Environmental Hearing Board

Adjudications and Opinions

2001 Volume II

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

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

JOHN M. RIDDLE, JR.	:	
	:	
v.	:	
	:	**EHB Docket No. 2000-230-MG**
COMMOWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and HEPBURNIA COAL COMPANY	:	**Issued: April 30, 2001**

OPINION AND ORDER ON MOTION TO DISMISS

By George J. Miller, Administrative Law Judge

Synopsis:

A motion to dismiss an appeal from the approval of a renewal of a mining permit under the Surface Mining Conservation and Reclamation Act on the ground that the appellant lacks standing is denied because standing need not be established in the notice of appeal, the motion is supported only by the permittee's bare assertion that the appellant will not be adversely affected by the Department's action and the appellant states that he will be adversely affected by the Department's action, or at least that he needs more information to make such a determination.

OPINION

This appeal arises from the approval by the Department of Environmental Protection of the renewal of a surface mining permit issued to Hepburnia Coal Company (Hepburnia) under the provisions of the Surface Mining Conservation and Reclamation Act (the Act)[1] to continue

[1] Act of May 31, 1945, P.L. 1198, *as amended*, 52 P.S. §§ 1396.1 – 1396.31.

mining on specified properties owned by persons other than the Appellant in New Washington Borough, Clearfield County. The Department's approval contained a special condition prohibiting additional mining on the Appellant's property until Hepburnia obtains a Supplemental C signed by all of the Riddle property owners and corrects the ownership information for the property owned by all the Riddle property owners on the application's permit maps.

The Appellant, John M. Riddle, Jr., filed a notice of appeal containing 34 objections to the Department's action. Hepburnia has moved to dismiss this appeal on the ground that the Appellant lacks standing to appeal this order because none of these 34 objections allege any manner in which continued mining on other properties will have an impact on his property, and any further mining activities conducted under the Surface Mining Permit will not affect the Appellant's property.

The Appellant's answer to the motion states both that he cannot tell whether continued mining on the other properties would impact the Appellant's property because the other properties on which continued mining is authorized are not listed and that the Department's decision does "affect the property the Appellant owns an interest [sic]."

We must assess a motion to dismiss in a light most favorable to the non-moving party. We will dismiss the appeal only where the moving party is entitled to judgment as a matter of law. *Florence Township v. DEP*, 1996 EHB 282, 285.

The Act at 35 P.S. § 1396.4(b), governing applications for permits and bond releases provides in relevant part:

> Any person having an interest which is or may be adversely affected by any action of the department under this section may proceed to lodge an appeal with the Environmental Hearing Board in the manner provided by law....."

We must deny the motion on the stated ground that the notice of appeal does not set forth facts on which the Appellant's standing might be based, because the notice of appeal is not required to contain any such information. In a motion to dismiss, it is the burden of the moving party to establish that the Appellant lacks standing. *Seder v. DEP*, 1999 EHB 782, 785; *see also, Valley Creek Coalition v. DEP,* 1999 EHB 935, 941.

We must also deny the motion based on Hepburnia's bare claim that further mining activities will not affect the Appellant's property. The Appellant thinks he will be affected or that at least he needs more information on which he might make such a determination. Since the standard for standing under the Act is "[a]ny person having an interest which is or may be adversely affected", we must assess the motion in the light most favorable to the Appellant and deny the motion to dismiss.

Accordingly, we enter the following:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

JOHN M. RIDDLE, JR.	:	
	:	
v.	:	
	:	**EHB Docket No. 2000-230-MG**
COMMOWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and HEPBURNIA COAL COMPANY	:	

ORDER

AND NOW, this 30th day of April, 2001, the Permittee's Motion To Dismiss is hereby **denied.**

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

DATED: April 30, 2001

c: **DEP Bureau of Litigation**
Attn: Brenda Houck

For the Commonwealth, DEP:
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Southcentral Region

Appellant - *pro se*:
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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

JOHN M. RIDDLE, JR.	:	
	:	
v.	:	
	:	**EHB Docket No. 99-226-MG**
COMMOWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and HEPBURNIA COAL COMPANY	:	**EHB Docket No. 99-227-MG**
	:	**Issued: April 30, 2001**

OPINION AND ORDER ON MOTION FOR RECONSIDERATION

By George J. Miller, Administrative Law Judge

Synopsis:

The Board denies the appellant's motion for reconsideration because he has failed to come forth with persuasive and compelling reasons which would necessitate reconsideration. While it is clear that the appellant disagrees with the Board's conclusions, he has pointed to no mistake of law or fact or properly brought forth any new relevant evidence which could not have been presented at the hearing.

OPINION

Before the Board is the motion for reconsideration by John M. Riddle, Jr. (Appellant). The Appellant requests the Board to reconsider its adjudication issued on February 26, 2001.[1] For the reasons that follow, we will deny the Appellant's motion.

---

[1] Normally, the Board requires petitions for reconsideration of final orders to be filed within 10 days of the adjudication or final order because the period for reconsideration runs contemporaneously with the 30-day right to appeal to the

The Board will only grant reconsideration for compelling and persuasive reasons. 25 Pa. Code § 1021.124(a); *Potts Contracting Co. v. DEP*, EHB Docket No. 97-236-C (Opinion issued February 25, 2000). The Board's rule provides bases upon which reconsideration may be granted:

> (1) The final order rests on a legal ground or factual finding which has not been proposed by any party.
> (2) The crucial facts set forth in the petition
> (i)Are inconsistent with the findings of the Board.
> (ii)Are such as would justify 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 (1) and (2).

The subject matter of the Appellant's appeals was his allegation that mining activity by Hepburnia Coal Company (Permittee) caused the diminution of the water supply in his drinking water wells. Although the Permittee was presumed to have caused this diminution of water supply by operation of Section 4b(f)(2) of the Surface Mining Conservation and Reclamation Act, Act of May 31, 1945, P.L. 1198, *as amended*, 52 P.S. § 1396.4b(f)(2), after considering the evidence presented at hearing, the Board concluded that the Permittee had rebutted this presumption and shown that there were factors other than its mining activity which caused the diminishment of water supply in the Appellant's well.

Commonwealth Court. 25 Pa. Code § 1021.124 and Comment. The Appellant sought an extension of time which was granted only because of his unusual travel circumstances and because he informed the Board that he did not intend to file an appeal with the Commonwealth Court and understood that he only had 30 days from the final order to do so. The Appellant was also granted leave to file a reply brief which was received by the Board on April 23, 2001.

The Appellant raises three grounds for reconsideration: (1) his belief that the Board's decision was based on an erroneous conclusion that the mining activity at issue occurred on property owned by the Appellant; (2) the Board incorrectly concluded that the testimony of two expert witnesses was credible; and (3) the Board made its decision based on an incorrect standard of proof. None of these arguments provides a compelling reason for the Board to revisit its decision.

Property Ownership

It is clear, reading the Board's adjudication as a whole, the Board's decision in this matter did not hinge on any question of property ownership. First, there is no statement that mining activity and the Appellant's well were on the same parcel of property. Second, even if the Board did erroneously conclude that the mining and the well were on the same parcel, the Appellant has not explained how this fact would change the outcome of this appeal. We agree that property ownership may be a pressing issue in other appeals before the Board concerning this Appellant and this Permittee. However, the pivotal conclusion in this case was that mining occurred within 500 feet of the Appellant's well, which raised the presumption that the Permittee was liable for the diminution of water supply unless it could show otherwise. (Conclusion of Law No. 2) The Appellant does not contest this conclusion. Therefore we so no reason to grant reconsideration on this basis.

Expert Testimony

The Appellant next takes issue with the conclusions reached by the expert witnesses that it was more likely than not that the supply problems in the Appellant's well were caused by his failure to properly maintain the well, and not the mining activity

of the Permittee. However, the Appellant simply disagrees with the Board's conclusions. He does not provide any evidence, which could not have been presented at the hearing, that would show that the Board made a mistake such as to warrant reconsideration. Reconsideration is not an appropriate vehicle to cure the evidentiary shortcomings of the Appellant's case. *Cf. Svonavec, Inc. v. DEP,* 1998 EHB 346; *Marwell, Inc. v. DEP*, 1998 EHB 7 (failure to include an exhibit which should have been presented in the motion for summary judgment does not provide a basis for reconsideration).

Standard of Proof

The Appellant argues that the Board improperly granted judgment in the Department's favor based on a conclusion that it "was more likely than not" that factors other than the Permittee's mining activities caused the diminution of the Appellant's water supply. The Appellant views this phrase as an "expression of doubt" and that a "decision of this magnitude can have no doubt."

It is a well-settled principle of law, that a civil tribunal need not reach a conclusion "beyond a reasonable doubt," as is required in criminal trials. Rather, the proponent of a defense must prove the facts that support judgment in its favor by a preponderance of the evidence. *See, e.g.,* 25 Pa. Code § 1021.101(a)("It shall generally be the burden of the party asserting the affirmative of the issue to establish it by a preponderance of the evidence.") To satisfy the "preponderance of evidence" standard, a party need not foreclose the possibility of other alternatives; it need only prove that the existence of a contested fact is more probable than not. *South Hills Health System v. Department of Public Welfare*, 510 A.2d 934, 936 (Pa. Cmwlth. 1986); *C & K Coal Co. v. DER*, 1992 EHB 1261, 1289. It is clear from the Board's adjudication that it was not

expressing significant doubt as to the cause of the diminution of the Appellant's water supply. Rather, it was simply articulating its findings in within the framework of the "preponderance" standard.

In sum, inasmuch as the Appellant has failed to come forth with a compelling reason for the Board to reconsider its February 26, 2001 adjudication, the Appellant's motion is denied. We therefore enter the following:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

JOHN M. RIDDLE, JR.	:	
	:	
v.	:	
	:	**EHB Docket No. 99-226-MG**
COMMOWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and HEPBURNIA COAL COMPANY	:	**EHB Docket No. 99-227-MG**

ORDER

AND NOW, this 30th day of April, 2001, the motion of John M. Riddle, Jr. for reconsideration in the above-captioned matter is hereby **DENIED**.

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

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

MICHAEL L. KRANCER
Administrative Law Judge
Member

DATED: **April 30, 2001**

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

For the Commonwealth, DEP:
Matthew B. Royer, Esquire
Southcentral Region

For Appellant:
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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOAR

JOHN M. RIDDLE, JR.	:
	:
v.	:
	: **EHB Docket No. 98-142-MG**
COMMOWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and HEPBURNIA COAL COMPANY	: **(consolidated with 2000-001-MG)**
	:
	: **Issued: April 30, 2001**
	:

OPINION AND ORDER
ON MOTION FOR PARTIAL SUMMARY JUDGMENT

By George J. Miller, Administrative Law Judge

Synopsis:

A party's motion for summary judgment in an appeal from the Department's action under a Stage I Bond release under the Surface Mining Conservation and Reclamation Act is granted in part and denied in part. The motion is granted with respect to (1) objections that the Appellant should have raised, but did not, in an appeal from the original issuance of the mining permit and (2) with respect to a number of miscellaneous objections, two of which the Appellant has agreed can be dismissed. The motion is denied as to a number of objections which claim that the permittee violated the Act, the Department's regulations and the conditions of the permit during mining, which violations may be uncorrected and may be material to bond release. The motion as to a few objections in the notice of appeal will be acted on further at a prehearing conference.

BACKGROUND

This appeal is from the recommendation of the Department of Environmental Protection (Department) that the Stage I Bond be released with respect to 62.9 acres of land in New Washington Borough, Clearfield County owned by John J. Riddle, Jr. (Appellant) on which Hepburnia Coal Company (Hepburnia) is permitted to conduct surface mining activities pursuant to a permit issued by the Department under the Surface Mining Conservation and Reclamation Act, Act of May 31, 1945, P.L. 1198, *as amended*, 52 P.S. §§ 1396.1 - 1396.31 (the Act). The permit was issued by the Department after Hepburnia posted a bond. Under the Act, prior to commencing surface mining, the permittee must file a bond with the Department "for the land affected by each operation" in the form required by the Department "conditioned that the permittee shall faithfully perform all of the requirements of this act" and of other specified environmental laws apparently not relevant to this appeal. 52 P.S. § 1396.4(d) This bond also must be in compliance with the requirements of the Department's regulations. These regulations at 25 Pa. Code § 86.143 require that the bond be conditioned on the permittee's compliance with the applicable requirements of all of the relevant acts, the regulations thereunder, the permit, the reclamation plan, and the conditions of the permit.

Such a bond may be released in whole or in part on the basis of an application made under the Act[1] and under 25 Pa. Code § 86.171 of the regulations. The Act authorizes the Department to release the bond in whole or in part in three specified stages if it is satisfied that the reclamation covered by the bond or portion thereof has been

[1] 52 P.S. §1396.4 (g)

accomplished as required by the Act. The Act at 52 P.S. § 1396.4 (g) provides in relevant part as follows:

> (g) Subject to the public notice requirements of subsection (b), if the department is satisfied the reclamation covered by the bond or a portion thereof has been accomplished as required by this act, it may, upon request by the permittee or any other person having an interest in the bond, including the department, release in whole or in part the bond or deposit according to the following schedule:
>
> (1) At Stage I, when the operator has completed the backfilling, regrading and drainage control of a bonded area in accordance with his approved reclamation plan the release of up to sixty per cent of the bond for the applicable permit area, so long as provisions for treatment of pollutional discharges, if any, have been made by the operator.

The Appellant, John M. Riddle, Jr., appearing *pro se,* filed a notice of appeal setting forth 50 objections to the Department's approval of Hepburnia's application for a Stage I Bond release.[1] A number of these objections are based on a claimed failure to meet the required reclamation standards, violations of the Act, the Department's regulations and the permit committed by Hepburnia during mining, violations of the requirements of the Act and the Department's regulations in issuing the permit and a number of miscellaneous objections, including statements of opinion, intent and desire for further information.

Hepburnia's motion for summary judgment seeks a partial summary judgment as to all of these objections other than those which state a failure to meet reclamation standards. The Department has filed an answer to the motion and a supporting memorandum of law supporting Hepburnia's motion.

---

[1] This appeal was docketed at 2000-001-MG. By order dated November 30, 2000, it was consolidated with an earlier appeal of a Stage I Bond release for another parcel owned by the Appellant at EHB Docket 98-142-MG.

Because some of the Appellant's objections are not at all clear as to what is intended and because Hepburnia's motion does not present the Board with information as to the content of its reclamation plan, the Board will schedule a prehearing conference promptly after the issuance of this Opinion and Order so that further rulings can be made as to the real issues for the hearing on the merits. The reasons for the Board's rulings on the motion based on the information available to it at this time are set forth below.

OPINION

The grant of summary judgment is proper under Rule 1035.2 of the Pennsylvania Rules of Civil Procedure whenever (1) there is no genuine issue of material fact that could be established by additional discovery or expert report, or, (2) after the completion of discovery relevant to the motion, the party opposing the motion who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury. *Schreck v. Department of Transportation,* 749 A.2d 1041 (Pa. Cmwlth. 2000); *Kee v. Pennsylvania Turnpike Commission,* 743 A.2d 546 (Pa. Cmwlth. 2000). The grant of summary judgment is warranted only in a clear case and the record must be viewed in a light most favorable to the non-moving party, resolving all doubts regarding the existence of a genuine issue of material fact against the grant of summary judgment. *See Young v. Department of Transportation,* 744 A.2d 1276 (Pa. 2000); *County of Adams v. Department of Environmental Protection,* 687 A.2d 1222 (Pa. Cmwlth. 1997).

Claimed Violations During Mining

Hepburnia moves for summary judgment on Objection 6 of the notice of appeal on the ground that this objection could apply only to a bond release after Stage II

reclamation standards have been achieved. Objection 6 states: "Top soil, subsoil, whatever soil not saved in virgin mining."

Under the Department's regulations at 25 Pa. Code § 86.174(a), Stage I reclamation standards have been reached when "the entire permit area or a portion of a permit area has been backfilled or regraded to the approximate original contour or approved alternative, and when drainage controls have been installed in accordance with the approved reclamation plan...." Under section 86.174(b) of these regulations the replacement of topsoil is not required until an application for bond release is made on the basis of the achievement of Stage II reclamation standards. We previously have held that because the *replacement* of topsoil is not a precondition of a Stage I Bond release but is only a Stage II release issue, the objection that topsoil has not been *replaced* must await the application for a Stage II Bond release application. *Lucchino v. DEP*, 1996 EHB 583, 592-593.

However, we read Objection 6 to relate to the failure of Hepburnia to conduct its mining operations in accordance with the requirements of the regulations relating to topsoil removal and storage under 25 Pa. Code §§ 87.97 and 87.97. In considering whether the application for bond release should be approved, 25 Pa. Code § 86.171 requires the Department to consider, among other things, whether the permittee has complied with the applicable act, regulations thereunder and the conditions of the permit.

(f) Departmental review and decision will be as follows:

(1) The Department will consider during inspection, evaluation, hearing and decision:

(i) Whether the permittee has met the criteria for release of the bond under § 86.172.

(ii) Whether the permittee has satisfactorily completed the requirements of the reclamation plan, or relevant portion thereof, and complied with the requirement of the acts, regulations thereunder and the conditions of the permit, and the degree of difficulty in completing remaining reclamation, restoration or abatement work.

(iii) Whether pollution of surface and subsurface water is occurring, the probability of future pollution or the continuance of present pollution, and the estimated cost of abating pollution.

25 Pa. Code § 86.171(f).

Neither Hepburnia's motion nor the Department's supporting response thereto address whether topsoil was properly handled in compliance with the Act, the regulations thereunder, the permit and the reclamation plan during Hepburnia's mining operation. While we have held that violations that have been corrected by the time of bond release are not relevant to a Stage I Bond release,[2] Hepburnia does not indicate whether there were any such violations or whether they had been corrected at the time of bond release. While the Department is authorized to grant the application for a Stage I Bond release if the specified reclamation standard has been met, that does not mean that it is reasonable or appropriate to do so if the mining company has engaged in violations of the Act, the regulations, and the permit, which remain uncorrected. If topsoil removal was not conducted in accordance with the Department's regulations and the permit application, the achievement of final reclamation standards may be difficult or impossible. Since any such failure may well be a reason for the Department to have rejected the application even if Stage I reclamation standards had been achieved, the Motion for Summary Judgment as to Objection 6 of the notice of appeal will be denied.

[2] *Lucchino v. DEP*, 1998 EHB 473, 483; *Lucchino v. DEP*, 1999 EHB 214, 222.

Objection 18 of the notice of appeal claims that an area on the mine map labeled "NOT TO BE EFFECTED" has been one-half to two-thirds affected. Since this objection appears to claim that the bond should not be released due to uncorrected violations during mining, we will deny the motion for summary judgment as to Objection 18 for the reasons set forth above.

Hepburnia seeks summary judgment on Objection 26 of the notice of appeal. This objection states: "Prime farm land was not properly handled and shown on maps." Hepburnia says that this objection is beyond the scope of this appeal because prime farm land issues are Stage II Bond release issues. It may be that the Appellant intends by this objection to claim that the bond should not be released because Hepburnia did not comply with the requirements of sections 87.178 and 87.179 of the regulations relating to the removal and storage of topsoil. Since neither Hepburnia nor the Department address this issue, the motion for summary judgment will be denied at this time. However, it may be that the Appellant intended this objection to relate merely to the location for prime farm lands on the maps presented in the permit application. If so, summary judgment will be granted on this objection following the prehearing conference for reasons set forth below relating to the Appellant's failure to appeal the issuance of the permit.

Hepburnia moves for summary judgment as to Objections 5 and 20 because these objections have already been adjudicated by the Board in *Riddle v. DEP*, EHB Docket Nos. 99-226 and 99-227. Objection 5 states: "The Company claims water in the area not affected but in fact has been affected substantially." The Appellant's answer to the motion says that this objection relates to a pond on the mined property that no longer holds water and a water supply on the mined property that Dr. Miller required Hepburnia

to investigate along with complaints filed by surrounding property owners. We read this objection as it relates to a pond that no longer holds water to charge that the bond should not have been released because Hepburnia failed to conduct its operations so as to meet one or more of the hydrologic balance requirements of 25 Pa. Code §§ 87.101, 87.115 and 87.116. This is not precisely the same issue recently adjudicated in *Riddle v.* DEP, EHB Docket Nos. 99-226-MG and 99-227-MG (Adjudication issued February 25, 2001). For reasons set forth above relating to topsoil and prime farm lands, the motion for summary judgment will be denied as to so much of Objection 5 of the notice of appeal that relates to the pond. The balance of this objection appears to relate to the same matters as contained in Objection 20. Whether this is so will be taken up at the prehearing conference.

Objection 4 to the notice of appeal states: "an intermittent stream no longer flows across the permitted and mined area." The motion for summary judgment will be denied as to this objection. Section 87.104 of the Department's regulations permits the diversion of intermittent streams within the permit area under circumstances specified in the regulation. Neither Hepburnia nor the Department claim that the elimination of this stream was authorized in the permit, otherwise met the conditions of this regulation or that this condition has been corrected. Accordingly, this may be an uncorrected violation during mining which the Department was required to consider in deciding whether Hepburnia should be granted a Stage I Bond release.

Objection 20 appears to relate to the water supply problems of persons other than the Appellant. The Appellant states in his answer to the motion that he does not challenge the removal of this Objection. While this objection may be relevant to bond

release, it is duplicative of the second part of Objection 5. Since Appellant is willing to withdraw Objection 20, a summary judgment will be issued as to Objection 20. Whether this ruling should also apply to the second part of Objection 5 will be discussed at a prehearing conference and a disposition of the motion for summary judgment as it relates to this second part of Objection 5 will be made at that time.

Objections 22 and 23 relate to an archaeological survey. Since the Appellant's answer states that he will not object to the removal of these objections, a summary judgment will be issued as to Objections 22 and 23.

Objections 46 and 47 appear to claim that the bond release should not have been approved because of violations of the permit while mining. Objection 46 states: "The mining sequence shown and stated according to the permit and maps was not followed." Objection 47 states: "Area, areas, veins or seams of coal were mined in areas not permitted to do so at the time mined." Since neither Hepburnia nor the Department have said that there were no such violations, that they have been corrected or that they are not material to the Department's action approving bond release, summary judgment will be denied as to these objections.

Propriety of Permit Issuance

A significant number of the Appellant's objections relate to the propriety of the issuance of the permit to Hepburnia. The affidavit of John Varner, attached to Hepburnia's motion, contains some description of the steps the Department took in issuing the permit and establishes that the Appellant failed to appeal this approval after the issuance of the permit was properly advertised in the Pennsylvania Bulletin.

Accordingly, both Hepburnia and the Department claim that these objections are barred by the doctrine of administrative finality.

Objections 27-32 relate to the use of the Supplemental "C" submitted as a part of the permit application. Objection 30 goes so far as to state: "An investigation needs to be conducted to determine if the Company and/or DEP makes a habit of using the Supplemental "C" as a lease or if this was an isolated case." Supplemental "C" deals with the consent of the landowners to mining and the right of Hepburnia to enter the land for mining.

We will enter a summary judgment as to these objections because these objections, if valid at all, should have been raised in an appeal from the Department's issuance of the permit and are now barred by the doctrine of administrative finality due to the Appellant's failure to appeal the issuance of the permit. *Department of Environmental Resources v. Wheeling-Pittsburgh Steel Corp.*, 375 A.2d 320, 325, *aff'd*, 375 A..2d 320 (Pa. 1977), *cert. denied*, 434 U.S. 969 (1977); *Reading Anthracite Co. v. DEP*, 1998 EHB 112, 119-21 (appellant barred from raising the propriety of a landowner consent in challenging a permit renewal for failure to appeal from the original issuance of the permit; see discussion of this principle in *Tinicum Township v. DEP*, 1996 EHB 816, 822-823. For this reason we will enter a summary judgment as to Objections 27-32 of the notice of appeal. In addition, Hepburnia properly claims that the Board has no jurisdiction to direct the investigation suggested by Objection 30.

The following additional objections in the notice of appeal also must be dismissed because of the Appellant's failure to raise them in an appeal from the issuance of the permit:

1. Whether the maps submitted as part of the permit application properly showed features such as the boundaries and names of property owners and the location of existing buildings, utility lines and prime farmland. (Objections 26 (to the extent it relates only to the mapping of agricultural lands), 33-36)

2. Whether there was a failure to conduct an archaeological survey (Objections 22-23)

3. Whether the bonded areas are contiguous and whether sufficient bond was posted by Hepburnia (Objections 40, 48)

Mining in Unpermitted and Unbonded Areas

Objections 37-39 claim that Hepburnia conducted mining in areas that were not permitted or were not bonded. Hepburnia and the Department claim that these claims are irrelevant to the question of whether Stage I Bond release requirements have been met. While this claim may be irrelevant to the question of whether the bond should be forfeited,[3] we believe that any such violation of the Act, the Department's regulations or the permit must be considered by the Department in deciding whether to approve an application for a Stage I Bond release. As set forth above, section 86.171(f)(1)(ii) specifically requires that the Department consider whether the permittee has satisfactorily complied with the requirements of the acts, regulations thereunder and the conditions of the permit. While it is true that the Department has other remedies to deal with any such violation, to the extent the Board held in *Duncan v. DER*, 1989 EHB 459, 469, that the Department need not consider such a violation during mining in approving an application for a Stage I Bond release, that decision is overruled.

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[3] *Lucchino v. DEP*, 1996 EHB 583, 588.

Miscellaneous Objections

Hepburnia moves for summary judgment on Objection 2 of the notice of appeal. This objection states: "Brush piles remain that have to be removed and these piles have been brought to DEP personnel's attention with no action taken." A reason for this failure of response may be contained in the affidavit of John Varner that states that Module 19.3, attached as an exhibit to the affidavit, stated that minimal trees and brush will be left on the outskirts of the affected areas in order to establish a wildlife habitat for small game animals. Hepburnia claims only that this does not relate to any issue involved in a Stage II Bond release. While the Appellant does nothing in his response to clarify this issue, nothing in the record submitted with the motion indicates that the brush that the Appellant complains about is covered by this aspect of the permit. Since this may be an uncorrected violation during mining, which the Department should have considered in granting the Stage II Bond release, the motion for summary judgment as to this objection will be denied at this time. However, if it appears at the prehearing conference that this brush is covered by the permit provision relating to wildlife habitat, the motion for summary judgment will be granted.

The notice of appeal contain a number of statements of the appellant's opinions, intentions, questions and his prior dealings with the Department, Hepburnia and other parties which Hepburnia believes cannot be construed as objections to the Department's action. We will grant summary judgment with respect to the following stated objections that are not otherwise dealt with above:

19. Waiting for Van Plocus of VAPCO Engineering to answer questions have pertaining to this permit.

41. On the two letters approving completion reports on this permit, a different person has signed the letter other than the person whose name is typed for signature. One must ask, why?

42. Service Requests for Complaint were filed with DEP concerning problems with the mining operation with little or no response.

43, 44. These relate to matters the Appellant is entitled to seek through discovery.

45. The events leading to the public meeting and any documentation before, during and after the meeting will be investigated.

49. A letter requesting an extension of time before taking final action on this bond release, which may have made this appeal unnecessary, was never acknowledged.

50. DEP has not worked with property owners.

We do not view any of these stated objections to be legally cognizable objections. Accordingly, we grant summary judgment as to these stated objections in the notice of appeal.

Accordingly, we enter the following:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

JOHN M. RIDDLE, JR.	:	
	:	
v.	:	
	:	**EHB Docket No. 98-142-MG**
COMMOWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and HEPBURNIA COAL COMPANY	:	**(consolidated with 2000-001-MG)**

ORDER

AND NOW, this 30th day of April, 20001 it is HEREBY ORDERED as follows:

1. The motion for summary judgment of the Permittee, Hepburnia Coal Company, is **granted** with respect to Appellant's Objections 19, 20, 22, 23, 26 (as it may relate only to map locations), 27-36, 40-45, 48, 49 and 50.

2. The motion for summary judgment is **denied** with respect to Appellant's Objections 2, 4, 5, 6, 18, 26 (as it may relate to the handling of top soil of agricultural lands), 46 and 47.

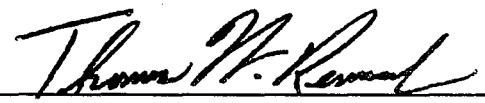
3. As a minimum, the Board will consider further action on the motion with respect to Objection 2 (brush left on site), Objection 5 (to extent it may be intended to relate to water supplies of other land owners, 7 (complaining of insufficient notice to remove timber) and Objection 26 (as it may relate only to the mapping of agricultural lands) at the prehearing conference to be scheduled promptly after the issuance of this Opinion and Order.

4. Unless otherwise ordered at the prehearing conference, the hearing on the merits will proceed with respect to Objections 1, 3-6, 8-18, 21, 24-26, 37-39, 46 and 47 as set forth in the notice of appeal.

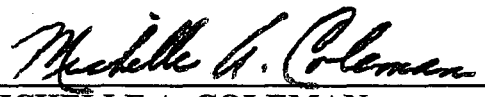
ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

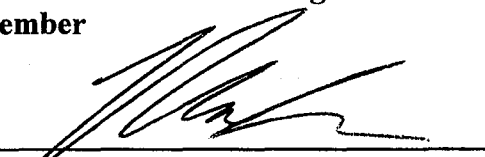


THOMAS W. RENWAND
Administrative Law Judge
Member



MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member



MICHAEL L. KRANCER
Administrative Law Judge
Member

Dated: April 30, 2001

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

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Matthew B. Royer, Esquire
Southcentral Region

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

LEONARD E. TRIGGS	:	
	:	
v.	:	**EHB Docket No. 2000-240-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and CALPINE CONSTRUCTION FINANCE CO., LP	:	**Issued: May 3, 2001**

OPINION AND ORDER ON THE PERMITTEE'S MOTION FOR SUMMARY JUDGMENT

By George J. Miller, Administrative Law Judge

Synopsis:

A motion for summary judgment based on standing is denied in an appeal from the Department's issuance of a plan approval under the Air Pollution Control Act where the Appellant commented in the public participation process leading to the plan approval and the evidence of record indicates that he has a reasonable, real-world concern that he will be adversely affected by the Department's action.

