess sedimentation was prevented.

An E&S plan is simply a best professional guess of what will work. No one really knows if the plan will actually work until it is implemented in the field. Regardless of what the plan specifies, the permittee's true responsibility is to minimize pollution. If the plan does not work, it must be revised. If necessary, controls should be added or modified. In worst-case scenarios, work should stop until control is restored. These concepts, like the notion that a permittee vouches for its own plan, would seem to go without saying, but they too are spelled out in the permit. (F.F. 10, 13.) The plans themselves state that "[a]dditional erosion and sedimentation controls may be necessary depending upon actual construction methods employed." (C. Ex. 206, 210, 211, 213.)

Because a plan is merely a prediction, there may well be an adjustment period once work begins on a large project. A permittee who is reasonably caught off guard during such a period because it installed controls in accordance with what turned out to be a defective plan, and who reacts quickly to correct the situation, might be entitled to some consideration in a penalty action. The situation presented here bears no resemblance to that scenario. Leeward's violations were ubiquitous and continued for nearly a year -- the entire life of the project. It allowed the pollution to continue unabated. Whether the original E&S plans were defective has very little significance in such a situation.

Leeward's defense is largely out of place in this enforcement action. In a private suit between Leeward and its engineers, the merits of the plan might be relevant. If this was an

appeal from the issuance of the permit, the adequacy of the plans would be of central importance. Furthermore, the Department has not cited Leeward for submitting a defective design.

With only minor exceptions, Leeward's defense has little or no factual relevance to the vast majority of its violations. Leeward's most serious violations are unrelated to the adequacy of the plan. Leeward's most serious violations under Counts I through III were its failure to install *any* controls. It installed no controls on the Borrow Site before beginning work. It allowed at least "a three to four week period near the end of January" (Leeward Post-Hearing Brief at 73) to go by without control on a portion of the Wal-Mart Site that was critical to preventing sedimentation for a significant portion of the site. There are numerous other examples where Leeward failed to install controls.

Whether the plan was adequate does not excuse Leeward's effort to cut corners on final stabilization measures. (F.F. 44k&l.) The alleged inadequacy of the plan does not excuse conducting earthmoving off of the permitted area of disturbance and without any controls. It does not excuse the failure to protect inlets, or build ditches with no lining at all, or the failure to install any ditch in a designated area. It does not excuse beginning earthmoving at the Borrow Site without a plan.

The adequacy of the plan is largely beside the point of Leeward's lack of care in maintaining most of the controls. Its effort to attribute stream pollution to an inadequate plan design is defeated by its lack of care in maintaining controls. Sediment Basin No. 1 illustrates this point. Leeward has made much of the fact that the soils did not settle out very well in SB 1. Leeward contends that the plan should have accounted for that fact (although it does not explain exactly how). Leeward has advocated everything from the nature of the soils, to the limitations on the depth of the pond, to the weather, to the District's alleged lack of review, to groundwater

infiltration to explain the lack of settling. Yet, even if all of these contributing factors were present, the fact remains that Leeward did not take the elementary step of cleaning out the basin on a regular basis. For the life of the project, which lasted approximately one year, Leeward only cleaned out the basin twice. Leeward cites these two cleanouts without any apparent sense of embarrassment or irony as examples of its diligence. (Leeward Brief at 60.) We are left to speculate why, with all of the claimed difficulties that arose at the site, and the critical importance of SB 1 in controlling pollution, that personnel and equipment were not assigned to clean out the basin more frequently. Instead, several photos showed it to be consistently loaded with silt. (C. Ex. 19, 36a, 48, 49, 50, 51; L. Ex. 62c, d, and h.) The silt remained in place so long that grass started to grow on it. (C. Ex. 48.) The basin's outlet was also neglected. The basin's faulty design, assuming there was one, did not excuse Leeward's lack of maintenance.

We are not altogether unsympathetic to the situation in which Leeward found itself. It undertook a huge project on a site that was very likely to cause problems. The project was permitted in extremely close proximity to high quality streams. Although we believe it has limited legal significance, we do not dispute Leeward's contention that the design for the site was, at best, aggressive. Among other things, the design did not leave much room for installation of and convenient access to some controls. (T. 1433.) In short, there was no room for error on this project. A willingness to make tougher choices in connection with the original permitting of such a demanding design at a questionable site might have alleviated the need to employ as much after-the-fact enforcement. As the actual earthmover, Leeward was the easy target for enforcement action. We have taken these considerations into account in performing our penalty assessment.

Leeward had misgivings regarding the feasibility of the project from the start. (T. 1408.)

It nevertheless opted to take advantage of the business opportunity that was presented by being the contractor on what may have been the largest earthmoving project in the history of the county. (T. 692.) Leeward decided to accept the job in spite of the risks. Having committed to the project, it was obligated to safeguard the environment. Unfortunately, Leeward did not rise to the task. It fell so far short in so many ways that much of the consideration that it might have otherwise been entitled to receive was lost.

We have taken the following points specific to certain controls at the Wal-Mart Site into consideration of the penalty amounts assessed for the various days of violations:

Sediment Basin No. 1. SB 1 was the largest and most important control device at the Wal-Mart Site, and therefore, the most important to maintain properly. (T. 669.) The basin consistently discharged sediment laden water. Leeward never installed a clean-out stake in the basin. (The stake is a device that shows the build-up of sediment.) Leeward argues that the Department exaggerated the importance of the absence of a stake. It points out that, with the exercise of good judgment and common sense, one can tell when a basin needs to be cleaned out without a stake. Leeward's point is well-taken, but it cuts both ways. Leeward failed to exercise that good judgment and common sense by neglecting the basin throughout the duration of the project.[2]

Leeward also contends that the basin did not actually reach the clean-out level described in the plans as measured by perforations on the outlet device. (T. 1707.) The clean-out level in the plan, however, became something of a moot point because the basin was not dug to the approved depth and the outlet device was also changed. (T. 1797-1801.) Further, SB 1 was so

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[2] Leeward criticized the District and the Department for not taking more actual field measurements to determine whether, for example, the basins and other controls were at clean-out levels. We believe that Leeward's own contradictory argument -- that it is "not rocket science"

large that sediment buildup in the vicinity of the device was quite different than at other parts of the basin, such as the area of inflow.

We recognize that the basin was difficult to clean out due to its size, close proximity to a road and waterways, and perhaps the inflow of groundwater. Leeward took some steps in the vicinity of the outlet to try to reduce the discharge of sediment. On one occasion, Leeward reacted quickly to correct a problem with the outlet structure. (T. 1323.) Leeward constructed a surge basin upstream of SB 1 in advance of when required in a good faith effort to reduce the strain on SB 1.

Sediment Trap No. 3. Leeward chronically allowed ST 3 to fill with sediment. The trap filled to the point of being virtually useless. (Compare L. Ex. 67a, b, c, with C. Ex. 28.) ST 3 was an important control for the back part of the project in protecting adjacent wetlands and Holbert Creek. Almost every photograph of the area shows very muddy water leaving the site and flowing into the Holbert Creek wetlands. (C. Ex. 25, 29, 58, 59, 92b; L. Ex. 67e, f, g, 82.) We acknowledge that access to the pond was problematic.

Sediment Trap No. 1. Although the parties dispute whether ST 1 was installed near the Wal-Mart entrance at the beginning of the project in 1997 as required, there is no dispute that at least several weeks went by in early 1998 when the facility was removed and no control was in place. (Leeward Brief at 73; T. 1559.) Substantial sedimentation occurred due to the absence of any controls. ST 1 was ultimately constructed (or reconstructed) with several deficiencies which rendered it ineffective. This is another of the many examples where Leeward's defensive themes in no way excuse the dereliction of its obligations.

Rite-Aid Trap. Although Leeward deserves some credit for the attempt, this trap, not

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to see whether a basin needs to be cleaned out (T. 1331) -- is the better argument.

called for in the plans, does not appear to have had much value in reducing pollution of Holbert Creek, particular because Leeward built it, but then failed to maintain it.

Inlet Protection. At first blush, installing controls to prevent sediment from flowing into the permanent stormwater system inlets during construction might seem to be a relatively minor manner. In fact, there were no controls at the *outlet* of that system, so without inlet controls, substantial amounts of sediment easily discharged directly into the streams instead of bypassing the system and flowing into controls. Again, Leeward's failure to install these relatively small, yet very important controls pervaded the project. Again, its major defensive themes do not explain why it did not implement some of these simple controls, even after being repeatedly asked to do so.

Stabilization. The record is replete with examples of Leeward's failure to install adequate temporary cover in inactive areas and appropriate permanent stabilization in completed areas. Leeward disregarded repeated requests in this regard. Leeward's defensive themes do not excuse its failure to apply proper permanent cover. Much of that work needed to be redone by Wal-Mart. (T. 367-368.)

We will not assess separate penalties for Leeward's failure to provide comprehensive temporary cover following issuance of the stop-work orders because we believe that that deficiency is adequately subsumed by the penalty we assess under Count V (violation of stop-work orders). Other areas, however, required temporary cover irrespective of the stop-work orders, and a penalty is appropriate for those areas. We do not assess a penalty for failure to mulch actively worked areas overnight. We also acknowledge that much work was performed over the winter months when seeding was not an option. Regular precipitation contributed to the difficulty in maintaining cover. It is not clear that certain areas where the Department objected

to the absence of temporary cover were indeed sufficiently inactive to require cover.

Staging Areas. Leeward's use of large areas for construction support activities outside of the permitted areas of disturbance and beyond the protection of any controls (except the Rite-Aid trap, whose value is debatable) was a serious violation that it makes little attempt to justify.

Swales. The eastern swales were very important in attempting to divert sediment away from the adjacent wetlands and Holbert Creek. Again, Leeward's failure to maintain the swales was chronic. Leeward removed the swales entirely without authorization and prior to permanent stabilization. We note that Leeward added extra controls in the area of the eastern swales. The swales were difficult to access.

Regardless of whether Swale 2 was originally intended to carry upslope clean water, it did not end up that way. Instead, it carried a significant portion of flow from the combined project area, yet it had seriously inadequate controls at its terminus and it was not properly maintained.

Construction entrance. Again, the failure to maintain the entrance was chronic. We acknowledge that the adverse consequences were ameliorated by the fact that the main entrance emptied onto a township road that was heavily impacted by the project and only lightly used. (T. 1429.)

We have taken the following points specific to particular controls at the Waste Site into consideration in assessing the penalty amounts:

Sediment Basin. The sediment basin was the primary control at the Waste Site, and although it was crucially important in preventing excess sedimentation, it was not installed in a timely manner. It is debatable whether an adequate control was ever installed. If Leeward's contention is true that site conditions such as a buried utility line prevented construction of the

approved control, it fails to explain why it did not seek timely written approval for a modification. Conducting major earthmoving in the area for months (T. 1474) without *any* effective controls in the area was inexcusable.

Swales. Leeward disputes that swales were not built, and attempts to justify its failure to build one of the swales because it could have done more harm than good to disturb the area. (T. 1469.) The arguments are graphically belied by photographs of muddy, misshapen, unlined ditches. (C. Ex. 10, 11, 41, 52, 56, 66, 67.) Leeward admits that another swale on the site was inadequate to handle its flow. (Brief at 97.)

Borrow Site. Specific to the Borrow Site, there are two components to Count III of the Complaint. The Department seeks a penalty because Leeward (1) performed earthmoving work at the Borrow Site without obtaining an approved E&S plan, and (2) failed to construct and maintain adequate E&S controls at the site.

We have already found that Leeward's permit for the Wal-Mart Site required it to obtain an approved E&S plan for the Borrow Site prior to the start of operations at that site. *Leeward I,* F.F. 11, 72, and 2000 EHB at 764. Leeward began substantial earthmoving activity on the Borrow Site on April 4, 1998. (F.F. 45.) That work continued on April 6, 7, 8, and thereafter. Leeward admits that it did not prepare an E&S plan for the site until April 9 (Brief at 99), which is consistent with the record (T. 986).

On April 15, the Department ordered Leeward to stop work and submit its plan for approval. Leeward submitted a plan on April 17. (T. 986.) Meanwhile, work at the site continued unabated. (C. Ex. 197.) The plan was not approved until July 16.

Leeward asserts that it was confused about whether a separate NPDES permit was necessary for the site. We fail to see how this confusion has any relevance. The Department has

not cited Leeward for failing to obtain a permit. Leeward obviously knew that it needed an E&S plan for the site because it prepared one on April 9. This suggests that it knowingly chose to ignore a legal obligation by beginning work on April 4. There certainly could not have been any doubt after the Department's order of April 15 citing the lack of an approved plan. Yet, Leeward's earthmoving activity without an approved plan continued unabated. Leeward's actions suggest a disregard for its legal obligations.

There are some points that militate in Leeward's favor in setting a penalty amount. The Borrow Site has not been alleged to cause actual pollution. Leeward had what eventually proved to be an acceptable plan as of April 9; it simply failed to get the plan approved. (Of course, that defense does not apply to the first four days of operations on the site.) Administrative violations, although they can be serious, are generally less of a concern than violations that more directly lead to environmental harm.

We assess a penalty for $2,000 for each of the days that Leeward worked without any plan at all. We assess a penalty of $2,000 for the additional period during which Leeward worked without an *approved* plan in place.

Leeward also failed to install and maintain adequate controls on the Borrow Site in accordance with its own plan. Indeed, it commenced major earthmoving activity as observed on April 14 with virtually no controls in place. Leeward had an E&S plan as of that date that called for several controls. Thus, Leeward knew enough to create a plan, which in turn required the installation of controls, but it failed to implement those controls. Thereafter, Leeward failed to install and/or maintain controls ranging from silt fence to what was supposed to be a rock-lined ditch. These deficiencies were documented on ten days, but the fact that the same deficiencies continued from one inspection to the next without change indicates that the deficiencies were in

place in excess of the ten documented days.

Leeward has not contested that any of these violations occurred. Further, its themes regarding a difficult site, poor site design, and inadequate assistance from the regulators do not apply to the Borrow Site. Leeward points out that the site had previously cleared, but it does not explain how that should factor in our analysis. We do not discern how the fact that the site was previously cleared excuses the failure to obtain an approved plan and comply with it. The Department has not cited Leeward for any of the clearing activity.

Leeward also notes that the site was producing discolored water before it began work on the site. Again, the relevance of the point as in any way excusing Leeward's violations is lost on us. The Department did not cite Leeward for pollution from the Borrow Site. If anything, the evidence of preexisting discolored runoff demonstrates the importance of installing controls on the site to prevent additional pollution from occurring. The Department seeks penalties under Count III for several days on which Leeward failed to install adequate interim stabilization as required by the stop-work order. We believe that this activity is subsumed by the penalty for the violations of the stop-work order, as discussed below. We did not assess a separate penalty for those violations under Count III.

Considering all of the above factors, and applying them to the individual violations as described in the findings of fact, we assess penalties under Counts I through III as set forth in Appendix A for a total penalty of $109,000.

Count IV – Pollution to Waters of the Commonwealth

Leeward does not separately contest Count IV of the Complaint in its post-hearing brief. Leeward has not, and could not, contest that the pollution occurred (F.F. 47),[3] and that the

[3] The Department met its burden of proving that pollution occurred on seven of the eight

pollution constitutes a violation of the law. 35 P.S. § 691.401; *Leeward I*, 2000 EHB at 757. The only portions of the brief that we read to be inconsistent with Count IV are (1) Leeward's general defense regarding the inadequacy of the E&S plans as discussed above, and (2) an argument that the Department has not attempted to define the limits on the allowable quantities of sediment that may be discharged. (See, e.g., Brief at 35, 119, 120.) Leeward's protestations regarding its inadequate plan no more excuse its actual pollution violations than they excused its failure to install and maintain effective controls. We previously addressed Leeward's second argument in *Leeward I*, where we held as follows:

> It is now well established that sediment laden runoff constitutes pollution. *Community College of Delaware County v. Fox*, 342 A.2d 468, 479 (Pa. Cmwlth. 1975) (pollution includes siltation during the construction process); *Power Operating Company, Inc. v. DEP*, 1997 EHB 1186, 1193 (sediment laden water constitutes pollution); *DEP v. Carbro Construction Corp.*, 1997 EHB 1204, 1229 (same); *DEP v. Silberstein*, 1996 EHB 619, 635-36 (same); *Furnley H. Frish v. DER*, 1994 EHB 1226, 1238 (same). Leeward correctly points out that there are no numeric criteria for sediment discharges that define what exactly constitutes unacceptable pollution. This lack of criteria, however, did not prevent a finding of pollution in the just-cited cases. Although the lack of specific criteria requires a judgment call on the part of the Department and then (in the event of an appeal) this Board, excess sedimentation can nevertheless constitute pollution. See 35 P.S. § 691.1 (defining pollution very broadly); 25 Pa. Code § 93.6 (prohibiting pollution in general terms).
>
> There may, someday, come a case where we are forced to define the outer limits of what it means to "prevent" or "minimize" "excess" sedimentation and specify the threshold of how much sedimentation can reasonably be considered to be pollution. This appeal does not present that case. Photographs of the project taken on or about the dates at issue, some of which were introduced by Leeward, graphically depict opaque, brown water leaving the project site at various locations and flowing into the receiving streams. (*See, e.g.*, F.F. 32, 35, 40, 50, 53.) Leeward's own witnesses contended that the site was a difficult one to handle, but conceded the ineffectiveness of the E&S controls as built and maintained. (*See, e.g.*, F.F. 40.) The Department and Conservation District witnesses confirmed the sediment laden nature of the project's runoff in testimony that we find to be credible. (See, e.g., F.F. 32, 33, 35, 40, 48, 50, 53, 55, 59.) Leeward makes no attempt in its post-hearing brief to argue or point to any

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dates listed in the complaint. It did not meet its burden for January 29, 1998.

> evidence showing that excess sedimentation was not occurring. Our review of the record leaves no doubt that severe accelerated erosion and sedimentation of the receiving streams were occurring at the project, thereby supporting the issuance of the Wal-Mart and Waste Site orders.

2000 EHB at 757-759. This discussion applies with equal force to the other days of violations listed in our findings of fact.

Turning to the civil penalty amount, the Department sent Leeward its first inspection report of record on September 18, 1997. (C. Ex. 130.) The report documented the discharge of sediment-laden water. Leeward received additional notices that it was polluting the streams on January 7, 1998 (C. Ex. 137, 138), and received compliance orders for ongoing pollution on January 16, 1998 (C. Ex. 139, 140). Photographic evidence convinces us that severe excess sedimentation was obvious at least as early as January 7. (C. Ex. 2.) No reasonable contractor could have worked on the project without seeing the obvious damage that was being caused on a continuous basis. (See also L. Ex. 67e, f, g, 77b, c, i, k, o, 82, 84.) In fact, Leeward was fully aware of the problem. (T. 1324, 1487, 1494.)

The Department has not suggested that Leeward deliberately pumped sediment into the streams. We do not find that Leeward willfully caused pollution. We do find, however, that, by the time of the first cited discharge on January 7, Leeward was acting with a conscious disregard of the fact that its failure to control erosion on the Wal-Mart and Waste Sites was resulting in pollution. In other words, Leeward's pollutional discharges resulted from its reckless behavior.

With regard to the damage to the waters of the Commonwealth, the receiving waters were designated as special protection, high quality waters. (F.F. 22.) The significance of this designation is tempered somewhat by the fact that the approved plans for the project virtually guaranteed that there would be significant damage to the Unnamed Tributary. The tributary was extremely close to disturbed areas. The tributary was relocated and channelized. The

Department never required the removal of the Rite-Aid trap, which was essentially built right into the tributary. It has not sought a penalty for the installation (as opposed to maintenance) of that trap. Preserving the aesthetic of a pristine stream was unrealistic under such circumstances.

Having said that, the Unnamed Tributary was truly devastated by the project. The photographs of the tributary depict a man-made channel choked with sediment with small rivulets of water snaking over the surface of the mud. (C. Ex. 2, 18, 36b, 37a, b, 46, 72, 81a, 82a, 94a, 105b, 113.) It is difficult to think of the channel as a "stream" or a "creek."

The damage was not limited to the tributary. Photographs and the videotapes showed the muddy water leaving the site and mixing into the otherwise relatively clear waters of Holbert Creek and the wetlands adjacent thereto. (C. Ex. 12, 29, 92, 102, 103, 218.) We also find credible the eyewitness testimony and sampling data showing excess sedimentation of the Lackawaxen River, an important resource of the Commonwealth. (F.F. 47(e).) Although the build-up of sediment is not nearly as dramatic as it was in the tributary, any excess sedimentation must be taken seriously. As we stated in *Carbro:*

> Generally the discharge of sediment to a stream or a creek has a detrimental effect on the chemical, physical and biological properties of the water. The sediment itself may contain chemical components such as fertilizers, nutrients and petrochemicals that could have a chemical effect on the water resources. In addition, the discharge of sediments may have a biological effect on macroinvertebrates, the fish populations, as well as on flora and fauna involved in the water resource. Sediments can also affect the reproduction rates of the fauna and the fish. Sediments affect the quality of the water as far as drinking water supplies, recreational usage of the waters or other potential uses that the water has down stream. It may also affect the carrying capacity of the stream by the laying down of sediments or through a scouring effect and causing additional stream bank erosion conditions.

Carbro, 1997 EHB at 1234. The unrebutted expert testimony in this case is consistent with those findings. (T. 1385-1399; C. Ex. 177.) Militating against a higher penalty, there was no evidence of actual harm to biota here, and there was no proof of permanent damage as a result of the

sediment discharges to the creek and the river (as opposed to the tributary.)

With regard to deterrence, we believe that a significant penalty is necessary to deter excess sedimentation from occurring on large earthmoving projects. A small penalty will be ineffective in encouraging future compliance by Leeward and other contractors engaged in such projects. Contractors must understand that it is critically important to take whatever steps are reasonably necessary to minimize pollution. This is particularly the case where a contractor is aware that the damage is occurring, yet does not take necessary measures to stop it for an extended period of time.

Considering all of these factors, we assess a penalty of $2,500 for each day of discharge to the Unnamed Tributary. We add $500 for discharges to the wetlands, $5,000 for discharges to Holbert Creek, and $2,500 for discharges to the river. Thus, we calculate the penalty to be assessed under Count IV as follows:

1/7	$ 7,500
2/18	8,000
3/3	3,000
3/10	3,000
5/10	10,000
5/11	10,000
6/12	8,000
	$49,500

Count V – Violations of the Stop-Work Provisions

The February 2 compliance orders for the Wal-Mart and Waste Sites and the April 15 order for the Borrow Site required Leeward to cease all earthmoving activities except for interim stabilization pending the submission and approval of revisions to the E&S plans in the case of the Wal-Mart and Waste Sites, and an original plan in the case of the Borrow Site. The Wal-Mart cessation requirement was lifted on April 27. We have found that the Department lifted the cessation requirements for the Waste and Borrow Sites on July 9 and on July 16, respectively.

(F.F. 53.) The merits of the stop-work requirements are no longer at issue because we upheld the stop-work requirements in *Leeward I*.

Leeward violated the cease-work requirement at all three sites. In fact, it completely disregarded the requirement to stop work. It simply continued to move forward with the construction project as if the orders had never been issued. There was no interruption or reduction in site preparation work of any kind in response to the orders. (F.F. 54.) As we study the progression of site development in the extensive array of photographic, videographic, and documentary evidence, it is apparent that there could not have been many work days between February 20 and April 27, and thereafter at the auxiliary sites, when major earthmoving activity was not taking place. (C. Ex. 17, 20, 45, 55, 78, 79a, b, 83-91, 93, 94b, 95-98, 104, 105a, 107, 119.) Indeed, the store opened in June. (T. 460.)

Each day that Leeward continued with the project as if the orders had not been issued constituted a separate violation of the Clean Streams Law. 35 P.S. §§ 691.402(b), 691.610, and 691.611. Although Leeward's continuing earthmoving work is the more serious concern, we also take into account Leeward's failure to perform interim stabilization of what were supposed to be idled areas in accordance with the orders. (C. Ex. 85, 86, 154, 158, 160, 164, 168, 173, 180, 189.) A penalty of up to $10,000 is authorized for each day that the orders were violated. 35 P.S. § 691.605.

The Department's complaint is based upon 10 days of violations. The record demonstrates that Leeward violated the stop-work requirements on each of those 10 days; namely, March 20 and 27, April 2, 13, 15, 20, and 28, May 6 and 28, and July 15. (F.F. 54.) April 28 and May 6 and 28 relate to Waste and Borrow Sites, and July 15 relates to the Borrow Site. Although we do not impose penalties for any additional days, we do take into consideration

the duration of the violations in calculating the amount of the penalty. We do not view the 10 days at issue as isolated or sporadic violations; they are, instead, reflective of an essentially continuous situation.

Leeward undoubtedly had a strong economic incentive to disregard the stop-work orders. It committed a large investment of manpower and equipment to the site. Idling those resources would surely have imposed a burden on the company. Rather than suffer this disruption, Leeward chose to continue the project. Ideally, the civil penalty for Leeward's choice would be large enough to ensure that the company did not, in effect, profit from violating the law. It should not be less expensive to violate the law and pay a penalty than to comply with the law.

The theme of Leeward's case is that it has been the victim of circumstances. As a result of forces largely beyond its control, it assumed an unfair portion of the burden of managing a problematic site. This theme, however, does not carry over well to Leeward's decision to violate the stop-work orders. The choice of complying with the law, seeking immediate relief from this Board regarding the orders, or simply ignoring them and continuing its work was entirely within Leeward's control. No forces of nature or challenging site conditions compelled Leeward to choose to violate the law.

Leeward did not accidentally or unwittingly violate the stop-work requirements. Given the continuous, pervasive, and substantial nature of the violations, we do not hesitate to conclude that they were willful. Leeward may have believed that finishing the site as quickly as possible was not only the best business decision, but the most sound environmental choice. (T. 1511-1514; C. Ex. 204.) That choice, however, was not Leeward's to make. Whatever Leeward's motivation, there is no doubt that its decision to violate the orders was intentional.

We reject Leeward's argument that it did not understand what conduct was prohibited by

the orders. Leeward argues that the orders allowed stabilization work, and that was all that Leeward did. The argument taken to its logical conclusion -- which Leeward has done -- is that Leeward could finish the project unabated because all of its work was in one way or another connected to preparing and stabilizing the site. Given such a reading, the cessation requirement is rendered meaningless. We do not agree that the language of the orders was confusing in language, design, or intent. Leeward was to stop earthmoving work pending approval of a revised E&S plans, and implement only those interim stabilization measures that were necessary to ensure that the sites did not cause damage during the review process. Even if we assumed that the requirements of the orders were unclear, a simple telephone call to the Conservation District or the Department would have undoubtedly sufficed. *See Frisch*, 1994 EHB at 1240 (characterizing as "ridiculous" a party's argument that a cessation order was impossibly contradictory because the order required the party to cease earthmoving and implement control measures).

Furthermore, given the most favorable possible reading of the orders in favor of Leeward, Leeward's conduct still went well beyond the limits of the cessation requirement. A review of Leeward's timesheets and other record evidence reveals that Leeward conducted activities that unquestionably went well beyond the stabilization activity permitted under the orders.[4]

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[4] The following are selected examples of entries contained in Leeward's daily logs (C. Ex. 197): February 26 ("Excavated behind the Building"); March 11 ("Grading for concrete slab outside the building. Digging + forming for light standards for A, D, L"); March 12 ("Hauled waste from final grading....dug + formed foundations for A, D, L"); March 13 ("dug, formed + poured 5 light standards"); March 17 ("Graded for sidewalks outside the building for Milnes Co."); March 18 ("Backed curbs along Old Willow Ave."); March 19 ("Hauled to Waste from cut slope"); March 20 (Conservation District "video tape us hauling waste from the cut slope"); March 25 (grading for sidewalks, concrete paving, curbs); March 28 (grading and hauling to waste); April 2 (grading for concrete islands); April 4 ("Graded between the garden + auto center... stripped soil of at the hotel site"); April 6 ("started digging shale on the hotel site"); April 7 ("Backfill the islands on the east end of the building...hauled shale from the hotel site);

Leeward's claim that it misunderstood the orders is belied by these examples of its violative conduct.

Leeward argues that, if it was violating the orders, the District or the Department should have told it so. In other words, not only should the Department have issued the orders, it should have monitored the site and warned Leeward if it believed Leeward was violating the orders. We reject this argument. The Department had no obligation to monitor Leeward on a daily basis. It was Leeward's duty to either seek relief from the orders or comply with them. If there was any doubt about the scope of compliance, it was Leeward's obligation to clarify the situation, or proceed at its own potential peril. In any event, as we have already discussed, there were no close calls here. Leeward simply proceeded with the project without the slightest concession to the cessation requirement. Still further, we reject the premise of Leeward's argument. Leeward did, in fact, receive several warnings that it was engaged in earthmoving activities. (T. 938; C. Ex. 154, 158, 160, 164, 165, 168, 169, 173, 174, 180, 181, 189, 197.) It was fully aware of the stop-work orders, and it repeatedly asked that they be lifted. (L. Ex. 22, 25, 29.) In short, we do not accept Leeward's attempts to characterize its violations of the orders as anything other than willful.

The deterrent function of a civil penalty is particularly significant with regard to deliberate violations. Where a violation is deliberate, the party made a calculated decision to violate the law notwithstanding the possibility of a penalty. The civil penalty needs to be set at

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April 8 (same); April 9 (same); April 11 (same); April 13 (grading for parking lot, concrete islands...blasted on the hotel site); April 14 (hauled waste...blast #2 at hotel site); April 15 (grade for parking lot); April 16 (same); April 21 (dug and backfilled trench for site lighting); and May 19 (last blast at the borrow area). A similar pattern emerges from our review of Leeward's timesheets (C. Ex. 198), which include such entries as working on the foundation for the Rt. 6 sign, grading for a pad by the garden center, grading for sidewalks, hauling waste, and "busted rock behind the building, pouring concrete, etc."

an amount that discourages such decisions in the future.

We believe that a penalty of anything less than the statutory maximum for each of the 10 days cited by the Department will not be sufficient to have the necessary deterrent effect of the Department's stop-work orders regarding willful, long-lasting, extensive violations at large earthmoving projects such as the one at issue here. Accordingly, we assess a penalty of $100,000 under Count V of the Complaint.

CONCLUSIONS OF LAW

1. The Environmental Hearing Board has jurisdiction over this matter.

2. The Department has the burden of proof when it files a complaint for a civil penalty. 25 Pa. Code § 1021.101(b)(1). The Department satisfied that burden in this case.

3. The Lackawaxen River, Holbert Creek, and the Unnamed Tributary are designated as special protection waters because they are high quality, cold water fisheries and migratory fisheries. 25 Pa. Code § 93.9b.

4. Leeward's discharges of excess sediment constituted violations of Sections 401 of the Clean Streams Law, 35 P.S. § 691.401, the then applicable 25 Pa. Code §§ 102.4(a) and 102.12(g), and the conditions of its permit. Such discharges constitute unlawful conduct under Section 611 of the Clean Streams Law, 35 P.S. § 691.611.

5. Leeward failed to construct or maintain effective erosion and sedimentation controls at the Wal-Mart Site, Waste Site, and Borrow Site in violation of the terms and conditions of its permit Sections 402(b) and 611 of the Clean Streams Law, 35 P.S. §§ 691.402(b) and 691.611, and the then applicable 25 Pa. Code § 102.4(a).

6. Leeward's failure to obtain an approved plan at the Borrow Site constituted a violation of its permit, and, therefore, a violation of Sections 402 and 611 of the Clean Streams

Law, 35 P.S. §§ 691.402 and 691.611.

7. Leeward's failure to comply with orders of the Department and the terms and conditions of a permit issued pursuant to the Clean Streams Law constituted unlawful conduct pursuant to Sections 402 and 611 of the Clean Streams Law, 35 P.S. §§ 691.402 and 691.611.

8. The Board sets the amount of civil penalties under the Clean Streams Law.

9. The Board sets the penalty amount pursuant to Section 605 of the Clean Streams Law, 35 P.S. § 691.605 by considering the willfulness of the violation, damage or injury to the waters of the Commonwealth and their uses, the cost to the Department of enforcing the provisions of the Act, cost of restoration, deterrence, and other relevant factors.

10. The violations of the Clean Streams Law documented by the Department and the District warrant an assessment of a $258,500 civil penalty.

LEEWARD ADJUDICATION APPENDIX A

DATE	WAL-MART	WASTE	BORROW	PENALTY
9/18/97	X			$500
11/12/97	X			500
1/7/98	X	X		7,500
1/29	X	X		7,500
2/9	X	X		7,500
2/18	X	X		7,500
3/3	X	X		7,500
3/10	X	X		7,500
3/20	X			5,000
3/27	X			5,000
4/4 - 4/8			No plan	8,000
4/9 - 7/16	N/A	N/A	No approved plan	2,000
4/13	X			2,500
4/14			X	9,000
5/6			X	1,000
5/15		X	X	1,000
5/28		X	X	1,000
6/5		X	X	1,000
6/12	X		X	2,500
6/29	X	X	X	7,500
7/15	X	X	X	5,000
8/4		X		2,500
8/24	X	X	X	5,000
9/16	X	X	X	5,000
				$109,000

X = Violations noted
N/A = Not applicable

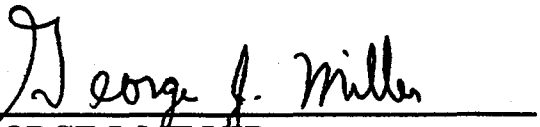
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
v.	:	**EHB Docket No. 99-257-L-CP**
LEEWARD CONSTRUCTION, INC.	:	

ORDER

AND NOW, this 1st day of October, 2001, civil penalties are assessed against Leeward Construction, Inc. in the total amount of $258,500.

ENVIRONMENTAL HEARING BOARD



GEORGE J. MILLER
Administrative Law Judge
Chairman

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

MICHAEL L. KRANCER
Administrative Law Judge
Member

DATED: **October 1, 2001**

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

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

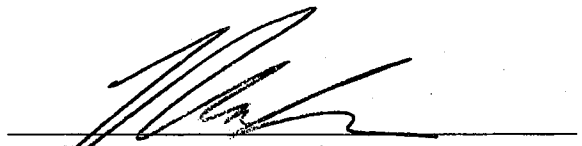
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
v.	:	EHB Docket No. 99-257-L-CP
LEEWARD CONSTRUCTION, INC.	:	

CONCURRING OPINION OF ADMINISTRATIVE LAW JUDGE MICHAEL L. KRANCER

I agree with Judge Labuskes's opinion in this case and I join in it. I write separately only to comment that I think that a prominent theme of the civil penalty imposed in cases like this one, which involve such a flagrant and volitional course of chronic violative conduct, should be, at a minimum, to make sure that any and all profit that the violator may have made on the job on which it engaged in its pattern of illegal conduct is totally disgorged. We do not really know here whether, even after the imposition of the $258,500 penalty, Leeward still goes away from this job with a profit. It should not be allowed to retain any profit at all. Allowing Leeward in these circumstances to have profited at all from this transaction is not only wrong, but also it puts at a competitive disadvantage companies that take the steps and incur the costs to perform their activities in a law abiding fashion. This latter situation creates a synergy of adverse effect by simultaneously promoting the degradation of the environment and undermining the competitive free market system. Thus, I would have like to have seen much more evidence elicited and presented on the economic aspects of the contract or contracts including, but not limited to, the base contract payment amount, costs to perform and profit earned. In addition, I would have also

liked to have been in the position to have been able to have considered whether to add an appropriate additional amount of civil penalty, over and above the amount of the profit earned, for punishment and deterrence.

ENVIRONMENTAL HEARING BOARD



MICHAEL L. KRANCER
Administrative Law Judge
Member

DATED: October 1, 2001

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD
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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOAR

TOWNSHIP OF PARADISE AND LAKE SWIFTWATER, INC.	:	
	:	
v.	:	**EHB Docket No. 2001-024-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and AVENTIA PASTEUR, INC. Permittee	:	**Issued: October 2, 2001**

OPINION AND ORDER ON MOTION TO AMEND NOTICE OF APPEAL

By George J. Miller, Administrative Law Judge

Synopsis

The Board denies a motion to amend a notice of appeal to add additional objections concerning the discharge of certain metals in an appeal of a National Pollutant Discharge Elimination System permit. The appellant's motion fails to properly specify facts which could not have been previously discovered exercising due diligence or which were based upon specific facts discovered from a hostile witness or a Department employee.

A motion to amend the name of the appellant in the caption for the appeal is granted.

OPINION

Before the Board is a motion by the Township of Paradise and Lake Swiftwater Club, Inc. (collectively, Appellant) to amend their appeal of a National Pollutant

Discharge Elimination System (NPDES) permit issued to Aventis Pasteur, Inc. on December 15, 2000. Specifically the Appellant seeks to amend the caption to correct the name of Lake Swiftwater, Inc. to Lake Swiftwater Club, Inc. and to add an averment alleging that the Department failed to consider the long-term impact from the discharge of mercury, magnesium and aluminum. While we will grant the amendment to the Appellant's name in the caption, we will deny the Appellant's motion to add additional factual bases for objecting to the issuance of the permit because the Appellant failed to properly specify facts which could not have been previously discovered exercising due diligence or which were based upon specific facts discovered from a hostile witness or a Department employee as required by the rules of the Board.

Although the Board has been liberal in allowing the addition of legal objections[1] to an action of the Department, the Board's Rules of Procedure at 25 Pa. Code § 1021.53(b) allowing amendments which are factual in nature have very specific requirements which must be met:

> [L]eave may be granted if the appellant establishes that the requested amendment satisfies one of the following conditions:
>
> (1) It is based on specific facts, identified in the motion, that were discovered during discovery of a hostile witness or Departmental employees.
>
> (2) It is based upon facts, identified in the motion, that were discovered during preparation of appellant's case, that the appellant, exercising due diligence, could not have previously discovered.[2]

Further, the motion must be supported by affidavits and verified.[3]

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[1] *See, e.g., Global Ecological Services, Inc. v. DEP*, EHB Docket No. 2000-128-MG (Opinion issued January 11, 2001); *see also* 25 Pa. Code § 1021.53(b)(3).

[2] 25 Pa. Code § 1021.53(b).

The Appellant's motion to amend fails to comply with the Board's rule both procedurally and substantively. Substantively, the motion fails to aver that the facts which form the basis of its new objections could not have been previously discovered. As pointed out in the Response filed by Aventis, the Appellant expressed concerns about heavy metals during the comment period on the permit, even before its notice of appeal was filed.[4] Further, the permit explicitly contains an effluent limitation for mercury.[5] Accordingly, we fail to see why the Department's consideration of these metals could not have been addressed in the Appellant's notice of appeal.

The Appellant argues that it chose not to object to heavy metal discharges in its original notice of appeal because of alleged assurances from Aventis that mercury limits would not be exceeded. The Appellant contends that there have been violations of the permit limits[6] and what it characterizes as "high levels of aluminum." Even if the Appellant had presented proper support for these factual assertions,[7] permit violations which occur after the permit is issued are irrelevant; they do not show that the permit should not have been issued initially.[8]

In short, the Appellant has not shown that there is any evidence which has come to light through discovery that it could not have previously discovered. Rather, it made a

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[3] 25 Pa. Code § 1021.53(d).

[4] See Aventis' Response Exs. 4-6.

[5] Notice of Appeal, Attachment.

[6] Aventis admits to an exceedance of its mercury limit on January 30, 2001. This event was evidently immediately reported to the Department and also to the Appellant. (Response ¶ 2(h); Ex. 1 ¶ 10).

[7] See discussion below.

[8] *North Pocono Taxpayers' Association v. DER*, 1994 EHB 449.

decision not to include any objections to heavy metals in spite of what was allowed by the permit and therefore it must live with the consequence of that decision.

Procedurally, the motion is neither supported with affidavits nor verified. It vaguely references "several facts discovered during depositions of DEP personnel indicate that DEP failed to evaluate potential long term impact from Lake Swiftwater itself from heavy metals." The motion fails to identify which Departmental personnel and which facts it is referring to and therefore fails to establish that the Appellant discovered specific facts under certain circumstance.[9] The Appellant does include an affidavit from a Steven Saslow in a filing entitled "Appellants Reply to Aventis' Response to Appellant's Motion to Amend Notice of Appeal."[10] This affidavit does not identify the affiant or provide a basis for his personal knowledge and includes his recollection of what he was told by a person at Aventis concerning mercury in the Aventis waste stream. Since there is no basis of personal knowledge and the fact alleged may be inadmissible hearsay, it would not be admissible in evidence as proof that the Department failed to consider

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[9] *CNG Transmission Corp. v. DEP*, 1998 EHB 1, 4 n.5 (comparing subsection (3) of the rule to subsections (1) and (2)).

[10] Strictly speaking, the Board's rules do not permit a reply to a motion to amend a notice of appeal without leave from the Board since it is not a dispositive motion. 25 Pa. Code § 1021.53(d)(motions to amend are governed by the rules set for at §§ 1021.70 and 1021.74) and 25 Pa. Code § 1021.70(g)(except for a dispositive motion a moving party may not file a reply). Given our disposition of this motion, we will overlook this defect.

mercury in issuing the NPDES permit.[11] Accordingly, it can not support the Appellant's motion to amend its notice of appeal.[12]

Finally, Aventis contends that it would be severely prejudiced by allowing a heavily fact-based amendment to the Appellant's notice of appeal at this late date in the proceedings. Discovery has been extended several times already which has delayed the Aventis' expansion allowing it to increase vaccine production.[13] Therefore, it contends, that it is left with "the Hobson's choice of either requesting the reopening of discovery as to the basis of Appellants' new-found claims or facing a trial by ambush situation."[14]

In view of the Appellant's failure to satisfy the requirements of the Board's rule for amendments to appeals and the further delay and prejudice to Aventis which would result from the necessity of reopening discovery, we deny the Appellant's motion to add a new objection to the NPDES permit.

However, as no party has an objection to the amendment of the name of the appellant in the caption for the appeal, that portion of the motion is granted.

We therefore enter the following:

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[11] *Cf. Yourshaw v. DEP*, 1998 EHB 819, 823 (affidavits used in support of or in opposition to a motion for summary judgment shall be made on personal knowledge, shall set forth facts which would be admissible in evidence and show affirmatively that the signer is competent to testify to the matters stated in the affidavit).

[12] We note that Mr. Saslow is identified in the Appellant's Reply as a Supervisor of Paradise Township. He references a deposition statement by Peter Salmon of Lake Swiftwater Club as his source of information for alleged permit violations. Obviously neither of these people are hostile witnesses or Departmental employees who may provide newly discovered information forming the basis of an appeal amendment as required by 25 Pa. Code § 1021.53(b)(1).

[13] Since the filing of the notice of appeal on January 30, 2001, the Appellant has requested and been granted extensions changing the discovery deadlines from May 8, 2001, to September 10, 2001. Additionally the Appellant was granted an extension for the filing of its expert report to October 26, 2001.

[14] Aventis' Response ¶ 4(e).

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

TOWNSHIP OF PARADISE AND LAKE SWIFTWATER, INC.	:	
	:	
v.	:	**EHB Docket No. 2001-024-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and AVENTIA PASTEUR, INC. Permittee	:	

ORDER

AND NOW, this 2nd day of October, 2001, upon consideration of the motion of the Township of Paradise and Lake Swiftwater, Inc. to amend their notice of appeal, IT IS HEREBY ORDERED as follows:

1. The motion to add further objections to the Department's issuance of the permit due to its alleged failure to adequately consider the discharge of mercury, magnesium and aluminum is **DENIED**.

2. The motion to amend the name of Lake Swiftwater, Inc. to Lake Swiftwater Club, Inc. is **GRANTED**. All future filing with the Board shall reflect the following caption:

Township of Paradise and Lake Swiftwater Club, Inc.	:	
	:	
	:	**EHB Docket No. 2001-024-MG**
Commonwealth of Pennsylvania, Department of Environmental Protection and Aventis Pasteur, Inc., Permittee	:	

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

DATED: October 2, 2001

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

For the Commonwealth, DEP:
Joseph S. Cigan, Esquire
Northeast Region

For Appellants:
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For Permittee:
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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOAI

AINJAR TRUST,	:	
JOHN O. VARTAN, TRUSTEE	:	
	:	
v.	:	**EHB Docket No. 99-248-K**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	**Issued: October 10, 2001**
PROTECTION, SUSQUEHANNA TOWNSHIP	:	
and McNAUGHTON COMPANY	:	

ADJUDICATION

By Michael L. Krancer, Administrative Law Judge

Synopsis:

The Board upholds the Department's approval of an Act 537 sewage planning module, but revises the module approval to delete reference to 30 EDUs for a Clubhouse which had been requested in the module but had been eliminated from the development plan before the Department's review of the module. No "burden shifting" is applicable here and the appellant did not satisfy its burden of proof that the Department's action was in error or that the module approval should be overturned by the Board. The Board finds that Susquehanna Township does have an underlying Act 537 Plan and that the module proposes a method of sewage disposal, for the proposed development, *i.e.*, public sewage, which is consistent with that underlying Plan. The Board further finds that the module is otherwise approvable against challenges that: (1) there was insufficient information

regarding the logistics of the method of hook-up to the existing public sewage facilities; (2) the path of the hook-up to the existing public facilities traverses an area impacted by wetlands; (3) the development constitutes alleged "segmented development". The Board finds that the Department's January 5, 1999, letter to the Susquehanna Township Authority declaring that the North Branch of the Paxton Creek Interceptor was in projected overload is not administratively final with respect to the separate Chapter 94 consistency determination that must be made with respect to this module. The Board further finds that the module is not inconsistent with the Department's Chapter 94 Municipal Wasteload Management regulations and that the public notice/public participation provided with respect to this module was adequate.

FINDINGS OF FACT

The Parties.

1. The Appellant is The Ainjar Trust (TAT or Ainjar).

2. John O. Vartan is the Trustee of Ainjar.

3. The Department of Environmental Protection (DEP or Department) is the executive agency of the Commonwealth charged with the responsibility of administering and enforcing the provisions of the Sewage Facilities Act, 35 P.S. § 750.1 – 750.20a, and it is an Appellee.

4. The other Appellee is Susquehanna Township.

5. The Intervenor is the McNaughton Company (McNaughton).[1]

[1] *See Ainjar v. DEP*, 2000 EHB 75 (granting McNaughton's Petition To Intervene).

6. McNaughton owns approximately 120 acres of land in Susquehanna Township, north of Linglestown Road, on which it intends to develop a residential housing development named Margaret's Grove. (N.T. 1445)

7. Ainjar also owns land located in Susquehanna Township, which is immediately north of and adjacent to the McNaughton tract of land. (N.T. 198, 204)

Subject of Appeal.

8. Ainjar appeals, in this action, the Department's November 15, 1999 approval of Susquehanna Township's Act 537 sewage facilities plan revision.

9. Such Act 537 plan revisions, for particular developments, are referred to as "modules," and we will refer to the one under appeal here as "Module."

10. The Module under appeal here is for a residential development of McNaughton referred to as Margaret's Grove.

11. The Module contemplates that Margaret's Grove will connect to existing public sewer lines in Susquehanna Township. (Ex. M-48)

12. The main lines of public sewerage involved in this appeal are the Paxton Creek Interceptor and its two tributaries, the North and East Branches. (Ex. M-48)

13. The North and East Branches join, in a "Y" type construction, to form the Paxton Creek Interceptor. (Ex. TAT-55)

14. Pursuant to the Module, sewerage from Margaret's Grove will be fed into the North Branch of the Paxton Creek Interceptor and then flow through for treatment to the Harrisburg Sewage Treatment Plant. (Ex. M-48, Ex. M-72)

Submission of Sewer Module To Susquehanna Township.

15. Paul Navaro, a private consulting engineer with the firm Navaro and Wright, provided McNaughton with engineering services and drafted the Module for Margaret's Grove. (N.T. 1990-93)

16. As an initial step in the Module process, Navaro and Wright submitted a "postcard" request to the Department, for a module form. (N.T. 1394)

17. Navaro and Wright received the module package from the Department on March 26, 1998, in response to its postcard request. (N.T. 1394)

18. When Navaro and Wright submitted its postcard request to the Department, it indicated that 290 equivalent dwelling units (EDUs) were potentially available for development. (N.T. 1394)

19. The term EDU refers to "equivalent dwelling unit" which is a unit of measurement for volume of sewage flow. (N.T. 217-18; Ex. M-36, M-48, M-51)

20. Navaro and Wright arrived at the 290 EDU number by multiplying the acreage to be developed, 26 acres, by the maximum density permitted under Susquehanna Township zoning law, 10 EDUs per acre - 260. The remaining 30 units were assigned to, or allocated to, a potential clubhouse facility. (N.T. 180-81, 394-95; Ex. M-51)

21. On or about December 14, 1998, McNaughton submitted the Module to Susquehanna Township, as part of its development plan for Margaret's Grove. (N.T. 89, 188, 1449; Ex. M-12)

22. Francis R. Kessler is the Zoning Officer for Susquehanna Township, and part of his duties include checking sewer modules submitted to the Township to insure that every necessary component has been included. (N.T. 142; Ex. M-51)

23. Mr. Kessler reviewed the Module. (N.T. 142)

24. Mr. Kessler utilized the "Municipal Checklist" found on the Module form when reviewing the Module. (N.T. 143)

25. Mr. Kessler reviewed the McNaughton sewer module to determine if all the components listed in the "Municipal Checklist" were present. (N.T. 143)

26. Mr. Kessler did not review the McNaughton Module for completeness and/or accuracy. (N.T. 143)

27. Mr. Kessler determined that all the components listed in the "Municipal Checklist" were present in the Module. (N.T. 67-68, 142-143)

28. Susquehanna Township relies on the Susquehanna Township Authority (Authority) to perform technical reviews of submitted sewer modules. (N.T. 68, 145)

29. The Authority is the entity which has jurisdiction over the entirety of the public sewage system within Susquehanna Township. (N.T. 585)

30. The Authority contracts CTE Engineering Services (CTE) to provide the Authority with engineering support. (N.T. 581-84, 670-71)

31. CTE reviewed the Module and gave the Authority its opinion on the capacity of the Township's sewerage system to handle the sewage from Margaret's Grove. (N.T. 598-605; Ex. M-14, Ex. M-16, Ex. M-36)

32. Susquehanna Township has sufficient capacity to accept the additional 49,290 MGD contemplated by the Module. (N.T. 663-667; Ex. M-36)

33. After Mr. Kessler reviewed the Module, he then requested that Mr. Gary Myers, Susquehanna Township Secretary/Manager, place on the agenda, for a Township meeting, a resolution for action by the Township Commissioners to forward the Module to DEP for approval. (N.T. 68)

34. As the Margaret's Grove project progressed through the land development process, numerous geographic constraints on the proposed development site, such as streams and steep topography, caused Navaro and Wright to initially reduce the number of EDUs from 290 to 222 (192 residential units and 30 units for a proposed clubhouse). (N.T. 1395-96; Ex. M-51)

35. The number of dwelling units and thus EDUs was reduced again from 222 to 186 units (156 residential units and 30 units for a proposed clubhouse), as a result of meeting with Susquehanna Township officials, after the Module had been submitted in December of 1999, to discuss the layout of roads in the Margaret's Grove development. (N.T. 1396-98; Ex. M-51)

36. On July 16, 1999, Mr. Navaro made changes to the Module, in consultation with Pam Winters, a member of the Authority, reflecting the EDU reductions. (N.T. 1399-1400)

37. A particular change to the layout of roads was made to Continental Drive, a road within Margaret's Grove, and it resulted in an increase in the total acreage for the development to 32.6 acres. (N.T. 1401, 1466)

38. Navaro and Wright had originally calculated 400 gallons of sewage per day (GPD) for each EDU, but after consulting with Mr. Hilderhof, an employee of CTE, they revised the GPD down to 265 GPD. (N.T. 1396, 1400)

39. The 400 GPD per EDU figure was based on design criteria for an on-lot system, not a public sewerage system such as that proposed in the Margaret's Grove Module, and that number is further based on census data from as far back as 1970 which showed, at that time, there were approximately 3.5 persons per EDU. The 265 GPD per EDU figure, on the other hand, is applicable to public sewerage and is based upon the most recent census data showing from between 2.5 to 2.8 persons per EDU with each person using about 100 gallons of water per day. (N.T. 641-46, 1082-85)

40. Mr. Navaro made changes to the Module to reflect the GPD per EDU modification. (N.T. 1400-01)

41. The Module contemplates that the sewer lines for Margaret's Grove will connect to existing sewer facilities by gravity flow to an existing sanitary sewer line at Pheasant Hill Manhole 12-8 via an eight-inch sewer line. (N.T. 1405-06, 1461; Ex. M-48, Ex. M-70-B note 4, Ex. M-70-D)

42. Mr. Navaro sent Mr. Kessler a letter dated August 12, 1999 describing and explaining the changes he made to the Module. (N.T. 1403; Ex. M-51)

43. On August 12, 1999 Susquehanna Township approved the Module. (N.T. 78; Ex M-48)

44. After approval, Susquehanna Township forwarded the Module to DEP. (N.T. 170)

Susquehanna Township's Act 537 Plan.

45. Timothy Finnegan works in the DEP Southcentral Regional Office as a Sewage Planning Specialist. His responsibilities include the Act 537 Planning Program. (N.T. 983)

46. Mr. Finnegan has worked with the Department for over 29 years. (N.T. 984)

47. Since 1975 Mr. Finnegan has worked in the Sewage Facilities Program. (N.T. 984)

48. Early in his career, Mr. Finnegan was responsible for all Act 537 Base Plans submitted to the Department. (N.T. 985)

49. Mr. Finnegan is familiar with the regulations in place during the mid 1970s regarding the Department's review and approval of municipalities' Base Plans. (N.T. 992-93)

50. Mr. Finnegan is familiar with the Department's practices and procedures in place during the early and mid 1970s regarding its review of Base Plans. (N.T. 993)

51. In the early 1970s it was common for municipalities at the township level to adopt county-level sewerage plans to be their Act 537 Base Plans. (N.T. 1029-30)

52. Susquehanna Township Resolution 71-R-20, dated December 29, 1971, adopted the "Sewerage Plan" Plan for Dauphin County, prepared by the Dauphin County Planning Commission, as the Act 537 Base Plan for the Township. (N.T. 1031-32; Ex. M-6; Ex. T-1)

53. Susquehanna Township Resolution 75-R-1, passed sometime in 1975, adopted the "Tri-County Sewage Plan" providing sewage disposal by community sewage systems, or treatment and discharge to surface waters, as a part of the official Act 537 Base Plan of the Township. (Ex. M-4, Ex. T-1)

54. The "Tri-County Sewage Plan" is the "Sewerage Plan, Cumberland and Dauphin Counties Area," prepared by the Tri-County Regional Planning Commission, dated 1969. (Ex. T-1)

55. The Tri-County Sewage Plan is Susquehanna Township's Act 537 Base Plan (Base Plan). (N.T. 991, Ex. T-1)

56. The Base Plan calls for public sewerage to be the method of sewage disposal for the majority of Susquehanna Township, which includes the Linglestown Road area, and is where Margaret's Grove is located. (N.T. 992, 1075; Ex. T-1)

57. During his career, Mr. Finnegan has reviewed the Base Plan in connection with reviewing other sewer modules, revisions, and updates submitted from Susquehanna Township. (N.T. 992)

58. Mr. Finnegan coordinated and participated in the Department's review of the Module. (N.T. 988-90)

59. Mr. Finnegan was aware that the Base Plan called for public sewerage for the specific area covered by the Module. (N.T. 1075; Ex T-1)

60. Mr. Finnegan reviewed plot plans submitted by McNaughton and determined sewage from Margaret's Grove would connect with manhole 12-8 at the Pheasant Hill Apartment complex. (N.T. 1093-95; Ex. M-70-B note 4, Ex. M-70-D)

61. Although some of the land on which Margaret's Grove is to be located is not designated in the 1969 Sewerage Plan for high-density residential development, today's zoning ordinance of Susquehanna Township designates all of the land on which Margaret's Grove is to be located for high-density residential development. (N.T. 180-81, 1394)

Wetlands.

62. Mr. Finnegan was aware that wetlands were located on Margaret's Grove and considered it before the Department approved the Module. (N.T. 1099-1103; Ex. M-70-C)

63. On a plot plan, wetlands are depicted as a dotted overlay in some areas in the northwest segment of Margaret's Grove. (N.T. 1100; Ex. M-70-C)

64. McNaughton submitted general permits for wetlands crossings to the Department before the Department approved the Module. (N.T. 1103; Ex. M-58)

65. The second condition to the Department's approval of the Module is that, "[o]ther Department permits may be required for construction if encroachment to streams or wetlands will result." (Ex. M-60)

Segmented or Phased Development.

66. The Module contains documentation discussing the future development of Margaret's Grove and other surrounding development that could reach the level of 1600 EDUs. (Ex. M-48.22-48.30)

67. In particular, McNaughton, at one time, contemplated a 540 EDU development, but now that number has been reduced to 420 EDUs because of the terrain of the land and engineering limitations. (N.T. 1396-98, 1447, 1467; Ex. M-43, Ex. M-48.22-48.24)

68. Subsequent to the submission of the Module, McNaughton has embraced the idea of a 12 inch sanitary sewer line to accommodate future development, but plans have not been fully designed, nor proposed to the Department as of the completion of this trial. (N.T. 1457-63, 1487-88, 1419; Ex. TAT-50)

69. The Department's approval is only for an eight-inch sewer line and nothing larger. (N.T. 1080-81)

70. The McNaughton Company understands that the use of anything but an eight-inch sewer line to connect the sewerage flow from Margaret's Grove to Manhole 12-8 will require additional planning and permitting before construction could proceed in Margaret's Grove. (N.T. 1462-64; McNaughton proposed FOF 71)

Consistency With Chapter 94.

71. Each Act 537 sewer module is required to be not inconsistent with the Chapter 94 Municipal Wasteload Management Program. (N.T. 782, 788-89; Ex. M-48-10-15)

72. A Chapter 94 consistency determination is a part of each and every Department review of an Act 537 Module submission. (N.T. 782, 788-89; Ex. M-48 pp. 48.10-48.15)

73. Chapter 94 provides a wide variety of tools and places a wide variety of obligations on the Department and on sewer facility operators/permittees in connection with monitoring sewer loading and preventing overloading. (N.T. 788-814)

74. The primary diagnostic and informational tool used by the Department to enforce and implement the Chapter 94 program are the Chapter 94 Annual Reports required to be filed by each operator of sewerage facilities. (N.T. 788-91)

75. Based on its review of the Annual Reports, the Department may determine that facilities are either in an "existing overload" situation or a "projected overload" situation. *See* 25 Pa. Code §§ 94.21, 94.22.

76. "Overload" refers to either a hydraulic or organic overload.

A hydraulic overload is defined as:

> Hydraulic overload—The condition that occurs when the monthly average flow entering a plant exceeds the hydraulic design capacity for 3-consecutive months out of the preceding 12 months or when the flow in a portion of the sewer system exceeds its hydraulic carrying capacity.

25 Pa. Code § 94.1.

77. If the Annual Report establishes, or the Department separately determines, that there is either an existing organic or hydraulic overload, Section 94.21 applies which provides that the operator is to: (1) prohibit new sewer connections with certain exceptions; (2) immediately begin to plan and build additional sewerage capacity; and (3) submit a Corrective Action Plan (CAP) for review and approval of the Department. (N.T. 797-98)

78. If, on the other hand, there is not an existing overload, but there is a 5 year projected overload, Section 94.22 applies which provides that the operator is to: (1) to submit a CAP within 90 days; and (2) limit new connections to and extensions of the sewage facilities based upon remaining available capacity under a plan submitted in accordance with the CAP. (N.T. 797-98)

79. The Department has implemented some of the Chapter 94 program authority as to the Susquehanna Township Authority with respect to the North Branch of the Paxton Creek Interceptor. (Ex. M-26)

80. By letter dated January 5, 1999 (January 5, 1999 Letter), the Department notified the Authority that, based on its review of the Authority's Chapter 94 Annual Report, the North Branch of the Paxton Creek Interceptor is a projected overload facility under 25 Pa. Code § 94.22. (Ex. M-26)

81. The January 5, 1999 letter goes on to direct the Authority as follows:

> For the projected hydraulically overloaded situation in the Paxton Creek Interceptor, it will be necessary for the Susquehanna Township Authority to comply with Section 94.22 of the Department's regulations which requires that the Susquehanna Township Authority do the following:
>
> 1. Submit to the Department's Southcentral Regional Office, within 90 days of receipt of this letter, a written plan setting forth the steps which will be taken to prevent the Paxton Creek Interceptor from becoming overloaded.
>
> 2. Limit new connections to the sewer system tributary to the overloaded sewage facilities based upon the remaining available capacity and the written plan submitted in accordance with Sections 94.22 of Chapter 94 and item 1 above.

(Ex. M-26)

82. Pursuant to the January 5, 1999 Letter and its obligations under Section 94.22, the Township submitted a CAP which was received by the Department on March 5, 1999. (N.T. 616-18, 1058; Ex. TAT-54)

83. Also, the Authority has taken steps to limit future connections by its Resolution No. 1999-1, which was passed by the Authority on March 4, 1999. (N.T. 636-37; Ex. M-44)

84. That Resolution was passed as a response to the January 5, 1999 Letter. (Ex. M-44 at p. 1-2)

85. The Module contains a section entitled "Chapter 94 Consistency Determination" (Ex. M-48 pp. 48.10-48.15)

86. The Chapter 94 consistency determination section of the Module culminates with the question to the permittee whether the particular project, which is subject to the Module, will create a hydraulic or organic overload within five years on any existing

collection or conveyance facilities that are part of the system. (Ex. M-48 pp. 48.10, 48.12)

87. For the Susquehanna facilities, the chart on the Chapter 94 Consistency Determination section of the Module shows that the peak design and/or permitted capacity is 14.2 million gallons per day (MGD), the present flows at peak are reported at 16 MGD for "normal wet weather conditions" or 22 MGD during "extreme wet weather conditions", and the projected flows in 5 years for peak flow is reported at 16 MGD for "normal" wet weather and 22 MGD for "extreme wet weather". (Ex. M-48 pp. 48.9 - 48.10)

88. These numbers are averages. (Ex. M-48 pp. 48.9-48.10)

89. The individual monthly, or other data points as a function of time, which together comprise this average are not reported in the Module. (Ex. M-48)

90. There is no series of monthly data reported in the Module. (Ex. M-48)

91. The term "surcharge" means that a facility is operating with flows that are in excess of the design or permitted capacity, but below the point where the system experiences an actual overflow. (N.T. 736-37, 817-18)

92. The numbers reported in the Module do not establish that the flow in the Susquehanna system has exceeded hydraulic design capacity *for 3-consecutive months out of the preceding 12 months.* (Ex. M-48)

93. Since Dr. Archer's conclusion that the Susquehanna facilities are operating at an existing overload condition was based on the numbers in the Module, we do not accept it. (N.T. 462-64)

94. There is no evidence the average monthly flow in the Susquehanna system has exceeded hydraulic design capacity *for 3-consecutive months out of the preceding 12 months.*

95. The present flows for the Harrisburg POTW are reported in the Module at 34.5 MGD and the peak design capacity at 29.0 MGD. (Ex. M-48 p. 48.9)

96. These numbers are averages. (Ex. M-48 pp 48.9- 48.10)

97. The individual monthly or other data points as a function of time which together comprise this average are not reported in the Module. (Ex. M-48)

98. There is no series of monthly data reported in the Module. (Ex. M-48)

99. The numbers reported as average flow in the Module do not establish that the monthly average flow entering the plant exceeds the hydraulic design capacity *for 3-consecutive months out of the preceding 12 months.* (Ex. M- 48 p. 48.9)

100. Since Dr. Archer's conclusion that the Harrisburg POTW is in an existing overload condition was based on the numbers set forth in the Module, we do not accept it. (N.T. 458-61)

101. There is no evidence the average monthly flow into the Harrisburg POTW has exceeded hydraulic design or permittted capacity *for 3-consecutive months out of the preceding 12 months.*

102. Hydraulic carrying capacity is greater than design capacity. (N.T. 656-59, 736-37, 856-58, 961)

103. Under pressure, a pipe system can carry additional flow beyond that for which it was originally designed. (N.T. 656-59, 736-37, 856-58, 961)

104. An actual overflow is more of a threat to human health and the environment than a surcharge condition. (N.T. 817-18)

105. Based on modeling done on behalf of the Authority, it was determined that the facilities could operate at a hydraulic carrying capacity of 17 MGD before an overflow or spillage would occur. (N.T. 657-58)

106. The Module reports a flow of 22 MGD for "extreme wet weather conditions" for the Susquehanna Authority facilities. (Ex. M-48 p. 48.10)

107. This number does exceed the design or permitted capacity as well as the hydraulic carrying capacity (Ex. M-48 p. 48.10)

108. This led to the Authority answering with a "qualified no" to the question on the Chapter 94 consistency determination sheets whether the proposed sewer flow represented in this Module will create a hydraulic overload within the next five years on any existing collection or conveyance facilities. (Ex. M-48 pp. 48.10-48.15)

109. The answer was qualified with a footnote that states, "except during periods of extreme wet weather". (Ex. M-48 p 48-15.)