OPINION

This appeal is from the issuance of a plan approval by the Department on October 10, 2000, under the Air Pollution Control Act, Act of January 8, 1960, P.L. (1959) 2119, *as amended*, 35 P.S. §§ 4001-4106. This action authorized the Permittee, Calpine Construction Finance Co., L.P. (Calpine or Permittee), to construct operation of a natural gas fired combined cycle electric generating facility (Facility) along Route 61, north of Reading in Ontelaunee Township, Berks County.

The Appellant, Leonard Triggs, filed this appeal on November 9, 2000 objecting to the Department's action on the basis of 12 enumerated objections. Among other things, the Appellant challenges the Department's determination of emission limits for Nitrous Oxides (NO_x), volatile organic compounds (VOCs), carbon oxides and hazardous air pollutants.

The Permittee's motion for summary judgment is based on the claim that the Appellant has no standing to appeal the Department's determination because he has proffered no evidence of any direct, immediate and substantial interest affected by the issuance of the plan approval or the construction and operation of the Facility. The Appellant is now a resident of West Chester.

The grant of summary judgment is proper under Rule 1035.2 of the Pennsylvania Rules of Civil Procedure whenever (1) there is no genuine issue of material fact that could be established by additional discovery or expert report, or, (2) after the completion of discovery relevant to the motion, the party opposing the motion who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury. *Schreck v. Department of Transportation,* 749 A.2d 1041 (Pa. Cmwlth. 2000); *Kee v. Pennsylvania Turnpike Commission,* 743 A.2d 546 (Pa. Cmwlth. 2000). The grant of summary judgment is warranted only in a clear case and the record must be viewed in a light most favorable to the non-moving party, resolving all doubts regarding the existence of a genuine issue of material fact against the grant of summary judgment. *See Young v. Department of Transportation,* 744 A.2d 1276 (Pa. 2000); *County of Adams v. Department of Environmental Protection,* 687 A.2d 1222 (Pa. Cmwlth. 1997).

The Permittee's motion is based entirely on traditional standards of standing which would require that the Appellant's response to the motion provide admissible evidence demonstrating a

direct, immediate and substantial interest in the plan approval based on the Pennsylvania Supreme Court's 1975 decision in *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 346 A.2d 269, 280 (Pa. 1975), and subsequent court decisions following that precedent. The factual basis for the Permittee's motion is that the Appellant's residence is in West Chester, approximately 50 miles from the Facility, and that he has no interest in any property anywhere near the Facility in Ontalaunee Township. (Motion, pars. 2 (14)-(16) and 3)

The Permittee's motion establishes that the Appellant did comment on the Department's action in the public comment process. (Motion Par. 2(10) and Exhibits 23-16) However, neither the Permittee's motion nor its supporting brief refers to the General Assembly's specific grant in its 1992 enactment of the Air Pollution Control Act of a right to any person who participated in the public comment process for a plan approval or permit to appeal the Department's action to the Environmental Hearing Board. 35 P.S. § 4010.2.

The Appellant responds that this "standing provision" of the Air Pollution Control Act gives him standing to pursue this appeal. As Appellant states in his answer to the motion, the Air Pollution Control Act provides in pertinent part as follows:

> Any person aggrieved by an order or other administrative action of the department issued pursuant to this act or *any person who participated in the public comment process for a plan approval* or permit shall have the right, within (30) days from actual or constructive notice of the action, to appeal the action to the Hearing Board. (emphasis supplied)

35 P.S. § 4010.2.

The Appellant argues that this provision gives him a right to appeal the Department's action notwithstanding the absence of traditional legal standing requirements set forth in the Supreme Court's opinion in *William Penn Parking Garage* and subsequent court decisions based on the principles articulated in that opinion. In support of that argument he cites our recent

decision in *Smedley v. DEP*, EHB Docket No. 97-253-K (Adjudication issued February 8, 2001), and Opinions of the Commonwealth's Attorney General and General Counsel apparently issued in support of the Commonwealth's State Implementation Plan submission to EPA. The Board's adjudication in *Smedley* does not support the Appellant's argument because the Board in that case found that the appellant had standing under traditional legal standards and specifically reserved the question of whether he might also have had standing under the "participated in the public comment" clause of the statutory standing provision relied upon by the Appellant. *Smedley,* slip op. at pp. 30-32.

However, the Appellant's answer to the Permittee's interrogatory indicates that he may have more than an academic interest in the plan approval:

> Appellant presently resides approximately 50 miles southeast and generally downwind of the Project. As you are most likely aware, ground level ozone (smog) is formed when oxides of nitrogen and volatile organic compounds react in the presence of heat and light. Human beings are susceptible to the adverse effects of ozone, e.g. damage to lung tissues and the reduction of lung function. Ozone can be transported by wind currents and cause health impacts far from the original sources. The US Environmental Protection Agency issued a new regulation in September of 1998 specifically aimed at reducing NOx emissions.

The Permittee has saved its real argument on standing for its reply brief to which the Appellant has no right to respond. That reply brief contends that the Board must read the special standing provisions in the Air Pollution Control Act together with Section 4(c) of the Environmental Hearing Board Act, 35 P.S. § 7514(c). This provision of the Environmental Hearing Board Act states that 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 Board under subsection (g)." The Permittee's reply brief also suggests that "federal case or controversy" requirements may also be applicable and that the Appellant has not demonstrated

that he has sufficient "injury in fact" sufficient to give him standing under those requirements.

These contentions raise interesting questions that can be resolved only in a final adjudication because the Permittee has not demonstrated that its right to summary judgment is free from doubt. It is not clear whether the special standing provision in the Air Pollution Control Act should be considered to be completely amendatory of the Environmental Hearing Board Act, or whether these provisions must somehow be read together to impose the requirements that the Appellant demonstrate that he will be adversely affected by the Department's action.

Secondly, it is not at all clear that the Appellant might not meet the standing requirements of federal law[1] even if those standing requirements could be applied in this case. The Permittee relies on *Lujan v. National Wildlife Federation*, 497 U.S. 871, 888 (1992), in which the Supreme Court found that an organization's allegations that one of its members used an unspecified portion of an immense territory on some portion of which mining might occur were insufficient to prove standing. By contrast the Supreme Court most recently in *Friends of the Earth v. Laidlaw Environmental*, 120 S.Ct. 693 (2000), applied more liberal standards of what is necessary to satisfy the "injury in fact" required to demonstrate standing under federal law.

In any event we will not deal with these issues on a motion for summary judgment, in part because the Permittee has not advanced its real argument on standing until its reply brief. The Appellant's response to the Permittee's motion and the evidence of record leads us to the conclusion that the Permittee's right to summary judgment, at the very least, is not free from

[1] Appellant's answer to the motion refers to an opinion of the Commonwealth General Counsel and Attorney General stating that the Commonwealth's standards relating to standing are more restrictive than required by the "case or controversy" provision in Article III of the Constitution of the United States. The Permittee argues from this that Appellant could not meet the standing requirements of federal law.

doubt. The author of this opinion believes that this standing provision is a legislative exception to the traditional standards of standing at least where the person has a reasonable real-world concern that he will be adversely affected by the Department's action.[2] Accordingly, the motion for summary judgment is denied. The resolution of the issue of the Appellant's standing will be reserved to the time of the Board's adjudication following the hearing on the merits. At that time we will be able to evaluate the evidence of the Appellant's standing, including evidence concerning the extent to which the Appellant will be adversely affected by the Department's action, if at all.[2] The parties should submit at that time any material legislative history as to the reasons for the inclusion of this special standing provision in the Air Pollution Control Act.

Accordingly, we enter the following:

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[2]We reserve judgment as to whether or not such a concern is a necessary component of proof of standing under these circumstances. This may be required to avoid the charge that the Board will waste resources of the Commonwealth in the adjudication of solely academic questions.

[2] The Appellant bears the burden of proving standing at the hearing on the merits even where a motion for summary judgment by opposing parties has been denied unless that requirement is waived by the other parties. *Florence Township v. DEP*, 1997 EHB 616; *Township of Florence v. DEP*, 1997 EHB 763.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

LEONARD E. TRIGGS	:	
	:	
v.	:	**EHB Docket No. 2000-240-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and CALPINE CONSTRUCTION FINANCE CO., LP	:	

ORDER

AND NOW, this 3rd day of May, 2001, the Permittee's motion for summary judgment is **denied.**

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

DATED: **May 3, 2001**

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

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Southcentral Region

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Harrisburg, PA 17101-1507

COMMONWEALTH OF PENNSYVLANIA
ENVIRONMENTAL HEARING BOARD

NORTH AMERICAN REFRACTORIES COMPANY	:	
v.	:	EHB Docket No. 99-199-MG
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	Issued: May 8, 2001

ADJUDICATION

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

Synopsis:

The Department erred when it denied a brick manufacturer's application for emission reduction credits (ERCs) as untimely filed. The manufacturer ceased operating an air pollution source in order to perform repairs, but did not file its application for credits until it determined several months later that the shutdown would be permanent instead of temporary. The part of 25 Pa. Code § 127.207 that requires that an ERC application must be filed within one year of "the initiation of the emissions reduction used to generate ERCs" means one year from when the facility commits to initiate an acceptable emission reduction technique as defined in the same regulation. In the case of a curtailment in operations such as that which is the subject of this appeal, 25 Pa. Code § 127.207(5)(ii) provides that the curtailment must be permanent.

BACKGROUND

This matter comes before us as an appeal filed on September 23, 1999 by North

American Refractories Company (North American) from a letter of the Department denying its application for emission reduction credits (ERCs) on the basis that its application was not filed within the time prescribed by the regulations. The central issue in this appeal is whether or not North American is entitled to ERCs as a result of the shutdown of a tunnel kiln at its brick refractory in Womelsdorf, Lebanon County. The Department takes the position that North American is not entitled to ERCs because its application was not filed within the one-year deadline required by the Department's regulations. North American argues that the Department's interpretation of its regulations is in error because the kiln was initially shut down only temporarily and its application was filed shortly after it decided the shutdown would be permanent. In the alternative, North American contends that the one-year deadline is unlawful under the Air Pollution Control Act because the one-year deadline is more stringent than required by federal law. The Board denied cross-motions for summary judgment on this important question of regulatory interpretation. *North American Refractories Company v. DEP*, EHB Docket No. 99-199-MG (Opinion issued May 23, 2000).

A hearing on the merits was held for two days on October 17-18, 2000. The parties filed an extensive stipulation of facts which was entered into evidence as Exhibit B-1. Following the hearing, the parties filed requests for findings of fact and conclusions of law and supporting legal memoranda. Additionally, the Southwestern Pennsylvania Growth Alliance filed a memorandum of law as *amicus curiae*. The record consists of a transcript of 357 pages and 26 exhibits. After a thorough review of the record we make the following:

FINDINGS OF FACT[1]

1. The Appellant is North American Refractories Company, a corporation with a manufacturing location in Womelsdorf, Lebanon County. (Notice of Appeal)

2. The Department is the agency with the duty and authority to administer and enforce the Air Pollution Control Act (APCA), Act of January 8, 1960, P.L. 2119 (1959), *as amended*, 35 P.S. §§ 4001-4106, and the regulations promulgated thereunder.

3. The Womelsdorf plant generally consists of operations that are utilized to produce refractory shapes. (Ex. B-1 ¶1)

4. Historically, operations included two tunnel kilns, eight bell kilns, and four ovens. Raw material preparation activities precede much of the operations. There are crusher screens, bins, batch cars, mixers and presses that are employed to manufacture the product before it is fired, burned or cured. The tunnel kilns were integral components of these operations, and were part of the flexible operating structure of the Womelsdorf plant that allowed it to produce many different types of products. (Ex. B-1, ¶¶3-5)

5. The Womelsdorf plant, in turn, operates as a component in the overall scheme of production and distribution of North American facilities in the U.S., Canada and worldwide. (Ex. B-1, ¶6)

6. The No. 1 tunnel kiln was constructed in 1969 and the No. 2 tunnel kiln was constructed in 1974. (Ex. B-1, ¶7)

7. Throughout the 1970's, 1980's and 1990's, it was not uncommon to have one of

[1] The Notes of Testimony are designated as "N.T."; the Appellant's exhibits as "A-__"; the Department's as "C-__."

the tunnel kilns down for several months at a time for maintenance, repairs or during times of slow business (Ex. B-1, ¶8)

8. Especially in recent times, business circumstances have dictated the hours of operation, number of batch cars and the production rate for the Womelsdorf plant. (Ex. B-1, ¶11)

9. Since the early 1990's, the refractory business has been substantially affected by the business climate for one of its largest customers – the steel industry, which has fallen victim to a prolonged "soft" market affected by, among other things, steel imports. (Ex. B-1, ¶14)

10. The No. 1 tunnel kiln was alternately up and down, for months at a stretch, from 1993 until 1997 to compensate for this market condition. (Ex. B-1, ¶15)

11. Following a restart of No. 1 tunnel kiln in March 1997, No. 2 tunnel kiln was temporarily taken down for a planned rebuild. (Ex. B-1, ¶16)

12. The rebuild of the No. 2 tunnel kiln commenced in April 1997. (Ex. B-1, ¶17)

13. Approximately 6,000 unique, specialty bricks were produced to repair the No. 2 tunnel kiln and to allow it to produce both fired alumina and fired basic products. (Ex. B-1, ¶20)

14. In July 1997, work stopped on the No. 2 tunnel kiln rebuild because it was being evaluated whether the product produced by the tunnel kilns, burned magnesia and magnesia-chromite basic brick (MGG), might be partially or totally produced at North American's Becancour, Quebec facility. (Ex. B-1, ¶21)

15. The No. 1 tunnel kiln continued to operate throughout this period. (Ex. B-1, ¶22)

16. An internal North American "Executive Summary" from November 1997 states that "[d]emand for burned basic brick (MGG) looks strong for December [1997], January and February [1998]." (Ex. B-1, ¶23; Ex. A-3)

17. The Executive Summary further provides that product lead time "is pushing 8-9 weeks" at Becancour (as compared to a more desirable 4 weeks or less lead time) and overall North American lead time, including Womelsdorf "has increased to 8 weeks." (Ex. B-1, ¶24; Ex. A-3)

18. In January 1998, North American received a fax from its Austrian parent company seeking further clarification of the rebuild cost estimate for No. 2 tunnel kiln. (Ex. B-1, ¶25; Ex. A-4)

19. Womelsdorf intended to complete the repair of the No. 2 tunnel kiln, its better kiln, to allow it to operate as efficiently as possible, for the future. (Ex. B-1, ¶26)

20. A "Product Group Detail" Report from March 1998 showed the MGG demand was still strong for April – June 1998 and increasing over the demand for the first quarter of 1998. In May 1998, one of the tunnel kilns at Becancour was shut down and both tunnel kilns were not expected to be operational until October 1998. (Ex. B-1, ¶27; Ex. A-5)

21. Actual production rates during the second quarter of 1998 at Womelsdorf exceeded the projections from March 1998 and production rates for the third quarter of 1998 were higher still for Womelsdorf. (Ex. B-1, ¶28)

22. In late Spring of 1998, it was predicted that when both kilns became operational at Becancour, at least one and likely both tunnel kilns at Womelsdorf could be idled when it was established that Becancour could, in fact, handle the total MGG capacity. (Ex. B-1, ¶29)

23. On June 10, 1998, Kim Nelson, Safety, Health and Environmental Manager, wrote a memo reflecting the understanding at that time that due to projected market conditions and for economic reasons, it then was likely that both tunnel kilns at Womelsdorf would cease operation and be torn down in October 1998. (Ex. B-1, ¶30; Ex. A-6)

24. The memo also requests permission to begin the ERC process. (Ex. B-1, ¶31)

25. In October 1998, North American decided to cancel the rebuild and permanently shut down the No. 2 tunnel kiln. North American did not make its decision to permanently shut down the No. 2 tunnel kiln until October 1998. (Ex. B-1, ¶32)

26. Since March 1997, North American's No. 2 tunnel kiln has not been operated or utilized for production of refractory bricks. (Ex. B-1, ¶33)

27. North American discussed the ERC issue with the Department and, on October 16, 1998, submitted its ERC application for the No. 2 tunnel kiln. (Ex. B-1, ¶34)

28. On August 26, 1999, the Department issued a letter denying North American's ERC application for the Womelsdorf No. 2 tunnel kiln. (Ex. B-1, ¶35)

29. The Department's letter stated that the Department was denying North American's ERC application because North American did not submit its ERC application "within one year of the initiation of an emissions reduction" for the No. 2 tunnel kiln. (Ex. B-1, ¶36)

30. Although prior regulations provided for the banking of emission reductions for the use as offsets, the current ERC regulations are an element of the New Source Review program contained in the 1990 amendments to the federal Clean Air Act. (N.T. 111-113)

31. The most basic provision of the program is that new emissions must be offset by actual reductions in emissions. Accordingly, in order to obtain authorization to operate a new source, an applicant must include ERCs in the application. (N.T. 113)

32. ERCs must be certified and registered by the Department; an emissions reduction only becomes an ERC when it is certified by the Department. (N.T. 116-117)

33. The drafters of 25 Pa. Code § 127.207 intended that the one-year prescriptive period set forth in that regulation would begin to run when a facility commits to implement an

acceptable emissions reduction technique as defined in the same regulation.

DISCUSSION

Emission reduction credits, or ERCs, are part of the Department's New Source Review (NSR) program, promulgated in response to the 1990 amendments to the federal Clean Air Act, 42 U.S.C. ¶¶ 7401-7671q. (N.T. 111) The regulations defining and regulating the use of ERCs are found in Chapter 127 of the air quality regulations. 25 Pa. Code Chapter 127. The goal of the NSR program is an overall reduction in air contaminant emissions in order to achieve attainment of air quality standards, while at the same time allowing for growth and development of emission sources. Accordingly, the program requires that new emissions be more than offset by reductions in emissions from other sources. (N.T. 112-113) This is achieved by the use of ERCs. That is, for an applicant to receive approval for a new source of air contamination, the new emissions must be offset by emission reductions, either from the applicant's own facility or from reductions purchased from another facility. *See* 25 Pa. Code § 127.205(3) and (4); 25 Pa. Code § 127.206. (N.T. 116) Reduced emissions may be made usable as an ERC by application for registration with the Department. Once registered, reductions may be used as offsets in connection with a new source or increased emissions from an existing source. 25 Pa. Code § 127.206. (N.T. 116-117)

North American shut down its kiln for a rebuild in April 1997. (Finding of Fact ("F.F.") 11-12) It stopped work on the rebuild in July of that year because the company started to question whether it really needed the kiln. (F.F. 14) It was not until October 1998 that North American decided to cancel the rebuild and permanently shut down the kiln. (F.F. 25) North American applied for ERCs for the shutdown on October 16, 1998. (F.F. 27) The Department denied the application on August 26, 1999 because it concluded that North American had not

submitted its application within one year of the initiation of the emissions reduction used to generate ERCs. (F.F. 28, 29)

The controlling regulation, 25 Pa. Code § 127.207, provides in part as follows:

> For facilities subject to this subchapter, an ERC registry application shall be submitted to the Department within 1 year of the initiation of an emissions reduction used to generate ERCs. Facilities or sources not subject to this subchapter shall submit a registry application and receive Department approval prior to the occurrence of an emissions reduction.

25 Pa. Code § 127.207(2). The North American facility is subject to the subchapter, so the first sentence applies. The Department interprets that sentence to mean that the one-year period began running the moment North American turned the kiln off in April 1997, even though the Department does not dispute that the company intended at that time to restart the kiln after a rebuild. North American interprets the regulation to mean that the one year did not begin running until it committed to make the shutdown permanent in October 1998. As a factual matter, it is undisputed that the ERC application was time-barred if the Department is right. If North American is right, the application was not time-barred.

In a case involving the interpretation of a regulation, if a regulation is clear and free from all ambiguity, the inquiry regarding its meaning is at an end. 1 Pa. C.S.A. § 1921(b). A regulation is ambiguous if it will reasonably bear two or more meanings. *Scanlon v. Department of Public Welfare, Department of Aging,* 739 A.2d 635, 638 (Pa. Cmwlth. 1999) *quoting Bethenergy Mines v. Commonwealth of Pennsylvania, Department of Environmental Protection,* 676 A.2d 711, 715 (Pa. Cmwlth. 1996). There is no question in our minds that Section 127.207 is reasonably capable of being understood in at least two different ways. The regulation could mean that *any* actual reduction in emissions triggers the one-year period. The regulation could

also mean that only an emissions reduction that may be "used to generate ERCs" triggers the one-year period. We view both interpretations advanced by the parties as reasonable. The regulation is unquestionably ambiguous, which compels us to embark on the unenviable journey of regulatory interpretation.

The Department at this point suggests that we must adopt the Department's interpretation unless it is "clearly erroneous." (DEP Brief at 28.) Such a high level of deference may be appropriate when a court of broad jurisdiction reviews the actions of a specialized agency of the executive branch. *Mathies Coal Company v. Commonwealth of Pennsylvania, Department of Environmental Resources*, 559 A.2d 506, 512 (Pa. 1989) (agency's regulatory interpretation entitled to deference "by this court"). In that setting, constitutional considerations governing the separation of powers are implicated. Such considerations, however, are not implicated here. Although the Department is an agency charged with responsibility for implementing the air pollution control laws, so is this Board. The Department's action and this Board's review of that action are part and parcel of the same administrative process, all of which precedes review by an independent judiciary. *Starr v. Department of Environmental Resources*, 607 A.2d 321, 323 (Pa. Cmwlth. 1992) (court defers to *Board's* (not Department's) regulatory interpretation).

According an extreme level of deference to the Department in interpreting regulations is also inconsistent with this Board's duty to conduct a *de novo* review. We recently explained why reviewing the Department's actions under the protective glaze of arbitrariness and caprice is inappropriate. *Smedley v. DEP*, EHB Docket No. 97-253-K (Adjudication issued February 8, 2001). It is at least equally inappropriate to defer to the legal interpretations that the Department relied upon in taking its appealable action. The Department's proposed interpretation is very important to us, but so is an appellant's or any other party's for that matter. The Department is

frequently more knowledgeable than any other party and its interpretation is entitled to great weight. But the Department is not entitled to a bye on this issue in the form of "clearly erroneous" review by this Board. To the extent we held otherwise in the past, the applicable portion of these cases are overruled.[2]

It is important to emphasize that our discussion is addressed to the *interpretation* of the regulation, not the validity or reasonableness of the regulation itself. A properly promulgated regulation is presumed valid and reasonable. *Pennsylvania Department of Health v. North Hills Passavant Hospital*, 674 A.2d 1141, 1148 (Pa. Cmwlth. 1996), *appeal denied*, 686 A.2d 1314 (1996). No such presumption must be applied by this Board to the Department's interpretation of a regulation. Similarly, a properly promulgated regulation has the force of law. *Borough of Pottstown v. Pennsylvania Municipal Retirement Board*, 712 A.2d 741, 743 (Pa. 1998). No such circumspection must be applied by this Board to the Department's interpretation of a regulation. A regulation is entitled to a presumption of validity because it has been put to the test in the context of a strenuous promulgation process that is in the nature of legislative enactment. A Departmental interpretation has undergone no such review, that is, until an appeal is brought before this Board. If this Board applies a "clearly erroneous" standard of review, the Departmental interpretation (as opposed to the regulation itself) never really undergoes much of a review at all.

In an appeal that involves regulatory interpretation, who must prove what is guided by the rules governing the allocation of the burden of proof and the substantive rules of regulatory interpretation. The Board's rules govern the burden of proof, 25 Pa. Code § 1021.101, and the

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[2] *See, e.g., PUSH v. DEP*, 1998 EHB 250, 255; *Cambria Cogen Company v. DER*, 1995 EHB 191, 205; *Ambler Borough Water Department v. DER*, 1995 EHB 11, 24; *Kise v. DER*, 1992 EHB 1580, 1616.

substantive rules of regulatory interpretation are set forth in the Statutory Construction Act, 1 Pa. C.S.A. §§ 1501-1991. *See Pennsylvania State Police v. Benny Enterprises, Inc.*, 669 A.2d 1018, 1021 (Pa. Cmwlth. 1995), *appeal denied*, 681 A.2d 1344 (1996) (rules of statutory construction apply to regulations). North American bears the burden of proving by a preponderance of the evidence that its proposed interpretation is the correct one. 25 Pa. Code § 1021.101. The object of all interpretation and construction of regulations is to ascertain and effectuate the intention of those who drafted the regulation. 1 Pa. C.S.A. § 1921(a).

In ascertaining the drafters' intent, we begin our inquiry by examining the testimony from two Department employees and the preamble to the regulations. One Department employee, John Slade, testified that he was not involved in the drafting of the regulations. (N.T. 149, 219, 244) When first asked whether he was involved in the drafting process, the other Department employee, James Salvaggio, testified: "Yes, in a broad general sense. There was staff working on the regulation changes. I was supervising that staff." (N.T. 50) When called back to the stand, however, Mr. Salvaggio added more detail about the drafting process. (N.T. 266-269, 294-297) Unfortunately, none of the testimony sheds any light on the trigger question. Mr. Salvaggio explained how the drafters discussed the need for a limitation period and selected a period of one year, but he does not testify about whether there was any specific discussion regarding when that period begins. He refers to the input of committees and members of the regulated community about whether the limitations period should be six months or one year, but not when that six months or one year begins to accumulate. We do not have any degree of comfort based upon the record before us that the various persons involved in discussions regarding the length of the limitations period during the drafting of Section 127.207 understood that the one-year period would begin upon the occurrence of absolutely any emissions reduction

instead of the initiation of an emissions reduction that is qualified to receive credits.

It is appropriate to consider a regulation's preamble in the construction thereof. 1 Pa. C.S.A. § 1924. The preamble in this matter sends conflicting signals. In support of the Department's interpretation, it provides as follows:

> The requirement in proposed § 127.207(2) that an ERC registry application be submitted prior to the initiation of the emission reduction has been revised [from the proposed regulation] to allow facilities subject to this subchapter to submit the application to the Department up to 1 year after the date actual reduction of emissions commenced.

24 Pa. Bulletin 450 (January 15, 1994).

Yet, at other places, the preamble would seem to support the opposite interpretation:

> This section [127.207] establishes requirements for the generation and creation of ERCs. The requirements include the following: that all ERCs must be surplus, permanent, quantified and Federally enforceable; that an ERC registry application must be submitted within 1 year of the emissions reduction which generates the ERCs by facilities subject to the requirements of this subchapter, and prior to the *actual* occurrence of the emissions reduction which will generate the ERCs by facilities not subject to the requirements of this subchapter....

24 Pa. Bulletin 444 (emphasis added). A facility subject to the regulatory subchapter must submit the application "within 1 year of the emissions reduction which generates the ERCs." In contrast, the trigger that applies to a facility that is not subject to the subchapter relates to the *actual* occurrence of the emissions reduction which *will* generate the ERCs. *See O'Boyles Ice Cream Island v. Commonwealth*, 605 A.2d 1301, 1302 (Pa. Cmwlth. 1992) (where specific language is included in one portion of a statute and excluded in another, the language should not be implied where excluded). We do not question that the preamble tends to support the Department's interpretation. It is not clear enough, however, to be conclusive evidence of regulatory intent. *See Commonwealth of Pennsylvania v. Campbell*, 758 A.2d 1231, 1237 (Pa.

Super. 2000) (preamble headings may be considered in construction but they are not controlling).

How the Department has actually implemented a regulation can be helpful to us in divining regulatory intent, particularly where, as here, there is some overlap between the persons who were engaged in the drafting process and those who have been involved in implementing the final result. 1 Pa. C.S.A. § 1921(c)(8). Some of the evidence shows that, in implementing the regulation, the Department has acted as if Section 127.207(2) is triggered when there is an actual shutdown. The obvious fact that the Department denied North American's application demonstrates that point. Again, however, the evidence is not entirely consistent. The Department's Southcentral Regional Office granted another application that was made more than one year after a shutdown. (N.T. 323) Although the Department now claims that it erred, there is no evidence that it took any action to rescind its earlier approval.[3] In addition, the Department's Southeast Regional Office denied an application "because the application was not submitted within one year of the *permanent* shutdown sources (emphasis added)." (Ex. C-5)

The actual testimony on this point is also not entirely consistent. At various points in his examination, Mr. Slade was asked whether the use of the term "permanent" in the regulation refers to the shutdown or the ERC itself. At one point, he answered: "Permanent is relative to the reductions in those emissions." (N.T. 138) In response to curative leading questions, Mr. Slade testified to the opposite: "Permanent is relative to credits." (N.T. 139) At a later point, in addressing the point that the distinction is not clear, he testified that "[i]t is a matter of semantics....I have attempted to explain the permanence. It all depends upon the semantics of how people say shutdown." (N.T. 197-198) We do not intend to be critical. The inconsistent implementation and confused testimony are entirely understandable given the ambiguity of the

[3] We are not suggesting that the Department is estopped or otherwise bound by its past

operative regulation. Our point is simply that this is not a case where the Department's clear and/or consistent implementation strongly compels selection of one of our interpretive choices.

We turn now to the language of the regulation on its face. Every regulation must be construed, if possible, to give effect to all of its provisions. 1 Pa. C.S.A. § 1921(a). In interpreting a regulation, it is to be presumed that every word of the regulation is intended for some purpose and, accordingly, must be given effect. *Commonwealth v. Lobiondo*, 462 A.2d 662, 664 (Pa. 1983). The phrase we are most directly called upon to interpret is "emissions reduction used to generate ERCs." 25 Pa. Code § 127.207(2). We are not called upon to define "emissions reduction." An "emissions reduction" is not the operative trigger. Pointedly, neither is an "actual emissions reduction," although that phrase was used at other places in the regulation. *See, e.g.*, 25 Pa. Code § 121.1, 127.207(5). Instead, the operative trigger relates to an "emissions reduction used to generate ERCs." It would not be appropriate for us to read "used to generate ERCs" out of the regulation. It would also not be appropriate for us to insert the modifier "actual" into the regulation when the drafters could have so easily done so themselves. *O'Boyles, supra*, 605 A.2d at 1302.