110. The extreme wet weather conditions which would cause the system to experience flows in excess of the hydraulic carrying capacity as described in the Module are extraordinarily rare and would occur only in very unusual wet weather conditions. (N.T. 658)

111. An overflow event relating to wet weather has happened only once on the entire Paxton Creek Interceptor and that took place along the main trunk, not the North Branch. (Ex. M-36)

112. While there has been surcharging on the North Branch of the Paxton Creek Interceptor below the point where it joins the East Branch, there has been no observed surcharging or overflowing of the North Branch of the Paxton Creek Interceptor as a result of flows generated within its subject basin. (N.T. 820-21)

113. The sewer system was holding without overflowing rainfall in the normal course of events. (N.T. 658-59) The record of experience bears him out on that.

114. On rebuttal, Mr. Vartan, who lives along the North Branch of the Paxton Creek Interceptor and whose driveway is either on or just near a manhole along that Interceptor, claimed that he has seen half a dozen overflows from that manhole onto his driveway over the last two or three years. (N.T. 1510-11)

115. He claimed that these overflows happened during heavy wet weather. (N.T. 1510-11)

116. He claimed that the Township had come to clean out the line in connection with these events. (N.T. 1511)

117. That testimony is not credible. (N.T. 1501-02, 1509)

118. That testimony was provided on Ainjar's rebuttal case and not offered in its case-in-chief.

119. The issue of whether there were actual overflows along the North Branch to report would obviously have been a relevant part of Ainjar's case-in-chief on the issue of the status of the Paxton Creek Interceptor and especially its North Branch, and one would have expected that if Mr. Vartan had anything to report on that he would have done so in his case-in-chief.

120. On cross-examination, Mr. Vartan admitted that he never reported any of these supposed overflows to the authorities. (N.T. 1511)

121. Mr. Vartan claimed that his neighbor, Mr. Trexler, who is the President of Vartan Supply Company, which is owned by Mr. Vartan, also experienced these overflows and supposedly reported them. (N.T. 501, 1511)

122. However, these supposed overflows were not confirmed by any extrinsic evidence either oral or documentary.

123. Indeed, there was no evidence of any other observations or reports of actual overflows at any point along the North Branch at any time.

124. Even if the testimony were credible, the testimony would not undermine the testimony of Mr. Corriveau, Mr. Wendle and the Authority's conclusion about the overflow history of the North Branch.

125. No conclusion can be reached that the overflows, even if they did occur on or near Mr. Vartan's property, were symptomatic of any systemic overflowing of the system as opposed to some clog in the pipe, which existed at or near Mr. Vartan's property.

126. If the supposed overflows represented a systemic condition, one would have expected to see some evidence of other overflows at other locations and there was none.

127. A clog in the pipe at or near Mr. Vartan's home is consistent with the Township having to come and "clean-out" the line in association with such overflow events. (N.T. 1511)

128. The Module, having been submitted to the Department in July, 1999 was not inconsistent with Chapter 94 because the Authority had done what it was supposed to do under 25 Pa. Code § 94.22, namely, submit a CAP and take steps to limit new connections.

129. This Module is not antithetical to the authority's Chapter 94 situation.

130. The Susquehanna sewage facilities have the capacity to accept the additional 49,290 MGD that are contemplated by the Module. (N.T. 663-67; Ex. M-36)

131. Anticipated flow covered by this particular sewer Module would not be a source of overflow in the event of extreme wet weather even if such a condition were to occur. (N.T. 659)

132. The Module is not inconsistent with Chapter 94.

Public Notice.

133. The Module as originally submitted to the Township was printed in the *Harrisburg Patriot News* on December 11, 1998. (N.T. 1404, Ex. M-48 pp. 48.31-48.32)

134. The notice contains a summary description of the nature, scope, and locations of the planned area:

> McNaughton Homes, Inc. has proposed the development of a parcel of land identified as Margaret's Grove at Deer Path Woods. The subdivision will consist of 26.6 acres subdivided into 172 lots and is adjacent to existing Deer Path Woods subdivision located off Lingelstown Road at Crooked Hill Road and Continental Drive. It is proposed that sewer service be provided by a sewer extension.

(Ex. M-48 pp. 48.31-48.32)

135. The Public Notice further announces that "[r]esidents of Susquehanna Township are hereby notified of a thirty (30) day comment period during which time

written comments regarding the Amended Act 537 Plan may be submitted to the [Township Building]." (Ex. M-48 pp. 48.31-48.32)

136. Mr. Vartan knew about the Module submission not later than December 16, 1998. (Ex. M-23)

137. Mr. Vartan received all of the Module materials not later than January 29, 1999. (N.T. 310-11; Ex. M-29, Ex. M-37, Ex. M-38, Ex. M-39)

138. Mr. Vartan actively participated in the public input process during the entire time the Township reviewed the Module and even after the Township approved it on August 12, 1999. (Ex. M-23, Ex. M-24, Ex. M-28, Ex. M-32, Ex. M-35, Ex. M-40, Ex. M-49, Ex. M-50, Ex. M-53, Ex. M-54)

139. Mr. Vartan drafted, in part or in full, and distributed, either by mail or hand or both, a "Dear Neighbor" letter, dated December 18, 1999 to engage public interest in the Module. (N.T. 296-97; Ex. M-25)

140. Mr. Vartan knew not later than July 23, 1999 that the project had changed from 26.6 acres to 36.68 acres, and the number of dwelling units had been reduced from 222 to 156. (Ex. M-49)

141. The changes made to the Module between the date of its first submission and final approval were not so fundamental that the combined changes represented a new or completely different module.

142. The Department considered Mr. Vartan's comments when it reviewed the Module. (N.T. 844-46; Ex. M-28, Ex. M-32, Ex. M-35, Ex. M-53, Ex. M-54, Ex. M-55)

143. Edward J. Corriveau is the Planning Project and Finance Manager in the Department's Southcentral Regional Office of Water Management. (N.T. 763-64)

144. His duties require him to oversee the entire Act 537 Sewage Program for the Department. (N.T. 767)

145. Mr. Corriveau has worked for the Department since 1974, and all of his jobs during that tenure involved sewage. (N.T. 763-71)

146. Mr. Corriveau had direct contact with Mr. Vartan regarding the Module. (N.T. 844-847)

147. Mr. Corriveau brought Mr. Vartan's concerns and materials to Mr. Finnegan's attention. (N.T. 846)

148. Upon consideration of Mr. Vartan's comments and concerns the Department sent a letter dated October 8, 1999 to Susquehanna Township informing the Township that they had reviewed the module and before it could make a decision it needed additional information, specifically responses to all public comments that it had received. (Ex. M-57)

149. Susquehanna Township responded to the Department's request with a letter dated November 8, 1999, which enclosed another letter, dated November 5, 1999 drafted by Charles M. Courtney of the law firm McNees Wallace & Nurick, responding to Mr. Vartan's comments detailed in a letter dated September 7, 1999. (Ex. M-54, Ex. M-58)

150. The Township's response letter and enclosures were appropriate. (N.T. 849, 1092)

151. The Department reviewed and considered this to be responsive information before it approved the Module. (N.T. 847)

152. Mr. Vartan was not deprived of access to the Module.

Recreation Facility/Clubhouse.

153. The clubhouse was eliminated from the Margaret's Grove plan after the initial Module submission. (N.T. 1467-69)

154. The Department was aware at the time that it reviewed the Module that the clubhouse had been eliminated from the Margaret's Grove plan. (N.T. 1217-18)

155. The approval letter contains a minor technical error because it provides for flow for the clubhouse, which had been eliminated from the land development plan before the Department's review of the Module. N.T. 1217-18)

DISCUSSION

Factual and Procedural Background.

This appeal relates to the Act 537 sewage plan revision approval granted by Susquehanna Township (Township) and the Department for a residential development of the McNaughton Company (McNaughton) referred to as Margaret's Grove. Such Act 537 sewage plan revisions for particular developments are referred to as "modules" and we will refer to the one under appeal here as the "Module". The portion of the land subject to the Module consists of 32.68 acres situated on the southern end of a 123.52 acre tract owned by McNaughton. The land subject to the Module is located off of North Progress Avenue, north of the intersection of North Progress Avenue and Lingelstown Road in Susquehanna Township. Ex. M-70D, Ex. 51(b). The Module covers 156 dwelling units to be situated on the 32.68 acres. The total number of EDUs in the

Module is 186; one each for the 156 dwelling units and an additional 30 for a Clubhouse. M-48.[2]

The Module contemplates that Margaret's Grove will connect to existing public sewerage lines. The main lines of public sewerage which are involved in this appeal are the Paxton Creek Interceptor and its two tributaries, the North Branch and East Branch of the Paxton Creek Interceptor. The North Branch and East Branch of the Paxton Creek Interceptor form from a "Y" type construction from the Paxton Creek Interceptor. Ex. TAT-55. The Module contemplates that sewage from the development will be fed into the North Branch of the Paxton Creek Interceptor. Ex. M-48, Ex. M-72. The sewage then would flow through to the Harrisburg Sewage Treatment Plant for treatment. Ex. M-48.

The Module was submitted to the Township on or about December 11, 1998. The Township approved the Module, with some modifications, on August 12, 1999. The Township then submitted the Module to DEP for its review. The Department approved the Module by letter dated November 15, 1999. This appeal followed.

The appellant is the Ainjar Trust (Ainjar), John O. Vartan (Vartan or Mr. Vartan), Trustee. Ainjar owns approximately 33 acres of land which borders on the land owned

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[2] The term "EDU" refers to "equivalent dwelling unit" which is a measurement of volume of sewage flow. Ex. M-48, Ex. M-36, Ex. M-51. The Module as originally submitted to the Township in December, 1998 covered 222 EDUs; one EDU each for the 192 dwelling units and another 30 EDUs for a Clubhouse facility. Navarro Tr. 1393-98, Ex. M-39. Later, before the Module was reviewed by the Department, the Clubhouse facility was eliminated from the land development plan. We will have more to say about that later, as well as other changes that were made to the Module after it was submitted to the Township but before the Township approved it.

by McNaughton on which Margaret's Grove is to be located. Vartan Tr. 204. McNaughton was granted intervenor status in the appeal.[3]

Standard of Review and Burden of Proof.

The Appellant, Ainjar, has both the burden of proceeding and the burden of proof in this case. 25 Pa. Code § 1021.101(a), (c)(2). The Board, in its adjudication of *Smedley v. DEP,* EHB Docket No. 97-253-K (Adjudication issued February 8, 2001) discussed in detail the nature of the Board's standard of review to be applied in cases before it. In short, actions before the Board involve the determination of whether the findings upon which DEP based its action are correct and whether DEP's action is reasonable and appropriate and otherwise in conformance with the law. *Smedley, supra,* at 30.

Ainjar argues that the burden of proceeding and the burden of proof in this case has shifted to the Department and to McNaughton because Ainjar supposedly demonstrated the likelihood of environmental harm. Appellants rely on *Marcon, Inc. v. Department of Environmental Resources*, 462 A.2d 969 (Pa. Cmwlth. 1983) and *Concerned Residents of the Yough, Inc. (CRY) v. Department of Environmental Resources,* 639 A.2d 1265 (Pa. Cmwlth 1994). Appellants argue that under these precedents, "burden shifting" is called for in this case because the issuance of the "permit" (sic) is likely to cause environmental harm.

The Board addressed and rejected a similar argument recently in *Birdsboro v. DEP*, EHB Docket No. 99-071-K (Adjudication issued April 30, 2001), *slip op.* at 19-22, appeal docketed, No. 1241 CD 2001 (Pa. Cmwlth. May 24, 2001), and we do so again here for the same reasons.

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[3] McNaugton trial exhibits are cited as "M-__"; Ainjar trial exhibits as "TAT-__", and the Department's trial exhibits as "DEP-__"

Marcon does not compel the conclusion that burden shifting is applicable here. In *Marcon*, which involved a challenge to the granting of various NPDES permits, the Commonwealth Court approved the Board's decision to shift the burden of proceeding to the Department after the Appellants presented expert scientific testimony which showed the likelihood of environmental harm in that case. *Marcon, supra*, 462 A.2d at 971. The Commonwealth Court stated as follows regarding "burden shifting":

> Here the Clubs presented expert scientific evidence which tended to show that the permit would have a serious and deleterious effect upon both Sand Spring Run and neighboring Lake Maskenozha. The Board viewed this evidence as credible and so, in essence, shifted the burden of going forward with the evidence to the DER and the petitioners.

Marcon, Inc., 462 A.2d at 971. In *CRY*, the Court stated as follows, "[w]hen the protesting party produces credible evidence, the burden of proof shifts to DER to justify the permit." *CRY, supra*, at 1269 *citing Marcon,* 462 A.2d at 971.

Thus, *Marcon* and *CRY* supports burden shifting only *after* Appellants have presented credible evidence that the prospective project being challenged will cause environmental harm.[4] We do not think that Ainjar produced such evidence. We do not

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[4] DEP argues that the *burden of proof*, as distinguished from the *burden of proceeding*, does not shift in any event. The precise wording of the *Marcon* decision supports that view. *Marcon* said that when the challengers present credible evidence of harm, the burden shifts to the defenders of the permit of "*going forward with the evidence*" to justify the action. *Marcon*, 462 A.2d at 971 (*emphasis added*). Thus, *Marcon* would not seem to support any notion that the *burden of proof* has shifted, but only that the *burden of production* has shifted. *CRY*, though, refers to the *burden of proof* as shifting. In *CRY*, the Court said that "[w]hen the protesting party produces credible evidence, the *burden of proof shifts* to DER to justify the permit." *CRY*, 639 A.2d at 1269 *citing Marcon,* 462 A.2d at 971. The *CRY* Court's citation on this point is, however, to the *Marcon* Court's discussion of the shifting of the *burden of proceeding* as distinguished from the burden of proof. We seriously doubt that the *CRY* Court actually meant to substantively change the holding of *Marcon* so as to mean that the *burden of proof* is shifted in the context of its citing the *Marcon* case approvingly.

agree that Ainjar has proved that the activities contemplated by the Module would constitute an environmental harm. As we said in *Birdsboro*,

> Appellants' theory of "burden shifting" in this case is just another way of saying that Appellants must prove their case with affirmative evidence. If Appellants are successful in presenting affirmative evidence which establishes a *prima facie* case on the point or points they have to prove, then it becomes incumbent upon the other party to produce countervailing evidence. The suggestion that burden shifting should apply in this case begs the question of whether Appellants did in fact produce credible affirmative evidence which tended to show that the mining activities authorized by the permit in this case would have a serious and deleterious effect upon Hay Creek and the Hay Creek watershed. Burden shifting applied in *Marcon* because the plaintiff produced such affirmative evidence which was found to be credible. Thus, it then became incumbent upon the Department and the Permittee to produce evidence to the contrary. Appellants' contention that burden shifting should apply here as well assumes that it has produced affirmative credible evidence of likely adverse impact.

Birdsboro, *supra*, *slip op.* at 22. We conclude here, based on our discussion which follows, that the Module as approved would not constitute or result in environmental harm.

There Is An Underlying Act 537 Plan of Susquehanna Township.

The review of any module under Chapter 71 obviously starts with reference to the underlying Act 537 Plan in the municipality. In this case, Ainjar argues that there is no legally effective underlying Act 537 Plan of Susquehanna Township and, accordingly, by definition, the Module could not be consistent with the underlying Act 537 Plan as required for approval. Ainjar's argument rests upon two primary bases. First, the Township Manager and custodian of records, Mr. Myers, identified a document as being the Township's underlying Act 537 Plan during his deposition, which later was acknowledged not to be the Township's underlying Act 537 Plan. Second, Ainjar's expert, Dr. Archer, reviewed the Department's files on Susquehanna Township sewage

matters and he was unable to locate the Township's underlying Act 537 Plan in that file review.

The fact that Mr. Myers identified the wrong document at his deposition and that Dr. Archer may not have been able to find the Plan in his file review do not demonstrate that there is no Plan. We are convinced from the evidence presented at trial that there is an underlying Act 537 Plan for Susquehanna Township. In any event, even if there were not, that fact would not require disapproval of the Module.

The reason for the apparent confusion over whether Susquehanna Township has an underlying Act 537 Plan in the first place is due in large part to the era in which the Plan was born. The evidence of the Township's Plan goes back to the early 1970s, which was at the time when Act 537 was new and was the dawn of the Act 537 planning process. Act 537 became effective in 1967. 35 P.S. § 750.1.

Mr. Timothy Finnegan, who has been with the Department's sewage facilities program since 1975, provided insight into historical Act 537 practice. He has worked in the Harrisburg region, now known as the Southcentral Region, which has Susquehanna Township within its Act 537 planning jurisdiction, for his entire career in the sewage planning program. Finnegan Tr. 988. Indeed, Mr. Finnegan testified that, "I have dealt with Susquehanna Township on and off for my entire career in the Sewage Planning Program." Finnegan Tr. 988. Thus, he has unique knowledge, experience and insight both with respect to the sewage facilities planning program in general, but with respect to Susquehanna Township sewage facilities planning in particular.

Mr. Finnegan informed the Board that in the early 1970s, it was common for municipalities of the Township level to adopt county-level plans to be their required Act 537 base plans. Finnegan Tr. 1029-30. That is what happened in this case.

By Resolution 71-R-20, dated December 29, 1971, the Township adopted as its official Act 537 Plan, the "Sewerage Plan" for Dauphin County, prepared by the Dauphin County Planning Commission, to be its Act 537 Plan to serve Susquehanna Township. Ex. M-6. By Resolution 75-R-1, which is undated, but we take to have been passed sometime in 1975, the Township adopted the plan known as "Tri-County Sewage Plan, providing sewage disposal by community sewage systems, or treatment and discharge to surface waters as a part of the official plan of the municipality". Ex. M-4. The plan referred to is the "Sewerage Plan, Cumberland and Dauphin Counties Area", prepared by the Tri-County Regional Planning Commission, dated 1969, which was admitted into evidence as Ex. T-1.

Mr. Finnegan understood that the Sewerage Plan prepared by the Tri-County Regional Planning Commission was to be the Township's official base Act 537 Plan. Finnegan Tr. 991. The underlying Plan calls for public sewerage to be the method of sewage disposition in the majority of the Township including the Lingelstown Road area, which is where the proposed Margaret's Grove development is located. Finnegan Tr. 992, 1075. Mr. Finnegan has had occasion to review this underlying Plan in connection with planning modules for Susquehanna Township, which he has reviewed over his career. Finnegan Tr. 992.

Even if Ainjar was right on this point, which it is not, the absence of a Plan would not have been reason for the Department then or this Board now to reject the Module.

The regulations specifically provide that the lack of a Plan or the failure to revise it as required by an Order of the Department is not to be grounds for denying a sewer module. Section 71.32(f)(3) states as follows:

> (f) In a municipality that does not have an official plan, or fails to revise or implement its official plan as required by an order of the Department or this part, the following apply-
>
> 3. A supplement or a revision for new land development will not be denied nor will an exception to the requirement to revise be found inadequate solely because the municipality in which the new land development is being proposed has failed to do one of the following:
>
> i. Submit an update revision or special study.
> ii. Implement its plan as required by an order of the Department or part.

25 Pa. Code § 71.32(f)(3). As Mr. Corriveau of the Department put it so colorfully, this section means that, "we shouldn't hold new [Act 537 modules] hostage while we wait to do a base plan or an update." Corriveau Tr. 786.

Further, Ainjar argues that the "Sewerage Plan" document does not qualify, as a legal matter, as an Act 537 Plan because it does not show that it contemplated consideration of or contains all of the items which are required to be considered and contained in an Act 537 base plan under Section 5 Act 537, 35 P.S. § 750.5 and Chapter 71. Thus, according to Ainjar, the "Sewerage Plan" is not an Act 537 Plan at all. We reject that contention for two reasons. First, this is a case about whether the Module is consistent with the Plan, not one about whether the Township's underlying Act 537 Plan needs to be updated or supplemented in some way. The Department may order the Township to revise its Base Plan under its authority provided in 25 Pa. Code § 71.13 if the Department determines that the underlying Plan does not meet the requirements of Chapter 71. It has not done so and obviously whether it should do so or not is a matter

which is extraneous to the issue on this appeal, which is whether the approval of this Module was appropriate. Second, as we have discussed, even if there were no Plan or even if the Plan is deficient and needs revision, Section 71.32(f)(3) provides that a new module is not required to be denied on that basis.

Consistency of Module With Underlying Plan.

The record shows that the Department did review this Module for consistency with the underlying Act 537 Plan. Mr. Finnegan coordinated and participated in the Department's review of this Module. Finnegan Tr. 988-90. Mr. Finnegan testified that he was very familiar with the fact that the Susquehanna Township base plan called for public sewerage in the specific area covered by this Module and that this Module called for public sewerage. Finnegan Tr. 1075. On this basis he determined that the Module was consistent with the underlying Act 537 Plan. *Id.*

We reject Ainjar's argument that the fact that Mr. Finnegan did not actually physically look at the Sewerage Plan document in specific connection with his review of this Module is fatal to the Department's action here. He knows the Susquehanna Township underlying Plan from his career-long experience with sewage planning activities involving Susquehanna Township.[5]

We also reject Ainjar's argument that, even if the Sewerage Plan could be considered an underlying Act 537 Plan, which Ainjar does not concede, that the Module is inconsistent with the underlying Act 537 Plan because, "the text of the document and

[5] Ainjar also argues that the fact that neither the Department nor the Township actually physically obtained the underlying Plan and used it as the point of comparison to review the Module is further proof that there is no underlying Act 537 Plan. We do not think that this particular argument demonstrates Ainjar's point any more than do the other two arguments which we have already discussed.

the map attached to the document make clear that the area of the Margaret's Grove development is not planned for high density development". Ainjar Trust Post Hearing Brief at 61. While the 1969 Sewerage Plan may have not designated some of the land on which Margaret's Grove is to be located for high-density residential development, the zoning ordinance has been revised since 1969 and, today, it provides that all of the land on which Margaret's Grove is to be located is zoned for high-density residential development. Kessler Tr. 180-81, Navarro Tr.1394.

Ainjar attacks various other alleged deficiencies in the Module itself or in the Township and/or Department review process, which he claims rendered it unapprovable at the time the Department reviewed it and unapprovable on appeal today. We will now discuss those contentions.

Alleged Deficiency of the Module For Lack of Information On How The Actual Connection To Existing Public Sewage Facilities Is To Be Made.

We reject Ainjar's dual and related arguments that: (1) the Module is deficient because it fails to show that consideration is given to how the pipe connection is to be made from Margaret's Grove to existing sewer facilities; and (2) that the record does not show that the Department gave consideration to the Module's treatment of this aspect of the Module. Mr. Navarro, the primary drafter of the Module submission, testified that the Module showed that the point of connection was at Manhole 12-8, which is located in the adjacent Pheasant Hills development. Navarro Tr. 1393, 1405-06. Indeed, as shown on the "Sanitary Sewer Plan, Preliminary Plot Land Development Plan", dated December 4, 1998, and "Final Subdivision & Land Development Plan Overall Site Plan", dated July 8, 1999, which were part of the Module submission, the point of connection to existing

sewer facilities is to be accomplished via Manhole 12-8, which is located at neighboring Pheasant Hills. Ex. 70-B, note 4, Ex. 70-D. Prior to the Department's approval of the Module, Mr. Finnegan reviewed the aforementioned plot plans. Finnegan Tr. 1093-95.

Moreover, McNaughton claims that it has a valid right of easement over the Pheasant Hills property to place the connecting pipe as evidenced, at least in part, by the July 26, 1995 Easement Agreement between McNaughton Company as Grantee and Pheasant Hill Estates Associates as Grantor. McNaughton Tr. 1454-55, 1479-1482, Ex. M-11.[6]

Wetlands Considerations.

Ainjar complains that the projected path of the connecting pipe traverses wetlands. Even if this is so, which it appears to be, this is not grounds in itself to reject the Module as Ainjar contends. First, there is no mandate in the law which provides that if a pipe contemplated in a Module traverses wetlands, the Module must be rejected. Second, the record shows that the Department considered this question and that the possible encroachment on wetlands is covered by three general permits which the Department reviewed. Navarro Tr. 1426-28, Ex. M-58, Finnegan Tr. 1099-1103, Ex. M-58. Third, condition No. 2 of the Module approval specifically states that, "[o]ther Department permits may be required for construction if encroachment on streams or wetlands will result." Ex. M-60.

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[6] Ainjar tries to argue that the Easement Agreement is not valid, has expired and does not cover sufficient territory. We are not here to try whether the Easement Agreement is enforceable as a matter of property law. Suffice it to say that Mr. McNaughton, the person most responsible for and affected by whether McNaughton Company can lay the connecting pipe it needs to breathe any life at all into Margaret's Grove, believes he has a property right to lay the connecting pipe over Pheasant Hills' territory and he presented credible documentary and testimonial evidence to that effect.

Alleged Segmented Development.

Ainjar argues that the Module should have been rejected because the Module which was presented and approved, represents only a small portion of the overall plan for Margaret's Grove development. It argues that the developer should not be allowed to "piecemeal" module approvals. Related to this argument is the contention that additional sewage facilities, which would have to be developed for the entirety of Margaret's Grove, would require a Phase II Water Quality Management Permit and that this step should have been required now. This is so both because the supposed eventual size of the Margaret's Grove development will cross the triggering point for when a Part II Permit is needed and because even the eventual sewer configuration connecting Margaret's Grove with the existing sewerage will require a 10-inch to 12-inch pipe instead of the 8-inch pipe which is set forth in the Module.

The regulatory basis of Ainjar's argument in this regard is 25 Pa. Code § 71.52(a)(2) which provides as follows:

> (a) An official plan revision for new land development shall be submitted to the Department in the form of a completed sewage facilities planning module provided by the Department and shall include, but not be limited to, the following information:
>
> (2) The relationship of the proposed development to existing sewage needs, proposed sewage facilities and sewage management programs in an area delineated by the municipality, including identification of:
>
> (i) The areas included in, and adjacent to, the project which are in need of improved sewage facilities.
> (ii) The existing and proposed sewage facilities for remaining acreage or delineated lots not included in the project.
> (iii) Existing sewage facilities and sewage management programs in the area.
> (iv) Other proposed sewage facilities and sewage management programs – public and private – in the area.

(v) The method for integrating the proposal into the comprehensive sewage program in the area as reflected in the approved official plan.

25 Pa. Code § 71.52(a)(2).

The Margaret's Grove Module presented to the Department covered 32.68 acres out of a total of 120 acres in all of the Margaret's Grove property. Ex. M-48, McNaughton Tr. 1391, 1445. The Module covers 156 dwelling units and a Clubhouse. This adds up to a total of 186 EDUs for this Module—one each for the dwellings and 30 for the Clubhouse. The Module, as submitted, contemplated an 8-inch pipe connecting Margaret's Grove to the existing sewer facilities. McNaughton Tr. 1461. However, the developer, in December, 1999, subsequent to the submission of the Module, embraced a plan for a 10-inch connecting pipe and in August, 2000 changed that plan in favor of a 12-inch connecting pipe in order to accommodate the possibility of future development. Ex. TAT-50; McNaughton Tr. 1457-63, 1487-88, Navarro Tr. 1419. The plans for a different than 8-inch connector pipe had not been fully designed or, of course, proposed to the Department as of the date of the hearing. Navarro Tr. 1419.

Any development which is in excess of 250 EDUs requires a Part II Water Quality Management Permit. Wendle Tr. 507, 607-08. In addition, any pipe connector larger than the 8-inch one contemplated by the Module would require separate planning approval and a Part II Permit. Wendle Tr. 726, McNaughton Tr. 1464. It is on this basis that Ainjar claims that the Department improperly allowed "piecemealing" of this project and that it should have first required a Part II Water Quality Permit in connection therewith.

The Module, as submitted, does indeed contain documentation discussing that future development of Margaret's Grove, and other surrounding development could reach the level of 1,600 EDUs in the future. Ex. M-48.22-48.30. As for Margaret's Grove itself, it appears from materials which were part of the Module package, that the developer had at one time the desire to build 540 dwelling units on the property. Ex. M-48.22-48.24. There was testimony at trial, however, that this number was overly ambitious and that the tract itself would physically be able to accommodate only about 420 dwelling units at the most because of terrain and engineering limitations. Navarro Tr. 1396-98, McNaughton Tr. 1447, 1467; Ex. M-43.

Whatever the potential might be for possible future development, the point is that it is *possible future development.* The gleam in a developer's eye is not necessarily ever realized in the form he or she conceives of it, or even realized at all. This Module is limited to this scope of development, 156 dwelling units, one EDU per dwelling unit, 30 EDUs for a clubhouse, and connection *via* an 8-inch pipe—nothing more. Finnegan Tr. 1080-81. Other planning approvals would be required for anything different.

The law clearly recognizes and allows so-called "phased development". In *The Chesterbrook Conservancy v. DER*, 1974 EHB 406, the appellants challenged the Department's granting of an erosion and sedimentation control permit for one phase or section of what was planned to be a larger development. Appellants challenged the action, in part, on the theory that the piecemeal approval should not have been granted. The Board posed the question this way,

> The key question of whether the department acted reasonably in issuing an E&S permit for eighty (80) acres when it knew the final and complete project would encompass more than 800 acres, now deserves our attention.

Id. at 416. It answered that question in the negative reasoning as follows:

> It is clear and undisputed, that the department also knew that Tredyffrin Township would not issue any building permits unless and until the sewer and water problems were solved on the entire 800 acre development. [footnote omitted]
>
> The department knew that these two important road blocks to any construction on the site were being addressed by the permittee in a proper manner. It is this key information which supported the department's action in granting the permit. To take the opposite view would practically eliminate 'phases' for future large construction projects. The permit was granted for the first phase only.

Id. at 416-17.

Under *Chesterbrook*, phased development is not to be considered necessarily unlawful under the Department's programs. Nor does this particular phasing require that the Module be rejected. In our case, the future development is apparently much less concrete than in the *Chesterbrook* case. In that case, the Department "knew" that the Chesterbrook project would encompass 800 acres of development. The plans here cannot be considered nearly as palpable. There is a possibility that future phases of Margaret's Grove could be constructed and a possibility that future other development could take place. No final land development plans showing future phases of Margaret's Grove or any other development in that area were presented. The developer's "sketch-plan" dated February 29, 1999 showing a full build out was merely conceptual. McNaughton Tr. 1448. These conceptual plans go through numerous iterations. *Id.* at 1448-49. Mr. McNaughton testified that he expected that the Phase I 156 units would take six years to sell. McNaugton Tr. 1490-91. So when and if there ever will be a Phase II or other phase of Margaret's Grove is unknown.

Also, because a Part II Water Quality Management Permit may be needed with respect to some future phase of the development, or a change from an 8-inch pipe connector to a 10-inch or 12-inch one, does not mean that the Department should have denied this Module when it was reviewed or that the Board should reject it now. As we said, this Module is limited to the development and connection as specifically proposed in the Module and as specifically outlined in the Module. The developer has no Act 537 planning approval for any additional dwelling units or the use of anything other than an 8-inch pipe connector and it would need to secure Act 537 planning approval to implement either or both.

Consistency With Chapter 94.

Each Act 537 sewer module is required to be not inconsistent with the Chapter 94 Municipal Wasteload Management Program. The regulatory source of this Chapter 94 consistency determination is 25 Pa. Code § 94.14 which states that, "no official plan, official plan revision or supplement will be approved by the Department...that is inconsistent with this chapter." 25 Pa. Code § 94.14. In the parlance of module reviews this part of the review is referred to as the "Chapter 94 consistency determination". A Chapter 94 consistency determination is thus, by regulation, required to be a part of each and every Department review of an Act 537 Module submission. The Department does undertake such a Chapter 94 consistency determination with respect to each and every module it reviews. Corriveau Tr. 782 ,788-89.

Chapter 94 is entitled "Municipal Wasteload Management". Its purpose, to paraphrase the Department's brief, is to require owners and operators of sewage facilities to manage wasteloads discharged to the sewerage facilities in order to, among other

things, prevent the occurrence, of overloaded sewerage facilities. DEP Post Hearing Brief at 42 (paraphrasing 25 Pa. Code § 94.2). Chapter 94 provides a wide variety of tools and places a wide variety of obligations, on the Department and on sewer facility operators/permittees in connection with monitoring sewer loading and preventing overloading. The primary diagnostic and informational tool used by the Department to enforce and implement the Chapter 94 program are the Chapter 94 Annual Reports required to be filed by each operator of sewerage facilities. Chapter 94 requires every permittee to submit these annual reports, which must set forth a review of the submitter's sewerage facilities so as to "ensure that there is sufficient time to address existing operational or maintenance problems or to plan and construct needed additions." 25 Pa. Code § 94.12. Based on its review of the Annual Reports, the Department may determine that facilities are either in an "existing overload" situation or a "projected overload" situation. See 25 Pa. Code §§ 94.21, 94.22. "Overload" refers to either a hydraulic or organic overload. Here, organic overload is not an issue but hydraulic overload is. A hydraulic overload is defined as:

> Hydraulic overload—The condition that occurs when the monthly average flow entering a plant exceeds the hydraulic design capacity for 3-consecutive months out of the preceding 12 months or when the flow in a portion of the sewer system exceeds its hydraulic carrying capacity.

25 Pa. Code § 94.1.

If the Annual Report establishes, or the Department separately determines, that there is either an existing organic or hydraulic overload, Section 94.21 applies, which provides that the operator is to: (1) prohibit new sewer connections with certain exceptions; (2) immediately begin to plan and build additional sewerage capacity; and (3)

submit a Corrective Action Plan (CAP) for review and approval of the Department. On the other hand, if there is not an existing overload but there is a 5 year projected overload, Section 94.22 applies which provides that the operator is to: (1) to submit a CAP within 90 days; and (2) limit new connections to and extensions of the sewage facilities based upon remaining available capacity under a plan submitted in accordance with the CAP. Interestingly, Section 94.22, unlike Section 94.21, does not require Department approval of the CAP. This is undoubtedly because an existing overload situation is perceived as a more temporally advanced, more serious and more imminent problem than a projected overload.

The Department has a strong hammer under the Chapter 94 program in that it can, indeed it is mandated to, impose actual sewer connection bans under certain circumstances. The Department is to impose a ban on connections whenever it determines that the sewerage facilities or any portion thereof are either hydraulically or organically overloaded, or that the discharge from the plant causes actual or potential pollution of the waters of the Commonwealth and either: (1) the Department determines that such a ban is necessary to prevent or alleviate endangerment to public health; or (2) the operator/permittee has failed to submit a satisfactory CAP or has failed to implement the CAP as required by 25 Pa. Code § 94.21 (relating to existing overload conditions). 25 Pa. Code § 94.31.

In this case, the Department has implemented some of the Chapter 94 program authority as to the Susquehanna Township Authority with respect to the North Branch of the Paxton Creek Interceptor. By letter dated January 5, 1999 (January 5, 1999 Letter), the Department notified the Authority that, based on its review of the Authority's Chapter

94 Annual Report, the North Branch of the Paxton Creek Interceptor is a projected overload facility under 25 Pa. Code § 94.22. The January 5, 1999 Letter goes on to direct the Authority to:

> For the projected hydraulically overloaded situation in the Paxton Creek Interceptor, it will be necessary for the Susquehanna Township Authority to comply with Section 94.22 of the Department's regulations which requires that the Susquehanna Township Authority do the following:
>
> 1. Subject to the Department's Southcentral Regional Office, within 90 days of receipt of this letter, a written plan setting forth the steps which will be taken to prevent the Paxton Creek Interceptor from becoming overloaded.
>
> 2. Limit new connections to the sewer system tributary to the overloaded sewage facilities based upon the remaining available capacity and the written plan submitted in accordance with Sections 94.22 of Chapter 94 and item 1 above.

Ex. M-26. Thus, Susquehanna Township has been directed down the 25 Pa. Code § 94.22 pathway.

Pursuant to the January 5, 1999 Letter and its obligations under Section 94.22, the Township submitted a CAP, which was received by the Department on March 5, 1999. Wendle Tr. 616-18, Finnegan Tr. 1058, Ex. TAT 54. Also, the Authority has taken steps to limit future connections by its Resolution No. 1999-1, which was passed by the Authority on March 4, 1999. Wendle Tr. 636-37, Ex. M-44. That Resolution was passed as a response to the January 5, 1999 Letter. Ex. M-44 at p. 1-2.

Unfortunately, neither Chapter 71 nor Chapter 94 provide any specific delineation or direction on what it means for a Chapter 71 module to be not inconsistent with Chapter 94 or exactly how that determination is to be made. Obviously, given the context and provisions of Chapter 94, the inquiry of whether a particular module is consistent with

Chapter 94 involves, at least in part, a review of present and projected flow calculations. The portion of the Module which relates to the Chapter 94 consistency determination requires the applicant to set forth the anticipated flow of the project involved and the present and future anticipated flow calculations of the existing municipal sewer facilities that will be receiving the flow. Ex. M-48.9-48.15. The Chapter 94 consistency determination pages of the Module culminate with the question to the permittee whether the particular project, which is subject to the module, will create a hydraulic or organic overload within five years on any existing collection or conveyance facilities that are part of the system. Ex. M-48.10, 48.12.

One question, then, that is an input to the overall determination of whether a Module is consistent with Chapter 94 is whether the facilities in question are in an existing overload or a projected overload situation. Under Chapter 94 this is one of the forks in the road since if a permittee's facilities are in a projected overload condition, the processes of 25 Pa. Code § 94.22 apply to the permittee, whereas if the permittee is in an existing overload situation, the processes of 25 Pa. Code § 94.21 apply to the permittee.

The answer to the question of whether the receiving facilities are in projected or existing overload, though, is not the end of the inquiry. The regulations do not require the Department to deny a module when the receiving facilities are in projected or even existing overload. As we have set forth already, Chapter 94 prescribes specific deliberate steps in the nature of responses that must be undertaken by the permittee, which are different depending on whether it is in an existing overload situation or a projected overload situation. For receiving facilities that are in projected or even existing overload, the consistency determination must, then, involve an inquiry into whether receiving

facilities have followed whatever steps it is mandated to take under either 25 Pa. Code § 94.21 in the case of existing overload, or 25 Pa. Code § 94.22 in the case of projected overload. If the module is not out of synchronization with the permittee's Section 94.21 or 94.22 obligations then the module is not necessarily inconsistent with Chapter 94.

Another important inquiry to be made in the Chapter 94 consistency determination is whether the receiving facilities have the capacity to take on the added flow from the project which is the subject of the Module. This question is, of course, related to the question whether the facilities are in an existing or projected overload.

In this case the Department's conclusion that the Module was not inconsistent with Chapter 94 rests on two basic pillars. First, the Department determined that the receiving facilities did have the capacity to accept the added flow outlined in this Module. Second, as for the facilities' 25 Pa. Code § 94.22 projected overload status as set forth in the January 5, 1999 Letter, the Department determined that the Township had submitted its CAP. As the Department's brief states, "...the Department was required to decide whether the proposed module was consistent with Chapter 94 status. It did so by recognizing that a corrective action plan was submitted and accepted by the Department." DEP Post Hearing Brief at 43.

Ainjar attacks both pillars of the Department's rationale by claiming that the facilities are not in projected overload, but rather they are in existing overload. Ainjar presented evidence which it argues shows that the facilities are in an existing overload situation. Ainjar seems to be arguing that if the facilities are in existing overload the Module is *a fortiori* inconsistent with Chapter 94, and thus, the Department's approval of the Module was *per se* improper. In addition, Ainjar contends that the Department's

review of the Module using the 25 Pa. Code § 94.22 standard for projected overload was erroneous since the proper standard would have been 25 Pa. Code § 94.21 for existing overload.

Preliminarily, we have to address the Department's argument that the question of whether the facilities are in projected or existing overload is beyond the scope of this Board's review because of the administrative finality, which it contends attaches to the Department's unappealed January 5, 1999 Letter, and which it further contends applies here. As the Department's brief states, "[w]hile the Department recognizes that there must be a demonstration that the module is consistent with Chapter 94..., review of the Department's consistency determination by the Board does not require, or even allow, for second guessing of the Department's decision regarding the Chapter 94 status of the North Branch of the Paxton Creek Interceptor [as set forth in the January 5, 1999 letter]. DEP Post Hearing Brief at 40.

We cannot accept the Department's argument in this regard. It has long been recognized that the doctrine of administrative finality can be legislatively altered. *Kent Coal Mining Co. v. DEP*, 550 A.2d 279 (Pa. Cmwlth. 1988). The structure of Chapter 94 taken together with Chapter 71 demonstrate a regulatory plan which is antithetical to the application of administrative finality as the Department would have it applied here because the Department is required by regulation to make an independent, separate and distinct Chapter 94 consistency determination with respect to each and every module it reviews at the time of its review thereof. At least a part of and an input into that Chapter 94 consistency determination, which has to be made as to each and every module, is a consideration of the projected or existing overload status of the receiving facilities. Thus,

the regulatory framework governing the review of modules for Chapter 94 consistency does not permit a determination made in January of 1999, in connection with the Department's review of Susquehanna Township's routinely submitted Chapter 94 Annual Report, to provide a cloak of administrative finality to a determination made in November of 1999, as part of the Department's review of this Act 537 Module.

In one sense the Department is correct. The January, 1999 decision is not at issue here. Whatever administrative finality may or may not apply to the determination of the Department outlined in its January 5, 1999 Letter, the Chapter 94 determination, of which the projected or existing overload status of the North Branch is a part, and which, by law, must be made, and was in fact made, in connection with this sewer Module, is not subject to that administrative finality.

We also note that neither Ainjar Trust, Mr. Vartan nor McNaughton were parties to, or indicated as having been provided notice of, the January 5, 1999 Letter. This is another reason that the January 5, 1999 Letter should not have the impact of being administratively final either in favor of or against any of those parties in this action.

As we have noted, though, there is no hard and fast rule anywhere in Chapter 71 or in Chapter 94 which dictates that a module must be denied on the sole basis that the receiving facilities are in projected, or even existing, hydraulic overload. There is more to the Chapter 94 consistency determination than that. The primary regulation cited by Ainjar to support its theory of *per se* denial in the case of existing overload is 25 Pa. Code § 94.11(a) which states as follows:

> A sewer extension may not be constructed if the additional flows contributed to the sewerage facilities from the extension will cause the plant, pump stations or other portions of the sewer system to become overloaded or if the flows will add to an existing overload unless the

> extension is in accordance with an approved CAP submitted under § 94.21 or § 94.22 (relating to existing overload; and projected overload) or unless the extension is approved under § 94.54 (relating to sewer line extension).

25 Pa. Code § 94.11(a). This, however, prohibits *sewer extension construction*, not module approvals. Module approvals are not sewer extension constructions nor are they even sewer extension construction or connection permits. Also, even the proscription of sewer extension construction is conditional. Sewer extensions can be made if they are "in accordance with an approved CAP submitted under Section 94.21 or Section 94.22" or if the extension is approved by the Department under 25 Pa. Code§ 94.54.

For much the same reason and others as well, Ainjar's citation to *East Pennsboro Township Authority v. DER*, 334 A.2d 798 (Pa. Cmwlth. 1975) is not on point. Ainjar maintains that this case stands for the proposition that "when a sewer authority has exceeded its design limits, and when hydraulic overload conditions exist a sewer ban is appropriate." Ainjar Post Hearing Brief at 87. This may be an accurate recitation of the general outcome of *East Pennsboro* in the legal and factual setting of that case, but the legal and factual setting of that case have nothing to do with the matter at hand here. The *East Pennsboro* case did not involve a sewer module nor, obviously, a Chapter 94 consistency determination. That case involved a Department order, imposing a ban on sewer connections under the authority of the Clean Streams Law. We are not dealing with a Department sewer connection ban in this case, but a Department approval of a sewer module. Also, the *East Pennsboro* case predated the enactment of Chapter 94 altogether. *East Pennsboro* was decided on March 20, 1975 while Chapter 94 was not adopted until November 4, 1977. *See* 25 Pa. Code § Chapter 94 Table of Contents, Source recitation.

Today's Chapter 94 sewer ban regulation, which we have already mentioned, does not even absolutely require the Department to issue a connection ban order when there is an existing overload. The ban is to be issued only when the Department determines that the ban is necessary to prevent or alleviate endangerment to public health, or the permittee has not followed its obligations to submit and implement its CAP under 25 Pa. Code § 94.21 (relating to existing overloads). 25 Pa. Code § 94.31. Also, there are various exceptions to even pending sewer connection ban orders. *See* 25 Pa. Code §§ 94.51-94.56.

In any event, Ainjar points to the numbers set forth in charts on pages 48.9 and 48.10 of the Module, and the accompanying testimony of its expert, Dr. Hugh Archer, as showing that there are existing overload conditions with respect to both Susquehanna Township facilities and the Harrisburg POTW. Archer Tr. 458-64. For the Susquehanna facilities, the chart shows that the peak design and/or permitted capacity is 14.2 million gallons per day (MGD), the present flows at peak are reported at 16 MGD for "normal wet weather conditions" or 22 MGD during "extreme wet weather conditions", and the projected flows in 5 years for peak flow is reported at 16 MGD for "normal" wet weather and 22 MGD for "extreme wet weather". Dr. Archer testified that these numbers indicate a "Chapter 94 problem" in that "existing flow has exceeded permitted capacity". Archer Tr. 463-464. Also, Dr. Archer testified that, in his opinion, these numbers indicate that the Paxton Creek Interceptor is "surcharged". Archer Tr. 464-65, 475-76. The term "surcharge" is not defined in the Chapter 94 regulations, but we understand that a facility is said to be operating at surcharge where it has flows, which are above the

design or permitted capacity, but below the point where the system experiences an actual overflow. Wendle Tr. 736-37, Corriveau Tr. 817-18.

We do not think that the numbers or the testimony of Dr. Archer conclusively establish that the North Branch of the Paxton Creek Interceptor is in an existing overload situation as defined in Chapter 94. The first prong of the definition of hydraulic overload provides that there exists a hydraulic overload when the monthly average flow entering the plant exceeds the hydraulic design capacity *for 3-consecutive months out of the preceding 12 months.* The numbers in the chart do not show this to be the case. There is no series of monthly data in this record on which to base a conclusion about *any* 3-consecutive month period. What we see is only a single set of numbers—a single set of data points. These numbers reflect an average. Ex. M-48.10. We do not even know over what period of time this average reflects nor how many data points are inputs to the average. The individual data points which make up this average, whether they are monthly data points or points based on some other periodic separation, are not provided. While, the numbers reported in the chart on the Module may have been derived in some fashion from the annual reports filed by the Authority under Chapter 94, we do not have those annual reports so as to see their format, nor do we have any testimony on specifically how those numbers may have been derived from the annual reports. There is no historical or temporal data which would permit the conclusion that the flow entering the plant has exceeded its design capacity for *any* 3-consecutive month period let alone *for 3-consecutive months out of the preceding 12 months.* In addition, there was no evidence of any flow data, testimonial or documentary, since the Department issued its approval letter for this Module on November 15, 1999. Since Dr. Archer's testimony that

the Susquehanna facilities are operating in an existing overload condition is based on these numbers we do not accept it.

The same would apply to the number reported for the Harrisburg POTW. Archer Tr. 458-62. The present flows are reported at 34.5 MGD and the peak design capacity at 29.0 MGD. Again, these numbers do not establish that the monthly average flow entering the plant exceeds the hydraulic design capacity *for 3-consecutive months out of the preceding 12 months.* Ex. M-48.9. Since Dr. Archer's conclusion that the Harrisburg POTW is at an existing overload condition was based solely on those two numbers, we do not accept it.

Nor do we conclude on the basis of Mr. Wendle's testimony on cross-examination in which he agreed to counsel's characterization of the system as being overloaded that the system is in existing overload as that term is defined in the regulations. Wendle Tr. 678. That testimony was based on the single data points in the Module which we have just talked about. Thus, we do not see that such testimony is, or could be, linked to the regulatory definition of existing overload. To that extent the references to being overloaded were made in the conventional or conversational sense and not the regulatory sense.

Alternatively, the second prong of the definition of hydraulic overload provides that there is such a condition when "the flow in a portion of the sewer system exceeds its *hydraulic carrying capacity*". Hydraulic carrying capacity is a term which is indirectly defined in the regulations through the related term, "sanitary sewer overflow". The definition of "sanitary sewer overflow" is,

> An intermittent overflow of wastewater, or other untreated discharge from a separate sanitary sewer system (which is not a combined

> sewer system), which results from a flow in excess of the *carrying capacity* of the system or from some other cause prior to reaching the headworks of the plant.

25 Pa. Code § 94.1 (*emphasis added*). In other words, the carrying capacity is that point just short of where actual overflow from the system takes place. In this regard, the term carrying capacity can be regarded in common parlance or layman's terms as non-spilling capacity.

Mr. Wendle and Mr. Corriveau pointed out that hydraulic carrying capacity is greater than design capacity. Put simply, under pressure, a pipe system can carry additional flow beyond that for which it was originally designed. Wendle Tr. 656-59, 736-37, Corriveau Tr. 856-58, 961. The Department regards an actual overflow as being more of a threat to human health and the environment than a surcharge condition. Corriveau. 817-818. That view is certainly reasonable. Based on modeling done on behalf of the Authority, it was determined that the facilities could operate at a hydraulic carrying capacity of 17 MGD before an overflow or spillage would occur. Wendle Tr. 657-658.

The reported number of 22 MGD for "extreme wet weather conditions" for the Susquehanna Authority facilities does exceed the design or permitted capacity as well as the hydraulic carrying capacity. Ex. M-48.10. This led to the Authority answering with a "qualified no" to the question on the Chapter 94 consistency determination portion of the Module whether the proposed sewer flow represented in this Module will create a hydraulic overload within the next five years on any existing collection or conveyance facilities. Ex. M-48.10-48.15. The answer was qualified with a footnote that states, "except during periods of extreme wet weather". Ex. M-48.15.

The regulations do not define "extreme wet weather", but we conclude that extreme wet weather conditions, which would cause the system to experience flows in excess of the hydraulic carrying capacity as described in the Module, are extraordinarily rare and would occur only in very unusual wet weather conditions. Wendle Tr. 658. We will not here try to put a quantitative or qualitative definition on what is normal rainfall versus extreme wet weather. Suffice it to say that an overflow event relating to wet weather has happened only once on the entire Paxton Creek Interceptor and that took place along the main trunk, not the North Branch. Ex. M-36. While there has been surcharging on the North Branch of the Paxton Creek Interceptor below the point where it joins the East Branch, there has been no observed surcharging or overflowing of the North Branch of the Paxton Creek Interceptor as a result of flows generated within its subject basin. Corriveau Tr. 820-21. Mr. Wendle opined that the sewer system was holding without overflowing rainfall in the normal course of events. Tr. 658-59. The record of experience bears him out on that.

The testimony of Mr. Vartan, who lives along the North Branch of the Paxton Creek Interceptor and whose driveway is either on or just near a manhole along that Interceptor, claiming that he has seen half a dozen overflows from that manhole onto his driveway over the last two or three years is not credible. Vartan Tr. 1501-02, 1509. He claimed that these overflows happened during heavy wet weather. Vartan Tr. 1510-11. He claimed that the Township had come to clean out the line in connection with these events. Vartan Tr. 1511. That testimony was provided on Ainjar's rebuttal case and not offered in its case-in-chief. The issue of whether there were actual overflows along the North Branch to report would obviously have been a relevant part of Ainjar's case-in-

chief on the issue of the status of the Paxton Creek Interceptor and especially its North Branch, and one would have expected that if Mr. Vartan had anything to report on that he would have done so in his case-in-chief. On cross-examination, Mr. Vartan admitted that he never reported any of these supposed overflows to the authorities. Vartan Tr. 1511. Mr. Vartan claimed that his neighbor, Mr. Trexler, who is the President of Vartan Supply Company, which is owned by Mr. Vartan, also experienced these overflows and supposedly reported them. Vartan Tr. 1501, 1511. However, these supposed overflows were not confirmed by any extrinsic evidence either oral or documentary. We neither heard from Mr. Trexler nor did we see any business records from either the Department recording any such reports of overflows or from the Township recording any such reports or recording any of the supposed clean-outs which Mr. Vartan claimed occurred. Indeed, there was no evidence of any other observations or reports of actual overflows at any point along the North Branch at any time.

Even if the testimony were credible, we do not find that it would undermine the testimony of Mr. Corriveau, Mr. Wendle, and the Authority's conclusion about the overflow history of the North Branch. We cannot conclude that the overflows, even if they did occur on or near Mr. Vartan's property, were symptomatic of any systemic overflowing of the system as opposed to some clog in the pipe which existed at or near Mr. Vartan's property. If these overflows represented a systemic condition, one would have expected to see some evidence of other overflows at other locations and there was none. A clog in the pipe at or near Mr. Vartan's home is consistent with the Township having to come and "clean-out" the line in association with such overflow events. Vartan Tr. 1511.

In light of this, we credit the testimony of Mr. Corriveau and Mr. Wendle as well as the determination of the Authority over the testimony on rebuttal of Mr. Vartan on the question of the overflow history of the North Branch of the Paxton Creek Interceptor.

Given all of these factors, we cannot conclude that Department's application of the Section 94.22 projected overload standard to its consistency determination in this case was unreasonable or unlawful. Aside from our conclusion that the numbers do not necessarily show a Chapter 94 existing overload, the Chapter 94 program is constructed as a process which includes various steps and gradations which are a function of time. Where the Authority is in that process at any given point in time ought to be left in the first instance to the Department to determine. This case is not about whether the Department should have moved the Authority one step further down the Chapter 94 program into the Section 94.21 existing overload process in the summer and fall of 1999 when it reviewed this Module. This case is about whether the Module is consistent with Chapter 94. Even if, arguably, the Department should have moved the North Branch into an existing overload situation during its review of this Module, or even if it had done so, that would not necessarily have been then or now a *per se* reason to deny this Module as being inconsistent with Chapter 94. Even with the intersection of Chapter 71 and Chapter 94 at 25 Pa. Code § 94.14, the two programs are separate and independent of each other, operate differently, and have different goals and tools.

Looking at the matter afresh today, as we do under our *de novo* review, we cannot conclude that the Module is inconsistent with Chapter 94. The Authority has duly submitted its CAP and has duly taken steps to limit connections to the North Branch of the Paxton Creek Interceptor as required by 25 Pa. Code § 94.21. To that extent, the

Module, having been submitted to the Department in July, 1999 was not inconsistent with Chapter 94 because the Authority had done what it was supposed to do under 25 Pa. Code § 94.22, namely, submit a CAP and take steps to limit new connections.

Even if the numbers reported in the Module and its textual responses as qualified reflect an existing overload this does not necessarily mean either that the Department's conclusion on Chapter 94 consistency for this Module was unreasonable or that the Module necessarily had to have been denied by the Department then or by the Board now. The overall question is that of Chapter 94 consistency, *i.e.*, is this Module antithetical to the Authority's Chapter 94 situation. The numbers reported in the Module, which we have now examined in some detail, do not in themselves establish that the Module is inconsistent with Chapter 94. The Authority is very clear that it has the capacity to accept the additional 49,290 MGD that the Module reports would be associated with this project. Wendle Tr. 663-67, Ex. M-36. Mr. Wendle so testified and we credit his testimony in that regard. In addition, Mr. Wendle testified, as we have noted, that the system is holding in the normal course of weather events. Wendle Tr. 658. Also, as we already noted, while some surcharging has been experienced on the North Branch of the Paxton Creek Interceptor, below the point where it joins the East Branch, there has been no observed surcharging or overflowing of the North Branch of the Paxton Creek Interceptor as a result of flows generated within its subject basin. Corriveau Tr. 820-21.

Given all of these factors, we cannot conclude that the Module is inconsistent with Chapter 94.

Adequacy of Public Notice and Participation Process.

Ainjar claims that this Module review and approval process was infected by failure to follow the public notice requirements applicable to review and approval of Act 537 module submissions. The applicable regulation is 25 Pa. Code § 71.31(c), which states as follows:

> (c) 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 including the antidegradation classification of the receiving water where a discharge to a body of water designated as high quality or exceptional value is proposed and the plan's major recommendations, including a list of the sewage facilities alternatives considered. A 30-day public comment period shall be provided. A copy of written comments received and the municipal response to each comment, shall be submitted to the Department with the plan.

25 Pa. Code § 71.31(c).

The seminal case on this issue which both parties refer to is *Green Thornbury Committee v. DER*, 1995 EHB 636. Both parties agree that the test, under Green Thornbury for whether there has been adequate public notice and participation in the module review process is "whether [an appellant] actually [had] access to the module[ ] to comment on [it]". *Id.* at 665. We think that under the circumstances here, the record shows that Ainjar had access to the module in question, participated in the process, and that the Department listened to Ainjar's comments and provided for a response thereto.

Notice of the Module as originally submitted to the Township was printed in the *Harrisburg Patriot News* on December 11, 1998. Ex. M-48.32-48.33. This notice states in part that,

> McNaughton Homes, Inc. has proposed the development of a parcel of land identified as Margaret's Grove at Deer Path Woods. The

> subdivision will consist of 26.6 acres subdivided into 172 lots and is adjacent to existing Deer Path Woods subdivision located off Lingelstown Road at Crooked Hill Road and Continental Drive. It is proposed that sewer service be provided by a sewer extension...

Ex. M-48.31. The notice further announces that, "[r]esidents of Susquehanna Township are hereby notified of a thirty (30) day comment period during which time written comments regarding the amended Act 537 Plan may be submitted to the [Township Building]". *Id.*

This notice certainly contains a summary description of the nature, scope and location of the planned area, and is otherwise appropriate under 25 Pa. Code § 71.31(c). Ainjar's main complaint is that the Module evolved to some degree over time such that the Module, which eventually emerged from the Township as approved by it and which it submitted to the Department, was different in some ways than the one described in this notice. In essence, he is complaining that the Module was a moving target.

It is true that as the Margaret's Grove land development process moved ahead, certain changes were effectuated as an offshoot thereof to the Module, which was pending at that time before the Susquehanna Board of Supervisors. The acreage involved in the development changed from approximately 26 acres to approximately 32 acres, the number of dwelling units was reduced from 192 to 156, the total number of EDUs was consequently reduced from 222 to 186, and the calculation for Gallons Per Day (GPD) per EDU was changed from 400 GDP per EDU to 265 GPD per EDU. Compare Ex. M-12 with Ex. M-48. The precise reasons for the changes in the number of dwelling units related to land development considerations, including topography and the relocation of a planned road which made the number of dwellings that could be placed in the space lower than had been originally thought. Navarro Tr. 1396-98; Ex. M-51.

Mr. Vartan knew about the Module submission not later than December 16, 1998. Ex. M-23. He wrote to Mr. Kessler on December 17, 1998 which stated that upon his return from vacation he read the notice. This letter goes on to mention that he, Mr. Vartan, had been to see Mr. Kessler the day before and at that time had asked Mr. Kessler to provide Mr. Vartan with materials relating to the Module. Mr. Vartan had received all of the Module materials by no later than January 29, 1999. Vartan Tr. 310-311, Ex. M-29, M-37, M-38, M-39. Exhibits M-37 through M-39 show without question that the Township and/or the Authority freely transmitted whatever Module materials Mr. Vartan had requested. Each of those exhibits is a part of the Module and each shows either that it was faxed to Mr. Vartan or that he had representatives pick it up physically for him. *See also* Vartan Tr. 310-11. Since he had in his possession by the end of January, 1999 the entirety of the Module package, as it then existed, demonstrates that he was not deprived of access to the Module under the test outlined in *Green Thornbury.*

Mr. Vartan actively participated in the public input process during the entire time that the Module was being considered by the Township up through and even after the date it was approved, August 12, 1999. The record is replete with correspondence from him to Township or Authority officials or their representatives on the subject of the Module and/or other aspects of the Margaret's Grove development. Ex. M-23, Ex. M-24, Ex. M-28, Ex. M-32, Ex. M-35, Ex. M-40, Ex. M-49, Ex. M-50, Ex. M-53, Ex. M-54. These correspondence span from December 17, 1999 through September 7, 1999. Mr. Vartan also directed a "Dear Neighbor" letter, dated December 18, 1999, for general distribution outlining what he perceived to be deficiencies and problems with respect to

the Margaret's Grove land development plan, and outlining aspects of the plan that would negatively impact the community. Ex. M-25.

It is clear that Mr. Vartan had known as of January 28, 1999 that the figure for GPD per EDU was changed from its original 400 GPD to 265 GDP. The letter dated January 28, 1999 from Mr. Hilderhoff and Mr. Wendle of CET Engineers, the consultants for the Authority, which bears a fax header receipt indicated delivery to Mr. Vartan on January 28, 1999, describes that change. Ex. M-37, Ex. M-38[7] It is also clear that, by no later than July 23, 1999, Mr. Vartan had become aware that the project had changed from 26.6 acres to 36.68 acres and that the number of dwelling units had been reduced from 222 to 156. Mr. Vartan's letter dated July 23, 1999 to Mr. Cooper of the Susquehanna Township Planning Commission states that, "according to the subdivision plan, approximately 33 acres will be used to generate 156 units". Ex. M-49 (page 2, bulleted paragraph No. 3). The change in total EDUs from 222 to 186 was effectuated on July 16, 1999 by handwritten note directly on the Module itself. However, because Mr. Vartan was aware of the change in the number of dwelling units, the change in the number assigned for GPD per EDU, and because total project EDUs are simply a

[7] Ainjar criticizes and challenges the use of 265 GPD per EDU instead of using a figure of 400 GPD per EDU which was originally in the Module information. However, we find the use of the figure of 265 GPD per EDU to be reasonable and supportable. Mr. Wendle explained why the use of 265 GPD per EDU was more appropriate than a figure of 400 GPD per EDU. Wendle Tr. 641-646. Mr. Finnegan also confirmed that the use of the 265 GPD figure was reasonable. Finnegan Tr. 1082-85. In short, the 400 GPD figure is based on design criteria for an on-lot system, not a public sewerage system such as we have here, and that number is further based on census data from as far back as 1970 which showed, at that time, there were approximately 3.5 persons per EDU. The 265 GPD per EDU figure, on the other hand, is applicable to public sewerage and is based upon the most recent census data showing from between 2.5 to 2.8 persons per EDU with each person using about 100 gallons of water per day.

mathematical function of those two numbers, Mr. Vartan and Ainjar were aware of the change in total EDUs down from 222 to 186.

These facts do not portray a lack of access to the Module as to Mr. Vartan. We agree with the Department that a seminal purpose of the public notice/participation feature of the Chapter 71 sewer module regulations is to allow potentially affected persons to become involved in the process as early as possible so the potential that their input may impact that process is maximized. Thus, publication of notice of a module, which is being considered by a municipality, as early in the process is to be encouraged. On the other side of the coin, it is not unreasonable to expect that during the land development and module review process, some aspects of the development and/or the sewer module may change. Finnegan Tr. 1088. Indeed, that would seem to be what the public participation process envisions.

In this case, certain aspects of the project, which we have discussed already, changed from the time that the Module was first proposed in December, 1998 to the date it was approved on August 12, 1999. We do not think that new publication had to be undertaken with each or any of the changes to the project that we have reviewed here. These changes were not so fundamental that they represented such a new or different module. Ironically, those changes, about which Ainjar complains, represented a *decrease* in anticipated flow from the Module as approved compared to the Module as first submitted because the number of dwelling units was reduced from 192 to 156. In any event, the evidence is clear that Ainjar, through Mr. Vartan, was fully aware during the pendency of the review process at the Township level of each change in the Module. Thus, it cannot be said that he was denied access to the Module.

In order to assure that the Department was aware of the reasons for the various changes in the Module from its original form to the one which was approved by the Township, the Township requested that Mr. Navarro prepare a letter explaining the history of and the reasons for the changes. Kessler Tr. 159; Ex. M-51. This letter, dated August 12, 1999, was submitted by the Township to the Department as part of the Module package. *Id.*

The record shows that the Department, in its review of the Module submission, did hear and consider Mr. Vartan's comments. Mr. Vartan contacted Mr. Corriveau by telephone shortly before September 22, 1999 at which time Mr. Vartan expressed concerns about the Module. Corriveau Tr. 844-45. Mr. Vartan requested a face to face meeting with the Department to discuss his concerns about the Module. Corriveau Tr. 845. Mr. Vartan followed up his telephone contact with a letter dated September 22, 1999 to Mr. Corriveau, which enclosed various information about the Module and a letter dated October 6, 1999 to Mr. Corriveau requesting a face to face meeting with Mr. Corriveau and his staff to discuss the Module. Ex. M-55, Ex. M-56; Corriveau Tr. 844-46. The materials forwarded to Mr. Corriveau in the letter included the December 11, 1998 publication notice of the Module and many of the various letters that Mr. Vartan had directed to the Township, the Authority, or the Planning Commission regarding Margaret's Grove that we discussed above.[8] Among these materials was a copy of Mr. Vartan's September 7, 1999 letter to the Township which expressed protestation at the Township's approval of the Module and outlined particular alleged deficiencies of the

[8] A catalogue of the various letters which Mr. Vartan had directed to local officials during the pendency of the Module review at the Township level which he forwarded to Mr. Corriveau with his letter of September 22, 1999 is as follows: Ex. M-28, Ex. M-32, Ex. M-35, Ex. M-53 and Ex. M-54.

Module. Ex. M-55, Ex. M-54. Mr. Corriveau brought Mr. Vartan's concerns and materials Mr. Vartan had sent to Mr. Corriveau to the attention of Mr. Finnegan. Corriveau Tr. 846. It was decided that the material would be sent to the Township so that it could respond. *Id.* Indeed, the Department sent a letter to the Township on October 8, 1999 which stated that, "the [Module] has been reviewed and it has been determined that additional information is required. Please forward the municipal responses to all public comments that were received on this project". Ex. M-57. There is no question, then, that the Department was taking Mr. Vartan's input seriously.

The Township responded to the Department's request by letter dated November 8, 1999, which enclosed a copy of a letter dated November 5, 1999 drafted by McNaughton's counsel, Charles M. Courtney, of the McNees, Wallace & Nurick law firm. Ex. M-58. The Courtney letter contains a point-by-point response to the matters raised by Mr. Vartan in his letter dated September 7, 1999 directed to the Township. Ex. M-58. The Department reviewed and considered this responsive information before it approved this Module. Corriveau Tr. 847.

Vartan complains that the process was defective at the Department level because: (1) he was refused a face-to-face meeting; and (2) the response to the Department's inquiry was drafted by counsel for the developer. Neither of these points has any merit. On the first point, there is no requirement in the law that the Department grant a face to face meeting in these circumstances. On the second point, there is nothing inherently suspect or nefarious about a proponent's consultant or attorney drafting a response document. Both Mr. Corriveau and Mr. Finnegan testified that it is quite common for the Department to receive submissions authored in this fashion and we see no fatal flaw in it

here. Corriveau Tr. 849, Finnegan Tr. 1092. It is clear that the Department reviewed and considered the comments and the responses for itself. Corriveau Tr. 847.

The foregoing discussion also dispenses with Ainjar's complaint that the Module was defective because as received by the Department, neither of the boxes in Section E of the Module dealing with the public notification requirements was checked. These two alternative statements in Section E for which a box for checking is provided state as follows: (1) "[a]ttached is a copy of the public notice, all comments received as a result of the notice, and the municipal response to these comments"; and (2) "[n]o comments were received. A copy of the public notice is attached". In light of the facts that the Department became aware almost as soon as it received the Module that Vartan wished to comment thereon, its receipt of the catalogue of Vartan's comments, its request to the Township to be supplied with material relating to public comments on the Module, the lack of any check mark in either of the two alternative statements on the Module form is of no consequence.

Ainjar's *Heidelberg* Argument.

We reject Ainjar's argument that the case of *Heidelberg v. DER*, 1977 EHB 266 demonstrates that the Department erred in its approval of this Module. In *Heidelberg*, the Board overturned a Department approval of a module because the Department had simply accepted the municipality's conclusion that the module was consistent with the underlying Act 537 Plan, and the Department, itself, had engaged in no review at all of that question. *Id.* At 273. As the Board has correctly described our holding in *Heidelberg*,

> The Board [in *Heidelberg*] 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. [citation omitted] 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.

Montgomery Township v. DEP, 1995 EHB 483, 537. The lesson of *Heidelberg* is that the Department cannot simply "rubber-stamp" the determinations of the municipality. The Department must review the module too. As we have discussed, the record in this case shows that the Department did independently review this Module and, based on that independent review, concluded that it was approvable.

EDUs For The Recreation Facility/Clubhouse

We do believe that the Module approval should be revised by the Board to the extent that the approval includes 30 EDUs for the clubhouse. That part of the developer's plan had been abandoned prior to the Department's review of the Module submission.

As we have noted, the Module as proposed and as approved included 30 EDUs for the clubhouse. Ex. M-48, M-60. Mr. McNaughton confirmed that the clubhouse was eliminated from the land development plan *after* the initial information for the Module had been submitted. McNaughton Tr. 1467-69. The Module submission was never amended to reflect that fact. Mr. Finnegan confirmed at trial that at the time the Department reviewed the Module, the Department was aware that the developer had abandoned the plans to have a clubhouse included as part of this phase of the project. Finnegan Tr. 1217-18. Mr Finnegan admitted that the Department was aware at the time it approved the Module that the Module was actually seeking approval for more flow than what the developer then had as a part of its current plan. *Id.* He admitted that "it was just

a minor technical error in the approval letter," "I believe we could have reasonably left that out of the letter," and "[t]he letter could have been sent out without those 30 units included for the clubhouse. *Id.* at 1221, 1217, 1221.

We think that under the circumstances, the Department should have left the reference to the 30 EDUs, and the anticipated flow they represent for the clubhouse out of the letter. We will now correct the technical error in the approval letter by revising the Department's approval to delete the portion which refers to the 30 EDUs for the Clubhouse and reducing the anticipated sewage flow covered by the Module to 41,340 gallons per day.[9]

CONCLUSIONS OF LAW

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

2. The scope of the Board's review is *de novo* meaning that the Board is not limited to considering only the evidence that was before the Department when it rendered its decision but the Board will consider all relevant and admissible evidence presented to it at the time of hearing and will weigh all the evidence presented anew. 35 P.S. § 7514(c); *Pequea Township v. Herr*, 716 A.2d 678, 685-87 (Pa. Cmwlth. 1998); *Young v. Department of Environmental Resources*, 600 A.2d 667, 668 (Pa. Cmwlth. 1991); *Warren Sand & Gravel Co. v. DER*, 341 A.2d 556, 565 (Pa. Cmwlth. 1975); *Smedley v. DEP*, Docket No. 97-253-K, slip op. at 26-27 (Adjudication issued February 8, 2001); *O'Reilly v. DEP*, Docket No. 99-166-L, slip op. at 14 (Adjudication issued January 3, 2001).

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[9] The new anticipated sewage flow of 41,340 GPD is calculated as follows. Each EDU is 265 GPD. *See* Ex. 48 and n. 7, *supra.* 30 EDUs which had been allocated to the Clubhouse then represents 7,950 GPD which is 30 EDUs x 265/GPD per EDU. The anticipated sewage flow as specified in the November 15, 1999 approval letter is 49,290. The reduction of the 30 EDUs for the Clubhouse is a reduction of 49,290 GPD by 7,950 GPD to 41,340 GPD.

3. Actions before the Board involve the Board's *de novo* determination of whether the findings upon which DEP based its action are correct and whether DEP's action is reasonable and appropriate and otherwise in conformance with the law. *Smedley v. DEP*, Docket No 97-253-K, slip op. at 30.

4. Ainjar Trust has the burden of proof and the burden of proceeding in this case to demonstrate by a preponderance of the evidence that the Department's approval of this Module was error. 25 Pa. Code § 1021.101(a),(c)(2).

5. So-called "burden-shifting", as discussed in *Concerned Residents of the Yough, Inc. (CRY) v. Department of Environmental Resources,* 639 A.2d 1265 (Pa. Cmwlth. 1994) and *Marcon, Inc. v. Department of Environmental Resources*, 462 A.2d 969 (Pa. Cmwlth. 1983) is not applicable in this case.

6. The Department did not unlawfully fail to undertake its own independent review of this Module. *Heidelberg v. DER*, 1977 EHB 266.

7. There is an underlying Act 537 Sewage Facilities Plan for Susquehanna Township and that Plan is embodied in the "Sewerage Plan" for Dauphin County, prepared by the Dauphin County Planning Commission in 1969 which was adopted by the Township to be its Act 537 base plan by Resolution 71-R-20, dated December 29, 1971 and by Resolution 75-R-1 which was passed in 1975.

8. Even if there were no underlying Susquehanna Township Act 537 base plan, that would be no reason in and of itself to deny approval of the Module. 25 Pa. Code § 71.32(f)(3).

9. The Module is consistent with the underlying Act 537 base plan for Susquehanna Township in that the underlying plan calls for public sewage for the area covered by the Module and the Module contemplates the use of public sewers.

10. The Module is not deficient on the alleged basis that it lacked information on the precise nature of the connection made to the existing public sewer facilities.

11. The Module is not deficient on the alleged basis that the projected path of the connecting pipe traverses wetlands.

12. The Module is not deficient because it allegedly represents "segmented development" in that the Margaret's Grove development may, in the future, involve a larger number of dwelling units.

13. The Module covers only sewage facilities for the 156 single family housing units to be connected to the existing public sewage facilities by an 8-inch pipe. Any other configuration or broader scope of project would have to be subject to further Act 537 planning processes and, if applicable, Clean Streams Law permitting processes.

14. Ainjar, in this case, may challenge the Department's conclusion outlined in a January 5, 1999 letter to the Susquehanna Township Authority that the North Branch of the Paxton Creek Interceptor is in projected overload status. The conclusions in that letter are not administratively final with respect to the Chapter 94 consistency analysis which must be made with respect to this Module.

15. The Module is not inconsistent with the Chapter 94 Municipal Wasteload Management Program. 25 Pa. Code § 94.14.

16. Ainjar was provided with adequate public notice of the Module and there was no defect in the public notice and/or public participation process. *Green Thornbury Committee v. DER*, 1995 EHB 636.

17. The Department did err in issuing the Module approval so as to include 30 EDUs for a Clubhouse facility when the Clubhouse facility had been eliminated from the development project before the time that the Department reviewed the Module and the Department knew this to be the case.

18. Other than as just mentioned in Conclusion of Law No. 18, Ainjar failed to sustain its burden with credible evidence that the Department erred in approving this Module.

Accordingly, we enter the following:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

AINJAR TRUST,	:	
JOHN O. VARTAN, TRUSTEE	:	
	:	
v.	:	**EHB Docket No. 99-248-K**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION, SUSQUEHANNA TOWNSHIP	:	
and McNAUGHTON COMPANY	:	

ORDER

AND NOW, this 10th day of October, 2001, it is HEREBY ORDERED that the appeal of Ainjar Trust is denied except that the Board revises the Department's November 15, 1999 approval letter to delete the reference to the approval for the 30 EDUs for the "community center" and its accompanying anticipated sewage flow allocable to the Clubhouse of 7,950 GPD. The approval is thus amended so as to cover 156 EDUs for a total anticipated sewage flow of 41,340 gallons per day.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

Thomas W. Renwand

THOMAS W. RENWAND
Administrative Law Judge
Member

Michelle A. Coleman

MICHELLE A. COLEMAN
Administrative Law Judge
Member

MICHAEL L. KRANCER
Administrative Law Judge
Member

JUDGE LABUSKES WAS RECUSED FROM PARTICIPATION IN THIS ADJUDICATION.

DATED:

c: **DEP Bureau of Litigation**
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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

MILCO INDUSTRIES, INC., and MUNICIPAL AUTHORITY of the TOWN of BLOOMSBURG	:	
v.	:	**EHB Docket No. 2001-179-L (consolidated with 2001-188-L and 2001-194-L)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

OPINION AND ORDER ON MOTION TO SUSTAIN APPEAL

By Bernard A. Labuskes, Jr., Administrative Law Judge

Synopsis:

The Board treats a "motion to sustain appeal" as a motion for summary judgment. The motion, which challenges the Department's legal authority to issue an order to cease discharging industrial wastewater into a sewer system, is denied because there are genuine issues of material fact that are germane to the issue.

OPINION

Milco Industries, Inc. ("Milco") filed the appeal docketed at EHB Docket No. 2001-179-L from the Department of Environmental Protection's (the "Department's") order directing Milco to temporarily stop discharging industrial wastewater into Bloomsburg's sewer lines. The Department determined that the wastewater was the source of malodorous emissions from the sewer lines in a residential area. Milco denies that it is the cause of the malodors.

Milco has filed a "Motion To Sustain Appeal." The motion has been filed well in advance

of the completion of discovery. It is not supported by any discovery materials or independent affidavits. Instead, Milco argues that, based entirely upon the findings set forth in the Department's order, the Department lacks the legal authority to issue the order.

Our rules do not specifically provide for a "motion to sustain appeal." Milco's motion as measured by its timing, content, and everything but its title is a motion for judgment on the pleadings. Indeed, the first numbered paragraph of Milco's motion reads: "The pleadings are closed." We do not, however, accept motions for judgment on the pleadings in appeals from Departmental actions for the simple reason that there are no pleadings in such cases. 25 Pa. Code § 1021.2; *Allegro Oil & Gas, Inc. v. DEP*, 1998 EHB 790 (containing a detailed discussion of motions for judgment on the pleadings in Board cases). Milco relies on the findings set forth in the Department's order in support of its motion, but that order is not a pleading, and the Department is not necessarily limited to those findings in this appeal. *See Tanknology – NDE International, Inc. v. DEP*, 2000 EHB 638, 647. Milco's motion must fail for lack of a foundation.

Even if we were to treat the motion as a motion for summary judgment, it would need to be denied. Summary judgment is appropriate where there is no genuine issue of material fact as to a necessary element of the cause of action which could be established by additional discovery or expert reports. Pa.R.C.P. 1035.2; 25 Pa. Code § 1021.73. With rare exception, it is not ordinarily an efficient use of the parties' and the Board's resources to file motions for summary judgment prior to the close of discovery.

Milco's motion implicates numerous issues of disputed material fact. For example, Milco asserts that the Department does not have the authority to issue the order under the Air Pollution Control Act, 35 P.S. § 4001 *et seq.*, because there have been no emissions into the "outdoor

atmosphere." The Department's order, however, expressly describes such malodorous emissions from, *inter alia*, manholes in the sewer line. (See, e.g., Paragraphs I-K, T.) Milco asserts that it is not an "air contaminant source." The Department points out in response that such a source includes a facility "by reason of which" air contaminants are emitted. 35 P.S. § 4003. If the malodors are occurring by reason of the wastewater that was being produced by Milco's facility, the facility could very well be said to be source of the emissions and, therefore, fall within the statutory definition. Milco argues that the emissions in question are not malodorous under Board case law. The character of the emissions is a question of fact that is at the very heart of this matter, and that character is heavily disputed.

The Department's authority to issue the order under the other statutes cited in the order also involves disputed issues of material fact. It will only be possible to resolve those issues after the development of a proper record. There is no need to address those statutes at this juncture because the Department's authority under the Air Pollution Control Act remains an open issue. If we eventually determine that the Department had the necessary authority under the Air Pollution Control Act, it may not matter whether it also had authority under the other statutes cited in the order. We, of course, express no opinion on whether the order is otherwise lawful or whether it is necessary, reasonable, and appropriate.

Accordingly, we enter the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MILCO INDUSTRIES, INC., and MUNICIPAL AUTHORITY of the TOWN of BLOOMSBURG	:	
	:	**EHB Docket No. 2001-179-L**
v.	:	**(consolidated with 2001-188-L**
	:	**and 2001-194-L)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 16th day of October, 2001, Milco's motion to sustain its appeal docketed at EHB Docket No. 2001-179-L is **DENIED**.

ENVIRONMENTAL HEARING BOARD

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: October 16, 2001

See next page for service list.

EHB Docket No. 2001-179-L
(consolidated with 2001-188-L and 2001-194-L)

c: **DEP Bureau of Litigation**
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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOAF

RICHARD and CATHY MADDOCK	:	
	:	
v.	:	**EHB Docket No. 2001-183-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and CONSOL COAL COMPANY, Permittee	:	**Issued: October 19, 2001**

OPINION AND ORDER ON MOTION TO DISMISS

By Bernard A. Labuskes, Jr., Administrative Law Judge

Synopsis:

The Board dismisses an untimely appeal. The appellants' claim that they did not understand that one of the Department's actions was a final action, even if true, does not provide the Board with a basis for accepting jurisdiction over the untimely appeal.

OPINION

On August 10, 2001, Richard and Cathy Maddock filed an appeal from a Department of Environmental Protection ("Department") letter dated June 18, 2001, an internal Department memo dated June 7, 2001, and a Department letter dated June 7, 2000. On the section of the Board's notice-of-appeal form asking the appellant to identify "[o]n what date and how you received notice of the Department's action," the Maddocks wrote: "written letter dates: June 7 2000, June 7 2001 written letter dates June 18, 2001."

The Board issued an order on August 16, 2001 directing the Maddocks to identify the date on which they *received* notice of the Department's actions. In a response filed on September 6, the Maddocks wrote that they were told in a telephone conversation in July 2001 that the Department's letter was a final action. They continued: "The Maddock's were never sent a certified finalized action letter stating the date of the finalized action and that we had 30 days to appeal their action. The Maddock's wrote [the Department] for a letter showing a finalized date but the Department will not sent one."

On August 17, 2001, Consolidation Coal Company ("Consol") filed a motion to dismiss the Maddocks' appeal as untimely filed. Consol alleged that the Maddocks had failed to file their appeal within 30 days of receiving the Department letters and memorandum referenced in the notice of appeal. The Department subsequently concurred in the motion. The Maddocks have not responded to the motion.

The Board lacks jurisdiction over an appeal by a person to whom a Departmental action is directed or issued if it is filed more than 30 days after the person received written notice of the action. 25 Pa. Code § 1021.52(a)(1); *Rostosky v. Department of Environmental Resources*, 364 A.2d 761, 763 (Pa. Cmwlth. 1976); *Broscious Construction Co. v. DEP*, 1999 EHB 383, 384. Pursuant to 25 Pa. Code § 1021.70(f), we deem the Maddocks' failure to respond to Consol's motion as an admission that they filed their appeal more than 30 days after they received written notice of the three Departmental actions referenced in their notice of appeal.

It may be that the Maddocks, who are appearing *pro se*, believed that their response to the Board's August 16 order sufficed as a response to Consol's motion to dismiss. If we assume that the response relates to Consol's motion, the Maddocks have not denied the material facts set forth in Consol's motion; namely, that the Maddocks received notice of the Department's actions on or

near the date of the actions but did not file their appeal within 30 days of receipt. (See Consol Motion, ¶¶ 2, 4, 6, 7.) Accordingly, we deem those facts to have been admitted. 25 Pa. Code § 1021.70(e).

Although the Maddocks essentially concede that they filed an untimely appeal, they have provided an excuse for the late filing to the effect that they did not understand the Department's most recent action to be final. Any lack of understanding on the Maddocks' part regarding whether the Department's latest action was final, however, does not excuse their late appeal. *See Exeter Township v. DEP*, EHB Docket No. 98-154-L, slip op. at 8 (Opinion and Order issued May 30, 2001) (Department letter need not contain notice of appeal rights in order to constitute a final action). We also note that the Maddocks have not requested permission to file an appeal *nunc pro tunc*.

Accordingly, we lack jurisdiction over this untimely appeal, and we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

RICHARD and CATHY MADDOCK	:	
	:	
v.	:	**EHB Docket No. 2001-183-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and CONSOL COAL COMPANY, Permittee	:	

ORDER

AND NOW, this 19th of October, 2001, the Permittee's motion to dismiss is hereby **GRANTED**. This appeal is dismissed as untimely filed.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

Thomas W. Renwand

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

MICHAEL L. KRANCER
Administrative Law Judge
Member

DATED: **October 19, 2001**

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

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Southwestern Regional Counsel

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For Permittee, Consol Coal Company:
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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOAR

TOWNSHIP OF PARADISE AND LAKE SWIFTWATER, INC.	:	
	:	
v.	:	**EHB Docket No. 2001-024-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and AVENTIS PASTEUR, INC., Permittee	:	**Issued: October 30, 2001**

OPINION AND ORDER ON MOTION FOR SANCTIONS

By George J. Miller, Administrative Law Judge

Synopsis:

The Board denies a pre-hearing motion for sanctions which seeks to preclude the introduction of witnesses in the appellant's case at the hearing on the merits. Although the appellant has not answered interrogatories with a great deal of specificity it is impossible for the Board to judge the prejudice to the permittee or the willfulness of the appellant at this point. There have been no motions to compel more specific answers to interrogatories nor has the appellant violated any orders of the Board requiring more specific answers to the interrogatories. Accordingly, the harsh sanction of precluding the introduction of witnesses at the hearing is inappropriate.

OPINION

Before the Board is a motion for discovery sanctions filed by Aventis Pasteur, Inc., the permittee in an appeal of a National Pollutant Discharge Elimination System (NPDES) permit, for violations of discovery rules by the Appellants, the Township of Paradise and Lake Swiftwater Club, Inc. Specifically, Aventis seeks to bar the Appellants from introducing evidence at the hearing on the merits in the form of documents and testimony because the Appellants provided answers to interrogatories which Aventis believes were not specific enough. Although we can sympathize with Aventis' frustration with the Appellants' answers, we do not believe that the harsh sanction of preclusion is appropriate at this time.

The relevant facts are as follows. Aventis first served interrogatories upon the Appellants on March 12, 2001. Interrogatory Nos. 3, 6, 7, 11, and 12 sought the identification of fact witnesses who may have knowledge concerning the factual basis for the objections in the notice of appeal. Similarly Interrogatory Nos. 26-41 sought the factual basis for the objections and documents which supported those factual assertions. These questions included a request for the Appellants to identify effluent limits which the Appellants believed would be appropriate where there were limits in the permit that they charged were inadequate. On June 29, 2001 the Appellants served answers to these interrogatories.[1] Their answers to the interrogatories at issue identified some witnesses, but stated also that the Appellants were continuing to investigate their case and could not as of that time provide complete answers. As for their factual bases for their appeal, the Appellants stated that they were continuing to investigate and review documents and

[1] Aventis' Motion Ex. B.

could not answer the interrogatories with specificity.[2] The Appellants did not further supplement their answers until Aventis filed a motion to compel on August 14, 2001. The Appellants did not respond to the motion but on September 8, 2001, a Saturday, served a supplemental response to the interrogatories. Their response provided the names of further witnesses and some additional facts, but noted that the Appellants were continuing to review the information and had forwarded documents to their experts for review and would provide more specific factual statements in their answers to expert interrogatories. Discovery closed the following Monday, September 10, 2001.

On September 13, 2001, the Board held a conference call on several motions which had been filed in this matter, including Aventis' August 14 motion to compel. In view of the Appellants' supplemental response the Board ordered that the motion would be considered upon receipt of any supplement that Aventis desired to file. Accordingly, Aventis filed its current motion.

The Board's authority for imposing sanctions is governed by 25 Pa. Code § 1021.125. Whether or not to impose sanctions is wholly within the Board's discretion and must be appropriate given the magnitude of the violation.[3] Ordinarily, discovery sanctions, especially the sanction of the preclusion of evidence, are not imposed unless a party defies an order compelling discovery.[4] We do not believe it is appropriate to deviate from that practice in this case. First, the Appellants did make some attempt to answer

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[2] The Appellants also interposed objections to some of the interrogatories, but went on to provide the answers described.

[3] *Environmental & Recycling Services v. DEP*, EHB Docket No. 2000-172-C (cons.)(Opinion issued September 7, 2001).

[4] *DEP v. Land Tech Engineering, Inc.*, 2000 EHB 1133; *see also, Griffin v. Tedesco*, 513 A.2d 1020, 1024 (Pa. Super. 1986); *DER v. Chapin & Chapin*, 1992 EHB 751.

Aventis' interrogatories. This is a highly technical and scientifically complex appeal, and while the Appellants could certainly be more diligent in reviewing materials related to the appeal, we see nothing that amounts to willfulness in their attempts to answer Aventis' discovery request. Second, this motion comes shortly after the close of discovery, therefore it is impossible to truly gauge the prejudice which may actually be suffered by Aventis. Aventis has not yet had to file its responsive expert report, nor has the filing of pre-hearing memoranda and hearing been scheduled.

Third, we can not conclude that precluding the introduction of evidence is the only mechanism for redressing Aventis' grievance. The Board certainly would have been willing to entertain a motion to extend discovery or for more specific answers to interrogatories had Aventis filed such a motion. Further, the Rules of Civil Procedure require the Appellants to automatically amend their answers to interrogatories under certain circumstances. Examples include, where the respondent made an incorrect response, or where the response is no longer true.[5] This duty is not limited to the period allowed for discovery, but continues.[6] Further, the explanatory note to Pa. R.C.P. No. 4007.4, which governs interrogatories states that "the inquirer may, at any time, force a review of prior responses by filing supplementary interrogatories or noticing a supplementary oral examination to discover whether the respondent has become aware of any information which requires an amendment of any prior response."[7] In short, there are many mechanisms available to Aventis to discover the information it seeks, very likely without undue delay in the scheduling of a hearing in this appeal.

---

[5] Pa. R.C.P. No. 4007.4(2).

[6] *Environmental & Recycling Services v. DEP*, EHB Docket No. 2000-172-C (cons.)(Opinion issued September 7, 2001).

[7] Pa. R.C.P. No. 4007.4, Explanatory Note.

Finally, the preclusion of evidence in not an appropriate sanction because the Appellants have not violated any order of the Board directing discovery in this matter which would establish a pattern of disobedience meriting the sanction of preclusion.[8]

In sum, we do not find the Appellants' behavior in discovery so egregious that the sanction of preclusion of evidence at the hearing is merited at this time. Of course, the Appellants have a continuing obligation to seasonably supplement their answers to interrogatories and responses to a request for production of documents as outlined in Pa. R.C.P. No. 4007.4. Should they fail to do so, and other avenues of relief are exhausted, Aventis is free to ask the Board to revisit the issue.[9]

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[8] *Cf.* Where an appellant in an appeal has failed to fully answer interrogatories concerning his expert witnesses—despite the Board's rules, repeated orders, and a conference call admonishing it to do so—the Board will grant a motion to preclude those witnesses from testifying at hearing. *DEP v. Land Tech Engineering, Inc.,* 2000 EHB 1133.

[9] *See Environmental & Recycling Services v. DEP*, EHB Docket No. 2000-172-C (cons.)(Opinion issued September 7, 2001)(holding that the Department violated the rules of discovery by failing to supplement answers to interrogatories and discovery requests meriting the preclusion of certain documents at the hearing.)

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

TOWNSHIP OF PARADISE AND LAKE SWIFTWATER, INC.	:	
	:	
v.	:	**EHB Docket No. 2001-024-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and AVENTIS PASTEUR, INC., Permittee	:	

ORDER

AND NOW, this 30th day of October, 2001, the motion for sanctions of Aventis Pasteur, Inc. in the above-captioned matter is hereby **DENIED**.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

DATED: October 30, 2001

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

PETER BLOSE	:	
	:	
v.	:	**EHB Docket Nos. 98-034-R**
	:	**and 2000-275-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and SEVEN SISTERS MINING COMPANY, Permittee	:	**Issued: November 1, 2001**

OPINION AND ORDER ON APPELLANT'S MOTION TO AMEND APPEAL

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

The Appellant's Motion to Amend Notice of Appeal is granted in part and denied in part. The Appellant will be permitted to amend his appeal to allege the Department failed to make a written finding regarding presumptive evidence of water pollution since he raised a similar issue in an earlier amendment to his appeal. His motion is denied in all other respects since it fails to satisfy the requirements of 25 Pa. Code § 1021.53(h).

OPINION

Presently before the Board is Appellant Peter Blose's Motion to Amend Notice of Appeal.[1] The Board has issued various opinions in these matters, including two Adjudications in

[1] Also before the Board is Appellant's "Motion to Amend Peter Blose's Motion to Amend Notice of Appeal." Mr. Blose, contrary to 25 Pa. Code § 1021.53(d), did not support his Motion to Amend with the necessary affidavit. He has now filed the required affidavit. Pursuant to 25 Pa.

the Appeal docketed at EHB Docket No. 98-034-R. Basically Mr. Blose seeks to amend his appeal to allege that the Department of Environmental Protection (Department) failed to make written findings required by law and that the Department did not review or reconsider the revised Laurel Loop mine application as required by our Adjudication and Order issued March 7, 2000.

The Permittee and Department oppose the Motion to Amend. Permittee argues that according to Mr. Blose, he inspected the Department's files shortly after the issuance of the revised permit so he had to have been aware of the alleged lack of documentation when he filed his Notice of Appeal at EHB Docket No. 2000-275-R in December, 2000 and his Amended Notice of Appeal on January 2, 2001. Permittee further alleges that Appellant did not exercise due diligence in "discovering" these "new objections." For us to allow such an amendment now, according to both the Permittee and the Department, would result in prejudice to them as they would have to undertake additional discovery and preparation.

The Department also argues, quite convincingly, that Mr. Blose's argument in support of its position would virtually swallow-up the requirement to timely raise objections. Under Mr Blose's approach, the Department contends, an appellant would only need to allege that its additional objections are in some way related to facts learned in discovery. Since the purpose of discovery is to learn facts related to the appeal, this should not be difficult to do. Thus, the Department contends, almost any appellant would be able to raise new objections virtually at will throughout the pre-hearing period. There is substantial merit in the Department's position.

It has been the long-standing rule in proceedings before the Environmental Hearing Board that an appellant waives any issues not raised in the notice of appeal.[2] The notice of appeal should set forth all grounds of appeal.

Code Section 1021.4 we will disregard this "error or defect of procedure which does not affect the substantial rights of the parties."

An appeal may be amended as of right within twenty days after the filing and docketing of the appeal.[3] Mr. Blose utilized this procedure in his second appeal by filing an Amended Notice of Appeal within twenty days after the filing of his Notice of Appeal. After the twenty day period for amendment as of right, the Board, upon motion by the appellant, may grant leave for further amendment of the appeal.[4] Our rule provides as follows:

> This leave may be granted if Appellant establishes that the requested amendment satisfies one of the following conditions:
>
> 1) It is based upon specific facts, identified in the motion, that were discovered during discovery of hostile witnesses or Departmental employees.
> 2) It is based upon facts, identified in the motion, that were discovered during preparation of appellant's case, that the appellant, exercising due diligence, could not have previously discovered.
> 3) It includes alternate or supplemental legal issues, identified in the motion, the addition of which will cause no prejudice to any party or intervenor.[5]

In applying this standard to decide Mr. Blose's Motion to Amend, we are hard-pressed to allow any amendment to his Notice of Appeal. Moreover, based on his numerous failures to answer discovery requests pursuant to the Pennsylvania Rules of Civil Procedure, we are certainly mindful of the Permittee's and Department's strong arguments of the prejudice they may suffer in having to conduct additional discovery if these amendments are permitted. Nevertheless, after carefully reviewing the proposed amendments, we will allow Mr. Blose to amend his Notice of Appeal to allege that the Department failed to make a written finding regarding the revised application that there was no presumptive evidence of water pollution as required by 25 Pa. Code Section 86.37(a)(3). We note that Mr. Blose raised a similar issue in his Amended Notice of Appeal filed in January, 2001. We also are not convinced that either the

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3 *Enterprise Tire Recycling v. DEP*, 1999 EHB 900; *Lucchino v. DEP*, 1999 EHB 759; 25 Pa. Code Section 1021.51(e).

4 *Caernarvon Township Supervisors v. DEP*, 1997 EHB 60; 25 Pa. Code Section 1021.53(a).

5 25 Pa. Code Section 1021.53(b).

25 Pa. Code Section 1021.53(b)(1)(2)(3).

Department or Permittee will be prejudiced in any way by this amendment. We do not foresee extensive discovery on this issue and it is closely related to an issue already in the case.

The other proposed amendments will not be permitted. Such amendments would run afoul of 25 Pa. Code Section 1021.53 for the reasons earlier set forth in this opinion.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PETER BLOSE	:	
	:	
v.	:	**EHB Docket Nos. 98-034-R**
	:	**and 2000-275-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 1st day of November, 2001, Appellant's Motion to Amend Appeal is **granted in part** and **denied in part**. Appellant, within twenty days of the date of this Order, may file an Amended Appeal as set forth in the within Opinion. All other requested amendments are **denied**.

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Administrative Law Judge
Member

DATED: November 1, 2001

See following page for service listing

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

PETER BLOSE	:	
	:	
v.	:	**EHB Docket Nos. 98-034-R and 2000-275-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and SEVEN SISTERS MINING COMPANY, INC., Permittee	:	**Issued: November 1, 2001**

OPINION AND ORDER ON MOTIONS TO COMPEL

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

The Permittee's Motion to Compel is granted in part. The Appellant shall make himself available for a deposition in which he will be required to answer questions regarding his visits to the permit site, including the dates of his visits and the names of people with whom he visited the site. However, the Permittee is not entitled to discovery regarding the Appellant's medical information and former wife. These matters are not relevant to the issues raised in this appeal; nor are they likely to lead to admissible evidence. The Appellant's Motion to Compel filed against the Department is denied where it is not clear that the document was requested, there was no intent on the part of the Department to hide the document in question, and the Appellant now has the document in his possession.

OPINION

These cases involve third party appeals where the Department of Environmental Protection (Department) has authorized Seven Sisters Mining Company (Seven Sisters) to conduct surface coal mining activities in Armstrong County. The Board had issued two adjudications in the appeal filed at EHB Docket Number 98-034-R and various opinions and orders. Presently before the Board are two Motions to Compel. The first one is Seven Sisters' Second Motion to Compel against Appellant Peter Blose. The second is Appellant's Motion to Compel against the Department.

Discovery before the Board is governed largely by the Pennsylvania Rules of Civil Procedure.[1] These rules provide that "a party may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action. .."[2] "Relevancy" for the purposes of discovery is to be broadly construed.[3] As pointed out recently by Judge Miller, "this is distinct from the concept of relevancy for the purposes of hearing, which is a much narrower inquiry. For the purposes of discovery, it is not a ground for objection that the information sought would be inadmissible at hearing, so long as it is reasonably likely that the information will lead to admissible evidence."[4] The burden is on the party objecting to a discovery request to demonstrate its right to produce the information.[5]

Discovery must also be conducted in good faith or the system will break down. The purpose

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1 25 Pa. Code § 111(a).
2 Pa. R.C.P. 4003.1(a).
3 *Valley Creek Coalition v. DEP*, 2000 EHB 971; *Harbison-Walker Refractories v. DER*, 1992 EHB 943.
4 *Valley Creek, supra* at 972.
5 *County of Allegheny, Department of Aviation v. DEP*, 2000 EHB 1255, 1256.

of the discovery rules is to secure the just, speedy, and inexpensive determination of every action.[6] Discovery is not intended to be an "intermediate arena for jousting" in the time between the filing of the Notice of Appeal and the filing of the pre-hearing memoranda.[7] Parties may not take positions clearly contrary to the Rules of Civil Procedure and then soften their stances or spit the information out in bits and pieces when a motion to compel is filed. Such practices turn the search for truth and justice into a game.[8]

1.. *Permittee's Motion to Compel*

With these principles in mind we turn now to Seven Sisters' Motion to Compel. It is readily apparent after a review of the papers that the parties are engaged in a fierce battle over discovery. Previously, the Board issued an Order (in April 2001) after carefully reviewing Seven Sisters' Motion to Compel and Mr. Blose's responses. That motion concerned interrogatories and Requests for Production of Documents directed to Mr. Blose. Since that time Mr. Blose was deposed, which has sparked more legal fireworks.

Seven Sisters filed a lengthy Motion to Compel on July 27, 2001. The motion focused on answers Mr. Blose gave at his deposition. Seven Sisters argues that it is stymied in its attempts to discover information concerning the Appellant Peter Blose's residence, his visits to the permit site, and individuals who may have observed him recreating in the area. Seven Sisters contends that Mr. Blose refused, at his deposition, to answer questions specifically setting forth dates of his visits,

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6 Pa. R.C.P. 126.
7 *Oley Township v. DEP*, 1995 EHB 1005, 1008.
8 *People United to Save Homes v. DEP*, 1998 EHB 194, 197.

specific people who accompanied him to the site, and even the identity of the person who took his photograph at or near the permit site. Mr. Blose, a law school graduate, argues that much of the information requested is not relevant.

In response to this Motion to Compel, Mr. Blose filed a lengthy response. Although still contending that most of the disputed questions were irrelevant, his response did include the names of various surface owners and other information that he had refused to disclose at his deposition. Based on this response, the Board issued an Order denying the motion without prejudice since it appeared "that Appellant in his response has answered some of the discovery requests of the Permittee." The Board indicated that Seven Sisters was free to file another Motion to Compel "setting forth any of its discovery requests it feels are proper and that are still not answered after the filing of Appellant's response."

The Board's intent in issuing such an order was twofold – to enable the parties to clearly set forth what discovery requests were still at issue and to provide them with a further opportunity and framework to resolve the discovery issues themselves. However, this attempt to simplify the discovery issues and encourage the parties to untie this Gordian Knot has only resulted in more confusion and evidently a hardening of positions. Seven Sisters' next Motion to Compel incorporates all 18 paragraphs of its earlier motion and then makes additional complaints. Mr. Blose's response incorporates his previous response and disputes Seven Sisters' new discovery contentions.

The Pennsylvania Rules of Civil Procedure envision that the parties will freely exchange information with little or no involvement from the tribunal. Nevertheless, the Rules of Civil Procedure provide the tribunal, in this case the Environmental Hearing Board, with broad and far-reaching ability to effectively police discovery. The Board has a wide array of sanctions it can impose including the barring of witnesses from testifying at hearing, the striking of pleadings, and a whole host of lesser sanctions.

The Board has literally spent hours trudging through this swamp of accusations and counter-accusations. It is clear that some of Seven Sisters' requests are overly broad. Medical information and the whereabouts of Mr. Blose's ex-wife, whom he evidently divorced 15 years ago, have no place in this case. A person does not lose constitutionally protected privacy rights by filing an appeal objecting to the granting of a permit to a mining company. Such an exercise of his rights as a citizen should not result in the opening up of his medical records and marital history. These matters are not relevant to the issues raised in this appeal; nor could they possibly lead to admissible evidence.

However, some of Mr. Blose's answers to questions posed at his deposition are simply outrageous. At his deposition, Mr. Blose refused to identify people he had visited at the Laurel Loop (the permit site), people he had recreated with on the Crooked Creek, and even people who drove around with him at the site and took his picture. Only after motions to compel were filed did he provide some of the information requested at his deposition. This practice is simply not acceptable.

As Mr. Blose well knows, this is not the way discovery is supposed to work. By simply

providing names and some information after the deposition, he has effectively deprived Seven Sisters and the Department from probing his answers with follow-up questions. Mr. Blose contends he has legal standing to prosecute this case based, in part, on his recreational use of the Laurel Loop. Yet at his deposition he refused to identify anyone who could verify his visits or testify concerning his activities. To argue, as he does, that such activities may take place as solitary activities, is certainly true. It also completely misses the point. He has testified that at least on some occasions he was with people when he engaged in these activities. Seven Sisters is clearly entitled to conduct discovery in this area and Mr. Blose must answer questions in this regard.

2. *Appellant's Motion to Compel*

On October 12, 2001 Mr. Blose filed a Motion to Compel Discovery against the Department. He subsequently filed a Motion to Amend his Motion to Compel Discovery. Mr. Blose essentially argues that the Department never produced a letter from one of Seven Sisters' attorneys to Department counsel written shortly after the Board's Adjudication.

This letter eventually was placed in the Department's public file and was subsequently discovered by Mr. Blose. Based on the Department's failure to provide this document in response to Mr. Blose's interrogatory requesting the Department to "identify all documents pertaining to the revised surface mine permit no. 03950113 issued November 20, 2000 either from or to or produced by the department dated on or before November 20, 2000 which are not privileged ***other*** than the following ..." and since this document allegedly was not in the Department's public file until more

recently, Mr. Blose wants the Board to order the Department to fully answer his interrogatories, conduct a Department-wide search for any and all documents regarding the revised Laurel Loop permit, and require written responses from all personnel employed at the Greensburg District Mining Office regarding the search for such documents.

The Department opposes the motion. First, it contends that it did provide all documents responding to Mr. Blose's interrogatories. The Department argues that the letter "does not pertain to the revised surface mining permit" and "at the time of the March 15, 2000 letter, no permit revision had been submitted nor had any discussions about revising the Laurel Loop permit occurred. The letter contained [counsel's] unsolicited thoughts about what his client [Seven Sisters] may do in the future in response to the Board's March 7, 2000 decision." In addition the Department filed an affidavit from its lead reviewer, Mr. Michael Gardner, indicating that "he did not rely upon or otherwise base any review and ultimate recommendation to issue the Laurel Loop revision, issued in November, 2000, in any way on the March 15, 2000 letter." The Department further explains that there may have been a slight delay in placing the letter in the public file but contends that the letter was in the file at the time of Mr. Blose's previous reviews.

Because we believe Mr. Blose's interrogatory is inartfully drafted we accept the Department's position that the March 15, 2000 letter was properly not identified. Moreover, Mr. Blose now has the document and we are convinced that there was certainly no intent on the Department's part to "hide" this document. In addition, even if Mr. Blose is correct that the document was not in the

public files until recently we see no basis for his broad-based assault on the Department's document management system as set forth in its public files. We are convinced that the Department will answer all properly propounded discovery requests and we see no need to grant the relief Mr. Blose requests in his Motion to Compel.

We will issue an appropriate Order.

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

PETER BLOSE		
	:	
v.	:	**EHB Docket Nos. 98-034-R**
	:	**and 2000-275-R**
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION and SEVEN SISTERS	:	
MINING COMPANY, INC., Permittee	:	

ORDER

AND NOW, this 1st day of November, 2001, it is ordered as follows:

1) Seven Sisters' Motion to Compel is **granted in part**.

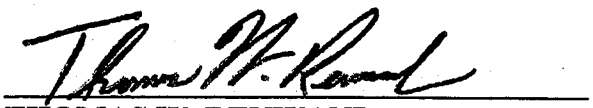
2) The motion is granted in that Mr. Blose shall make himself available for a deposition at a mutually convenient time and answer questions posed consistent with this Opinion and our previous Order issued in April 2001. In addition, he shall specifically answer any questions as set forth in paragraphs 10a, b, d, e, and f of Seven Sisters' Second Motion to Compel.

3) The parties shall advise the Board of the date and time of Mr. Blose's deposition. Any disputes arising at the deposition that counsel and Mr. Blose can not resolve at the deposition shall immediately be brought to the

Board's attention by a telephone call.

4) Mr. Blose's Motion to Compel Discovery is **denied**.

ENVIRONMENTAL HEARING BOARD



THOMAS W. RENWAND
Administrative Law Judge
Member

DATED: **November 1, 2001**

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

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION :

v. :

ANDREW LENTZ :

EHB Docket No. 2000-198-CP-K

Issued: November 9, 2001

OPINION AND ORDER ON MOTION TO COMPEL

By Michael L. Krancer, Administrative Law Judge

Synopsis:

The Department's Motion To Compel Answers To DEP's First Set Of Interrogatories alleging that the defendant failed to provide any responses to a list of interrogatories is denied because the defendant did provide answers. Whether the answers may be inadequate or insufficient is not a question presented by the Department's motion. Also, the Board denies the Department's request that a document referred to in the responses to interrogatories be produced because there is no documentation that the document was asked for in the discovery process.

OPINION

Factual and Procedural Background.

This matter arises from a Complaint for Assessment of Civil Penalties filed by the Department of Environmental Protection (Department), on September 20, 2000 as Plaintiff

against the Defendant Andrew Lentz (Mr. Lentz or Lentz). The Department seeks $50,350.00 in civil penalties from Mr. Lentz for alleged earth disturbance activities conducted without proper erosion and sedimentation control measures and in violation of NPDES permit conditions. Mr. Lentz is proceeding in this matter *pro se*.

The Board has ruled on three previous Department motions. On April 24, 2001 the Department filed a Motion for Default because Lentz had not served an answer to the Department's Complaint. After a conference call among the Board, counsel for the Department and Mr. Lentz, the Board entered an Order dated May 5, 2001 ordering Lentz to file his Answer by no later than May 11, 2001, holding the Department's Motion For Default in abeyance until then and warning Mr. Lentz that sanctions would be imposed if no Answer were filed by the deadline set forth in the Order. Lentz filed an Answer on May 11, 2001 and the Board, then, denied the Department's Motion For Default by Order dated June 14, 2001. The June 14, 2001 Order also established a discovery schedule. The Department's next Motion came as a result of Lentz's ignoring the Department's Interrogatories and Requests For Admission which had been duly served on Lentz pursuant to the June 14, 2001 Order. On August 16, 2001, since Lentz had failed to respond at all to the Department's pending Interrogatories or Requests For Admission, the Department filed a Motion to Deem Matters Set Forth in the Department's Request for Admissions Directed to Complainant Admitted and a Motion to Compel Answers to DEP's First Set of Interrogatories. Lentz failed to respond to that Motion. By Opinion and Order dated September 13, 2001, the Board granted both of the Department's motions. *DEP v. Lentz*, Docket No. 2000-198-K (Opinion Issued September 13, 2001). Lentz was ordered to supply full and complete answers to the pending Department interrogatories by September 28, 2001.

Lentz sent his answers to the interrogatories directly to the Board by telecopy on September 28, 2001 and the responses were received by regular mail on October 1, 2001. He did not serve the Department with the responses but the Board telecopied Lentz's responses to counsel for the Department on September 28, 2001. DEPM ¶¶ 14, 15. On the heels of its receipt of Lentz's answers, the Department filed the instant Motion To Compel Answers To DEP's First Set Of Interrogatories on October 11, 2001. It is that Motion with which we deal in this Opinion and Order. As is now customary for Lentz, he filed no response to the Department's October 11, 2001 Motion.

Discussion.

The Department's Motion alleges that Lentz's responses "failed to set forth *any* response to the following interrogatories" [nos. 7, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 21, and 22]". DEPM ¶ 17 (emphasis in the original). The Motion also states that Lentz refers to a "Soil Erosion and Sedimentation Control Narrative Report" throughout his responses but fails to attach this document. DEPM ¶ 18. Thus, the Department asks that we direct Lentz to supply the Department with this document. The Department contends that Lentz has violated the Board's September 10, 2001 Order.

25 Pa. Code § 1021.70(f) provides that where there has been a failure to respond to a motion, as is the situation here, the Board will deem the factual allegations asserted in the motion to have been admitted. 25 Pa. Code § 1021.70(f). However, we will not take that path here because our review of the responses of Mr. Lentz to the Department's Interrogatories shows that he did respond to each and every of the numbered interrogatories that the Department lists in Paragraph 17 of its Motion. We note that for No. 12 he responds by stating, "[i]t is not clear what you are asking for in this section". Even this, though, is not a total failure to respond. In

fact, each numbered response sets forth responses in itemized alphabetized form which apparently must reflect the itemized sub-parts of the numbered interrogatories.

We cannot tell whether the answers may be deemed to be insufficient or inadequate nor do we even entertain that question here. The Department's Motion does not provide as an exhibit a copy of the actual Interrogatories served so we cannot, in this Motion, compare the Interrogatories to the responses provided. Paragraph 17 of the Motion sets forth only digests and/or partial quotes of the respective interrogatories. This is apparent because, as we noted, Lentz's numbered responses are set forth in alphabetized subparagraphs which must correspond to sub-parts of each of the Interrogatories. Also, Paragraph 17 of the Department's Motion refers to there not being an answer to "[a]ll parts of Interrogatory 12, including sub-parts (a) – (h)." None of the paraphrases outlined in Paragraph 17 of the Department's Motion contain any sub-parts. In any event, the Department's Motion does not allege that the answers are insufficient or incomplete, only that Lentz has not provided any responses to the Interrogatories listed which is simply not the case.

We will not grant the Department's request that the Board direct Mr. Lentz to attach a copy of "Soil Erosion and Sedimentation Control Narrative Report" in the context of this motion to compel. DEP Motion to Compel ¶ 18. This Motion is to compel answers to interrogatories not to compel responses to document production requests. A motion to compel responses to interrogatories, even if meritorious, is not the proper vehicle in our view for a party to tack on a request for production of a document which happened to have been mentioned in the responses to interrogatories but for which there is no record documenting that it was ever asked for in discovery in its own right.

It is no matter in determining this motion to compel answers to interrogatories that the document referred to in the responses to the interrogatories might have been unheard of before the answers to interrogatories were provided. First, as we eluded to, it simply does not appear that Lentz was ever asked in the discovery process to produce this document. Second, it is a simple task to include, either as a sub-part of each interrogatory, or as a separate one, a request that the responding party identify any documents relied upon or consulted in formulating the interrogatory responses and to serve with the interrogatories an accompanying document production request which includes a request for the production of any and all documents referred to or mentioned in the responses to interrogatories or which a party may have referred to in formulating responses to the interrogatories.

Accordingly, we enter the following:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**EHB Docket No. 2000-198-CP-K**
v.	:	
ANDREW LENTZ	:	

ORDER

AND NOW, this 9th day of November, 2001, The Department's Motion To Compel Answers To DEP's First Set Of Interrogatories is **DENIED**.

ENVIRONMENTAL HEARING BOARD

MICHAEL L. KRANCER
Administrative Law Judge
Member

DATED: November 9, 2001

c: **For the Commonwealth, DEP:**
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Southcentral Region

Defendant:
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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

TOWNSHIP OF PARADISE AND LAKE SWIFTWATER, INC.	:	
v.	:	**EHB Docket No. 2001-024-MG**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and AVENTIS PASTEUR, INC. SCHOOL DISTRICT, Permittee	:	**Issued: November 15, 2001**

OPINION AND ORDER ON SECOND MOTION TO AMEND NOTICE OF APPEAL

By George J. Miller, Administrative Law Judge

Synopsis:

The Board denies a second motion to amend a notice of appeal to add additional objections concerning the discharge of mercury in an appeal of a National Pollutant Discharge Elimination System permit. Although the appellants have adduced additional data that was not presented in their first motion to amend its appeal, there remains nothing to suggest that the claim should not have been included in their original appeal. The appellants were aware that the permit contained an effluent limitation for mercury even before their notice of appeal was filed and made a conscious decision not to include an objection. Although the information obtained in discovery may indicate to them that mercury presents a more significant issue than they originally thought, the essence of the

claim is not newly discovered. The additional delay in discovery and resulting prejudice to the permittee is therefore not justified.

OPINION

The Township of Paradise and Lake Swiftwater Club, Inc., Appellants, have for a second time asked this Board to grant them leave to amend their notice of appeal to object to the issuance of a National Pollutant Discharge Elimination System (NPDES) permit to Aventis Pasteur, Inc. Specifically, the Appellants wish to add an objection based on the discharge of mercury. Although the Appellants have included a significant amount of scientific data with this motion which they believe makes the mercury discharge more serious than they believed it to be at the time they filed their notice of appeal, they have not demonstrated that their objection is really a new objection that they could not have included in their original appeal. We will therefore deny their motion.

As we explained in our prior opinion, the Board's rules allow amendments to appeals which are factual in nature in two circumstances: It is based on facts that were discovered from a hostile witness or Departmental employee; or, it is based on facts which could not have been previously discovered by the appellant.[1] Clearly, the facts upon which the Appellants contend support their new objection were obtained through test results and analysis by the Appellants' own experts, and not from a hostile witness or a Departmental employee.[2] Moreover, for the most part, the studies are based on sampling in areas[3] which have been available to the Appellants at all times.[4] Therefore, in

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[1] 25 Pa. Code § 1021.53(b).
[2] *See* Appellant's Motion at 2.
[3] Swiftwater Lake and Swiftwater Creek.

order to provide a basis for the Board to grant leave to amend their appeal, the Appellants must satisfy the second criterion. Reviewing their motion and attached exhibits, we find that they have not met the requirement that the new objection is based upon facts that could not have been previously discovered.[5]

First, in both this motion and their first motion to amend, the Appellants admit that the discharge of mercury was a concern even before the final permit was issued. In fact, the Appellants commented on the draft NPDES permit based on its concern about the discharge of mercury. Also, the permit itself includes a specific effluent limitation for mercury. Accordingly, it is very clear that a discharge of mercury as a potential basis for an objection to the permit was well known to the Appellants before the permit was even finally issued. Even if the Appellants did not believe that it was a significant problem, there was no impediment to including it in the notice of appeal as a protective measure. Therefore, although there are facts which have come to light that the Appellants believe demonstrate that the discharge of mercury may be a more significant issue than the Appellants thought at the time they filed their notice of appeal, it does not amount to a new basis for objecting to the issuance of the permit within the meaning of 25 Pa. Code § 1021.53. That is, the essence of the claim both then and now is that the Department failed to give proper consideration to the effect of the discharge of mercury when it issued Aventis' permit.

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[4] The only area solely within Aventis' control were samples taken from a holding pond. However, there is no evidence of mercury in the water of that holding pond. (See Appellant Motion, Ex. B)

[5] Aventis spent a significant portion of their response pointing out the procedural deficiencies of many of the Appellants' exhibits. Because of our disposition of this motion we do not reach the question of whether or not the exhibits are properly supported or verified as required by the Board's rules.

The Appellants explain their decision to not object to mercury in the original notice of appeal because of alleged assurances from Aventis that mercury limits in the permit would not be exceeded.[6] However, there is no suggestion by the Appellants that Aventis' behavior was somehow fraudulent or improper. Further the Appellants have been represented by counsel through much of the permitting process and throughout the proceedings before the Board.[7] Therefore the responsibility for their decision to not include an objection to the permit based on a mercury discharge is the Appellants' alone.

Finally, the existence of this controversy has limited Aventis' ability to move their proposed facility expansion forward, providing yet another reason to limit the Appellants' ability to amend their appeal with a claim that should have been included in their original appeal. The result of permitting such an amendment would require additional discovery and cause further delay which is clearly not justified in these circumstances.

We therefore enter the following:

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[6] This was also an excuse offered in their first motion. *See Township of Paradise v. DEP*, EHB Docket No. 2001-024-MG (Opinion issued October 2, 2001), slip op. at 3-4.

[7] Appellants' Motion, Ex. F at 1.

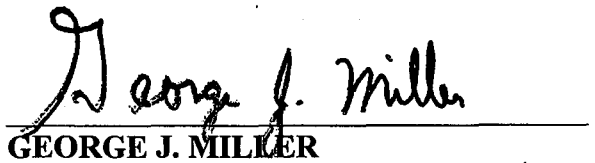
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

TOWNSHIP OF PARADISE AND LAKE SWIFTWATER, INC.	:	
v.	:	**EHB Docket No. 2001-024-MG**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and AVENTIS PASTEUR, INC. SCHOOL DISTRICT, Permittee	:	

ORDER

AND NOW, this 15th day of November, 2001, the motion of the Township of Paradise and Lake Swiftwater Club, Inc. in the above-captioned matter is hereby **DENIED.**

ENVIRONMENTAL HEARING BOARD



GEORGE J. MILLER
Administrative Law Judge
Chairman

DATED: November 15, 2001

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

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

UNITED MINE WORKERS OF AMERICA, UNITED MINE WORKERS OF AMERICA DISTRICT 2, AND UNITED MINE WORKERS OF AMERICA, LOCAL 1197	:	
v.	:	**EHB Docket No. 2001-081-K**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION AND EIGHTY FOUR MINING COMPANY, PERMITTEE	:	**Issued: December 5, 2001**

ADJUDICATION

By Michael L. Krancer, Administrative Law Judge

Synopsis:

The Board rescinds the Department's approval of a variance from the provisions of Section 228(a) of the Pennsylvania Bituminous Coal Mining Act, Act of July 17, 1961, P.L. 659, as amended, 52 P.S. §§ 701-101 – 701-706 (BCMA), which requires that a pre-shift examination be performed within the three hours immediately preceding the start of a coal or non-coal producing shift. Eighty-Four Mining Company (EFMC) had requested the variance under Section 702 of the BCMA which provides that nothing in the BCMA shall be construed to prevent the adoption or use by any operator of new methods and processes, if such new methods and processes accord protection to personnel and property substantially equal to or in excess of the requirements set forth in the BCMA. The variance had sought to unlink the timing

requirement set forth in Section 228(a) that pre-shift examinations be performed within the three hours immediately before the start of shifts. EFMC proposed, instead, to conduct pre-shift examinations on a regular time interval of every eight hours. EFMC had sought the variance in connection with its implementation of an alternative work schedule under which the mine stayed in continuous operation with coal producing shifts of 10 and 12 hours. The Board finds that the Department did not err in treating EFMC's request as a variance under Section 702; the Department was not acting outside of its scope of authority to implement and enforce the BCMA in issuing in 1995 of a Technical Guidance Document which sets forth a procedure for processing such variance requests and; the Department followed the procedures outlined in the Technical Guidance Document in all material respects. However, the Board finds that the evidence demonstrates that the variance, as applied to the alternative schedule in this particular case, would not accord equal or greater protection to personnel and property.

FINDINGS OF FACT

The Parties.

1. The appellants are the United Mine Workers of America, the United Mine Workers of America, District 2 and the United Mine Workers of America, Local 1197 (collectively referred to as the UMW).

2. UMW represents approximately 500 employees working at the 84 Mine.

3. The Department of Environmental Protection (Department or DEP) is the executive agency with the duty and authority to administer and enforce the Pennsylvania [1]Bituminous Coal Mining Act, Act of July 17, 1961, P.L. 659, as amended, 52 P.S. §§ 701-101 –

[1] Notes of the Transcript are cited as "N.T. _____"; Joint Stipulations are cited as "JS-_____"; Joint Exhibits are cited as "Ex. J-____"; UMW Exhibits are cited as "Ex. UMW-____"; DEP

701-706 (BCMA); Sections 1915-A and 1917-A of the Administrative Code of 1929, Act of April 9, 1929, P.L 177, as amended, 71 P.S. §§ 510-15 and 510-17 (Administrative Code); and the rules and regulations promulgated thereunder.

4. The Permittee is Eighty Four Mining Company (EFMC), an affiliate of Consolidation Coal Company that operates the 84 Mine, an underground bituminous coal mine located in South Strabane Township, Washington County, Pennsylvania. (N.T. 500; JS-1)

Subject of Appeal.

5. UMW appeals the Department's approval of EFMC's request to vary from the requirements of Section 228(a) of the BCMA at 84 Mine (UMW's Notice of Appeal)

6. Section 228(a) requires that a pre-shift examination (*i.e.* inspection) of the mine take place "within three hours immediately preceding the beginning" of a coal or non-coal producing shift. (52 P.S. 701-228(a))

7. The Department approved the variance under Section 702 of the BCMA which provides as follows:

> Nothing in this act shall be construed to prevent the adoption or use by any operator of new machinery, equipment, tools, supplies, devices, methods and processes, if such new machinery, equipment, tools, supplies, devices, methods and processes accord protection to personnel and property substantially equal to or in excess of the requirements set forth in any portion of this act.

52 P.S. § 701-702

8. The Department's approval letter, dated March 12, 2001, allows EFMC to "conduct pre-shift examinations within three hours preceding the beginning of any 8 hour

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Exhibits are cited as "Ex. C-____"; EFMC Exhibits are cited as "Ex. EFMC ____"; Findings of Fact are cited as "FOF____".

interval during which any person is scheduled to work or travel underground and . . .[to] establish the 8 hour intervals of time subject to the examination at Mine 84." (Ex. J-4)

9. The variance, thus, unlinked or severed the timing requirement of section 228(a) that pre-shift examinations occur "within three hours immediately preceding the beginning" of shifts. (Ex. J-4)

10. The Department approved EFMC's request subject to the following seven conditions:

1. The approval only applies for days when Mine 84 operates less than 3 coal-producing shifts, and the coal-producing shift starting times are 10 hours or more apart.

2. Following any idle shift, the operator is required to conduct a pre-shift examination of all active areas of the entire mine in accordance with Section 228(a) within 3 hours immediately preceding the beginning of the first coal-producing shift and before any miners in such shift other than those who may be designated to make the examination enter the mine.

3. Workers other than those who may be designated to make the examination shall not enter or remain in an underground area unless a pre-shift examination has been completed for the established 8-hour interval.

4. The operator shall ensure that areas of the mine that have not been examined as part of the 8-hour interval pre-shift will be examined within 3 hours before workers, other than persons making the examinations, enter those areas.

5. At all times certified miners, machine runners, short-firers, and mine officials shall monitor their work areas for all dangerous conditions. Certified machine runners or mine officials shall conduct a methane test at all working places where energized equipment is located at intervals not to exceed 20 minutes. All dangerous conditions that are not corrected shall be immediately dangered off and reported to a certified mine official. Certified

mine officials shall notify incoming workers of all dangerous conditions in their assigned work areas and see that a danger sign is posted at the entrance to those areas before workers enter.

6. The operator shall use and maintain the systems for monitoring methane on continuous miners and longwall face equipment and for monitoring carbon monoxide on belt conveyors and permanent battery charging stations in compliance with all federal requirements, and manufacturers' specifications.

7. This approval applies only to the schedule of shifts and pre-shift examinations set forth in the variance request. Changes in the pre-shift examination schedule will be submitted to the Department for approval before implementation.

(Ex. J-4)

General Background About 84 Mine.