The qualifying phrase "used to generate ERCs" might be read to simply point out the obvious. For example, an emissions reduction on a company's kiln at one plant does not trigger the limitations period on applying for credit at a kiln at a different plant. We wonder whether such an obvious point needed to be made. Indeed, the point is so obvious that such a reading renders the phrase essentially redundant. Without it, the regulation would have the same meaning: "[A]n ERC registry application shall be submitted to the Department with 1 year of the initiation of an emissions reduction." We are inclined to construe the phrase in a way that makes

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mistakes. We simply refer to this incident as an example of inconsistent implementation.

it more than mere surplusage. In other words, the phrase must mean that not just any emissions reduction will trigger the limitations period. Only an emissions reduction that is "used to generate ERCs" will do.

The Department argues strongly that we should not view Section 127.207(2) in isolation. We could not agree more. *Smith v. Mitchell*, 616 A.2d 17, 20 (Pa. Super. 1992) (sections of regulations must be construed with reference to the entire regulation). At a minimum, in struggling to impart meaning to the phrase "used to generate ERCs," we need to look at all of Section 127.207, not just subsection (2).

In doing so, our attention is immediately drawn to Subsection (5) of the regulation. That subsection states that not every emission reduction technique is eligible for generating ERCs. In order for a curtailment in production or operating hours to be eligible for credit, it must be "permanent." 25 Pa. Code § 127.207(5)(ii). Reading Section 127.207 as a whole, it is only natural to conclude that applying for credit for an unacceptable reduction technique would be a fruitless act, and the regulation cannot possibly compel such an act. Rather, when Sections 127.207(2) and 127.207(5) are read together, an emission reduction that may be "used to generate ERCs" as described in subsection (2) results from a "*permanent* curtailment in production or operating hours." § 127.207(5)(ii) (emphasis added). A temporary curtailment is not an "acceptable emissions reduction technique," so it is not "emissions reduction" that can ever be "used to generate ERCs." If it can never be used to support an application for ERCs, it is not justifiable to say that it can act as a trigger to file an application requirement. A much more cohesive reading of the regulation suggests that only an eligible reduction technique as defined in subsection (5) can trigger a need to apply for credit. *See Pennsylvania State Police, Bureau of Liquor Control Enforcement v. Beer & Pop Warehouse, Inc.*, 603 A.2d 284, 287 (Pa. Cmwlth.

1992) (sections of statute must be construed with reference to the entire statute even if the section makes no specific reference to another section).

The Department relies quite heavily upon 25 Pa. Code § 127.215 in support of its interpretation. Section 127.215 describes the conditions that must be met if a facility wishes to deactivate a source for a year or more and retain the right to reactivate the source without needing to undergo new source review. The facility must, within one year of the deactivation, submit and implement a maintenance plan. 25 Pa. Code § 127.215(a)(1). The facility must also submit a notice to the Department within one year of deactivation "requesting preservation of the emissions in the inventory *and indicating the intent to reactivate the facility.*" 25 Pa. Code § 127.215(a)(3) (emphasis added). The Department places particular reliance on subsection (c): "For a facility which is deactivated in accordance with subsection (a) [outlining the conditions for an approvable deactivation], ERCs may be created only if an ERC registry application is filed within 1 year of deactivation." 25 Pa. Code § 127.215(c). Thus, subsection (c) is limited to "a facility which is deactivated in accordance with subsection (a)." For such facilities, "ERCs may be created only if an ERC registry application is filed within 1 year of deactivation."

Subsection (a) of 127.215 states that the regulation only applies to "[a] facility which has been out of operation or production for 1 year or more." Under the Department's interpretation of Section 127.207, however, a facility that is out of operation for at least one year will have forfeited its right to obtain ERCs. Therefore, to imply in subsection (c) that a facility that is out of operation for at least a year has *any* opportunity to obtain ERCs is, at best, misleading. In point of fact, the *effect* of subsection (c) is that a facility that wishes to deactivate and retain the right to reopen without undergoing new source review must forfeit its rights to ever obtain ERCs for the present or any future reduction of the same emissions. In the alternative, a facility can

file for ERCs and forever forfeit its right to reopen without undergoing new source review. We cannot imagine why this Hobson's choice was not clearly spelled out for the benefit of both the regulators and the regulated community. The validity of Section 127.215, however, is not presented in this appeal because North American did not apply for deactivation. 25 Pa. Code § 127.215(c) (subsection only applies to "a facility which is deactivated"). For current purposes, we conclude that Section 127.215 only adds further confusion to an already complex issue.

It is also of little use as an interpretative aid. Subsection (c) purportedly sets a deadline for filing an ERC application that is triggered by "deactivation." Deactivation, frustratingly, is not defined. Subsection (c) could have used the same language that was used to describe the trigger in Section 127.207. Furthermore, because Section 127.215 only relates to facilities that are deactivated "in accordance with subsection (a)," and subsection (a) requires, *inter alia*, filing a maintenance plan, subsection (c) arguably does not begin to run until that maintenance plan is submitted, which can be up to 364 days after an actual shutdown. Section 127.215(a)(1). Thus, Section 127.215 does nothing to help us clear up the meaning of Section 127.207.

In searching for other regulatory clues, the parties argue the significance of the fact that a source may apply for credits for a future emissions reduction. 25 Pa. Code § 127.207(3)(iii). The fact that a facility *can* file an application before a shutdown does not help in determining when it *must* file. If anything, Subsection 127.207(3) suggests that it is the *commitment to permanence* that controls. In other words, a source does not need to shut down – permanently or otherwise – before it applies for credits. The Department will accept the application so long as there is a promise of a permanent shutdown. (Of course, the credits cannot be registered until the shutdown is realized and permanent. 25 Pa. Code § 127.207(1).) In contrast, a commitment to a temporary shutdown would obviously be meaningless. An actual temporary shutdown – *without*

a commitment of permanence – should be equally meaningless.

The Department also refers us to the definition of "generation." The object of that term as it is used in Section 127.207(2) is the ERCs: "initiation of an emissions reduction used to generate ERCs." "Generation" is defined as "[a]n action taken by a source or facility that results in the actual reduction of emissions." 25 Pa. Code § 121.1. This definition of generation cannot be said to apply to the generation of ERCs because ERCs are clearly not created simply by an actual reduction. They are only created after the Department registers them after numerous criteria have been satisfied. 25 Pa. Code § 127.207. Had the term been used to relate to the emissions reduction instead of the ERCs, it might have been more significant.

In short, we believe that the best reading of the language of Section 127.207 on its face and viewed in its proper context is that the "initiation of an emissions reduction used to generate ERCs" does not occur until the applicant commits to employ an "acceptable emissions reduction technique." In the case of curtailments, that entails a commitment that the curtailment is "permanent." 25 Pa. Code § 127.207(5)(ii). Any other reading compels a facility to perform the senseless act of filing an application that is doomed to failure.

Whenever possible, we must presume that the regulatory drafters did not intend a result that is absurd, impossible of execution, or unreasonable. 1 Pa. C.S.A. § 1922(1); *See New Bethlehem Volunteer Fire Co. v. Workmen's Compensation Appeal Bd.*, 654 A.2d 267, 270 (Pa. Cmwlth. 1995), *appeal denied,* 668 A.2d 1140 (Pa. 1995). It is arguably unreasonable to suggest that the period within which a facility must file an application is ticking away when the facility could not possibly file a successful application. The time should only begin running once a source initiates emission reductions that are capable of supporting an application for credits. If a reduction is not eligible, it is not reasonable to conclude that it triggers a limitations period.

The limitations period created in 25 Pa. Code § 127.207(2) is analogous to other statutes of limitation. It is a basic tenant of law that a cause of action does not accrue, and that, therefore, a statute of limitations does not begin to run, until a party can first maintain an action to a successful conclusion. *Stonehouse v. City of Pittsburgh*, 675 A.2d 1305, 1308 (Pa. Cmwlth. 1996); *Saft v. Upper Dublin Twp.*, 636 A.2d 284, 286 (Pa. Cmwlth. 1993); *Westinghouse Electric Corp. v. DEP*, 1996 EHB 1144, 1200, *aff'd*, 705 A.2d 1349 (Pa. Cmwlth. 1998). A party who reduces emissions as a result of a temporary shutdown is not capable of pursuing a credit application to a successful conclusion. It is only when the emission reduction would support an application that could be maintained to a successful conclusion that the duty to file should accrue.

The Department's proposed interpretation raises practical problems which we suspect the drafters would not have intended. Reading the regulation to mean that literally any reduction in emissions triggers the limitations period would suggest that the one-year period starts running every time the switch is thrown to the off position on a covered source. It is difficult to accept that the Environmental Quality Board intended such a casual trigger. A more meaningful "reduction" is in order. Indeed, the term "reduction" seems to connote something more than a temporary suspension of emissions. A statute of limitations limiting important benefits that would otherwise be available but for the passage of time should not be said to begin running every time there is even the slightest temporary change in status.

If the limitations period begins running when any emissions reduction occurs, as the Department contends, it is not clear whether it is merely tolled when the curtailment or shutdown ends, or whether the limitations period begins anew with each curtailment. Section 127.207(2) certainly does not specify that the curtailment must be continuous. It simply provides that the

limitations period begins with the "initiation" of the specified event. These sorts of questions do not arise if Section 127.207(2) is interpreted to be limited to permanent curtailments.

The Department is concerned that requiring a curtailment to be permanent inserts an element of intentionality into the process, which makes it easy to avoid operation of the limitations period. First, we suspect that there is a very small set of cases where there will be any question regarding permanence. If a kiln is demolished, there will be no debate regarding the permanence of the reduction.

Thinking of the distinction between permanent and temporary curtailment in terms of intent tends to confuse the issue and makes it sound like more of a subjective determination than it really is. It is better to think of the distinction in terms of commitment. Unless an owner is willing to commit not to turn a source back on, there is no permanent reduction. Commitment may be demonstrated by word (e.g. sworn affidavits, permit conditions) or deed (e.g. demolish the source). No mind reading is required. In any event, both the Department and this Board are required on nearly a daily basis to divine intent. (Coincidentally, this very appeal involves an investigation of intent.) Aside from direct testimony, sworn affidavits, and the like, circumstantial evidence can provide evidence regarding true intent. In this case, for example, the Department has never contested the fact that North American originally planned to restart the kiln in question. (Stip. 17, 18, 20) If there ever is a dispute about when a given curtailment is permanent, this Board is certainly available to review that determination.

Finally, in interpreting a regulation, we are required to consider the following:

- The occasion and necessity for the regulation;
- The circumstances under which it was promulgated;
- The mischief to be remedied;

- The object to be attained; and
- The consequences of a particular interpretation.

1 Pa. C.S.A. § 1921(c). *Department of Environmental Resources v. PBS Coals*, 677 A.2d 868, 873 (Pa. Cmwlth. 1996), *appeal denied*, 686 A.2d 1313 (1996), (intent to be ascertained by considering the necessity for and circumstances surrounding enactments, the evil to be remedied, and the object to be attained).

The one-year deadline is one small aspect of the Department's ERC program. It is easy for the parties to conclude, as we do, that an interpretation that favors the creation of ERCs should be favored. As expressed by *amicus curiae* Southwestern Pennsylvania Growth Alliance:

> It is important to recognize that an ERC is not just another piece of paper in the overall system for regulating emissions. It is the key that opens the door to location and expansion in Pennsylvania for large manufacturing firms that require ERCs under new source review regulations. If a firm cannot find sufficient ERCs to cover its planned emissions, it will not receive permission to operate in Pennsylvania. When the Department denies ERCs to a company which is seeking to create them, it may well be denying jobs to Pennsylvanians by making it impossible for another business to find the ERCs it needs to locate or expand in the state.

(Post-Hearing Brief at 5)

The Departmental witnesses conceded that inhibiting the creation of ERCs is counterproductive to the environment. For example, Mr. Slade testified as follows:

> Q: Would the inhibiting of the generation of ERCs be counterproductive to the environment?
>
> A: Inhibiting ERCs would be counterproductive to the environment. The entire NSR ERC program envisions the fact that if someone brings on a new source or a modified source and increases emissions, they more than offset their new emissions with reductions that are more.
>
> There's an offset ratio and there are different ratios for

different parts of the state. So that a source coming in under the New Source Review program that provides offsets is actually providing reductions beyond the level at which they are going to increase [emissions]. There is definitely a benefit to a New Source Review and ERC Program.

(N.T. 188) He also testified:

Q. The point I'm trying to make, I want to make sure you agree with this, is that through the New Source Review Program, when emission reduction credits are used, there is a net environmental improvement because the facility has to both implement the lowest achievable emission reduction technology in existence, which obviously is lower than anything else that's out there, and also there's a minimum of a 1.15 to 1 ratio, and sometimes a higher ratio, that is utilized so that 115 tons of ERCs would not be purchased for 100-ton source. Is that correct?

A. Yes.

Q. So there's a net environmental improvement overall. It's not a one-for-one. It is not a complete wash when these ERCs are used for new sources. Right?

A. Right.

(N.T. 232)

Where the parties split company is whether the Department's proposed interpretation of the one-year deadline results in the creation of more ERCs than North American's interpretation. The Department contends that the deadline effectively forces companies to create ERCs that might not otherwise be created. Its contention is supported by logic, but it is not supported by statistical analysis, anecdotal evidence, or any other proof on the record. On the other hand, the very fact of this appeal shows that some valuable ERCs that would otherwise have been available are lost solely because of the Department's strict interpretation of the deadline. The Department's position is theoretical on this point; North American's is painfully real.

In sum, we have examined the language of the regulation and related regulations,

inconclusive testimony regarding the drafting process, the inconsistent implementation of the regulation, conflicting signals sent by the preamble, the background and purposes behind promulgating the regulation, and considerations of reasonableness and common sense. Based upon the totality of the evidence, we conclude that North American has proven by a preponderance of the evidence that the one-year prescriptive period set forth in 25 Pa. Code § 127.207(2) should be interpreted to begin to run when a facility commits to employ an acceptable emissions reduction technique as defined in 25 Pa. Code § 127.207(5). It is undisputed that North American applied for credit within one year of its commitment to initiate an emissions reduction technique that would support a successful ERC application. Accordingly, the Department erred in denying the application as time-barred. Our conclusion means that we need not reach North American's argument that the regulation is invalid on its face.

CONCLUSIONS OF LAW

1. North American bears the burden of proof. 25 Pa. Code § 1021.101(c)(1).

2. "An emissions reduction used to generate ERCs" as that phrase is used in Section 127.207 is initiated at the time the operator commits to employ an "acceptable emissions reduction technique" as defined in 25 Pa. Code § 127.207(5).

3. The Department improperly denied North American's application for ERCs as time-barred.

We, therefore, enter the following Order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

NORTH AMERICAN REFRACTORIES COMPANY	:	
v.	:	EHB Docket No. 99-199-MG
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	Issued: May 8, 2001

ORDER

AND NOW, this 8th day of May, 2001, North American Refractories Company's appeal is **SUSTAINED**. North American's ERC registry application is remanded to the Department for consideration on its merits.

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

Chairman George J. Miller's dissenting opinion and Administrative Law Judge Michael L. Krancer's dissenting opinion are attached.

DATED: **May 8, 2001**

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

NORTH AMERICAN REFRACTORIES COMPANY	:	
v.	:	EHB Docket No. 99-199-MG
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	Issued: May 8, 2001

DISSENTING OPINION OF ADMINISTRATIVE LAW JUDGE, GEORGE J. MILLER

I respectfully disagree with the majority of the Board's interpretation of the Department's regulations in this case that will require the Department to register applications for emission reduction credits (ERC's) no matter when the reduction in emissions on which the application is based was initiated. I believe the plain language of the regulations means that an application for an ERC must be filed one year after the initiation of the emission reduction on which the application is based. This is the Department's interpretation and I believe the law requires the Board to give deference to the Department's interpretation of its own regulations unless that interpretation is inconsistent with the language used in the Department's regulations. *Concerned Residents of the Yough, Inc. v. Department of Environmental Resources,* 670 A.2d 1120 (Pa. 1995).

As indicated in the Adjudication, the Department relies on section 127.207(2) which states "ERC registry application shall be submitted to the Department within 1 year of the initiation of an emissions reduction used to generate ERC's." 25 Pa. Code § 127.207(2). Because this section of the regulation specifically deals with when an ERC application must be filed, I would not look to more general provisions in the Department's regulations to contradict

that plain English provision.

At the time of the hearing I believed that the regulations provided that the reduction in emissions be permanent before an emission reduction could qualify for its registration as an ERC. That impression was based on an inadequate reading of section 127.207 (1) of the Department's regulations which states that ERC's shall be "surplus, *permanent*, quantified and Federally enforceable." *(emphasis supplied)* However, a close reading of the definition of "permanent" contained in subpart (ii) of that regulation makes it clear that "permanent" relates not to the emission reduction but to the ERC. 25 Pa. Code § 127.207(1)(ii). This concept of permanence is that the reduction must be federally enforceable through an operating permit or a SIP revision and assured for the life of the increase in emissions that the ERC is used to offset.[4]

The majority of the Board, by contrast, finds a concept of permanence in section 127.207(5). I believe that this subsection describes only the types of emission reduction techniques that might be used as a basis for an ERC application, but does not deal with *when* the application for an ERC based on one of these techniques must be filed. The majority focuses on subpart (ii) which applies to a "[p]ermanent curtailment in production or operating hours of an existing operating facility." 25 Pa. Code § 127.207(5)(ii). However, this section means that if a facility wants to decrease its production or hours of operation and apply for an ERC measured by the amount of the decrease, it may do so by making the curtailment permanent in nature by a permit provision or SIP amendment. The word "curtailment" is generally accepted to mean a reduction in part. I believe a proper interpretation of the Department's regulations is that this

[4] A SIP revision is a change in the State Implementation Plan which states are required to submit to the EPA for approval. The SIP includes the state's air pollution control statute, the regulations thereunder, existing permits and other matters which the state submits to EPA to persuade EPA that the state's program is adequate to attain EPA's National Ambient Air Quality Standards. Some, but not all, changes in permits for "major sources" must be approved by EPA

case involves a *shutdown* of a facility, not a *curtailment* of the operations of a facility. Accordingly, the use of the word "permanent" as a condition of a partial reduction in operations cannot reasonably be used as a basis for interpreting the Department's regulations with respect to a shutdown to mean that the application need not be filed until after the facility's owners or operators decide that the shutdown is permanent.

Secondly, I believe that we are required to give deference to the Department's interpretation of these regulations in this case. At best the majority's interpretation of these regulations is no more than an acceptable alternate interpretation. Nothing in the majority's discussion persuades me that the Department's interpretation is contrary to the plain meaning of the words used in the regulation. As President Judge Doyle said in *Tri-State Transfer Company v. Department of Environmental Protection*, 722 A.2d 1129 (Pa. Cmwlth. 1999), "An administrative agency's interpretation of its own regulations is to be given great weight unless the interpretation is plainly erroneous or inconsistent with the regulations." 722 A.2d at 1133. In that case the Commonwealth Court affirmed our order primarily because the Department's interpretation was contrary to the "plain language" of the Department's regulations. This principle of deference to the Department's interpretation of the regulations in absence of any contrary provision in the Department's regulations has also been accepted in a number of previous court decisions. *See, e.g., Mathies Coal Co. v. Department of Environmental Resources*, 559 A.2d 506 (Pa. 1989); *Hatchard v. Department of Environmental Resources*, 612 A.2d 621 (Pa. Cmwlth. 1992).

Beyond the plain language of the regulations, there is good reason to give deference to the Department's interpretation in this case. It is the Department's air quality personnel who

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through a SIP revision so that they will be federally enforceable.

have the responsibility of seeing that the Commonwealth is able to attain the National Ambient Air Quality Standards (NAAQS). The Director of the Department's Bureau of Air Quality Control, James Salvaggio, testified that the adoption of the one-year rule as interpreted by the Department was necessary to enable the Commonwealth to attain the NAAQS as required by the federal Clean Air Act.[5] Since he is familiar on a day-to-day basis with the emission inventory reports filed by industry, the need for additional emission reductions to meet EPA requirements, and the available technology required to advance the improvement of air quality in Pennsylvania, I believe that the legally, but not technically, trained members of the Board should give his interpretation considerable deference. By contrast, the legally trained members of this Board may be better equipped to understand the language used in provisions of the regulations which might be contrary to the Department's more policy-oriented interpretation. However, I find no such provision in the Department's regulations that would allow the Board to strike down the Department's interpretation.

Finally, to the extent that the majority's interpretation may be inspired by the belief that one year is an unreasonably restrictive time frame for an operator to decide on the permanence of a reduction, I think that belief is misguided when weighed with other considerations which are part of the Department's policy. As Mr. Salvaggio testified, the grant of an untimely ERC is likely to mean that some other Pennsylvania company's permit must be made more restrictive.[6] In addition, the importance to all businesses of Pennsylvania's attainment of the NAAQS cannot be over emphasized. Until those standards are attained, the location of new business operations and the expansion of existing businesses in Pennsylvania will be strongly discouraged.

Pennsylvania companies are not the only business concerns that must contribute to the

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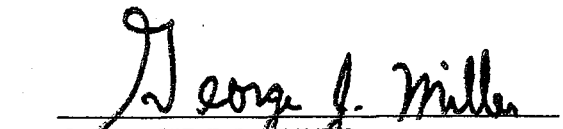
[5] N.T. 293, 295.

effort to attain the NAAQS. A major part of the Department's and EPA's effort is to enable Pennsylvania and other states in the northeastern section of the United States to attain the NAAQS is to require power utilities in the mid-west to spend millions of dollars for additional pollution controls to reduce their emissions of nitrous oxides. This is being done under so-called SIP calls[7] by EPA requiring certain states in the mid-west to present plans for EPA's approval to reduce these emissions because emissions from these facilities contribute to ozone nonattainment in Pennsylvania and other states in the northeast region. *See Michigan v. EPA*, 213 F.3d 663 (D.C. Cir. 2000), *cert. denied*, 2001 U.S. LEXIS 1991-1993. (U.S. March 5, 2001) If this financial commitment by out-of-state businesses is necessary to reach attainment in Pennsylvania, it is hardly unreasonable to require domestic Pennsylvania companies that desire to register an ERC to decide whether to apply for an ERC within one year of the shutdown of a facility by deciding in that one year that the shutdown will be permanent.

ENVIRONMENTAL HEARING BOARD



GEORGE J. MILLER
Administrative Law Judge
Chairman

DATED: May 8, 2001

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[6] N.T. 285.

[7] A SIP call is a requirement from EPA that the state revise its SIP usually to impose more stringent air pollution requirements. The SIP calls referred to here require some mid-western states to impose more stringent requirements for emissions of nitrous oxides by power utilities in those states. They are commonly referred to as the NOx SIP calls.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

NORTH AMERICAN REFRACTORIES COMPANY	:	
v.	:	EHB Docket No. 99-199-MG
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	Issued: May 8, 2001

DISSENTING OPINION OF ADMINISTRATIVE LAW JUDGE, MICHAEL L. KRANCER

I respectfully dissent from the majority opinion.

The salient point about the ERC regulations under review in this case is that they are subject to two interpretations, both of which are logical and plausible. On that point there can be no doubt after the presentations of both parties during summary judgment practice, the trial, and post hearing-briefing to which the voice of *Amicus* Southwestern Pennsylvania Growth Alliance was added. The majority opinion and dissenting opinion of Judge Miller, each taking the opposite view of the regulatory interpretation question, are the final testaments that neither of the conflicting interpretations of the ERC regulations is flawed in any significant way. Indeed, the majority opinion acknowledges that both interpretations advanced by the parties are reasonable.

I think that the Department's evidence, arguments and briefing on the question make out a plausible, convincing and persuasive case. I think the same about NARCO. Both theses have strong points and weak points. Importantly, my view is that this is not a case where the two competing interpretations are both reasonable but one is substantially or even noticeably more convincing or logical than the other. All litigants and authors in this case, *including the majority and Judge Miller's dissent*, have been able to produce equally plausible, convincing and

persuasive arguments in support of one or the other interpretation of the ERC regulation.

With that backdrop, I have to agree with Judge Miller's dissent that the Department's interpretation of these regulations ought to win the day. I base my conclusion on my view that NARCO, under these circumstances, has not satisfied its burden of proof as set forth in 25 Pa. Code § 1021.101. Under 25 Pa. Code § 1021.101, the Department is the "king of the hill" going into the proceeding because NARCO has the burden of proving that its position is correct and the Department's is incorrect. Under the circumstances here, I do not think that NARCO has knocked the Department off the top of the hill. After my study of the record in this case, and upon assigning a perceptible positive weight to the Department's interpretation of the regulation to the balance, I cannot conclude that NARCO has succeeded in demonstrating the affirmative that its interpretation is correct and the Department's is wrong.

I do not view this case as having to present the issue of whether the Department's interpretation is to be accorded "extreme deference", or some other standard of deference, which is the focus of critical portions of both the majority opinion and the dissenting opinion of Judge Miller. When, as here, the regulatory interpretation question is so excruciatingly close, as even the majority concedes it is, and when both interpretations are reasonable, as the majority also concedes, if the Department's interpretation is to be accorded *any weight at all* in our processing of the evidence, then the conclusion has to be that the party with the burden of proof, NARCO in this case, has not succeeded in affirmatively proving that its position is the correct one and the Department's is the incorrect one.

I think that the majority, in defending with such zeal its declination to accord "*extreme deference*" to the Department's interpretation, has actually gone to the opposite extreme and, in effect, counts the Department's interpretation for nothing. The majority *says* that the

Department's interpretation "is very important to us" and that the Department's interpretation of its regulations, because it is frequently more knowledgeable than any other party about its regulations, is entitled to great weight. But then, in its actual discussion of what factors were being considered and weighed to arrive at the conclusion that NARCO has succeeded in presenting the preponderance of the evidence, it seems to me that the Department's interpretation was accorded no weight whatsoever in the analysis of whether NARCO satisfied its burden under 25 Pa. Code § 1021.101. While the Department's witnesses and their testimony is discussed by the majority, what is absent is any perceptible factor of *crediting* of the Department's interpretation of the regulation on the Department's side of the 25 Pa. Code § 1021.101 balance scale. Given the extraordinary closeness of the regulatory interpretation question, even if this factor is only accorded the weight of a feather, the conclusion is inescapable that NARCO could not have tipped that scale its favor. Actually, with that feather on the Department's side, the scale probably tips in its favor. The Department may feel it should like a recount because it clearly appears that the Department's interpretation was the subject of an "undercount" on the majority's 25 Pa. Code § 1021.101 tally sheet.

I certainly would not consider this as an occasion to overrule any Board cases on the subject of the role of the Department's interpretation of its regulations as the majority has done. As I mentioned, those cases need not be assigned such a pivotal role in this case such that they have to be either overruled or reaffirmed. The concept of "extreme deference" or any other degree of deference aside, if the Department's interpretation were given *any weight at all* then NARCO could not prevail. Not even NARCO asked us to overrule any Board precedent. Also, the Board cases which the majority is overruling rely on Commonwealth Court precedent as their underpinning. In addition, the Department was never provided an opportunity to brief the

question of whether *any* Board cases should be overruled, let alone cases which are of such obvious and substantial importance to it. The Department was thus never provided the opportunity to argue to us that the cases which the majority overrules ought not be overruled and to persuade us not to do so.

Substantively, I cannot even agree that the majority's reasoning in support of its overruling of the cases they do is sound. To say that *Starr v. Department of Environmental Resources*, 607 A.2d 321, 323 (Pa. Cmwlth. 1992), stands for the proposition that the Commonwealth Court has endorsed an approach that "it defers to the *Board's*—not the Department's--regulatory interpretation" is not only beside the point but, in my view, not a fair statement of the holding in *Starr*. This characterization of *Starr* is provided in a parenthetical citation to the case without any discussion of that case. *Starr*, in my view, does not mean that the *Board's* interpretation is to be given deference *and that the Department's is not*. In *Starr*, the Commonwealth Court upheld a decision of the Board *which upheld* the Department's interpretation of a regulation. Obviously, then, the Commonwealth Court was upholding a decision by the Board with respect to the interpretation of a regulation. But we were upholding the interpretation given to the regulation *by the Department*. The majority ignores that aspect of the *Starr* decision.

The Commonwealth Court stated in its opinion in *Starr* that "the construction given a statute by those charged with its execution and application is entitled to great weight and should not be disregarded unless it is clear that the agency's interpretation is incorrect." *Starr, supra* at 323 *citing T.R.A.S.H. v. Department of Environmental Resources*, 574 A.2d 721, *appeal denied*, 598 A.2d 429 (1990); *Slovak-American Citizens' Club of Oakview v. Pennsylvania Liquor Control Board*, 549 A.2d 251 (1988). It is clear from the context of this statement by the

Commonwealth Court that it was referring to *the Department's* interpretation of the regulation in question. The Commonwealth Court's reference to the *T.R.A.S.H.* case confirms that. *T.R.A.S.H.*, like *Starr*, was a case up on review from the Board to the Commonwealth Court. In *T.R.A.S.H.*, the Commonwealth Court was specifically referring to *the Department's* interpretation of a regulation. This is clear because the Court said, "[b]ecause *DER's* interpretation of its regulations carries controlling weight and because § 127.83 authorizes the supplementing of the BAT definition by the PSD's BACT definition, DER did not commit an error of law in considering the definition of BACT when drafting the BAT Guidance document." *T.R.A.S.H.*, *supra*, at 724 (emphasis added).