11. The 84 Mine is part of an underground mine complex that has been under development for many years. (JS-1)

12. The active and inactive sections of the Mine cover an underground area of about 28 square miles or 17,000 acres. (N.T. 502; JS-1)

13. There are eleven shafts, which are cylindrical concrete tubes in the mine. (N.T. 502-03, Ex. J-5)

14. Elevators, which are used to transport miners and other workers from the surface to the underground mine area, are located in three of the eleven shafts. (N.T. 503)

15. Approximately 90% to 95% of the workers use the elevator located at the Zedeker shaft. (N.T. 505, 507)

16. There is a distance of about seven miles from the Anderson shaft to the Zedeker shaft and a distance of about 12 to 14 miles extending in the other direction. (N.T. 505, Ex. J-5)

17. The depth to the active face of mining at 84 Mine is approximately 200 to 900 feet with the average depth being about 600 feet. (N.T. 502; JS-2; Ex. J-5)

18. The mine is a "gassy mine" as defined by the Pennsylvania BCMA, 52 P.S. § 701-103(7), in that methane gas has been detected in the amount of twenty-five one hundredths percent or more. (JS-8)

19. 84 Mine employs approximately 500 workers who are represented by the UMW. (JS-8)

20. The 84 Mine mines coal from the Pittsburgh seam of coal. (N.T. 502)

21. There are currently five active continuous miner sections and one active longwall unit operating at 84 Mine. (JS-6)

22. "Continuous Miner" machines have a rotating head with carbide bits that cut the coal from the "face". (N.T. 508)

23. The "face" is the area where miners are actually mining the coal. (N.T. 59, 515, 590, 594, 597)

24. The continuous miner machine cuts the coal from the face and mechanically loads it onto a shuttle car for transportation. (N.T. 508-09)

25. The shuttle car is much like a dump truck. The shuttle car takes the mined coal to one of many conveyor belts located down in the mine. (N.T. 508-09)

26. Mined coal is transported by conveyor belt from underground to the surface of the mine. (N.T. 119, 556; Ex. J-3).

27. There are 22 conveyor belt lines which cover a distance of 32 linear miles. (N.T. 556; Ex. J-3)

28. The conveyor belts carry the mined coal the length of the mine, from the McKahan Shaft, to the Zedeker Shaft, past Livinston Shaft, and the Richardson Shaft and out up the slope to the exterior of the mine. (N.T. 508-09; Ex. J-3)

29. The longwall equipment moves in once the continuous miner operations are finished in a particular section of the mine. (N.T. 508-09)

30. The longwall face in Mine 84 is about 1,100 feet wide by about 8,000 to 12,000 feet long. (N.T. 508-09)

31. Seven exhaust fans ventilate the mine with air shafts for main intakes and one belt/track slope entry.

32. Mine 84 monitors mine air for the presence of methane and carbon monoxide in the following ways: (1) face equipment operators, mine examiners and other mine officials carry hand-held detectors, some of which are designed to monitor the mine air continuously while others are designed to sample the air when the detector is activated by the examiner; (2) some of the hand-held detectors just mentioned also measure oxygen content of the air; (3) all conveyor belts and permanent battery charging stations throughout the mine are equipped with carbon monoxide sensors that provide an alarm at a location that is staffed continually; (4) continuous mining machines and longwall face equipment are equipped with methane monitors that continuously monitor and automatically de-energize electric power when methane levels exceed allowable limits. (JS-4)

The Section 228(a) Pre-Shift Examination In General And At The 84 Mine.

33. The scope of a Section 228(a) pre-shift examination made prior to a coal-producing shift is more comprehensive than a pre-shift examination made prior to a non-coal producing shift. (52 P.S. § 701-228(a); JS-10)

34. Pre-shift examinations prior to coal-producing shifts must include inspection of "every active working place and places immediately adjacent thereto in such area" and must include tests for accumulations of methane and oxygen-deficiency in the air. (52 P.S. 701-228(a); JS-10)

35. Pre-shift examinations prior to a non-coal producing shift are to include only those areas where workers will travel and work in the mine as well as those areas of the mine that are ventilated by the same split of air. (52 P.S. 701-228(a); JS-10)

36. Pre-shift examinations discover and mitigate the various dangerous conditions associated with underground coal mines. (N.T. 116-124)

37. There are numerous dangerous conditions which can and do develop in deep coal mines that can and have caused accidents involving death and/or serious injuries to miners and others in the mine. (N.T. 564-565)

38. Methane gas is dangerous because it is liberated during the coal mining process and it is explosive at concentrations of 5-15%. (N.T. 647, 905)

39. The BCMA requires corrective action if methane reaches a 1% concentration at the face. (N.T. 647)

40. Coal mines in the Pittsburgh seam, including the 84 Mine, experience instances of excess amounts of methane. (N.T. 126, 357, 477)

41. Poor ventilation is another danger in underground coal mining because improper ventilation underground may result in the accumulation of methane gas or an oxygen deficient atmosphere. (N.T 121, 516)

42. "Hot rollers" are an additional danger. (N.T. 119-120)

43. The conveyer belts which transport coal to the surface are moved along by

hundreds or thousands of large supportive metal rollers which lay underneath the conveyor belts. (*Id.*)

44. The rollers contain bearings, and when the bearings inside the rollers wear out or become damaged, the rollers can become hot due to friction. (*Id.*) When this occurs the condition is known as a "hot roller". (*Id.*)

45. A "hot roller" can cause a fire in the mine if coal dust, pieces of coal or methane are immediately present and in contact with the "hot roller." (*Id.*)

46. Further dangerous conditions are damaged ribs or damaged sections of the roof. (N.T. 516-17)

47. If roof supports malfunction then a cave-in may occur. (*Id.*)

48. Also, methane gas can accumulate in a roof cavity *i.e.,* where the roof raises higher than it was after it was mined, and result in an explosion. (*Id.*)

49. Pursuant to section 228(a), when a mine examiner discovers a dangerous condition, the examiner must "danger off" the area. To "danger off" an area means to physically post a danger sign at a conspicuous point where persons entering the dangerous area would be required to pass. (N.T. 86-87)

50. Mr. Joseph Marcinek, a certified mine examiner who works at the 84 Mine, spends 98-99% of his time doing pre-shift examinations of the mine. (N.T. 118)

51. Mr. Marcinek generally corrects dangerous conditions himself, but sometimes, he dangers off the area and gets assistance to rectify the problem. (N.T 121)

52. On average, Mr. Marcinek discovers 15-20 dangerous conditions a week. (N.T. 122-23)

53. Section 228(a) directs mine examiners to place their initials and the date at or near

the face of each area of the mine they inspect. Further, at the conclusion of the pre-shift exam, the mine examiner must record, in the "fireboss book", the results of their exam, including a statement of any dangerous conditions discovered. (N.T. 86; 52 P.S. §701-228(a)

54. Miners, entering the mine, look at the fire boss book to inform themselves about the results of the pre-shift exam. (N.T. 86)

55. Pursuant to industry practice, pre-shift examiners verbally inform the oncoming shift of the pre-shift examination results. (N.T. 86, 363-64, 408-09)

56. Certified mine officials with mine examiner certifications issued by the Commonwealth of Pennsylvania perform pre-shift exams. (N.T. 512-13; 52 P.S. §§ 701-210 701-206, 701-228(a)). In order to be certified, mine examiners must undergo training, which includes schooling every night for six months, traveling with a mine foreman in the mine, and a two day test that they must pass. (N.T. 1023)

57. At the 84 Mine, approximately half the pre-shift examinations are conducted by management employees and half by rank and file miners. (N.T. 118)

58. 84 Mine follows industry practice, in that for each shift the foreman assigns mine examiners a specific area of the mine. The foreman determines the specific daily pre-shift examination schedule, including how many examiners are required and when and what parts of the mine must be examined. (N.T. 123, 161, 513, 705)

59. At the 84 Mine, eight examiners usually perform a pre-shift exam, and those examiners walk combined approximately 32 linear miles during a pre-shift-exam. (N.T. 513)

60. Those inspectors examine the slope of the mine, all of the track and conveyor belt lines, and all active sections of the mine including the faces of active sections.

61. The "slope" is the 7-mile tunnel-way into Mine 84 from the surface to the coal

seem. The slope contains a rail system with overhead electrical wire. It is through the slope that all mining equipment is transported into the mine. (N.T. 504-05)

62. The total time to perform a pre-shift examination varies depending on the type of exam, the area to being examined, and whether any dangerous conditions are discovered, but usually, a pre-shift examination at 84 Mine takes between two and two and a half hours. (N.T. 124)

63. However the discovery of a condition requiring attention extends that time. (N.T. 124-25)

The Federal Mine Safety and Health Act And "Pre-Shift Eight Hout Interval Examinations" Thereunder.

64. The parties agree that Mine 84 is subject to the requirements of not only the BCMA, but also the requirements of the Federal Mine Safety and Health Act, 30 U.S.C. § 801-962. (JS-5)

65. The primary purpose of The Federal Mine Health and Safety Administration (MSHA), which is the federal agency that enforces and implements the Federal Mine Safety and Health Act, is to provide for the health and safety of persons employed in and about underground coal mines. (JS-6)

66. In 1999, MSHA promulgated a final Rule which revised the requirements of the MSHA for pre-shift examinations such that they are to be conducted under federal law on regular 8-hour intervals instead of three hours before the start of each shift. (JS-11)

67. The resulting schedule of federal mine examinations at Mine 84 includes three pre-shift examinations per day, spaced eight hours apart, seven days per week for a total of 21 federal pre-shift examinations per week. (JS-12)

68. Since the rule change in the federal system, these examinations are referred to as "eight-hour interval examinations" rather than "pre-shift examinations". (N.T. 584, 596, 662, 673)

69. Although the substantive requirements for making pre-shift examinations under MSHA and Section 228(a) of BCMA are not identical in all respects, Mine 84 performs all of its Section 228(a) pre-shift examinations and its MSHA eight-hour interval examinations in the same manner so that each time such an examination is performed at the mine such examination satisfies both federal and state requirements. (JS-13)

EFMC's Variance Request.

70. The variance request in this case has its origin from Mine 84 management's election in November, 2000, to implement a new "alternative schedule" under which the mine operates 24 hours per day/7 days per week with miners working 10 or 12 hour shifts instead of the traditional 8 hour shifts. (N.T. 519-20, 802)

71. The "alternative schedule" was first recognized and permitted by the 1993 National Bituminous Coal Wage Agreement (1993 NBCWA). (*Id.*, Ex. J-29B p. 324)

72. Under the 1993 NBCWA, the employer was authorized, at its election, to implement the 24 hour per day/7 day per week "alternative schedule" with coal producing shifts lasting ten or twelve hours. (Ex. J-29B p. 324)

73. Prior to the 1993 NBCWA, coal producing shifts had been limited to 8 hours per shift. (N.T. 518-19, 532, 845; Ex. J-29B)

74. The 1998 National Bituminous Coal Wage Agreement (1998 NBCWA), which is the Wage Agreement in force today, and which covers 84 Mine, maintains the 1993 NBCWA's provision for implementation of an "alternative schedule". (N.T 519-20; Ex. J-29A p. 326)

75. The new schedule divides employees into two separate and distinct work forces; one set of employees works Monday through Thursday and the other group works Friday through Sunday and all working holidays. (N.T. 521)

76. The mine will be idle only four days a year, two days at Thanksgiving and two days at Christmas. (N.T. 522)

77. The new alternative schedule allows Mine 84 management to operate the mine continuously. (N.T. 519-22, 802-03; Ex. J-1, Ex. J-6, Ex. J-29B)

78. Under the alternative schedule, 84 Mine operates two 10-hour coal producing shifts every Monday, Tuesday, Wednesday, Thursday and Friday and two 12-hour coal producing shifts every Saturday and Sunday. (N.T. 521-530, 845; Ex. J-6)

79. The two 10-hour coal producing shifts scheduled Monday through Thursday run from 6:00 a.m. to 4:00 p.m. and from 4:00 p.m. to 2:00 a.m. On Fridays, the 10-hour coal producing shifts run from 4:00 a.m. to 2:00 p.m. and 2:00 p.m. to midnight. (*Id.*)

80. On Saturdays and Sundays, 12-hour coal producing shifts run from midnight (that is midnight on Friday/Saturday night and Saturday/Sunday night) to noon and then from noon to midnight. (N.T. 521-530, 845; Ex. J-6)

81. The Monday through Thursday coal-producing shifts employ 90 miners each while the Friday, Saturday and Sunday coal-producing shifts employ 85 miners. (Ex. J-6)

82. In addition to coal-producing shifts, 84 Mine also runs three 8-hour non-coal producing shifts, referred to as Maintenance, Production and Other (MPO) shifts, seven days a week which run from midnight to 8:00 a.m., 8:00 a.m. to 4:00 p.m. and 4:00 p.m. to midnight. (N.T. 522,844-45; Ex. J-6)

83. EFMC reserves the option to use the 12:00 a.m. to 8:00 a.m. MPO crew to produce coal rather than for maintenance, housekeeping, or construction activities. Whenever this occurs the 12:00 to 8:00 a.m. non-coal producing shift becomes a coal producing shift. (N.T. 845-846; JS-1).

84. The MPO shifts employ from between 15 to 60 persons each. (Ex. J-6)

85. EFMC submitted its variance request by letter dated October 6, 2000, from Mr. Aloia, the Superintendent of the 84 Mine, to Mr. Richard Stickler, the Director of the Department's Bureau of Deep Mine Safety (Bureau or DBMS). (Ex. J-1)

86. The essence of the request was to allow EFMC to unlink pre-shift examinations from the Section 228(a) requirement that they be performed within three hours immediately preceding the beginning of a coal or non-coal producing shift and to perform them, instead, on regular intervals of every eight hours. (*Id.*)

87. In its request, EFMC maintains that the variance will "afford protection to persons and property substantially to or in excess set forth in the [BCMA]" which, of course, is the standard for allowing the use of new methods and processes under Section 702. (*Id.*; 52 P.S. § 701-702)

The Department's Acceptance, Review and Approval of the EFMC Variance Request.

88. Once the Department received EFMC request, Mr. Stickler determined that the request was an appropriate subject for consideration as a "variance" under Section 702(a) of the BCMA. (N.T. 802; JS-16)

89. Mr. Stickler so concluded because he determined that the request related to a new method or process for implementing shift schedules and the resulting schedules of mine

examinations required by Section 228(a) (*Id.*)

90. After completion of the preliminary administrative review of EFMC's request, the Bureau advised EFMC that the request would be processed and reviewed in accordance with the procedures set forth in the Department's July 17, 1995 technical guidance document No. 580-2200-004 entitled "Procedures for Processing Requests to Adopt New Items or Methods Under Section 702 and 1402 of the Pennsylvania Mining Laws" (TGD). (N.T. 805-06; Ex. J-2, Ex. C-2)

91. The TGD contains notice and opportunity to comment provisions. The TGD calls for, among other things, (1) notice of and a copy of the variance to be sent to the Mine Safety Committee of the affected mine; (2) notice of the proposed variance to be posted at the affected mine; and (3) notice of the proposed variance to be published in the Pennsylvania Bulletin and a 30-day comment period provided. (Ex. J-2)

92. The TGD provides for the assignment of an investigative committee to investigate the request and to then draft a report thereon. (*Id.*)

93. The investigative committee's report is to contain sufficient factual information to support the granting of the variance as proposed or amended or to support the denying of the variance. (*Id.*)

94. The TGD provides that the Bureau Director is to review the report and he or she then makes the final decision on the request for the variance. (*Id.*)

95. The TGD requires publication in the Pennsylvania Bulletin of a summary of the final decision. (*Id.*)

96. According to Mr. Stickler, the TGD was adopted by the Bureau of Deep Mine Safety in order to establish a consistent procedure for the Bureau's disposition of requests for

variances under Section 702. (N.T. 783-88)

97. Before the adoption of the TGD, Section 702 variance requests were handled between mine operators and individual District Mine Inspectors (DMI) without a formal process. (JS-14)

98. Typically, mine operators would simply unilaterally implement new machinery, equipment or methods without seeking prior approval from the Bureau. The DMI either would accept the change or initiate enforcement action to stop it if the DMI determined that the change was inappropriate. (*Id.*)

99. In other cases, the mine operator would submit a plan to the DMI and/or to the Bureau Director who either approved or denied the plan to implement the change. (*Id.*)

100. Pursuant to the TGD, Mr. Stickler appointed Daniel Smicik, DEP Bituminous Mine Inspector Supervisor, Robert Frantz, DEP Bituminous Underground Mine Inspector, and Brad Cole, DEP Mining Engineer to the investigative committee for this variance request. (N.T. 20, 809, JS-17; Ex. J-3 and exhibit 3 thereto)

101. BDMS notified Joseph Marcinek, Chairman of the 84 Mine Safety Committee and a member of the UMW, in writing, that the Bureau had received the variance request, provided him with a copy of it and advised him that the Bureau was soliciting comments from him and any interested group of 84 Mine employees. (JS-18.a; Ex. J-17)

102. BDMS published a notice in the November 4, 2000 Pennsylvania Bulletin summarizing EFMC's request. (JS-18.b)

103. The notice in the Pennsylvania Bulletin advised that affected parties could submit comments on the variance request to the Bureau within 30 days. (*Id.*)

104. BDMS received written comments from Mr. Marcinek and Mr. Baker to 84 Mine

on the variance proposal and forwarded those comments for EFMC's consideration and response.[2] (JS-18.c)

105. The Bureau also sent letters to Messrs. Marcinek, Baker and Lamont acknowledging receipt of their comments and advising them that their letters had been forwarded to EFMC for response and that the Bureau would compile a comment and response document at the conclusion of its investigation summarizing and responding to their comments of which, they would be provided with a copy. (JS-18.d; Ex. J-19)

106. The investigation committee completed its investigation report on February 27, 2001. (JS-18.e, Ex. J-3)

107. Two weeks latter, Mr. Stickler, by letter dated March 12, 2001 to Mr. Aloia, approved EFMC's 702 variance request, subject to seven conditions. (Ex. J-4; *See* FOF Nos. 8,10)

Exhibit J-6 Illustration of How The Variance Would Operate at 84 Mine.

108. Exhibit J-6 illustrates graphically the alternative work schedule and how the proposed variance would operate if it went into effect at the mine.

109. The exhibit is in time-line, bar-graph format and it depicts for a seven day time frame: (1) coal-producing shifts by green bars; (2) non-coal producing shifts by yellow bars; (3) presently performed BCMA Section 228(a) pre-shift examinations by orange bars; and (4) proposed Section 228(a) pre-shift examinations which would be performed, if the variance goes into effect, by purple bars.

[2] Before mailing the comment letters to EFMC, the BDMS redacted any information in or on the letters which revealed the identity of the commenters. (JS-18.c n. 2)

110. Exhibit J-6 is of assistance in understanding this case, and it is therefore being included as Appendix A to this Adjudication. [3]

The Variance Request Is Within
The Ambit Of Section 702.

111. EFMC's request to alter the timing of pre-shift examinations constitutes a new method or process.

112. Section 702 has been used to grant variances even from direct prescriptions contained in the BCMA.

113. BCMA requires wooden guards over overhead electrical trolley wires. However, through the variance procedure, it is commonplace that neoprene is used as trolley overhead wire guard material instead of wood because it is more effective than wood, wraps around or encases the trolley wire entirely and accords more protection from accidental exposure and shock than wood guards. (N.T. 769-70, 784-85; 52 P.S. § 702-328)

114. The BCMA requires that "shelter holes" be spaced every 80 feet within a mine. (52 P.S. § 701-268)

115. Shelter holes are large depressions dug into the wall of the mine along locomotive tracks where miners can seek refuge from oncoming locomotives moving rail-cars of coal out of the mine. (N.T. 772-73, 783-84)

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[3] One caveat is in order. The UMW argues that the exhibit does not portray all of the Section 228(a) examinations which are currently mandated by Section 228(a). In short, the Exhibit illustrates 19 Section 228(a) pre-shift examinations (in orange bars) taking place per week while the UMW claims that Section 228(a) requires 29 such examinations per week based on the shift schedule portrayed in the Exhibit. We recognize that position by the UMW and we address the parties' respective arguments on this issue of whether Section 228(a) requires 19 or 29 pre-shift examinations per week as it relates to the variance later in this opinion. The exhibit is, in any event, of assistance in understanding this case.

116. Pursuant to a variance, where circumstances warrant, the Department has allowed shelter holes to be placed up to 150 feet apart. (*Id.*)

117. In such cases locomotive transportation of coal out of mines had been replaced to some degree by conveyor belt transportation making shelter holes less of a major safety concern and, concomitantly, these particular mines had particularly precarious roof stability conditions which shelter hole construction exacerbates. (*Id.*)

118. It was considered safer, in those cases, to not have shelter-holes, which lessen roof integrity, spaced every 80 feet but, instead, to have them placed further apart. (*Id.*)

The Department Did Not Err In Either Using The TGD In The First Place Or In The Manner In Which It Processed The EFMC Request Pursuant To The TGD.

119. The TGD is an administrative tool that "establishes internal procedures to be used by the Department to process requests for variances submitted by operators under Sections 702 and 1402." (Ex. J-2)

120. Before the TGD was drafted, the application of Section 702 was inconsistent and led to anomalous results in the field. In one case an inspector had approved the use of neoprene covering instead of wood boards to guard trolley wire, but when a successor DMI took over inspection duties for the same mine he spotted the neoprene in the stead of wood and ordered that the neoprene be replaced with wood boards which resulted in a two-day shut down of the mine. (N.T. 784-85; DEP Proposed FOF 128)

121. The TGD provides for a documented and orderly approach to section 702 variance requests which did not exist before the creation of the TGD. (Ex. J-2)

122. The TGD contains significant notice and comment provisions which before the

TGD were not a part of the Section 702 variance process. (*Id.*)

123. The duties of mine inspectors include the authority to enter mines and perform inspections, order the withdrawal of workers from dangerous situations and/or the cessation of work in such circumstances and to institute proceedings for violations. (52. P.S. §§ 701-117, 701-120, 701-121)

124. Nowhere in Sections 117, 120 or 121 is there any mention of reviewing or passing upon Section 702 variance requests or even any role whatsoever for mine inspectors in doing so. Section 702 is nowhere even cross-referenced or mentioned in any of these sections. (*Id.*)

125. The Department sufficiently followed the steps outlined in the TGD in this case. (JS-18)

Key Witnesses on the Variance and Whether it Accords Substantially Equal or Greater Protection to Persons and Property

UMW.

126. The Board qualified James P. Lamont as an expert on health and safety matters in underground bituminous mining in Pennsylvania and on pre-shift examinations in Pennsylvania. (N.T. 345-47)[4]

127. Mr. Lamont is employed by the International United Mine Workers of America as a health and safety representative. (N.T. 302-303)

128. His duties as a health and safety representative involve his meeting with union members in Pennsylvania and New York to discuss different aspects of safety, accidents, and accident investigations, providing training, and interacting with state and federal mine safety

[4] Mr. Lamont's Curriculum Vitae (CV) was admitted into evidence as part of Ex. J-31 and we have reviewed and considered that CV, as well as his testimony, in connection with our findings

agencies on health and safety matters. (N.T. 303)

129. Mr. Lamont visits the 84 Mine every couple of months. (N.T. 305)

130. Mr. Lamont started his career in 1974 as a coal miner at the Tanoma Mine. (N.T. 304-05)

131. Mr. Lamont spent 14 years as a mining inspector at the Tanoma Mine. (*Id.*)

132. While at Tanoma Mine he was a member of the United Mine Workers bargaining unit as well as Chairman of the Health and Safety Committee of the Mine. (*Id.*)

133. He performed pre-shift examinations every day as a normal part of his duties (*Id.*)

134. Timothy Baker is the Assistant to the Director of Occupational Health and Safety for the International Mine Workers of America, and he has held that position since 1993. (N.T. 178)

135. As the Assistant to the Director, Mr. Baker monitors regulatory developments in the mining field. (N.T. 179)

136. Mr. Baker started his mining career in 1976 as a coal miner in Pennsylvania coal mines, and he worked in Pennsylvania coal mines until 1993. (*Id.*)

137. Daniel Smicik started working for the Department of Environmental Protection's Bureau of Deep Mine Safety in 1982. (N.T. 56)

138. Since 1992, Daniel Smicik has worked for the Department as a Mine Inspector Supervisor. (*Id.*)

139. As Mine Inspector Supervisor, Mr. Smicik supervises three mining inspectors of Mine 84 and three mining inspectors who inspect three other mines. (N.T. 56, 63)

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on Mr. Lamont's background.

140. Prior to working for the Commonwealth, Mr. Smicik worked for Consolidation Coal Company as miner and mine inspector from 1968 until 1982. (N.T. 57)

141. Mr. Smicik was certified by the Commonwealth of Pennsylvania as a mine examiner in 1977. (N.T. 57-58)

142. Mr. Smicik was appointed by Mr. Stickler to serve on the Section 702 investigation committee with respect to the EFMC variance request at issue in this case. (N.T. 20, 809, Ex. J-3 and Exhibit 2 thereto, JS-17)

143. Mr. Smicik testified in the UMW's case-in-chief under subpoena. (N.T. 55-56, 133, 1051)

The Department.

144. The Board qualified Richard Stickler as an expert in underground coal mining. (N.T. 768)[5]

145. Mr. Stickler is the Director of the Bureau of Deep Mine Safety. He has held that position since 1997. (N.T. 747)

146. Mr. Stickler has worked in the mining industry since 1966. (N.T. 751)

147. He worked for Bethlehem Steel from 1966 until 1996. (N.T. 751-762)

148. Throughout his 30 year tenure, Mr. Stickler performed many different jobs for Bethlehem Steel which were: (1) an underground miner while he attended college; (2) from 1968 until 1970, he worked as an engineer and construction foreman; (3) from 1970 to 1972 he worked as an Assistant to the Superintendent of Nanty-Glo Mine; (4) from 1972 to 1974 he worked as a shift foreman at the Ehren Mine 38, in charge of all activates that occur during a

[5] Mr. Stickler's Curriculum Vitae (CV) was admitted into evidence as part of Ex. J-31 and we have reviewed and considered that CV, as well as his testimony, in connection with our findings regarding Mr. Stickler's background.

shift including production, safety, and construction; (5) in 1974 he headed up a team assigned to evaluate the purchase of a mine for Bethlehem Steel; (6) from 1975 to 1979 he worked at Mine 60 (now the 84 Mine) as superintendent in charge of converting the mine from a continuous mining machine operation to a longwall operation; (7) from 1979 to 1983 he worked as the Superintendent of Mine 51; (8) from 1983 to 1987 he worked as the General Superintendent of the Ellsworth Butler Division; (9) from 1987 to 1994 he was put in charge of the Pennsylvania operations, primarily looking towards Bethlehem Steel's long range plans to exit the mining industry; and (10) from 1994 to 1996 he managed Bethlehem Steel's only remaining mine, the Boone Mine. (*Id.*)

149. In 1996, Mr. Stickler's services were sold with the Boone Mine when A.T. Massey Coal purchased the mine from Bethlehem Steel. He worked there only a few months. (N.T. 761-62)

150. Mr. Stickler's final job before becoming director was as Assistant to the President at the Performance Coal Company. (N.T. 761)

EFMC.

151. Albert Aloia is the Superintendent of Shared Services for Consol Energy. (N.T. 499)

152. Mr. Aloia was the Superintendent of the 84 Mine in October 2000 when EFMC made its variance request to the Department. (N.T. 500; Ex. J-1)

153. The superintendent is the person who shall have, on behalf of the mine operator, immediate supervision of one or more mines. (52 P.S. § 701-103(10))

154. The duties of the superintendent include overall management of the mine. (52 P.S. 701-234)

155. The superintendent of a mine is akin to the "captain of the ship" the top person along with the mine foreman responsible for the coal mine. (N.T. 550)

156. Mr. Aloia drafted the variance request. (Ex. J-1)

157. Mr. Aloia has worked for Consolidated Coal since 1976. (N.T. 498-500)

158. Mr. Aloia's career in mining started in 1976 while he was in college as a UMW laborer underground. (N.T. 499)

159. After college he worked as an mine engineer, a section foreman, and four times as a mine superintendent (N.T. 498-500)

160. The Board qualified Mr. Jack Tisdale as an expert in coal mine health and safety, in particular as relating to examinations of underground coal mines for conditions that could create risks to mine personnel and mine property. (N.T. 571)[6]

161. Mr. Tisdale has a degree in mining engineering from the University of Illinois. (N.T. 562)

162. Mr. Tisdale has approximately 46 years of public and private sector experience in the coal mining industry. (N.T. 561)

163. Mr. Tisdale is a certified mine examiner in the State of Illinois. (N.T. 561)

164. At age 30, in approximately 1962, he started working for the Federal Bureau of Mines where he worked for three and a half years inspecting mines in Virginia and Eastern Kentucky (N.T. 562)

165. Thereafter his title changed to mine health and safety engineer where, in that capacity he focused on roof control and accident investigations. (N.T. 563)

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[6] Mr. Tisdale's Curriculum Vitae (CV) was admitted into evidence as part of Ex. J-31 and we have reviewed and considered that CV, as well as his testimony, in connection with our findings on Mr. Tisdale's background.

166. In 1968 he became a supervisory mining engineer and his responsibilities included managing and developing the Bureau's mine inspection program for the then new mine receptacle dust and noise requirements. (N.T. 563)

167. In 1971 he was transferred to Pittsburgh where he became an assistant to the District Manager. (N.T. 564)

168. In 1973 he was promoted to District Manager. (N.T. 563)

169. He was involved in several mine rescue and recovery operations including the Tower City mine flooding disaster which occurred in Pennsylvania in 1977. (N.T. 564)

170. He also directed the activity in the recovery work of the Consol No. 9 Mine in which the bodies of some dead miners were recovered, but some still remain entombed there to this day. (N.T. 565)

171. In 1977, Mr. Tisdale started employment with the Eastern Associated Coal Corporation as its Vice President of Safety and Training where his responsibility was to run that company's safety program. (N.T. 565)

172. In 1980 he was taken out of safety work and promoted to be the Vice President of the company's Valley Division in southern West Virginia. (N.T. 565)

173. After Eastern Associated Coal Corporation was sold, Mr. Tisdale began employment with Pennsylvania Mines Corporation as Vice President of Operations. (N.T. 586)

174. In 1986, Mr. Tisdale took a job with Highland Coal Company in Lexington, Kentucky as its safety director where he worked for four or five months before being promoted to Vice President of Operations Support. (N.T. 566)

175. In 1988 Mr. Tisdale rejoined the federal Mine Safety and Health Administration (MSHA) and he was subsequently promoted to chief of the safety division of MSHA. (N.T. 566)

176. In 1997, at age 65, Mr. Tisdale retired from MSHA. (N.T. 568)

177. Since then, Mr. Tisdale has been self-employed as a coal mine safety specialist. (N.T. 561)

Unlinking The Section 228(a) Pre-Shift Examination From The Requirement That It Be Conducted Within The Three Hours Immediately Preceding The Start of Each Shift Reduces Protection.

178. The timing of the pre-shift examination to come within the period of time within three hours immediately preceding the commencement of a mining shift is important because that procedure establishes a system of advanced notice of dangerous conditions. (N.T. 86, 290-95)

179. The pre-shift examination is the single most important safety examination in a mine. (*Id.*)

180. Under Section 228(a) this system of advanced notice of potentially dangerous conditions applies to each shift of miners before they descend into the mine to start their shift. (N.T. 361-62)

181. The unlinking of the timing of the pre-shift examination to the three hours immediately preceding a coal producing shift has the effect in this case of sending a very large number of coal miners on coal producing shifts at different times into the mine without any pre-shift examination having been done within the three hours immediately prior to the commencement of their shifts as is done now. (Ex. J-6)

182. Under the variance, the 90 miners who descend into the mine on the coal producing shift commencing each Monday through Thursday at 6 a.m. will not have a pre-shift examination done prior to the start of their shift. (*Id.*)

183. The variance pre-shift examination closest in time to the commencement of that shift starts at 5:00 a.m. but is not completed until 8:00 a.m., two full hours after those 90 miners have descended into the mine. (*Id.*)

184. The most proximate in time completed pre-shift examination from the perspective of this shift of miners would have taken place from between 9:00 p.m. to 12:00 midnight the night before their shift. (*Id.*)

185. Thus, it would have been completed six hours before they descend into the mine. (*Id.*)

186. The same situation applies to the Friday 4:00 a.m. to 2:00 p.m. shift of 85 miners. (*Id.*)

187. Under the variance, a pre-shift examination will have been done from 9:00 p.m. to 12:00 midnight the day before. (*Id.*)

188. This pre-shift examination will have been completed for four hours before this shift of 85 miners descends into the mine. (*Id.*)

189. The next pre-shift examination under the variance, the one running from 5:00 a.m. to 8:00 a.m. will not start until these miners have been underground for one full hour. (*Id.*)

190. Again, the same scenario applies to the 85 miners working the Friday 2:00 p.m. to 12:00 midnight shift. (*Id.*)

191. Under the variance, the last completed pre-shift examination runs from 5:00 a.m. to 8:00 a.m. (*Id.*)

192. Thus, these miners descend into the mine six hours after the completion of the last pre-shift examination. (*Id.*)

193. A pre-shift examination commences under the variance one hour before this shift,

at 1:00 p.m. but it is not completed until 4:00 p.m., two hours after the miners on this shift have descended into the mine. (*Id.*)

194. Finally, the same applies to the 85 miners assigned to the Saturday and Sunday 12:00 noon to 12:00 midnight shift. (*Id.*)

195. Under the variance, the last completed pre-shift examination runs from 5:00 a.m. to 8:00 a.m. and is thus completed four hours before they enter the mine. (*Id.*)

196. The next pre-shift examination under the variance would run from 1:00 p.m. to 4:00 p.m. and it would thus not even start until one hour after these miners had entered the mine. (*Id.*)

197. These four shifts comprise a total of 345 miners which is a substantial portion of EFMC's work force. (*Id.*)

198. As to this large number of miners on a host of different shifts the variance does not accord equal or more protection, it accords less protection.

199. Mr. Tisdale, EFMC's own expert, admitted that there could exist a dangerous condition which would require that no miners enter the mine and that it is safer for the miners if such a condition is discovered before the start of the shift, that is before the miners enter the mine, than if it is discovered after the shift starts. (N.T. 638-644)

200. Mr. Tisdale admitted that there are some conditions in a mine which require the evacuation of the mine. (N.T. 644)

201. It is safer to not have a shift of 85 or 90 miners descend into unsafe conditions in the first place than to have to evacuate miners once they are already down in the mine and the dangerous condition is discovered. (N. T. 643-44)

202. Mr. Stickler observed that with respect to conditions in a mine, that, "the longer

the distance in time, the more things are going to change". (N.T. 916)

203. Mr. Stickler also agreed that finding and eliminating dangers *before* workers enter an area provides them with a greater measure of safety than having workers enter the area without the dangers having first been eliminated. (N.T. 911)

204. For these reasons, having miners already down in the mine when the danger is discovered is a more dangerous, or less safe, situation than had the dangerous condition been discovered during the pre-shift examination conducted under the time linkage requirement of Section 228. (FOFs 200-204)

205. The Monday to Thursday 6:00 a.m. to 4:00 p.m. shift, for example, illustrates this enhanced danger, or lessened safety. (Ex. J-6)

206. Under Section 228(a) a pre-shift examination takes place from 3:00 a.m. to 6:00 a.m., before those 90 miners in that shift start their descent into the mine. Under the variance on the other hand, the last pre-shift examination had been done from 9:00 p.m. to 12:00 midnight the day before. (Ex. J-6)

207. That examination has been finished for six hours before those 90 miners descend into the mine. (Ex. J-6)

208. There is a pre-shift examination which starts at 5:00 a.m., which is one hour before those miners descend into the mine, but it is not completed until 8:00 a.m., which is two hours after they are down. (Ex. J-6)

209. Because conditions at a mine can change rapidly, a dangerous condition, including one which might require that no miners be in the mine, could have developed in the time between the completion of the pre-shift examination at 12:00 midnight and 6:00 a.m. which would not be discovered until after all those miners were down in the mine. (N.T. 912; Ex. J-6)

210. The risk to these miners is increased as a result of the variance. (FOF 207-211)

211. Both Mr. Lamont and Mr. Baker opined that the variance, because it operates to unlink the timing of the Section 228(a) pre-shift examination from being required to be performed within the three hours immediately before the start of shifts was less protective. (N.T. 183-84, 361-62)

212. We credit their opinions for the reasons just stated.

213. Also, Mr. Smicik, who has worked for the Department's Bureau of Deep Mine Safety for almost 20 years and who served on the Review Committee for this proposed variance, was of the opinion that the variance did not provide the same degree of protection as performing pre-shift examinations pursuant to the traditional Section 228(a) schedule. (N.T. 89, 93-94)

214. His testimony was contrary to the position of this employer, the Department. (N.T. 93)

215. We find Mr. Smicik to be a credible and convincing witness.

216. The enhanced risk of unlinking the timing of the pre-shift examination to three hours immediately preceding the commencement of the shift is enhanced even further during times when two shifts of miners accomplish their shift change by "hot seat exchange". (N.T. 595)

217. Under a "hot seat exchange", the relief shift descends into the mine during the time the prior shift is still in the mine and the miners accomplish their shift exchange at the work site. (N.T. 468, 486, 526, 595, 683-685)

218. During such "hot seat exchanges" there is not one but two shifts of miners underground at the time of the shift change. (N.T. 682-85)

219. This takes place, for example, at the shift change occurring at 2:00 p.m. on

Fridays. (Ex. J-6)

220. No pre-shift examination has been completed within the immediately preceding 3 hours of the beginning of that 2:00 p.m. shift and at that time there are the 85 miners from the shift being relieved plus the 85 miners from the new shift, a total of 170 miners, underground. (N.T. 683-84)

The Variance's Schedule For Section 228(a) Pre-Shift Examinations Is Not More Protective Because, As Alleged By the Department and EFMC, 84 Mine Is In Continuous Operation 24 Hours Per Day/Seven Days Per Week.

221. Even under the alternative schedule at Mine 84, there are many areas of the mine which are not regularly staffed. (N.T. 952)

222. One of those areas that is not constantly staffed is the conveyor belts. *Id*

223. The 32 miles of conveyor belts in the 84 Mine is the location in which one of the primary dangers at which a pre-shift examination is aimed, *i.e.*, the "hot roller". (N.T. 119-20)

Supposed Confusion Resulting From Pre-shift Examination Requirements Acting Together with Section 228(a) Pre-shift Examinations.

224. There is no evidence to support the Department's and EFMC's claim that the overlap of federal and state pre-shift examinations causes "confusion" to infect and thereby diminish the effectiveness of the Section 228(a) pre-shift examination process.

225. There is no evidence to support the claim by the Department and EFMC that Section 228(a) pre-shift examinations are conducted in a perfunctory manner due to the presence of a federal MSHA pre-shift examination schedule which calls for federal pre-shift examinations to occur at different and/or overlapping times than Section 228(a) pre-shift examinations.

226. The Department's February 27, 2001 investigation report on this variance request rejects this "confusion" theory. (Ex. J-3)

227. Page 6 of that Report notes that EFMC had alleged that without the variance, compliance with both state and federal pre-shift examination requirements "serve[s] no safety purpose and are an inefficient use of the workforce." (Ex. J-3) The Report's finding on this allegation states that individual mine examiners are assigned to specific areas of the mine and that, "duplicative examinations can be considered a safety improvement rather than an inefficient use of a resource." (Ex. J-3)

228. Mr. Aloia, the 84 Mine superintendent, proffered no credible evidence that there was confusion in the performance of Section 228(a) pre-shift examinations. (N.T. 545)

229. Mr. Aloia's testimony on the subject amounted to nothing more than anecdotal double hearsay. (*Id.*)

230. Mr. Tisdale proffered no credible evidence that there was confusion in the performance of Section 228(a) pre-shift examinations. (N.T. 618-623)

231. His testimony on that subject was stated as merely a general hypothetical concern that confusion may occur which he admitted was not based on any personal knowledge of any such problems at Mine 84. (N.T. 623-625)

232. Mr. Tisdale had no knowledge of any confusion or perfunctory performance of pre-shift examinations being performed at 84 Mine when he drafted his expert report. (N.T. 624-625.)

233. Mr. Stickler did not proffer any credible evidence that there was any confusion in performing Section 228(a) examinations. (N.T. 913-914, 964-969)

234. His main commentary on the question was his observation that during the site visit by the Board he had observed that the chalk boards, which are supposed to record the date and times of pre-shift examinations, were difficult to read. (N.T. 965-966).

235. This testimony does not permit the conclusion that there is confusion in the performance of Section 228(a) pre-shift examinations.

The Department's and EFMC's Theory That The Variance Is More Protective Because, Without It, The Interval Of Time Between Pre-Shift Examinations Would Be Longer Is Without Factual Or Legal Basis.

236. Pre-shift examinations at Mine 84 under the alternative work schedule are currently occurring *every eight hours* pursuant to the requirements of federal law. (N.T. 542-543; JS-11, JS-12; Ex. J-6).

237. There is never a period of time longer than eight hours at Mine 84 in which a pre-shift examination does not occur. (N.T.542-543; Ex. J-6; JS-11, JS-12)

238. Mine 84 is not experiencing a phenomenon whereby the time interval between pre-shift examinations is being stretched to longer than every eight hours due to shifts which are stretching in length to 10 or even 12 hours. (N.T. 630, Ex. J-6)

239. For the reasons just stated, the opinion, expert or otherwise, that there is a safety "concern" which this variance addresses, because of the longer than eight-hour coal producing shifts at this mine, the time between pre-shift examinations is being stretched to 10 or perhaps even 12 hours, is neither factual nor credible.

The New Technological Developments Relating To Monitoring For Methane And Other Dangerous Conditions.

240. There have been improvements since 1961, when the BCMA was passed, in technology and technological capabilities regarding safety and protection in deep mines. (N.T. 580-81, 598-600, 770, 853-54)

241. Some equipment and/or capability exists today which did not even exist in 1961. (*Id.*)

242. There have been improvements in methane and carbon monoxide monitoring equipment as it exists today. (*Id.*)

243. In 1961, carbon monoxide detection systems that could detect carbon monoxide at 5-10 pm and report the levels to an outside person on duty 24 hours a day were not available as they are today. (*Id.*)

244. Methane monitors which are on continuous mining machines and longwall face equipment, while available by the late 1960s, have today evolved such that these devices are much more reliable and effective. (*Id.*)

245. Hand held methane detectors were available as of the 1970s, but these devices have improved capabilities since then. (*Id.*)

246. Today, some hand held detectors can be set to alarm for the presence of methane and oxygen at levels as low as 0.5%. (*Id.*) Before these devices were developed, miners had to rely on the flame safety lamp to detect low oxygen which were much less sensitive. (*Id.*)

247. These improved safety devices and capabilities do not render the fundamental timing requirement of Section 228(a) superfluous or useless. (*Id.*)

248. These improved safety capabilities in the technology realm are not reasons to override the pre-shift examination timing requirement contained in Section 228(a) as it applies at 84 Mine under its new schedule.

249. The new technology and technological capabilities may serve to mitigate the degree of lesser protection which the variance would produce, but the net result is that, even considering the new and improved technology in the field of mine safety, the variance does not accord equal to or greater protection of personnel and property.

The Conditions Attached To The Variance.

250. Much, if not all, of the measures of Condition No. 5 are either already required by federal law or constitute standard industry practice. (N.T. 273-74, 363-64)

251. Even though under the BCMA a methane gas check is done every 30 minutes, a methane gas check is nevertheless already done every 20 minutes under federal law. (N.T. 112, 273-74)

252. As a matter of common practice in performing pre-shift examinations, miners whose shift is scheduled to start after the examination are verbally notified of any dangerous conditions which may have been discovered during the pre-shift examination. (N.T. 363-64, 408-09).

253. The operation of the variance would virtually negate the import of its Condition No. 5 requirement of notification to incoming miners of dangerous conditions because large numbers of miners in various different shifts on different days would already be down in the mine working their shifts when the pre-shift examinations under the variance schedule is completed. (Ex. J-6, N.T. 363-64, 408-09, 451)

254. Condition No. 6 requires nothing more than equipment, which is being used already in 84 Mine, to be used and maintained in accordance with federal standards and the manufacturers' specifications. (Ex. J-4)

255. Continuous miners and longwall face equipment are already equipped with methane monitors that continuously monitor and even automatically de-energize electric power or shut down mining machines when methane levels exceed allowable limits. (JS-4)

256. There was no evidence that any equipment was not already being used in accordance with federal standards and manufacturers' specifications or that Mine 84 would need such a stipulation in order to have its equipment operated in such fashion.

257. The federal mine enforcement authorities have a substantial presence at 84 Mine with at least one federal mine inspector whose only responsibility is Mine 84. (N.T. 650)

258. There is no evidence that the federal regulations are not being enforced or that the federal enforcement personnel are not doing an adequate job of enforcing federal mine regulations at 84 Mine.

DISCUSSION

FACTUAL BACKGROUND.

Introduction and Procedural Background.

This case is a challenge by the United Mine Workers of America, the United Mine Workers of America, District 2 and the United Mine Workers of America, Local 1197 (collectively referred to as the UMW) to the Department's March 12, 2001 approval of a "variance" for Eighty-Four Mining Company (EFMC) from the Section 228(a) pre-shift examination requirement of the Pennsylvania Bituminous Coal Mining Act (BCMA) with respect to EFMC's operations at the 84 Mine located in South Strabourne Township, Washington

County. The variance provision of the BCMA, which is Section 702, provides as follows:

> Nothing in this act shall be construed to prevent the adoption or use by any operator of new machinery, equipment, tools, supplies, devices, methods and processes, if such new machinery, equipment, tools, supplies, devices, methods and processes accord protection to personnel and property substantially equal to or in excess of the requirements set forth in any portion of this act.

52 P.S. § 701-702 (we will refer to this as Section 702 of the BCMA). The Section 702 variance was to relieve EFMC from adherence to the requirement of Section 228(a) of the BCMA that a safety inspection of the mine take place within the three hours immediately preceding the start of each coal and/or non-coal producing shift. The relevant portions of Section 228(a) provide as follows:

> In a gassy mine, within three hours immediately preceding the beginning of a coal producing shift, and before any workmen in such shift . . .enter the underground areas of such mine, certified persons designated by the mine foreman . . .shall make an examination, as prescribed in this section, of such areas . . .
>
> . . .
>
> . . . No person on a non-coal producing shift . . .shall enter any underground area in a gassy mine, unless such area, which shall include all places on that particular split of air, has been examined as prescribed in this subsection within three hours immediately preceding his entrance into such area.

52 P.S. § 228(a). The examinations required by Section 228(a) are referred to as "pre-shift examinations" because of the requirement that they be conducted "within three hours immediately preceding the beginning of a [coal and/or non-coal producing] shift." The variance, which EFMC sought and the Department approved, unlinks the Section 228(a) pre-shift examination from being conducted within three hours immediately preceding the beginning of a shift and instead permits, Section 228(a) pre-shift examinations to be conducted on a regularly

spaced schedule of every eight hours.

The UMW challenges this variance on the grounds that EFMC's request was not a proper subject for Section 702, that the Department committed error in the manner in which it processed the request, and, of course, that the variance does not accord substantially equal or greater protection to personnel and property. The matter was originally scheduled for a Supersedeas hearing, but the parties agreed, instead, to an expedited discovery and hearing schedule. EFMC agreed to refrain from implementing the variance while this matter is pending for disposition at the Board.

The hearing was held from June 19, 2001 through June 22, 2001 and July 10, 2001 through July 11, 2001. Closing arguments were conducted on July 12, 2001. In addition the presiding trial judge conducted a site view. The site view was conducted on Monday, July 10, 2001 and involved approximately one-half hour of safety training before descending into the mine and staying for about three and one-quarter hours.

Post-trial briefing by the parties was completed on October 18, 2001. In addition to the parties' briefs, the Board granted leave to the Pennsylvania Coal Association (PCA) to file a Brief Amicus Curiae which it did on September 25, 2001.

LEGAL ANALYSIS.

Standard of Review and Burden of Proof.

The UMW has both the burden of proceeding and the burden of proof in this case. 25 Pa. Code § 1021.101(a), (c)(2). The Board, in its adjudication of *Smedley v. DEP,* EHB Docket No. 97-253-K (Adjudication issued February 8, 2001) discussed in detail the nature of the Board's standard of review to be applied in cases before it. In short, actions before the Board involve the determination of whether the findings upon which DEP based its action are correct and whether

DEP's action is reasonable and appropriate and otherwise in conformance with the law. *Smedley, supra,* at 30. In this case, then, the UMW has the burden of proving that the Department's action in approving EFMC's Section 702 variance request was improper under the law and/or that the variance, as applied to this mine with this work schedule does not accord substantially equal or greater protection to personnel and property.

The Variance Request Is Within The Ambit Of Section 702.

Before we even get to the question of whether the variance accords substantially equal or greater protection to personnel and property, which is the Section 702 standard, the UMW argues that the request outlined by EFMC is not a proper Section 702 request in the first place because the proposal does not involve new methods or processes within the meaning of Section 702 but only a different schedule. The UMW points out that there is no new method of conducting pre-shift examinations being proposed. The Department and EFMC argue that what is being proposed is indeed a new method or process of conducting pre-shift examinations, namely, a new method or process of scheduling such examinations. The PCA's Brief Amicus Curiae similarly argues that the variance requested by EFMC in this case falls within the purview of being considered as a new method or process under Section 702.

We believe that the Department, EFMC and the PCA are correct on this issue. There is nothing in Section 702 which would disqualify a proposal to change the timing of pre-shift examinations from being considered as a new "method or process" under Section 702. Indeed, Mr. Lamont admitted that he considered the pre-shift examinations that he performed when he served as a mine inspector to be an essential part of the method of operating those mines. Lamont Tr. 444. Also, there was evidence in the record that Section 702 has been used to grant variances even from direct prescriptions contained in the BCMA. For example, the BCMA

requires that underground overhead electrical trolley lines be protected from being touched by wooden boards. 52 P.S. § 702-328. Today, however, it is commonplace, through the variance procedure, that neoprene instead of wood is used because it is more effective than wood, wraps around or encases the trolley wire entirely and accords more protection from accidental exposure and shock than wood guards. Stickler Tr. 769-70, 784-85. Also, the BCMA requires that "shelter holes" be spaced every 80 feet within a mine. 52 P.S. § 701-268. Shelter holes are large depressions dug into the wall of the mine along locomotive tracks where miners can seek refuge from oncoming locomotives moving rail cars of coal out of the mine. However, pursuant to variance, in some particular cases, where circumstances warrant under the terms of Section 702, shelter holes have been placed up to 150 feet apart. The reason for this is that, in those cases, locomotive transportation of coal out of mines had been replaced to some degree by conveyor belt transportation making shelter holes less of a major safety concern and, concomitantly, these particular mines had particularly precarious roof stability conditions which shelter hole construction exacerbates. Thus, it was considered safer, on balance, to not have shelter-holes, which lessen roof integrity, spaced every 80 feet but, instead, to have them placed further apart. Stickler Tr. 772-73, 783-84.

The UMW does not seem to dispute the notion that Section 702 can be used, in the appropriate circumstances, to countermand even specific prescriptions of the BCMA. The appropriate circumstances being, of course, as outlined in Section 702, that the variance "accord protection to personnel and property substantially equal to or in excess of the requirements set forth in any portion of this act." 52 P.S. § 701-702.

In light of the language of Section 702, the experience we were told about with respect to its application, and the UMW's apparent agreement that Section 702 can authorize the deviation

from even a specific prescription of other provisions of the BCMA, we conclude that the EFMC variance request was not precluded from being considered under the provisions of Section 702. The real question, then, is whether the variance as proposed to be applied at 84 Mine under its new alternative work schedule "accord[s] protection to personnel and property substantially equal to or in excess of the requirements set forth in any portion of this act." 52 P.S. § 701-702. Before we get to that question, however, we need to dispense with one other preliminary question posed by the UMW and that is whether the Department erred in either using the TGD to process EFMC's request in the first place or in the particular manner in which it processed EFMC's request pursuant to the TGD.

The Department Did Not Err In Either Using The TGD In The First Place Or In The Manner In Which It Processed The EFMC Request Pursuant To The TGD.

The UMW advances a two-pronged attack on the Department's application in this case of the TGD. First, in a broad sense, it asserts that the TGD is not a proper vehicle under which to process Section 702 variances. The essence of this argument is that the BCMA does not provide the Department, or the Director of the Bureau in particular, with the authority to employ this TGD, or any TGD, in processing Section 702 variance requests. The UMW argues that only individual mine inspectors have the authority under the BCMA to allow or not allow variances and that the TGD improperly usurps the prerogative of the mine inspectors to enforce the BCMA in this respect. Second, the UMW argues that the Department did not even apply the TGD correctly to this variance request.

We think that neither of the principle points of the UMW's argument is convincing. We find that use of the TGD to process Section 702 variances in general is a proper exercise of the Department's authority to administer the BCMA and that the Department properly followed the TGD in this case.

Section 104 of the BCMA vests the Secretary of Department with the authority and "duty . . . to see that the mining laws of the Commonwealth are faithfully executed." 52 P.S. § 701-104. The TGD is an administrative tool that "establishes internal procedures to be used by the Department to process requests for variances submitted by operators under Sections 702 and 1402." Ex. J-2. The production of a TGD to deal with BCMA Section 702 variance requests is certainly within the ambit of the Department's authority to administer and execute the mining laws of Pennsylvania.

The record shows that the Department's judgment in 1995 that the application of Section 702 of the BCMA was in need of administrative upgrading cannot be deemed to have been wrong. The Balkanization of application of Section 702 led to anomalous results in the field. One example of particular note involved a case of an inspector who approved the use of neoprene covering instead of wood boards to guard trolley wire. When a successor DMI took over inspection duties for the same mine he spotted the neoprene instead of wood and ordered that the neoprene be replaced with wood boards which resulted in a two-day shut down of the mine. Stickler 784-85; DEP Proposed FOF 128. Application of the TGD seeks to avoid these types of problems and we find that exercise of administrative authority by the Department to be supported by the BCMA and reasonable.

The TGD provides for a documented and orderly approach to section 702 variance requests which did not exist before the production of the TGD. Moreover, the TGD contains significant notice and comment provisions, which before the TGD were not a part of the Section 702 variance process. The UMW may complain that the TGD's notice and comment provisions should be different, but that is no basis to conclude that Department's protocol as set forth in the TGD is outside of the scope of its authority to administer the BCMA.

We also reject the notion that the TGD is violative of the BCMA because it supposedly usurps the province of mine inspectors. Nowhere in the BCMA are mine inspectors given authority, even implicitly, to receive, review and pass upon Section 702 variance requests. The duties of mine inspectors include the authority to enter mines and perform inspections, order the withdrawal of workers from dangerous situations and/or the cessation of work in such circumstances and to institute proceedings for violations. 52. P.S. §§ 701-117, 701-120, 701-121. Nowhere in Sections 117, 120 or 121 is there any mention of reviewing or passing upon

Section 702 variance requests or even any role whatsoever for mine inspectors in doing so. In fact, Section 702 is nowhere even cross-referenced or mentioned in any of these sections.

Under Section 123 of the BCMA, a right to appeal any decision of a mine inspector to the Secretary is provided. 52 P.S. § 701-123. Under Section 123, the Secretary appoints an investigative commission to make further examination into the matter in dispute. *Id.* The TGD does not usurp the mine inspectors' powers enumerated in Section 117, 120, and 121, nor is the TGD contrary to or violative of the Section 123 statutory procedure for appealing a decision of a mine inspector. In fact, the TGD and the Section 123 procedure are substantively unrelated. The only relation between the two is coincidental, *i.e.*, the TGD borrowed the idea from Section 123 of establishing an investigative commission or committee.

We also think that the Department sufficiently followed the steps outlined in the TGD in this case. JS-18, FOF 87-89, *infra* p. 14-17.

Now that we have dispensed with these two issues, we turn our attention to whether the variance as it would be applied in this case at 84 Mine with 84 Mine's new alternative work schedule "accord[s] protection to personnel and property substantially equal to or in excess of the requirements set forth in any portion of this act." 52 P.S. § 701-702. We find that it does not.

The Variance Does Not Accord Substantially Equal Or Greater Protection To Personnel And Property.

The Arguments Of Each Side That The Variance Either Increases Or Decreases The Gross Number Of Pre-Shift Examinations Per Week.

In presenting arguments whether the variance accords equal or more protection, or less protection, to personnel, both sides have focused a great deal on whether there would be more or fewer pre-shift examinations per week under the alternative schedule with the variance. This

argument centers around whether Section 228(a) of the BCMA requires 19 or 29 pre-shift examinations per week under EFMC's alternative schedule. It is undisputed that under the variance there would be 21 Section 228(a) pre-shift examinations per week. The UMW claims that under the current law as applied to Mine 84's alternative schedule, there would be 29 pre-shift examinations required. Of these 29 pre-shift examinations, 14 would be the more comprehensive examinations required for coal-producing shifts and 15 would be less comprehensive examinations associated with non-coal producing shifts. Under the Department's and EFMC's view of the alternative schedule being practiced at 84 Mine, 19 pre-shift examinations are required. Of these 19, 14 are the more comprehensive examinations for coal-producing shifts and 5 are the less comprehensive ones done in connection with non-coal producing shifts. The 21 examinations done under the variance would be of the entire mine and thus they would be full Section 228(a) pre-shift examinations. The Union argues that the variance would be less protective because the number of Section 228(a) pre-shift examinations is dropping from 29 per week to 19 per week. The Department and EFMC argue that protection is increased since the number of Section 228(a) pre-shift examinations is increasing under the variance from 19 per week to 21 per week. The Department and EFMC also argue that even if the number of pre-shift examinations were decreasing under the variance, the variance still accords a greater level of protection of personnel.

We agree with the Department and EFMC that the gross number of Section 228(a) pre-shift examinations per week is not determinative of the question whether the variance accords equal or more or less protection to personnel. Mr. Baker, testifying for the UMW, stated that the number of pre-shift examinations per week in itself is not the key issue in determining whether the variance in this case accords more or less protection to personnel. Baker Tr. 195-96. We

agree with the Department's characterization of Section 228(a) when it says that the section does not speak to how many pre-shift examinations must take place per any given block of time. Department Reply Brief at 2. To us it is clear that Section 228(a) speaks to when those examinations are to be performed and that is *within three hours preceding the beginning of a coal-producing or non-coal producing shift.* Thus whether Section 228 requires 19 or 29 pre-shift examinations under the current work schedule and whether the variance will provide for more or fewer pre-shift examinations per week is not determinative on the question whether the Section 702 variance accords equal or improved protection to personnel and property.

Unlinking The Section 228(a) Pre-Shift Examination From The Requirement That It Be Conducted Within The Three Hours Immediately Preceding The Start of Each Shift Reduces Protection.

As we just discussed in the previous section, the key question is not how many pre-shift examinations take place in any given time frame but whether unlinking the pre-shift examination from being done within the three hours immediately preceding the beginning of the coal or non-coal producing shift, as established by the Legislature in Section 228(a) of the BCMA, and, instead, performing such examinations on a regular periodic basis every eight hours, accords equal or better protection to personnel and property. Given our hearing of the witnesses on both sides and a review of the evidence presented, we conclude that the UMW carried its burden of proof in this case. It has demonstrated that the pre-shift examination schedule proposed for this mine, with this work schedule, does not accord protection to personnel and property which is substantially equal to or in excess of the protections accorded to them by adherence to requirement in Section 228(a) of the BCMA that pre-shift examinations take place within three hours immediately preceding the beginning of a coal or non-coal producing shift. Accordingly, we decline to uphold the Department's granting of the variance under Section 702.

The timing of the pre-shift examination to come within the period of time within three hours immediately preceding the commencement of a shift is important because that procedure establishes a system of advanced notice of dangerous conditions. Smicik Tr. 86, Baker Tr. 290-95. Mr. Smicik referred to the pre-shift examination as "the single most important exam we have." (*Id.*) Under Section 228 (a) this system of advanced notice in the case of uncovering of a dangerous condition or conditions applies to each shift of miners before they descend into the mine to start their shift. Lamont Tr. 361-62.

Both Mr. Lamont and Mr. Baker, witnesses for the UMW, were of the opinion that the variance, because it operates to unlink the timing of the Section 228(a) pre-shift examination from being required to be performed within the three hours immediately before the start of shifts was less protective. Baker Tr. 183-84; Lamont Tr. 361-62. We find it significant that not a single person who actually mines coal, who are the persons primarily protected by the BCMA in general and Section 228(a) in particular,[7] testified that pre-shift examinations performed pursuant to the schedule outlined in the variance accords protection to personnel and property substantially equal to or in excess of the Section 228(a) system of pre-shift examinations. Indeed, Mr. Smicik, who has worked for the Department's Bureau of Deep Mine Safety for almost 20 years and who served on the Review Committee for this proposed variance, was of the opinion that the variance did not provide the same degree of protection as performing pre-shift examinations pursuant to the traditional Section 228(a) schedule. Smicik Tr. 89, 93-94. Mr.

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[7] The parties' Joint Stipulation states the obvious, that "[t]he primary purpose of the BCMA is to provide for the health and safety of persons employed in and about underground coal mines". Ex. J-6. This terminology comes from Section 104(a) of the BCMA which specifically directs the secretary "to protect the health and promote the safety of all persons employed in and about the mines". 52 P.S. § 701-104. In addition, the Board has also recognized that protection of miners is the primary purpose of the BCMA. We have stated that "the intent of the [BCMA] is...the protection of the health and safety of those employed in and around bituminous coal

Smicik testified in the UMW's case in chief under subpoena. Smicik Tr. 55-56, 133, Tr. 1051 His testimony was contrary to the position of this employer, the Department. As he put it, "I don't enjoy coming here in this position, taking a position, opposite my employer, I don't enjoy this but I'm under oath..." Smicik Tr. 93. The Department and EFMC have characterized Mr. Smicik as unreliable, not credible, and biased and prejudiced against Mr. Stickler. However, we find him to be a credible and convincing witness.

The unlinking of the timing of the pre-shift examination from being done three hours immediately preceding a coal producing shift has the effect in this case of sending a very large number of coal miners on coal producing shifts at different times into the mine without any pre-shift examination having been done within the three hours immediately prior to the commencement of their shifts as is done now. For example, under the variance, the 90 miners who descend into the mine on the coal producing shift commencing each Monday through Thursday at 6 a.m. will not have a pre-shift examination done prior to the start of their shift. The variance pre-shift examination closest in time to the commencement of that shift starts at 5:00 a.m. but is not completed until 8:00 a.m., two full hours after those 90 miners have descended into the mine. The most proximate in time, completed pre-shift examination from the perspective of this shift of miners would have taken place from between 9:00 p.m. to 12:00 midnight the night before their shift. Thus, it would have been completed six hours before they descend into the mine. The same situation applies to the Friday 4:00 a.m. to 2:00 p.m. shift of 85 miners. Under the variance, a pre-shift examination will have been done from 9:00 p.m. to 12:00 midnight the day before. This pre-shift examination will have been completed for four hours before this shift of 85 miners descends into the mine. The next pre-shift examination under the

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mines." *Pennsylvania Mines Corp. v. DER*, 1991 EHB 1348, 1372.

variance, the one running from 5:00 a.m. to 8:00 a.m. will not start until these miners have been underground for one full hour. Again, the same scenario applies to the 85 miners working the Friday 2:00 p.m. to 12:00 midnight shift. Under the variance, the last completed pre-shift examination runs from 5:00 a.m. to 8:00 a.m. Thus, these miners descend into the mine six hours after the completion of the last pre-shift examination. A pre-shift examination commences under the variance one hour before this shift, at 1:00 p.m. but it is not completed until 4:00 p.m., two hours after the miners on this shift have descended into the mine. Finally, the same applies to the 85 miners assigned to the Saturday and Sunday 12:00 noon to 12:00 midnight shift. Under the variance, the last completed pre-shift examination runs from 5:00 a.m. to 8:00 a.m. and is thus completed four hours before they enter the mine. The next pre-shift examination under the variance would run from 1:00 p.m. to 4:00 p.m. and it would thus not even start until one hour after these miners had entered the mine. These four shifts comprise a total of 345 miners which is a substantial portion of EFMC's work force.

As to this quite large number of miners on a host of different shifts the variance does not accord equal or more protection, it accords less protection. Mr. Tisdale, EFMC's own expert begrudgingly admitted that there could exist a dangerous condition which would require that no miners enter the mine and that it is safer for the miners if such a condition is discovered before the start of the shift, that is before the miners enter the mine, than if it is discovered after the shift starts. Tisdale Tr. 638-644. The reason is obvious, it is safer to not have a shift of 85 or 90 miners descend into unsafe conditions in the first place than to have to evacuate miners once they are already down in the mine and the dangerous condition is discovered then. Tisdale 47. Mr. Stickler observed that with respect to conditions in a mine, "the longer the distance in time, the more things are going to change". Stickler Tr. 916. Mr. Stickler also agreed that finding and

eliminating dangers *before* workers enter an area provides them with a greater measure of safety than having workers enter the area without the dangers having first been eliminated. Stickler Tr. 911.

For these reasons, having miners already down in the mine when the danger is discovered is a more dangerous, or less safe, situation than had the dangerous condition been discovered during the pre-shift examination conducted under the time linkage requirement of Section 228(a). This is precisely the situation of increased risk which pertains to the groups of miners we have been discussing which results from unlinking the Section 228 (a) pre-shift examination from being required to take place within three hours immediately preceding the start of their respective shifts.

This enhanced danger, or lessened safety, is easily illustrated by reference to, for example, the Monday to Thursday 6:00 a.m. to 4:00 p.m. shift. Under Section 228(a) a pre-shift examination takes place from 3:00 a.m. to 6:00 a.m., immediately before those 90 miners in that shift start their descent into the mine, as is contemplated by Section 228 (a). Under the variance on the other hand, the last pre-shift examination would been done from 9:00 p.m. to 12:00 midnight the day before. That examination has been finished for six hours before those 90 miners descend into the mine. There is a pre-shift examination which starts at 5:00 a.m., which is one hour before those miners descend into the mine, but it is not completed until 8:00 a.m., which is two hours after they are down. Because conditions at a mine can change rapidly a dangerous condition, including one which might require that no miners be in the mine, could have developed in the time between the completion of the pre-shift examination at 12:00 midnight and 6:00 a.m. which would not be discovered until after all those miners were down in the mine. The risk to these miners is increased as a result of the variance.

The enhanced risk of unlinking the timing of the pre-shift examination to three hours immediately preceding the commencement of the shift is enhanced even further during times when two shifts of miners accomplish their shift change by "hot seat exchange". (Tisdale Tr. 595) Under a "hot seat exchange", the relief shift descends into the mine during the time the prior shift is still in the mine and the miners accomplish their shift exchange at the work site. During such "hot seat exchanges" there is not one but two shifts of miners underground at the time of the shift change. This takes place, for example, at the shift change occurring at 2:00 p.m. on Fridays. As we have already noted, no pre-shift examination has been completed within the immediately preceding 3 hours of the beginning of that 2:00 p.m. shift and at that time there are the 85 miners from the shift being relieved plus the 85 miners from the new shift, a total of 170 miners, underground. Tisdale Tr. 683-84.

The Department and EFMC seemed to try to argue that the pre-shift examination is not really that important in terms of notifying miners in advance of their descent into the mine to start their shift because, normally, a dangerous condition which may be present does not rise to the level of requiring actual evacuation and can be handled directly on the scene with little or no difficulty or disruption. Even if that were true statistically, the argument misses the point. Mr. Tisdale did admit that there are some conditions in a mine which require the evacuation of the mine. Tisdale Tr. 644. The Department's and EFMC's argument is akin to saying that most automobile accidents are fender benders so; therefore, wearing your seatbelt is not safer. Nobody would dispute that for the minority of automobile accidents which are at high speed, the seatbelt can be and has been a life-saver. Even if we focus only on the supposed minority of dangerous situations which require wholesale absence of personnel from the mine, in those situations the absence of a pre-shift examination within the three hours immediately preceding

the start of the shift makes the personnel in those shifts less protected than if there had been an examination in the time frame required by Section 228(a). Mr. Trisdale provided graphic testimony about disastrously fatal incidents in coal mines – including the incident at Consol No. 9 Mine where, to this day, dead miners' bodies are still entombed. The Department's and EFMC's approach here stands the notion of safety planning on its head. It is singly for those minority of situations—the high speed collisions in the case of automobiles, and conditions requiring absence of personnel from the mine in the case of coal mining—that the safety measures we are talking about are at their highest value.

The Variance's Schedule For Section 228(a) Pre-Shift Examinations Is Not More Protective Because, As Alleged By the Department and EFMC, 84 Mine Is In Continuous Operation 24 Hours Per Day/7 Days Per Week.

The Department's and EFMC's theory that the variance does accord the same or greater protection because the 84 Mine is in continuous operation, 24 hours per day/7 days per week is not convincing. The Department and EFMC argue that since the alternative schedule contemplates operation of the mine 24 hours per day, seven days per week, that the Section 228(a) requirement that pre-shift examinations take place within the three hours immediately preceding the start of a shift is antiquated and moot. This theory is based on an historical view of coal mining, Section 228 (a), the BCMA and the fact that today, unlike the past, there are always personnel present in the mine to detect dangerous conditions. According to the Department and EFMC, when the BCMA was passed in 1961, mines did not operate 24 hours per day/7 days a week and that there were periodic times when mines sat idle. The primary concern of the drafters of the BCMA in writing Section 228(a) was to provide for inspection of mines that had sat idle before miners descended into them.

Neither the statutory language nor the historical context of Section 228(a) of the BCMA support this view of Section 228(a). Moreover, we reject the factual premise of the Department's and EFMC's theory.

Section 228(a) does not say that pre-shift examinations shall be conducted within three hours immediately preceding the start of a shift *where the mine has been idle or empty before the start of the shift.* Also, it is clear that the Legislature in 1961 was not viewing a mining industry landscape which necessarily involved periods of idle or empty time in the mine. EFMC's proposed Finding of Fact No. 23 states that, in 1961, when Section 228(a) was enacted, although mines were typically idle to some degree over the weekends, a typical weekday daily schedule involved two coal production shifts of 8 hours each followed by an 8-hour maintenance shift. EFMC Proposed FOF No. 23, *See also* Tisdale Tr. 593. Thus, the mine was not empty during the normal weekday for any period of time. Again, the Legislature did not draft Section 228(a) to provide for pre-shift examinations within three hours immediately preceding the start of a shift *on Mondays*, or only for the first 8-hour coal producing shift of the day following the nightly maintenance shift.

Moreover, even when a mine is operating 24 hours per day/7 days per week, Mr. Stickler admitted that there are many areas of the mine which are not regularly staffed. Stickler Tr. 952. Indeed, one of those areas that is not constantly staffed is the conveyor belts. *Id.* In this mine there are approximately 32 miles of conveyor belts which are not staffed regularly even though the mine is operational 24 hours per day/7 days per week. Ex. J-3, Aloia Tr. 556; Stickler Tr. 952. These miles and miles of conveyor belts is the location in which one of the primary dangers at which a pre-shift examination is aimed, i.e., the "hot roller".

Supposed Confusion Resulting From Federal Pre-Shift Examination Requirements Acting Together With Section 228 (a) Pre-Shift Examination Requirement.

The Department and EFMC also claim that the variance pre-shift examination schedule provides a safer regimen than the current system of overlapping federal and state pre-shift examinations. They contend that the overlap of federal and state pre-shift examinations causes "confusion" to infect the pre-shift examination process. They further state that this overlap which causes confusion causes pre-shift examinations to be less effective because they are performed in a "perfunctory" manner. Through the variance, the argument goes, both federal and state pre-shift examination schedules are matched so there will be no more confusion and no more perfunctory performance of pre-shift examinations. We reject this argument as there is no evidence to support it.

The Department's February 27, 2001 investigation report totally repudiated this theory and came to the opposite conclusion. Page 6 of that Report notes that EFMC had alleged that without the variance, compliance with both state and federal pre-shift examination requirements "serve[s] no safety purpose and are an inefficient use of the workforce." Ex. J-3. The Report's finding on this allegation totally rejects this notion. The Report notes that individual mine examiners are assigned to specific areas of the mine and that, "duplicative examinations can be considered a safety improvement rather than an inefficient use of a resource." Ex. J-3.

That EFMC attempted to advance this argument at trial and in post-hearing briefs is to be expected. That the Department did the same after having so forcefully rejected it and coming to the exact opposite conclusion in the administrative process is surprising. *See* Department Post-Hearing Brief, proposed FOF Nos. 158d. 159, 160, page 88-89 n.37, Department Post-Hearing Reply Brief p. 2

In any event, there was no palpable, let alone credible, evidence to support this notion at trial from either the Department or from EFMC. At the outset, we think that such an argument is grounded in concepts of behavioral psychology or organizational behavioral psychology. There was no expert testimony on those areas from either the Department of EFMC. Second, the testimony that we did have on this subject was completely conjectural. For example, Mr. Aloia, the 84 Mine superintendent, admitted that he had no direct evidence supporting this theory. He said that he had only heard about this notion anecdotally by second level hearsay. Aloia Tr. 545. He testified as follows:

> Q. Can you recall who the people were who indicated to you that they were confused?
> A. They were our firebosses that had made comments how they thought the firebossing was inefficient and how it was –
> Q. Do you recall who they were, and did they report to you or to somebody else?
> A. They reported to my shift foreman, who reported to me, but I do not recall their names.
> Q. Did you ever know their names?
> A. No, not really, just as general comments from the group.

Aloia Tr. 545.

We think that the fact that the mine superintendent has no palpable evidence of this supposed "confusion" or "perfunctory" performance of pre-shift examinations as a result of differing federal and state schedules is particularly convincing on the question because, as Mr. Aloia himself described his position, he is the "captain of the ship, the top person, the one who, along with the mine foreman, is responsible for the coal mine" Aloia Tr. 550. Moreover, as the Department points out, the superintendent fills the key management position at the mine insofar as he is statutorily responsible for supervising the entire work force of a mine and ensuring that the work force complies with the requirements of the BCMA. *See* Department Reply Brief p.8

n.3; 52 P.S. § 701-103(10)(statutory definition of "superintendent"); 52 P.S. § 229-234 (setting forth statutory duties of mine superintendent).

Mr. Tisdale did not even testify on direct examination about potential confusion or perfunctory performance of pre-shift examinations. He volunteered a general concern about such confusion in response to a question on cross-examination. Tisdale Tr. 618-623. However, this general concern does not rise to the level of credible evidence. Mr. Tisdale admitted that he had no knowledge of any confusion or perfunctory performance of pre-shift examinations being performed at 84 Mine when he drafted his expert report. Tisdale Tr. 624-25. He also admitted that his concern about same which was stated during his cross-examination was not based on any specific information regarding 84 Mine operating under its current schedule and that he had no personal knowledge of any problems of confusion or perfunctory performance of pre-shift examinations at 84 Mine. Trisdale Tr. at 623-25.

Mr. Stickler's testimony on this question was neither on point nor convincing. Stickler Tr. 913-14, 964-69. When asked by the trial Judge what role the supposed confusion or perfunctory performance of pre-shift examinations due to overlapping federal and state regulations had played in his analysis of the variance, Mr. Stickler's answer was indirect with his seminal point being that, during the Board's site view, he had observed that the chalk boards, which are supposed to record the date and times of pre-shift examinations, were difficult to read. Stickler Tr. 965-966. Even if that were so, there is no connection between that fact and supposed confusion or perfunctory performance of pre-shift examinations due to overlapping federal and state schedules.

The Department's and EFMC's Theory That The Variance Is More Protective Because, Without It, The Interval Of Time Between Pre-Shift Examinations Would Be Longer Is Without Factual Or Legal Basis.

The second of the Department's and EFMC's theories why the variance accords more protection to personnel and property is that, under Section 228(a), as coal production shifts lengthen to 10 or 12 hours, as they do under the alternative schedule, the Section 228(a) pre-shift examinations which do take place become more separated in time. In other words, since coal producing shifts are 10 or 12 hours long instead of 8 hours long, Section 228(a) pre-shift examinations would not occur every 8 hours as they would if coal producing shifts change every 8 hours. Accordingly, the theory goes, it is safer to provide, as the variance does, for regular Section 228(a) pre-shift examinations every eight hours. Both Mr. Tisdale and Mr. Stickler testified that they relied on this theory in concluding that the variance accorded more protection than the normal occurrence of pre-shift examinations under the operation of Section 228(a). Tisdale Tr. 575-77; Stickler Tr. 861.910. We reject this theory because it is based on an admittedly false factual premise and because it relies on an erroneous application of Section 702 of the BCMA.

No party disagrees that, as a factual matter, pre-shift examinations are currently occurring *every eight hours* pursuant to the requirements of federal law. JS-11, JS-12.[8] Mr. Tisdale

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[8] The 1999 federal MSHA Rule which instituted the fixed interval examination system is entitled "Pre-shift Examinations at Fixed Intervals". 30 CFR 75.360(a)(1). The National Mining Association (NMA), a trade association of mining companies, challenged the new MSHA Rule in the Court of Appeals for the District of Columbia. *National Mining Association (NMA) v. MSHA*, 116 F.3d 520, 529 (1997). Ironically, NMA claimed that the new fixed interval approach to pre-shift examinations was not appropriate or required from a safety standpoint because pre-shift examinations every eight hours were not necessarily safer than pre-shift examinations conducted at nine or ten hour intervals. The NMA argued that the term "shift" in 30 U.S.C. § 863(d)(1) did not necessarily mean an eight hour period and that, therefore, safety

admitted that Mine 84 does not have the problem that the time interval between pre-shift examinations is being lengthened. Tisdale Tr. 630. Mr. Aloia, the mine superintendent admitted that federal pre-shift examinations take place every eight hours. Aloia Tr. 542-43. Thus, the factual basis for the view of the Department, EFMC and their respective experts' opinions is acknowledged to be wrong. It is a fact that there is no period of time longer than eight hours between the performance of a pre-shift examination. In short, the notion that the variance address the safety "concern" that the time between pre-shift examinations is being stretched to 10

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considerations did not necessarily require conducting pre-shift examinations at eight hour intervals rather than, say, nine or ten hour intervals. *NMA*, *supra*, 116 F.3d at 530. The NMA also argued that the new regulation was not promulgated with sufficient notice and opportunity for comment under the Administrative Procedure Act, 5 U.S.C. § 553. *Id.* at 530-31

The *NMA* Court acknowledged that the eight-hour interval approach "reflects a break with past practice." *NMA*, *supra* at 529. The Federal Coal Mine Safety Act, passed in 1952, required pre-shift examinations in gassy coal mines within four hours immediately preceding the beginning of a coal producing shift. *Id.* at 529 *citing* Section 209(d)(7) of the FCMSA, 66 Stat. 692, 704 (1952). The Federal Coal Mine Health and Safety Act of 1969 called for pre-shift examinations within three hours immediately preceding the beginning of any shift. *Id. citing* Section 303(d)(1) of the FCMHSA of 1969, 30 U.S.C. § 863(d)(1). Section 863 of the FCMHSA outlines "interim mandatory safety standards". 30 U.S.C. § 863, *NMA*, *supra*, 116 F.3d at 530. The Secretary of Labor is specifically authorized under Section 811 of the FCMHSA to develop and promulgate and revise interim safety standards with improved ones where applicable. 30 U.S.C. § 861(a). *NMA*, *supra*, 116 F.3d at 530. Regulations promulgated from 1970 to 1992 incorporated the statutory language requiring pre-shift examinations to take place within three hours immediately preceding the start of a shift. *Id.* at 529 (citations omitted). MSHA's proposed Rule of 1994 also contained the same language. *Id.* However, during the comment process, MSHA changed the Rule to provide for eight-hour interval examinations and promulgated in that fashion in 1996. *See* 64 Fed. Reg. 45,165, 45,165.

The *NMA* Court upheld the NMA's claim regarding lack of legal notice and remanded the regulation for further action. *Id.* at 532. In response to the D.C. Circuit's decision in *NMA*, MSHA re-promulgated the proposed Rule calling for pre-shift examinations at fixed eight-hour intervals in 1998 and then it promulgated the final Rule in that form on August 19, 1999. 64 Fed. Reg. 45,165, 45,166. The final Rule became effective on October 18, 1999. JS-11.

or perhaps even 12 hours because of the longer than eight-hour coal producing shifts at this mine is nonsense as a factual matter.

The Department and EFMC, however, contend that the law requires that this fact be ignored. They point to the last few words of Section 702 as commanding this treatment. Specifically, Section 702 states that "nothing in this act is to construed to prevent [implementation of new methods] which accord protection to personnel and property substantially equal to or in excess of *the requirements set forth in any portion of this act.*" 52 P.S. § 701-702 (*emphasis added*). It is this clause, "in any portion of this act" and specifically the words "this act" which we are told mandates that the fact that federal pre-shift examinations do take place every 8 hours be ignored and that it is only the BCMA pre-shift examination schedule that can be considered. We reject this construction of Section 702 of the BCMA as being unreasonable.

It is said that "facts are stubborn things". It is a fact that pre-shift examinations occur every eight hours at this mine under this schedule and that there is never any period of time in excess of eight hours between pre-shift examinations. That this fact is extant in part because of the operation of federal law is beside the point. Section 702 does not require that we ignore facts, even facts which are extant because of the operation of federal law. We would not even consider as serious any other attempt to have us ignore this fact, or some other important fact relating to protection of personnel, if it were present due to some other cause besides federal law. For example, if EFMC, as a matter of company policy, was providing for pre-shift examinations every eight hours, we would not ignore that fact. Section 702 does not require that we ignore this fact whether it is due to company policy or federal law or any other initiating cause. To read Section 702 in that way in this case would be to read Section 702 to permit, even encourage, a

variance which diminishes protection while pretending that it enhances protection. That "Emperor's New Clothes" approach to Section 702 is directly contrary to the language of Section 702 which requires that for a variance to be approved it must, as a matter of fact, be equally or more protective of personnel and property. That interpretation of Section 702 is also directly contrary to the primary purpose of the BCMA which both parties agree is to provide for the health and safety of the persons employed in and about underground coal mines.

In addition, aside from the Section 702 interpretation question, any expert or other opinion which is based on the patently factually false premise that the variance accords equal or greater protection to personnel and property because the variance addresses the "concern" that the time between pre-shift examinations is creeping to periods of time longer than eight hours is not to be credited. Regardless of how Section 702 is interpreted, this aspect of Mr. Tisdale's and Mr. Stickler's expert opinion was based totally on this erroneous factual assumption and those opinions are therefore not credited on this point. Tisdale Tr. 576; Stickler Tr. 861. Likewise, Mr. Aloia's opinion on this topic, which is similarly based on the erroneous factual premise, is not credited. Aloia Tr. 536.

The Department and EFMC themselves provide vivid illustrations of the illogic of their position on this point. As we have discussed in the previous section of this opinion, the Department of EFMC argued that the overlapping federal and state pre-shift examination requirements caused confusion and the performance of the pre-shift examination in a perfunctory manner. Although the evidence does not in any way support this assertion, it cannot escape note that the Department and EFMC, in that instance, insist that the interaction of federal law with state law cause this effect. Also, EFMC, in its post-hearing reply brief, makes the very point, in

response to a UMW argument, that there is never a passage of time greater than eight hours between pre-shift examinations at Eight-Four Mine. EFMC's brief states as follows:

> At closing, counsel for the UMWA exaggerated [the concern that due to lengthening shifts, the interval between pre-shift examinations could lengthen] by suggesting that the interval between examinations could be extended to 24 or 62 hours. This, of course, is a total red herring because MSHA requirements which mandate 8-hour interval examinations, Article III, Section (b) and that 1998 Wage Agreement (J-29), which mandates the signatories' obeisance to the Federal Act and the actual variance approved by the Department for Mine 84. In simple terms, it couldn't happen.

EFMC Post-Hearing Brief at 31.

We think that the supposed concern or problem that the time interval between pre-shift examinations could stretch out to greater than eight hours at 84 Mine is imaginary because "it just couldn't happen." Also, the argument that the variance addresses this imaginary problem in a way that is equally or more protective of personnel or property is in a "red herring."[9]

The New Technological Developments Relating To Monitoring For Methane And Other Dangerous Conditions.

The Department and EFMC argue that the timing requirement of Section 228(a) for pre-shift examinations is much less important today than when the BCMA was passed in 1961 because of new and/or more technologically advanced monitoring and safety hardware that exists today. Mr. Tisdale explained the improvements in methane and carbon monoxide monitoring equipment since 1961. Tisdale Tr. 580-81, 598-600. Mr. Stickler did likewise. Stickler Tr. 770,

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[9] As the quoted portion of EFMC's brief also makes clear, the federal MSHA law is not the only cause for the fact that there are pre-shift examinations every eight hours. The 1998 Wage Agreement also is a cause of this to happen. By being party to that Agreement, 84 Mine has contractually bound itself to conducting pre-shift examinations every eight hours. So even if the Department's and EFMC's construction of Section 702 as requiring that facts caused by federal law be ignored would be credited, the fact that pre-shift examinations occur every eight hours at 84 Mine is attributable not only to federal law but also to a contractual arrangement, specifically, the 1998 Wage Agreement.

853-54. Moreover, some equipment and/or capability exists today which did not even exist in 1961.

In 1961, carbon monoxide detection systems that could detect carbon monoxide at 5-10 ppm and report the levels to an outside person on duty 24 hours a day were not available as they are today. Methane monitors which are on continuous mining machines and longwall face equipment, while available by the late 1960s, have today evolved into much more reliable and effective devices. Hand held methane detectors were available as of the 1970s but these devices have improved capabilities since then. Today, some hand held detectors can be set to alarm for the presence of methane and oxygen at levels as low as 0.5%. Before these devices were developed, miners had to rely on the flame safety lamp to detect low oxygen, which were much less sensitive. Tisdale Tr. 598-600, Stickler Tr. 770.

The fact that today's technological capabilities for monitoring methane, as well as other safety equipment, are more advanced than in 1961 should come as no surprise to anyone. However, these improved safety devices and capabilities do not render the fundamental timing requirement of Section 228(a) superfluous or useless as the Department and EFMC seem to argue. These improved safety capabilities in the technology realm are not reasons to override the pre-shift examination timing requirement contained in Section 228(a) as it applies at 84 Mine under its new schedule. That would be tantamount to taking one step forward on account of technology and two steps backward by unlinking the pre-shift examination timing requirement of Section 228(a). At best, the new technology and technological capabilities may serve to mitigate the degree of lesser protection which the variance would produce. However, the net result is that, even considering the new and improved technology in the field of mine safety, the variance does not accord equal to or greater protection of personnel and property.

The Conditions Attached To The Variance.

The Department and EFMC contend that the seven conditions imposed in the variance reinforce the additional protection which the variance provides. However, given our conclusion that the main theme of the variance, *i.e.*, unlinking the pre-shift examination from the timing requirement of being within three hours immediately preceding the start of a shift under 84 Mine's alternative schedule accords less protection to personnel and property, we do not and cannot conclude that the various conditions imposed in the variance transforms the variance into being more protective. At best, the seven conditions operate to mitigate the degree of the diminished protection which the variance produces.

The Department and EFMC emphasize especially conditions Nos. 5 and 6 as improving protection. Stickler Tr. 851-53, 991-94. Condition No. 5 requires the following: (1) certified miners and other specified workers are to conduct methane gas tests every 20 minutes; (2) they are to "danger off" and report to a certified mine official any dangerous conditions which cannot be corrected immediately; and (3) the certified mine officials are to notify incoming workers of all dangerous conditions in their respective work areas and see that a danger sign is posted at the entrance of those areas before workers enter. Ex. J-4. Condition No. 6 requires the operator to use and maintain the systems for monitoring methane continuously and to maintain such continuous monitoring equipment on all longwall face equipment, belt conveyors and permanent battery charging stations in compliance with all federal requirements and manufacturers' specifications. *(Id.)*

Much, if not all, of the measures of Condition No. 5 are either already required by federal law or constitute standard industry practice. Baker Tr. 273-274, Lamont Tr. 363-364, 408-409, 451. For example, even though under the BCMA a methane gas check is done every 30 minutes,

a methane gas check is nevertheless already done every 20 minutes under federal law. Smicik Tr. 112, Baker Tr. 273-274. Mr. Lamont testified that it was his experience in performing pre-shift examinations that he, as a matter of common practice, would verbally notify entering miners of the any dangerous conditions discovered. Lamont Tr. 363-364, 408-409.

Also, the very operation of the variance would virtually negate the import of its Condition No. 5 requirement of notification to incoming miners of dangerous conditions. As we pointed out already, under the variance, large numbers of miners in various different shifts on different days would already be down in the mine working their shifts when the pre-shift examinations under the variance schedule are completed. For example, the "pre-shift" examination for the Monday through Thursday coal-producing shift which starts at 6:00 a.m. would not be finished until about 8:00 a.m.--two hours after that morning mining shift has started. Ex. J-6. Obviously, the notification to incoming mine-workers of any dangerous conditions is of questionable value to miners who are already down in the mine. Lamont Tr. 408-409.

Condition No. 6 requires nothing more than equipment which is being used already in 84 Mine be used and maintained in accordance with federal standards and the manufacturers' specifications. Continuous miners and longwall face equipment are already equipped with methane monitors that continuously monitor and even automatically de-energize electric power or shut down mining machines when methane levels exceed allowable limits. JS-4. There was no evidence that any equipment was not already being used and maintained in accordance with federal standards and manufacturers' specifications or that Mine 84 would need such a stipulation in order to have its equipment operated and maintained in such fashion.

The Department and EFMC argue that these Conditions operate to expand the Department's enforcement jurisdiction to safety matters which state law does not now cover. For example, under Condition No. 5, the Department can enforce the requirement that methane gas tests be done every 20 minutes where under the BCMA as it stands the Department could only enforce methane gas tests being done every 30 minutes. First, Mr. Tisdale admitted that the federal mine enforcement authorities have a substantial presence at 84 Mine with at least one federal mine inspector whose only responsibility is Mine 84. Tisdale Tr. 650. Thus, there is no issue here of the federal regulations not being enforced or the federal enforcement authorities being understaffed as to 84 Mine. Secondly, and more fundamentally, while it may be true that the Conditions to the variance bring the Department's enforcement power into various other safety related particulars where otherwise it may not reach, this factor does not in itself operate to make such a fundamental matter of the unlinking of the timing requirement of Section 228(a) for pre-shift examinations under this work schedule more protective.

CONCLUSION.

Based on all of the foregoing, we conclude that the UMW has proven that the variance providing for Section 228(a) pre-shift examinations to take place every 8 hours if implemented here under this work schedule, does not provide substantially equal or greater protection to personnel and property than is provided with the operation of Section 228(a) pre-shift examinations taking place within the three hours immediately preceding the beginning of each shift.

CONCLUSIONS OF LAW

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

2. The scope of the Board's review is *de novo* meaning that the Board is not limited to considering only the evidence that was before the Department when it rendered its decision but the Board will consider all relevant and admissible evidence presented to it at the time of hearing and will weigh all the evidence presented anew. 35 P.S. § 7514(c); *Pequea Township v. Herr*, 716 A.2d 678, 685-87 (Pa. Cmwlth. 1998); *Young v. Department of Environmental Resources*, 600 A.2d 667, 668 (Pa. Cmwlth. 1991); *Warren Sand & Gravel Co. v. DER*, 341 A.2d 556, 565 (Pa. Cmwlth. 1975); *Smedley v. DEP*, Docket No. 97-253-K, slip op. at 26-27 (Adjudication issued February 8, 2001); *O'Reilly v. DEP*, Docket No. 99-166-L, slip op. at 14 (Adjudication issued January 3, 2001).

3. Actions before the Board involve the Board's *de novo* determination of whether the findings upon which DEP based its action are correct and whether DEP's action is reasonable and appropriate and otherwise in conformance with the law. *Smedley v. DEP*, Docket No 97-253-K, slip op. at 30.

4. The UMW, as appellants in this case, have the burden of proof and the burden of proceeding in this case to demonstrate by a preponderance of the evidence that the Department's approval of this variance request was error or otherwise contrary to law. 25 Pa. Code § 1021.101(a),(c)(2).

5. The Department did not err in considering the EFMC variance request under Section 702 of the BCMA.

6. The Department did not act outside the scope of its authority under the BCMA to promulgate the TGD to process Section 702 variance requests.

7. The Department followed the TGD in all material respects in this case.

8. EFMC's requested variance in this case does not accord substantially equal or greater protection to personnel and property.

9. In applying Section 702 of the BCMA which provides that, "[n]othing in this act shall be construed to prevent the adoption or use by any operator of new machinery, equipment, tools, supplies, devices, methods and processes, if such new machinery, equipment, tools, supplies, devices, methods and processes accord protection to personnel and property substantially equal to or in excess of the requirements set forth in any portion of this act", the term "this act" is not to be construed to require one to ignore relevant and important factual circumstances in determining whether the proposed variance accords substantially equal or greater protection because those factual circumstances are, at least in part, extant because of the requirements of federal mining law.

10. For the reason stated in Conclusions of Law No. 8 and 9, the Findings of Fact outlined in this Adjudication and the discussion therein, the Department committed error in granting EFMC's requested variance.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

UNITED MINE WORKERS OF AMERICA UNITED MINE WORKERS OF AMERICA DISTRICT 2, AND UNITED MINE WORKERS OF AMERICA, LOCAL 1197	:	
v	:	EHB Docket No. 2001-081-K
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION AND EIGHTY FOUR MINING COMPANY, PERMITTEE	:	Issued: December 4, 2001

ORDER

AND NOW, this 4th day December, 2001, this appeal is **SUSTAINED**. The Department's action dated March 12, 2001 granting Eighty-Four Mining Company's request for a variance from the requirements of the pre-shift examinations requirements of Section 228(a) of the Pennsylvania Bituminous Coal Mining Act, 52 P.S.§ 701-228(a), is hereby rescinded.

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

MICHAEL L. KRANCER
Administrative Law Judge
Member

Chairman George J. Miller's dissenting opinion and Administrative Law Judge Bernard A. Labuskes, Jr.'s dissenting opinion are attached.

DATED: **December 5, 2001**

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

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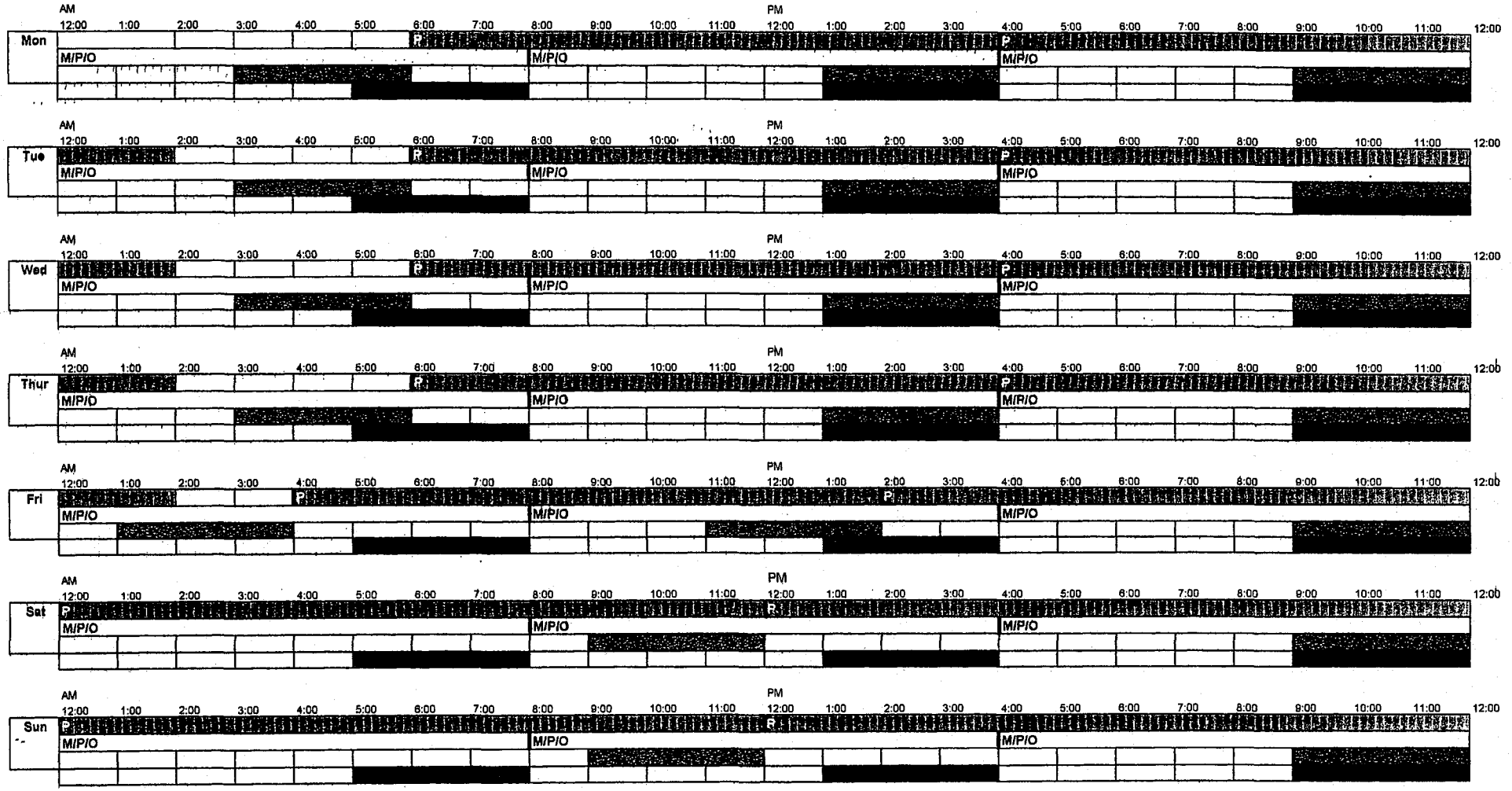
Appendix A

Ex. J-6

"Required Pennsylvania Pre-Shift Examinations and Proposed Fixed Interval Pre-Shift Examinations"

Mine 84



1111

Approximate Number of Persons (Max)				
Crew		Day		No. Entering
12:00 AM		Mon-Thur		60
6:00 AM		Mon-Thur		90
8:00 AM		Mon-Thur		20
4:00 PM		Mon-Thur		90
12:00 AM		Fri		60
4:00 AM		Fri		85
8:00 AM		Fri		20
2:00 PM		Fri		85
4:00 PM		Fri		15
12:00 AM		Sat-Sun		85
8:00 AM		Sat-Sun		15
12:00 PM		Sat-Sun		85
4:00 PM		Sat-Sun		15

P 10 or 12 hour Production Crews

M/P/O Maintenance/Production/Other Crews

Pennsylvania Required Pre-Shift

Proposed Examination Schedule

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

UNITED MINE WORKERS OF AMERICA UNITED MINE WORKERS OF AMERICA DISTRICT 2, AND UNITED MINE WORKERS OF AMERICA, LOCAL 1197	:	
v	:	EHB Docket No. 2001-081-K
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION AND EIGHTY FOUR MINING COMPANY, PERMITTEE	:	

DISSENTING OPINION OF BOARD MEMBERS
GEORGE J. MILLER AND BERNARD A. LABUSKES, JR.

By Bernard A. Labuskes, Jr., Administrative Law Judge

I respectfully dissent. I believe that the Department made the correct decision. In my view, the ultimate question, which is whether the variance accords protection to personnel and property substantially equal to or in excess of the requirements set forth in any portion of the BCMA, must be answered solely by reference to state law. The question should not be answered by reference to federal law, the current union contract, industry custom, tradition, or usage, or what EFMC happens to be doing at the mine as of today. The statute does not call or allow for a comparison of how the mine is being operated now considering all applicable federal and state laws, the union contract, and traditions versus how the mine will be operated in accordance with the variance and all applicable federal and state laws, the union contract, and traditions. Although the Appellants' cause happens to benefit from the approach taken here, it could easily backfire in other situations. For example, the linchpin of the argument is the federal eight-hour

requirement, but the requirement could be changed at any time. In that case, there would be no eight-hour comprehensive inspections. In my view, each program should stand on its own. We should not use the federal program to prop up the state program, and vice versa.

Determining whether the variance is at least as safe or safer than what is required *by the BCMA* boils down to deciding which is safer: (a) requiring inspections before every shift but sometimes allowing 10 to 12 hours to separate complete inspections for the production workers; or (b) requiring complete inspections of the occupied mine every eight hours without exception, even if it means that some inspections occur in the midst of ongoing shifts. If (b) is not at least as safe as (a), it is not allowed.

The appellants' expert testimony, when one eliminates its reliance on the existing federal requirements covering the weakness in the state program, is that there is a great deal of comfort for miners about to enter a mine knowing that an inspection has just been completed. I would not presume to dispute that. But what about the miner down in the mine who has been working for 12 hours since the last inspection?

In contrast, the opposing parties rely on solid evidence (used in support of the federal change) that it is best to never let more than eight hours go by without an inspection if people are in the mine. Indeed, the Appellants do not dispute that point. The evidence and the opinions based thereon suggest that 12-hour miners should feel the least comfortable during the last four-hour window that current state law allows past the point at which the eight-hour inspection effectively expires. Everyone seems to agree that four-hour period is not necessarily safer simply because the mine is active. Based upon my reading of the record, anything that gets rid of that four-hour period is laudable.

Thus, the uncontradicted expert testimony is that it is better to have inspections

every eight hours on a 24/7 basis than 10- or 12-hour periods without inspections. Option (b), the variance, is, indeed, safer than option (a), which is current state law. That is the only issue before us. Therefore, I would have dismissed the appeal from the variance.

GEORGE J. MILLER
Administrative Law Judge
Chairman

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: December 5, 2001

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

BOROUGH OF KUTZTOWN	:	
	:	
v.	:	**EHB Docket No. 2001-244-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: December 13, 2001**

OPINION AND ORDER ON MOTION TO DISMISS

By Bernard A. Labuskes, Jr., Administrative Law Judge

Synopsis:

The Board holds that a Departmental letter, which finds that a sewage treatment facility is projected to become overloaded, and which advises the appellant that it will be necessary for it to submit a corrective plan within 90 days and plan for limiting future connections, is an appealable action.

OPINION

The Department of Environmental Protection (the "Department") sent the Borough of Kutztown ("Kutztown") a letter that read as follows:

> A review of your 2000 Annual Municipal Wasteload Management Report submitted pursuant to Chapter 94 of the Department's rules and regulation has been completed. The report indicates that your wastewater treatment facility is projected to become organically overloaded. It will be necessary for the permittee to comply with Section 94.22 of Chapter 94 as follows:
>
> Submit a corrective action plan (CAP) to the regional office within 90 days setting forth steps to be taken by the permittee to prevent the projected overload. If the steps to be taken include the planning, design, financing, construction and operation of a sewage facility, the facility shall be consistent

with an official plan approved under the Pennsylvania Sewage Facilities Act (35 P.S. Sections 750.1-2) and the regulations in Chapter 71 (relating to administration of the sewage facilities planning program) and consistent with the requirements of the Department and the federal government regarding statewide planning and sewerage facilities.

Limit new connections to and the extensions of the sewerage facilities based upon remaining available capacity under a plan submitted in accordance with this section.

* * *

We would like to meet with you to discuss the adequacy and implementation of the plan and schedule you develop. When you have developed a plan that you are satisfied is adequate, please contact me and arrange a meeting....

* * *

In addition, on September 18, 2001, a Pennvest Planning Consultation was conducted at our office (copy enclosed) with Maxatawny Township to discuss their approved Act 537 plan with a proposed stream discharge to Sacony Creek and also review the Berks County Planning Commission (BCPC) comments which advocated a regional approach for wastewater treatment with neighboring Kutztown Borough. We ask that you work with the BCPC in developing your CAP response and include the status of Maxatawny Township as a part of your CAP. It is our understanding that BCPC planning approval is required for Pennvest funding.

Kutztown filed an appeal from the letter. The Department has moved to dismiss the appeal. It argues that the letter is not appealable because it does not constitute an "action" of the Department. The Department's argument is that the letter, unlike an order, is not independently enforceable. The regulations require Kutztown to take certain actions but the letter itself does not. The letter has no legal effect. It is akin to a notice of violation, which merely advises the recipient of its legal obligations but does not in and of itself compel the recipient to satisfy those obligations. It is an attempt to obtain voluntary compliance. Kutztown may face consequences if it ignores the regulations, but it is free to ignore the letter.

Kutztown responds that the letter by its own terms requires Kutztown to take several very

specific, costly actions. But for the letter, Kutztown would not be required to take those actions. The letter imposes liability on Kutztown that did not previously exist, and it includes a limitation on new connections to the system. It effects a significant change in Kutztown's status.

We described the basic principles regarding the appealability of actions in *Borough of Edinboro et al. v. DEP*, 2000 EHB 835, 836, where we quoted *Felix Dam Preservation Association v. DEP*, 2000 EHB 409, 421-22, as follows:

> Section 4(a) of the Environmental Hearing Board Act, Act of January 13, 1988, P.L. 530, *as amended*, 35 P.S. §§ 7511-7514, § 7514(a), provides that the Board has jurisdiction over "orders, permits, licenses, or decisions of the Department." Our jurisdiction attaches over an "adjudication" as defined under the Administrative Agency Law or an "action" as defined under the Board's Rules of Practice and Procedure. Under the Administrative Agency Law an "adjudication" is defined as, "[a]ny final order, decree, decision, determination or ruling by an agency affecting personal or property rights, privileges, immunities, duties, liabilities or obligations of any or all of the parties to the proceeding in which the adjudication is made." Administrative Agency Law, Act of April 28, 1978, P.L. 202, as amended, §§ 101-754, 2 Pa. C.S.A. § 101. Under Board Rule 1021.2 an "action" is '[a]n order, decree, decision, determination, or ruling by the Department affecting personal or property rights, privileges, immunities, duties, liabilities or obligations of a person including but not limited to a permit, a license, approval or certification."
>
> As this Board has said before in analyzing the appealability of DEP actions, we must examine the substance of the DEP's action. *See e.g., Bituminous Processing Co., Inc. v. DEP*, Docket No. 99-172-L slip op. at 2 (opinion issued, January 18, 2000)(in determining whether a letter stating DEP's notice of intent to forfeit a bond constitutes an appealable action, the Board will consider the substance of the letter itself)(*citing Central Blair County Sanitary Authority v. DEP*, 1998 EHB 643, 646-47).

This Board dealt with the same question that is presented by the Department's motion in this appeal nearly twenty years ago in *Hatfield Township Municipal Authority v. DER*, 1982 EHB 331. In that case, the Department sent a letter that determined that Hatfield's facility was projected to become overloaded. The letter required Hatfield to submit a written plan setting forth steps to be taken by the appellant to prevent overloading, and to limit new connections

based upon remaining available capacity. In other words, the letter in *Hatfield*, although not quoted, appears to be substantially identical to the letter in this appeal.

In *Hatfield*, as here, the Department moved to dismiss the appeal from what it argued was an unappealable act. The Board denied the Department's motion. It found that the letter directed Hatfield to comply with the law and "imposed a liability upon appellant, namely, limiting of new connections to the sewage facilities plant." 1982 EHB at 332. It also "affected the obligations and duties of appellant by requiring the submission of a written plan which would set forth [steps] to be taken to prevent overloading." *Id.* The letter changed the status of the parties. For these reasons, we concluded that the letter was appealable.

In *Bethel Park v. DER*, 1984 EHB 716, we addressed the appealability of a letter containing the following language:

> The survey indicates your sewer system is hydraulically overloaded and several issues regarding the overload remain unresolved....It will be necessary for Bethel Park Borough, as permittee, to comply with 25 Pa. Code Section 94.21. This section requires that Bethel Park Borough:
>
> 1) Submit to this office a written plan setting forth the actions to be taken to reduce the overload and a schedule showing the dates of each step toward compliance with this section. (We suggest this plan and schedule be submitted within 45 days of receipt of this letter).
>
> 2) Restrict new connections to the sewer system tributary to the overloaded sewerage facilities to only those connections which fall within the exceptions stated in 25 Pa. Code Sections 94.55, 94.56, and 94.57 until the requested plan and schedule is approved by the Department.

Developments subsequent to the issuance of the letter compelled the appellant to move to withdraw its appeal from the letter "without prejudice." The Department in opposing the motion took the opposite of the position that it takes here: It argued that the subject letter was an

appealable action. In the course of rejecting the appellant's motion, the Board suggested that a letter containing a mere finding of overloading might not constitute an appealable action. 1984 EHB at 719. On the other hand, where such a finding was followed by instructions that "it would be necessary" to submit a corrective action plan and restrict new connections, the Board agreed with the parties and concluded that such a letter did constitute an appealable action. 1984 EHB 718-719.

In *Swatara Township Authority v. DER*, 1987 EHB 757, the letter at issue advised the Harrisburg Sewerage Authority of the Department's determination that the Authority's treatment facility was projected to become overloaded within five years. The letter directed Harrisburg to submit a corrective action plan. That portion of the letter was not appealed. The letter went on to advise Harrisburg that the Department would no longer accept planning modules for projects tributary to an overloaded sewer line. An interested municipality appealed that provision of the letter and the Department moved to dismiss. The Board granted the Department's motion. It held that the provision under appeal was a mere threat of a future appealable action, and therefore, it was not itself a final appealable action. 1987 EHB at 759-60.

In *Westtown Sewer Company, et al. v. DEP*, 1992 EHB 82, there were two letters. The first letter read as follows:

> Available information now indicates that an actual hydraulic overload exists at the Westtown Sewer Company wastewater treatment plant.
>
> We wish to remind you of the requirements of Section 94.21 Municipal Wasteload Management Regulations and of your responsibilities under this section which states in part that "No building permit shall be issued by any governmental entity which may result in a connection to overloaded sewerage facilities or increase the load to those facilities from an existing connection."

The second letter read as follows:

> The reports established that your sewage treatment facility is hydraulically overloaded. It will be necessary for [WSC], as permittee, to comply with Section 94.22 of Chapter 94. This section requires that the permittee....

The Board raised the issue of the first letter's appealability *sua sponte*. Interestingly, the Department argued that the first letter was appealable. 1992 EHB at 83. No party contested the appealability of the second letter. The Board held that the first letter was not appealable and the second letter was appealable. The Board was impressed by the fact that the second letter "makes a clear finding of overload and directs WSC to undertake actions in response thereto." 1992 EHB at 86. The Kutztown letter is like the letter that was held to be nonappealable in *Westtown* because it says that the wasteload report "indicates" that the facility is projected to become overloaded, but it is like the letter that was held to be appealable in *Westtown* because it states that "it will be necessary for" Kutztown to comply with Section 94.22.

We recently dealt with a similar situation in *Borough of Edinboro, et al. v. DEP*, 2000 EHB 835. The letter in that case read as follows:

> In accordance with Section 94.21 of the Department's Wastewater Management Regulations, the Department expects the Borough to prohibit new connections in the areas identified and that the 1999 Wasteload Management Report due March 31, 2000 will identify the extent of the problems and what steps are planned to correct them.
>
> Furthermore, the Department under Section 71.13 of the Sewage Facilities Planning Regulations is now requiring the full participation by the Borough of Edinboro in the development and submission of a Joint Municipal Official Sewage Plan Update Revision with Washington Township.

We denied the Department's motion to dismiss, reasoning as follows:

> A key consideration in determining whether a Departmental letter constitutes an appealable action is whether it requires the recipient to do something that will change the status quo. *Medusa Aggregates Company v. DER*, 1995 EHB 414, 419 (letter stating that mining no longer permitted on previously approved land is tantamount to an order). Here, the letter states that "**the Department expects** the Borough to prohibit new

> connections (emphasis added)" and that the forthcoming wasteload management report "**will** identify the extent of the problems and what steps are planned to correct them (emphasis added)." The letter goes on to expressly require Edinboro's participation in a certain planning effort.

2000 EHB at 837.

We will not pretend that these cases are perfectly consistent. Certain core principles, however, do emerge. For one thing, the cases illustrate that it is impossible to paint a bright line between those Departmental actions that affect a party's personal or property rights to such a degree that immediate Board review is warranted, and those Departmental actions that do not. Therefore, the determination must be made on a case-by-case basis. *Ford City v. DER*, 1991 EHB 169, 172. Although the results may vary, the same factors should be considered in every case. In deciding whether a Departmental letter constitutes a final "action" or "adjudication," we consider such factors as the wording of the letter, the substance, meaning, purpose, and intent of the letter, the practical impact of the letter (with an eye to what actions a reasonably prudent recipient of the letter would take in response to the letter), the regulatory and statutory context of the letter, the apparent finality of the letter, what relief the Board can offer (i.e., the practical value of immediate Board review), and any other indicia of a letter's impact upon its recipient's personal or property rights. When we apply these factors to the Kutztown letter, we conclude that the letter is appealable.

We always start with the specific wording of the letter. *See 202 Island Car Wash v. DEP*, 1999 EHB 10, 12; *Highridge Water Authority v. DEP*, 1999 EHB 1, 4. We acknowledge that the letter to Kutztown has some language that is somewhat tentative (the report "indicates" that the facility is overloaded), and some language that reads like a request ("We ask that you work with the BCPC in developing your CAP response..."), and some language that provides a legal interpretation ("It is our understanding that BCPC planning approval is required for Pennvest

funding."). Such qualified findings, simple requests or suggestions, and legal interpretations are indicative of a nonappealable act. *See Sandy Creek Forest, Inc., v. DER*, 505 A.2d 1091, 1093 (Pa. Cmwlth. 1986). The key point to the Kutztown letter, however, is that Kutztown must begin planning on how it is going to address its alleged overloading situation. The Department imposes that requirement in no uncertain terms. The Department does not tell Kutztown that it might want to think about planning, or that it would be a good idea. It states "[i]t will be *necessary*" for Kutztown to submit a new plan and limit new connections. The Department is not *asking* Kutztown to take certain measures, it is *telling* it to do so. The Board has consistently held that letters with such mandatory language are appealable. *See, e.g., Edinboro, Westtown, Bethel Park, and Hatfield, supra.* The fact that the letter imposes a specific deadline for submitting a plan adds to our conviction that the letter is appealable.

We, of course, are not necessarily bound by the actual words that happen to be chosen by the letter writer. But it is also obvious from a review of the entire Kutztown letter that the Department's purpose and intent is not to make helpful suggestions or provide an interpretation of the law. It is to require Kutztown to act. The purpose of the letter is to require Kutztown to begin planning immediately, and do so in a specific manner. If Kutztown does not act, consequences are not a remote possibility; they are almost certain to follow. The Department has not given Kutztown a choice. It has given it specific, nondebatable instructions. The letter taken as a whole is imperative, not advisory. *Contrast Oxford Corporation v. DER*, 1993 EHB 332, 334 (NOV not appealable because it is advisory, not imperative). It is not just descriptive, it is prescriptive.

No reasonably prudent municipality would simply file the letter away and wait for the other foot to fall. The most prudent course for Kutztown to take is to engage the necessary

engineers or other professionals and begin the planning process. And as Kutztown points out, "Sewer planning and intermunicipal negotiation involve substantial expenditures of time and money."

As we found in *Hatfield*, the letter effectively changes Kutztown's status. To use a colloquialism, the letter makes it official. Kutztown is now in projected overload status. That status not only defines Kutztown's standing and obligation vis-à-vis the Department, it will undoubtedly influence Kutztown's relationships with other parties as well. To suggest that the letter has not had a practical effect on Kutztown's status would be unrealistic.

The Department's argument that Kutztown's duty to act is compelled by the underlying regulation and not the letter itself has some merit, but it is also somewhat artificial. It is true that the letter, unlike an order, is not likely to be independently enforceable. We do not imagine the Department going into court to enforce this letter. On the other hand, it is unlikely that the Department would ever attempt to enforce *any* letter in court, yet a long line of Commonwealth and Board cases as discussed above holds that mandatory letters can be appealable actions. These cases suggest that a letter need not expose its recipient to an enforcement action to qualify as having affected personal and property rights. The argument is somewhat artificial because orders, although independently enforceable, must also have some legal basis. Ultimately, whether it is a letter or an order, the fundamental legal obligation flows from the applicable statute or regulation. *See National Forge v. DEP*, 1993 EHB 1639 (letter appealable that "triggered various legal requirements").

There is no indication that the Kutztown letter is tentative, contingent, interim, or anything less than final. It does not ask or allow for further study. It does not open the matter up for discussion or suggestions. It does not merely threaten future actions. The Department has

made a final determination and embodied it in the letter. If the matter is not open for further debate, we are left to wonder why the Department would advocate here, contrary to the position it took in *Bethel Park and Westtown*, that Kutztown should not have the benefit of immediate due process review.

At the most basic level, the requirement that a Departmental act be an "action" or an "adjudication" before this Board may get involved is based on the principle that Board review is unnecessary and inappropriate in academic disputes or in cases where a person does not have anything at stake. *See Boyle Land and Fuel Co. v. DER*, 1982 EHB 326 (Board does not issue advisory opinions). Thus, analyzing whether the Board could offer any meaningful relief to a particular party with respect to a particular letter is helpful in assessing whether it constitutes an appealable action. Here, the Board's review involves more than the hope of an advisory opinion. We might well conclude that the Department's finding of a looming overload is not accurate, and thereby relieve Kutztown of the expensive and time-consuming planning efforts, as well as a an impending limitation on connections.[1]

Finally, Kutztown would have been taking a serious risk had it not appealed this letter. Had it subsequently been determined that the letter was a final action, Kutztown would have been precluded from appealing the findings or requirements set forth in the letter in any subsequent proceeding. Although the Department states in its reply brief that it would not make that argument, that is exactly what it argued in *Bethel Park*. We will not speculate on whether such an administrative finality argument would have prevailed here, but the objectively reasonable threat of such a finding certainly supports our finding of jurisdiction. If a letter is definitive enough to possibly support a claim of administrative finality, it is likely that it is

[1] Although it goes without saying, we nevertheless emphasize that we have not so much as looked at the merits of the controversy and we express no opinion whatsoever in that regard.

definitive enough to constitute an appealable action.

For the foregoing reasons, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BOROUGH OF KUTZTOWN	:	
	:	
v.	:	**EHB Docket No. 2001-244-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 13th day of December, 2001, the Department's Motion to Dismiss is **DENIED.**

ENVIRONMENTAL HEARING BOARD

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: December 13, 2001

c: **DEP Bureau of Litigation:**
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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOAR

ROBERT K. GOETZ, JR., db/a/ GOETZ DEMOLITION COMPANY	:	
	:	**EHB Docket No. 2000-127-C**
v.	:	**(consolidated with EHB**
	:	**Docket No. 99-168-C and**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**EHB Docket No. 99-220-C)**
	:	**Issued: December 14, 2001**

OPINION AND ORDER GRANTING IN PART AND DENYING IN PART A MOTION TO DISMISS

By: Michelle A. Coleman, Administrative Law Judge

Synopsis:

The Board grants in part and denies in part the Department's motion to dismiss three consolidated appeals. The Board dismisses the appeal of an inspection report for lack of jurisdiction where the language of the report does not direct the recipient to undertake any specific action. The Board denies the motion to dismiss as moot the appeals of two compliance orders which were lifted by the Department. Where two compliance orders were appealed but no stay was ever sought, Appellant complied with the orders, the Department consequently lifted, as opposed to revoking, the orders, and the Department purported to waive future use of the alleged violations only in relation to the civil penalty escalation regulations pertinent to the Noncoal Surface Mining Conservation and Reclamation Act, the appeals were not rendered moot because the Appellant continued to retain a sufficient stake in their outcome.

OPINION

This matter involves appeals from two compliance orders and one inspection report issued by the Department of Environmental Protection ("DEP") to Appellant Robert K. Goetz, Jr. d/b/a Goetz Demolition Company ("Goetz") on August 10, 1999, September 24, 1999, and May 23, 2000, respectively. The compliance orders and inspection report pertained to alleged violations by Goetz of the Noncoal Surface Mining Conservation and Reclamation Act, Act of December 19, 1984, P.L. 1093, as amended, 52 P.S. § 3301 *et seq.* ("NSMCRA") on property located in Franklin Township, Adams County, Pennsylvania. Goetz timely appealed each of the two orders and the inspection report.[1]

At a pre-hearing conference on September 14, 2001, DEP informed the Board that in July 2001 it had lifted the two compliance orders. That same day, DEP filed a motion for leave to file a motion to dismiss. The motion for leave was unopposed by Goetz and, by Order dated October 2, 2001, the Board consolidated the three appeals *sua sponte* pursuant to 25 Pa. Code § 1021.80(a), permitted DEP to file a motion to dismiss, and set a briefing schedule.

Presently before the Board is DEP's Motion to Dismiss, filed on September 14, 2001, which is supported by the Affidavit of Thomas Flannery, a DEP Surface Mine Inspector Supervisor. In its Motion, DEP asserts that the appeals from the compliance orders have been rendered moot because, when the compliance orders were lifted and DEP had waived use of the alleged violations for any civil penalty escalation under the NSMCRA, the Board could no

---

[1] Goetz was initially represented by counsel in these matters. After prehearing memoranda were filed and just before a merits hearing, Goetz's counsel withdrew from further representation following the Adjudication issued in *Robert K. Goetz, Jr. d/b/a Goetz Demolition v. DEP*, 2000 EHB 840 (dismissing various appeals challenging inspection reports and compliance orders issued for engaging in noncoal surface mining without a license and permit). The Board postponed the hearing to allow Goetz time to obtain new counsel. Goetz ultimately secured another attorney, who entered his appearance in September 2000. However, several months later Goetz dismissed his second attorney. After receiving additional time from the Board to obtain a third attorney, Goetz elected to proceed in these matters *pro se*

longer grant any effective relief to Goetz. DEP further argues that because the inspection report did not direct Goetz to perform any action, but merely reported on Goetz's progress in reclaiming the disturbed land, the Board lacks jurisdiction over the inspection report appeal.

Goetz timely filed a short letter opposing the motion on October 31, 2001. Goetz does not dispute any of the factual assertions in DEP's motion papers, nor does he specifically contest DEP's legal arguments. Goetz essentially argues that he has been wronged by DEP's actions and requests an opportunity to present these appeals at a hearing on the merits.

I. Factual Background

The undisputed facts are as follows. Goetz was the operator of a noncoal surface mine located on property owned by Goetz in Franklin Township, Adams County (the "Site"). On August 10, 1999, DEP conducted an inspection of the Site and issued Compliance Order 99-5-072-N that same day (the "August Order"). The August Order cited Goetz for violations of the NSMCRA and its implementing regulations; specifically, Goetz was cited for conducting noncoal/industrial mineral mining activities without a license and a permit, and for failing to comply with the standards and requirements set forth in 25 Pa. Code, subchapter 77.[2]

The August Order directed Goetz to backfill, regrade, prepare a seedbed, seed and mulch approximately two acres on the Site. Goetz was also ordered to stabilize roadways and parking areas on the Site with appropriate stone material; all of the reclamation work was to be completed by November 2, 1999. On August 25, 1999, Goetz appealed the August Order (EHB Dkt. No. 99-168-C), generally asserting that he was not engaged in unauthorized mining.

On September 24, 1999, DEP conducted another inspection of the Site and issued

[2] Pursuant to 52 P.S. § 3305: "No person shall conduct a surface mining operation unless the person has first applied for and obtained a license from the department." In addition, "no person shall operate a surface mine . . . unless the person has first obtained a permit from the department in accordance with this act and the person is operating in accordance with the conditions provided in the permit as well as the applicable statutes and regulations." 52 P.S. § 3307. *See also* 25 Pa. Code §§ 77.51, 77.101 and 77.501.

Compliance Order 99-5-072-N-A (the "September Order"), which again cited Goetz for the violations described in the August Order. However, the September Order amended the earlier order by extending the final date for correcting the violations from November 2, 1999 until May 30, 2000. On October 25, 1999, Goetz filed an appeal of the September Order, docketed at EHB Dkt. No. 99-220-C, in which he reiterated his objections to the August Order almost verbatim.

On May 23, 2000, an inspection of the Site was conducted and DEP issued an inspection report that day (the "May Inspection Report"). The May Inspection Report recorded the inspector's observations of conditions at the Site and the progress made by Goetz to complete reclamation work as previously ordered. The report stated that Goetz had completed most of the work with the exception of some erosion and sedimentation problems and a lack of adequate vegetation on a portion of the Site. *See* Flannery Affidavit, at ¶ 6 and exhibit C. Shortly thereafter, DEP assessed a civil penalty of $2,200 on Goetz for the violations cited in the August and September Orders. *Id.* at ¶ 7 and exhibit D (Civil Penalty Assessment dated May 30, 2000).

On June 14, 2000, Goetz appealed the May Inspection Report, (EHB Dkt. No. 2000-127-C), asserting, *inter alia*, that the report was factually incorrect and legally insufficient. However, Goetz (who was represented by counsel at the time) never appealed the May 30, 2000 Civil Penalty Assessment.

At no time during these proceedings has Goetz ever sought a supersedeas of either of the two compliance orders. Instead, Goetz complied with the directives in those orders. On July 18, 2001, DEP conducted another inspection of the Site and prepared an Inspection Report which noted, in pertinent part: "All affected areas have been backfilled & regraded to acceptable standards. The affected areas have also been seeded, both upper & lower. All outstanding compliance orders are therefore lifted. Reclamation acceptable by the operator." *See* Flannery

Affidavit, at ¶¶ 8-10 and exhibit E. The July 2001 Inspection Report, having determined that Goetz had satisfied the compliance orders, lifted the two orders and, as of July 18, 2001, "Goetz had no further obligation under" those orders. Flannery Affidavit, at ¶ 11.

On September 4, 2001, DEP issued a letter to Goetz in which the agency purported to waive consideration of the August and September Orders as they relate only to compliance history review and the escalation of future civil penalties under the NSMCRA. Specifically, the Monitoring and Compliance Manager in DEP's Pottsville office wrote a letter to Goetz that reads as follows: "The Department hereby waives consideration of the above referenced Compliance Orders issued on August 10, 1999 and September 24, 1999, as they relate to compliance history review and the escalation of future civil penalties due to those violations under the Department's regulations at 25 PA Code 77.294(b)(2)." *See* Flannery Affidavit, at ¶ 12 and exhibit F.

II. Discussion

The Board will grant a motion to dismiss where there are no material facts in dispute and the moving party is entitled to judgment as a matter of law. *See, e.g., Smedley v. DEP*, 1998 EHB 1281, 1282. After a careful review, we now deny DEP's motion to dismiss the appeals from the compliance orders and grant the motion with respect to the inspection report appeal.

A. The Appeals of the Two Compliance Orders Have Not Been Rendered Moot Because Appellant Continues to Retain a Sufficient Stake in the Outcome of These Appeals

"It is axiomatic that a court should not address itself to moot questions and instead should only concern itself with real controversies, except in certain exceptional circumstances." *In re Glancey*, 518 Pa. 276, 282 (1988). *See also, e.g., Flynn-Scarcella v. Pocono Mountain School District*, 745 A.2d 117, 119 (Pa. Cmwlth. 2000). Exceptions to the general rule are made "where the conduct complained of is capable of repetition yet likely to evade review, where the case involves issues important to the public interest or where a party will suffer some detriment

without the court's decision." *Sierra Club v. Pennsylvania Public Utility Commission*, 702 A.2d 1131, 1134 (Pa. Cmwlth. 1997), *aff'd*, 557 Pa. 11 (1999).

The appropriate inquiry in determining whether a case is moot is whether the agency will be able to grant effective relief or whether the litigant has been deprived of the necessary stake in the outcome. *See Horsehead Resource Development Company, Inc. v. DEP*, 780 A.2d 856, 858 (Pa. Cmwlth. 2001); *see also Bensalem Tp. Police Benevolent Association, Inc. v. Bensalem Tp.*, 777 A.2d 1174, 1178 (Pa. Cmwlth. 2001) ("where intervening changes in the factual matrix of a pending case occur which eliminate an actual controversy and make it impossible for the court to grant the requested relief, the case will be dismissed as moot").

The Board has examined the question of mootness in numerous cases where a compliance order which forms the subject of an appeal has subsequently been withdrawn or vacated by the Department. *See, e.g., West v. DEP*, 2000 EHB 462; *Kilmer v. DEP*, 1999 EHB 846; *Power Operating Company v. DEP*, 1998 EHB 466. Where DEP has acted to rescind its prior appealable action, the Board has generally not hesitated to dismiss such appeals as moot. *Pequea Township v. DER*, 1994 EHB 755, 758. A revoked compliance order no longer exists, and thus the Board cannot provide any meaningful relief with regard to it; moreover, a vacated compliance order cannot serve as the basis for any future civil penalties, or be considered in permit or license reviews. *West*, 2000 EHB at 463; *Kilmer*, 1999 EHB at 848.[3]

A different situation is presented where DEP issues a compliance order, the order is appealed, the appellant complies with the order, and DEP then "lifts" the order because it has

[3] Although a multiplicity of terms may be used to describe the Department's action in those appeals—withdraw, vacate, revoke, rescind—the intent was the same: to make void a previously-issued order. *See* American Heritage Dictionary 1545 (3d ed. 1992) (defining "revoke" as "to void or annul by recalling, withdrawing, or reversing; cancel; rescind"); Webster's Third New International Dictionary 1930 (1986) (defining "rescind" as "to take back; annul, cancel; to vacate or make void"); *id.* at 2527 (defining "vacate" as "to make of no authority or validity; make void; annul").

been satisfied. *See Al Hamilton Contracting Co. v. DER*, 494 A.2d 516 (Pa. Cmwlth. 1985); *Harriman Coal Corporation v. DEP*, 2000 EHB 954. When a compliance order has been lifted due to satisfaction of its terms, the compliance order retains its validity and can continue to have a tangential impact on the recipient. The *Al Hamilton* case illustrates the point.