Thus, to transmigrate *Starr* into supporting the notion that the Commonwealth Court defers to the Board's interpretation of regulations *and not the Department's* is not right. The majority's statement in the portion of the opinion which contains the parenthetical cite of the *Starr* case that the Board, also, is an agency charged with the responsibility for implementing the air pollution control laws not only does not support that majority's use of *Starr*, but does not seem strictly correct to me. First, even if the Board were "an agency charged with the responsibility for implementation of the air pollution control laws", thus, ostensibly, bringing the Board within the statement in *Starr* that "the construction given a statute by those charged with its execution and application is entitled to great weight and should not be disregarded unless it is clear that the agency's interpretation is incorrect", that does not mean that the Department of Environmental Protection *is not also* an agency which fits that description. Secondly, the Environmental Hearing Board Act dictates not that the Board is responsible for implementing statutory or regulatory programs but it is responsible for reviewing actions of the Department of Environmental Protection. Nor does the Air Pollution Control Act provide that the Board is the

agency which executes and implements its provisions. The Board does nothing with respect to the Air Pollution Control Act except in the context of appeals from decisions of the Department involving its implementation and execution of the Act. The two concepts—execution and implementation of an act and reviewing decisions by the Department--are perhaps related but they are not the same in my mind. The bottom line is that the *Starr* case does not stand for the proposition that the Department's interpretation of environmental regulation is to be accorded no deference.

Our *Smedley* case likewise does not support the conclusion that the Department's interpretation of environmental regulations is not to be accorded any weight in our consideration. The portion of the case being relied on by the majority did not deal with the question of what weight the Board would assign to the Department's interpretation of environmental regulations. *Smedley* explained that, as to our standard of review of a Department action, the action as a whole cannot be accorded an elevated, virtually impregnable, standard of protection which would insulate it from being overturned absent a showing of some extreme error. Thus, an appellant who has the burden of proof must present a preponderance of the evidence, meaning just greater than 50%, not an evidentiary "supermajority" of some prescribed magnitude more than just greater than 50%. The *Smedley* case did not deal specifically with what weight should be accorded to the factor of the Department's interpretation of a regulation in our review of all of the pieces of evidence in play in a case to determine the quantity of evidence each side has on its side of the balance scale at the end of the day. In this case, that means what weight should be accorded to the Department's interpretation of the ERC regulations in our analysis of whether NARCO is at 50% of the evidence or whether it is at that hair above 50%. As I have mentioned, I think that weight ought to be above zero and if it is then NARCO could not have greater than

50% of the evidence on its side at the end of our day.

For those reasons, I respectfully dissent.

ENVIRONMENTAL HEARING BOARD

MICHAEL L. KRANCER
Administrative Law Judge
Member

DATED: May 8, 2001

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

BITUMINOUS PROCESSING CO., INC.	:	
	:	
v.	:	**EHB Docket No. 99-172-L**
	:	**(consolidated with 2000-129-L)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: May 9, 2001**
	:	

ADJUDICATION

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

Synopsis:

The Board upholds the Department's suspension of a mining company's surface mining permit and the Department's forfeiture of its bonds where the company stipulates, among other things, that it failed to reclaim its mining site in violation of the Surface Mining Act, the Clean Streams Law, orders of the Department, and the terms of its permit.

Introduction

On July 13, 1999, the Department of Environmental Protection (the "Department") suspended a surface mining permit issued to Bituminous Processing, Inc. ("Bituminous Processing") for a surface coal mine and coal preparation facility in South Huntington Township, Westmoreland County. On May 3, 2000, the Department forfeited the bonds that were issued for the site. Bituminous Processing appealed both of these Departmental actions, and this Board consolidated the two appeals. At both parties' request, the Board adjudicates this appeal on a stipulated record of the facts in lieu of a hearing on the merits.

FINDINGS OF FACT

1. The Department is the executive agency of the Commonwealth with the duty and authority to administer and enforce the Surface Mining Conservation and Reclamation Act, Act of May 31, 1945, P.L. 1198, *as amended*, 52 P.S. §§1396.1-1396.19a (the "Surface Mining Act"); the Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §§ 691.1-691.1001 (the "Clean Streams Law"); Section 1917-A of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, *as amended*, 71 P.S. § 510-17 (the "Administrative Code"); and the rules and regulations promulgated at Title 25 of the Pennsylvania Code. (Joint Stipulation [hereinafter "Stip."] 1.)

2. Bituminous Processing is a Pennsylvania corporation whose business includes the mining of coal by the surface method and the chemical or physical processing and cleaning of coal and coke materials ("coal preparation"). (Stip. 2.)

3. Bituminous Processing is the owner and operator of a surface mining site and coal preparation facility located near the intersection of Interstate 70 and State Route 31 in South Huntington Township, Westmoreland County (the "Wyano Strip"). (Stip. 3.)

4. On June 17, 1993, the Department issued Surface Mining Permit Number 65920108 to Bituminous Processing authorizing surface mining of the Redstone Coal Seam and coal preparation activities at the Wyano Strip. (Stip. 6.)

5. At some point between January 1994 and December 1997, Bituminous Processing discontinued mining and coal preparation activities at the Wyano Strip. (Stip. 7.)

6. On April 6, 1998, Bituminous Processing submitted a permit renewal application. (Stip. 8.)

7. SMP No. 65920108 expired on June 17, 1998. (Stip. 9.)

8. On December 14, 1998, the Department and Bituminous Processing entered into a consent assessment of civil penalty in the amount of $10,537 for Bituminous Processing's failure to promptly reclaim the Wyano Strip and failure to comply with a Department order directing reclamation. (Stip. 10; Joint Stipulated Exhibit [hereinafter "Exh."] 3.)

9. The consent assessment set forth a schedule for Bituminous Processing's payment of the civil penalty on a monthly basis beginning on December 1, 1998 and ending on October 1, 1999. (Stip. 11; Exh. 3.)

10. On March 17, 1999, the Department renewed Bituminous Processing's permit, but specified that it was being issued for reclamation only, at SMP No. 65920108R. (Stip. 12; Exh. 1.)

11. The issuance of SMP No. 65920108R was conditioned upon Bituminous Processing's continued compliance with the payment agreement contained in the consent assessment. (Stip. 13; Exh. 1, Part B, Special Condition No. 11.)

12. Bituminous Processing did not appeal the March 17, 1999 renewal of its permit to this Board. (Stip. 14; Exh. 2.)

13. Bituminous Processing discontinued payments under the consent assessment as of May 1, 1999 after paying only $4,537 of the $10,537 civil penalty. (Stip. 15.)

14. On or about May 11, 1999 the Department issued Compliance Order Number 991037 ("C.O. 991037") to Bituminous Processing. (Stip. 16; Exh. 5.)

15. Bituminous Processing did not appeal C.O. 991037 to this Board. (Stip. 17).

16. In C.O. 991037, the Department found that Bituminous Processing failed to promptly reclaim all disturbed areas of the Wyano Strip in accordance with the approved reclamation plan in violation of 25 Pa. Code § 87.140 and directed Bituminous Processing to

reclaim all disturbed areas of the Wyano Strip in accordance with the approved reclamation plan by June 2, 1999. (Stip. 18; Exh. 5.)

17. After issuance of C.O. 991037, Bituminous Processing undertook no reclamation activity in an attempt to comply with the order. (Stip. 19.)

18. On or about June 9, 1999, the Department issued Compliance Order Number 991057 ("C.O. 991057") to Bituminous Processing. (Stip. 20; Exh. 7.)

19. Bituminous Processing did not appeal C.O. 991057 to this Board. (Stip. 21; Exh. 8.)

20. In C.O. 991057, the Department found that Bituminous Processing failed to comply with C.O. 991037 in violation of Section 18f of the Surface Mining Act, 52 P.S. §1396.18f, and Section 611 of the Clean Streams Law, 35 P.S. §691.611, and directed Bituminous Processing to immediately comply with C.O. 991037 by reclaiming the Wyano Strip. (Stip. 22; Exh. 7.)

21. Bituminous Processing failed to reclaim the Wyano Strip following the issuance of C.O. 991057. (Stip. 23.)

22. Bituminous Processing has not reclaimed all areas of the Wyano Strip that were disturbed by its mining activities in accordance with the rules and regulations and the approved reclamation plan authorized under SMP 65920108 and SMP 65920108R. (Stip. 24.)

23. On July 13, 1999, the Department suspended Bituminous Processing's permit based on the violations set forth in C.O. 991037 and C.O. 991057. (Stip. 25; Exh. 10.)

24. On September 10, 1999, the Department issued an assessment of civil penalty to Bituminous Processing in the amount of $22,500 for Bituminous Processing's failure to comply with an order of the Department. (Stip. 26; Exh. 11.)

25. Bituminous Processing did not appeal the September 10, 1999 civil penalty assessment to this Board. (Stip. 27; Exh. 12.)

26. Bituminous Processing has not paid the September 10, 1999 civil penalty assessment. (Stip. 28.)

27. On December 17, 1999, the Department issued an assessment of civil penalty to Bituminous Processing in the amount of $1,200 for Bituminous Processing's failure to promptly reclaim all disturbed areas in conformance with the approved reclamation plan. (Stip. 29; Exh. 13.)

28. Bituminous Processing did not appeal the December 17, 1999 civil penalty assessment to this Board. (Stip. 30; Exh. 14.)

29. Bituminous Processing has not paid the December 17, 1999 civil penalty assessment. (Stip. 31.)

30. Bituminous Processing's most recent liability insurance policy on the Wyano Strip was Policy Number CGL37962, issued by Rockwood Casualty Insurance Company, with an effective date of July 6, 1999 and an expiration date of July 6, 2000. (Stip. 32; Exh. 15.)

31. Policy Number CGL37962 was cancelled on August 30, 1999. (Stip. 33; Exh. 16.)

32. Bituminous Processing has not submitted to the Department certification of liability insurance coverage currently in effect for the Wyano Strip and does not have a liability insurance policy currently in effect for the site. (Stip. 34.)

33. On May 3, 2000, the Department declared forfeit Bond Numbers 100718470, 100718471, 100718472, 170-497G4073, and 170849F3193 on the Wyano Strip based on the Department's findings of numerous uncorrected violations at the site, including failure to reclaim

in accordance with the approved reclamation plan, failure to comply with an order of the Department, failure to maintain liability insurance, failure to show a willingness or intention to comply with applicable laws and regulations, and failure to pay outstanding civil penalties. (Stip. 35; Exh. 17.)

DISCUSSION

The Permit Suspension

Our responsibility is to make a *de novo* determination of whether the Department should have suspended Bituminous Processing's surface mining permit. *Warren Sand & Gravel, Inc. v. Department of Environmental Resources,* 341 A.2d 556, 565 (Pa. Cmwlth. 1975); *Smedley v. DEP*, EHB Docket No. 97-253-K (Adjudication issued February 8, 2001). The Department has the burden to show by a preponderance of the evidence that, in suspending Processing's permit, it acted lawfully, reasonably, and appropriately. 25 Pa. Code § 1021.101(b); *Smedley.* The Department has met that burden.

Section 4c of the Surface Mining Act and Section 610 of the Clean Streams Law authorize the Department to issue such orders as are necessary to aid in the enforcement of the respective statute's provisions, including orders modifying, suspending, or revoking permits. 52 P.S. §1396.4c; 35 P.S. § 691.610. Section 18f of the Surface Mining Act and Section 611 of the Clean Streams Law both provide that it is "unlawful to fail to comply with any rule or regulation of the department or to fail to comply with any order or permit or license of the department, to violate any of the provisions of this act or the rules and regulations hereunder, or any order or permit or license of the department...." 52 P.S. § 1396.18f; 35 P.S. § 691.611. The stipulated facts and exhibits show that Bituminous Processing failed to reclaim its site in accordance with the statutes, regulations, 25 Pa. Code §§ 87.140, 87.158, its permits, and the Department's

Orders. (F.F. 16, 17, 20, 21, 22.) This constituted a violation of Section 18f of the Surface Mining Act and 611 of the Clean Streams Law, and thus, the Department could suspend Bituminous Processing's permit under Section 4c and Section 610 of those acts respectively.

Bituminous Processing also failed to complete payment under the consent assessment of civil penalty, as required by its permit. The permit required that Bituminous Processing continue to comply with a payment agreement contained in a consent assessment between Bituminous Processing and the Department. Nevertheless, Bituminous Processing discontinued its payments under the consent assessment after paying $4,537 of the agreed to $10,537 amount. (F.F. 13.) By failing to complete payment under the consent assessment of civil penalty as required by its permit, Bituminous Processing engaged in unlawful conduct under Section 18f of the Surface Mining Act and Section 611 of the Clean Streams Law. 52 P.S. § 1396.18f; 35 P.S. § 691.611.

Still further, Bituminous Processing failed to maintain liability insurance on the Wyano Strip. The Surface Mining Act and the regulations pertaining to surface mining require every operator to maintain a public liability insurance policy covering all of its mining activities within the Commonwealth for the duration of its mining and reclamation activities. 52 P.S. § 1396.3a(c); 25 Pa. Code §§ 86.67, 86.144 and 86.168. Bituminous Processing's most recent insurance policy was cancelled on August 30, 1999. The company has not submitted to the Department certification of liability insurance coverage currently in effect for the Wyano Strip and it does not have a liability insurance policy currently in effect for the site. (F.F. 31, 32; Exh. 16.) By failing to maintain liability insurance Bituminous Processing engaged in unlawful conduct under Section 18f of the Surface Mining Act, 52 P.S. § 1396.18f, and Section 611 of the Clean Streams Law. 35 P.S. § 691.611.

In *C.N. & W., Inc. v. DER,* 1989 EHB 432, the Board held that a mining company's admitted violations of the Surface Mining Act, the Clean Streams Law, permit conditions and the requirements of two Department compliance orders for failure to reclaim justified the Department's suspension of its permit. The facts in *C.N. &W., Inc.* mirror those in this appeal. The Board in that case granted a motion for summary judgment in the Department's favor based on those facts. Bituminous Processing had made no attempt to distinguish the case, and we find it to be controlling in this appeal.

Bituminous Processing claims that the Department's permit *renewal* was unlawful and an abuse of discretion. That claim has no place in this appeal. "Where a party is aggrieved by an administrative action of the Department and fails to pursue his statutory appeal rights, neither the content nor the validity of either the Department's action or the regulation underlying it may be attacked in a subsequent administrative or judicial proceeding." *Lucchino v. DEP*, 1999 EHB 214, 220; *See also Department of Environmental Resources v. Wheeling-Pittsburgh Steel Corporation*, 348 A.2d 765, 767 (Pa. Cmwlth. 1975), *aff'd*, 375 A.2d 320 (Pa. 1977), *cert. denied*, 434 U.S. 969 (1977). On March 17, 1999, the Department renewed Bituminous Processing's Permit at SMP No. 65920108R. (F.F. 10.) 25 Pa. Code § 1021.52(a)(1) gave Bituminous Processing thirty days to appeal that action, but it chose not to take advantage of the opportunity. (F.F. 12.) Because Bituminous Processing's arguments in this appeal relate to the Department's March 17, 1999 permit renewal, and Bituminous Processing did not appeal that Department action, Bituminous Processing is now barred by the doctrine of administrative finality from raising the issues here.

Bituminous Processing maintains that it was not given proper notice that SMP No. 65920108R, issued by the Department on March 17, 1999, was the full extent of its permit

renewal. It contends that the Department gave insufficient notice that SMP No. 65920108R was in fact the renewal of its permit and that a subsequent permit would not be issued. To the extent that this argument has any relevance here, Bituminous Processing applied for the renewal of one permit, SMP No. 65920108. (F.F. 6.) The Department clearly stated in its letter to Bituminous Processing that "[y]our Surface Mining permit is hereby renewed and attached." (Exh. 1.) The Department's letter and the enclosed permit were sufficient to give Bituminous Processing notice of the Department's permitting decision. It would be unreasonable for Bituminous Processing to expect the Department to issue any permit other than SMP No. 65920108R, considering that it applied for one permit and considering that the Department clearly stated in its letter that the permit was renewed and attached. To the extent that Bituminous Processing objected to the fact that the renewed permit only allowed reclamation activities at the site, Bituminous Processing could have, but did not, file an appeal.

Finally, Bituminous Processing states in its brief that it has not failed to comply with the Department's approved reclamation plan. The argument is directly contrary to the parties' stipulation of facts. C.O. 971037 and C.O. 971057, which were not appealed, found that Bituminous Processing had failed to reclaim its site, and there is nothing in the record to show that the site has been reclaimed since then. In fact, to repeat, the stipulated facts are directly to the contrary. (F.F. 20.) Bituminous Processing cannot stipulate repeatedly that it failed to reclaim the site and then argue in its brief that the Department has failed to prove a lack of reclamation. The stipulations are binding judicial admissions. They "have the effect of withdrawing a fact from issue and dispensing it without the need for proof of the fact." *Duquesne Light v. Woodland Hills School District*, 700 A.2d 1038, 1054, (Pa. Cmwlth. 1997).

For all of these reasons, we conclude that the suspension of Bituminous Processing's permit was lawful, reasonable, and appropriate.

Bond Forfeiture

Turning to the Department's forfeiture of Bituminous Processing's bonds, Section 4(h) of the Surface Mining Act[1] and Section 315(b) of the Clean Streams Law require in part that: "If the operator fails or refuses to comply with the requirements of the act in any respect for which liability has been charged on the bond, [the Department] shall declare such portion of the bond forfeited...." 52 P.S. § 1396.4(h); 35 P.S. 691.315(b). The bonds forfeited by the Department require that Bituminous Processing faithfully fulfill all of the requirements of, among other things, the Surface Mining Act, the Clean Streams Law, the rules and regulations promulgated thereunder, and the provisions and conditions of the permit. (Exh. 19.) We have detailed Bituminous Processing's unlawful conduct above in our discussion of the permit suspension. In light of that unlawful conduct, and Section 4(h) of the Surface Mining Act and Section 315(b) of the Clean Streams Law, we find that the Department acted lawfully, reasonably, and appropriately by forfeiting Bituminous Processing's bonds.

CONCLUSIONS OF LAW

1. The Environmental Hearing Board has jurisdiction over this matter pursuant to Section 4 of the Environmental Hearing Board Act, 35 P.S. § 7514.

---

[1] The Commonwealth Court has held that "[T]he language in 52 P.S. § 1396.4(h) is mandatory." *Morcoal Co. v. Department of Environmental Resources*, 459 A.2d 1303, 1308. In *Morcoal Co.* the Commonwealth Court held that, in the face of evidence that revealed Morcoal's history of abandoning unreclaimed sites, it was the Department's duty, pursuant to 52 P.S. §1396.4(h), to forfeit Morcoal Co.'s bonds. *Morcoal Co.*, 459 A.2d at 1308.

2. The Department is authorized to suspend an operator's permit under Section 4c of the Surface Mining Conservation and Reclamation Act, 52 P.S. § 1396.4c, and Section 610 of the Clean Streams Law, 35 P.S. § 691.610, where that operator is in violation of any relevant provision of the act, or of any relevant rule, regulation or order of the Board or relevant order of the Department.

3. Bituminous Processing violated the Surface Mining Act, the Clean Streams Law, and the rules and regulations by failing to reclaim its site, complete payment under consent assessments of civil penalty, comply with orders of the Department, and maintain liability insurance on the Wyano Strip. 52 P.S. §1396.18f; 35 P.S. 691.611.

4. The Department has met its burden to show by a preponderance of the evidence that its suspension of the permit was lawful, reasonable, and appropriate based on Bituminous Processing's conduct. 25 Pa. Code § 1021.101(b).

5. Based on Bituminous Processing's unlawful conduct, the Department acted lawfully, reasonably, and appropriately by forfeiting its bonds under Section 4 of the Surface Mining Act and Section 315 of the Clean Streams Law. 52 P.S. § 1396.4; 35 P.S. §691.315.

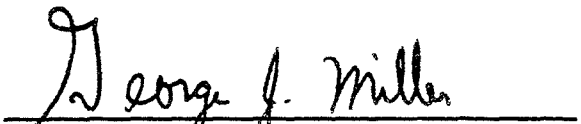
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BITUMINOUS PROCESSING CO., INC.	:	
	:	
v.	:	**EHB Docket No. 99-172-L**
	:	**(consolidated with 2000-129-L)**
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	**Issued: May 9, 2001**
PROTECTION	:	

ORDER

AND NOW, this 9th day of May, 2001, this consolidated 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

EHB Docket No. 99-172-L
(consolidated with 2000-129-L)

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

MICHAEL L. KRANCER
Administrative Law Judge
Member

DATED: **May 9, 2001**

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

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOAR

CARL L. KRESGE & SONS, INC.	:	
	:	
v.	:	**EHB Docket No. 99-149-K**
	:	**(Consolidated with 99-051-K)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: May 14, 2001**

ADJUDICATION

By Michael L. Krancer, Administrative Law Judge

Synopsis:

The Board sustains the Department's forfeiture of an operator's Surety Bond associated with its non-coal mining permit. The Department has previously been granted summary judgment that the operator had committed charged violations. The violations committed by the operator were of the nature for which liability was charged under the terms of the Surety Bond. Therefore, forfeiture was appropriate.

FINDINGS OF FACT

1. Carl L. Kresge & Sons, Inc. (Kresge) has committed violations of the Clean Streams Law, the Noncoal SMCRA, the regulations promulgated under the Noncoal SMCRA, Department Orders and the noncoal mining permit as set forth in *Carl L. Kresge & Sons, Inc. v. DEP*, EHB Docket No. 99-149-K (Opinion and Order issued January 27, 2000) (*Kresge I*).

2. Kresge's surety bond posted in connection with his mining permit (the Surety Bond) provides as follows:

1. *Conditions of the Obligation.* If the operator shall faithfully perform and conform to all of the applicable requirements of the following:

(a) the Clean Streams Law;
(b) the Surface Mining Conservation and Reclamation Act;
(c) the Air Pollution Control Act;
(d) the Coal Refuse Disposal Control Act;
(e) the Dam Safety and Encroachments Act;
(f) the Noncoal Surface Mining Conservation and Reclamation Act (applicable only to applicants for noncoal surface mining permits);
(g) the Solid Waste Management Act

(the statutes described in (a) through (g), inclusive, immediately above, collectively, called the "Acts")

(h) all amendments and additions hereafter made to the Acts and all statutes enacted as substitutes or replacement for the Acts.
(i) all rules and regulations now or hereafter promulgated under the Acts;
(j) the terms and conditions of the Permit, and all amendments or additions thereto; and
(k) all Department orders issued relating to Operator conduct under the Permit.

(the requirements described in (a) through (k), inclusive, immediately above, collectively called the "Law"); then this obligation shall be null and void, otherwise to be and remain in full force and effect.

(Ex. C-2)

3. Liability has been charged under the Surety Bond for Kresge's violations of, among other things, the Clean Streams Law, the Noncoal SMCRA, all rules and regulations under the Clean Streams Law and/or the Noncoal SMCRA, and all Department Orders issued relating to the operators conduct under the mining permit. (Ex. C-2)

4. The violations of Kresge established as set forth in *Kresge I* are of the nature for which liability has been charged under the Surety Bond. (Ex. C-2)

DISCUSSION

This is a consolidated appeal by Kresge of the Department's forfeiture of its Noncoal SMCRA Surety Bond and its assessment of a civil penalty for the same conduct which formed the basis of its bond forfeiture action. The appeal of the bond forfeiture action bears Docket No. 99-051-K and the appeal of the civil penalty assessment bears Docket No. 99-149-K. The Board issued an Opinion and Order Granting Summary Judgment In Part And Denying Summary Judgment In Part (Docket No. 99-051-K) dated January 27, 2000 (*Kresge I*). In *Kresge I,* the Board granted summary judgment to the Department inasmuch as the doctrines of administrative finality, *res judicata* and collateral estoppel established Kresge's violations of the Noncoal SMCRA, the Clean Streams Law, the rules and regulations of the Department, and Kresge's mining permit as set forth in detail in *Kresge I.* The Board also granted summary judgment to the Department inasmuch as the *Kent Coal* doctrine does not apply to allow Kresge to challenge the fact of the violations in this action, and Kresge's defense of "impossibility" cannot be maintained for an action for default of the Surety Bond. The Board, however, did not grant summary judgment to the Department on the ultimate question of whether the bond forfeiture was appropriate because there was no record evidence at that point in the proceedings regarding the actual terms of the Surety Bond. Thus, the Board was not able to determine whether the violations established were of the nature "for which liability has been charged under the bond" as required under the Noncoal SMCRA. 52 P.S. § 3309(k)(1).

A trial was held in this matter from September 11, 2000 through September 13, 2000. Evidence was heard on Kresge's appeal of the bond forfeiture action and the penalty assessment. Also, testimony was heard about the Surety Bond and, of course, the Surety Bond in question was introduced into evidence. (Ex. C-2)

This final Adjudication dispenses with only Docket No. 99-051-K which is Kresge's appeal of the Department's forfeiture of the Surety Bond associated with the mining permit of Kresge. Kresge's appeal of the Department's Civil Penalty Assessment for the same conduct which formed the basis of the Department's bond forfeiture will be dealt with in a separate Board decision document which is being issued this date as well.

Our standard of review is to determine 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,* EHB Docket No. 97-253-K (Adjudication issued February 8, 2001). The Department has the burden to show that its action in forfeiting the Surety Bond was reasonable, lawful and appropriate. 25 Pa. Code § 1021.101(a),(b)(4).

The bond forfeiture provision of the Noncoal SMCRA under which the Department proceeded to declare Kresge's Surety Bond forfeited in this case provides as follows:

> (k) Forfeiture.—
>
> (1) If the operator fails or refuses to comply with any requirement of this act for which liability is charged under the bond, the department shall declare the bond forfeited.

52 P. S. § 3309(k)(1). As we have noted, the question left open in *Kresge I* was whether the violations Kresge committed were of the kind "for which liability is charged under the bond".

After reviewing the Surety Bond we have no trouble concluding that the violations Kresge has committed are of the nature for which liability is charged under the Surety Bond. The Surety Bond is specifically conditioned upon Kresge's faithful adherence to and conformance with, among other things, the Clean Streams Law, the Noncoal SMCRA, all rules and regulations of the Department promulgated under either those statutes, the terms and conditions of Kresge's mining permit and all Department Orders issued relating to Kresge's conduct under its mining permit. (Ex. C-2) The violations for which Kresge was found to have

committed in *Kresge I* are clearly within the ambit of the aforementioned. The Department's action therefore in declaring the Surety Bond forfeited was reasonable and appropriate and in conformance with the Noncoal SMCRA. 52 P. S. § 3309(k)(1) [1]

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

---

[1] The Department argued at the summary judgment stage and again now that its duty to forfeit under Section 9(k)(1) of the Noncoal SMCRA, 52 P. S. § 3309(k)(1), in the circumstances found in this case, *i.e.*, where there are violations of the Noncoal SMCRA for which liability has been charged under the bond, is *mandatory*. We discussed this argument in *Kresge I* and, after reviewing the similar language from the Coal SMCRA and the cases interpreting that Act, said that "[c]onceptually, we see no reason not to apply the 'mandatory' language of the Noncoal SMCRA bond forfeiture provision the same way the Board and the Commonwealth Court have applied the 'mandatory' language of the Coal SMCRA bond forfeiture provision." *Kresge I* at 41. However, we did not proceed to do that in *Kresge I* because of the remaining question whether the Kresge's violations were of the type for which liability has been charged under the bond. Now we have squarely determined that Kresge's violations are of the type for which liability has been charged under the bond. However, either way one looks at it, whether the Department was *required* to declare the Kresge Surety Bond forfeited or whether it was *permitted* to declare it forfeited, the Department's action in doing so in this case must be upheld. We have found that the Department's findings upon which it based its action are established, as set forth in *Kresge I* and this Adjudication, and that its action is reasonable, appropriate and in conformance with the Noncoal SMCRA. These findings on our part lead to the sustaining of the Department's action whether it was a mandatory one or a permitted one.

We also note that Kresge asks us to reconsider the rulings we made in *Kresge I* that the "impossibility defense" cannot be asserted as a defense to a bond forfeiture and that the *Kent Coal* doctrine does not apply to allow Kresge to challenge in this action the factual predicates of the underlying offenses which form the basis for the Department's decision to declare the Surety Bond forfeited. We believe the rulings sets forth in *Kresge I* were correct and we will not reverse any of them.

(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 (Adjudication issued February 8, 2001).

4. The Department has the burden of proceeding and the burden of proof to show that its action in forfeiting the Surety Bond was reasonable and appropriate and otherwise in conformance with the law. 25 Pa. Code § 1021.101(a), (b)(4).

5. The Surety Bond is expressly conditioned upon Kresge's full compliance with among other things, the Clean Streams Law, the Noncoal SMCRA, all rules and regulations under the Clean Streams Law and/or the Noncoal SMCRA, and all Department Orders issued relating to the operator's conduct under the mining permit.

6. Kresge failed to abide by the express conditions of the Surety Bond.

7. The violations established as set forth in *Carl L. Kresge & Sons, Inc. v.* DEP, EHB Docket No. 99-149-K (opinion issued January 27, 2000) (*Kresge* I) are for violations of, among other things, the Clean Streams Law, the Noncoal SMCRA, all rules and regulations under the Clean Streams Law and/or the Noncoal SMCRA, and all Department Orders issued relating to the operator's conduct under the mining permit.

8. Default of the Surety Bond has been triggered by the conduct established as set forth in *Kresge I.*

9. The Department's action in declaring the Surety Bond forfeited was proper, appropriate and not contrary to law.

Accordingly, we enter the following:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CARL L. KRESGE & SONS, INC.	:	
	:	
v.	:	**EHB Docket No. 99-149-K**
	:	**(Consolidated with 99-051-K)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 14th day of May, 2001, Kresge's appeal docketed at EHB Docket No. 99-051-K is hereby **dismissed**.

All future filings with the Board in this appeal shall be captioned as follows:

CARL L. KRESGE & SONS, INC.	:	
v.	:	**EHB Docket No. 99-149-K**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

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: **May 14, 2001**

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

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

CARL L. KRESGE & SONS, INC.	:	
	:	
v.	:	EHB Docket No. 99-149-K
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	Issued: May 14, 2001

OPINION AND ORDER ON ALLEGED INABILITY TO PRE-PAY CIVIL PENALTY

By Michael L. Krancer, Administrative Law Judge

Synopsis:

An appellant who asserts its alleged inability to prepay a $23,250 civil penalty assessed against it under the Noncoal Surface Mining Act or to post an appeal bond shall have a hearing on that issue even when the allegation is not made until after the 30 day period from the date of the assessment. The appellant, who has the burden of proceeding and the burden of proof on the issue of its alleged inability to prepay or post an appeal bond, failed to produce sufficient evidence to prove its asserted inability to prepay or post an appeal bond. The only evidence produced was the testimonial evidence of the sole shareholder of the Appellant which was neither complete nor convincing. No corroborating documentary evidence was produced to support the claim. The Appellant never even tried to secure a loan for the amount of the penalty or to secure an appeal bond. Appellant's unsupported and uncorroborated opinion that he was not creditworthy and/or that he was told he could not obtain credit is not sufficient to prove an inability to

either prepay or post an appeal bond. The Board, upon finding, on hearing, that the Appellant has not satisfied its burden of proof that it was unable to prepay or post on appeal bond in connection with its appeal of a civil penalty assessment, will not dismiss the appeal even where the assertion of inability to prepay is made after the 30 day initial prepayment period. The Board will enter an order requiring Appellant to prepay or post an appeal bond within 30 days.

BACKGROUND

This Opinion and Order is the third published decision document in the appeals by Carl L. Kresge & Sons, Inc. (Kresge) of two actions of the Department: (1) its forfeiture of Kresge's Noncoal SMCRA Surety Bond and; (2) its assessment of a civil penalty of against Kresge in the amount of $23,250 for the activities which were the subject of the bond forfeiture. The appeal of the bond forfeiture was assigned EHB Docket No. 99-051-K and the appeal of the civil penalty assessment was assigned EHB Docket No. 99-149-K. The two cases were consolidated.

Both the bond forfeiture action and the civil penalty assessment flowed from the Department's issuance to Kresge of Compliance Order No. 97-5-059 and Failure to Comply Order No. 97-5-069. By Opinion and Order dated January 27, the Board granted partial summary judgment to the Department in the bond forfeiture matter. *Carl L. Kresge & Sons, Inc v. DEP*, Docket No. 99-051-K (Opinion and Order issued January 27, 2000) (*Kresge I*). A full description of the aforementioned Compliance Order and Failure to Comply Order are provided in that Opinion. The gravaman of the *Kresge I* Opinion was that the violations set forth in those Orders had become established by operation of *res judicata*, collateral estoppel and administrative finality. The Board did

not grant full summary judgment however because there was no record evidence at that point in the proceedings regarding the actual terms of the Surety Bond. Thus, the Board was not able to determine whether the violations established were of the nature "for which liability has been charged under the bond" as required under the Noncoal SMCRA. 52 P.S. § 3309(k)(1).

On September 11, 2000 trial commenced in both what was left of the bond forfeiture matter and the entirety of the civil penalty assessment case. The Board is also issuing today its Adjudication in the bond forfeiture case in which we upheld the Department's forfeiture of Kresge's Noncoal SMCRA Surety Bond. *Carl L. Kresge & Sons, Inc v. DEP*, Docket No. 99-051-K (Adjudication Issued May 14, 2001) (*Kresge II*) That appeal was, therefore, dismissed and it is no longer on our docket.

This Opinion and Order deals with the very important and threshold aspect of Kresge's appeal of the Department's civil penalty assessment, *i.e.*, the question of Kresge's alleged inability to have prepaid the penalty amount or to have posted an appeal bond. In a procedural oddity, neither party, prior to the first day of the hearing on the merits, had focused on the fact that Kresge had not either prepaid the penalty amount or posted an appeal bond as required by Section 21(b)(1) of the Noncoal SMCRA. 52 P.S. § 3321(b)(1).[1] The Department had never made a Motion to Dismiss on that basis nor had the Appellant requested a hearing on that question. Apparently, there had been no discovery on that subject either.

---

[1] This appeal was filed on July 29, 1999. On September 4, 1999 Board Rule 1021.51(f) became effective. We, therefore, have not considered that Rule in our analysis of this case.

On the first day of the hearing on the merits, the Department made an oral motion to dismiss based on the fact that Kresge had never either prepaid the amount of the penalty or posted an appeal bond as required by 52 P.S. § 3321(b)(1). (N.T. 9-10)[2] The presiding Judge took the oral motion under advisement for potential disposition by the Board in its entirety. (N.T. 9-10) Then, the Board proceeded with the hearing on the merits as scheduled but specifically allowed evidence to be presented from the Appellant regarding its alleged financial inability to have prepaid the penalty amount or to have posted an appeal bond. The Board, in essence, conducted a hearing within the hearing on the merits of the appeals on the specific question of the alleged inability to prepay. *See* N.T. 6-7. (explanation by the Board that a 'hearing within a hearing' would be conducted regarding the alleged financial inability to have prepaid the penalty amount or post an appeal bond)

Appellant produced one witness on the subject of the alleged inability to prepay or post an appeal bond. That witness was Mr. Kresge himself who is the sole shareholder of Kresge. (N.T. 5) No documentary evidence was proffered. The Department was, of course, allowed to cross-examine Mr. Kresge on the subject of the alleged inability to prepay or post an appeal bond, which it did.

DISCUSSION

Section 21(b)(1) of SMCRA provides as follows:

> When the department proposes to assess a civil penalty, the secretary shall inform the person, within a period of time to be prescribed by rule and regulation, of the proposed amount of the penalty. The person charged with the penalty shall then have 30 days to pay the proposed penalty in full or if the person wishes to contest either the amount of the penalty or the fact of the violation, forward the proposed amount to the

[2] Notes of the Transcript are cited as "N.T.___."

> secretary for placement in an escrow account with the State Treasurer or any Pennsylvania Bank, or post an appeal bond in the amount of the proposed penalty. The bond shall be executed by a surety licensed to do business in this Commonwealth and be satisfactory to the department. If, through administrative or judicial review of the proposed penalty, it is determined that no violation occurred or that the amount of the penalty shall be reduced, the secretary shall, within 30 days, remit the appropriate amount to the person, with any interest accumulated by the escrow deposit. Failure to forward the money or the appeal bond to the secretary within 30 days shall result in a waiver of all legal rights to contest the violation or the amount of the penalty.

52 P.S. § 3321(b)(1).

The Commonwealth Court has dictated that when an appellant asserts that it is unable to prepay the penalty or post an appeal bond, the Board is to hold an evidentiary hearing on that question. *Pilawa v. Department of Environmental Protection*, 689 A.2d 141 (Pa. Cmwlth. 1997); *Twelve Vein Coal v. Department of Environmental Resources*, 561 A.2d 1317 (Pa. Cmwlth. 1989). That is what we did in this case, albeit, due to the unusual circumstances, concomitantly with holding the trial on the merits, and this decision document deals with that threshold matter.[3]

Kresge bears the burden of proceeding and of proving that it is unable to prepay or post an appeal bond for the amount of the civil penalty. 25 Pa. Code 1021.101(a); *See Hrivnak Motor Company v. DEP*, 1999 EHB 437, 441; *Heston S. Swartley*

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[3] The Department's counsel at trial agreed that such an evidentiary hearing regarding the Appellant's alleged inability to prepay the penalty or post an appeal bond is mandated by Commonwealth Court precedent, *i.e.*, the case of *Twelve Vein Coal Company v. Department of Environmental Resources*, 561 A.2d 1317 (Pa. Cmwlth. 1989). *See also Pilawa v. Department of Environmental Protection*, 698 A.2d 141 (Pa. Cmwlth. 1997) The sections of the transcript which reflect the hearing on the alleged inability to prepay or post an appeal bond are as follows: N.T. 5, 16-24 (first part of Mr. Kresge's direct testimony); 98-101 (initial Department cross-examination of Mr. Kresge); 115 (Mr. Kresge's redirect examination; 117-18 (questions from the Board); 119-120 (Department re-cross examination of Mr. Kresge; and 121 (re-redirect of Mr. Kresge).

Transportation Co., Inc. v. DEP, 1999 EHB 88, 89; *Goetz v. DEP*, 1998 EHB 955, 964-65. In *Swartley*, Judge Labuskes said that in reviewing the evidence in an inability to prepay case, "we are guided by the Board's decision in [*Goetz v. DEP*, 1998 EHB 955] where we held that the Board must have hard evidence before it can determine that an appellant is unable to prepay a penalty." *Swartley*, 1999 EHB 88, 89 *citing Goetz v. DEP*, 1998 EHB at 967-68. In *Goetz* the Board said that the types of evidence it was looking for to establish a claim of inability to prepay included:

> recent financial statements and income tax returns, as well as information concerning any:
>
> a. accounts and notes receivable;
> b. marketable securities owned by appellant;
> c. interests appellant owns in closely held corporations or partnerships;
> d. intangible property owned by appellant;
> e. vehicles owned by appellant;
> f. real estate owned by appellant;
> g. oil, gas, or mineral rights owned by appellant;
> h. recent loan applications filed by appellant;
> i. insurance policies naming appellant as the insured or beneficiary; and,
> property appellant recently sold for value or transferred as a gift.

Goetz, 1998 EHB at 967-68 n.9; *See Swartley,* 1999 EHB at 89.

Here Mr. Kresge presented only testimonial evidence to the effect that the financial positions of Kresge, other businesses owned by Mr. Kresge, and Mr. Kresge personally did not at the time of the penalty assessment up through the date of the hearing permit prepayment of the penalty amount the obtaining of an appeal bond. No palpable corroborating documentary evidence was proffered at all which supported Kresge's claim of inability to prepay. Based on our review and consideration of the evidence in concert with the caselaw and the purpose of Section 21(b)(1) of the Noncoal SMCRA, we

conclude that Mr. Kresge did not succeed in proving that Kresge could not have prepaid the $23,250 or have obtained an appeal bond.

Mr. Kresge testified that Kresge filed for Chapter 11 bankruptcy on March 31, 2000, that another company he owns, Wilbar Realty Co., is also in Chapter 11 Bankruptcy, and that he is in Chapter 13 bankruptcy. (N.T. 5, 16, 18) However, none of the filings or the financial data which supported those filings was offered into evidence. The civil penalty assessment under appeal here was issued on June 28, 1999, almost 9 months before the various bankruptcy filings. The absence of documentary evidence is particularly problematic here since the bankruptcy filings and the financial data upon which they were based would undoubtedly have touched upon the precise time frame that the Department's civil penalty assessment was issued. Also, we are left not knowing what the status of those various bankruptcy proceedings was at the time of our hearing except for Mr. Kresge's vague and generalized testimony that things have not improved. We note in this regard that there is no evidence that Kresge has ceased to exist or that it is or ever was being, or scheduled to be, liquidated or taken out of existence.

Also, Mr. Kresge never attempted to seek a loan for the penalty amount. The *Goetz* Board noted that the fact that the appellant had not sought a loan to cover the prepayment amount was a strong indication that appellant failed to exhaust all reasonable means at his disposal to prepay the penalty. *Goetz, supra* at 968. Mr. Kresge testified that he sought and was denied a loan, that he had no liquid assets to sell that would enable him to prepay the civil penalty, and that at no time now or since the assessment of the civil penalty did Kresge have money to pay the civil penalty. (N.T. 17-23) But the only loan he had sought and which was denied was a jumbo loan in the amount of

$450,00 constituting a global refinancing of all of his and his companies' debts. That loan was applied for and denied before the civil penalty assessment was made. (N.T. 19-20; 98-101). Kresge never sought a loan for the much smaller amount of the civil penalty only. (N.T. 98-100) Mr. Kresge's response that he believed that because other creditors had everything he had "tied up," he and/or the company could not have received credit for an amount smaller than $450,000 nor did any bank *offer* him less credit when he was denied his application for the jumbo loan is not only inadequate, it is beside the point. (N.T. 115) Naturally, the fact that the lender did not offer a smaller loan for $23,250 at the time it denied the loan for $450,000, which was before the civil penalty assessment was even made, or thereafter, misses the point. Kresge never asked for the loan of $23,250.

Mr. Kresge testified that he had no reason to believe that he could have obtained a loan for the $23,250. (N.T. 115) That is insufficient. In *Goetz*, Mr. Goetz's testimony that his attorney and his bonding agent told him that he would not be able to get an appeal bond was inadequate. The Board said that, "[a]ppellant's attorney and his bonding agent never took the stand, or otherwise gave evidence to support Appellant's hearsay statements". *Goetz*, 1998 EHB at 967-68. The same principle applies here as to the potential for a loan. Nobody took the stand and no documentary evidence was offered to corroborate and substantiate Mr. Kresge's assertion that he had no reason to believe that he could have obtained a loan for the penalty amount.

Mr. Kresge testified in conclusory fashion that he did not have the ability to secure an appeal bond. (N.T. 23) As a threshold matter, Mr. Kresge admitted that he never even inquired about posting an appeal bond. (N.T. 99) Thus, as with a possible

loan to cover the penalty prepayment amount, Mr. Kresge never actually attempted to explore the appeal bond option either. Mr. Kresge's support for his assertion that he could not have obtained an appeal bond was that "DEP had taken my bond in forfeiture". (N.T. 23) Obviously, that "reason" is a *non sequitur*. Also, it is not an acceptably concrete basis on which to pin a claim of inability to prepay a civil penalty amount or post an appeal bond. Mr. Kresge also testified vaguely about his opinion of what his and other bonding companies thought of his creditworthiness. He testified that, "[t]hey wanted their money, and that was the end of it. I couldn't afford it". (N.T. 23) He also testified that he learned from his surety company that Kresge was not able to become bonded and that he now concentrates on homeowner design jobs and cannot bid the "big jobs" since he cannot obtain a bond. (N.T. 24) We have no way of knowing what Mr. Kresge means by "big jobs" and what magnitude of bonds it supposedly cannot obtain. Also, more fundamentally, even if we accepted this as Mr. Kresge's testimony that, in his opinion, the bonding companies viewed him and/or his company as not creditworthy, this would be insufficient for the same reason we just discussed, citing the *Goetz* case, in connection with the possibility of having obtained a loan. Finally, this testimony is problematic because it confirms that Kresge or some related company is an ongoing concern which generates revenue albeit from "homeowner design" jobs.

The Board has noted in that past that:

> [a] party claiming financial inability cannot simply appear and state that is has no money. It must produce hard evidence that gives the Department a reasonable opportunity to independently assess the claim. This evidence must, among other things, include proof of the appellant's assets and liabilities. In the absence of hard evidence, the Legislature's objective in requiring prepayment could too easily be thwarted without sufficient proof or substantial justification.

Heston S. Swartley Transportation Company v. DEP, 1999 EHB 160, 165 (*Swartley II*). In essence, not only did Kresge do no more than "simply appear and state that it has no money" Mr. Kresge's statement to that effect was less than complete in substance and less than convincing in effect. Not only did Kresge or Mr. Kresge on Kresge's behalf not try very hard to prepay the penalty amount or post an appeal bond, the record shows that they did not specifically try at all to do so. Accordingly, we believe that the Legislature's objective in requiring prepayment would not only be thwarted if we allowed Kresge to obtain refuge, but that its objective would be directly defied.[4]

Now we must decide what to do with this matter now that we have decided that Kresge did not satisfy his burden of proof that he was or is unable to prepay the civil penalty amount or post an appeal bond. We do not agree with the Department's assertion that the Board's jurisdiction must end with the evidentiary hearing--regardless of our findings. It argues that once we close the book on the evidentiary hearing--regardless of the outcome--we must dismiss the case and leave it to the Commonwealth Court to take up at that point. The Department relies on the second sentence and especially the last sentence of Section 21(b)(1) which provide:

> The person charged with the penalty shall then have 30 days to pay the proposed penalty in full or if the person wishes to contest either the

[4] We point out that the issue presented here is not the *standard* of impecunity that Judge Labuskes wrote about in *Hrivnak*. In other words, we are not dealing here with the *definition* of impecunity, meaning we are not wrestling with the question of whether an individual, in Judge Labuskes's words, "could be required to sell his house, cars, and jewelry—whatever it takes to produce the money." *Hrivnak*, 1999 EHB at 442. The question here precedes that question. Kresge's evidence was not sufficient to establish impecunity in any sense. The evidence was so vague and amorphous that that it failed to even get us to the point of having to go to the next step and deal with the question of whether Kresge would have to sell his house, cars, and jewelry, or do anything else, in order to produce the money. Indeed, because of the inadequate record on the matter, we are *not able* to begin to address that question.

> amount of the penalty or the fact of the violation....Failure to forward the money or the appeal bond to the secretary within 30 days shall result in a waiver of all legal rights to contest the violation or the amount of the penalty.

52 P.S. § 3321(b)(1). In rejecting the Department's argument on this point in *Goetz*, the Board wrote,

> If Section 21(b)(1) of the Noncoal Surface Mining Act, 52 P.S. § 3321(b)(1), were the last word on the issue, we might have come to a different conclusion... But Section 21(b)(1) is not the last word on the issue. Although the 30 day prepayment requirement of Section 21(b)(1) may seem at first to be absolute and jurisdictional, the Commonwealth Court has made it clear the neither is the case. [*Twelve Vein Coal Company, Inc. v. Department of Environmental Resources*, 561 A.2d 416 (Pa. Cmwlth 1989)].

Goetz at 970. In *Goetz*, the Board then entered an Order providing the appellant Goetz with 30 days to prepay the penalty amount or file and appeal bond. *Id.* at 973.

We still find the Department's view that our jurisdiction lasts only until the completion of the hearing to be inconsistent with the commands of *Twelve Vein* and *Pilawa*. We start with the premise that the *Pilawa* case instructs us that the hearing must be held even if the assertion of inability to prepay comes after the 30 days set forth in the statute. *Pilawa* involved a penalty under the Storage Tank and Spill Prevention Act, 35 P.S. § 6021.101-6021.2105. That Act contains a prepayment requirement which is virtually identical to the one in Section 21(b)(1) of the Noncoal SMCRA. *See* 35 P.S. § 6021.1307(b). Pilawa had neither prepaid the penalty nor asserted its inability to prepay within the 30 day period set forth in the statute. The Board, upon the Department's Motion to Dismiss filed after the 30 day period had run, dismissed for lack of jurisdiction. The Commonwealth Court, however, reversed the Board's holding on the jurisdiction question. The Court stated that,

> Our decision in *Twelve Vein* clearly holds that when a party alleges that it is not able to comply with the prepayment or bond requirements for perfecting an appeal to the EHB, the proper procedure is for the EHB to hold a hearing to determine whether the party is, in fact, impecunious and unable to comply with the prepayment condition. While the issue of the timeliness of an appellant's claim of financial hardship was not discussed in *Twelve Vein Coal Co.*, we do not believe that Pilawa's failure to raise the financial condition as a separate issue during the appeal period mandates a different result here.

Pilawa, 698 A.2d at 143.

The Department's view that the Board's jurisdiction terminates at the conclusion of the hearing is directly at odds with the lesson of *Pilawa*. In *Pilawa*, the Board *dismissed* for *lack of jurisdiction* because the prepayment was not made within the 30 days outlined in the statute. The Commonwealth Court specifically *reversed* that decision, *remanded* to the Board for an evidentiary hearing on the alleged inability to prepay issue and relinquished its jurisdiction. Clearly, then, the Board did *not* lose jurisdiction because the prepayment was not made within the 30 day period as the direct holding of the Commonwealth Court was that the Board was wrong when it so concluded.

We do not believe that the Commonwealth Court had in mind in *Pilawa* that the Board, as the finder of fact, would hold an evidentiary hearing as an academic exercise just to dismiss the case. We believe that the *Pilawa* Court envisioned that the Board would hold the mandated hearing and then proceed to make a determination, based on the evidentiary hearing, whether the appellant is in fact unable to prepay or not and proceed accordingly based on that determination.

We wish to make clear that we are not passing upon the constitutionality of the prepayment provision of the Noncoal SMCRA. That, the Commonwealth Court would have to do if and when that issue is presented to it. What we are doing, though, is

following the steps mandated by the Commonwealth Court to hold an evidentiary hearing on the question of alleged financial inability to prepay.

In *Goetz*, though, the appellant, unlike the one here, *did* raise the issue of his alleged inability to prepay before the initial 30 day period from issuance of the penalty assessment had expired. Thus, the Goetz Board was dealing with whether an appellant *who raises the issue of its alleged inability to prepay within the thirty days from the date of the assessment* may have another 30 day window of opportunity to prepay in the event the Board, as it did in *Goetz*, and as we do here, holds that the appellant did not prove his allegation of inability to prepay. *Goetz, supra*, 1998 EHB at 969-70 n. 10. The Board specifically recognized that,

> "[w]hether an appellant would be entitled to another opportunity to prepay had he not raised the issue of his inability to prepay within the initial 30-day period is a tougher question (since there is greater potential for delaying the Board's proceedings) but one which is beyond the scope of this appeal."

Id. at 969-79 n. 10. That issue is presented here though. We think that the result should be no different here as it was in *Goetz*.

First, we are satisfied this is not a question of jurisdiction as it appears the Department is arguing. We have already discussed why we think, based on the *Pilawa* case, that the Board has jurisdiction even though the question about the inability to pay arose after the expiration of the 30 days starting from the date of the issuance of the penalty assessment. Clearly, the failure to raise the issue within that original 30 day period does not divest the Board's jurisdiction over the case. That is a direct and necessary deduction from the *Pilawa* case. Also, interestingly, after the *Pilawa* matter was remanded to the Board, the case continued through to an adjudication. The

Department stipulated to Pilawa's inability to prepay, the Board then permitted the case to go to trial. Pilawa eventually lost on the merits. *Pilawa v. DEP*, 1998 EHB 1016, 1018, 1040.

Proceeding from that foundation regarding jurisdiction, we think the best thing to do is to do exactly what we did in the *Goetz* case based on much of the same reasoning found in the *Goetz* discussion of this issue. *See Goetz*, 1999 EHB at 969-72. In short, the protection of the financially vulnerable appellant dictates that we proceed with great caution. As Judge Labuskes wrote in *Hrivnak*, "[t]he Commonwealth Court has instructed that we are to tread carefully in this area because parties generally should not be deprived of access to the courts and due process of law simply because of their impecunity." *Hrivnak*, 1999 EBH at 439 *citing Twelve Vein Coal Company, Inc. v. Department of Environmental Resources*, 561 A.2d 1317, 1319 (Pa. Cmwlth. 1989)

We do not think that it would be in keeping with *Pilawa* if, granted that an appellant may assert his inability to prepay late and still have a hearing, he suffers immediate and automatic dismissal without opportunity to cure if he turns out to have been wrong. Both the rationale and the verbiage of the Judge Doyle's decision in *Pilawa* is applicable to the question we are now discussing so we will respectfully borrow them: The Commonwealth Court's decisions in *Twelve Vein* and *Pilawa* clearly hold that when a party alleges that it is not able to comply with the prepayment or bond requirements for perfecting an appeal to the Board, the proper procedure is for the Board to hold a hearing to determine whether the party is, in fact, impecunious and unable to comply with the prepayment condition. While the issue of the timeliness of an appellant's claim of financial hardship was outside the scope of the Board's *Goetz* decision, we do not believe

that Kresge's failure to raise the financial condition as a separate issue during the appeal period mandates a different end result here than was reached in the *Goetz* case with respect to whether the appellant should be provided an opportunity to prepay once the Board, after hearing, determines that it has not sufficiently proven its assertion of inability to pay. *See Pilawa*, 698 A.2d at 143.

Also, we note that in this particular case, the potential for delaying the Board's proceedings, which was the factor the *Goetz* Board said would make the call tougher in the case where the issue is raised later than within the initial 30 day period, is not present here.[5] In this case, although we hardly think that we will see this scenario as typical, the matter was raised for the first time on the first day of trial and the Board, together with hearing evidence on the inability to prepay issue, proceeded to complete the record as to all matters. The trial in this case is already done. Also, we note that in other cases, the Department may raise this issue at any point in the proceedings as well. It does not have to sit and wait for the Appellant to do so.

Accordingly, now that we have found that Kresge has not sufficiently proven its assertion of inability to prepay, we will allow a 30 day period for it to either prepay or post an appeal bond.

Accordingly, we enter the following order:

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[5] The Board's citation to "delaying the Board's proceedings" as the factor which would make the call more difficult in the case, like this one, where the assertion of inability to pay comes after the initial 30 day period also demonstrates that the *Goetz* Board did not believe that this question was jurisdictional at root. Whether a proceeding at the Board may take longer to litigate is obviously not a factor upon which the Board's jurisdiction rises or falls. The actual or potential *temporal duration* of a proceeding before the Board is not an input to the inquiry of whether Board *jurisdiction* exists.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CARL L. KRESGE & SONS, INC.	:	
	:	
v.	:	EHB Docket No. 99-149-K
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 14th day of May, 2001, it is HEREBY ORDERED that Appellant shall prepay the civil penalty or file an appeal bond for the amount of the penalty, in accordance with Section 21(b)(1) of the Noncoal Surface Mining Act, by **June 13, 2001.**

ENVIRONMENTAL HEARING BOARD

MICHAEL L. KRANCER
Administrative Law Judge
Member

DATED: **May 14, 2001**

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

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Southcentral Regional Counsel

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOAR

BENJAMIN D. and SARA JO AU, RALH and PEGGY YENZI and GERALDINE BROCIOUS	:	
v.	:	**EHB Docket No. 2000-214-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and FALLS CREEK ENERGY CO., INC., Permittee	:	**Issued: May 23, 2001**

OPINION AND ORDER ON DEPARTMENT'S MOTION TO DISMISS

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

When a coal mining company withdraws its permit and the permit is subsequently cancelled by the Department, the Appeal of the issuance of the permit is moot.

Discussion

Presently before the Board is the Department's Motion to Dismiss the Appellants' Appeal based on mootness. Appellants appealed the issuance of a surface coal mining permit to Falls Creek Energy Company, Inc. ("Falls Creek"). Several months thereafter, Falls Creek advised the Department that it wished to withdraw its permit and the Department subsequently cancelled the surface coal mining permit.

The Department contends that since the permit is withdrawn and cancelled the Appellants' Appeal is moot because there is no effective relief which the Board can grant to Appellants. *Ziviello v. State Conservation Commission*, 1999 EHB 889; *Kilmer v. DEP*, EHB

846. Appellants do not dispute that the Appeal is moot but contend that the Board should dismiss the Appeal as moot but allow the Appellants to attempt to create a factual record to support an award of fees and costs against the Department. The Department contends that Appellants are not legally entitled to fees and costs.

The validity of Appellants' claim for fees and costs is not presently before us. We will enter an Order dismissing the Appeal as moot. However, Appellants may file a petition setting forth their claim for fees and costs.

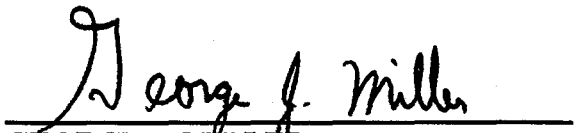
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BENJAMIN D. and SARA JO AU, RALH and PEGGY YENZI and GERALDINE BROCIOUS	:	
v.	:	**EHB Docket No. 2000-214-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and FALLS CREEK ENERGY CO., INC., Permittee	:	

ORDER

AND NOW, this 23rd day of May, 2001, the Appellants' Appeal is **dismissed** as moot.

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: May 23, 2001

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

For the Commonwealth, DEP:
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Southwest Regional Counsel

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For Permittee:
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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

STEPHEN FERINO AND FRANK FERINO	:	
	:	
v.	:	**EHB Docket No. 2000-284-K**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: May 23, 2001**

OPINION AND ORDER ON THE DEPARTMENT'S MOTION FOR RECUSAL

By Michael L. Krancer, Administrative Law Judge

Synopsis:

The Department's motion that the presiding Judge recuse himself in an appeal of a civil penalty assessment under the Storage Tank and Spill Prevention Act, Act of July 6, 1989, P.L. 169, No. 32, *as amended*, 35 P.S. §§ 6021.101-6021.2104 (Tank Act) is denied. The basis of the motion is Appellants' counsel's utterance during a routine status teleconference of the amount of a Department settlement demand. The Judge concludes that his impartiality has not been compromised.

DISCUSSION

Before me is the Motion of the Department, filed on April 30, 2001, asking that I recuse myself from further involvement in this case which is an appeal of a civil penalty assessment under the Tank Act. The genesis of the Department's Motion is the utterance by counsel for the Appellants, in the midst of an April 17, 2001 telephone status conference, in which I, as the presiding Judge in the case, was participating, of the

amount of a settlement offer DEP had allegedly made. The demand referred to by counsel for the Ferinos was considerably lower than the civil penalty assessment amount, which is the subject of this litigation. The Department characterizes this disclosure as both unilateral and improper on the part of Appellants' counsel.

The Department alleges that:

> [a]fter internal discussion of the above facts the Department believes that the atmosphere of the Board proceedings with respect to the penalty has been irremediably tainted by [counsel for Appellants'] unilateral and improper action, and reluctantly concludes that recusal of Administrative Law Judge Krancer is necessary for an impartial ruling on the penalty assessment.

The Department's Motion also states that it "now believes that any penalty amount [Judge Krancer] submits to the rest of the Board for consensus will have unavoidably—however unconsciously—been colored by [counsel for Appellants'] improper action."

Importantly, the Department prefaces its argument by stating that, "[t]he Department wishes to be clear from the outset that it attributes to Administrative Law Judge Krancer no improper conduct or animus in this matter." It also states that, "[t]he Department is not contending that Administrative Law Judge Krancer has shown any evidence of prejudging this matter, or partiality toward or against any participant."

The Department looks for more than just my recusal in the context of this Motion. Following on its premise that the utterance by counsel for Appellants was improper, the Department notes that the Board should also have the opportunity to declare in a written opinion that counsel for the Ferinos conduct was improper and not to be repeated or emulated. Thus, the Order the Department seeks here is not only for my recusal, but also prohibiting the Ferinos and their counsel, on pain of sanction, from representing to the

Board any alleged Department settlement offer unless such offer has been made in writing and accepted.