In *Al Hamilton*, the Department issued an abatement order directing the appellant to clean up a diversion ditch, catch basin and underdrain within eleven days. The appellant first complied with the order, and subsequently filed an appeal challenging whether it was actually guilty of the alleged violations that led to the abatement order. *Al Hamilton*, 494 A.2d at 517. The Commonwealth Court held that the company lacked a sufficient interest based solely on its contention that the abatement order was improperly issued, when it had failed to seek a stay of the abatement order:

> In attempting to demonstrate the necessary stake, Hamilton first maintains that by complying with the DER abatement order it expended time and money and is now deprived of the opportunity to challenge whether it was, in fact, guilty of the named violations. It argues that denial of a hearing constituted deprivation of property without due process. Hamilton has already complied with the abatement order . . . . While sums of money may have been expended, the cleanup is now complete. Had Hamilton seriously questioned the propriety of the abatement order it could have requested a stay pursuant to DER regulation 21.76. This it failed to do. . . . The fact that Hamilton was deprived of property without a hearing because of its compliance with the abatement order does not justify ignoring the fact that the appeal is moot with respect to the injury of expenditure of time and money to achieve compliance with the abatement order.

Al Hamilton, 494 A.2d at 518.

However, the Commonwealth Court concluded that because an environmental regulation provides for enhanced civil penalties if there is a record of prior violations, *see* 25 Pa. Code § 86.194(b)(6), the appellant continued to have a sufficient stake in the outcome of its appeal so that the matter was not moot. *Al Hamilton*, 494 A.2d at 518-19. *See also Harriman Coal Corporation*, 2000 EHB at 957-58 (appeal not moot where compliance order was lifted due to

appellant's satisfaction of the order but violation could still be used in calculating future civil penalties).

Al Hamilton provides the framework for analyzing Goetz's appeals of the compliance orders. Goetz performed the reclamation actions directed by the compliance orders; although he challenged the validity of the orders, he did not seek a supersedeas, as provided for by 25 Pa. Code § 1021.76, to stay the operation of orders he believed were wrongfully issued by the agency. If Goetz believed he had adequate grounds on which to challenge the validity of DEP's compliance orders, his legal recourse was to appeal the orders and seek a supersedeas staying their effect—*before* he incurred any expense to comply with the orders.[4] At this point, there is no longer any practical relief which the Board can give to Goetz with respect to expenditures he may have incurred to comply with the August and September Orders. Even if Goetz were successful in proving that the compliance orders were legally invalid, such a determination, while perhaps psychologically significant for Goetz, would be a meaningless academic exercise with respect to Goetz's expenditures in complying with the orders. *See Kilmer*, 1999 EHB at 849 (the "inability to do anything meaningful beyond opining whether [DEP] made a mistake is the essence of the mootness doctrine").[5]

Nevertheless, the *Al Hamilton* case teaches that Goetz may still retain a *sufficient* stake in

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[4] "The fundamental requisite of due process of law is the opportunity to be heard," *Goldberg v. Kelley*, 397 U.S. 254, 267 (1970), however, "due process of law does not require a [trial-type] hearing in every conceivable case of government impairment of private interest." *Stanley v. Illinois*, 405 U.S. 645, 650 (1972). Due process—in the form of an appeal and supersedeas proceeding before the Board—was made available to Goetz for challenging the validity of the compliance orders prior to any government impairment of his property interest; he simply did not avail himself of the available process.

[5] There is also no question that two of the three exceptions to mootness—*i.e.*, conduct complained of is capable of repetition yet likely to evade review and the case involves issues important to the public interest—do not apply here. First, issuance of a compliance order by DEP is a final action appealable to the Board, *see* 35 P.S. § 7514 and 25 Pa. Code § 1021.2(a), and thus cannot evade review. Second, this is a standard compliance order appeal and clearly does not involve issues of great importance to the general public; moreover, the public interest exception is granted only in rare circumstances. *See Pequea Township*, 1994 EHB at 763-65.

the outcome, and thus avoid dismissal of the appeals as moot, if the fact of the alleged violations—which "fact" Goetz would be precluded from litigating on the merits by a dismissal in this case of his challenge to the validity of the compliance orders—could be used by DEP in the future in a manner adverse to Goetz's interests. *See Al Hamilton*, 494 A.2d at 518-19. Thus, the question here is whether Goetz continues to retain the necessary stake in the outcome of these appeals despite DEP's purported waiver of the agency's use of the alleged violations in relation to the civil penalty escalation regulations pertinent to the NSMCRA.[6]

We believe that Goetz continues to retain a sufficient stake in the outcome, despite DEP's purported waiver.[7] This is so because of the limited scope of the waiver letter—which only purports to waive DEP's consideration of the August and September Orders "as they relate to compliance history review and the escalation of future civil penalties due to those violations under the Department's regulations at 25 PA Code 77.294(b)(2)." *See* Flannery Affidavit, at ¶ 12 and exhibit F. Even assuming the purported waiver is binding on the agency, the orders at issue may continue to have a significant future impact on Goetz in contexts outside of the NSMCRA civil penalty assessment determination. DEP would still be able to consider the alleged violations

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[6] To some extent, the inquiry concerning retention of a sufficient stake in the outcome is an extension of the third recognized exception to mootness—*i.e.*, whether a party will suffer some detriment without a decision on the merits. *Cf. Horsehead Resource*, 780 A.2d at 858-59. As explained below, it is not so readily apparent that Goetz will not suffer a detriment if he is unable to litigate the validity of DEP's issuance of the two compliance orders. Although Goetz has not articulated any cognizable detriment that he will assuredly suffer in the absence of a decision by the Board, particularly given his failure to appeal the May 30, 2000 Civil Penalty Assessment, DEP may still use the alleged violations to Goetz's detriment in the future, at least outside of the NSMCRA context, on account of the agency's unwillingness to revoke the compliance orders and the limited scope of its purported waiver.

[7] We assume, without deciding, that DEP had the authority to waive the future use of Goetz's alleged violations as a factor in determining civil penalty assessments under the NSMCRA. *But see* 52 P.S. § 3321(a)(2) ("In determining the amount of the civil penalty, the department shall consider the willfulness of the violation, damage or injury to the lands or to the waters of this Commonwealth or their uses, cost of restoration and other relevant factors"); 25 Pa. Code § 77.294(b)(1)-(5) (listing criteria, including compliance history, based upon which civil penalties under the NSMCRA "will be assessed"). The issue has not been raised by the parties nor is resolution of the question necessary to decide the present motion.

in future permitting decisions under, for example, the NSMCRA, *see* 52 P.S. § 3308(b)(1)(ii); the Clean Streams Law, *see* 35 P.S. § 691.609; or the Solid Waste Management Act, *see* 35 P.S. 6018.503(c), 25 Pa. Code § 271.125. DEP may also be able to consider the violations in enforcement contexts other than civil penalties issued under the NSMCRA. *See, e.g.*, 25 Pa. Code § 86.194, § 271.412 and § 287.412. While there may be other possible tangential future impacts, in our view these are sufficient to prevent dismissal of the compliance order appeals. As the Court explained in *Al Hamilton*, the Appellant's satisfaction of the compliance orders could ultimately be used against him in these kinds of future determinations. *Al Hamilton*, 494 A.2d at 518-19. Nor is it clear that Goetz would have an opportunity in future appeals to properly litigate the underlying validity of the August and September Orders. In any event, Goetz would clearly "be at a disadvantage to prove the negative (a non-violation) that may have occurred" years earlier. This result is unfair, and the validity of the compliance orders "should be litigated now while the witnesses are fresh and the data available." *Al Hamilton*, 494 A.2d at 519.

In addition, DEP notably did not withdraw the August and September Orders, but instead issued a letter with waiver language of very limited scope. If DEP intended for the alleged violations to have no future impact whatsoever upon Goetz, it could simply have revoked the compliance orders, thus rendering the orders void, and preventing the compliance orders from serving as the basis for any future civil penalties, from being considered in permit or license reviews, and from having any future detrimental impact on Goetz. *See West*, 2000 EHB at 463; *Kilmer*, 1999 EHB at 848. DEP's failure to simply revoke the August and September Orders supports the conclusion that Goetz continues to retain a sufficient stake in the outcome to prevent dismissal on the basis of mootness. Accordingly, we will deny the motion to dismiss the two compliance order appeals.

B. The Board Lacks Jurisdiction Over Goetz's Appeal of the Inspection Report

DEP also seeks dismissal of Goetz's appeal of the May Inspection Report, arguing that the Board lacks jurisdiction over that appeal because the inspection report at issue here is not a final action of the Department. We agree with DEP and will dismiss the inspection report appeal.

Pursuant to the Environmental Hearing Board Act: "The Board has the power and duty to hold hearings and issue adjudications . . . on orders, permits, licenses or decisions of the Department." 35 P.S. § 7514(a). The May Inspection Report is appealable only if constitutes an "action" by DEP, which 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, a permit, license, approval or certification." 25 Pa. Code § 1021.2(a). *See Elephant Septic Tank Service v. DER*, 1993 EHB 590, 593. Notably, the appealability of a Departmental communication turns on the substance of the communication, and not merely its title. *See 202 Island Car Wash, L.P. v. DEP*, 1999 EHB 10, 12 (appealability of a letter issued by DEP was governed by whether the language of the letter required some specific action by the recipient or merely advised recipient of the agency's interpretation of the law).

The fundamental question is whether the May Inspection Report affects the personal or property rights, privileges or immunities of the Appellant. In this case, the May Inspection Report is not an appealable action because it did not direct or require any specific action to be undertaken by Goetz. Rather, the report merely records the inspector's observations on the progress of reclamation activities being conducted at the Site. The language of the report is descriptive, not prescriptive. *See* Flannery Affidavit, at exhibit C. As such, the inspection report does not impose any obligations or liabilities on its recipient, and therefore does not affect Goetz's personal or property rights by compelling him to take some action. *See, e.g., Malak v.*

DEP, 1999 EHB 769, 770 (inspection report not appealable because its language was advisory, not imperative); *Hapchuk, Inc. v. DER*, 1992 EHB 1134, 1136 (inspection report which merely recited terms of prior consent order was not an appealable action). Because the May Inspection Report does not constitute an appealable action of the Department, the Board lacks jurisdiction over Goetz's appeal of the inspection report, and that appeal will also be dismissed.

Accordingly we enter the following Order:

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

ROBERT K. GOETZ, JR., db/a/ GOETZ DEMOLITION COMPANY	:	**EHB Docket No. 2000-127-C**
v.	:	**(Consolidated with EHB Docket No. 99-168-C and EHB Docket No. 99-220-C)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 14th day of December, 2001, it is hereby ordered that:

1. The Department of Environmental Protection's Motion to Dismiss is granted in part and denied in part;

2. The appeal at EHB Docket No. 2000-127-C is hereby dismissed;

3. The Motion to Dismiss is denied with respect to the appeals at EHB Docket No. 99-220-C and EHB Docket No. 99-168-C.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

Thomas W. Renwand

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

MICHAEL L. KRANCER
Administrative Law Judge
Member

Dated: December 14, 2001

c: **For the Commonwealth, DEP:**
Charles B. Haws, Esquire
Southcentral Regional Counsel

For Appellant:
Robert K. Goetz, Jr.
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Orrtanna, PA 17353

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

TIRE JOCKEY SERVICES, INC.	:	
	:	
v	:	**EHB Docket No. 2001-155-K**
	:	**(Consolidated with 2001-041-K)**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: December 17, 2001**

OPINION AND ORDER ON PETITION FOR SUPERSEDEAS

By Michael L. Krancer, Administrative Law Judge

Synopsis:

The Board grants a limited and conditional supersedeas from one aspect of the Department's Order directed to an unpermitted tire facility to cease accepting waste tires, cease processing waste tires and to dispose of all waste tires on site within 30 days. The facility, which operates inside a building, receives used tires at the site which it tests to determine if the tires can be reused as tires. Those that can be reused as tires are moved into a segregated storage area inside the building and held for resale as tires. The plan for those tires that cannot be reused is to cut and/or shred them for making products such as mats and crumb rubber which is ground tire material. Crumb rubber allegedly has market value and can be sold for uses such as playground ground cover. The definition of "waste tire" and whether and if so to what extent the facility's operations may go on without a permit under the Solid Waste Management Act are at issue in this case. The Board grants the supersedeas, but only to the extent that it would require

Petitioner to dispose of tires that have been inflation tested, passed the inflation test, and have been segregated and held out for sale for reuse as tires. Because many non-reusable tires are present at the facility, the limited supersedeas is conditioned upon the Petitioner posting a bond in the amount of $74,891 within 7 calendar days of the date of the Board's Order.

Introduction.

This case requires that we, in the context of a supersedeas petition, and after a four day supersedeas hearing determine whether Tire Jockey has demonstrated that it will succeed on the merits in convincing the Board that some or all of its activities with respect to tires at its Fairless Hills, Bucks County facility is exempt from permitting under the Pennsylvania Solid Waste Management Act, 35 P.S. § 6018.101 *et seq.* (SWMA) and the regulations promulgated thereunder regarding residual waste. In short, we need to look into the question of when, if, and if so, at what point, a tire becomes subject to regulation under the SWMA and the residual waste regulations.[1]

Factual and Procedural Background.

Tire Jockey, Inc. (TJI) operates a facility in Fairless Hills, Bucks County, Pennsylvania. The President and Chief Operating Officer of TJI is Mr. Alfred Pignataro. Mr. Pignataro is the inventor of a process and technology covered by United States Patent which covers a technology

[1] This supersedeas opinion, like all such opinions, is based on a supersedeas hearing which has a limited record. In this case the supersedeas hearing was held for four hearing days; Thursday and Friday, December 5th and 6th, and Monday and Tuesday, December 10th and 11th. A hearing on the merits would produce a full record which could change the basis or outcome of this opinion. In addition, an outcome of a hearing on the merits would also involve the consideration and action of all five Judges of the Board and could, thus, be different on that basis as well. Also, this supersedeas opinion is being issued on an expedited track without transcripts and without even post-hearing briefs. The parties and the Board concurred that such expedition was advisable. For that reason, citations in this opinion to documentary evidence (Petitioner's Exhibits will be cited as "Ex. P-__" and the Department's Exhibits as "Ex. C-__") also may be inclusive of explanatory testimony relating to the document which was heard. That testimony

and technique of cutting and/or shredding tires into strips, the removal of the steel belts and, then, shredding the tires. Ex. P-9. This process supposedly can produce various utilitarian products at various stages of the cutting and shredding process. Ex. P-8, P-9. Crumb rubber is the name given generically to material which consists of shredded tires. Ex. P-8. Crumb rubber can be produced in various sizes. Percofill is the United States registered trademark of TJI for its crumb rubber. Mr. Pignataro testified that one particular prominent use for crumb rubber is for playgournd safety covering. He testified that crumb rubber is superior to its closest competitor in that market, wood chips, because, among other things crumb rubber does not decompose as do wood chips, and crumb rubber provides better actual protection. Other potential uses for crumb rubber are as ground cover for landscaping or daily cover for landfills. Ex. P-9.

In addition to the production of crumb rubber from the shredding of tires, TJI contemplates producing rubber floor mats from cut strips of tires sidewalls. At this time, TJI has a contractual relationship with Carlotta's Mat Company whereby TJI is filling Carlotta Mat Company sales orders. Ex. P-4. TJI has supplied approximately 700 mats to Carlotta's from April, 2001 through November, 2001. Mr. Pignataro testified about several other potential products that could be made from cut tire sidewalls besides mats. For example, the Patent discusses construction materials, landscaping materials, a lumber substitute. TJI is not producing or selling any such other potential products. Production of these products may take place in the future.

The centerpiece, though, of TJI's business and prospective business is the resale of used, but reusable tires for use as tires. Ex. P-8. TJI's plan involves having its truck, which carries about 500 tires, go out and pick up loads of used tires and bringing them back to the TJI facility.

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could not be cited herein.

The main sources of TJI's used tires are new car dealerships, but gas stations and used car dealerships are also targets. No tires are dropped off at TJI from third parties. At the facility the load of tires undergoes a triage process where each tire is first visually inspected and separated into two categories: (1) those potentially still suitable for reuse as a tire; and (2) those which are no longer useable as a tire. The second level of this triage process involves the machine inflation testing of those tires which had been visually identified as potentially reusable as tires. The tires which pass this machine test are branded with the "TJ" symbol for identification and the tire size is marked on the tread section. Those tires are placed into a segregated storage location and held for intended resale, in the wholesale market, for use as tires.

TJI has been able to generate sales of the used tires to export to eight foreign countries as well as domestically. Ex. P-33, P-40, P-41, P-42, P-43, P-44. Records are insufficient to determine exactly how many tires have been sold for reuse as tires. In fact, record-keeping by TJI is terrible. There are no records which directly show the inflow and outflow of either the usable or non-usable tires.

Mr. Pignataro commenced occupancy of the Fairless Hills facility in approximately May, 2000 when he signed a Lease with USX Corporation for a building in an industrial complex which used to be a United States Steel manufacturing plant. The building which houses the TJI facility is a former oil storage building used by USX. The building has a sprinkler system which is in working order. TJI spent the time from about May, 2000 to July, 2000 making improvements to the building with the goal of obtaining a Use and Occupancy Permit from Falls Township. In July, 2000 Falls Township did issue a Use and Occupancy Permit.

TJI started accepting tires at the facility at about the same time that it obtained its Use and Occupancy Permit. The evidence was actually that it started to accept tires sometime before

it was issued the Use and Occupancy Permit. At that time, TJI was bringing tires in and going through the triage process that we have discussed. Further, TJI was cutting the sidewalls and removing the steel belts. TJI stored the sidewall material on the site both inside and outside the building. Reusable tires were moved into a separately designated storage room. Non-reusable tires and tire material were stored in another room. Mr. Pignataro was not having TJI conduct shredding operations because he thought that type of operation would require a Department of Environmental Protection Permit.

On August 1, 2000, the Department conducted and inspection of the TJI facility. The prominent feature of the inspection is that the Department representative, Mr. Jonathan Bower, observed TJI cutting tires and he orally informed Mr. Pignataro that he needed a permit to conduct any operations involving the accepting and cutting of what he called "waste tires" at the facility. Mr. Bower told Mr. Pignataro to cease "processing" tires until TJI obtained a permit for the Department. By "processing" Mr. Bower meant accepting or cutting "waste tires". Ex. C-13. A Notice of Violation was directed to TJI dated August 16, 2000 which cited TJI for processing tires without a permit in violation of 25 Pa. Code § 297.201(a). TJI continued to take in tires after that NOV was issued, but did cease the cutting of tires. Mr. Pignataro did respond to Mr. Bower's NOV by letter dated August 28, 2000 in which, among other things, Mr. Pignataro asked if there were any temporary or limited permit that TJI may obtain pending application for and obtaining a "formal permit". Ex. C-6. The Department did not respond to that question.

From this point on, relations between the Department and Mr. Pignataro and TJI became progressively worse and more adversarial. A meeting was held among representatives of the Department and Mr. Pignataro after the August NOV was issued. Mr. Pignataro testified that

there were two "departments" of DEP present at that meeting; permitting and enforcement. Apparently there was some brinksmanship practiced at that meeting as Mr. Pignataro, at one point told the Department representatives that he was thinking of picking up stakes, which at that point were relatively low, and moving "to a better jurisdiction". Mr. Pignataro testified that the enforcement people left the meeting and the permitting people suggested that TJI could consider filing for a General Permit to cover its present and future contemplated operations.

Mr. Bower visited the site again on September 25, 2000 and October 26, 2000. On the October visit, Mr. Bower observed the storing of tires without a permit which he considered a violation. He noted that Mr. Pignataro had adopted by this time a position that it was his view that he, Mr. Pignataro, did not view the tires at the site as waste tires or that he was storing waste tires. Ex. C-18. Mr. Bower directed a Notice of Violation to TJI as a result of his October 26, 2000 inspection. The NOV, dated October 27, 2000, cites TJI for both storing and processing waste tires without a permit, *i.e.*, operating a residual waste transfer station without a permit in violation of 25 Pa. Code § 293.201(a). On November 2, 2000, Mr. Bower was back at the facility. He reported that "there are many tires being stored at the site." Ex. C-20.

On December 12, 2000, TJI filed an application for a Residual Waste General Permit. Ex. P-28. The General Permit applied for is WM-GR-038, which is applicable to "Processing/Beneficial Use of Residual Waste". Ex. P-45. Just over a week later, on December 20, 2000, a team of five Department inspectors, Mr. Bower and Ms. Cherrie Niemeyer included, conducted an inspection of the facility the major purpose of which was to try to quantify the number of tires and cut tires present at the facility. They estimated that there were approximately 28,530 tires inside the building and approximately 19,883 outside the building. Ex. C-21.

On or about January 22, 2001, the Department hand delivered to TJI the Order and Civil Penalty Assessment which is the main topic of this supersedeas petition. Ex. C-22. The Order provides, in its most relevant part, that: (1) TJI "shall immediately cease accepting and processing waste tires...without a permit from the Department" (¶ 1); and (2) TJI shall "remove all waste tires from [the Fairless Hills facility] within 30 days of the date of this Order and dispose of them at a lawfully permitted facility" (¶ 2). The Order also requires that within 45 days of its date that TJI shall submit to the Department all records including but not limited to invoices, disposal receipts, and bills of lading relating to the disposal of waste tires from the Fairless Hills facility. Ex. C-22. It is from this Order that TJI seeks a supersedeas.

Although the appeal from the Order was filed within 30 days of its receipt, it is now almost 11 months since the Order was issued and we have this supersedeas petition on our hands. This particular petition was apparently triggered by the Department's decision in October, 2001 to proceed with a petition in Commonwealth Court to enforce the January 22, 2001 Order. The Commonwealth Court had scheduled a hearing on the Department's Petition for November 19, 2001. TJI filed its Petition For Supersedeas with the Board on November 13, 2001 along with a Petition For Temporary Supersedeas arguing that with impending Commonwealth Court enforcement proceedings it was faced with the prospect of being ordered to comply with the Order before there was any determination of the challenge to its appeal of the Order. The Department subsequently agreed to an adjournment of the Commonwealth Court proceedings pending the outcome of this Board supersedeas proceeding. This is one reason that the parties and the Board have taken the unusual step of proceeding from hearing to opinion without transcripts and post-hearing briefing.

During the 11 months since the Order was issued, the Department and TJI have continued

to battle each other with relations between the two souring even further. Mr. Niemeyer, who took over as the main Department inspector of the facility from Mr. Bower, reports that during an inspection she conducted on March 27, 2001 Mr. Pignataro "appeared to be very upset with the Department conducting an inspection at that time" and "Mr. Pignataro behaved in a rude and uncooperative manner during portions of the inspection". Ex. C-24. Also, on October 4, 2001, the Department issued a $1,000 Civil Penalty Assessment against TJI for Mr. Pignataro having allegedly refused on July 11, 2001, to permit the Department to inspect the facility and having hindered and obstructed the inspection. TJI has appealed that action and that case is now pending. In October, 2001, as we have mentioned, the Department sought to prosecute a petition to enforce its January 22, 2001 Order in Commonwealth Court. Ms. Niemeyer testified that during a December 4, 2001 inspection she asked Mr. Pignataro where the tires that were taken off-site going and that "he did not answer, he turned and walked away".

Also, during this interim period, TJI's General Permit application was denied by letter dated June 8, 2001. The main reasons for the denial were the alleged deficient compliance history of Mr. Pignataro and a disagreement on how to approach bonding for the facility. In short, Mr. Pignataro was a principal in a company called Tire Derived Products. The Department alleges that TDP operated an illegal tire processing facility in Elizabeth, New Jersey which engaged in the very same activities that TJI intends to do at Fairless Hills. TDP ceased operations and left a large amount of tire waste at its facility in Elizabeth. Mr. Pignataro failed to disclose this matter in his original General Permit application. Thus, the Department is faced with both an apparent lack of candor by Mr. Pignataro and well as the substance of the problem which he left in Elizabeth. The bonding problem boils down, as much of this case does, to what is viewed as a "waste tire" thus required to be covered under a bond and what is not a "waste

tire" and thus need not be covered under the facility bond.

TJI appealed the permit denial. That permit denial case has been consolidated with this case so the supersedeas is, technically, from both the Department's Order and the permit denial. We deal here only with consideration of the supersedeas from the order as we view our role as constrained to that only. *See Solomon v. DEP*, 1996 EHB 989, 992-95 and the cases cited therein (under normal circumstances, no supersedeas lies from a permit denial).

Also, most problematically and the same time most predictably, the number of tires at the facility has increased since January 22, 2001. TJI has continued to take in tires, triage them, store reusable and non-reusable tires and sell a modest number of the reusable ones. TJI has ceased cutting tires with one exception. Mr. Pignataro testified that he very occasionally cut a tire in order to obtain white-wall for production of mats. The "back-end" of the TJI business concept has been shut down. However, the front end, tire pickups, tire triage, and attempted sales have been continuing, albeit in distressed mode due to the shut down of the back end of the operation. The result of this is predictable, the number of tires physically present at the site has been steadily increasing. Because of a lack of adequate record-keeping by TJI, it has no idea how many tires have come onto the site since January 22, 2001 nor does it know how many are on the site now. There is no direct system of inventory control or other record-keeping practice which tracks inflow or the current number of tires on the site. The situation has grown so bad that the Falls Township Fire Marshall directed a Notice of Violation to TJI resulting from an inspection conducted on November 27, 2001 which cited TJI for, among other things, illegal outside storage of tires and tires being stacked to the ceiling inside the building so as to block the sprinkler heads from proper operation. Ex. P-35. The Department estimates that although there may have been some decrease in the amount of tires from November, 2001 to December, 2001,

that there are about three times as many tires present now inside the building as there were at its December 20, 2000 tire count. If that is correct, that would mean that there are approximately 85,000 tires in the building.

Standard For Supersedeas.

The standard which petitioner must meet and the burden the petitioner must carry in order to obtain a supersedeas are set forth in 35 P.S. § 7514 and 25 Pa. Code § 1021.78. In determining whether to grant a supersedeas the Board is to consider, among other factors: (1) irreparable harm to the petitioner in the absence of the supersedeas; (2) the likelihood of the petitioner prevailing on the merits; and (3) the likelihood of injury to the public or other parties. 35 P.S. § 7514(d)(1)(i)-(iii). Numerous cases have discussed that standard and how it is applied. We agree with the formulation of the standard and how the various elements which are involved interact with each other set forth by Judge Labuskes in *Global Eco-Logical Services, Inc. v. DEP*, 1999 EHB 649, 651. In the Global case, Judge Labuskes wrote that:

> The Board ordinarily requires that all three statutory criteria must be satisfied. *Svonavec, Inc. v. DEP*, 1998 EHB 417, 420; *Kane Gas Light and Heating Co. v. DEP*, 1997 EHB 961, 962; *Oley Township v. DEP*, 1996 EHB 1359, 1362. There have, however, been exceptions. *See, e.g. Mundis, Inc. v. DEP*, 1998 EHB 766, 774 (no irreparable harm or absence of harm to the public needs to be shown where Department acted without authority); *202 Island Car Wash v. DEP* 1998 EHB 443, 450 (same); *Gary L. Reinhart, Sr. v. DEP*, 1997 EHB 401, 419 ("On occasion, we have been persuaded to grant a supersedeas even though we believed that the petitioner would not prevail on the merits."); *Keystone Cement Co. v. DER*, 1992 EHB 590 (same); *Wazelle v. DER*, 1985 EHB 207 (no likelihood of success but harm to the public if supersedeas not issued). In the final analysis, the issuance of a supersedeas is committed to the Board's discretion based upon a balancing of all of the statutory criteria. *See Pennsylvania PUC v. Process Gas Consumers Group*, 467 A.2d 805, 809 (Pa. 1983)(each criterion should be considered and weighed relative to the other criteria).

Global Eco-Logical Services, Inc. v. DEP, 1999 EHB 649, 651.

Discussion and Analysis.

TJI argues that it is irreparably harmed by the Department's Order on several grounds. It argues that the Order requires it to incur costs to dispose of what is saleable product not waste. The reusable tires are not waste because they can be resold as tires and the non-reusable tires are not waste because they can be recycled into other usable products such as the percofill. TJI argues that because it has ceased cutting operations, tires have become crowded into the building causing extreme space constraints which has virtually ruined TJI's ability to maintain an optimum level of inventory of reusable tires. In other words, the business' circulation has been cut-off because the back end of the business, the cutting to achieve volume reduction and ultimate turning of the non-reusable tires into other saleable products has been stopped. Thus, argues TJI, the Department's Order should be superceded to allow TJI to cut tires for volume reduction so that the reusable tire business can be reinvigorated. Mr. Pignataro testified that the business was "bleeding" and that it was on the brink of going bankrupt.

The Department has pointed to various provisions of the residual waste regulations, most particularly the definition of waste set forth in 25 Pa. Code § 287.1, to argue that all of the tires which arrive at the Tire Jockey facility and all the tires present there now are "waste" and are thus subject to regulation. These residual waste regulations just came into effect as of January, 2001. 31 Pa. Bull. 235 (January 13, 2001). The Department focuses on the term "discarded" in the first sentence of the definition of waste. We heard testimony from Mr. Ronald Furlan, the Regional Manager of the Department's Southeast Region Waste Management Program, that the Department's position is that as soon as the tires are taken off the car they are waste. We heard also from Solid Waste Specialist, Cherrie Niemeyer, that she considers that tires have become

waste subject to regulation as waste when the original owner removes them from his or her car and pays a fee for their removal. The two views are only different in nuance and not in substance and we glean that, basically, the Department considers a tire to be waste subject to regulation under the residual waste regulations when the original owner takes the tires off the car with the intent to not use them as car tires anymore. We understand that this is what counsel for the Department contends that the law is as applied to tires in view of the first sentence of the definition which states that a "waste" is a "discarded material which is recycled or abandoned". 25 Pa. Code § 287.1.

Tire Jockey points first to the Waste Tire Recycling Act, 35 P.S. §§ 6029.101 – 6029.113 which defines a "waste tire" as "a tire that will no longer be used for the purpose for which it was originally intended", to argue that the reusable tires that arrive at the facility and that are there now are not to be considered as regulated waste under the Solid Waste Management Act. Then, Tire Jockey contends from there that the non-reusable tires are not "waste" under the Solid Waste Management Acts regulatory definitions because Tire Jockey is intending to cut the tires into various inputs for other products it will make such as floor mats or percofill and thus those non-reusable tires are exempted from being regulated as waste under the definitional provisions of 25 Pa. Code § 287.1, especially the provisions regarding "materials that are not considered waste when recycled" set forth in subsection (ii)(A) of the definition of "waste". In other words, since Tire Jockey is intending to recycle the non-reusable tires into other products, those tires are within the safe harbor set forth in subsection (ii) of the definition of waste.

The Department first notes that the Waste Tire Recycling Act is extraneous to permitting matters and it relates, primarily, to government grants. The Waste Tire Recycling Act, it argues, was never meant to gut the permitting requirements of the Solid Waste Management Act, which

is the permitting and regulating statute. The Department counters Tire Jockey's residual waste regulations "recycling" argument by saying that the Tire Jockey activities involve "reclamation" which is a specific proviso within subsection (ii)(A) which takes a material out of the non-regulated sphere. The term "reclaimed" is defined by the residual waste regulations as "process[ing] to recover a useable product, [or if the material is regenerated]. 25 Pa. Code § 287.1. Processing is also defined to mean:

> (i) The term includes one or more of the following:
> (A) A method or technology used for the purpose of reducing the volume or bulk of municipal or residual waste or a method or technology used to convert part or all of the waste materials for offsite reuse.
> (B) Transfer facilities, composing facilities and resource recovery facilities.
> (ii) The term does not include a collection center that is only for source separated recyclable materials, including clear glass, colored glass, aluminum, steel and bimetallic cans, high-grade office paper, newsprint, corrugated paper and plastics.
> 25 Pa. Code § 287.1.

25 Pa. Code § 287.1.

Tire Jockey defends that argument by pointing to the last sentence of subsection (ii)(A) which provides that "[s]izing, shaping or sorting of the material will not be considered processing for the purpose of this subclause of the definition". 25 Pa. Code § 287.1(ii)(A). Tire Jockey argues that its initial sorting of reusable from non-reusable tires is sorting and that its cutting and shredding of tires is "sizing or shaping". Tire Jockey also argues that what is does is not "processing" by pointing to the exclusion from the term "processing" applicable to a "collection center that is only for source separated recyclable materials, including clear glass, colored glass, aluminum, steel, and bimetallic cans, high-grade office paper, newsprint, corrugated paper plastics". 25 Pa. Code § 287.1. Tire Jockey says that the term "including" indicates that the examples are not exclusive and that its facility is such a "collection center" engaging in source separation, i.e., the separation of reusable tires from non-reusable tires.

Tire Jockey also points to the regulations governing residual waste storage facilities at 25 Pa. Code § 299.155 – 299.162, which deal with tire storage, as supporting its position that it requires no permit. These regulations seem to require only that the person storing the tires notify the Department. The Department counters that these regulations apply only to generators and not to off-site storage locations like the Fairless Hills facility. Testimony of Department personnel at trial provided two views of what a "generator" is for purposes of this series of regulations. The "generator" is either the consumer owner of the tires or a gas-station or car dealership. It is noteworthy that this set of regulations does not in itself state anything about being applicable only to generators and not applicable to off-site locations. The regulations apply to "persons or municipalities" that store tires.

The parties' pre-hearing papers and argument at the hearing on the relevant statutory and regulatory provisions has resembled a fencing match with one party thrusting, the other meeting the thrust with a block then thrusting, the other party meeting the thrust with a block and thrusting and on and on they go.

Both parties' have diametrically different interpretations of the residual waste regulations on this point of what is waste and when is a tire waste. Both parties also see their respective views, despite their black versus white nature, as being beyond question. The Department considers this as not even a close call. It thinks that the regulations are obvious that tires are waste as soon as the original owner takes them off his vehicle with the intent of not putting them back on. Tire Jockey thinks that the regulations, taken as a whole and read in concert with the Waste Tire Recycling Act, clearly establish its right to conduct its entire operation without coming into the purview of the permitting provisions of the Solid Waste Management Act.

We think that to some extent the parties' respective views are result and litigation driven.

The Department is rightly concerned about recurrences of tire facility disasters. Tire Jockey, on the other hand, is locked to its interpretation because of the pending Order, its lack of a permit, and its having gone so far down the road without a permit. The parties' positions, views and attitudes have also been hardened on account of the history of the difficult, often adversarial relations between the parties and the presence of this ongoing litigation.

We do not share the respective parties' positions that the ultimate answers to the questions presented here are clearly delineated in the residual waste regulations. The very fact that both parties think their conclusions are so clearly supported by the law and the regulations demonstrates that neither can be right on that point. There is of course more fundamental bases for concluding that the parties are wrong about this question being so patent on the face of the regulations. The relevant residual waste regulations to which we have been directed in this case to make the critical determination whether and/or which of the tires at this facility are waste did not have tires or what to do with tires as any part of their developmental background. These residual waste regulations come down to us from the hazardous waste regulations. In fact, the EQB virtually extracted the definitions which we are dealing with here from the hazardous waste regulations. As the EQB states in its Preamble to the 1998 proposed residual waste rulemaking,

> The Board is proposing to amend certain terms and to add additional terms which assist in the identification of materials which are considered waste and which are not considered waste, such as coproducts. The terms used to help with this determination include the following: "accumulated speculatively"; "byproduct"; "coproduct"; "product"; "reclaimed"; "recycled"; "spent material"; "used or reused"; and "waste." To a large extent, these new and revised terms are identical to terms defined under the hazardous waste program.

28 Pa. Bull. 4073 (August 15, 1998). The hazardous waste regulations' definitions of what is waste and what is not were forged and formulated from a background, experience and culture which has little relationship to the context of tires and/or waste tires. The hazardous waste

regulations' definition of what is considered waste and what is not was born from and aimed at highly industrialized, highly complex and very process specific considerations involving complex chemical manufacturing processes. This is illustrated by reviewing the Preamble to the Federal Rulemaking on this topic which was promulgated in 1988. 50 Fed. Reg. 614 (January 4, 1985). That regulatory package was dealing with very specific aspects of very advanced and heavy industrial systems and processes. Just as one example, the Agency provided as examples of the term "co-product" the following: sulfuric acid from smelters' metallurgical acid plants, various metals produced in tandem by smelting operations (such as lead recovered from primary copper smelting operations), or co-products such as kerosene, asphalt, or pitch from petroleum refining." *Id.* As another example, a "by-product", as set forth in the regulation, includes "residues such as slags or distillation column bottoms." 42 CFR § 261.1(c)(3).

The hazardous waste regulations, especially those having to do with what is waste and what is not, were molded and crafted to deal with the question of what is waste and what is not in the context from which they came. Those regulations were crafted to fit the question presented. On the other hand, the world of tires and waste tires is not the same as the world of metallurgical acid plants, smelting operations, petroleum refining. At the trial of this matter, the Department's counsel informed us that the Environmental Quality Board did not provide meaningful guidance in its residual waste regulation regulatory package how tires fit into the scheme of the regulations with respect to the question we face here. Our review of both the proposed rulemaking and the final rulemaking confirms that to be true.

To take these residual waste regulations, which were born out of the hazardous waste experience, and try to apply them to tires, which had nothing to do with either their formulation originally as hazardous waste regulations or their reincarnation by the EQB as residual waste

regulations, is like trying to wear a suit tailored to someone else's measurements. The suit can, perhaps, be worn, but it is not going to be a nice fit; it is going to be either too loose or too tight, too long or too short.

The other reason we do not think that either side has the indisputably clear case here is that the regulations themselves simply do not yield an unequivocal answer on what, if any, tires coming into or which are currently located at the Tire Jockey facility are within the Department's permitting and regulatory authority. This can hardly be considered as surprising in light of the fact that the EQB was apparently not addressing the tire and waste tire question directly when it passed the residual waste regulations. Each side had particular points of the regulations which supported its view either in whole or in part. For example, the regulation does say that waste is "discarded" material which is "recycled or abandoned". The tires coming to Tire Jockey have been discarded and/or abandoned by their original owners and they are headed for either resale as tires or recycling as mats or percofill. Under that view they are certainly waste subject to regulation. On the other hand, at least the reusable tires are being used or reused as an effective substitute for a commercial product, *i.e.*, the reusable tires are an effective substitute for new tires. Thus, the reusable tires would be excluded from being considered waste. On the other hand, it could be viewed that both reusable and non-reusable tires are being "reclaimed" which would preclude the application of the just discussed exclusion. On the other hand, both the reusable and non-reusable tires are merely undergoing "sizing, shaping or sorting" which would mean that they are not considered as being processed. None of these definitional provisions clearly answers the question presented. Put into that mix the fact that the only definition of "waste tire", which is the operative wording in the pending Order, is in the Waste Tire Recycling Act, and it refers, specifically, to a tire that will no longer be used for the purpose for which it

was originally intended, and it is clear that the ultimate answer is far from clear.

In any event, it is with this imperfectly fitting suit that we attempt to address the request for supersedeas which is before us.

Non-Reusable Tires/Cutting and Shredding Into Other Products. We do not think that Tire Jockey has convinced us that it has a likelihood of succeeding on the merits of its claim that its operations involving the cutting and/or shredding of non-reusable tires is not subject to regulation under the residual waste regulations. Tire Jockey admits that about 60% of the tires that it receives are not reusable as tires. Thus, even under its Waste Tire Recycling Act centered focus on the definition of "waste tire", these tires are "waste tires". We cannot conclude at this point in time that Tire Jockey will bring these tires under the safe harbor of the residual waste regulations' "materials which are not waste when recycled" provisions. Inasmuch as the EQB did not have tires in mind, or operations such as those contemplated by Tire Jockey, when it was enacting the subsection (ii) "materials which are not waste when recycled" provision, we think that Tire Jockey will have an uphill battle showing that these regulations fit its situation. In any event, even given the regulatory framework in place was authored with other matters than tires in mind, we think that it would not be illogical to conclude that the act of cutting non-reusable tires with the intent to use the cut pieces for the production of mats as would be done in this case with this set of facts is an act of reclaiming or processing. We think that this activity fits best within the definition of processing in that the activity involves a method or technology used to convert part or all of the waste materials for offsite reuse. We think that the fit in that definition of "processing" is a better fit than the "sizing, shaping or sorting" provision which would exclude this material from being considered waste. After all, the process being used is subject to United States Patent. A United States Patent is, by definition, a technology. Thus, the use of the

patented process is a "technology". The conversion is taking place in that the tire is cut and its pieces being converted thereby into input pieces for a mat. The same goes for the shredding of the material into percofill. That is also the use of a "technology" to convert part or all of the waste materials for off-site reuse. In the case of percofill the off-site reuse is for percofill to be supplied as playground cover.

In addition, the record was clear that there have been no sales of percofill or any other products to be manufactured from cutting or shredding non-reusable tires. There was no evidence of even anticipated contracts, provisional contracts or prospective sales. There is a strong hope for sales and equally strong expectation of sales, but no evidence that the hope or expectation is real. In addition, we do not believe that the evidence showed that there was even a known market or disposition for the material" as set forth in subsection (v) of the definition of "waste". The only evidence offered on that subject was a trade publication of the Recycling Research Institute which listed market prices for crumb rubber, buffings, tire-derived fuel, tire chips and shreds. Although this was represented by Mr. Pignataro as being a national market, we were not convinced that this document, in itself, shows that there is a known market for disposition of this material which is accessible Tire Jockey. The document is not specific as to whether there is a market for any material Tire Jockey may produce the area which Tire Jockey could service and there was no evidence from any expert or other witness on that subject. We do not accept Mr. Pignataro's optimistic view that whatever he makes he could sell. The same analysis applies to the mats. At this time, Mr. Pignataro sells mats only to one source. He testified that he felt constrained at this point in time due to the uncertainty of the DEP enforcement situation to seek to expand that market. We saw no evidence of any tangible prospect that he could expand that market even if he were to try to do so. The same analysis of a

lack of tangible market prospects applies to the other products Tire Jockey intends to produce from non-reusable tires and projects that it could sell. Thus, even if the cutting and shredding of tires could conceivably qualify as being outside the ambit of "waste" under subsection (ii) of the definition, Tire Jockey has failed to make the demonstration outlined in subsection (v) that there is a "known market or disposition for the material". 25 Pa. Code § 287.1.

The supposed irreparable harm here is both illusory and self-inflicted. Even if we were satisfied that the business was about to founder, that would not result in granting the supersedeas.[2] Under *Solomon*, of course, we cannot, nor will we here, grant a supersedeas to allow activity to proceed without a permit which we think that petitioner has not demonstrated a likelihood of convincing the Board can be conducted without one. Also, the business plan involves an inflow and an outflow, *i.e.*, a circulation of tires to survive. The flow of that circulation depends upon there being a permit in place. It was TJI that decided to commence operations without a permit.

The equities also militate against our superseding the Department's Order which we interpret as requiring Tire Jockey to immediately remove from the premises and properly dispose of all non-reusable tires whether stored inside or outside and whether being stored as whole tires or as cut portions of tires. It has been almost one year since the Department issued its Order. Since then, the testimony shows that the number of tires at the facility, including the non-reusable ones, has increased dramatically, perhaps by a factor of three times. Tire Jockey could have come to the Board in January, 2001 for a Supersedeas when there were fewer tires on the

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[2] We note here that the only evidence of the business being *in extremis* was the bare testimony of Mr. Pignataro. There were no records or specific details which actually substantiated that contention. We have held before that more is required in order to establish a claim of irreparable harm in the context of a supersedeas petition. *Lower Bucks County Joint Municipal Authority v. DEP*, 2000 EHB 1078, 1097-1099.

site. Instead it waited for almost a year and now, because it has continued to bring in tires, the problem is bigger. Besides that, the evidence showed that the facility was cited by the Falls Township Fire Marshall for fire code violations observed as recently as November 29, 2001. The violation, evidenced by the Fire Marshal's December 3, 2001, cites Tire Jockey for, among other things, having tires "stacked to the ceiling [which] where blocking sprinklers from proper operation". Ex. P-35. Mr. Pignataro's handling of that situation at trial was hardly confidence inspiring. He testified that the Fire Marshall was wrong and that the Fire Marshall was not familiar with the relevant fire code. He basically contended that he knew more about the fire code and fire fighting with respect to tire fires than the Fire Marshall. Mr. Pignataro also admitted that before the Fire Marshal showed him the applicable Fire Code, applicable specifically to tire storage, that he was unaware that there even was such a Fire Code relating to tire storage. This is very alarming to hear from a person who is President and in charge of operating a facility which has been storing tires at the building in Fairless Hills for over a year.

We will not therefore supersede the provisions of Paragraphs 1 and 2 of the Department's Order which we interpret to mean that Tire Jockey is required to immediately cease and/or refrain from any cutting or shredding of non-reusable tires and to remove from the premises and properly dispose of all non-reusable tires whether stored inside or outside and whether being stored as whole tires or as cut portions of tires.

Tires That Are Reusable As Tires. The reusable tires come into the facility together with the non-reusable ones in the same truck. They are sorted once they get to the facility. There is evidence that Tire Jockey not only can sell reusable tires for use as tires, but has been doing so, even during the pendency of the Department's Order and its restricted operations. While sales have been modest, there are ongoing sales of these reusable tires for reuse as tires.

As we have noted, the only definition of "waste tire" in any statute or regulation that we or the parties know of is the one in the Waste Tire Recycling Act which states that a waste tire is one that "will no longer be used for the purpose for which it was originally intended". 35 P.S. § 6029.104. While we are cognizant of the Department's argument that the Waste Tire Recycling Act is beside the point, we can hardly ignore the only definition of "waste tire" which is the operative wording of the Department's pending Order, which exists in all of Pennsylvania statutory or regulatory law. Tire Jockey may be able to convince the Board that this specific definition in the WTRA should be used as an aid in interpreting the subsection (ii) "materials that are not waste when recycled provision". Also, Tire Jockey may be able to convince the Board that even if the initial staging point where reusable tires and non-reusable tires are separated is not exempt from regulation, (*See* pp. 24-25, infra), that the reusable tires, once taken to a segregated storage area dedicated to tires for sale for use as tires, are at that point out of the regulatory province. *See Fifer v. DEP*, 2000 EHB 1234, 1250-52.

The irreparable harm that would flow from forcing Tire Jockey to immediately remove from its site the reusable tires that have been marked for resale for use as tires is manifest. If Tire Jockey wins on either of the regulatory points just mentioned, it would have irretrievably lost valuable and legally possessed inventory.

Thus, we will supersede the Department's Order as interpreted to mean that Tire Jockey must remove and dispose of reusable tires which have been inflation tested, passed the inflation test and held out for sale for reuse as tires. *See Fifer v. DEP*, 2000 EHB 1234, 1250-52. Due the situation at the site as it exists now, however, we will exercise the discretion provide to us by 25 Pa. Code § 1021.78(c) to condition this supersedeas upon TJI's posting of a bond in the amount of $74,891 within 7 calendar days of the date of our limited supersedeas order. This measure is

necessary in light of the fact that over the last 11 months tires have been piling up at the facility, there are, at present, perhaps as many as approximately 85,000 tires there. These facts taken together with the testimony about the prospect that TJI's business may fail, creates in our mind the possibility of a repeat here in Fairless Hills of the experience of Elizabeth, New Jersey. This measure, then, is necessary to protect, at least to some degree, the interests of the public. TJI would have to file a bond anyway in the event it wins its appeal of the permit denial and secures a permit so posting of a bond at this point in time is not requiring TJI to do something that it otherwise would not be required to do in the normal course of events. The bond is to be in the form that would normally be required in the context of a residual waste management permit and it is to be posted with the Department in the same manner it would be so posted in connection with a residual waste management permit.

The bond figure that we use here is calculated by taking the estimated number of tires that were inside the building during the December 20, 2000 tire count (28,530), increasing that by the three times factor that DEP believes are in the building now (to 85,590), multiplying that number by 50% which is the best expected experiential percentage of tires which come into the TJI facility which are reusable as tires (resulting in a rough number of 42,795 non-reusable tires), and, finally, multiplying that number by $1.75 which is the middle of the range of between $1.50 per tire and $2.00 per tire that Mr. Wentzel testified was the Department's experience of dealing with tire clean-ups.

This approach to bond calculation may not be what either side envisions or envisioned, what either side sees as its preferred method to calculate a bond amount, or what would be established in the eventual outcome of the permit denial litigation, but to the extent it pains TJI as being too high, the pain is to a large degree self inflicted in that TJI has no records which

would permit an accurate count of the number of non-reusable tires on the site, it waited for 11 months to seek a supersedeas during which time the number of tires at the facility increased. Also, in the event TJI is victorious in litigation establishing either a lower bond amount or a legal interpretation which may result in a lower bond amount it may then have its bond lowered. To the extent the bond amount pains the Department as being too low, it would have no bond at all at this point in time if this Order were not issued in this fashion.

Accepting Tires. The tires come into Tire Jockey before they are segregated into reusable versus non-reusable tires. The triage process occurs at the site. The Department, of course, interprets the provision of its Order providing that Tire Jockey shall cease accepting "waste tires" to mean all tires it accepts because all of them, in the Department's view, are "waste tires" in that all of them have been discarded by their original owners. The triage operation, however, could be considered as "sorting" thus exempting it from the being considered waste under subsection (ii)(A) of the definition of waste.

It is clear, though, that even if Tire Jockey were to win on that particular point down the road, that the provision of the Department's Order cannot be superseded and must, in practical effect, be enforced to mean that no tires, not even ones that end up passing the inflation test and being classified as reusable be allowed to come into the facility. When the tires arrive at the facility and are unloaded, it is not known which are reusable as tires and which are not. All are, in essence, presumed to be non-reusable unless and until they pass the inflation test. Mr. Pignataro testified that tires are tested, *and if they pass the test*, they are marked for sale and placed with other for-sale tires. We think that under the regulations, this co-mingling of reusable and non-reusable tires in the same area means that all the tires, and the physical location where this co-mingling and triage operation takes place, at least at the point in the process before the

particular tires have been demonstrated to be reusable as tires and taken to a different area of the facility, are subject to regulation. The "materials that are not waste when recycled" provision states that such materials can be outside the regulatory scope *"when they can be shown to be recycled"*. It is only *when* they have been shown to be recycled that the tires may, if Tire Jockey is correct, be considered outside regulatory reach.

In any event, the equities are not in favor of granting the Supersedeas on this point. As we noted before, the Tire Jockey operation is an organic whole. The operation depends upon non-reusable tires being cut and shredded for volume reduction and sale as percofill or other products. That backend of the Tire Jockey operation is what creates the flow-through necessary to sustain the operation. We have seen the detrimental and dangerous effect of the back end clogging up. Tires pile up, in this case to the point of the Fire Marshall having already cited the facility for a violation of the fire code.

The supposed irreparable harm as to this aspect of the Department's Order, if there is any, is illusory and self-inflicted here for the same reasons we discussed above.

For these reasons, we will not grant the Supersedeas as to the provisions of the Department's Order which it interprets as requiring Tire Jockey to cease accepting any tires and which we, for the present purposes for the reasons just stated, interpret to mean the same thing.[3]

---

[3] We also will not grant a supersedeas of Paragraph 3 of the January 22, 2001 Order requiring that TJI turn over documents. TJI did not argue that the supersedeas should apply to that paragraph of the Order. Nor do we address the last Paragraph of the Order relating to the payment of a $54,000 penalty. We expect that the fate of that penalty assessment will be handled in the remainder of the litigation before us.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

TIRE JOCKEY SERVICES, INC.	:	
	:	
v	:	**EHB Docket No. 2001-155-K**
	:	**(Consolidated with 2001-041-K)**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued:**

ORDER

And now this 17th day of December, 2001, upon consideration of the petition of TJI for a Supersedeas of the Department's January 22, 2001 Order and Civil Penalty Assessment (the Order or the Department's Order), the Department's response thereto and the four days of hearing of the Petition, it is hereby ordered that TJI's Petition For Supersedeas is granted in part and denied in part as follows:

1. No supersedeas is granted as to Paragraph No. 1 of the Department's Order which we interpret for the purpose of this Order as requiring TJI to cease accepting any tires. TJI shall accept no tires at its Fairless Hills facility during the pendency of this litigation or until a permit may be issued covering its operation.

2. No supersedeas is granted with respect to Paragraphs Nos. 1 and 2 of the Department's January 22, 2001 Order which we interpret to mean that Tire Jockey is required to immediately cease and/or refrain from any cutting (including the cutting of white-walls for making mats) or shredding of reusable or non-reusable tires and to remove from the premises and properly dispose of all tires which have not passed the inflation test and are not reusable

whether stored inside or outside and whether being stored as whole tires or as cut portions of tires.

3. Subject to the provisions of Paragraph 5 of this Order, Paragraph No. 2 of the Department's January 22, 2001 Order is superseded to the extent it may mean that Tire Jockey must remove within 30 days reusable tires which have been inflation tested, passed the inflation test and are being held out for sale for reuse as tires.

4. No supersedeas is granted as to Paragraph No. 3 of the Department's Order and TJI shall submit within 10 days of the date of this Order all such records (including, but not limited to, disposal receipts and bills of lading) relating in any way to the past outflow of tires from the facility whether relating to usable or non-reusable tires.

5. The limited supersedeas outlined in Paragraph No. 3 of this Order is conditioned upon TJI, within 7 calendar days of the date hereof posting a bond in the amount of $74,891. The bond is to be in the form that would normally be required in the context of a residual waste management permit and it is to be posted with the Department in the same manner it would be so posted in connection with a residual waste management permit. In the event TJI fails to meet this condition, the limited supersedeas herein granted shall lapse. In the event that there is an intention to have the bond in the amount herein stated posted, but a logistical problem in complying with the deadline set forth herein due to an administrative or clerical or other non-substantive reason, the Board may entertain a request that the limited supersedeas provided in

paragraph 2 of this Order be continued for some finite short period of time.

ENVIRONMENTAL HEARING BOARD

MICHAEL L. KRANCER
Administrative Law Judge
Member

DATED: **December 17, 2001**

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

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WILLIAM T. PHILLIPY II
SECRETARY TO THE BOA

CARL K. KRESGE	:	
	:	
v.	:	**EHB Docket No. 2001-254-K**
	:	
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: December 19, 2001**
	:	

OPINION AND ORDER ON
MOTION FOR AN EXTENSION OF TIME TO AMEND APPEAL

By Michael L. Krancer, Administrative Law Judge

Synopsis:

On the twentieth day after filing a Notice of Appeal, Appellant's counsel filed a Motion For An Extension of Time To Amend Appeal. The Motion claims that appellant's counsel filed just a "skeleton appeal" with the intention of providing more specific and detailed objections later but she is "constrained" from filing a more detailed appeal until the Bankruptcy Court approves of her retention as counsel for Appellant. 25 Pa. Code § 1021.53(a) allows amendments to appeals to be filed as a matter of right within 20 days after the Notice of Appeal is filed. The Rule on amendments of appeals has no provision for the Board to extend that 20-day period. Thus, Appellant cannot qualify for an amendment under the amendment-by-right Rule. Other than an amendment-by-right, 25 Pa. Code § 1021.53(b) provides for an amendment for cause. Appellant has failed, however, to demonstrate that any of the three conditions for amendment outlined in 25 Pa. Code § 1021.53(b) have been met. Even though Kresge's Motion

for Extension of Time to Amend Appeal does not fall within 25 Pa. Code § 1021.53(a) or (b) allowing for amendment of appeals, the Board allows Appellant an opportunity to amend the appeal pursuant to 25 Pa. Code § 1021.4. That Rule provides that the Board, at every stage of an appeal or proceeding may disregard any error or defect or procedure which does not affect the substantial rights of the parities and that justice is to be assigned an important role in our decision making. In this case, justice is best served by not punishing Mr. Kresge for the error of his counsel. Kresge's counsel is provided eight calendar days from the date of this Opinion and Order to file whatever amended appeal she wishes to file without having to demonstrate that the amendment qualifies under the provisions of 25 Pa. Code § 1021.53(b).

Factual and Procedural Background

Through his counsel, Carl K. Kresge (Kresge) filed a Notice of Appeal with the Board on November 9, 2001. The appeal challenges the Department of Environmental Protection's (Department or DEP) assessment of $9,270 civil penalty against Kresge under the Pennsylvania Safe Drinking Water Act, Act of May 1, 1984, P.L. 206, *as amended*, 35 P.S. §§ 721.1- 721.17 (Safe Drinking Water Act), 35 P.S. § 721.17. The Department assessed the civil penalty against Kresge for violating a Department March 30, 1998 compliance order and for numerous alleged violations of the Safe Drinking Water Act. As stated in the Notice of Appeal, Kresge objects to the Department's assessment alleging that "[t]he penalties are unreasonable in that they are arbitrary and capricious, an abuse of discretion, and otherwise contrary to law, including the permits and regulations applicable to the facility under the Safe Drinking Water Act." Additionally, the cover letter to Kresge's Notice of Appeal informs the Board that Kresge is a debtor in bankruptcy.

On November 29, 2001, counsel for Kresge filed the instant Motion for Extension of

Time to Amend Appeal. The motion alleges that Kresge filed a so-called "skeletal" Notice of Appeal on November 9, 2001, and that Kresge intended to amend the Notice of Appeal to include more specific objections pursuant to section 1021.53(a)[1] of the Board's rules once the Bankruptcy Court for the Middle District of Pennsylvania had approved Kresge's counsel to represent him before the Board. However, the Bankruptcy Court did not appoint Kresge's counsel within the 20 day as of right amendment period. Further, one of Kresge's creditors objected to the appointment of Kresge's counsel in this matter and a hearing has been scheduled for December 18, 2001 in Bankruptcy Court to hear a creditor's objections to the appointment of counsel for Kresge in this matter. The motion alleges that, based on all of this, Kresge's counsel is "constrained" in her representation of Kresge until the matter of her appointment is resolved by the Bankruptcy Court. The Motion also points out that counsel sought the concurrence of the Department's counsel but no response had been delivered by the time the motion was filed.

The Department filed an Answer to Kresge's motion on December 12, 2001. The Department opposes the motion and argues that: (1) Kresge did not file a skeletal appeal; (2) Kresge is not entitled to amend its appeal pursuant to section 1021.53(b); (3) Kresge's counsel was not "constrained" when she filed the notice of appeal was also not "constrained" either within the 20 day amendment-by-right time period or now; and (4) the bankruptcy proceedings are irrelevant to Kresge's appeal before the Board and irrelevant to the question of whether Kresge may amend the Notice of Appeal. The Department's Answer also states that on the afternoon of November 29, 2001, which was the last day of the 20 day amendment as of right period, Appellant's counsel sought concurrence from the Department's counsel, in the request to

[1] "An appeal may be amended as of right within 20 days filing thereof." 25 Pa. Code § 1021.53(a).

file an amended Notice of Appeal at a later date. The Department's counsel told Appellant's counsel at that time that it was extremely unlikely that the Department would concur with the request but that the Department's counsel would contact Appellant's counsel as soon as practicable after consulting with Department personnel. The Department's Answer states, finally, that on the morning of November 30, 2001, the day after the instant Motion was filed, the Department's counsel informed Appellant's counsel that the Department did not concur with Appellant's counsel's request for additional time to file an amended Notice of Appeal.

Discussion

Section 1021.53(a) of the Board's rules allows an appellant to amend its notice of appeal as of right within 20 days of filing the appeal. If an appellant fails to take advantage of this rule but still wants to amend its notice of appeal after the twentieth day it may do so only pursuant to section 1021.53(b). That rule, however, requires that the appellant seeking to amend establish that the amendment:

> (1) [I]s based upon specific facts, identified in the motion, that were discovered during discovery of hostile witnesses or Department employees.
>
> (2) [I]s based upon specific facts, identified in the motion, that were discovered during preparation of appellant's case, that appellant, exercising due diligence, could not have previously discovered.
>
> (3) It includes alternate or supplemental legal issues, identified in the motion, the addition of which will cause no prejudice to any other party or intervenor.

25 Pa. Code § 1021.53(b).

The 25 Pa. Code § 1021.53(a) amendment by right provision cannot apply here. Kresge's Notice of Appeal was filed on November 9, 2001. No amendment was filed within the 20 day amendment by right period which expired on November 29, 2001. Instead of an amended

appeal, Kresge's counsel filed the instant Motion For Extension of Time To Amend Appeal. This Motion seems to assume that we can, by Order, extend the 20-day amendment by right period outlined in 25 Pa. Code § 1021.53(a). We do not see that 25 Pa. Code § 1021.53 provides for or allows an extension of the 20 day time period which the Rule allots to file an amendment by right.

Unfortunately also for Kresge, the Motion fails to establish, at least as of this point in time, that any of the three conditions allowing amendment for cause outlined in 25 Pa. Code § 1021.53(b) have been met. Kresge's motion does not contain any allegations establishing that any of the three conditions have been met. Rather the motion simply pleads that counsel is "constrained" by the Bankruptcy proceedings and therefore needs more time to amend Kresge's appeal to provide for additional details.

We reject the notion that counsel for Appellant was under any "constraint" in her representation that prevented the filing of a fully detailed Notice of Appeal. There was no "constraint" in Appellant's counsel filing the Notice of Appeal in the first place. To have embarked on that course "constrains" Appellant's counsel to have done so in the manner which is required under the Board's Rules and other applicable protocol.

There may be an opportunity for an amendment to the Notice of Appeal under 25 Pa. Code § 1021.53(b) later if Appellant can demonstrate that such an amendment is appropriate for one or more of the three reasons stated in that section. Right now, however, we cannot make that determination in advance.

For the foregoing reasons, the pending Motion For Extension of Time To Amend Appeal should be denied. However, this does appear to be a case of first impression on the question of whether the Board can extend the time of the 20-day amendment by right period. We think the

answer to that question is both clear and self-evident that we cannot. However, this was, perhaps, not so clear to Appellant's counsel who did file her motion within the 20-day period. Under the circumstances, we will allow counsel eight (8) calendar days from the date of this Order to file whatever amended appeal with additional details she wishes to file without having to demonstrate that the amendment qualifies under one or more of the conditions outlined in 25 Pa. Code § 1021.53(b). We grant this rather extraordinary relief under 25 Pa. Code § 1021.4 which provides that the Board at every stage of an appeal or proceeding may disregard any error or defect or procedure which does not affect the substantial rights of the parities and that justice is to be assigned an important role in our decision making. We do not think that there is any prejudice to the Department in allowing counsel an opportunity to amend at this still very early stage of the case and no such prejudice was even alleged in the Department's answer to the Motion. Also, we think that Rule 1021.4 enunciates the salutary policy that cases should be decided based on their merits and not based on procedure or a lawyer's possible mistake about a particular procedural nuance. Indeed, one may wonder what was the point of the Department and the Department's counsel refusing to agree to allow Appellant's counsel some consideration to permit at least a limited time, under the circumstances, to file an amended Notice of Appeal without objecting. Under the particular circumstances presented here, to punish Mr. Kresge for the error of his counsel and the refusal of the opponent to surrender even an inch of procedural territory would not consonant with the spirit of Rule 1021.4.

Accordingly, we enter the following order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CARL K. KRESGE	:	
	:	
v.	:	**EHB Docket No. 2001-254-K**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

And now this 19th day of December, 2001, upon consideration of Appellant's Motion for Extension of Time to Amend Appeal, it is hereby ordered that the motion is granted and Kresge's counsel shall have eight (8) calendar days from the date of this Order to file whatever amended appeal she wishes to file without having to demonstrate that the amendment is one under 25 Pa. Code § 1021.53(b).

ENVIRONMENTAL HEARING BOARD

MICHAEL L. KRANCER
Administrative Law Judge
Member

DATED: December 19, 2001
Service list on following page.
Via Fax and U.S. Mail

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

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DAWN M ZIVIELLO, ANGELA J. ZIVIELLO and ARCHIMEDE ZIVIELLO, III	:	
v.	:	**EHB Docket No. 99-185-R**
COMMONWEALTH OF PENNSYLVANIA, STATE CONSERVATION COMMISSION and TING-KWANG CHIOU and CHIOU HOG FARM, LLC, Permittee	:	**Issued: December 20, 2001**

ADJUDICATION

By Thomas W. Renwand Administrative Law Judge

Synopsis:

An appeal of the State Conservation Commission's approval of a nutrient management plan is dismissed. The Commission's approval of the plan did not violate the Administrative Agency Law because the Appellants' ability to appeal the Commission's action to the Environmental Hearing Board affords the Appellants' due process of law. In addition, the notice requirements of the Sunshine Act were properly met. Although the Bedford County Conservation District has been delegated the power to review nutrient management plans for operations to be conducted in Bedford County, the Conservation District's decision to send the plan to the Commission for review did not constitute a violation of Section 6(e) of the Nutrient Management Act or 25 Pa. Code § 83.361(b). The nutrient management plan constitutes a

"public record" under Pennsylvania's Right to Know Act, even though it was not generated by the Commission it was filed with it and it was an essential component of the Commission's decision to approve the plan. Therefore, the Commission's failure to provide the Appellants with access to the plan for approximately two months constituted a technical violation of the Right to Know Act. However, this is not a basis for overturning the plan approval because the Appellants did not demonstrate that the Commission would have reached a different conclusion had the Appellants been provided with a copy of the plan at an earlier date; moreover, and more importantly, the Appellants were provided with a *de novo* hearing before the Board in which they were permitted to present evidence that may not have been considered by the Commission. The nitrogen figures in the nutrient management plan will protect water quality. The nutrient management plan includes realistic and achievable crop yields. The action of the Commission in approving the nutrient management plan submitted by the permittee was reasonable and the appeal is therefore dismissed.

BACKGROUND

This case of first impression before the Environmental Hearing Board (Board) involves an appeal by Dawn M. Ziviello, Angela J. Ziviello, and Archimede Ziviello III (the Appellants) from the approval by the State Conservation Commission (State Commission or Commission)[1] of a nutrient management plan for a proposed hog farm to be owned and operated by Ting-Kwang Chiou and Chiou Hog Farm, LLC (collectively, Chiou or Permittee) in Monroe Township, Bedford County, Pennsylvania. Because the proposed hog farm would qualify as a concentrated

[1] The State Conservation Commission is an administrative commission of the Department of Environmental Protection. 3 P.S. § 852. The Commission is charged to work with both the Department of Environmental Protection and the Department of Agriculture. (T. 498)

animal operation, Chiou is required under the Nutrient Management Act[2] to develop and implement a nutrient management plan for its operation.

Under the Nutrient Management Act, the State Conservation Commission is authorized to delegate administrative or enforcement authority to county conservation districts with adequate programs and resources to carry out the requirements of the act. Pursuant to this authority the Commission delegated such power to the Bedford County Conservation District. Chiou initially submitted a nutrient management plan to the Bedford County Conservation District which was approved on March 25, 1998. The Appellants appealed the plan approval on April 24, 1998 to the Board. Chiou then submitted a new nutrient management plan to the Bedford County Conservation District. Rather than acting on the second proposed plan itself, the Bedford County Conservation District referred the plan to the State Conservation Commission, which subsequently approved it on June 30, 1999. The Appellants also appealed the second plan approval. Thereafter, Chiou notified the Environmental Hearing Board (Board) and the Bedford County Conservation District that it was withdrawing the first plan. Based on this withdrawal, the Board dismissed the appeal of the first plan as moot.[3]

A hearing was held in Harrisburg on the appeal of the second plan approval and the parties filed post-hearing briefs. After a review of the record, the Board makes the following findings of fact:

FINDINGS OF FACT

1. The Appellants are Dawn M. Ziviello, Angela J. Ziviello, and Archimede Ziviello III. (Notice of Appeal)

2. The Appellants regularly visit and spend time at a farm located at 128 Short Road,

[2] Act of May 20, 1993, P.L. 12, 3 P.S. §§ 1701 –1718, at § 1706(b).

Monroe Township, Bedford County (the Ziviello property). This farm is owned by the parents of Angela and Archimede Ziviello. (T. 16, 118-19, 128-30)

3. Ting Kwang-Chiou and Chiou Hog Farm, LLC, submitted a nutrient management plan for the operation of a concentrated animal operation, or hog farm, in Monroe Township, Bedford County. (Notice of Appeal)

4. Mr. Chiou and his wife reside in Silver Spring, Maryland, approximately two hours from the proposed hog farm. (T. 651, 658)

5. Under the nutrient management plan, manure from the hog farm will be applied to land known as the Bussard Farm. The Bussard Farm surrounds three sides of the Ziviello farm, which is located to the south/east and downhill of the Bussard Farm. (T. 16, 309-10))

6. There is a private well on the Ziviello farm. (T. 18-19) There is also a pond on the Ziviello property that is fed by a spring. (T. 19)

7. The State Conservation Commission is an eleven-member body created by the Conservation District Law, Act 217 of May 15, 1945, P.L. 547, *as amended*, 3 P.S. §§ 849 – 864. The State Commission sets policy direction on soil, water and conservation issues for the Commonwealth. (T. 496)

8. The Conservation District Law provides for conservation districts to be created at the county level. *Id.* at § 853. The conservation districts are responsible for planning and managing programs dealing with soil, water conservation, erosion and other natural resources. (T. 499)

9. Pennsylvania's Nutrient Management Program was implemented pursuant to the Nutrient Management Act, Act 6 of 1993, P.L. 12, 3 P.S. §§ 1701 – 1718. A purpose of the Nutrient Management Act is "[t]o establish criteria, nutrient management planning requirements and an

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[3] *Ziviello v. State Conservation Commn.*, 1999 EHB 889.

implementation schedule for the application of nutrient management measures on certain agricultural operations which generate or utilize animal manure." *Id.* at § 1702.

10. The Nutrient Management Program is administered by the State Conservation Commission at the state level and through delegation to the county conservation districts. (T. 514) In counties where the conservation district has not adopted a program, the State Commission is responsible for carrying out the program. (T. 514)

11. Bedford County, the site of the proposed hog farm and manure application, has been delegated administrative authority as a county conservation district. (Exhibit B-14)

12. An operator of a concentrated animal operation is required to develop and implement a nutrient management plan in accordance with the Nutrient Management Act. *Id.* at § 1706(b).

13. A "concentrated animal operation" is defined in the Nutrient Management Act as an agricultural operation where the animal density exceeds two animal equivalent units per acre on an annualized basis. *Id.* at § 1706(a).

14. An "animal equivalent unit" is defined in the Nutrient Management Act as "[o]ne thousand pounds live weight of livestock or poultry animals, regardless of the actual number of individual animals comprising the unit." *Id.* at § 1703.

15. Nutrient management plans are reviewed by county conservation districts for approval. (T. 511-12)

16. The nutrient management plan that is the subject of this appeal (the Chiou plan) was reviewed and approved by the State Conservation Commission rather than the Bedford County Conservation District. (Notice of Appeal; Exhibit A-2)

17. A majority of the members of the Bedford County Conservation District voted to send the Chiou plan to the State Conservation Commission for review rather than voting on the plan

themselves. (T. 223-24)

18. An earlier nutrient management plan submitted by Ting Kwang-Chiou and Chiou Hog Farm was approved by the Bedford County Conservation District, but this plan was subsequently withdrawn following an appeal by the Appellants and submission and approval of the Chiou plan that is the subject of this appeal. (EHB Docket No. 98-074-R)

19. Beginning in March or April of 1999, the Appellants attempted to obtain a copy of the Chiou plan. (T. 54-60, 121)

20. The Appellants first contacted the Bedford County Conservation District, who advised their attorney by letter dated April 14, 1999 that because the matter had been turned over to the State Conservation Commission, the Appellants would have to obtain a copy of the plan from the Commission. (Appellant Exhibit 2)

21. The Appellants' attorney then sent a letter to counsel for the State Conservation Commission on May 5, 1999, requesting a copy of the Chiou plan pursuant to the Pennsylvania Right to Know Act. (Board Exhibit 13) He did not receive a copy of the plan. (T. 63)

22. The Appellants' attorney also contacted a second attorney representing the State Conservation Commission but was still not given permission to review the Chiou plan. (T. 63-64)

23. The Appellants were provided with a copy of the Chiou plan by the State Conservation Commission and their attorney on June 19, 1999. (T. 64, 65)

24. It is the policy of the State Conservation Commission to make nutrient management plans available to the public only when they are considered to be in "final form." (T. 629-30) Plans must be in final form seven days prior to the Commission's action on them. (T. 630)

25. A memorandum that accompanied the Chiou plan sent to the Appellants by the State

Conservation Commission notified them that written comments had to be submitted by June 22, 1999, *only* three days later. (Exhibit A-3; T. 68)

26. The Chiou plan was approved at a special meeting of the State Conservation Commission held in Harrisburg, Pennsylvania on June 30, 1999. (T. 516-17, 531)

27. Notice of the meeting was published in the Harrisburg *Patriot News* and the *Bedford Gazette*. (T. 517-18; Exhibit B-2)

28. At the June 30, 1999 special meeting of the State Conservation Commission, the Appellants were limited to five minutes of oral comments on the Chiou plan. (T. 76)

29. The State Conservation Commission did not provide written findings or reasons for its approval of the Chiou plan. (T. 77, 123)

30. The Appellants became aware of the plan approval by the State Conservation Commission through their attorney who informed them of the notice of approval in the August 7, 1999 *Pennsylvania Bulletin.* (T. 77; Exhibit B-3)

31. Douglas Goodlander is the director of nutrient management for the State Conservation Commission. (T. 534) Mr. Goodlander performed the administrative, technical and site review of the Chiou plan. (T. 536)

32. Mr. Goodlander is a certified public nutrient management specialist. (T. 536)

33. The Environmental Hearing Board (Board) recognized Mr. Goodlander as an expert in nutrient management planning and the operation of the state's nutrient management program. (T. 547-48)

34. William Rogers is a senior project manager within the nutrient management and environmental group of Brubaker Agronomic Consulting. (T. 659)

35. Mr. Rogers is certified to write nutrient management plans in Pennsylvania, as well as

Maryland and Virginia. (T. 662)

36. The Board recognized Mr. Rogers as an expert in the following areas: science of agronomy, soil science, agricultural engineering technology, nutrient management and environmental science, and preparation and review of nutrient management plans under Pennsylvania law. (T. 675)

37. William Plank is a director of the Bedford County Conservation District; he became an associate director in 1984 and has been a voting director since 1986. (T. 151)

38. Since 1973, Mr. Plank has lived on a 53-acre farm where he raises over 50 cows, alfalfa and hay. (T. 148-49) He is a member of numerous boards and committees dealing with environmental matters. (T. 151-63)

39. The Board recognized Mr. Plank as an expert in the area of agronomy and nutrient management. (T. 206)

40. Although Mr. Plank, as a member of the Bedford County Conservation District, voted on the earlier nutrient management plan submitted by Chiou, he did not vote on the plan that is the subject of this appeal. (T. 165-66)

41. In the buildings of the Chiou operation where the animals will be housed, there will be a slatted floor through which manure will drop; the manure will collect in a retention area directly below the animals. (T. 548-49)

42. The plan does not state how often the manure will be emptied from the retention area. According to Douglas Goodlander, it will be emptied "every number of days." (T. 549)

43. The manure will be transported out of the retention area and moved to the primary stage manure storage (Stage I) through an underground pipe. (T. 549)

44. The majority of solids will be deposited and retained in Stage I, while the liquid portion

will be transported to Stage II. (T. 549)

45. Stage II is predicted to be 98% liquid, while Stage I is predicted to be 92% liquid and 8% solids. (T. 550)

46. The manure storage areas will be lined with high-density polyethylene. (T. 561)

47. Manure will be removed from the manure storage areas and loaded onto a truck for application to fields. (T. 550)

48. 535,800 gallons of Stage II manure will be applied to the Bussard Farm; 886,000 gallons of Stage I manure and 1,757,790 gallons of Stage II manure will be exported to neighboring landowners. (Board Exhibit 1; T. 480, 686, 695)

49. The manure will be spread on fields of the Bussard Farm, not sprayed. (T. 550-51)

50. After the first cutting of hay, 5,000 gallons of manure will be spread per acre, the equivalent of .18 inches in depth. (T. 551-52)

51. Later in the summer, an additional 4,500 gallons of manure will be spread per acre, the equivalent of .16 inches in depth. (T. 552)

52. "Nitrogen content" is the total amount of nitrogen available to be absorbed by or lost into the environment. (T. 556)

53. Under ordinary circumstances, the proper way to determine nitrogen content is through testing of the manure. (T. 556)

54. Where a proposed facility has not yet been built and there is no manure to be tested, nitrogen content can be estimated by using book values. (T. 556-57)

55. There is no book value for nitrogen content for Stage I and Stage II storage because this is a new technology. (T. 557)

56. Since there is no book value for nitrogen content for Stage I and II storage, the Chiou

plan simply calculated the total nitrogen content for the proposed Chiou facility and partitioned it between Stage I and Stage II. (T. 557)

57. The nitrogen content estimated for the Chiou facility was comparable to that of another hog farm operated by Chiou in Franklin County with the same genetic strain of hogs and same feed rations. (T. 563)

58. Prior to actual application, the manure is required to be tested for nitrogen content. (T. 573)

59. The crop to be produced on the Bussard Farm on which the manure is to be applied is grass hay. (T. 598; Exhibit B-1)

60. It is necessary to know the crop yield of the land on which manure is to be applied in order to determine the amount of manure that can be applied to the field. (T. 592)

61. The Chiou plan estimates that the crop yield for the area where the manure is to be applied on the Bussard Farm will be 3.5 tons of grass hay per acre. (T. 593) The plan contains no information about the crop yield of neighboring fields where the manure is to be applied. (Board Exhibit 1)

62. There is no listing for grass hay in the *Pennsylvania Agronomy Guide* so Chiou's consultant, William Rogers, considered the yield for alfalfa, which, like grass hay, is a long-term forage crop. (T. 701-05)

63. The Agronomy Guide lists the expected crop yield for alfalfa to be four tons per acre. (T. 704-05)

64. Mr. Rogers adjusted this figure downward by ½ ton to arrive at an expected crop yield of 3.5 tons per acre for grass hay. (T. 701) Mr. Goodlander, who reviewed the plan, agreed with this approach. (T. 593-94)

65. Under current management practices, Mr. Goodlander admitted the Chiou farm will not yield 3.5 tons of hay per acre. (T. 596)

66. In the event the estimate for the crop yield is incorrect, the Chiou plan calls for re-evaluation after three years. (T. 598-99)

67. Overapplication of nitrogen to soil can result in the leaching of nitrates into the groundwater. (T. 642-43)

68. An excess of nitrates in a water supply can negatively affect human health. (T. 643)

69. Grass hay is a growing sod, which is a very stabilized base to receive the amount of manure that will be spread on the Bussard Farm. (T. 552)

70. The manure has to be tested prior to its application on the Bussard Farm. (T. 573)

71. A crop yield of 3½ tons per acre is reasonable. (T. 598)

72. Mr. Chiou intends to follow best management practices in order to achieve the crop yield goals of 3½ tons per acre at the Bussard Farm. (T. 654)

73. It would be possible with proper management practices to obtain yields of four to six tons per acre at the Bussard Farm. (T. 701)

74. There are a number of safeguards, concerning the amount of nitrogen that will be applied, in the nutrient management plan approved by the Commission. Those safeguards include an underestimation of the amount of nitrogen needed by grass hay, an over-assumption concerning the amount of residual nitrogen on the site, and the use of nitrogen estimates that likely are greater than the figures generated from a comparable facility. (T. 574)

75. The nitrogen content estimates in the Chiou plan will not result in an overapplication of nitrogen to the Bussard Farm. (T. 576)

76. The nitrogen figures in the Chiou plan will protect water quality. (T. 577)

77. As soon as the Chiou hog farm is in operation and testing of the manure can be performed, the manure will be tested for nitrogen content prior to application and the Chiou plan will be adjusted, if necessary, to reflect the nutrient concentration based upon actual test results. (T. 567-568)

DISCUSSION

In this third-party appeal of a nutrient management plan, the Appellants have the burden of proving by a preponderance of the evidence that the State Conservation Commission erred in approving the Chiou nutrient management plan. 25 Pa. Code § 1021.101(c)(2). Our review here is *de novo*.[4] As the Board previously explained in *Eisenhardt*, we shall consider the case anew and are not bound by previous determinations made by the Commission.[5]

The Appellants raise the following objections to the approval of the plan:

1) The State Conservation Commission's procedure for approving the plan did not comply with the Administrative Agency Law, Pennsylvania's Right to Know Law, and the Sunshine Act.
2) The Bedford County Conservation District's decision to refer the plan to the State Conservation Commission for approval rather than acting on the plan itself was a violation of the Nutrient Management Act and 25 Pa. Code § 83.361(c).
3) The plan approval violated the Nutrient Management Act and the regulations because it failed to contain a realistic expected crop yield and because it incorrectly calculates the nitrogen content and availability of the manure to be applied to the crops.

The Appellants also set forth their basis for standing in their post-hearing brief. However,

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[4] *Eisenhardt v. DEP*, EHB Docket No. 2000-109-MG (Adjudication issued June 4, 2001), slip op. at 9; *Smedley v. DEP*, EHB Docket No. 97-253-K (Adjudication issued February 8, 2001), slip op. at 30.

because neither the Commission nor Chiou challenged the Appellants' standing in their post-hearing briefs, they have waived this issue.[6]

The Administrative Agency Law

The Administrative Agency Law[7] provides as follows:

> No adjudication of a Commonwealth agency shall be valid as to any party unless he shall have been afforded reasonable notice of a hearing and an opportunity to be heard. All testimony shall be stenographically recorded and a full and complete record shall be kept of the proceedings.

The term "adjudication" is defined as follows:

> Any final order, decree, decision, determination or ruling by an agency affecting personal or property rights, privileges, immunities, duties, liabilities or obligations of any or all of the parties to the proceeding in which the adjudication is made....[8]

The Appellants assert that the State Conservation Commission's approval of the Chiou plan violated the Administrative Agency Law because the Appellants were not permitted to give oral argument or cross-examine witnesses at the special meeting at which the Chiou plan was approved, were not permitted to submit briefs, and were not provided with a written adjudication of the Commission's findings.

Section 4(c) of the Environmental Hearing Board Act[9] provides as follows:

> The [D]epartment [of Environmental Protection] may take an action initially without regard to 2 Pa.C.S. Ch. 5 Subch. A [of the Administrative Agency Law], but no action of the department adversely affecting a person shall be final as to that person until the person has had the opportunity to appeal the action to the [Environmental Hearing] [B]oard. . . .

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[5] *Eisenhardt, supra* at 9.
[6] 25 Pa. Code § 1021.116(c).
[7] Act of April 28, 1978, P.L. 202, 2 Pa.C.S.A. §§ 101 – 754, at § 504.
[8] *Id.* at § 101.
[9] Act of July 13, 1988, P.L. 530, 35 P.S. §§ 7511 – 7516, at § 7514(c).

The Commonwealth Court has held that the ability to appeal a Department of Environmental Protection action to the Environmental Hearing Board and to be heard before an action becomes final constitutes compliance with the Administrative Agency Law and affords an appellant the right to due process.[10] As noted above, our review in this matter is *de novo*.[11] As explained in *Smedley*, the Board is empowered to make a decision, "based on the evidence *we* hear, as to whether the findings on which [the Commission] based its actions are correct and whether [that] action is reasonable and appropriate and otherwise in conformance with the law." [12] In this proceeding before the Board, the Appellants were afforded the opportunity to give oral argument, examine and cross-examine witnesses and submit briefs. In addition, by virtue of this adjudication, they have been provided written findings of fact and conclusions of law with regard to their challenge of the Chiou plan.

The Appellants acknowledge Section 4(c) of the Environmental Hearing Board Act but assert that by its very language, it applies only to actions of the Department of Environmental Protection. Because the State Conservation Commission is an administrative commission of the Department of Environmental Protection[13] and its actions under the Nutrient Management Act are appealable to the Environmental Hearing Board[14] the same reasoning applies to actions of the Commission taken pursuant to the Nutrient Management Act.

We, therefore, conclude that because of the procedural due process safeguards afforded by a hearing before this Board, the State Conservation Commission's approval of the Chiou plan

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[10] *Department of Environmental Resources v. Steward*, 357 A.2d 255, 258-59 (Pa. Cmwlth. 1976); *Department of Environmental Resources v. Borough of Carlisle*, 330 A.2d 293, 296-97 (Pa. Cmwlth. 1974); *Commonwealth v. Derry Twp.*, 314 A.2d 874, 878 (Pa. Cmwlth. 1973).
[11] *O'Reilly v. DEP*, EHB Docket No. 99-166-L, *slip op.* at 36 (Adjudication issued January 3, 2001).
[12] *Smedley*, *slip op.* at 30.
[13] 3 P.S. § 852.

did not violate the Administrative Agency Law.

The Sunshine Act

The Appellants contend that the State Conservation Commission's actions violated the Sunshine Act.[15] The Sunshine Act, provides, *inter alia*, that meetings of government agencies shall be open to the public: "The General Assembly hereby declares it to be the public policy of this Commonwealth to insure the right of its citizens to have notice of and the right to attend all meetings of agencies at which any agency business is discussed or acted upon..."[16] The burden of proof is on the challenging party to prove that the public meeting requirements of the Sunshine Act were not met by a state agency.[17]

The Sunshine Act requires public notice and public participation of State Conservation Commission meetings. A "special meeting" is defined as "a meeting scheduled by an agency after the agency's regular schedule of meetings has been established."[18] Here, the meeting held on June 30, 1999 to consider the Chiou plan was a special meeting. The Sunshine Act requires that an agency give public notice of each special meeting at least 24 hours in advance of the meeting specified in the notice.[19]

The State Conservation Commission satisfied the notice provisions of the Sunshine Act not only by providing publicized notice in the *Patriot News* and the *Bedford Gazette*, but also by providing written notice to the Appellants and their attorney which they received eleven days

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[14] 35 P.S. § 1715.
[15] Act of October 15, 1998, P.L. 729, 65 Pa.C.S.A. §§ 701 – 715.
[16] 65 Pa.C.S.A. § 702(b).
[17] *Public Advocate v. Philadelphia Gas Commn.*, 637 A.2d 676 (Pa. Cmwlth. 1994), *rev'd on other grounds*, 674 A.2d 1056 (Pa. 1996).
[18] 65 Pa.C.S.A. § 703.
[19] *Id.* at § 709(a).

before the special meeting date.[20] The State Conservation Commission also complied with the Sunshine Act requirement concerning public comment. The Appellants and other members of the public were afforded the opportunity to submit both written and oral comments in accordance with Section 710.[21]

The Appellants state that the copy of the Chiou plan they received in June, 1999 bore a May 11, 1999 signature page. Chiou later supplied a faxed signature page dated June 28, 1999.[22] Based on this, the Appellants argues that it appears the Commission shielded the final version of the plan from a timely public review and acted upon a version of the plan finalized when it received the June 28 faxed signature page, or finalized when the signed original was supplied to the Commission. The record is devoid of any evidence that supports this contention. An updated signature page was provided to the Appellants and other members of the public. At most, this seems to be one of the errors in the nature of a misspelling or other inconsequential mistake that is discovered and rectified before final action is taken by an agency. As we recently stated in *Giordano v. DEP,*[23]alleged procedural defects minor in nature, will rarely, compel a nullification or remand of the permit (or in this case the plan). It certainly does not compel such a result here. In no way does it rise to either a violation of the Sunshine Act or of the Appellants' due process rights. In sum, the evidence supports our conclusion that the State Conservation Commission met all requirements of the Sunshine Act regarding its special meeting held on June 30, 1999 to consider and approve the Chiou plan.

Pennsylvania's Right to Know Act

The Appellants contend that they were improperly denied access to the Chiou plan after

[20] T. 65, 517 – 518; Board Exhibit 2; Board Exhibit 11
[21] *Id.* at § 710.1(a).
[22] Board Exhibit 1

its submission to the State Conservation Commission in violation of Pennsylvania's Right to Know Act.[24] After both Appellants and their attorney requested a copy of the plan from the Bedford County Conservation District, they were referred to the State Conservation Commission. After making a request to the Commission, they still were unable to obtain a copy of the plan. Mr. Goodlander testified that it is the policy of the Commission to make plans available to the public only after they are in final form.[25] The Chiou plan was in final form approximately 13 to 14 days prior to the Commission taking action on it.[26] The Appellants received a copy of the Chiou plan 11 days prior to the special meeting at which it was approved and only three days before written comments were due. It is the contention of the Appellants that their inability to obtain a copy of the Chiou plan when they requested it constitutes a violation of the Right to Know Act.

Section 2 of Pennsylvania's Right to Know Act[27] states as follows:

> Every public record of an agency shall, at reasonable times, be open for examination and inspection by any citizen of the Commonwealth.

The term "public record" is defined as follows:

> Any account, voucher or contract dealing with the receipt or disbursement of funds by an agency or its acquisition, use or disposal of services or of supplies, materials, equipment or other property and any minute, order or decision by an agency fixing the personal or property rights, privileges, immunities, duties or obligations of any person or group of persons: Provided, That the term "public records" shall not mean any report, communication or other paper, the publication of which would disclose the institution, progress or result of an investigation undertaken by an agency in the performance of its official duties, except those

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[23] EHB Docket No. 99-204-L, *slip op.* at 22-24 (Adjudication issued August 22, 2001)
[24] Act of June 21, 1957, P.L. 390, *as amended*, 65 P.S. §66.1 – 66.4.
[25] T. 630.
[26] *Id.*
[27] 65 P.S. § 66.2.

> reports filed by agencies pertaining to safety and health in industrial plants; it shall not include any record, document, material, exhibit, pleading, report, memorandum or other paper, access to which the publication of which is prohibited, restricted or forbidden by statute law or order or decree of court, or which would operate to the prejudice or impairment of a person's reputation or personal security, or which would result in the loss by the Commonwealth or any of its political subdivisions or commissions or State or municipal authorities of Federal funds, excepting therefrom however the record of any conviction for any criminal act.[28]

The burden of establishing that the requested document is a "public record" rests with the party seeking access.[29] In order to establish that a document is a public record, the person seeking the information must demonstrate that the requested material:

> 1) is generated by an agency covered by the [Right to Know] Act;
> 2) is a minute, order or decision of an agency or an essential component in the agency arriving at its decision;
> 3) fixes the personal or property rights or duties of any person or group of persons; and
> 4) is not protected by statute, order of decree of court.[30]

The Commonwealth Court has held that documents constitute public records if they "form the basis for an agency decision."[31] "[I]f a report or document constitutes an essential component of an agency decision, it falls within the [Right to Know] Act's definition of an agency decision and is, therefore, a public record."[32] A document is essential to an agency's decision where the decision is "contingent upon the information contained in the document and

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[28] *Id.* at § 66.1(2).
[29] *LaValle v. Office of General Counsel*, 769 A.2d 449 (Pa. 2001).
[30] *Della Franco v. Department of Labor & Industry*, 722 A.2d 776, 777 (Pa. Cmwlth. 1999) Citing *Tapco, Inc. v. Twp. of Neville*, 695 A.2d 460 (Pa. Cmwlth. 1997) (A proposed draft of a zoning permit was not a public record under the Right to Know Act). *See also, Pennsylvania Coal Assn. v. Environmental Hearing Board*, 654 A.2d 122, 123 (Pa.Cmwlth. 1995) (A draft adjudication used by the Board in rendering its final decision was not a "public record" under the Right to Know Act because it did not "independently affect any person's rights or duties.")
[31] *Consumer Education and Protective Assn. v. Southeastern Pennsylvania Transportation Authority*, 557 A.2d 1123, 1127 (Pa. Cmwlth. 1989).

could not have been made without it."[33]

In *Horsehead Resource Development Co. v. DEP*,[34] the Board considered the question of whether a transcript of testimony and exhibits presented during a supersedeas hearing constituted public records under the Right to Know Act. Relying on the Commonwealth Court's holding in *Sierra Club*, the Board held that the transcript and exhibits were public records because the Board could make certain determinations, affixing the rights and duties of both parties, only by reference to the transcript and exhibits, and, therefore, they were an essential element of the Board's decision.[35]

In the present case, the proposed plan submitted by Chiou clearly was an essential element of the State Conservation Commission's action. Although it was not generated by the Commission it was filed with it and the Commission's approval of the plan was contingent on the material contained in the plan and could not have been made without it.[36] Therefore, the Appellants have met their burden of establishing that the Chiou plan was a public record within the protection of the Right to Know Act.

Having established that the plan is a public record, the Appellants were entitled to review it. Section 2 of the Right to Know Act provides that "[e]very public record of an agency shall, at reasonable times, be open for examination and inspection by any citizen of the Commonwealth of Pennsylvania."[37]

The term "at reasonable times" has not been clearly defined by the courts. In *Lyons v.*

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[32] *Id.*
[33] *Sierra Club v. Public Utility Commn.*, 702 A.2d 1131, 1135, *aff'd*, 731 A.2d 133 (Pa. 1999). In *Sierra Club*, Judge Leadbetter, speaking for the Commonwealth Court, held that hearing transcripts were indeed public records.
[34] 1998 EHB 1087.
[35] *Id.* at 1092.
[36] *Sierra Club, supra* at 1135.

Kresge,[38] the Court of Common Pleas of Luzerne County held that restricting citizen access to township minute books to only once a month at the regular monthly meetings of the township supervisors was unreasonable. In *Baravordeh v. Borough Council*,[39] the petitioner challenged a borough resolution that stated, *inter alia*, requests for inspection of borough documents would be filled within five working days of the request. The petitioner argued that the resolution violated the Right to Know Act because the inspection request did not have to be fulfilled immediately but could involve a wait of five days. The court held that the waiting period was not unreasonable.

In the present case, the Appellants were required to wait approximately two months and make several requests before finally receiving a copy of the Chiou plan from the State Conservation Commission. The Commission explains the delay by stating that it is its policy not to make plans available until they are in final form. Plans need not be in final form until seven days prior to the Commission taking action on them. There is no indication this explanation was given to the Appellants at the time they made their requests. Nor did the Commission explain what is meant by a plan being in "final form." For instance, when Mr. Goodlander was asked what changes were made to the proposed plan after May 11, 1999, he stated he did not know without seeing the changes in front of him.[40] The only change noted on the record was a revised signature page.[41] Certainly at the time the plan was submitted initially to the Bedford County Conservation District and then passed on to the State Conservation Commission, it was in final enough form to be reviewed by the agency even if the Commission

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[37] 65 P.S. § 66.2.
[38] 66 Pa. D & C.2d 43 (1974).
[39] 699 A.2d 789 (Pa. Cmwlth. 1997).
[40] T. 629
[41] *Id.*

subsequently requested certain changes. As the Commonwealth Court has held, "The intent of the [Right to Know] Act is to assure the availability of government information to citizens of the Commonwealth by permitting access to official information. Under the Act, a broad construction is given to the initial determination of whether a document is a public record 'to be tempered as an opposing party brings into play the enumerated exceptions."[42] Neither Chiou nor the Commission have demonstrated that any exception applies here.

Given that the Appellants first requested a copy of the Chiou plan in March or April of 1999 following its filing with the Bedford County Conservation District and subsequently the State Conservation Commission, we find that it was an unreasonable delay to provide the Appellants with access to the plan only three days before written comments were due on June 22, 1999. Even if the Commission did not believe its delay was a violation of the Right to Know Act, its actions fall short of the manner in which a government agency should address its citizens.

We now turn to the question of what relief, if any, the Appellants are entitled to receive. The Right to Know Act provides that any citizen who has been denied his rights under the Act may appeal from such denial, and the court may enter such order for disclosure as it deems proper.[43] Judicial relief is afforded only to a citizen who is denied a right of access to a public record.[44] Where a citizen has been denied access to a public record by an agency of the Commonwealth, his remedy lies with the Commonwealth Court.[45] In this case, the Appellants did eventually receive a copy of the Chiou plan. Thus, there is no "denial of access" that they

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[42] *Tribune-Review Publising Co. v. Allegheny County Housing Authority*, 662 A.2d 677, 679 (Pa. Cmwlth. 1995), *appeal denied*, 686 A.2d 1315 (1996), (quoting *Marvel v. Dalrymple*, 393 A.2d 494, 497 (Pa. Cmwlth. 1978).
[43] 65 P.S. § 66.4.
[44] *Envirotest Partners v. Department of Transportation*, 664 A.2d 208, 212 (Pa. Cmwlth. 1995).

are seeking to have addressed, and, therefore, there is no remedy under the Right to Know Act. Nor is this a basis for overturning the Commission's approval of the plan. Even if the Appellants had been given access to the Chiou plan when they first requested it and had had more opportunity to review it and prepare comments, they have not demonstrated that the Commission would have reached a different result. Moreover, as noted earlier in this adjudication, the Board's review is *de novo* and, therefore, we may consider evidence that was not before the Commission when it made its decision.[46] Any evidence the Appellants felt they did not have an opportunity to present to the Commission during its review of the Chiou plan could have been brought before the Board and considered *de novo*. Therefore, although we find that the State Conservation Commission should have provided the Appellants with access to the Chiou plan in a more timely manner under the Right to Know Act, this, in an of itself, does not provide a basis for overturning the plan approval.

Approval of Plan by the State Conservation Commission rather than the Bedford County Conservation District

Section 6(e) of the Nutrient Management Act[47] states in relevant part as follows:

> Plans or plan amendments required under this act shall be submitted to local conservation districts for review and approval or alternatively to the commission for agricultural operations located in counties not delegated administrative authority....

Section 83.361(b) of the regulations states that the State Conservation Commission or delegated conservation district "shall approve, modify or disapprove the plan or plan amendment within 90 days of receipt of a complete plan or plan amendment."[48]

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[45] *Proffitt v. Davis*, 707 F. Supp 182 (E.D. Pa. 1989).
[46] *Smedley, supra; City of Harrisburg v. DER*, 1996 EHB 709, 720.
[47] 3 P.S. § 1706(e).
[48] 25 Pa. Code § 83.361(b).

The Appellants argue that under the language of the statute, the Bedford County Conservation District did not have the option of sending the plan to the State Conservation Commission but was required to approve, disapprove or modify the plan itself.[49] There appears to be at least some merit to the Appellants' argument since under the language of the statute the Commission is given authority to approve, disapprove or modify a plan for "agricultural operations located in counties not delegated administrative authority under section 4 [of the act]."[50] Bedford County has been delegated such authority by the Commission.[51]

The State Conservation Commission and Chiou argue, however, that the Commission retains concurrent jurisdiction with county conservation districts, pointing to Section 83.241(e) of the regulations, which reads as follows:

> When the Commission delegates one or more of its powers and duties to a delegated conservation district, the Commission will retain the concurrent power to administer and enforce the act and this subchapter.[52]

In order to resolve this issue, it is necessary to determine the legislative intent behind Section 6(e) of the Nutrient Management Act since a regulation cannot be upheld if it is contrary to the statute under which it was promulgated.[53]

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[49] The State Conservation Commission asserts that the Appellants have waived this argument since it was not raised in their notice of appeal. However, one of the objections set forth in the notice of appeal was that the plan approval failed to satisfy the requirements of the Nutrient Management Act. We find that this issue was at least raised generally in the notice of appeal and, therefore, is not waived. *Croner, Inc. v. Department of Environmental Resources*, 589 A.2d 1183 (Pa. Cmwlth. 1991).

[50] 3 P.S. § 1706(e). (Note: Section 4 of the Nutrient Management Act sets forth the powers and duties of the Commission, including the power and duty "[t]o delegate administration or enforcement authority, or both, under this act to county conservation districts that have an adequate program and sufficient resources to accept and implement this delegation." 3 P.S. § 1704(8).)

[51] F.F. 11

[52] 25 Pa. Code § 83.241(e).

[53] *Consulting Engineers Council v. State Architects Licensure Board*, 560 A.2d 1375, 1376

The Appellants argue that the purpose behind the language of Section 6(e) of the statute is to insure that there is local accountability and local participation in the review process. The State Conservation Commission and Chiou argue that the intent was for the Commission to retain concurrent jurisdiction even when it has delegated such power to local conservation districts.

Unfortunately, the intent behind the language of section 6(e) of the statute is not readily apparent. A review of the legislative history behind the Nutrient Management Act reveals little on this subject. However, there is one entry that bears consideration. Prior to voting on House Bill 100, which was ultimately passed as the Nutrient Management Act, Representative Stairs had the following comments:

> I rise to support HB 100. . .the last session when I was chairman of the Agriculture Committee when this bill was introduced, there were many parts of the bill that I found personally very offensive, and many people diligently worked to improve upon it and to make changes to it. During the course of time – this bill was up in front of us on several occasions – but during the course of time, *certainly a lot of improvements have been made. Particularly...I like the idea of the agriculture conservation districts working with the farmers, who know the farmers, instead of DER.*[54] So I am pleased that we made progress in this bill, and we took a bill that I criticized very rigorously and I, too, can support now.

House Bill 100, Printer's No. 178, Legislative Journal, p. 133 (emphasis added). This seems to indicate that there was at least some intent that duties under the Nutrient Management Act should be carried out at the local level whenever possible.

In this case, however, the decision to send the Chiou plan to the State Conservation

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(Pa.1989).

[54] The State Conservation Commission is an administrative commission of the Department of Environmental Protection, formerly the Department of Environmental Resources (or DER). Conservation District Law, Act of May 15, 1945, P.L. 547, *as amended*, 3 P.S. §§849 –864, at § 852.

Commission was made by the Bedford County Conservation District.[55] Thus, this was not a case of the local conservation district being bypassed in the review and approval process. Had Chiou submitted the plan directly to the State Conservation Commission, thereby bypassing the local conservation district, such action might then be contrary to the statute. Here, however, the Bedford County Conservation District made a decision to send the plan to the State Conservation Commission for consideration. There is no question that the Commission has the expertise to review nutrient management plans since it is the agency responsible for doing so in counties where such power has not been delegated locally. It is not clear that the drafters of the Nutrient Management Act foresaw that local county conservation districts would give up their right to approve or disapprove a nutrient management plan submitted to the district for its review, but in this case the Bedford County Conservation District decided to do so. While such an action may be surprising, it is not illegal. Therefore, we do not find the Bedford County Conservation District's decision to send the plan to the Commission for review to be a violation of the statute.

Expert Testimony of William Plank

Both the State Conservation Commission and Chiou argue that the Appellants' expert witness, William Plank, should not have been permitted to give expert testimony. They base their argument on two grounds: first, that Mr. Plank does not possess the necessary qualifications to give expert testimony on this subject matter and, second, that Mr. Plank is a member of the Bedford County Conservation District.

Pennsylvania Rule of Evidence 702 (Testimony by Experts) provides as follows:

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

[55] F.F. 17

may testify thereto in the form of an opinion or otherwise.

As set forth by the Supreme Court in *Miller v. Brass Rail Tavern, Inc.*[56]:

> The test to be applied when qualifying a witness to testify as an expert witness is whether the witness has any reasonable pretention to specialized knowledge on the subject under investigation. If he does, he may testify and the weight to be given to such testimony is for the trier of fact to determine.

Although Mr. Plank does not hold a degree in agronomy and nutrient management, he has done coursework in agronomy at Pennsylvania State University, consisting of approximately 50 credits.[57] He grew up on a farm and currently lives on 53-acre farm, where he raises, among other things, alfalfa and grass hay.[58] Until the summer of 2000, he had been farming approximately 100 acres of land.[59] Mr. Plank is a member of numerous committees and boards dealing with environmental matters, including the Bedford County Conservation District of which he became an associate director in 1984 and a voting director in 1986.[60] In order to become a member of the county conservation district board, Mr. Plank was recommended by certain nominating organizations in the county that were approved by the State Conservation Commission.[61] The Commission and Chiou make much of the fact that Mr. Plank is not a certified nutrient management specialist. However, as a member of the Bedford County Conservation District, he is charged with reviewing nutrient management plans and is familiar with the *Pennsylvania Agronomy Guide*.[62] The State Conservation Commission and Chiou contrast Mr. Plank's experience with that of their experts, Douglas Goodlander and William

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[56] 664 A.2d 525, 528 (Pa. 1995).
[57] T. 147.
[58] T. 148-49.
[59] T. 149.
[60] T. 151-63.
[61] T. 162, 503.
[62] T. 163, 165.

Rogers, both of whom are certified nutrient management specialists. While Mr. Plank does not have the same degree of specialized training as do Mr. Goodlander and Mr. Rogers, there is no question that he possesses specialized knowledge in the areas of agronomy and nutrient management plans beyond that held by a layperson. This is evidenced by the fact that Mr. Plank was selected to serve as a director of the very organization charged by the State Conservation Commission with reviewing and approving nutrient management plans in Bedford County. By virtue of his position on the board of the Bedford County Conservation District he is called upon on a regular basis to review nutrient management plans.

The fact that Mr. Plank is not a certified nutrient management specialist may go to the weight to be accorded his testimony, but it does not render him unqualified to give expert testimony on this subject. We are convinced based upon his testimony and training that Mr. Plank is qualified to give expert testimony in the areas of agronomy and nutrient management plans.[63]

The second basis put forth by Chiou and the Commission for disallowing Mr. Plank's testimony is that it created an appearance of impropriety in that Mr. Plank is a member of the Bedford County Conservation District, which voted on Chiou's first nutrient management plan. However, the second plan, i.e. the plan that is the subject of this appeal, was not approved or disapproved by the Bedford County Conservation District. Accordingly, Mr. Plank cast no vote on the plan in his official capacity as a director of the Bedford County Conservation District. Moreover, even if Mr. Plank had voted on the plan as a director of the Bedford County Conservation District, we are not convinced that his expert testimony should be disallowed on that basis. We see no difference between allowing his testimony and that of Douglas

[63] F.F. 39.

Goodlander, who recommended approval of the plan in his official capacity as director of nutrient management for the State Conservation Commission, and who subsequently testified as an expert on behalf of the Commission at the hearing on the plan's appeal. This situation is similar to that of a hydrogeologist or engineer at the Department of Environmental Protection who, in his official capacity as the lead reviewer of a permit, recommends either approving or denying the permit and then is called to give expert testimony if the permit issuance or denial is subsequently appealed. Moreover, neither the Commission nor Chiou cite to any case supporting their position that the allowance of Mr. Plank's testimony is improper. In conclusion, we see no basis for finding Mr. Plank's testimony to be improper.

Finally, the State Conservation Commission asserts that even if we do not find Mr. Plank's testimony to be improper, we should reject it as not being credible on the basis that Mr. Plank was not aware of standard practices and a guidance document used by specialists in this field and, further, that much of Mr. Plank's testimony was incoherent and disorganized. We disagree that Mr. Plank's testimony should be rejected based on his knowledge of standard practices in the area of nutrient management and agronomy. His testimony indicates that he is knowledgeable in these areas.

That being said, we do agree with the Commission that much of Mr. Plank's testimony was difficult to follow and did little to explain the alleged deficiencies in the Chiou plan. While Mr. Plank stated that he was concerned with a number of aspects of the Chiou plan, much of his testimony consisted of open-ended questions and incomplete statements. On several occasions, Mr. Plank testified that it was not his duty to research certain matters to provide justification for alleged faults with the plan. However, as the sole expert witness for the party with the burden of proof, he was required to do more than simply express concern over the figures arrived at by

Chiou or the Commission. *See O'Reilly v. DEP*[64], (Where an appellant has the burden of proof, assertions such as the Department "should have evaluated" an unproven hazard" or "no consideration was given" to a certain matter are not enough to carry one's burden of proof in a *de novo* proceeding.) We appreciate the fact that Mr. Plank appeared *pro bono* on behalf of the Appellants. However, even where an expert is not being reimbursed for his time at hearing, he must do more than simply question certain elements of a plan approval. In order to assist the trier of fact, he must provide a more detailed and understandable explanation of why those elements of the plan are improper. This was not done with regard to many aspects of the Chiou plan.

Compliance with the Nutrient Management Regulations

Section 83.361(c) of the nutrient management regulations states that approvals will be granted only for plans that satisfy the requirements of the Nutrient Management Act and regulations.[65] It is the Appellants' contention that the Chiou plan does not meet all of the requirements of the Act and the regulations and, therefore, should not have been approved. Specifically, the Appellants contest the type and amount of crop yield and the nitrogen content and availability set forth in the plan.

Nitrogen Content and Availability

"Nitrogen content" refers to the total amount of nitrogen in the manure to be absorbed by the crop or lost into the environment.[66] "Nitrogen availability" refers to the proportion of the nitrogen content of the manure that is immediately available to a crop.[67] Nitrogen availability is a subset of nitrogen content.

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[64] EHB Docket No. 99-166-L (Adjudication issued January 3, 2001), p. 21-22.
[65] 25 Pa. Code § 83.361(c).
[66] T. 556.

Sections 83.291(b) and (c) of the regulations set forth the method for calculating the nitrogen content and availability of the manure to be applied to the agricultural operation. Where there is no manure to be sampled, the regulations require the use of book values such as those contained in the *Manure Management Manual* or *Pennsylvania Agronomy Guide*. In this case, since the Chiou operation is not in existence, the planner used the *Agronomy Guide* to calculate the nitrogen content and availability.

There is no specific book value for the type of operation proposed by Chiou. The Chiou facility will consist of a two-stage manure storage system in which the majority of solids will remain in Stage I while the liquid portion will be transported to Stage II.[68] Since there is no breakdown of book values for nitrogen content in a two-stage operation, the Chiou plan simply calculated the total nitrogen content for the entire storage system and divided it between Stage I and Stage II.[69]

The Appellants contest the 50/50 split assumed by the plan. However, there is a safeguard built into the plan. Prior to actual application of the manure to the Bussard Farm, it must be tested for nitrogen content.[70] Therefore, if the nitrogen content is different from the estimates contained in the plan, it will be noted at that time. In addition, the nitrogen content estimates contained in the Chiou plan were at least comparable to that of another hog farm operated by Chiou in Franklin County. [71]

The Appellants also contend that Chiou's consultant used the incorrect table of book values in the *Agronomy Guide* when calculating the nitrogen content. It is the Appellant's

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[67] T. 578-79.
[68] F.F. 44
[69] F.F. 56
[70] F.F. 58
[71] F.F. 57

contention, based on Mr. Plank's testimony, that Table 2-17 should have been used because it is applicable to a manure *treatment* system, which Mr. Plank believes is the case for the Chiou operation. The nutrient management specialist who prepared the Chiou plan used Table 2-16, which is applicable for a manure *storage* system, and this was approved by the Commission. The Commission and Chiou dispute that treatment is involved.

Even if we were to accept Mr. Plank's position that the Chiou operation will involve a manure *treatment* system, this does not appear to help the Appellants' case since even Mr. Plank conceded on cross-examination that treatment results in a *lower* nitrogen content.[72] By categorizing its operation as a manure storage system, Chiou adopted a higher, more conservative figure for nitrogen content in its calculations.

Moreover, there is a very important safeguard in the Chiou plan. Mr. Goodlander emphasized that prior to application of the manure to the Bussard Farm it will be tested. If it is "a higher nitrogen content we would require the plan to be adjusted immediately to assure that we are not overapplying nitrogen."[73]

The same is true for nitrogen availability. Using Table 2-17 results in a nitrogen availability of 11%; Table 2-16 results in a nitrogen availability of 20%.[74] The 20% figure was incorporated into the Chiou plan.[75] The Appellants argue, however, that whereas the nitrogen availability may be no more than 20% under normal conditions, precipitation can affect the amount of nitrogen available to crops.[76] Mr. Plank argues that this figure could be as high as 35

[72] T. 389-90.
[73] F.F. 77.
[74] T. 581-82.
[75] T. 581.
[76] T. 259-61.

to 65% during a gentle rain lasting several days.[77] He further states that there is no indication that the plan takes these potentially higher rates into account.[78] Neither Chiou nor the Commission addressed this argument in their post-hearing briefs. Nevertheless, it would not be a better management practice to apply manure during a gentle rain. Mr. Chiou indicated that he would follow better management practices in his management of the Bussard Farm. Therefore, we must assume that Mr. Chiou would not apply manure to the fields of the Bussard Farm during a gentle rain. Mr. Plank's testimony once again raised a theoretical issue but it does not support a conclusion that the figures in the Chiou plan are incorrect or will result in any harm to the environment.

Crop Type and Realistic Expected Crop Yield

It is important to know the realistic expected crop yield of a farm in order to determine how much manure – and thereby how much nitrogen – can be applied to the field. Overapplication of nitrogen can result in nitrates leaching into the groundwater.[79] Excess nitrates in water can pose a risk to human health.[80] Because nitrogen has a potential for pollution, the Pennsylvania Agronomy Guide (Agronomy Guide)[81] recommends the use of manure only with crops that have a large nitrogen requirement.[82] The manure in question will be applied to fields containing grass hay. Because there is no listing for grass hay in the *Agronomy Guide*, Chiou's consultant, William Rogers, referred to the Agronomy Guide's listing for alfalfa

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[77] T. 259-61.
[78] T. 261.
[79] F.F. 67.
[80] F.F. 68.
[81] The State Conservation Commission's Nutrient Management Program directs certified planners to use the Pennsylvania State Agronomy Guide to calculate estimated crop yields. (T. 592)
[82] Board Exhibit 24, p. 40.

and adjusted the expected crop yield for alfalfa downward slightly.[83]

It is the contention of the Appellants that grass hay is not an appropriate choice for manure application. However, the testimony on this subject was not such that Appellants met their burden of proof. In other words, they did not prove by a preponderance of the evidence that grass hay is not an appropriate choice for manure application. While there is testimony by Mr. Plank that alfalfa and grass hay do not utilize nitrogen in the same way, he failed to explain why grass hay is an inappropriate choice for nitrogen utilization.[84]

Section 83.292(a) of the regulations requires that a nutrient management plan include the acreage and *realistic expected crop yields* for each crop group.[85] In order to calculate the realistic expected crop yield, the regulations provide as follows:

> (b) For the development of the initial plan, expected crop yields may not exceed those considered realistic for the soil type and climatic conditions, as set by the operator and the specialist, and approved by the Commission or delegated conservation district. If actual yield records are available during the development of the initial plan, the expected crop yields may be based on these records.[86]

The Chiou plan lists the expected crop yield as 3.5 tons of grass hay per acre. Although there is some evidence that indicates that this may not be a realistic expected crop yield for the Bussard Farm, where the manure from the proposed operation is to be applied, again Appellants have failed to prove their point by a preponderance of the evidence. At present, the Bussard Farm does not produce 3.5 tons of grass hay per acre, and according to the testimony of Douglas, Goodlander, the Commission's director of nutrient management, the Bussard Farm will not

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[83] T. 701, 704-05.
[84] T. 298.
[85] 25 Pa. Code § 83.292(a) (emphasis added).
[86] *Id.* at § 83.292(b).

produce 3.5 tons per acre under its current management practices.[87]

However, we are convinced based on the testimony of Mr. Chiou, who will be the operator of the hog farm; Mr. Rogers, his consultant, and Mr. Goodlander; that the necessary better management practices will be implemented to achieve the expected yields of 3.5 tons per acre. Moreover, based on the testimony of Mr. Rogers and Mr. Goodlander we think the figures supplied in the plan are environmentally conservative. For example, during the first three years of the plan the residual nitrogen number assumed in the plan will not be a factor. This provides substantial safeguards so that hard data will be developed, and pursuant to the regulations, can be used to adjust the figures to make sure that the necessary yields are meant to safeguard the environment. In fact, we believe the evidence supports yields of four to six tons per acre if proper management practices are utilized.[88] There is also testimony that the weights of the pigs on this site are overestimated so consequently the manure production would be overestimated.[89]

The regulations clearly allow an adjustment period. Section 83.292(b)(1) provides as follows:

> (1) If after the first 3 years of implementing the plan, the yields do not average at least 80% of the planned expected yield, the plan shall be amended to be consistent with the documented yield levels unless sufficient justification for the use of the higher yields is provided in writing to the Commission or delegated conservation districts.[90]

Therefore, if the Bussard Farm fails to produce the necessary crop yields, as set forth in Section 83.292(b)(1), the plan must be adjusted to account for a lower crop yield. Nevertheless based on the testimony at the hearing, we believe the necessary crop yields are certainly achievable.

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[87] F.F. 65
[88] F.F. 73.
[89] T. 721-22.
[90] 25 Pa. Code § 83.292(b)(1).

In conclusion, we find that although the Appellants have raised serious questions regarding the adequacy of the Chiou plan, they simply did not present sufficient expert testimony to carry their burden of proof. While some of the Chiou plan approved by the State Conservation Commission and parts of the testimony presented by Chiou and the Commission are certainly conclusory, these conclusions were not sufficiently repudiated by the expert testimony of the Appellants to overturn the Commission's approval of the plan. Where the burden of proof is on the Appellants, as it is here, they must do more than simply question the adequacy of the plan that has been approved by the Commission; they must present evidence that tips the scales in their favor. Moreover, and most importantly, the State Commission and the permittee did prove by a preponderance of the evidence that the Chiou plan complies with the Pennsylvania Nutrient Management Act and the supporting regulations. Thus, the action of the State Conservation Commission in approving the Chiou plan was reasonable. The Appellants' appeal is therefore dismissed.

We make the following conclusions of law:

CONCLUSIONS OF LAW

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

2. The Board's review of the State Conservation Commission's action is *de novo*. *Warren Sand and Gravel v. Department of Environmental Resources,* 341 A.2d 556 (Pa. Cmwlth. 1975), *City of Harrisburg v. DER,* 1996 EHB 709.

3. The Appellants have the burden of proving by a preponderance of the evidence that the Commission erred in approving the nutrient management plan submitted by Chiou. 25 Pa. Code § 1021.101(c)(2).

4. The Appellants' witness, William Plank, was qualified to provide expert testimony under

Pa. Rule of Evidence 702.

5. The Commission's approval of the Chiou nutrient management plan did not violate the Administrative Agency Law or the Sunshine Act.

6. The Commission failed to provide the Appellants with a copy of the Chiou plan in a timely manner in accordance with Pennsylvania's Right to Know Act. However, the Appellants have not demonstrated that this failure requires reversal of the Commission's approval of the plan.

7. The Appellants did not establish by a preponderance of the evidence that the Chiou plan fails to comply with the Nutrient Management Act and its regulations.

8. The testimony of Mr. Goodlander and Mr. Rogers supports the approval of the nutrient management plan by the State Conservation Commission.

9. The estimated nitrogen content figures in the Chiou plan satisfy the requirements of the Pennsylvania Nutrient Management Act.

10. The crop yields estimated in the Chiou plan satisfy the requirements of 25 Pa. Code § 83.292(b).

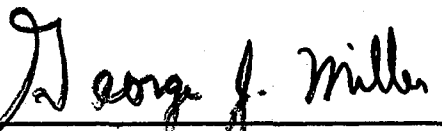
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DAWN M. ZIVIELLO, ANGELA J. ZIVIELLO and ARCHIMEDE ZIVIELLO, III	:	
v.	:	**EHB Docket No. 99-185-R**
COMMONWEALTH OF PENNSYLVANIA, STATE CONSERVATION COMMISSION and TING-KWANG CHIOU and CHIOU HOG FARM, LLC, Permittee	:	

ORDER

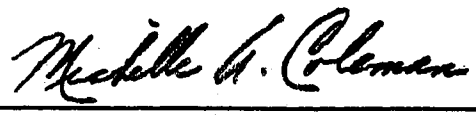
AND NOW, this 20th day of December, 2001, the Appellant's appeal is **dismissed.**

ENVIRONMENTAL HEARING BOARD



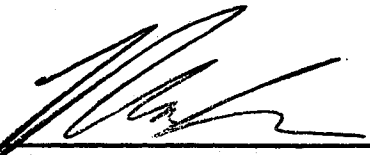
GEORGE J. MILLER
Administrative Law Judge
Chairman

THOMAS W. RENWAND
Administrative Law Judge
Member



MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member



MICHAEL L. KRANCER
Administrative Law Judge
Member

DATED: **December 20, 2001**

c: **DEP Bureau of Litigation**
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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

DEFENSE LOGISTICS AGENCY, DEPARTMENT OF THE ARMY, AND DEFENSE SUPPLY CENTER PHILADELPHIA	:	
v.	:	**EHB Docket No. 2000-004-MG**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and THE PHILADELPHIA HOUSING AUTHORITY, Intervenor	:	**Issued: December 21, 2001**

ADJUDICATION

By George J. Miller, Administrative Law Judge

Synopsis:

The Board dismisses an appeal from an order of the Department which required a military supply installation alone to perform certain remediation functions relative to the clean-up of a large hydrocarbon plume which underlies its property. The Department sustained its burden of proving that the order was necessary to aid in the enforcement of the Storage Tank Act and the Clean Streams Law. The information on which its order was based is that the plume had contaminated groundwater, infiltrated nearby sewers and posed a health risk to nearby residents and workers. Further, the appellant did not overcome the presumption that it is responsible for the contamination within 2,500 feet of the appellant's property, and it was not necessary for the Department to determine that the appellant was in any way at fault for causing the contamination underlying its property.

The appellant presented no evidence to support its claim that the order was issued as a result of bias, prejudice or ill-will, and the evidence presented by the Department demonstrated that there was no basis for such a claim.

The appellant's argument that language in a cost sharing agreement between the Commonwealth and the federal government or an earlier consent order which included the appellant precluded the Department from issuing the order is without merit. Similarly, the appellant failed to show that the Department's use of a confidential dispute resolution document was improper.

BACKGROUND

This appeal filed on January 11, 2000, arises from an order issued by the Department to the Defense Logistics Agency (DLA or Appellant) requiring it to take remedial action with respect to a large plume of non-aqueous phase liquid (NAPL) hydrocarbon underlying the Defense Supply Center of Philadelphia (DSCP) site in South Philadelphia. The Order, dated December 10, 1999, was issued under the authority of the Clean Streams Law and the Storage Tank Act. It requires the Appellant to, among other things, operate and maintain a NAPL removal system constructed pursuant to an earlier consent agreement among the Appellant, the Department and Sunoco. Sunoco owns a refinery adjacent to the Appellant's property and appears to be responsible for other portions of the large petroleum plume in South Philadelphia. The Order also requires the Appellant to create and operate any additional remedial systems necessary to remove as much of the petroleum contamination under the DSCP site as is practicable, to prepare risk assessment studies and to operate an odor abatement system for the adjacent storm sewers.

A hearing on the merits was held before Administrative Law Judge George J. Miller on

September 17, 19-21, 24, 2001. Following the hearing, each party filed requests for findings of fact and legal memoranda. The record consists of the notice of appeal, a transcript of 1122 pages and numerous exhibits, including a stipulation of facts and exhibits. After a full and complete review of the record,[1] we make the following:

FINDINGS OF FACT

1. The Department is the agency with the duty and authority to administer and enforce the Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §§ 691.1-691.1001 (Clean Streams Law); the Land Recycling and Environmental Remediation Standards Act, Act of May 19, 1995, 35 P.S. §§ 6026.101 – 6026.908 (Act 2); the Solid Waste Management Act, Act of July 7, 1980, P.L. 380, *as amended*, 35 P.S. §§ 6018.101 – 6018.1003; the Storage Tank and Spill Prevention Act, Act of August 7, 1989, P.L. 1989, *as amended*, 35 P.S. §§ 6021.101 – 6021.2104 (Tank Act); Section 1917-A of the Administrative Code of 1929.