The Ferinos filed a response with legal memorandum to the Department's Motion on May 18, 2001. The Ferinos argue that there is no evidence that I am in any way biased or that my impartiality can be questioned. Also, the Ferinos argue that the utterance by their counsel was not only not improper but, under the circumstances, counsel was obligated to make the revelation in order to correct a false impression that she understood the Board may have received from certain statements by counsel for the Department.

In determining this Motion I agree with both parties that we look to Canon 3(C) of the Code of Judicial Conduct, which is entitled "Disqualification", and which states in relevant part as follows:

> 1. A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:
> (a) he has personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
> (b) he served as a lawyer in the matter in controversy, or a lawyer which whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;
> (c) he knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a substantial financial interest in the subject matter in controversy or in a party to the proceeding or any other interest that could be substantially affected by the outcome of the proceeding;
> (d) he or his spouse, or a person within the third degree of relationship to either them, or the spouse of such a person;
> (i) is a party to the proceeding, or an officer, director, or trustee of a party;
> (ii) is acting as a lawyer in the proceeding;
> (iii) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) it is to the judge's knowledge likely to be a material witness in the proceeding.

Canon 3(C)(1), *Code of Judicial Conduct*. In this case, the only subsection of Canon 3(C)(1) which could be in play here is subsection (a) regarding bias or personal knowledge of disputed evidentiary facts concerning the proceeding. In any event, the central inquiry is whether the Judge's "impartiality might reasonably be questioned."

I am guided in my interpretation and application of Canon 3(C)(1) in this case by the principles set forth by Judge Renwand in *People United To Save Homes v. DEP*, 1997 EHB 643 (*PUSH*). In *PUSH*, Judge Renwand wrote:

> [The Movant] bears the burden of producing evidence establishing a conflict of interest, bias, or unfairness necessitating recusal. *Commonwealth v. Stanton,* 440 A.2d 585 (Pa. Super. 1982). The Pennsylvania Supreme Court directs that recusal "is a matter of individual discretion or conscience and only the jurist being asked to recuse himself or herself may properly respond to such a request." *Commonwealth v. Jones,* 663 A.2d 142 (Pa. 1995). Just as a judge must disqualify himself if the evidence adduced establishes reasonable doubt about a judge's impartiality, the judge has an equally affirmative duty to preside in the absence of such proof. *Welch v. Board of Directors of Wildwood Golf Club,* 918 F.Supp. 134 (W.D.Pa. 1996).

PUSH, 1997 EHB at 644.

Before I get to the specific matter at hand, I digress briefly to acknowledge the presence of two sub-disputes which have erupted, one from the set of circumstances giving rise to the Motion, and another from the circumstances surrounding the filing of the Motion papers and response themselves. The first of these sub-disputes, which we have already alluded to and which is related to the substance of the Department's Motion, is the Department's contention that the conduct of Ferinos' counsel was improper and the Ferinos' response that her conduct was not only not improper, but obligatory. The substance of this sub-dispute is a highlight of the Department's initial papers and we have

been invited, in the context of our written opinion in this matter, to both scold and warn Appellants' counsel. The other sub-dispute, which is more procedural in nature, is the Department's contention that the Ferinos' responsive papers were filed late and that it would be inappropriate for the Board to consider them.

Despite the Department's invitation, we choose not to come to any definitive conclusions on the first sub-dispute. The parties obviously have a fundamental and polar disagreement about whether the utterance by Appellants' counsel was, on the one hand, improper or, on the other hand, ethically obligatory under the particular circumstances here. This would be an excellent topic for an essay examination question in a law school Professional Responsibility class, but it does not, in our view, dispositively impact the decision we have to make in this case on recusal under the standards of Canon 3(C)(1). Even the parties agree with that evaluation as neither is arguing that our decision on recusal hinges on whether Appellants' counsel's utterance is characterized as being improper or being ethically obligatory. The decision on recusal hinges on the standard outlined in Cannon 3(C)(1), *i.e.*, whether the Judge's impartiality might reasonably be questioned.

That being said, however, I do not, as a matter of practice, approve of any party unilaterally disclosing any specific substance of settlement discussions without the prior approval of both the other parties in the case and the Judge. The Order For Status Reports and Teleconference (Order) entered by the Board under my signature on March 12, 2001, which called for the filing of status reports and scheduled the very status teleconference at which Appellents' counsel made the utterance which prompted the Department to file this Motion, states specifically that the parties' status reports are to

provide a "statement of the status of settlement discussions...*being mindful not to discuss the actual substance of any such settlement discussions.*" Order, ¶ 1.g. (emphasis added). That caveat clause is standard verbiage in all of my Orders which request the parties to address the status of, among other things, the current state of settlement efforts. Even if, as Appellants' counsel believes, unplanned events not of her making during the course of the status teleconference navigated her into a position of being ethically obligated to disclose the specific settlement demand of the Department, she was not ethically obligated to make the disclosure precipitously and unilaterally without first notifying both the Department's counsel and the Judge of her perceived ethical dilemma and her explanation of the course of action that she felt she was ethically required to follow as a result.

I realize that it is easy here and now, months after the status teleconference, after reading and considering opposing briefs on the subject, and after a long opportunity to reflect on the particulars of this matter, to express the view outlined in the previous paragraph. I offer this bit of "20/20 hindsight" not to pass judgment, but to provide my views on this subject to both Appellants' and the Department's counsel in this case in particular, and to the members of the Bar who appear before me in general.

As to the second sub-dispute, the Department, in a separate letter to the Board dated May 18, 2001 and faxed to the Board on that date, asks that we not consider the Ferinos' response because it was allegedly filed late. The Department states that the Motion, as reflected in the certificate of service, was served by mail on Thursday, April 26, 2001. Under Board Rule 1021.74(c), 25 Pa. Code § 1021.74(c), which allows for responses to miscellaneous motions, including specifically, motions for recusal, to be

filed within 15 days of the date of service, the Ferinos' response should have been received by no later than Monday, May 14, 2001, even adding the three extra days allowed when original service is accomplished by mail as set forth in Board Rule 1021.33(a), 25 Pa. Code § 1021.33(a). The Department states that it would not be appropriate for the Board to consider the Ferinos' response because "the parties to a litigation need to play by the Rules." The Ferinos initial response to that letter was by letter faxed to the Board several hours later. The Ferinos swear that the Department's Motion was not physically received by counsel until Monday, May 7, 2001. The Ferinos' response letter is accompanied by the sworn affidavit of the Ferinos' counsel's legal assistant, Ms. Anne Marie Robb, whose responsibility it is to time stamp all incoming correspondence, who testifies as to the date the Department's Motion was received. On that basis, the Ferinos conclude that the Department must not have placed its Motion package in the mail on Thursday until so late that it did not actually depart the building that day. By further letter from the Ferinos' counsel dated May 21, 2001, the Ferinos point out that the Department's Motion papers state that the Motion is being brought pursuant to 25 Pa. Code § 1021.73(a) which states that "[t]his section applies to *dispositive* motions. Rule 1021.73(d) permits a response to be filed to dispositive motions within 25 days of the date of service as opposed to 15 days as is the case for miscellaneous motions. It is clear to me, though, that the reference in the Department's Motion to the Motion being brought pursuant to 25 Pa. Code § 1021.73(a) is an error. The Motion is obviously a miscellaneous motion under Board Rule 1021.73, which Rule specifically includes motions for recusal.

Having heard both sides on this issue, we respectfully forgo reaching any definitive factual findings or conclusions on this sub-dispute and we conclude, holistically, that it would not be inappropriate, under the circumstances, to consider the Ferinos' response and accompanying memorandum of law.

Now, as to the substance of the Department's request that I recuse myself, after careful consideration and reflection I have concluded that I need not, and should not, recuse myself from this matter. The basis for that outcome is my conclusion that my impartiality in this matter has not been compromised and that it cannot be reasonably questioned. Indeed, the moving party, the Department, has stated that it attributes no animus to me and that it is not contending that I "[have] shown any evidence of prejudging this matter, or partiality toward or against any participant."

I cannot agree with the import of the Department's argument which is that a trial Judge is automatically tainted from further involvement in the case because he or she has heard, in the course of a status teleconference, the amount of the plaintiff party's settlement demand. A Judge's mere knowledge of a settlement demand does not necessarily and automatically poison his or her impartiality. Indeed, although I recognize that the list of potential circumstances set forth in subsections (a) through (d) of Canon 3(C)(1) for which a Judge is to be particularly aware of potential dangers to impartiality is not meant to be exclusive, that list does not include the mere knowledge of a settlement demand. If such were the case, as the Ferinos point out, Judges would have to recuse themselves in almost every case that they manage. Such a rule could also be subject to abuse since any litigant who wanted to obtain a new trial judge could simply mention the amount of a pending settlement offer or demand.

Beyond the broader considerations just talked about in the previous paragraph, the parties should rest assured that I have considered and reflected upon the specific case at hand and I am completely sure that, under the circumstances here, my impartiality remains completely intact. I think that the Department's Motion was prompted by the fact that the settlement demand attributed to it, which was revealed by the Ferinos' counsel during the April 17, 2001 conference call, was *lower* than the assessed civil penalty. That was no surprise to me at the time nor have I lost my impartiality on the basis of what I heard.

I was notified by routine status report two weeks before the April 17, 2001 conference call that the parties had been engaged in intensive settlement discussions. I think that, by definition, "settlement discussions" means a demand or demands by the Department which is or are *less* than the amount of the actual penalty assessment—otherwise the discussions would not be *settlement* discussions. Also, the initial Notice of Appeal filed on December 21, 2000, contained a certification that the Ferinos were financially unable to prepay the civil penalty amount or post an appeal bond, as required by the Tank Act, and they should, thus, be exempted from that requirement. The Board, by my Order dated December 27, 2000, isolated that aspect of the case for the initial subject of both documentary and deposition discovery and a hearing, which was scheduled for February 5, 2001. At the request of both parties, this hearing was postponed twice and then eventually cancelled altogether when the Board was notified, by letter dated February 13, 2001, and filed with the Board that date, that the parties had stipulated that the Ferinos would be able to show at the hearing that they lack the liquid

assets to prepay the full civil penalty amount. With that backdrop, that the Department's demand or demands were lower than the assessed amount is not surprising.

Under these circumstances, I am not a bit surprised, nor offended, nor, more importantly, is my impartiality compromised by having heard a settlement demand which is lower than the initial civil penalty assessment. My almost 17 years of experience litigating cases before coming to the Bench taught me that that settlement discussions are motivated by, and settlement demands and offers are inherently based, at least in part, on reasons and considerations external to the merits of a party's case. I am not prejudiced nor is my ability to preside over the trial on the merits in this case compromised by having heard from Appellants' counsel a settlement demand attributed to the Department. When trial comes, if it does, everybody knows, both the parties and the Judges, that "all bets are off". At that point, the merits of the Department's case and the defense, as presented by the parties, and the applicable law are the only matters which will be considered by me and by the other Judges of the Board. As Judge Renwand wrote in *PUSH*, in words equally applicable here, "[t]he Board will always be guided by the law and evidence in deciding the issues remaining in this case." *PUSH*, 1997 EHB at 657.

Accordingly, we enter the following Order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

STEPHEN FERINO AND FRANK FERINO	:	
	:	
vi.	:	**EHB Docket No. 2000-284-K**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 23rd day of May, 2001, the Motion of the Department for Recusal is **Denied**.

ENVIRONMENTAL HEARING BOARD

MICHAEL L. KRANCER
Administrative Law Judge
Member

DATED: May 23, 2001

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

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

EXETER TOWNSHIP, BERKS COUNTY, AUTHORITY	:	
v.	:	**EHB Docket No. 98-154-C**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued:** May 30, 2001

OPINION AND ORDER ON MOTION TO DISMISS

By Michelle A. Coleman, Administrative Law Judge

Synopsis:

The Board grants a motion to dismiss an appeal. A Department letter informing a municipality that the Department of Environmental Protection (Department) denied a portion of its request for subsidies under the Act of August 20, 1953, P.L. 1217, *as amended*, 35 P.S. §§ 701-703 (Act 339), and that the letter was a "final decision" is a Department "decision" for purposes of section 4(a) of the Environmental Hearing Board Act, Act of January 13, 1988, P.L. 530, *as amended*, 35 P.S. § 7514(a). Since the municipality did not appeal that letter, the Department's determination concerning the subsidy is final regarding the municipality, and administrative finality precludes any further consideration.

The Board will not invoke equity to deny the motion to dismiss, as the municipality requests, since the Board lacks equitable powers.

OPINION

This appeal concerns a subsidy the Department awarded on August 12, 1998, to Exeter Township Authority (Appellant), of Berks County, under Act 339.[1] Pursuant to section 1 of Act 339, 35 P.S. § 701, and 25 Pa. Code § 103.24a, the Department provided an annual subsidy of two percent of the costs incurred for the "acquisition and construction" of publicly-owned sewage treatment plants. Whether interest paid on funds borrowed for the "acquisition and construction" of plants is eligible for the subsidy has been disputed in the past. The Department used to take the position that only 1.5% of such interest was eligible for the subsidy. But on February 13, 1996, the Board ruled that the entire interest paid was eligible for the subsidy—not merely 1.5% of it. *See City of Philadelphia v. DEP,* 1996 EHB 47. The Commonwealth Court affirmed that decision on April 7, 1997, in *Department of Environmental Resources v. City of Philadelphia,* 692 A.2d 598 (Pa. Cmwlth. 1997).

In keeping with the Department's practice at the time, the subsidies that the Department awarded to Appellant before 1998 were calculated based on 1.5% of Appellant's interest costs. However, in 1998, when Appellant submitted its application for the subsidy for costs from the 1997 calendar year, Appellant also requested that Department award it a subsidy for the difference between the 1.5 percent of interest costs which the Department had included in the subsidy calculations for previous years and the total amount of the interest expended in those years. (We shall refer to the subsidy for this difference as the "additional interest subsidy.")

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[1] Act 339 was repealed effective December 31, 1999. *See* Act of December 15, 1999, P.L. 949, No. 68, § 3(a). The Environmental Stewardship and Watershed Protection Act, Act of December 15, 1999, P.L. 949, 27 Pa. C.S.A. § 6101-6113, now governs the matters previously addressed in Act 339.

On April 28, 1998, the Department sent a letter to Appellant informing it that, while the Department would award it a portion of the total subsidies Appellant requested, the Department was not going to include the additional interest subsidy. Appellant did not appeal that letter to the Board.

On August 12, 1998, the Department sent Appellant a check to Appellant covering the portion of the subsidies the Department agreed to pay in its April 28, 1998, correspondence. (*I.e.,* the check did not include the additional interest subsidy.) A cover letter accompanied the check.

On August 27, 1998, Appellant filed a notice of appeal challenging the Department's August 12, 1998, letter. Appellant asserted, among other things, that the Department erred by denying the additional interest subsidy because the Department required that applicants for the subsidies use forms provided by the Department, but, prior to 1998, the Department's forms only allowed applicants to request a subsidy for 1.5% of their interest costs—not the total eligible amount.

The Board has issued two previous decisions in this appeal. On March 23, 2000, we issued an opinion and order denying a Department motion to dismiss the appeal on the basis of administrative finality. *See Exeter Township Authority v. DEP*, and *Peters Township Sanitary Authority v. DEP*, EHB Docket Nos. 98-154-C and 98-189-R (opinion issued March 23, 2000).[2]

[2] The opinion was a joint decision in two appeals, both of which concerned whether applicants for Act 339 subsidies could request additional interest subsidies. In those motions to dismiss, the Department argued that the appellants were precluded from challenging the failure to award the additional interest subsidy because the appellants failed to appeal the decision at the time they received the subsidies for those years; instead, the appellants waited until years later and, after the Board ruled that the municipalities were eligible for such costs, attempted to recoup additional interest subsidies that they had not gotten from previous years. The Board held that the administrative finality doctrine did not bar the appellants from recouping additional

On May 1, 2000, we issued a decision granting a Department petition for reconsideration of an order the Board had issued sustaining Appellant's appeal. *See Exeter Township, Berks County, Authority v. DEP,* EHB Docket No. 98-154-C (opinion issued May 1, 2000). Upon reconsideration, we vacated the order. *Id.*

While reconsideration was pending in this case, the companion case was appealed to Commonwealth Court. *See Peters Township Sanitary Authority v. DEP*, No. 923 C.D. 2000 (Slip op. filed January 11, 2001)

On June 28, 2000, the Department filed a motion to dismiss Appellant's appeal, together with a supporting memorandum of law. Appellant filed a response and memorandum in opposition on July 31, 2000. The Department filed a reply, a memorandum in support, and a reply to Appellant's affirmative defense on August 22, 2000.

In its motion, reply, and memoranda, the Department argues that Appellant's appeal is untimely and barred by the doctrine of administrative finality. Specifically, the Department contends that:

> (1) it first informed Appellant that it would not award the additional interest subsidy in an April 28, 1998, letter;
>
> (2) the April 28, 1998, letter was appealable to the Board;
>
> (3) Appellant failed to file an appeal with the Board within 30 days of notice of the April 28, 1998, letter—or to request permission to file an appeal *nunc pro tunc*—and thus the Department's April 28, 1998, decision on the additional interest subsidy is final; and,

---

interest subsidies from previous years because there was no requirement that appellants request the subsidies for the same year in which the funds were spent. Although the Board denied those motions to dismiss, the Board made it clear that the Department remained free to raise other arguments concerning Appellant's appeal. *See Exeter Township Authority v. DEP*, and *Peters Township Sanitary Authority v. DEP*, EHB Docket Nos. 98-154-C and 98-189-R slip op. at 9 (opinion issued March 23, 2000).

(4) therefore, Appellant's current appeal amounts to a collateral attack on a final government action and is barred by the doctrine of administrative finality.

In addition, the Department argues that we lack jurisdiction over Appellant's appeal because the Department's August 12, 1998, letter was not an appealable decision.

In its response, new matter, and memorandum in opposition, Appellant argues that:

(1) the April 28, 1998, letter was not appealable to the Board;

(2) the Department's August 12, 1998, letter was appealable to the Board; and,

(3) even if the Department were entitled to have the appeal dismissed on legal grounds, the Board has equitable powers, and equity demands that the Department's motion be denied given the Department's repeated failure to respond to Appellant in its attempts to comply with Board's scheduling orders.

In its response to the new matter, the Department argues that the Board lacks equitable powers, and that, even if the Board had them, the Department's conduct concerning the scheduling orders has been appropriate.

The Board will grant a motion to dismiss where no material issues of fact remain in dispute and the moving party is entitled to judgment as a matter of law. *See Smedley v. DEP,* 1998 EHB 1281, 1282. All doubts are resolved in favor of the non-moving party. *Id.*

After a careful review of the law and facts, we conclude that the Department is entitled to dismissal of Appellant's appeal. The Department's April 28, 1998, letter is an appealable decision, and it became final when Appellant failed to appeal it to the Board. Therefore, Appellant cannot collaterally attack that determination in its appeal of the August 12, 1998, letter.

I. THE APRIL 28, 1998, LETTER WAS A DEPARTMENT "DECISION" APPEALABLE TO THE BOARD

Administrative agencies, such as the Board, have only those powers expressly conferred, or necessarily implied, by statute. *See, e.g., DER v. Butler County Mushroom Farm*, 454 A.2d 1, 4 (Pa. 1982), and *Pequea Township v. DEP*, 716 A.2d 678, 686 (Pa. Cmwlth. 1998). Act 339 does not specify what Department actions are appealable to the Board. Therefore, whether one may challenge a Department action taken pursuant to Act 339 by appealing to the Board turns on the "general rule" for appealable actions, at section 4(a) of the Environmental Hearing Board Act, 35 P.S. § 7514(a). Section 4(a) provides, "The Board has the power and duty to hold hearings and issue adjudications ... on orders, permits, licenses or decisions of the Department."

When determining whether a Department action is appealable, the Board typically looks to whether the action affected the appellant's legal rights or obligations. *See, e.g., Dallas Area Sewer Authority v. DEP,* EHB Docket No. 2000-091-C, slip op. at 3-4 (opinion issued September 12, 2000). Similarly, the Board held in *Eagle Enterprises v. DEP,* 1996 EHB 1048, that "letters from the Department which require no specific action on the part of appellants are not final actions over which the Board has jurisdiction." 1996 EHB at 1049.

We have stated previously, "The appealability of a particular Department letter is dictated by the language of the letter itself." *Central Blair County Sanitary Authority v. DEP*, 1998 EHB 643, 646-47. *See also Bituminous Processing Co., Inc. v. DEP,* EHB Docket No. 99-172-L slip op. at 2 (opinion issued January 18, 2000). Here, a comparison of the language in the Department's April 28, 1998, and August 12, 1998, correspondence shows that the former was the appealable action.

The April 28, 1998, letter stated, in pertinent part:

> *The processing of the Authority's your [sic] 1997 application for a State subsidy under Act 339 has been completed.*
>
> . . .
>
> [W]e believe that we have more than adequately addressed the interest paid matter with prior year Act 339 applications submitted by the Authority. The amount of interest approved for subsidy under the Act 339 program was determined at the time you applied for and we reviewed the sewage treatment facilities that were approved for subsidy with the Authority's 1994 application. The Authority was informed of this decision in our letter dated March 27, 1999....
>
> This matter was again discussed in our letter to the Authority dated April 10, 1997 ... regarding the 1995 application and October 22, 1997 ... regarding the 1996 Act 339 application.
>
> It is the Department's position that the decision on interest paid, as it relates to the facilities determined to be eligible with the Authority's 1994 application, was made and transmitted to the Authority in our letter of March 27, 1996. We have not reconsidered our decision in this matter.
>
> Since no construction occurred and no new eligible construction costs were incurred during 1997 at the Authority's sewage treatment facilities, the Authority's 1997 total eligible Act 339 construction costs remains at $21, 510,008.25. *This is the Department's final decision regarding your Act 339 application for 1997.*

(Motion, Exhibit A, emphasis added.) Although the letter never expressly states that Appellant had a right to appeal it, the letter does contain a number of other indicia that suggest that it is a final decision: the letter addresses Appellant's request for the additional interest subsidy; it provides that "[t]he processing of the ... application for a State subsidy under Act 339 has been *completed*" (emphasis added); and it warns that it is the Department's "final decision" regarding Appellant's Act 339 application.

The Department's August 12, 1998, letter, by contrast, bears none of the hallmarks of a final decision. It does not address Appellant's request for the additional interest subsidy or specify the amount that the Department is awarding Appellant; it makes no reference to when the Department's review of the application was completed; and it never states that it is a final decision of the Department. (Motion, Exhibit E.) Furthermore—as in the case of the April 28, 1998, letter—the August 12, 1998, letter does not state that Appellant has a right to appeal.

Instead, the August 12, 1998, letter simply states that it accompanies a check for the payment of state funds in accordance with Act 339; it summarizes the provisions of the Act; it asks that Appellant acknowledge receipt of the check; and it states that the Department "appreciate[s] your contribution to Pennsylvania's Clean Streams program and to the enhancement of the quality of life in Pennsylvania." (Motion, Exhibit E.)

Appellant argues that the Department's April 28, 1998, letter was not a final decision because the letter lacks a provision informing Appellant of its right to appeal. In support of its position, Appellant points to *Lehigh Township v. Department of Environmental Resources,* 624 A.2d 693 (Pa. Cmwlth. 1993). *Lehigh Township,* however, does not stand for the broad proposition that a letter must contain a notice of a right to appeal for the letter to be a final decision of the Department.[3] In *Lehigh Township,* the Commonwealth Court held that a letter without a notice of a right to appeal was not an appealable Department "order." But the Court's holding did not turn solely on whether the letter had the notice. In addition to pointing to the absence of the notice, the Court noted that (1) the letter involved in that appeal invited the recipient to direct further questions to a particular Department employee; (2) the recipient subsequently requested and received an opportunity to present additional information to the Department on the matter the Department allegedly resolved by the letter; and (3) the Department considered the additional information. 624 A.2d at 696. The Court ended its analysis by writing, "If [the Department] considers an internal decision final and non-negotiable,

[3] Indeed, the Board has expressly rejected that proposition elsewhere. *See, e.g., Olympic Foundry, Inc. v. DEP,* 1998 EHB 1046, 1051-52 (holding that a Department letter need not inform a recipient that it is appealable for the letter to be an appealable action).

it is incumbent upon it to clearly and definitively so inform the affected parties." *Id.* This is precisely what the Department did in its April 28, 1998, letter to Appellant: the Department wrote, "This is the Department's final decision regarding your Act 339 application ...." (Motion, Exhibit A.)

On May 13, 1998—after Appellant received the Department's April 28, 1998, letter—William Smyers, a project manager from Gannett Fleming, wrote to the Department requesting a "formal reconsideration" of the Department's decision, in light of the Board's May 5, 1998, decision in *University Area Joint Authority v. DEP,* 1998 EHB 396. (Motion, Exhibit B.) Among other things, Smyers wrote, "We respectfully request that you consider this new information and inform the authority of your decision on this matter as promptly as possible. There is a time limitation on the requested reconsideration because the Authority has instructed its counsel to prepare an appeal of this Department action. If you are unable to provide written documentation of eligibility by May 26, 1998, the Authority has authorized its solicitor to proceed with the appeal." (Motion, Exhibit B.)[4]

Appellant prepared a notice of appeal to the April 28, 1998, letter and, on May 26, 1998, served a copy of the notice of appeal upon the Department's counsel and the Department official who wrote the letter. However, Appellant failed to file a copy of the notice of appeal with the Board, as required by 25 Pa. Code § 1021.52(a).[5]

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[4] Significantly, in his May 22, 1998, response to Smyers's letter, counsel for the Department referred to "the Department's April 28, 1998 *final decision* on the Authority's 1997 Act 339 Application." (Motion, Exhibit C (emphasis added).) Thus, even before the appeal period expired, Appellant had additional confirmation that the Department regarded its April 28, 1998 decision denying the additional interest subsidy as final.

[5] In its motion, the Department avers that Appellant never filed its notice of appeal with the Board concerning the April 28, 1998, letter. (Motion, paragraph 11.) Appellant fails to admit or deny this averment in its response. (Response, paragraph 11.) The Department argues

II. SINCE APPELLANT FAILED TO APPEAL THE DEPARTMENT'S APRIL 28, 1998, DECISION, THAT DECISION IS FINAL

Since the Department's April 28, 1998, letter was an appealable decision within the meaning of section 4(a) of the Environmental Hearing Board Act, Appellant had to file a timely appeal of the letter or the Department's decision denying the additional interest subsidy would be final with respect to it. Section 4(c) of the Environmental Hearing Board Act, 35 P.S. § 7514(c), provides, "If a person has not perfected an appeal in accordance with the regulations of the board, the department's actions shall be final as to the person." And section 1021.52(a) of the Board's rules of practice and procedure, 25 Pa. Code § 1021.52(a), provides that the Board has jurisdiction over an appeal filed by the recipient of a Department action only where the recipient files its appeal with the Board within 30 days of receiving notice of the action.[6] Thus, the Department's April 28, 1998, letter became final with respect to Appellant unless Appellant appealed within 30 days of receiving notice of the action. *See Otte v. Covington Township Road Supervisors*, 650 A.2d 412, 414 (Pa. Cmwlth. 1994).

But Appellant failed to appeal the April 28, 1998, letter within 30 days of receiving notice. Appellant had notice of the action by at least May 26, 1998—the date on which Appellant served a copy of the notice of appeal upon the Department. (Motion and response,

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in its reply that the Department's failure to admit or deny the averment constitutes an admission. (Reply, paragraph 11.)

We need not decide whether Appellant's failure to specifically address the averment is an admission. It is well established that the Board can take judicial notice of its own records. *See, e.g., Pagnotti Enterprises, Inc. v. Department of Environmental Protection*, 1993 EHB 884, 919 n.13, and *Allegro Oil & Gas, Inc. v. DEP*, 1998 EHB 1162, 1165. Having reviewed our records, we have ascertained that Appellant never filed a notice of appeal to the April 28, 1998, letter.

[6] There is an exception in § 1021.52(a) for appeals *nunc pro tunc*. However, we need not account for that contingency in the instant appeal. Where, as here, an appeal is untimely because Appellant accidentally files a notice of appeal with the Department, the prospective appellant

paragraphs 11.) Yet Appellant failed to appeal the letter to the Board. Since more than 30 days have passed since May 26, 1998, the Department's April 28, 1998, letter is final and Appellant cannot appeal it now.

III. APPELLANT IS BARRED BY ADMINISTRATIVE FINALITY

In *Peters Township Sanitary Authority v. DEP*, 767 A.2d 601 (Pa. Cmwlth. 2001), Commonwealth Court held that "the aggrieving administrative action was DEP's use of 1.5% interest on the 1994 application, and PTSA's obligation to challenge it arose when DEP applied it to the 1994 application, having not challenged it then, administrative finality bars PTSA's claim in 1997 that it is now entitled to payments based on actual interest." Slip op at 6. Consistent with this holding, we find that since the municipality did not appeal the April 28, 1998 letter in which DEP decided the interest amount, it is barred by administrative finality.

IV. THE BOARD CANNOT DENY THE DEPARTMENT'S MOTION TO DISMISS SIMPLY BASED ON EQUITY, WHERE THE DEPARTMENT HAS ESTABLISHED THAT IS ENTITLED TO JUDGMENT AS A MATTER OF LAW.

Appellant argues that, even if its appeal would ordinarily be precluded as a matter of law, equity demands that the board deny the motion because of the Department's repeated failure to respond to Appellant in its attempts to comply with the Board's scheduling orders. We disagree. Even assuming the Department had acted in the manner Appellant alleges, we would not have the power to deny the Department's motion simply based on equity. As the Department notes in its reply brief, the Board lacks equitable powers. *See Pequea Township v. Herr*, 716 A.2d 678,

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may not file an appeal *nunc pro tunc*. *See, e.g., Rostosky v. DER,* 364 A.2d 761, 763 (Pa. Cmwlth. 1976); *Broscious Construction Co. v. DEP,* 1999 EHB 383, 385.

686 (Pa. Cmwlth. 1998); *Marinari v. Department of Environmental Resources*, 566 A.2d 385,387 (Pa. Cmwlth. 1989).

Accordingly, we enter the following order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

EXETER TOWNSHIP, BERKS COUNTY, AUTHORITY	:	
v.	:	EHB Docket No. 98-154-C
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 30th day of May, 2001, it is ordered that the Department's motion to dismiss is granted, and 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: May 30, 2001

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

For the Commonwealth, DEP:
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Southcentral Regional Counsel

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jb/bap

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

TRI-STATE RIVER PRODUCTS, INC.	:	**EHB Docket No. 2001-019-R**
GLACIAL SAND & GRAVEL COMPANY	:	**2001-020-R**
THE LANE CONSTRUCTION COMPANY	:	**2001-021-R**
and PIONEER MID-ATLANTIC, INC.	:	**2001-022-R**
	:	**2001-035-R**
v.	:	**2001-037-R**
	:	**2001-038-R**
COMMONWEALTH OF PENNSYLVANIA,	:	**2001-039-R**
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION	:	**Issued: June 1, 2001**

OPINION AND ORDER ON PETITION TO INTERVENE

By Thomas W. Renwand Administrative Law Judge

Synopsis:

A petition by a national citizen's organization to intervene in the appeals of the suspension of dredging permits and certain conditions placed in the permits by the Department of Environmental Protection is granted.

OPINION

This matter involves eight appeals by four dredging companies (the Appellants) from the Department of Environmental Protection's (Department) issuance and suspension of water obstruction and encroachment permits. The permits authorized the Appellants to dredge for sand and gravel at certain points along the Allegheny and Ohio Rivers. After determining that certain requirements for public comment and hearing had not been met, the Department suspended the

permits so that such requirements could be met.[1] The Appellants appealed the suspension of the permits as well as certain general and special conditions placed in the permits.

On May 2, 2001, Clean Water Action petitioned to intervene in the appeals. The Appellants filed an answer opposing intervention. The Department filed a letter stating it did not object to the proposed intervention.

The standard for intervention is set forth in Section 4(e) of the Environmental Hearing Board Act,[2] which states that "[a]ny interested party may intervene in any matter pending before the board." 35 P.S. § 7414(e); *Khodara v. DEP*, EHB Docket No. 2001-046-MG (Opinion and Order on Motion to Intervene issued April 5, 2001), at 2. The Commonwealth Court has defined "any interested party" in the context of intervention to mean "any person or entity interested, i.e. concerned, in the proceedings before the Board. The interest required...must be more than a general interest in the proceedings; it must be such that the person or entity seeking intervention will either gain or lose by direct operation of the Board's ultimate determination." *Browning Ferris, Inc. v. Department of Environmental Resources*, 598 A.2d 1057, 1060-61 (Pa. Cmwlth. 1991); *Orix-Woodmont Deer Creek I Venture, L.P. v. DEP*, EHB Docket No. 2000-237-R (Opinion and Order on Petition to Intervene issued January 11, 2001), at 2; *Ainjar Trust v. DEP*, 2000 EHB 75, 77-78; *Connors v. State Conservation Commn.*, 1999 EHB 669, 670. An organization has standing to intervene if at least one of its members has standing. *Orix-Woodmont, supra.* at 3; *P.H. Glatfelter Co. v. DEP*, 2000 EHB 1204, 1205.

Clean Water Action describes itself as "a national citizen's organization working for clean, safe and affordable water, prevention of health threatening pollution, creation of

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[1] On May 24, 2001, the Department lifted the suspension and reissued the permits with new conditions.

[2] Act of July 13, 1988, P.L. 530, *as amended*, 35 P.S. §§ 7511 – 7516.

environmentally safe jobs and businesses, and empowerment of people to make democracy work." (Petition to Intervene, p. 3) According to the verified petition, the group has over 80,000 members in Pennsylvania and over 10,000 in Allegheny County. The petition states that its members live near the areas of the dredging, observe wildlife and nature in the areas to be affected by the dredging, and drink the water that may be impacted by the dredging activities. Clean Water Action further states that its members have been concerned about alleged harmful effects of the dredging operations since the Appellants began to seek renewal of the permits and have written to the Department to voice their concerns.

The petitioner has demonstrated a sufficient interest in the subject matter of this appeal to allow intervention. It has members who live near the area of the dredging activities and who drink the water that could be impacted by the dredging. In addition, its members observe wildlife and nature in the area of dredging. As to the latter, the Board has recognized that an aesthetic appreciation for or recreational enjoyment of an environmental resource can confer standing. *Orix-Woodmont, supra.* at 5; *Ziviello v. DEP*, 2000 EHB 999, 1004, n. 9.

The Appellants, however, dispute that the environmental harm alleged in the petition has occurred or is likely to occur. They further contend that the dredging activity will benefit the public by providing a reliable and cost-effective source of materials for construction projects in the Pittsburgh region. Whether the dredging activities will cause environmental harm, as alleged by Clean Water Action, or have a net environmental benefit, as alleged by the Appellants, is a factual determination that must be made after a hearing on the merits. At this stage of the proceeding, in order to demonstrate standing, a petitioner need only show that there is an objectively reasonable threat that adverse effects will occur as a result of the challenged action. *Orix-Woodmont, supra.* at 5-6. Clean Water Action has sufficiently demonstrated in its petition

that the likelihood of the alleged adverse effects as a result of the proposed development is more than merely speculative and if such adverse effects were to occur, its members stand to suffer as a direct result. *Orix-Woodmont, supra.* at 6.

The Appellants also assert that intervention is barred on the basis of administrative finality. The Appellants point to the fact that Clean Water Action admits it was aware of the proposed dredging at the time the Appellants sought renewals of their permits yet did not file an appeal of the permit issuances. The Appellants contend that the permits are now final as to Clean Water Action and may not be further challenged. However, this is not a situation like that in *Robinson Coal Co. v. DER*, 1995 EHB 370, where one of two parties to whom the Department had issued a compliance order failed to appeal it and subsequently sought to intervene in the appeal of the other recipient of the order. In that case, the order had become final as to the petitioner and intervention was denied. The *Robinson Coal* situation does not exist here, where the Appellants have challenged the suspension of their permits and certain conditions placed in the permits. First, it is not clear that Clean Water Action would have had a right to appeal the permit suspensions and, therefore, finality does not come into play with regard to that issue. Second, as to the appeals of the permit conditions, simply because Clean Water Action chose not to appeal the issuance of the permits does not prevent it from intervening on the side of the Department in the Appellants' challenge to certain restrictions in the permits. *See, e.g., Appeal of Municipality of Penn Hills*, 546 A.2d 50 (Pa. 1988).[3]

Finally, the Appellants note that in the petition to intervene, Clean Water Action states that it intends to file appeals of any action the Department may take in reinstating the permits.

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[3] In that case, the municipality and school district of Penn Hills challenged a property assessment as being too low. The owner of the property did not file a timely challenge, but was permitted to intervene in Penn Hills' case and argue that the assessment was too high.

For that reason, argue the Appellants, it is premature to allow intervention at this stage. We agree that it is premature to consider any arguments with regard to reinstatement of the permits since neither Clean Water Action nor the Appellants have, as of the issuance of this opinion, filed an appeal of the reinstated permits. However, with regard to the appeals of permit conditions and suspensions, Clean Water Action has sufficiently demonstrated that it is entitled to intervene.

Accordingly, we enter the following order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

TRI-STATE RIVER PRODUCTS, INC.	:	**EHB Docket No. 2001-019-R**
GLACIAL SAND & GRAVEL COMPANY	:	**2001-020-R**
THE LANE CONSTRUCTION COMPANY	:	**2001-021-R**
and PIONEER MID-ATLANTIC, INC.	:	**2001-022-R**
	:	**2001-035-R**
v.	:	**2001-037-R**
	:	**2001-038-R**
COMMONWEALTH OF PENNSYLVANIA,	:	**2001-039-R**
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION	:	

ORDER

AND NOW, this 1st day of June, 2001, Clean Water Action's Petition to Intervene is **granted**. Henceforth, the caption of these appeals shall include Clean Water Action as Intervenor.

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Administrative Law Judge
Member

DATED: June 1, 2001

See following page for service listing

EHB Docket Nos. 2001-019-R
2001-020-R; 2001-21-R; 2001-022-R;
2001-035-R; 2001-037-R; 2001-038-R
and 2001-039-R

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

BARBARA EISENHARDT, RICHARD GAVER, MARTIN BIDART, STEVE DOWNS, GINI VINCENT, GEORGE DAILEY, ALAN SHELLY and NICHOLAS CALIO	:	**EHB Docket No. 2000-109-MG**
v.	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, DOYLESTOWN TOWNSHIP, Permittee and PENNS GRANT CORPORATION, Intervenor	:	**Issued: June 4, 2001**

ADJUDICATION

By George J. Miller, Administrative Law Judge

Synopsis:

The Board remands an appeal of a decision of the Department to approve a sewage facilities planning module which proposes the use of holding tanks as an interim method of sewage disposal for a commercial land development project until a sewage treatment plant can be expanded. The planning documents submitted by the water authority's engineer do not constitute an adequate written commitment to provide sewage service from the governing body of the authority, as required by the Department's regulations. Therefore the matter must be remanded to the Department for proper communication from the authority's board of directors concerning its commitment to provide sewage service for the proposed development.

BACKGROUND

This is an appeal by several individuals from the Department of Environmental Protection's approval of a revision of the official sewage facilities plan of Doylestown Township, Bucks County, that would permit the use of holding tanks pending construction of an expansion of a sewage treatment plant. This revision was approved on April 18, 2000. The appeal by Barbara Eisenhardt, Richard Gaver, Martin Bidart, Steve Downs, Gini Vincent, George Daily, Alan Shelly and Nicholas Calio (collectively, Appellants) was filed with the Board on May 18, 2000. A hearing on the merits was held before Administrative Law Judge George J. Miller on February 20-21, 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 449 pages and 18 exhibits. After a full and complete review of the record,[1] we make the following:

FINDINGS OF FACT

1. The Department of Environmental Protection is the agency with the authority to administer and enforce the Pennsylvania Sewage Facilities Act[2] and the rules and regulations promulgated thereunder.

2. The Appellants are residents of Doylestown Township. Notice of Appeal.

3. Barbara Eisenhardt is one of the Appellants, and is a resident of Doylestown Township. Since January 2000 she has also served as a township supervisor. (N.T. 20)

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[1] The transcript is designated at N.T. __; the Appellants' exhibits as "Ex. A-__"; and the Intervenor's exhibits as "I-__." Although the Department presented the testimony of witnesses, it did not introduce any additional exhibits into the record.

[2] Act of January 24, 1966, P.L. 1535 (1965), *as amended*, 35 P.S. §§ 750.1-750.20a.

4. Penn's Grant Corporation (Intervenor) is a Pennsylvania corporation maintaining its office and principal place of business in Doylestown, Pennsylvania. It is the equitable owner of a tract of land and the developer for the Doylestown Commerce Center. (Ex. A-18)

5. Glenn Stinson is a Sewage Planning Specialist Supervisor with the Department. He is responsible for reviewing planning modules and making recommendations to the Regional Manager. (N.T. 84)

6. Elizabeth Mahoney is a Sewage Planning Specialist for the Department. Her responsibilities include review of planning documents for consistency with the Department's regulations. She reviewed the planning modules for both the Commerce Center and the Green Street Expansion. (N.T. 305-307)

7. Benjamin Jones is the Executive Director for the Bucks County Sewer and Water Authority. He has held this position for seven years. He reports to the Authority's Board of Directors. (N.T. 246)

The Planning Documents

8. The Planning Module for Land Development for the Doylestown Commerce Center (sometimes also referred to as the "Tabor tract") describes the project as two office buildings and a daycare center on 27.03 acres. (Exs. A-18, I-3)

9. The planning module was forwarded to the Department by the Bucks County Water and Sewer Authority. (Mahoney, N.T. 308; Exs. A-11; A-18)

10. This planning module included a transmittal letter from Doylestown Township and included a resolution approving the project. (Ex. A-18; see also Eisenhardt N.T. 75)

11. Ultimately the planning module calls for the Commerce Center to be connected to the Bucks County Water and Sewer Authority collection system where the 7,500 gallons of sewage generated daily by the Commerce Center will be treated at the Authority's Green Street wastewater treatment facility. (Exs. A-18; I-3)

12. According to the information submitted to the Department, the Authority contemplated that the sewage generated by the Commerce center will be treated by the Green Street facility as expanded, not the current Green Street facility. (Stinson, N.T. 187; Ex. A-18)

13. Because Commerce Center will depend on the expansion of the Green Street facility, the Department determined that it could not approve the planning module for the Commerce Center until it approved the plan revision for the Green Street expansion project. (Stinson, N.T. 171-72; Mahoney, N.T. 316)

14. But the expansion project for the Green Street facility, which is necessary in order to accommodate the sewage from the Commerce Center, is not scheduled to be completed until at least 2003. (Ex. I-9; Stinson, N.T. 91)

15. In the interim the Department approved the use of on-site holding tanks where the sewage generated by the Commerce Center will be collected, pumped from the tanks and disposed of at another wastewater treatment facility. (Exs. A-18; I-3)

16. The holding tank system which will be used by the Commerce Center is not unusual in terms of the capacity of the system or length of service of the system. (Stinson, N.T. 134)

17. Contemporaneous with the approval for the Commerce Center, the Department also approved an update to the Act 537 Plan of Doylestown Township which

provided for the expansion of the Green Street Wastewater Treatment Plant from its current capacity of 0.7 MGD to a capacity of 1.2 MGD. (Ex. I-1)

18. The Department approved the module for the Commerce Center based on the schedule for completion of the Green Street expansion and the proposed connection of the Commerce Center to sewer lines owned by the Authority in 2003. (Stinson, N.T. 91; Ex. I-9)

19. A pump-and-haul system is different from the retaining tanks proposed for the Commerce Center. Although similar to a holding tank system, a pump-and-haul system does not provide the same amount of storage for sewage that the retaining tanks do. (Stinson, N.T. 141-42)

Assurance of Public Treatment

20. The Commerce Center can not currently be connected to the Green Street Wastewater Treatment Plant because all available capacity has been allocated at Green Street. (Jones, N.T. 249)

21. The Department's regulations for new land development planning require that the planning documents include a "written commitment" from the owner of the sewage facilities to provide service to the proposed project. 25 Pa. Code § 71.53(d).

22. The Department's regulations also provide conditions for the use of holding tanks, including appropriate assurance that they will eventually be replaced and municipal responsibility for the maintenance of the holding tanks. 25 Pa. Code § 71.63 (c).

23. The planning module for the Commerce Center included a letter from Glen Argue, the Engineering Manager for the Bucks County Water and Sewer Authority which

stated that assuming certain conditions precedent were met, such as issuance of appropriate permits, approving of the plan revision for the Green Street expansion, and the completion of that expansion, "it is the intention of the Developer and the Authority to ultimately convert the sanitary sewer flow from this project to the Authority's Green Street Wastewater Treatment plant . . . ." (Ex. A-11)

24. The Department considered this to be an adequate written commitment for the purposes of the regulation. (Stinson, N.T. 94, 104-08)

25. Additionally, the Authority completed Component 3, Section H of the planning module for the Commerce Center, which indicated that the Commerce Center will be connected to the Green Street plant when the expansion is completed. (Ex. A-18; Stinson, N.T. 186-87)

26. Generally, the Department considers Component 3, Section H of a planning module to be the "commitment" required by 25 Pa. Code § 71.53(d)(3), if it has been signed by the receiving municipal authority and indicates that there is collection, conveyance and treatment capacity available to serve the proposed project. (Stinson, N.T. 179-80, 186, 189)

27. Prior to the approval of the planning module for the Commerce Center, Barbara Eisenhardt contacted Glenn Stinson about her concern that the Authority had not "committed" to providing sewer capacity to the Commerce Center. A written commitment is a requirement of the Department's regulations for new land development. (Eisenhardt, N.T. 30-31; Ex. A-10)

28. By e-mail Mr. Stinson contacted the Authority for clarification. It responded by faxing a December 23rd letter which had been submitted to the Department and pages

from the planning module. These documents indicated the Authority's intention to provide sewer capacity to the Commerce Center, provided certain enumerated conditions were met, most notably the completion of the Green Street expansion. (Stinson, N.T. 117; Ex. A-11; Ex. A-18 at Component 3, Section H)

29. Neither Component 3, Section H nor the Authority's December 23rd letter have been withdrawn by the Authority. (Jones, N.T. 254-55)

30. Benjamin Jones explained that, to the Authority, a "commitment" to provide sewer capacity means that a sewer agreement has been executed between the Authority and a developer and signed by the Board of Directors. (Jones, N.T. 253)

31. It is the policy of the Authority not to enter into sewer agreements until capacity is actually available at a treatment plant. (Jones, N.T. 262)

32. The Commerce Center is currently on the waiting list for capacity at Green Street pending completion of the expansion project. When capacity becomes available and the Commerce Center meets other criteria, such as the payment of the appropriate fees, it is likely that the Authority would execute an agreement for the project. (Jones, N.T. 262, 276-78)

33. Although Glen Argue had authority to complete the planning documents in the ordinary course of his duties, he does not have the authority to make a commitment on behalf of the Authority to provide sewage service. (Jones, N.T. 250, 255-56)

34. Only the Authority's Board of Directors have the authority to make a commitment to provide sewage service. (Jones, N.T. 246)

35. The Department was aware that the holding tanks would be used for three years because the implementation schedule for the Green Street project called for the expansion to be completed in 2003. (Stinson, N.T. 91)

36. The Department considered this time-frame to provide an adequate schedule for discontinuing the use of the holdings tanks. (Stinson, N.T. 136, 173)

37. The Commerce Center was used by the Authority to justify, in part, the need to expand the Green Street plant. (Stinson, N.T. 99)

38. Further, the Doylestown Township Manager requested that the Township consulting engineers include an allocation of 30 EDU's of sewage capacity for the Commerce Center in the Green Street Expansion. This request was approved by the Township Supervisors at their June 1, 1999 meeting as a condition of approval for the Green Street Expansion. (Ex. A-20a)

39. The Department was also aware that a portion of the capacity from the Green Street Expansion will be used to accommodate failing on-lot sewage disposal systems. (Stinson, N.T. 153; Mahoney, N.T. 369-72; Ex. A-20 at Table 2)

40. The planning documents also included information from the Authority that the a portion of the capacity for the Green Street Expansion may be used to divert flow from another sewage treatment plant. But measures will be implemented to ensure that the actual flow diverted does not exceed the capacity allocated for the diverted flow. (Ex. I-9; Stinson, N.T. 164-68)

41. In the Department's view the plan for Green Street included adequate assurances of funding. (Stinson, N.T. 109)

DISCUSSION

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.[3]

In this appeal the Appellants bear the burden of proving that the Department acted inappropriately in approving the planning module for the Commerce Center. [4]

We can glean from the Appellants' post-hearing brief three reasons why they believe the Department's action in approving the planning module for the Commerce Center was incorrect: (1) the module contained an inadequate commitment from the Authority to provide sewage treatment capacity to the Commerce Center; (2) the take-out period for the holding tanks was unreasonable; and (3) the projected date for the replacement of the holding tanks with sewer connections was "unfixed and speculative." We will address each of these questions in order.

The Department's regulations for sewage plan revisions for new land development require the planning module to include a "written commitment from the owner of the receiving community sewerage facilities to provide service to the proposed

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[3] *Smedley v. DEP*, EHB Docket No. 97-253-K, slip op. at 30 (Adjudication issued February 8, 2001).

[4] 25 Pa. Code § 1021.101(c)(2); *Green Thornbury Committee v. DER,* 1995 EHB 636.

new land development and the conditions for providing service." 25 Pa. Code § 71.53(d)(3). The module for the Commerce Center included a letter signed by Glenn Argue, the Engineering Manager for the Authority stating that, assuming certain conditions were met, such as issuance of appropriate permits, the payment of fees, approval of the plan revision for the Green Street expansion, and the completion of that expansion, "it is the intention of the Developer and the Authority to ultimately convert the sanitary sewer flow from this project to the Authority's Green Street Wastewater Treatment plant . . . ."[5] In addition, Mr. Argue completed Component 3, Section H of the planning module, which provided available capacity for the Commerce Center upon completion of the Green Street expansion.[6] The Appellants argue that according to the testimony of Benjamin Jones, the Authority had not in fact committed to providing sewage service to the Commerce Center. At the hearing, he testified that to the Authority a "commitment" to provide sewer capacity means that a sewer agreement has been executed between the Authority and a developer and signed by the Board of Directors.[7] It is the policy of the Authority not to enter into sewer agreements until capacity is actually available at a treatment plant.[8]

We do not believe that either of these documents constitutes an appropriate "commitment" within the meaning of the regulation. Therefore the Statutory Construction Act directs us to its common meaning:[9] "an agreement or pledge to do something in the future; *esp*: an engagement to assume a financial obligation at a future

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[5] Ex. A-11.
[6] Ex. A-18.
[7] N.T. 253.
[8] N.T. 262.
[9] 1 Pa. C.S. § 1903.

date."[10] Reading this definition in the context of the Department's regulation, a commitment must mean that the owner of the receiving sewer must provide the Department with some sort of pledge that sewage service will be provided for the proposed project. A mere intention of doing so is not enough. Accordingly, neither the planning module nor the December 23rd letter rise to the level of a pledge from the governing body of the Authority to provide sewer service for the Commerce Center.

First, both documents were prepared by the Authority's engineering manager, Glen Argue. Benjamin Jones testified that although Mr. Argue had the authority to complete the planning documents in the ordinary course of his duties,[11] he does not have the authority to make a commitment on behalf of the Authority to provide sewage service.[12] That role is reserved for the Authority's Board of Directors.[13] There is no evidence that either the planning module or the December 23rd letter were approved by the Board or that the Board was even aware that they had been submitted to the Department.

Second, the December 23rd letter is not framed in the language of a "commitment" or a "pledge" to provide service. Instead it merely expresses an "intent" to provide service for the Commerce Center. And since Mr. Argue did not have the authority to express the Board of Directors' intent, it merely expresses his interpretation of what the Board's future action might be for providing sewer service for the Commerce Center.

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[10] Merriam-Webster's Collegiate Dictionary 231 (10th ed. 1999).
[11] N.T. 255-56.
[12] N.T. 250
[13] N.T. 246.

We do not believe that a commitment from the Authority must rise to the level of an executed contract signed by all parties including the Authority's Board of Directors because this would make planning under the Sewage Facilities Act impossible to achieve. However, the Authority must at least provide a written commitment in the form of a "pledge" from a person fully authorized by the Authority to make such a commitment. The Authority's statement of intention to provide service to the Commerce Center through its engineer can not meet this standard. Therefore, we are constrained to remand this matter to the Department for further clarification from the Board of Directors itself concerning its intent to provide sewer service to the project when the Green Street Expansion has been completed.

Because we do not believe that the commitment to provide sewage capacity for the Commerce Center was adequate, we do not need to reach the other issues raised by the Appellants concerning the take-out period for the holding tanks. Although it does not seem that the three-year period proposed in the planning documents is unreasonable, in view of the evidence adduced at hearing that the Authority is behind schedule in constructing the Green Street Expansion, the Department should also revisit the implementation schedule for that project. As of the hearing, the Authority had not issued a bond to finance the project or called for bids for its construction.[14] In view of this, the take-out period for the holding tanks may in fact be speculative if there is some question whether or not the Green Street Expansion will be completed within a reasonable time.

We therefore make the following:

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[14]Jones, N.T. 279.

CONCLUSIONS OF LAW

1. A commitment to provide sewage capacity must be in the form of a pledge from the Authority's Board of Directors rather than a mere expression of intent. 25 Pa. Code § 71.53(d)(3).

2. The completion of Component 3, Section H of the planning module and the letter from the Authority's engineering manager explaining the Authority's intent to provide sewage capacity for the Commerce Center does not constitute an adequate written commitment to provide sewage service, as required by the Department's regulations. 25 Pa. Code § 71.53(d)(3).

Accordingly, we enter the following:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

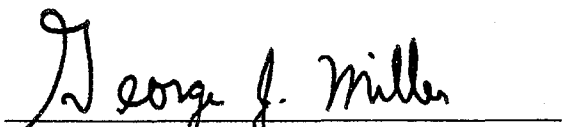
BARBARA EISENHARDT, RICHARD GAVER, MARTIN BIDART, STEVE DOWNS, GINI VINCENT, GEORGE DAILEY, ALAN SHELLY and NICHOLAS CALIO	:	**EHB Docket No. 2000-109-MG**
v.	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, DOYLESTOWN TOWNSHIP, Permittee and PENNS GRANT CORPORATION, Intervenor	:	

ORDER

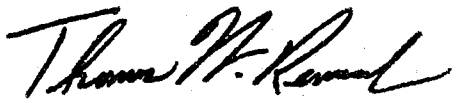
AND NOW, this 4th day of June, 2001, the appeal of Barbara Eisenhardt, et. al in the above-captioned matter is hereby **GRANTED.** This matter is remanded to the Department for further consideration consistent with this opinion.

Jurisdiction relinquished.

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: June 4, 2001

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

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOAR

HRIVNAK MOTOR COMPANY, JOHN HRIVNAK AND PEARL HRIVNAK	:	
v.	:	**EHB Docket No. 99-052-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: June 5, 2001**

ADJUDICATION

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

Synopsis:

The Department of Environmental Protection properly suspended the underground storage tank permits for a retail gasoline station. The suspension was lawful, reasonable, appropriate, and necessary to aid in the enforcement of the Storage Tank Act. The Appellants have failed to articulate any reasoned basis for reducing the Department's assessment of a civil penalty of $163,000 for violations of the Storage Tank Act.

BACKGROUND

This is an appeal by Hrivnak Motor Company and John and Pearl Hrivnak (the "Hrivnaks") from an administrative order and a civil penalty assessment issued by the Department of Environmental Protection (the "Department"). The order arose from an investigation of groundwater contamination near the Hrivnaks' retail gasoline facility located at the intersection of Schuylkill Road and Rapps Dam Road, East Pikeland Township, Chester County (the "Facility").

During the course of its investigation, the Department determined that the facility was operating in violation of the Storage Tank and Spill Prevention Act ("Storage Tank Act"), Act of July 6, 1989, P.L. 169, *as amended*, 35 P.S. §§ 6021.101-6021.2014, and the regulations promulgated thereunder. The Department's administrative order, issued on February 24, 1999, suspended the Hrivnaks' permits for the operation of their underground storage tanks. The Department also assessed nine civil penalties totaling $163,000 for the Hrivnaks' violations of the Storage Tank Act.

Although we held a brief hearing on the merits on January 22, 2001, the following findings of fact are taken verbatim from the extensive stipulation of facts, which included an extensive list of exhibits, filed by the parties.

FINDINGS OF FACT

1. The Department is the agency with the duty and authority to administer and enforce the Storage Tank and Spill Prevention Act, Act of July 6, 1989, P.L. 169, No. 32, as amended, 35 P.S. § 6021.101 et seq.; the Clean Streams Law, Act of June 22, 1937, P.L. 1987, as amended, 35 P.S. § 691.1 et seq. ("CSL"); the Land Recycling and Environmental Remediation Standards Act, Act of May 19, 1995, P.L. 4, No. 1995-2 35, 35 P.S. § 6026.101 et seq., ("Act 2"); Section 1917-A of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, as amended, 71 P.S. § 510-17 ("Administrative Code"); and the rules and regulations promulgated thereunder. Stipulation 1.a. (citing the Department's pre-hearing memorandum paragraph), ("Stip.") 1.

2. Hrivnak Motor Company ("HMC") was incorporated on April 2, 1952, and has a mailing address and registered office at Schuylkill and Rapps Dam Rd., Phoenixville, PA. At all

times relevant hereto, the officers of HMC were John Hrivnak ("Mr. Hrivnak") and Pearl Hrivnak ("Mrs. Hrivnak"). (Stip. 2.)

3. At all times relevant hereto, Mr. and Mrs. Hrivnak owned a parcel of property located at the intersection of Schuylkill Road and Rapps Dam Road, East Pikeland Township, Chester County ("Property"). The deed for the Property is listed in Chester County's Deed Book M 25, Page 225. The Property is referenced on tax map 26-3-32. (Stip. 3.)

4. Surrounding the Property are commercial uses and residences. The commercial uses include Twice as Ice (formerly Rita's Water Ice, formerly Andy's Steak Shop), Villa Pizza, Fisherman's Restaurant, Alpha Health Spa, Meineke Discount Muffler and M&H Transmission. These commercial establishments and the residences receive their water supplies from private on-site wells. (Stip. 4.)

The Facility

5. Located on the Property is a retail gasoline station and storage tank facility ("Facility"). (Stip. 5.)

6. At all times relevant hereto, the Facility was owned by HMC, and was operated by HMC, Mr. Hrivnak and Mrs. Hrivnak within the meaning of 35 P.S. § 6021.103 and 25 Pa. Code § 245.1. (Stip. 6.)

7. The Facility is registered with the Pennsylvania Storage Tank Program under the name of Hrivnak Motor Company with the Facility Identification Number 15-18897. (Stip. 7.)

8. Historically, the Facility has operated a petroleum product business from two areas on the Property. The Facility had nine regulated underground storage tanks ("USTs") located in the rear of the Property, which were used for bulk storage ("Bulk Storage Area") of gasoline, diesel and kerosene. They were located on the southwest corner of the Property behind

the building that housed a former car dealership. These tanks were removed in January 1995. (Stip. 8.)

9. The Facility includes a retail gasoline sale business operation located in the front of the Property that has several USTs ("Retail Tank Field"). Three USTs were removed from the Retail Tank Field in May 1997. The installation of a new UST, tank top upgrades, and the lining of three existing USTs were performed in the Retail Tank Field in July 1997. The Facility currently has four regulated USTs for the retail sale of gasoline and diesel from the Retail Tank Field. The following USTs are currently located at the Facility.