2. The Defense Logistics Agency (the Appellant or DLA) is a unit of the United States Army.

3. The Intervenor is the Philadelphia Housing Authority which owns Passyunk Homes.

4. The Defense Supply Center of Philadelphia (DSCP) site, for which the Appellant is responsible, is located at 2000 S. 20th Street in Philadelphia situated to the east of the south yard of the Point Breeze Processing Area of the Sunoco, Inc. Philadelphia Refinery (Point Breeze) and to the north and east of the Schuylkill Expressway. The former DSCP site is separated from the Point Breeze by 26th Street, CSX (formerly Conrail) tracks and the Schuylkill Expressway, each

[1] The transcript is designated as "N.T. __"; the Appellant's exhibits as "Ex. A-__"; the Department's exhibits as "Ex. C-__"; the Intervenor's exhibits as "Ex. I-__." The parties also negotiated a stipulation which was admitted as Ex. B-1. That stipulation included seven joint exhibits designated as J-1 through J-7.

of which runs north to south between DSCP and Point Breeze, with a combined width of approximately 550 feet. The DSCP site encompasses approximately 86.5 acres. (Ex. B-1, ¶ 13)

5. The United States Army Materiel Command currently owns the DSCP site.

6. Passyunk Homes is a former low-income housing project. It is located south of the DLA property. (Burke, N.T. 261-62, 526-28; Ex. C-3)

7. The DSCP site served as an active military logistics facility since the time of World War I until its mission was relocated in 1999. The main mission of DSCP was to procure by contract: food, medical supplies, and clothing for the Department of Defense. DSCP also included a clothing and textile factory which was closed in 1994. During this time, incident to normal operation, it stored and consumed petroleum products, including diesel fuels, gasoline and heating oils. Since the 1920's, petroleum products were stored in underground and above ground tanks located in various places on the DSCP site. Releases of hydrocarbons occurred on the DSCP property. (Ex. B-1, ¶ 14)

8. The Point Breeze Processing area (Point Breeze) owned by Sunoco has been an active petroleum handling, refining and storage facility throughout most of the 20th century. Point Breeze processes crude oil into refined petroleum products such as gasoline, kerosene, diesel, fuel oils, lubricating oils and asphalt. Point Breeze has numerous large above ground storage tanks and both above-ground and underground pipelines for storage and handling of these petroleum feedstocks and products. (Ex. B-1, ¶ 15)

9. Numerous NAPL plumes currently exist on the refinery property. (Ex. B-1, ¶ 28)

10. The groundwater beneath the DSCP site and the surrounding areas of South Philadelphia is a water of the Commonwealth as defined by Section 1 of the Clean Streams Law, 35 P.S. § 691.1, Act of April 9. 1929, P.L. 177, *as amended*, 71 P.S. § 510-17 (Administrative

Code) and the rules and regulations promulgated pursuant to these Acts. (Ex. B-1, ¶ 18)

11. The entire hydrocarbon contamination in South Philadelphia involves numerous areas of NAPL contamination as well as dissolved phase ground water and soil contamination. (N.T. 228-29)

12. The Department has actively investigated this situation since the early 1990's and, in 1993, believed that one of the NAPL plumes located on the Sunoco property might extend across the corridor between the Sunoco and the DSCP site onto the DSCP site. (N.T. 203, 207, 342-45; Ex. C-5)

13. As of 1993 neither the Appellant nor Sunoco had investigated this corridor to determine whether there was a direct connection between the NAPL on Sunoco's property and the NAPL on the DSCP site. (N.T. 251-55)

14. As a result, the Department believed that both DLA and Sunoco were potentially responsible parties with respect to the contamination on the DSCP site. (N.T. 344-46)

15. In 1993 Sunoco entered into a Consent Order and Agreement (1993 CO&A) with the Department which required clean up of NAPL plumes under the Point Breeze Processing Area and to investigate and clean up any NAPL that might have migrated off the refinery property. (Ex. B-1, ¶ 19)

16. On September 24, 1996, the Department, the Appellant and Sunoco entered into a further Consent Order and Agreement (the 1996 Agreement) to manage the remediation and study of the NAPL contamination in the area of both properties. Under that agreement the Appellant and Sunoco were required to, among other things, perform interim product recovery, delineate the plume, submit a final engineering design for free phase recovery and complete a risk assessment report. The agreement did not assign specific tasks to a particular party, but

created a framework for task and cost sharing among the parties. (Ex. J-2; DeLillo, N.T. 728-29)

17. In the fall of 1997, Sunoco, the Department and DLA activated the CO&A dispute resolution process, and each party named a representative to form a Dispute Resolution Panel (DRP). (Ex. B-1, ¶ 25)

18. On October 16, 1998, in order to establish a joint funding mechanism for the task of construction and operation of a free-phase hydrocarbon recovery system, the parties agreed to an amendment of the 1996 Agreement, referred to as Amendment 001. (Ex. J-3)

19. Amendment 001 provided that DLA and Sunoco would "jointly implement construction and operation of Phase I as approved by PADEP until August 31, 1999" provided for a 50/50 cost sharing agreement, and transferred the responsibility for developing the risk assessment study from DLA to Sunoco. (Ex. J-3, ¶ 7)

20. The parties' negotiations with respect to an ultimate clean up of the plume continued in consultation with a neutral technical expert chosen by the parties to the agreement. (Conrad, N.T. 59-68; J-6)

21. These discussions of the parties resulted in a draft of a long-term agreement for a remediation of the DSCP property subject to review by the United States Department of Justice. (Conrad, N.T. 71-73, 87-88; DeLillo, N.T. 709, 715, 736)

22. While the proposed agreement was being reviewed by the Department of Justice, in August, 1999, DLA, Sunoco and the Department entered into Amendment 002 to the 1996 Agreement in order to extend the 50/50 funding arrangement for the operation of the free phase hydrocarbon until October 31, 1999. (Ex. B-1, ¶ 21; Ex. J-4)

23. In September or October of 1999, the Department was told that the Department of Justice had refused to authorize signature of the agreement because of provisions which called

for DLA to impose obligations on other federal agencies. (Conrad, N.T. 87-88)

24. In December 1999, the Department issued a unilateral order against DLA, DSCP and the Department of the Army which charged the Appellant with sole remediation responsibilities and the NAPL plume on the DSCP site. (Ex. B-1, ¶ 26; Ex. J-1)

Witnesses

25. Eric Conrad is the Department's Director of Regional Coordination and Program Effectiveness. He has been employed by the Department since 1979. He has had dispute resolution training. (Conrad, N.T. 51-56)

26. David Burke is a water quality specialist for the Department assigned to the City of Philadelphia. Among his responsibilities are the investigation of spills and other water pollution incidents. (Burke, N.T. 202)

27. Joseph Feola is the Southeast Regional Director of the Department. He has held that position since August 1998. Before that time he has held various roles in the investigation of the contamination at Sunoco and DLA. (N.T. 613-14)

28. Joseph Morrow is a supervisor of industrial waste water for the Philadelphia Water Department. In that position he investigates spills, sewer systems and water supply. (N.T. 172-73)

29. Walter Payne is a geological specialist with the Department. Since 1994 he has handled Act 2 tank cases for the Department, including oversight of remedial investigations. He has been involved with the DLA NAPL plume since 1996. (N.T. 572-76)

30. Dennis DeLillo is the Chief of the Environmental Quality Division of DLA. He has held that position since 1995. From 1989-1995 he served as the Chief of the Hazardous Materials team. He has oversight and policy development responsibility for programs such as clean-up,

compliance and conservation. (N.T. 679-83)

Dispute Resolution and the Neutral Technical Expert (NTE)

31. The parties to the DRP agreed that the confidentiality provisions of 5 U.S.C. § 574 would apply to all dispute resolution communications, including a project involving securing the opinion of a neutral technical expert (NTE project). (Ex. A-63)

32. The DRP agreed to select a neutral technical expert to aid their negotiation. (Conrad, N.T. 63)

33. The purpose of the neutral technical expert (NTE) was to attempt to ascertain the source of the NAPL plume and provide input for defining ultimate responsibility. (Conrad, N.T. 61)

34. Sunoco, DLA and DEP agreed to release all technical field data collected as part of the NTE project to become part of the public record in DEP's files. (Ex. B-1, ¶ 31; *see also* Conrad, N.T. 63, 114-15)

35. Mr. Conrad testified that nothing in the confidentiality agreement led him to believe that he could not give the NTE report to the Department. (Conrad, N.T. 150; *see also* 158-59)

36. After the NTE presented a report, representatives from DLA, Sunoco and the Department were able to develop a written agreement which called for a commitment for the long-term clean up of the site. (Conrad, N.T. 67-70) However, the Department of Justice had to approve the agreement on behalf of DLA. (Conrad, N.T. 72)

37. After the NTE presented its report, the Department became concerned with the pace of the project inasmuch as it was not progressing as quickly as possible. (Conrad, N.T. 69; *see also* N.T. 134)

38. During the pendency of the Department of Justice's review of the proposed

agreement, Mr. Conrad felt that DLA's momentum in the project was waning. For example, the risk assessment was falling further and further behind schedule. (Conrad, N.T. 73-74)

39. By the middle of the summer of 1999, Mr. Conrad became increasingly concerned by the slow pace of the Department of Justice's review and the completion of clean-up activities. (Conrad, N.T. 78)

40. Also during this time the Department was under increased pressure from the public to address the health and safety concerns of the community. (Conrad, N.T. 86)

41. As indicated above, the Department of Justice completed its review in September or October and refused to authorize the agreement. (Conrad, N.T. 87-88)

42. Given the breakdown of the negotiation process, Mr. Conrad did not believe that a further attempt to reach an agreement would be fruitful. (Conrad, N.T. 145)

43. Accordingly, Mr. Conrad considered the dispute resolution panel a failure and recommended the issuance of an order directing the responsible parties to clean up the site. (Conrad, N.T. 88)

The NAPL Plume

44. The nature and extent of the NAPL plume under the DSCP site was investigated by the Department through hydrologic studies developed by the parties and Sunoco. (Burke, N.T. 262-301)

45. David Burke of the Department, using 14 reports submitted between 1991 and 1999 to the Department by Sunoco and DLA as sources, testified by summary exhibit which illustrates the progression of DLA's knowledge regarding the possible relationship between the DSCP NAPL plume and other NAPL plumes located under Sunoco's Point Breeze refinery. (Burke, N.T. 230-302; Ex. C-5)

46. The DLA had previously conducted an investigation as to leaking underground storage tank systems and discovered a substantial NAPL plume under the southern portion of the DSCP site. (Burke, N.T. 254-55, 684-88; DeLillo, N.T. 683-696; Exs. C-5, A-4)

47. These studies indicated that the NAPL plume is "thickest" along the southern edge of the DSCP site and just south of the Walt Whitman Bridge highway at Passyunk Homes northern extent. (Burke, N.T. 286-87; *see also* Ex. C-5 at Map 4)

48. The thickness of the plume is judged by the thickness of the petroleum found in the monitoring wells. (Burke, N.T. 286)

49. The studies indicated that the volume of the NAPL plume is between 750,000 to 2 million gallons. It underlies between 50 and 60 acres of ground of the DSCP site. (Burke, N.T. 502, 506)

50. To date, around 600,000-700,000 gallons of product have been removed from the DSCP site but there is still removable petroleum product in the ground. (Burke, N.T. 506)

51. All portions of the NAPL plume are less than 1320 feet from some portion of the DSCP site. (Burke, N.T. 511; Ex. C-5 at Map 6)

52. Three studies conducted along the 26th Street/CSX corridor from 1993 to 1997 led the Department to believe that there was no migration of NAPL from the Sunoco refinery across the corridor onto the DSCP site. (Burke, N.T. 262-81)

53. Data from studies conducted in 1998 by Malcolm Pirnie and Integrated Science and Technology, Inc. show wells placed in the corridor and a study conducted by Sunoco of the Belmont Terminal area in 1998 also indicated that there might be no connection between the NAPL plume under Sunoco's Belmont Terminal and the DSCP site. (Burke, N.T. 292-93, 295-97, 289-93, 378-79; Ex. C-5)

54. In addition to the hydrologic studies of the corridor between the Sunoco and DLA properties, a report of the U.S. Geological Survey, prepared at the request of the Department and the U.S. Environmental Protection Agency, states that the plumes of NAPL at the DSCP site and the Sunoco property are not connected. (Ex. C-31 at 28)

Odors

55. The Packer Avenue sewer borders Passyunk Homes and the southern portion of the DSCP site. (Ex. C-36; Morrow, N.T. 174-76; Burke, N.T. 350)

56. Investigations by the Department and the Philadelphia Water Authority revealed significant infiltration of petroleum in the Packer Avenue sewer line which were generating a rising number of complaints from area residents. (Burke, N.T. 443-45; Morrow, N.T. 182-86, 189-90)

57. During the winter of 1996 Mr. Burke became very active investigating odor complaints some of which involved odors from the sewer but also complaints of odor in the homes.

a. All of them involve the odor of light grade oil or light petroleum. He described the severity of the odors as varied. They were sometimes strong and he could perceive them when he investigated the site but others disappeared by the time he got there.

b. The odor in homes were a strong, not pleasant odor, and were irritating.

(Burke, N.T. 379-82)

58. Mr. Burke and Mr. Morrow testified that during an investigation on March 11, 1997, they saw petroleum in the sewers when the manhole covers were removed. (Burke, N.T. 434; Morrow, N.T. 180-86)

59. Specifically, in the Packer Avenue sewer between 26th Street and Penrose Ferry Road, eight areas between manholes A-5 and A-7 near the Passyunk homes were observed. Petroleum was seen seeping through the north wall, the side nearest the DSCP property. (Morrow, N.T. 177-78, 190-92; Burke, N.T. 437-40; Exs. C-28; C-28a; C29)

60. No petroleum has been observed east of manhole A-8. (Morrow, N.T. 179-81; Ex. C-36)

61. The odors in residences and in the street caused by petroleum vapors entering the Packer Avenue sewer from the NAPL plume under the DSCP site constitute a nuisance. (Burke 379-82; Ex. C-29)

62. This investigation changed DEP's approach to the situation. The Department advised the parties of the possible infiltration into the sewer line and asked the parties to investigate the sewer and develop an odor abatement system. (Burke, N.T. 443-46)

63. Sunoco complied with this request to construct an odor abatement system. (Burke, N.T. 445-46; *see also* Morrow, N.T. 187-89)

64. As indicated below, DLA declined to participate in the design or construction of such a system even in face of a Department regulatory determination under the 1996 Agreement.

65. DLA made no financial contribution or other assistance to the design and operation of the system. (Burke, N.T. 445-50, 1111)

66. This system was constructed by Sunoco near the S-44 regulator just inside the eastern boundary of Sunoco's property. It consists of three large fans that suction air out of the sewer and a hydrocarbon removal system to remove petroleum vapors. (Burke, N.T. 443-46; Ex. C-27)

67. The Packer Avenue sewer odor abatement system is effective in the sense that since the beginning of April 1998 there has been a substantial reduction in the number of odor

complaints. (Burke, N.T. 449)

68. The odor abatement system is necessary in part because as long as there is infiltration of product from the DSCP site to the Packer Avenue sewer there will be severe and uncontrolled impact of odor on local residents. (Burke, N.T. 450)

Prior Department Proceedings Concerning Odor Control

69. The Department issued a regulatory determination pursuant to the CO&A requiring DLA to participate in the sewer vapor abatement project. DLA appealed this determination to the Board on December 9, 1997. *Defense Personnel Support Center v. DEP*, 1998 EHB 512.

70. In that appeal, DLA claimed that it should not be required to participate in the sewer abatement project. Among other things, DLA argued that the sewer vapors were not caused by the NAPL plume at the DSCP site, and that there was no health risk associated with the sewer vapors. *Defense Personnel Support Center v. DEP*, 1998 EHB 512.

71. Based on information made available to the Board at the time, it held that due to the lack of evidence of adverse health risk contained in the draft risk assessment study developed by DLA, the Department could not require DLA to participate under the terms of the 1996 Agreement. The Board said, however, that the Department was free under the 1996 Agreement to exercise its regulatory powers to abate nuisances. *Defense Personnel Support Center v. DEP*, 1998 EHB 512.

72. Prior to this decision by the Environmental Hearing Board, DLA had declined to provide the Department with a working draft of the risk assessment, which the Department believes indicated that there might be significant health risks associated with petroleum vapors carried by the Packer Avenue sewer from the DSCP site, and instead advised the Department that the subsequent draft risk assessment did not indicate any significant health risks. (DeLillo, N.T.

717-18, 739-41; Exs. C-13, C14)

The Risk Assessment and TAG

73. Following the Board's decision the draft risk assessment study has gone through additional drafts with the helpful contributions of all stakeholders, including the parties and the Technical Advisory Group (TAG). This includes the 1998 and 1999 drafts as well as the 2001 draft. (Tucker, N.T. 809, 811-13; Song, N.T. 1070)

74. Both of the risk assessment experts testified that these studies demonstrated some levels of risk that must be realistically evaluated following proper risk management practices and procedures. (Tucker, N.T. 813-14; Song, N.T. 1074-75)

75. The TAG was established by the agreement of the parties during the dispute resolution process as part of the Appellant's development of a risk assessment study in order to represent the interests of the public concerning the remediation project and to explain documents to the public such as the risk assessment. The TAG provides comments to these documents as representatives of the public. (Payne, N.T. 581)

76. The TAG is important to the development of the risk assessment because it represents a neutral group to provide information to the public. Risk assessment is an extremely technical subject and the public is suspicious of information disseminated by the parties. (Payne, N.T. 583)

77. The involvement of stakeholders generally, and the TAG specifically, has greatly contributed to the quality and reliability of the risk assessment. (Tucker, N.T. 812, 814)

1999 Order

78. Mr. Feola decided that the Department needed an enforceable order to make sure that the remediation of the plume on the DLA site continued after the agreement on cost sharing

expired on October 31, 1999. Based on information from various sources and the advice of his staff he concluded that it was most appropriate to issue the order to the property owner, DLA. (Feola, N.T. 614-15)

79. The Department's order was based upon the obligation of DLA as a property owner with respect to the remediation of the plume to make sure the Department had a legally enforceable order for the clean up. (Feola, N.T. 969)

80. He believed that the terms of the 1996 Agreement had expired as spelled out in the 1998 amendment. He believed the amendment superseded the schedule laid out in the 1996 Agreement. (Feola, N.T. 964-65)

81. The Department felt that it had to issue an order in the absence of an explicit agreement to clean up the plume. Not only had a great deal of time passed but the Department was under significant public pressure to move forward as quickly as possible with the remediation program. (Conrad, N.T. 98-100)

82. At the time it issued the 1999 Order, the Department did not have a risk assessment that it felt was complete. (Payne, N.T. 600)

83. Whether DLA's conduct in connection with the creation of the plume was willful or not was not a significant consideration to the Department because there was insufficient information about how the release occurred. (Feola, N.T. 958)

84. DLA's compliance history was not relevant because the Department's chief concern in issuing the 1999 Order was to ensure that clean up of the site continued. (Feola, N.T. 963)

85. Mr. Burke testified that he had no prejudice or favoritism toward any party involved in the NAPL plume situation. (Burke, N.T. 451)

86. Patrick Anderson who was a special assistant to the regional director at the

Department from 1996-2000 testified that he had no bias or preference for either Sunoco or DLA and had no bias against any parties. (Anderson, N.T. 625, 921)

87. Mr. Conrad testified that during the course of this project he had no preference concerning whether Sunoco should be included in the 1999 Order. (Conrad, N.T. 101)

88. Mr. Feola testified that neither he, nor to his knowledge, has anyone on his staff reacted with bias or prejudice in connection with issuance of the 1999 Order, and that the order was not issued out of any sense of bias, prejudice or partiality. (Feola, N.T. 980-81)

89. In December of 1997, DLA had refused to provide the Department with information concerning the progress of the risk assessment because it was still in a working draft form. (DeLillo, N.T. 716; Ex. C-13)

90. The Department had the impression that the risk assessment was not going well. Because DLA had not shared information on the working draft of the Risk Assessment, the Department was not being reliably informed of the health risks. (Feola, N.T. 967)

91. There was significant evidence of the infiltration of petroleum into the sewer system in the area of Passyunk Homes. (Morrow, N.T. 178-79; Burke, N.T. 432-41); Exs. C-28;C-28a; C-36)

92. Petroleum was observed seeping into the north side of the sewer which borders the DLA property and Passyunk Homes. (Burke, N.T. 440)

93. The complaints of odors in the homes were related to the level of odor detected in the sewers. (Morrow, N.T. 182-86)

94. While the report of the NTE was considered by the Department in deciding to issue the order against DLA alone, the NTE report was not the sole basis for the issuance of the 1999 Order; the Order was also based on independent information described above indicating that the

NAPL plume to be remediated by the Order was from the Appellant's releases of petroleum product and there was little, if any, evidence that the NAPL plume underlying Appellant's property was from Sunoco's properties. (Conrad, N.T. 106-08)

95. The 1999 Order made no reference to the NTE report. (Conrad, N.T. 93; Ex. J-1)

Appellant's Efforts to Remediate the Plume

96. Over time, there have been several potential sources of releases of petroleum products on the DLA property including both underground and above-ground storage tanks, including the Bash Street gas station and the 28th Street gas station on the DSCP site. (Burke, N.T. 346; Ex. B-1, 16-17)

97. While DLA did address these problems, nearly 10 years passed before DLA began construction of a remediation system. (DeLillo, N.T. 683-696)

98. DLA discovered a leaking fuel line on their property in 1987. (DeLillo, N.T. 683-86; *see also* Ex. B-1, ¶ 17)

99. The first action taken by DLA was to order an investigation by the Army Corps of Engineers in December, 1987. (DeLillo, N.T. 744)

100. In January,1988 a report prepared by the Army Corps of Engineers on behalf of DLA stated that there was a significant amount of gasoline contamination of the groundwater. (DeLillo, N.T. 687-88; Ex. A-4 at 6)

101. Another study prepared in 1991 also indicates the existence of contamination and suggested further work to define the extent of it. All of the contamination was found on the DLA property. The report also recommends that DLA take action to remove free product. (DeLillo, N.T. 691, 694; Ex. A-5)

102. There was no attempt to initiate free product recovery as an interim remedial

measure or to begin delineation of the plume after receipt of the 1991 report. (DeLillo, N.T. 723-24, 750)

103. Although some product recovery was done in 1996, it was not until October 1998 that construction of a remediation system began. (DeLillo, N.T. 696, 725, 751; *see also* Bravo, N.T. 943)

104. DLA did not begin a remedial investigation until 1997. (DeLillo, N.T. 754)

Alleged Bias or Prejudice

105. At no time did any Department employee exhibit or hold any bias or prejudice toward DLA or partiality to Sunoco. (N.T. 101-02, 125, 450-51, 625, 921, 981)

DCMOA

106. In April 1994, the Department of Defense (DOD) and the Commonwealth of Pennsylvania entered into a Memorandum of Agreement (DCMOA) where, in part, the DOD, including DLA, agreed to reimburse the Department for costs associated with providing a host of services by the Department to Department of Defense installations. (Ex. B-1, ¶ 27; Ex. J-5)

107. Section I of the DCMOA is entitled "Reimbursement of Commonwealth Costs." Under subsection A entitled "Coverage" the DCMOA states that "This Agreement covers reimbursement of the costs associated with providing commonwealth services to the Department of Defense installations for activities funded under the Environmental Restoration, Defense (ER,D) appropriation." (Ex. J-5)

108. Janet S. Wright administers the DCMOA on behalf of the federal government. (Wright, N.T. 650)

109. Although she took the position that the purpose of the agreement was to set up a "partnership" between the Commonwealth and the DOD to clean up environmental

contamination at DOD facilities and that this agreement covered all disputes between the DOD, she could not find the word "partnership" anywhere in the document. (Wright, N.T. 653, 656; Exs. A-67; J-5)

110. There is no language in the agreement which suggests that its dispute resolution provisions apply to a type of dispute other than those related to the reimbursement of certain costs incurred by the Department in rendering environmental services to the DOD. (Exs. A-67; J-5; *see also* Moulder, N.T. 985)

111. While this agreement may have barred the Department's order requiring reimbursement of its expenses in providing certain services to DLA, that issue was settled by the parties before the hearing began. (Ex. B-1, ¶ 32)

DISCUSSION

Our analysis of the issues before us in this appeal, began with what has already been decided regarding the Appellant's objections to the issuance of the 1999 Order. On April 16, 2001 this Board granted in part and denied in part cross-motions for summary judgment on four issues. Specifically, we held that the Appellant was strictly liable for contamination on its property under the provisions of the Clean Streams Law[2] and the Storage Tank and Spill Prevention Act.[3,4] Second, we held that a defense of sovereign immunity for the Appellant, as an agency of the federal government, had been waived by the Congress by the enactment of Section 313 of the Clean Water Act[5] and Section 9007 of the Solid Waste Disposal Act.[6,7]

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[2] Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §§ 691.1 – 691.1001.

[3] Act of August 7, 1989, P.L., *as amended*, 35 P.S. §§ 6021.101 – 6021-2104.

[4] *Defense Logistics Agency v. DEP*, EHB Docket No. 2000-004-MG, slip op. at 7-8. (Opinion issued April 16, 2001).

[5] 33 U.S.C. § 6991f.

[6] 42 U.S.C. § 6991f.

The Department also sought summary judgment on the issue of whether the issuance of the 1999 Order violated the "terms and spirit" of the 1996 Agreement. On this point we held:

> The Appellant's Motion and Response do not address [the provision of the 1996 Agreement reserving the Department's right to pursue enforcement of the law]. Instead, the Appellant complains that the Regional Director who issued the Order misunderstood some facts, issued the Order in the mistaken belief that the Agreement had expired, did not know the details of a settlement offer the Appellant had made to Sunoco and issued the Order in violation of the Department's enforcement policy. We see nothing in these claims that are material to the Department's authority to require the Appellant to undertake action to remediate the NAPL plume because the Agreement reserved this right to the Department. Accordingly, we will grant the Department's motion to the extent that the Appellant claims that this aspect of the Order was in violation of the terms of the Agreement.[8]

Our summary judgment decision also left two issues open. First, whether the Department's issuance of the 1999 Order against the Appellant alone represents manifestly unreasonable judgment, partiality, prejudice, bias, ill-will or misapplication of the law; and second, whether certain cost reimbursement provisions of the Order were appropriate. The Department and the Appellant reached settlement concerning the Department's non-enforcement oversight expenses, and the paragraph of the 1999 Order relating to those expenses has been withdrawn by the Department.[9]

We turn now to the issues which remain. The Department argues (1) the 1999 Order was necessary; (2) the issuance of the Order was not an abuse of the Department's prosecutorial discretion; (3) the Department did not act with bias, prejudice or ill-will by issuing the Order against the Appellant alone; (4) it was not erroneous for Department staff to consider the results

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[7] *Defense Logistics Agency*, slip op. at 8.
[8] *Defense Logistics Agency,* slip op. at 9.
[9] Ex. B-1, ¶ 32.

of a report generated by a neutral technical expert which was generated as part of a dispute resolution process in issuing the 1999 Order; (5) the Department did not err in requiring the Appellant to assume some responsibility for the sewer vapor abatement system; (6) nothing in the Defense Commonwealth Memorandum of Agreement (DCMOA) precluded the Department from issuing the 1999 Order; and (7) it was reasonable for the Department to require the Appellant to continue to fund the Technical Advisory Group (TAG). The Intervenor's post- hearing submission focuses upon the reasonableness of the Department's order and contends that it was not improperly issued against the Appellant alone.

The Appellant, in contrast, argues that the 1999 Order was not necessary or appropriate because (1) either the dispute resolution provisions of the DCMOA or the 1996 Agreement should have been utilized; (2) the 1996 Agreement was still valid and enforceable; and (3) the 1999 Order contravenes an enforcement policy document of the Department. The Appellant also contends that the provision of the 1999 Order requiring it to take responsibility for odor abatement equipment owned by Sunoco and located on Sunoco's property is not reasonable.

Our review is *de novo*. That is, we will fully consider the case anew and are not bound by any determinations previously made by the Department. As the Board recently explained:

> Actions being heard before the Board involve a determination not just of whether the action under appeal was so egregiously wrong as to amount to being capricious or abusive, or based on partiality, prejudice, bias, ill-will, but a determination, based on the evidence we hear, whether the findings upon which [the Department] based its actions are correct and whether [the Department's] action is reasonable and appropriate and otherwise in conformance with the law.[10]

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[10] *Smedley v. DEP*, EHB Docket No. 97-253-K, slip op. at 30 (Adjudication issued February 8, 2001). We remind all parties that the abuse of discretion standard enunciated in *Sussex, Inc. v. DEP*, 1984 EHB 355, has been expressly overruled by the Board. *See Smedley*, at slip op. 28-29 (and cases cited therein).

Where the Department issues an enforcement order, it bears the burden of proving that its order meets this standard.[11] Accordingly, we will first address the arguments of the Department which support the issuance of the 1999 Order.

Both the Storage Tank Act and the Clean Streams Law authorize the Department to issue such orders as are "necessary" to aid in the enforcement of each law.[12] There is ample evidence to support the Department's position that the 1999 Order was "necessary" within the meaning of both statutes. As we explained earlier, the Appellant's liability has already been established. The Department clearly has authority to order abatement of the pollution under both statutes. There are several other factors which also support the Department's action.

First, given the magnitude and complexity of the contamination, the need to remediate the NAPL plume is undeniable. It has been estimated that the volume of the plume is between 750,000 and 2 million gallons of product. It underlies between 50 and 60 acres of ground of the Appellant's property.[13] Several witnesses testified that determining the nature of the plume was extraordinarily complex.[14] Moreover, although the source of the plume has never been definitively determined, the entire plume is either on the Appellant's property or within 2,500 feet of the property,[15] which is the distance of presumed liability directed by the Storage Tank Act.[16] As the Intervenor points out, the Board has upheld the Department's decision to order remediation of much smaller and simpler contamination plumes than that present on the

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[11] 25 Pa. Code § 1021.101(b)(4).
[12] 35 P.S. § 691.610; 35 P.S. § 6021.1309.
[13] Burke, N.T. 502, 506.
[14] *See, e.g.* Burke, N.T. 228-29.
[15] *See, e.g.,* Burke, N.T. 511; Ex. C-5 at Map. 6.
[16] 35 P.S. § 6021.1311.

Appellant's property.[17]

Second, investigations by the Department and the Philadelphia Water Authority revealed significant infiltration of petroleum into nearby sewers which generated a significant number of complaints from residents in the nearby Passyunk Homes area.[18] As the investigation proceeded, it was clear that these conditions amounted to a nuisance. See Finding of Fact No. 61. Experts for all parties agreed that these studies demonstrated some level of risk to residents or workers that must be realistically evaluated following proper risk management practices and procedures.[19] The remediation of the NAPL plume was of such great public concern that the TAG was established in order to respond to public concern about the remediation of the NAPL plume.[20]

Third, although the 1996 Agreement was a useful tool for managing the remediation project, as the enforceable terms of the Agreement came to expiration and with the collapse of settlement discussions with the Appellant, the Department determined that it needed a legally enforceable order to ensure that the remediation would continue.[21] Given the size, age and complexity of the plume, the health and environmental harm involved and the significant public pressure to ensure that the remedial work continued, this position by the Department is not unreasonable. The fact that the Appellant arguably may have been willing to continue the clean-up voluntarily does not affect the appropriateness of the Department's judgment in this regard.

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[17] *See, e.g., Hrivnak Motor Co. v. DEP*, EHB Docket No. 99-052-L(Adjudication issued June 5, 2001)(contamination plume underlying less than one acre); *Wagner v. DEP*, 2000 EHB 1032, *aff'd,* 2187 C.D. 2000 (Pa. Cmwlth. filed April 3, 2001)(involving a petroleum release of 13,000 gallons); *Lehigh Gas & Oil Co. v. DER,* 1994 EHB 767, *aff'd,* 671 A.2d 241 (Pa. Cmwlth. 1995), *petition for allowance of appeal denied,* 683 A.2d 886 (Pa. 1996)(petroleum release of 5,000-10,000 gallons).

[18] Burke, N.T. 443-45; Morrow, N.T. 182, 186, 189-90.

[19] Tucker, N.T..813-14; Song, N.T. 1014-15.

[20] Payne, N.T. 581.

[21] Feola, N.T. 614-15, 969.

The Appellant in its notice of appeal and in its response to the Department's motion for summary judgment contended that the Department improperly issued the order against it alone rather than including Sunoco in the 1999 Order because the Department was acting out of bias and prejudice against the Appellant and with partiality toward Sunoco. The Board denied the Department's motion for summary judgment and ordered a hearing on the merits in the belief that such conduct, if supported by the evidence, might be an exception to the general rule that the Department's discretion in decisions relating to enforcement is not subject to review by this Board. Had the Appellant's counsel not made such a broad charge, this entire appeal might have been resolved last Fall on the motion for summary judgment so that the remediation could proceed.

To the Board's surprise and deep concern, the Appellant presented no evidence to support this broad charge. Indeed, counsel for the Appellant failed to even mention this contention in her opening statement until reminded by the Board that this had been a primary contention of the Appellant on which the Board had relied in denying the Department's motion for summary judgment. (N.T. 644-45) The Appellant's Post Hearing Brief requests no findings of fact or conclusions of law with respect to this broad charge. Accordingly, we might simply limit this discussion to the fact that this failure of the Appellant resulted in a waiver of this contention.

Contrary to the Appellant's unsupported charge of bias and prejudice, the Department produced more than sufficient evidence to justify the Department's decision to issue the 1999 Order against the Appellant alone. First, Mr. Burke testified that *all* portions of the 50-60 acre plume were within 1,320 feet of some portion of property owned by the Appellant.[22] None of the plume which is required to be remediated by the 1999 Order underlies property owned by

Sunoco.[23] Second, there was ample evidence indicating that the Appellant was most likely responsible for the NAPL plume on its property. See Findings of Fact Nos. 96-104. Further, the Department had significant indications that the NAPL plume on the Appellant's property was unrelated to the plumes on the nearby Sunoco property. Specifically, data collected by the Department and the Environmental Protection Agency indicated that the contamination plumes on the two properties were not connected and failed to support the theory that the plume had migrated from Sunoco's property.[24] See Findings of Fact Nos. 45-54. Finally, there were several possible sources of releases that were located on the Appellant's property, including above-ground and underground storage tanks.[25] At least one release of gasoline from a leaking fuel line was discovered by the Appellant in 1987.[26]

Under these circumstances, the Department's failure to consider the Appellant's compliance history and other claimed irregularities in issuing the order is legally irrelevant because the Department's exercise of its broad power of prosecutorial discretion ordinarily is not reviewable by this Board. What was material to the Department's decision was the absence of an enforceable agreement and the apparent absence of any intent of the Appellant to voluntarily remediate the NAPL plume on its property in a manner satisfactory to the Department.

This Board has recently held that a slow response to remediate gasoline contamination provided adequate grounds for the Department to revoke a gasoline station owner's underground storage tank permits.[27] In this case, such a delay also provides grounds for the Department to

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[22] Burke, N.T. 511; Ex. C-5 at Map 6.
[23] Ex. J-1.
[24] Exs. C-3; C-5; C-31.
[25] Burke, N.T. 346.
[26] DeLillo, N.T. 683-86.
[27] *Wagner v. DEP*, 2000 EHB 1032, *aff'd,* 2187 C.D. 2000 (Pa. Cmwlth. filed April 3,

issue an order requiring remediation of the gasoline plume on the Appellant's property. In addition, the Appellant previously refused to comply with the Department's previous administrative order requiring the construction of an odor abatement system through the then existing dispute resolution process. *See* Findings of Fact Nos. 69-72.

The Appellant argues that the 1999 Order is inappropriate because the 1996 Consent Agreement was still a valid and enforceable document. This argument misses the mark. As we have repeatedly explained in both our prior adjudication in 1998 and in our decision on summary judgment in this appeal, the 1996 Agreement expressly reserved the Department's right to issue whatever enforcement orders it deemed were appropriate to assure compliance with the law.[28] Therefore, even if the Department's belief that the 1996 Agreement had expired was mistaken, that fact is irrelevant. It had reserved the right to issue the 1999 Order to remedy a clear nuisance. As we explained above, given all of the circumstances, the Department's need to have an order which it perceived to be more easily enforceable was not inherently unreasonable.[29]

The Appellant contends that the 1999 Order contravened the dispute resolution provisions of the 1996 Agreement. Specifically, the Appellant contends that the parties agreed that the dispute resolution in 1997 was to be non-binding unless the panel reached a unanimous decision, and that information gathered by the panel would remain confidential. Accordingly, the Appellant continues, when the Department issued the 1999 Order, relying on arguably

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2001).

[28] Ex. J-2, ¶ 17; *Defense Logistics Agency v. DEP*, EHB Docket No. 2000-004-MG, slip op. at 8-9 (Opinion issued April 16, 2001); *Defense Personnel Support Center v. DEP*, 1998 EHB 512, 534-35. As with its response to the Department's motion for summary judgment, the Appellant fails to even mention this provision of the 1996 Agreement.

[29] In fact, it could be argued that the Department's decision to issue an order that was more easily enforceable than the 1996 Agreement was a valid and responsible allocation of scarce Commonwealth resources in the event that the Appellant failed to adequately continue the

confidential information, the Department imposed a result which was not unanimous and was not what the parties agreed to.

We disagree with the Appellant's analysis of the 1996 Agreement. First, the evidence is clear that the 1997 dispute resolution panel failed to reach an agreement because the provisional agreement reached after the report of the NTE was received by the parties was rejected on behalf of the Appellant by the Department of Justice. Nor was any attempt made by either Sunoco or the Appellant to invoke the arbitration provision of the 1996 Agreement. Therefore that process was basically a nullity. Moreover, as we explain below, the Department properly relied in part on confidential information so that revocation of the 1999 Order is inappropriate.

Second, the Department reserved itself the right to impose further obligations on the parties in order to ensure that the remediation of the NAPL plume continued uninterrupted.[30] There is no language in the Agreement to suggest that this authority is curtailed in any way by the dispute resolution and arbitration provisions.

Third, the Department's position that the terms of the 1996 Agreement had expired is entirely reasonable. The August 1999 amendment, referred to as Amendment 002, placed an October 31, 1999 expiration on the arrangement between Sunoco and the Appellant relative to the Phase I recovery system and the risk assessment.[31] By December of 1999 there was nothing in place that would assure that the remediation and risk assessment would continue. Therefore there was nothing to submit to a dispute resolution panel.

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remediation of the NAPL plume.

[30] Ex. J-2, ¶ 17. That section provides, in part, "[t]he Department reserves all other rights to institute equitable, administrative, civil and criminal actions with respect to any matter addressed by this Consent Order and Agreement, including the right to require additional measures to achieve compliance with applicable law and the right to recover natural resource damages."

The Appellant contends that the Department erred in issuing the 1999 Order because it deviates from a policy document which describes factors that the Department should consider when pursuing enforcement actions. Specifically, the Department failed to consider the Appellant's compliance history, voluntary reporting, and degree of willfulness.

As we noted in our summary judgment opinion, "[w]e most certainly could not grant summary judgment on the ground that the Order may be in violation of the enforcement policy memorandum because that statement of policy is not a legally binding regulation that has the force of law."[32] Therefore we are at something of a loss why the Appellant persists in making this argument. Nevertheless, we hold that the Department's failure to consider compliance history, voluntary reporting or degree of willfulness is irrelevant in view of the Department's broad prosecutorial discretion, particularly where the Department's order is based on the Appellant's liability for remediation of pollution solely as a landowner and occupier. Because it is strictly liable regardless of fault or culpability, other factors such as prior compliance and level of culpability are not relevant in the context of this type of order. Although both the Clean Streams Law and the Storage Tank Act require the consideration of factors such as willfulness in determining the amount of civil penalties,[33] orders to abate pollution do not require such consideration, but must be "necessary to aid in the enforcement of the provisions of this act."[34] Accordingly, we again reject the Appellant's argument that the order is invalid because the

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[31] Ex. J-4.

[32] *Defense Logistics Agency v. DEP*, EHB Docket No. 2000-004-MG, slip op. at 13 n.4 (Opinion issued April 16, 2001)(*citing Central Dauphin School District v. Department of Education,* 608 A.2d 576 (Pa. Cmwlth. 1992); *Dauphin Meadows, Inc. v. DEP,* 2000 EHB 521).

[33] *See* 35 P.S. § 691.605; 35 P.S. § 6021.1307.

[34] 35 P.S. § 691.610; 35 P.S. § 6021.1309. Similarly, the Department's general power to abate nuisances is not limited to those who are particularly willful or have questionable compliance histories. *See* 71 P.S. § 510-17.

Department did not take into account certain factors described in a policy document.

Finally, the Appellant contends that the 1999 Order was improper because Department staff considered information in the report of the NTE in issuing the Order. This report was a scientific report which was generated to assist the dispute resolution panel which was convened pursuant to the terms of the 1996 Agreement, known as the Neutral Technical Expert (NTE) report. The NTE was hired in order to assist the panel by attempting to ascertain the source of the NAPL plume and thereby provide input for defining ultimate responsibility for the plume.[35] Although the parties agreed to release the data collected by the NTE to the public,[36] the report itself was subject to a confidentiality agreement entered into as part of the dispute resolution process.[37] The Department contends that neither the confidentiality agreement nor the Section 574 of the federal Alternative Dispute Resolution Act of 1996 (ADRA)[38] precluded the Department from considering the report in issuing the 1999 Order. We agree.

First, the record is less than clear on the extent to which the Department relied on the NTE report in crafting the 1990 Order. The parties stipulated that they agreed that the data gathered by the NTE was made part of the Department's public record.[39] Once made public a dispute resolution communication is no longer considered confidential.[40] Second, it is also clear that the Department had considerable data independent of the NTE report upon which it also

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[35] Conrad, N.T. 61.

[36] Ex. B-1, ¶ 31.

[37] The Board granted the Appellant's motion to preclude the introduction of the report into evidence because its disclosure to the Board would violate the agreement and would be contrary to the terms of the federal Alternative Dispute Resolution Act. *See* N.T. 384-420.

[38] 5 U.S.C. § 574.

[39] Ex. B-1, ¶ 31.

[40] 5 U.S.C. § 574(b)(3).

relied in drafting the order.[41] There is no mention of the NTE report in the order itself.[42] Indeed the ADRA only provides an evidentiary package for the NTE report.[43]

The Department's broad process in the area of enforcement entitles it to consider confidential information in deciding an enforcement action. Nothing in Section 574 of ADRA precluded it from doing so. That section reads, in pertinent part "a party to a dispute resolution proceeding shall not voluntarily disclose or through discovery or compulsory process be required to disclose any dispute resolution communication . . . ."[44] Communications generated by a neutral, such as the NTE, are specifically exempted from discovery.[45] Reading the section in its entirety, it is clear that the confidentiality provisions are primarily meant to protect a communication from disclosure to an entity *outside* the dispute resolution process, including this Board. It does not say that an agency who is a party to the dispute resolution process is precluded from making use of the communication except as a part of the dispute resolution itself. Rather than blanketing a communication in secrecy for all purposes for all time, Section 574 essentially creates an evidentiary privilege[46] and protects certain communications from disclosure to the public under the Freedom of Information Act.[47] Moreover, it is certainly not unprecedented for

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[41] *See* generally testimony of David Burke; *see also* Conrad, N.T.106; Feola, N.T. 614-15; Anderson, N.T. 916.

[42] Ex. J-1.

[43] It may be worth noting that Section 574 of the ADRA does not contain any penalty provisions for violation of the confidentiality provisions. It only provides that a communication that is improperly disclosed is not admissible in any proceeding. 5 U.S.C. § 574(c).

[44] 5 U.S.C. 574(b). The section then continues with a list of exceptions. At the hearing the Board granted the Appellant's pre-hearing motion to bar admission of the NTE Report or any mention of its contents from evidence.

[45] 5 U.S.C. § 574(b)(7).

[46] *See* note 27, above. Documents generated by the mediation process enjoy a similar evidentiary privilege under Pennsylvania law. *See* Section 5949(a) of the Judicial Code, 42 Pa.C.S. § 5949(a).

[47] *See* 5 U.S.C. § 574(j). In fact, there was great concern in the Congress that the

government agencies to rely on all manner of confidential information in making enforcement and other decisions.[48] In short, there is nothing in the record or the law which leads us to the conclusion that the Department improperly relied upon the NTE report as one of the many sources of data which it consulted when drafting the 1999 Order.

The Appellant argues that it is unreasonable for the Department to require it to assume responsibility for a portion of the odor abatement systems "which Appellant does not own, over which Appellant has no control, which is located on another's private property, and which has not been well-maintained."[49] This argument is identical to the argument that we rejected in the Appellant's motion for summary judgment:

> We have no hesitation however in rejecting the Appellant's motion for summary judgment on the ground that the Department is without authority to require it to perform the remediation set forth in the Department's Order because it requires the Appellant to take over the operation of a facility designed and constructed by Sunoco. The Appellant cites no authority for its contention. In *Al Hamilton Contracting v. Department of Environmental Resources*, 659 A.2d 31 (Pa. Cmwlth. 1995), the Commonwealth Court made it quite clear that the Department has authority to order groundwater studies beyond the premises of an appellant whenever that is necessary to remediate the contamination involved. We see nothing in the requirement of the Order to indicate that the Appellant operate and maintain a facility constructed by another responsible party is beyond the Department's authority.[50]

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protection of a communication from the requirements of FOIA be limited in order to balance the need to encourage candor in the dispute resolution process against the public's right to information. *See, e.g.,* 142 Cong. Rec. H 11446, 11449 (September 27, 1996).

[48] *See, e.g., Pennsylvania Independent Petroleum Producers v. Department of Environmental Resources,* 525 A.2d 829 (Pa. Cmwlth. 1987), *aff'd,* 550 A.2d 195 (Pa. 1988), *cert. denied,* 489 U.S. 1096 (1989).

[49] Appellant's Brief at 71.

[50] *Defense Logistics Agency*, slip op. at 13. *See also Ryan v. Department of Environmental Resources,* 373 A.2d 475 (Pa. Cmwlth. 1977)(*en banc*)(It was not erroneous for the Department to require the appellant to remediate groundwater pollution on land he had never owned and for which the lease authorizing his use of the land had expired; the Department has express authority to protect the health of the Commonwealth's citizens by ordering the abatement

It is beyond question that the infiltration of petroleum into the Packer Street sewer system is a serious problem and that the odors generated by the infiltration have negatively impacted the residents of the area, both in terms of the use and enjoyment of their homes and in terms of their health as well. The Appellant has adduced no new information which persuades us that our earlier ruling rejecting their contention that it was reasonable for the Department to require them to assume some responsibility for the abatement system was in error. In fact, at the close of the hearing the Appellant admitted that it had offered no evidence to support its claim that the Order in this respect was unreasonable.[51] Accordingly, we reject the Appellant's argument that this requirement of the 1999 Order was unreasonable.

The Appellant also argues that the 1999 Order contravened the dispute resolution provisions of a memorandum of agreement between the DOD and the Department. Specifically, it contends that Section III of the agreement, entitled "Lead Agencies" and Section IV of the agreement, entitled "Dispute Resolution" dictate that *all* disputes concerning remediation projects be resolved through dispute resolution so that the Department was thereby precluded from issuing the 1999 Order by virtue of the DCMOA.

In April 1994, the DOD and the Department entered into the DCMOA where, in part, the DOD, including DLA, agreed to reimburse the Department for costs associated with providing a host of services to DOD installations.[52] The plain language of the agreement clearly supports the Department's position that it is primarily an agreement to fund services rendered by the Department to DOD and has nothing to do with the Department's ability to initiate an

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of nuisances).

[51] N.T. 1118.

[52] Ex. B-1, ¶ 27.

enforcement action against the Appellant. For example, Section I of the DCMOA is entitled "Reimbursement of Commonwealth Costs." Under subsection A entitled "Coverage" the DCMOA states that "This Agreement covers reimbursement of the costs associated with providing Commonwealth services to the Department of Defense installations for activities funded under the Environmental Restoration, Defense (ER,D) appropriation."[53] Later, the coverage subsection states that "Unless a site-specific agreement provides otherwise, *this Agreement is the mechanism for payment of the costs incurred by the Commonwealth in providing the services listed in Paragraph B of this section . . .*."[54] The remaining sub-sections of Section I detail the framework under which such claims of reimbursement will be handled including defining which types of services qualify for reimbursement, accounting procedures, maximum annual reimbursement allowances, providing a mechanism for establishing annual budgets and revising cost estimates, establishing a paperwork procedure for requesting reimbursement, and establishing mechanisms for reimbursement of specific projects and emergency actions. Section II of the DCMOA details how the DOD will secure funding and prioritize the various sites where remediation services will be provided by the Commonwealth. If the drafters of the agreement had intended it to apply to other interactions between the DOD and the Commonwealth, it would have been so stated in the agreement.

The Appellant suggests that Section III of the agreement "addresses the management of remedial and removal actions"[55] because it references a "remedial project manager" which is defined by CERCLA regulations. This is an overly broad reading of that section. Section III requires both the DOD and the Commonwealth to designate points of contact for the

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[53] Ex. J-5.

[54] Ex. J-5, Section I.A.2. (Emphasis added.)

administration of the agreement. The point of contact for the DOD under the DCMOA will also be the person who acts as a remedial project manager.[56] This is clearly very logical because in order to determine what activities should be performed by the Commonwealth and reimbursed under the DCMOA and what activities should be handled in a different manner, the point of contact must have some knowledge of the remediation process. There is *no* language in this section which suggests that the DCMOA is meant to cover more than reimbursement of the Department's costs relative to remediation projects as described in Section I.A.

The Appellant also contends that language in the dispute resolution provisions of the DCMOA should be applied to *every* interaction between the Department and the Appellant, thereby depriving the Department of its ability to issue an enforcement order until the Governor of the Commonwealth and Secretary of the Army attempted to resolve the dispute through negotiation, because the Agreement contains the language that "all disputes shall be resolved in this manner."[57] The Appellant also references language in Section IV which provides that the points of contact defined in Section III shall "coordinate the remedial and removal programs at each military installation . . . ." Obviously, the Appellant has read this provision totally out of context with the plain language of the remainder of the DCMOA. "All disputes" clearly refers to

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[55] Appellant's Brief at 37.

[56] Section III provides, in part:

> Each DOD Component shall designate an individual responsible for managing remedial and removal actions for each installation within the Commonwealth. This individual shall be responsible for coordinating all tenant activities at the installation with regard to the remedial and removal action program. The individual will also act as remedial project manager (RPM) within the meaning of the National Contingency Plan (40 CFR Part 300).

The second paragraph describes the responsible individual representing the Commonwealth. Ex. J-5 at Section III.

all disputes concerning "reimbursement of the costs associated with providing commonwealth services to the Department of Defense installations for activities funded under the Environmental Restoration, Defense (ER,D) appropriation."[58] There is *nothing* to suggest that the dispute resolution provisions apply to anything other than cost reimbursement disputes. Similarly, read in the context of the agreement as a whole, simply defining the function of the point of contact to include coordination of remedial and removal programs does not mean that the DCMOA was meant to cover *all* aspects of those programs, including enforcement of Commonwealth laws requiring the abatement of pollution.

CONCLUSIONS OF LAW

1. The Department had the discretion to issue the 1999 Order to the Appellant because the Order was necessary in order to abate pollution and aid in the enforcement of the Storage Tank Act and the Clean Streams Law and the Order was not in violation of the 1999 CO&A or the DCOMA.

2. The Department acted appropriately in issuing the 1999 Order against the Appellant alone since the available environmental studies indicated that the NAPL plume beneath the Appellant's property was its responsibility and it appeared that the NAPL plume on the Appellant's property was not contributed to by Sunoco.

3. The Department was entitled to make use of confidential information in deciding to issue the compliance order, including the report of the NTE when crafting the 1999 Order.

4. The DCMOA does not preclude the Department from initiating an enforcement action against the Appellant for the remediation of pollution, such as the 1999 Order without

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[57] See Ex. J-5 at Section IV, B.
[58] Ex. J-5.

completing the dispute resolution process set forth in that agreement relating to the Department's costs. (Ex. J-5)

5. The Appellant waived its objection to the 1999 Order on the basis that the Department's motive in issuing the order was improper due to prejudice, bias or ill-will by its failure to present any evidence to support such a conclusion and by failing to support such a claim in its post-hearing requests and legal memoranda. 25 Pa. Code 1021.116(c); *see also Lucky Strike Coal Co. v. Department of Environmental Resources*, 547 A.2d 447 (Pa. Cmwlth. 1988); *Patti v. DEP*, 1999 EHB 610.

6. The Appellant's claims of "irregularities" in the issuance of the 1999 Order have no legal relevance and do not bar the Department's issuance of the Order because of the broad discretion the Department has in its enforcement decisions.

7. The Appellant waived its objection to Paragraph 5 of the 1999 Order which required it to continue the funding of the TAG by its failure to support its objection in its post-hearing requests and legal memoranda. 25 Pa. Code 1021.116(c); *see also, Lucky Strike Coal Co. v. Department of Environmental Resources*, 547 A.2d 447 (Pa. Cmwlth. 1988); *Patti v. DEP*, 1999 EHB 610.

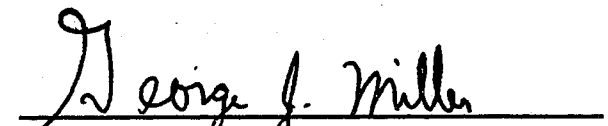
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DEFENSE LOGISTICS AGENCY, DEPARTMENT OF THE ARMY, AND DEFENSE SUPPLY CENTER PHILADELPHIA	:	
v.	:	**EHB Docket No. 2000-004-MG**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and THE PHILADELPHIA HOUSING AUTHORITY, Intervenor	:	

ORDER

AND NOW, this 21st day of December, 2001, the appeal of the Defense Logistics Agency in the above-captioned matter is hereby **DISMISSED**.

ENVIRONMENTAL HEARING BOARD



GEORGE J. MILLER
Administrative Law Judge
Chairman

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

MICHAEL L. KRANCER
Administrative Law Judge
Member

DATED: **December 21, 2001**

c: **DEP Bureau of Litigation**
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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

WILLIAM T. HOPWOOD	:	
	:	
v.	:	**EHB Docket No. 2001-051-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and CONSOL PENNSYLVANIA COAL COMPANY, Permittee	:	**Issued: December 21, 2001**

OPINION AND ORDER ON MOTION TO COMPEL, MOTION FOR LEAVE TO AMEND APPEAL, AND PETITION FOR LEAVE TO FILE APPEAL NUNC PRO TUNC

By Thomas W. Renwand Administrative Law Judge

Synopsis:

The Board denies a Motion to Compel seeking discovery concerning a Permit Revision when the Department of Environmental Protection action appealed was a Permit Review. A Motion to Amend an Appeal is denied where Appellant seeks to amend an appeal of a Permit Renewal to add an appeal to a Permit Revision. A Permit Revision is a separate action of the Department and each amendment does not fall within any of the enumerated reasons allowing amendments set forth at 25 Pa. Code § 1021.52(b). Where Appellant can not show "good cause" of either a non-negligent failure on his part or that fraud or a breakdown in the Board's process or procedure prevented him from filing a timely appeal, the Board will deny his request to file an appeal more than 30 days after publication in the *Pennsylvania Bulletin*.

INTRODUCTION

Presently before the Board is the Appellant's Motion to Compel, Or in the Alternative, Motion for Leave to Amend Appeal, or in the Alternative, Petition for Leave to File Appeal Nunc Pro Tunc (Motion). Since a review of the papers clearly leads to the inescapable conclusion that the discovery requests propounded by the Appellants to the Department of Environmental Protection deal almost entirely with the Permit Revision rather than the Permit Renewal of Consol Pennsylvania Coal Company's mining permit we have no choice but to deny Appellant's Motion to Compel and sustain the Department's objections to those discovery requests. Before deciding the Appellant's alternative motions, however, we feel it important to briefly review the state regulatory process dealing with the permitting of underground coal mines.

Underground coal mines, by their very nature are massive operations. Accordingly, the underground mining of coal in Pennsylvania is heavily regulated. In order to operate an underground coal mine, a coal company must submit a detailed application. Once a coal mining permit is issued the coal company still faces intense regulatory scrutiny. Consequently, the permit process is somewhat more complex than in most other regulated industries.

With this background in mind, it is imperative that all parties interested in the permitting of an underground coal mine pay extremely close attention to detail. A permit renewal of "a valid, existing permit issued by the Pennsylvania Department of Environmental Protection (Department) will carry with it the presumption of successive renewals upon expiration of the term of the permit."[1] More importantly and relevant to this case, a "permit renewal will not be available for extending the acreage of the operation beyond the boundaries of the permit area approved under the existing permit."[2] Applications for a Permit Renewal require public notification and the Department sends copies of its decision to the coal company and interested parties; including those objecting to the renewal of the permit. Although there is a presumption the permit will be renewed, if certain enumerated criteria are not met the Department will not renew the permit.[3] A Permit Renewal granted by the Department reflects a *revision* in the

[1] 25 Pa. Code Section 86.55(a).
[2] 25 Pa. Code Section 86.55(b).
[3] 25 Pa. Code Section 86.55(g).

permit to reflect the renewal.

The addition of acreage for mining to an existing coal mining permit is considered to be a Permit Revision and, unlike a Permit Renewal, is treated administratively as an application for a new permit.[4] Stated another way, in determining whether to grant the application to add acreage to the existing permit, the Department must apply the same criteria and conduct the same evaluation as it would for a new permit to mine the area.

Mr. Hopwood's Appeal

In the present Appeal, Consol Pennsylvania Coal Company (Consol Coal) filed an application for a Permit Renewal and another application for a Permit Revision to add additional acreage. As part of the regulatory review process, the Department gave public notice of both of these distinct actions and held separate public hearings concerning each application. The regulatory process regarding the Permit Renewal and the Permit Revision proceeded at relatively the same time and on close but separate regulatory tracks. Consequently, the Department approved the Permit Renewal and issued a letter to Consol Coal with copies to interested third parties on or about January 29, 2001. This is the letter that Mr. Hopwood attached to his letter of March 5, 2001 to the Environmental Hearing Board indicating, *inter alia*, that:

> I am responding to a notice I received at the *end of January* from the Pennsylvania Department of Environmental Protection regarding a *renewal permit*. A copy of the notice I received is enclosed for your reference. I do wish to let you know that I am aggrieved by this decision.[5] (emphasis added.)

Notice of this Permit Renewal was published by the Department in the *Pennsylvania Bulletin* on February 24, 2001.

Approximately two weeks after approving Consol Coal's request for a Permit Renewal the Department approved Consol Coal's request for a Permit Revision on February 13, 2001. This was a *separate* permit action from the Permit Renewal even though it involved the same coal company and the same coal mine. The Department's cover letter approving the Permit Revision clearly indicates it is a separate action as it makes specific mention of the addition of 9,369 acres to the permit area and the subsidence control plan area.

Apparently a copy of the Department's February 13, 2001 letter was sent to Mr.

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[4] 25 Pa. Code Section 86.52(d).

[5] Hopwood Notice of Appeal (letter of March 5, 2001).

Hopwood's attorney. However, the important triggering event for third party appeals did not take place until the Department published notice of its action of granting the Permit Revision in the *Pennsylvania Bulletin.* Publication in the *Pennsylvania Bulletin* occurred on July 28, 2001.[6] Thus, Mr. Hopwood and any other third party aggrieved by the Department's action in approving the Permit Revision, had ample time, from February 13, 2001 until August 27, 2001 to file an appeal with the Environmental Hearing Board. Based on this important and controlling legal fact, Mr. Hopwood's request to amend his appeal or file an appeal *nunc pro tunc* to include a separate Department action, the approval of Consol Coal's Permit Revision, must be denied.

Amendment of Appeal

The Environmental Hearing Board's jurisdiction attaches to review any final action by the Department provided that any Appeal to such action by a third party is filed within thirty days of publication in the *Pennsylvania Bulletin.*[7] Such an appeal must be in writing and should contain basic information set forth in the Board's Regulations.[8] To assist the public, the Board has a simple Notice of Appeal form which is easily obtainable either directly from the Board or which can be downloaded from the Board's website. Although Mr. Hopwood did not use this form or closely file the prescribed format his letter was docketed as his appeal.

An appeal may be amended without the permission of the Board within twenty days of filing.[9] After the twenty day period has run, the Board may still grant leave for an amendment, provided that one of the following conditions is satisfied:

1) It is based upon specific facts, identified in the motion, that were discovered during discovery of hostile witnesses or Department employees.
2) It is based upon facts, identified in the motion, that were discovered during

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[6] There is no explanation in either the Department's or Consol Coal's papers for the rather lengthy delay between the Department's approval of the Permit Revision on February 13, 2001 and its publication in the *Pennsylvania Bulletin* on July 28, 2001. However, such delay inured to the benefit of Appellant and any other third party as it gave them until August 27, 2001 to appeal the February 13, 2001 action of the Department. This delay in publication certainly did not prejudice any third party. Indeed, any claim of prejudice could more aptly be made by Consol Coal as it had to wait until August 27, 2001, a period of over six months from the Department's action, before it knew if any third parties would legally challenge its Permit Revision. Such a long length of time between approval and publication may add uncertainty to the permitting process.

[7] 25 Pa. Code Section 1021.52(a)(2)(i).

[8] 25 Pa. Code Section 1021.51.

preparation of appellant's case, that the appellant, exercising due diligence, could not have previously discovered.

3) It includes alternate or supplemental legal issues, identified in the motion, the addition of which will cause no prejudice to any other party or intervenor.[10]

It is difficult to conceive how an amendment of an appeal can be granted to allow the Appellant to appeal a *separate final action* of the Department. However, this is exactly what Appellant is requesting here. Moreover, Appellant's request does not fall into any of the three areas set forth in the Board's Rule which would allow such an amendment.

Mr. Hopwood had numerous occasions after the Department's approval of the Permit Revision on February 13, 2001 to file a timely appeal. His letter of March 5, 2001, which was accepted and docketed by the Board as his Appeal, did not specifically identify the action of the Department he was appealing. However, he did enclose a copy of the Department's letter of January 29, 2001 granting the Permit Renewal. In addition, he indicated that the Department's action took place in late January and that it was "regarding a renewal permit."

The Board ordered Mr. Hopwood to file additional information to perfect his Appeal. He ignored the Board's Order. Subsequently, he ignored a second Board Order seeking the same necessary information. Finally, after the second deadline had expired, the Board was contacted by Appellant's counsel who requested and was given additional time to comply with the Board's Order. Mr. Hopwood then clearly confirmed he was indeed appealing the Permit Renewal.

Mr. Hopwood was not required to file his appeal to the Department's action approving the Permit Revision until August 27, 2001 after publication of the notice of the approval of the Permit Revision on July 28, 2001 in the *Pennsylvania Bulletin*. Therefore, what was sent to Appellant's counsel by a Department employee contacted by Appellant's counsel in May 2001 to respond to the Board's Order to Appellant to perfect his Appeal filed in March, 2001 is not legally relevant. Furthermore, if what Appellant now indicates that what he wished to appeal was the Permit Revision, which added thousands of acres to the coal mining permit, even a cursory review of the regulations reveals that a Permit Renewal can not be used to add acres to a

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[9] 25 Pa. Code Section 1021.53(a).

[10] 25 Pa. Code Section 1021.52(b). There is an additional requirement, not relevant here, that "an appellant may not request leave to amend a notice of appeal after the Board has decided any dispositive motions or the case has been assigned for hearing, whichever is later." 25 Pa. Code Section 1021.53(e).

coal mining permit. It therefore should have been readily apparent that a Permit Renewal and a Permit Revision are two separate Department actions.

Appellant has not provided us with any authority that would allow an Appellant's Notice of Appeal to one action of the Department to be amended to add objections to a *second* and *separate* action of the Department. Appellant's reliance on *Columbia Gas Transmission Corp. v. DEP*[11] is misplaced. In this Appeal, Columbia Gas had timely filed an appeal to a Departmental action granting a Permit Revision to an underground coal mine. Prior to the scheduling of the matter for hearing and before any dispositive motions were filed, Columbia Gas sought to amend its Notice of Appeal to add objections to the *same* Departmental action. This Administrative Law Judge, over the objections of counsel for both the coal company and the Department, allowed the amendments. In so doing we stated:

> Columbia Gas has demonstrated that it meets the criteria for allowing an amendment of its appeal. Contrary to the Department and Eighty-Four Mining's assertions, it does not appear that any prejudice will result from allowing Columbia Gas to Amend its appeal at this early stage of the proceeding. Dispositive motions have not yet been filed or decided by the Board, and the hearing in this matter is not scheduled to take place until October 2001. Moreover, there is no suggestion by the Department or Eighty-Four Mining that they have changed their positions based on the limited issues raised in the amendment. Columbia Gas asserts that the amendment is simply an amplification of its earlier issues. While the Board does not necessarily agree with this characterization, we do not find that the new issue raised by Columbia Gas rises to the level of causing prejudice to Eighty-Four Mining or the Department.[12]

Appeals *Nunc Pro Tunc*

Since we deny Mr. Hopwood's Motion to Amend his Appeal we now turn to his Petition to file his Appeal *Nunc Pro Tunc*. Petitions for allowance to file an appeal *nunc pro tunc* are only granted by the Board in rare instances. This is not one of those instances.

They are only granted where there is fraud or breakdown in the *Board's* operation or unique and compelling factual circumstances establish a non-negligent failure to appeal.[13] Mr.

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[11] 2000 EHB 1289.
[12] *Id.* At 1291.
[13] *Grimaud v. Department of Environmental Resources*, 638 A.2d 299 (Pa. Cmwlth. 1994); *Falcon Oil Co. v. Department of Environmental Resources*; 609 A.2d 876, 878 (Pa Cmwlth.

Hopwood does not meet this test.

An appeal *nunc pro tunc*, as we indicated earlier, is an extraordinary remedy. The Board does not lightly grant such a petition.[14] In order to establish that good cause exits to grant such petitions the appellant must show that the delay in filing the appeal is either the result of a non-negligent failure on his part or that fraud or breakdown in the Board's process prevented him from filing his appeal on time.[15]

We recently held that a lack of understanding of the legal process does not excuse the bright line requirement that third party appeals must be filed within 30 days of publication in the *Pennsylvania Bulletin.*[16] Nor is negligence or mistake on the part of Appellant an excuse for a late filing.[17] Moreover, we have consistently held that the Department has no obligation to advise or inform potential appellants of the proper procedure for filing appeals or to alert them to flaws in their appeals.[18]

Mr. Hopwood claims the Department sent his attorney a copy of the wrong Department action and that he mistakenly believed that the Permit Renewal included the additional acreage that was part of the Permit Revision.[19] Mr. Hopwood's mistaken understanding is not enough to support a finding of "good cause." As we have stated earlier, the mailing of the Permit Renewal rather than the Permit Review is simply not legally relevant to the issue before the Board.

Mr. Hopwood had several months to determine that the additional acreage was included in the Permit Revision rather than the Permit Renewal. This failure is not the result of any fraud, duress or coercion on anyone's part. A review of the documents and regulations would have certainly revealed the proper action to appeal. Therefore, Mr. Hopwood's Petition for Leave to File his Appeal *Nunc Pro Tunc* must be denied.

1992).

[14] *Ziccardi v. DEP*, 1997 EHB 1.

[15] *West Caln Township v. Department of Environmental Resources*, 595 A.2d 702 (Pa. Cmwlth. 1991); *Dellinger v. DEP*, 2000 EHB 976.

[16] *Maddock v. DEP and Consol Coal Co.*, EHB Docket No. 2001-183-L (Opinion and Order issued October 19, 2001).

[17] *Ziccardi.*

[18] *West Caln Twp.*; *Ziccardi.*

[19] Affidavit, paragraph 5 and Hopwood Affidavit, paragraph 6.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

WILLIAM T. HOPWOOD	:	
	:	
v.	:	**EHB Docket No. 2001-051-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and CONSOL PENNSYLVANIA COAL COMPANY, Permittee	:	

ORDER

AND NOW, this 21st day of December, 2001, it is ordered as follows:

1) Appellant's Motion to Compel is **denied**.

2) Appellant's Motion for Leave to Amend Appeal is **denied**.

3) Appellant's Petition for Leave to file Appeal *Nunc Pro Tunc* is **denied**.

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Administrative Law Judge
Member

DATED: December 21, 2001

EHB Docket No. 2001-051-R

c: **DEP Bureau of Litigation**
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