- 2 - 4,000 (manifolded) gallon gasoline (installed 1978)
Tank Permit # 15935 and 15936
- 1 - 3,000 gallon gasoline (installed 1974)
Tank Permit # 15938
- 1 - 8,000 gallon diesel fuel (installed 1997)
Tank Permit # 143656

(Stip. 9.)

Prior Proceedings

10. On October 18, 1988, the Department issued an Administrative Order to HMC. In the Order the Department found that HMC was responsible for contaminating area groundwater and drinking wells with gasoline-type hydrocarbons. The Order required HMC to test its underground storage tanks, provide potable water to affected well owners, submit a work plan aimed at abating groundwater contamination, and implement the work plan after approval by the Department. (Stip. 10.)

11. HMC appealed the Order to the Board. Following two days of hearings, the Board issued an adjudication that found "that it is probable that the groundwater contamination in the vicinity – as shown in the 1987 sample results – resulted from activities on the Hrivnak property." (Stip. 11.)

12. In a subsequent opinion, the Board required HMC to test the tanks that would remain at the site and to prepare and submit to the Department a plan for remediating the groundwater contamination (including defining the current scope of contamination). (Stip. 12.)

13. On May 5, 1994, the Chester County Court of Common Pleas issued a ruling in an action brought by owners of a residual property near the Hrivnak property ("the Kulps") for contamination of the Kulps' groundwater. In that opinion, the Chester County Court of Common Please found that "[d]espite the accumulating evidence that their underground storage tanks are causing pollution to the wells of neighbors, [Hrivnak Motor Company] has done little or nothing either to test the tanks, or to withdraw the offending tanks and replace them (if necessary) with new tanks." The court further found that "Defendant's obstinacy in the face of the finding of the EHB warrants an award of punitive damages." (Stip. 13.)

Pre-Order Violations

14. In January 1995, the 9 USTs located in the Bulk Storage Area were removed. On January 25, 1995, soil samples were collected in the Bulk Storage Area. Some of these soil samples confirmed that there was a "reportable release" of petroleum product in the Bulk Storage Area, as defined in 25 Pa. Code § 245.1. (Stip. 15.)

15. On February 15, 1995, a telephone notice of contamination, on behalf of Mr. Hrivnak, was called into the regional office by Center Point Tank Services ("CPTS") for the soil contamination identified in the Bulk Storage Area. (Stip. 16.)

16. On March 27, 1995, the Department received a written Notification of Reportable Release/Notification of Contamination from CPTS. (Stip. 17.)

17. On October 16, 1995, four monitoring wells were installed at the property as part of site characterization activities associated with the Bulk Storage Area contamination. Three

monitoring wells ("MW") were placed in the rear of the Property and one well, MW 1, was placed in the front portion of the Property, north of the Retail Tank Field. (Stip. 18.)

18. On October 27, 1995, 0.56 feet of free-floating product was observed in MW 1 by CPTS. (Stip. 19.)

19. On October 19 and 31, 1995, the tanks and lines associated with the Retail Tank Field in the front area of the Property were tightness tested. Two 3,000-gallon unleaded gasoline USTs and one tank line failed the tightness test. Product was removed from the leaking UST into a UST that passed the test. The leaking gasoline UST was taken out of service in December 1995 but did not undergo the closure requirements of 25 Pa. Code § 245.451. This substandard UST was out-of-service for greater than 12 months and permanently closed on May 8, 1997. (Stip. 20.)

20. The free product evidenced in MW1 on October 27, 1995, and the tightness test failure for the tank product line in the Retail Tank Field on October 19 and 31, 1995, confirmed a reportable release in the Retail Tank Field. The Department did not receive a written notice of the reportable release until February 27, 1996, in response to a Department Notice of Violation. (Stip. 21.)

21. In answers to the interrogatories, HMC, Mr. Hrivnak and Mrs. Hrivnak admit that a reportable release from the Facility was discovered in October 1995. (Stip. 22.)

22. On December 7, 1995, the Department made a written request for a third party inspection of the storage tank systems at the Facility, to be conducted within 45 days. On December 15, 1995, the Department received a written request for an extension from CPTS on behalf of HMC. It was their request that the inspection take place after the storage tank construction planned for March 1996. The Department granted an extension until March 31,

1996. The Department received a copy of a third party inspection report on September 28, 1998, for an inspection that was conducted on September 9, 1998. (Stip. 23.)

23. On December 19, 1995, the Department received an *Initial Site Characterization and Hyrdogeologic Assessment* from CPTS for the investigation of contamination associated with the Bulk Storage Area at the Facility. The report states that "the fact that a leaking UST was in the vicinity of MW1 seems to indicate that the leaking UST (in the Retail Tank Field) was the source of free product in MW1". This was the first written notice of a reportable release that the Department received for contamination originating from the Retail Tank Field. The report recommended that free product recovery from MW1 be initiated. Based upon this notification, under the Tank Act and Regulations, 25 Pa. Code § 245.310, a site characterization report associated with the release from the Retail Tank Field that was identified in October 1995, would need to be submitted no later than June 17, 1996. Product recovery did not begin at the Property until March of 1999. The Department has never received a complete site characterization report for this release. (Stip. 24.)

24. On February 23, 1996, the Department sent Mr. Hrivnak a Notice of Violation for failure to submit a Notice of Contamination for the reportable release in the Retail Tank Field that was confirmed in October 1995. (Stip. 25)

25. On February 27, 1996, the Department received a written Notification of Contamination/Notification of Reportable Release from CPTS. (Stip. 26)

26. On March 5, 1996, representatives of the Department conducted a site inspection at the Facility. The site inspection revealed that inventory control, the method of leak detection used at the Facility, was not being conducted properly and did not satisfy the regulatory

requirements for leak detection. It was also noted that the 3,000-gallon UST that was taken out of service in December 1995, remained out-of-service. (Stip. 27)

27. On March 7, 1997, the Department sent Mr. Hrivnak a letter requesting an update on the free product recovery from MW1. The letter also stated that off-site domestic well water sampling could no longer be postponed, due to the possibility of an uncontrolled release in the area of MW1. The Department reminded Mr. Hrivnak in the letter that progress in site characterization and remediation was not apparent, and that failure to respond may lead to enforcement action. (Stip. 28.)

28. On March 10, 1997, the Department sampled some of the private drinking water wells in the vicinity of the Facility for volatile organic constituents, including but not limited to methyl-tertiary-butyl ether ("MTBE") and benzene. MTBE and benzene are both constituents of gasoline. Results for MTBE and benzene are listed in parts per billion ("ppb"). The Department's Health Advisory Limit ("HAL") for MTBE is 20 ppb. The maximum contaminant level ("MCL") in drinking water for benzene is 5 ppb. These test results indicated that Andy's Steak Shop and Meineke Discount Mufflers had levels of MTBE in their drinking water (170 ppb and 28 ppb, respectively) which exceeded the Department's HAL. These test results indicated that 1046 Meadow Lane and Gappa Oil Company had detectable levels of MTBE (8.8 ppb and 1.8 ppb, respectively) which did not exceed the HAL. These test results indicated that Andy's Steak Shop had detectable levels of benzene which did not exceed the MCL (5.0 ppb). (Stip. 29.)

29. On March 14, 1997, the Department sampled the free-floating product in MW 1 and the water under the free-floating product. The following are some of the results from this sampling:

Sample	DRO Diesel Range Organics	GRO Gasoline Range Organics	MTBE	Benzene	Toluene	Ethyl-benzene	Xylenes
Product Sample	**270,000 ppb**			5 ppb	1,000 ppb	700 ppb	10,000 ppb
Product Sample	**270,000 ppb**	**320,000 ppb**		**2,400 ppb***	990 ppb	**5,700 ppb*****	23,000 ppb
Water Below Free Product (not purged)			**520 ppb****	**1,600 ppb***	580 ppb	**1,000 ppb*****	3,100 ppb

*** Benzene Maximum Contaminant Level = 5 ppb**
**** MTBE Medium Specific Concentration/Health Advisory Limit = 20ppb**
*****Ethylbenzene Maximum Contaminant Level = 700 ppb**

(Stip. 30.)

30. On March 20, 1997, Tanknology - NDE, a UST and line tightness testing company, submitted a report to the Department on behalf of Hrivnak Motor Company. The report stated that 3 tanks failed an integrity test conducted on March 15, 1997. The report said that two 4,0000-gallon tanks, which were manifolded, failed a tightness test and one 3,000-gallon tank failed a tightness test. Tanknology recommended that the tanks be emptied of product. Based upon this notification, under the Tank Act and Regulations, 25 Pa. Code § 245.310, a site characterization report associated with the release from the Retail Tank Field that was identified on March 20, 1997, would need to be submitted no later than September 16, 1997. The Department has never received a complete site characterization report for this release. (Stip. 31.)

31. In answers to interrogatories, HMC, Mr. Hrivnak and Mrs. Hrivnak admit that a reportable release from the Facility was discovered in January, February and March of 1997. (Stip. 32.)

32. On March 31, 1997, the Department received a letter from CPTS dated March 26, 1997, providing an update of the investigative/corrective action taken regarding the contamination that was identified at the Facility. The letter indicated that:

- The 3,000-gallon tank that failed the tightness test was taken out of service;
- Repairs were made to the two 4,000-gallon tanks which were manifolded, and one of the two tanks was put back into service;
- Installation of carbon systems was performed at 1049 Schuylkill Road and 1046 Meadow Lane by March 26, 1997.

(Stip. 33.)

33. On April 9, 1997, the Department sent a letter to Mr. Hrivnak stating that it is imperative that he provide monitoring and maintain an alternate source of drinking water for any potable water well that is or may be impacted by the Facility. (Stip. 34.)

34. On April 14 and 15, 1997, four additional on-site groundwater wells were installed at the Property for additional site characterization. The new monitoring wells were designated as MW 5, MW 6, MW 7, and MW 8. (Stip. 35)

35. On April 18, 1997, the following free phase petroleum product measurements were recorded at the Facility by a representative of CPTS:

MW 5 - "appeared clear of product"
MW 6 - 1.2 inches of free product
MW 7 - 1.3 inches of free product
MW 8 - 3 feet, 8 inches of free product

(Stip. 36.)

36. On May 8, 1997, the leaking 3,000-gallon UST that was taken out-of-service in October 1995, was permanently closed via removal. At this time, closure and/or upgrade activities were conducted on the remaining tanks in the Retail Tank Field. (Stip. 37.)

37. On May 19, 1997, the Department sampled some of the private drinking water wells in the vicinity of the Property for volatile organic constituents. These test results indicated

that Meineke Discount Mufflers had levels of MTBE in its drinking water (23 ppb) and Andy's Steak Shop had levels of MTBE in its untreated drinking water (60 ppb) which exceeded the Department's HAL. These test results indicated Villa Pizza and 1046 Meadow Lane and Villa Pizza had detectable levels of MTBE (16 ppb and 6.2 ppb, respectively) which were below the Department's HAL. Test results indicated Andy's Steak Shop had levels of benzene which did not exceed the MCL (1.48 ppb). (Stip. 38.)

38. On June 13, 1997, the Department sent Mr. Hrivnak a letter acknowledging receipt of a closure report. This letter reminded Mr. Hrivnak that where the excavation zone assessment at closure indicates that there is contamination or additional contamination that must be addressed, corrective action must be initiated or continued in accordance with the corrective action regulations. (Stip. 39.)

39. On July 8, 1997, the Department sent Mr. Hrivnak a letter regarding free product recovery from the impacted monitoring wells. The letter stated that the product recovery effort must continue in a substantive and continuous manner. It was suggested that manual recovery may not be an effective recovery method. Mr. Hrivnak was asked to implement an active free product recovery operation immediately. Free product recovery was not implemented at the Property until March of 1999. (Stip. 40.)

40. On August 11, 1997, the Department sampled some of the private drinking water wells at Andy's Steak Shop. These test results indicated that Andy's Steak Shop had levels of MTBE in its untreated drinking water (87 ppb) which exceeded the Department's HAL. (Stip. 41.)

41. On September 2, 1997, the Department sent Mr. Hrivnak a letter acknowledging receipt of a closure report. This letter reminded Mr. Hrivnak that where the excavation zone

assessment at closure indicates that there is contamination or additional contamination that must be addressed, corrective action must be initiated or continued in accordance with the corrective action regulations. (Stip. 42.)

42. On September 9, 1997 the Department sampled the private drinking water well at 1046 Meadow Lane. These test results indicated that 1046 Meadow Lane had detectable levels of MTBE in its untreated drinking water (7.3 ppb) below the Department's HAL. (Stip. 43.)

43. On November 6, 1997, CPTS sampled some of the private drinking water wells in the vicinity of the Facility for volatile organic constituents. These test results indicated Andy's Steak Shop and Villa Pizza had levels of MTBE in their drinking water (88.8 ppb and 20.6 ppb, respectively) which exceeded the Department's HAL. These test results indicated 1046 Meadow Lane and Meineke Discount Mufflers had detectable levels of MTBE (8.3 ppb and 17.5 ppb, respectively) which do not exceed the Department's HAL. (Stip. 44.)

44. On January 14, 1998, the following free petroleum product measurements were made at the Property by a representative of CPTS:

MW 1- 6 feet of free product using the paste method
MW 2 - No free product using the paste method
MW 3 - No free product using the paste method
MW 4 - 0.1 feet of free product using the paste method
MW 5 - No free product using the paste method
MW 6 - 0.23 feet of free product using the paste method
MW 7 - 2 feet of free product using the paste method
MW 8 - 4 feet of free product using the paste method

(Stip. 45.)

45. On January 22, 1998 the following free petroleum product measurements were made at the Property by a representative of CPTS and the Department:

MW 1 - 10.41 feet of free product
MW 2 - No free product was detected
MW 3 - No free product was detected
MW 4 - No free product was detected

MW 5 - No free product was detected
MW 6 - No free product was detected
MW 7 - 3.92 feet of free product
MW 8 - 7.54 feet of free product

(Stip. 46.)

46. On January 22, 1998, the Department conducted sampling on MWs 1 through 8 at the Facility and Andy's Steak Shop drinking water well. The following are some of the results from this sampling:

Water Sample	**MTBE 20ppb**	**Benzene 5ppb**	**Toluene 1,000ppb**	**Ethyl-benzene 700ppb**	**Xylenes 10,000ppb**
MW 1 Below free product	**2000ppb****	**8600ppb***	**6600ppb******	660ppb	3600ppb
MW 2	1.0ppb	.5ppb	.5ppb	.5ppb	<1.5ppb
MW 3	10.8ppb	.7ppb	.5ppb	.5ppb	<1.5ppb
MW 4 Below free product Sheen	**260ppb****	**120ppb***	<25ppb	170ppb	185ppb
MW 5	**95.8ppb****	**214.3ppb***	120.7ppb	277.5ppb	835.1ppb
MW 6	**50ppb****	**52ppb***	78ppb	**1200ppb*****	3920ppb
MW 7 Below free product	**50ppb****	**680ppb***	180ppb	**2200ppb*****	5940ppb
MW 8 Below free product	**50ppb****	**2900ppb***	**1900ppb******	**2100ppb*****	9100ppb
Andy's Steak Shop Schuylkill Rd. (before carbon filters)	**88ppb****	**6.4pbb***	.5ppb	.5ppb	1.7ppb
Andy's Steak Shop Schuylkill Rd.	1.2ppb	<.5ppb	<.5ppb	<.5ppb	<1.5ppb

(after carbon filters)					

*** Benzene Maximum Contaminant Level = 5 ppb**
**** MTBE Health Advisory Limit = 20 ppb**
***** Ethylbenzene Maximum Contaminant Level = 700 ppb**
****** Toluene Maximum Contaminant Level = 1,000 ppb**
***** Xylenes Maximum Contaminant Level = 10,000 ppb

These test results indicated that Andy's Steak Shop had levels of MTBE and benzene in its untreated drinking water that exceed the Department's HAL and MCL. These test results indicated Andy's Steak Shop had detectable levels of MTBE in its treated drinking water that did not exceed the Department's HAL. (Stip. 47.)

47. On March 11, 1998, the following free petroleum product observations were made at the Property by the Department:

MW 1 - 4.74 feet of free product
MW 2 - No free product detected
MW 3 - Not within the plume area
MW 4 - Odor
MW 5 - Odor
MW 6 - Odor
MW 7 - 3.87 feet of free product

(Stip. 48.)

48. On March 11, 1998, the Department sampled some of the private drinking water wells in the vicinity of the Facility for volatile organic constituents, including but not limited to benzene and MTBE. These test results indicated that Andy's Steak Shop and 1046 Meadows Lane had levels of MTBE in their untreated drinking water (57 ppb and 24 ppb, respectively) which exceed the Department's HAL. These test results indicated that Villa Pizza had detectable levels of MTBE in its drinking water (17 ppb) which did not exceed the HAL. (Stip. 49.)

49. During a March 16, 1998 Department site visit, Mrs. Hrivnak was told both verbally and in a written site inspection report that the Department was proceeding with an enforcement action for corrective action violations. (Stip. 50.)

50. On April 23, 1998, the Department sent a Notice of Violation to Mr. Hrivnak for failure to initiate free product recovery at the Property. The letter also requested information about the environmental conditions of the soil stockpile that was generated during tank closure activities and stored at the Property. The information for the stockpile was to be submitted no later than May 15, 1998. (Stip. 51.)

51. On June 24, 1998 the Department sampled some of the private drinking water wells in the vicinity of the Facility for volatile organic constituents, including but not limited to benzene and MTBE. These test results indicated that 1051 Mowere Road had levels of MTBE in its drinking water (25 ppb) which exceed the Department's HAL. These test results indicated that 1046 Meadow Lane, 1047 Mowere Road and 113 Rapps Dam Road had detectable levels of MTBE (5.6 ppb, 1.7 ppb, and .58 ppb, respectively) which did not exceed the HAL. (Stip. 52.)

52. On July 6, 1998 the Department sampled some of the private drinking water wells in the vicinity of the Facility for volatile organic constituents, including but not limited to benzene and MTBE. These test results indicated that 1049 Mowere Road and 1103 Rapps Dam Road had detectable levels of MTBE in their drinking water (1.6 ppb and .97 ppb, respectively) which did not exceed the HAL. (Stip. 53.)

53. On July 14, 1998, the Department sampled some of the private drinking water wells in the vicinity of the Facility for volatile organic constituents, including but not limited to benzene and MTBE. These test results indicated that Rita's Water Ice (formerly Andy's Steak Shop) had levels of MTBE in its untreated drinking water (180 ppb) that exceeded the Department's HAL. These test results indicated that Villa Pizza and Fisherman's Restaurant had detectable levels of MTBE (17 ppb and 1.2 ppb, respectively) which did not exceed the HAL.

Test results indicated that Rita's Water Ice had levels of benzene in its drinking water that exceeded the MCL (26 ppb). (Stip. 54.)

54. On July 31, 1998, the following free phase petroleum product observations were made at the Facility by the Department:

MW 1 - Flush mount was closed - inaccessible
MW 2 - No free product was detected
MW 3 - Not within the plume area
MW 4 - Odor
MW 5 - 9.05 feet of free product
MW 6 - 2.94 feet of free product
MW 7 - 3.97 feet of free product
MW 8 - 10.18 feet of free product

(Stip. 55.)

55. On August 4, 1998, the following free phase petroleum product observations were made at the Facility by the Department:

MW 1 - 10.17 feet of free product
MW 5 - 8.71 feet of free product
MW 6 - 2.92 feet of free product

(Stip. 56.)

56. On August 31, 1998, the Department sent a letter to Mr. Hrivnak. This letter informed Mr. Hrivnak that, based upon calculations from recent facility groundwater data, it was estimated that there was free phase petroleum product in excess of one foot on the groundwater underlying an area of eighteen thousand square feet at the Property. The letter expressed concern about the environmental conditions including off-site impact to drinking water. The letter also told Mr. Hrivnak that the Department was in the process of developing a formal enforcement action, including penalties, for failure to comply with the law. (Stip. 57.)

57. On September 1, 1998, the Department sampled some of the private drinking water wells in the vicinity of the Facility for volatile organic constituents, including but not limited to benzene and MTBE. These test results indicated that 1051 Mowere Road had levels of

MTBE in its untreated drinking water (37 ppb) that exceeded the Department's HAL. These test results indicated that Villa Pizza and Meineke Discount Mufflers had detectable levels of MTBE in their untreated drinking water (18 ppb and 5 ppb) which did not exceed the HAL. (Stip. 58.)

58. On September 9, 1998, the storage tank facility at the Retail Tank Field was inspected by Walter V. Lent, a DEP certified inspector. Mr. Lent determined that each UST at the facility complied with the Department's requirements for: tank construction and corrosion protection; piping construction and corrosion protection; spill prevention; overfill prevention; tank release detection; and piping release detection. (Stipulation 1.c.)

59. On September 9, 1998, the following free phase product observations were made at the Property by a representative of CPTS:

MW 1 - 10.02 feet of free product
MW 2 - No free product was detected
MW 3 - No free product was detected
MW 4 - No free product was detected
MW 5 - 8.95 feet of free product
MW 6 - 2.90 feet of free product
MW 7 - 3.98 feet of free product
MW 8 - 9.53 feet of free product

(Stip. 59.)

60. Evidence of groundwater contamination of gasoline constituents (including but not limited to MTBE and benzene) in the monitoring wells and drinking water wells demonstrates that HMC, Mr. Hrivnak and Mrs. Hrivnak have permitted soil and groundwater contamination through releases of petroleum products from the Facility. (Stip. 60.)

61. The gasoline and chemicals of concern have migrated beyond the boundary of the Hrivnak Property located at the intersection of Schuylkill Road and Rapps Dam Road, East Pikeland Township, Chester County, to impact, affect and diminish the quality of area well water supplies. (Stipulation 1.b.)

Post-Order Activities

62. Pursuant to the Requirements of the Order, CPTS, on behalf of HMC, Mr. Hrivnak and Mrs. Hrivnak conducted quarterly sampling of off-site drinking water wells. The results from those sampling events indicate that off-site drinking wells continue to be impacted by MTBE and other gasoline constituents. (Stip. 62.)

63. Pursuant to the Requirements of the Order, CPTS, on behalf of HMC, Mr. Hrivnak and Mrs. Hrivnak submitted monthly status reports to the Department. CPTS, on behalf of HMC, Mr. Hrivnak and Mrs. Hrivnak, submitted both general status reports and status reports regarding product recovery and groundwater monitoring. (Stip. 63.)

64. On July 8, 1999 and September 27, 1999, the Department sent letters to Mr. Hrivnak and Mrs. Hrivnak reviewing their compliance with the Order. The September 27, 1999 letter informed Mr. Hrivnak and Mrs. Hrivnak of, inter alia, the following:

a. There is no evidence to suggest that the recovery effort is containing the free product.
b. A complete site characterization report has not been submitted. In addition, proper site characterization will require the installation of additional off-site wells.
c. A remedial action plan has not been submitted to the Department.
d. The soil pile was sampled and indicated levels of naphthalene above the statewide health standards. Neither proper remediation nor disposal of the pile has occurred.

(Stip. 64.)

65. On November 16, 2000, the Department sent a letter to CPTS, commenting on the monthly status reports for groundwater monitoring and free product recovery. This letter informed CPTS of, inter alia, the following:

a. Although there is evidence that free product of diesel range composition comprises part of the free product mixture in the subsurface at the Property, there is no record of diesel range free product recovery in the submitted reports.

b. There is no substantiated evidence that the recovery of free product has contained the free product accumulation to within the property boundary. On the contrary, it is reasonable to doubt the effectiveness of the free product recovery operation in preventing free product migration.

c. Additional monitoring wells beyond the Property boundary are needed to determine the eastern and southern extent of the free product accumulation and the dissolved groundwater concentrations. They are also required to determine the reasonable term of the remedial effort. (Stip. 65.)

66. On November 30, 2000, the Department received a response to its November 16, 2000 letter. The response was from CPTS on behalf of HMC. The response stated that:

> CPTS acknowledges that the installation of two or three additional wells in off-site areas on the south and east sides would provide better well control and improved ability to monitor the presence and amount of free product in those areas. However, Hrivnack (sic) Motor Company has indicated to CPTS that due to budgetary constraints, this has not been able to be accomplished.

(Stip. 66.)

Administrative Order

67. On February 24, 1999, the Department issued an Administrative Order to HMC, Mr. Hrivnak and Mrs. Hrivnak. In the Administrative Order, the Department suspended HMC's Storage Tank Operating Permits. The Department further required HMC, Mr. Hrivnak and Mrs. Hrivnak to:

a. Cease operating the regulated UST systems at the Facility.

b. Submit to the Department information regarding free product recovery at the Property.

c. Initiate interim remedial actions necessary to prevent and address any immediate threat to human health or the environment.

d. Complete a site characterization and submit to the Department a site characterization report.

e. Submit a remedial action plan to the Department, implement the remedial action plan, and submit a remedial action completion report to the Department when a level of cleanup established in accordance with Act 2 has been achieved.

f. Provide temporary and permanent potable water supplies to properties with water supplies that have been affected or diminished by the releases at the Property, and sample water supplies of properties that have been affected or diminished or are potentially affected or diminished.

g. Sample, properly manage and remediate or dispose of the stockpiled soils at the Property.

h. Submit monthly status reports to the Department. (Stip. 67.)

68. The Department assessed a Penalty against HMC, Mr. Hrivnak and Mrs. Hrivnak in the amount of $163,000. (Stip. 68.)

69. The Order was hand delivered by the Department on February 24, 1999. (Stip. 69.)

Appeal

70. On or about March 10, 1999, HMC, Mr. Hrivnak and Mrs. Hrivnak filed an appeal of the Administrative Order and Civil Penalty Assessment with the Board. (Stip. 70.)

DISCUSSION

The Administrative Order

The Hrivnaks challenge the suspension of their operating permits and the Department's calculation of the civil penalty. When the Department issues an order suspending a permit, it bears the burden of proving by a preponderance of the evidence that the permit suspension was necessary to aid in the enforcement of the Storage Tank Act and thatthe suspension order was otherwise lawful, reasonable, and appropriate. *Thomas F. Wagner, Inc. v. DEP*, 2000 EHB 1032, 1053, *aff'd*, 2187 C.D. 2000 (Pa. Cmwlth. April 3, 2001).

The Hrivnaks concede that the Department had the legal authority to suspend their permits under Section 1309 of the Storage Tank Act, 35 P.S. § 6021.1309. They dispute that the suspension was necessary, reasonable, and appropriate under the circumstances. The circumstances that they point to are that they expended considerable effort in bringing the equipment in the Retail Tank Field into regulatory compliance, only to have the Department shut the facility down a few months later. They argue that the retail operation should not be made to suffer while corrective action proceeds at the Bulk Storage Area, and that there is no suggestion of a future release from the upgraded retail equipment.

While we do not necessarily applaud the Department's decision to allow the Hrivnaks to move forward with upgrade activities under the circumstances, there is no question that the suspension order was necessary, reasonable, and appropriate. We start with the observation that the Hrivnaks' facility has caused severe environmental damage. We are struck by the fact that as much as ten *feet* of free product has been measured in the monitoring wells at the facility. (F.F. 54, 55, 59.) The Department has estimated that there is free-phase petroleum product in excess of one foot on the groundwater underlying 18,000 square feet. (F.F. 56.) Nearby wells have been

contaminated. (F.F. 37, 43, 46, 48, 51, 52, 53, 57, 62.) Contrary to the Hrivnaks' premise, the contamination has been associated with both of the tank fields at the site. (F.F. 23.)

Perhaps of even greater significance, the stipulated record reveals that the Hrivnaks have done virtually nothing to clean up the contamination. While there has been some monitoring, site characterization, and equipment upgrades, the Hrivnaks have not addressed the severe contamination itself in a meaningful way. (F.F. 64-66.) They have never submitted a complete site characterization report. (F.F. 64.) The Hrivnaks have advised the Department that additional corrective measures are unlikely. (F.F. 66.) As of the date of our record, the extent and severity of the ongoing contamination are still unknown. (F.F. 63-66.) Contrary to another one the Hrivnaks' premises, to the extent that meaningful corrective action is moving forward here, it is not because of the Hrivnaks.

Still further, the Hrivnaks failed to take measures that might have prevented the contamination in the first place, or at least quelled its spread. They have failed to conduct proper leak detection, notify the Department of releases, inspect tanks, permanently close an emptied tank, and sample and manage contaminated soils. (F.F. 19, 20, 22, 24, 26, 30, 50, 64, 65.) The Hrivnaks have been the subject of Departmental enforcement activity and Board proceedings since 1988. (F.F. 10-12.) Not only have the public agencies been forced to invest significant resources in dealing with the Hrivnaks, clean-up activities at the site are now being funded by the Underground Storage Tank Indemnification Fund. (Notice of Appeal.) Thus, the Hrinvaks miss the mark when they state that the upgraded equipment is unlikely to cause a release. The true and legitimate concern here is with the Hrivnaks as operators of that equipment, not the equipment itself.

Although any one of these factors might not be dispositive, taken together they compel the action taken by the Department in this case. Indeed, given the totality of the circumstances attending the Hrivnaks and their facility, the *only* prudent course was to suspend their ongoing participation in the very activity that had caused such serious environmental damage.

Our recent adjudication in *Thomas F. Wagner, Inc. v. DEP,* 2000 EHB 1032, *aff'd*, 2187 C.D. 2000 (Pa. Cmwlth. April 3, 2001), is on point. In that appeal, we upheld a permit suspension for reasons very similar to those that are present here. There, as here, the facility had caused extensive environmental damage. There, as here, the operator failed to properly monitor his gasoline inventory, and became aware of a possible release (here a known release) long before he took appropriate responsive measures. *Wagner*, 2000 EHB at 1056-1057. In words that apply equally in this case, we stated:

> [T]he Department's need to "preserve the integrity of the storage tank permit program, but also to provide an incentive for other operators to fulfill their legal responsibilities in the event of a spill" is a significant concern. (Department's Post-hearing Brief at 17) The Department has invested significant resources both financially and in man hours to the remediation of this one release at the Appellant's facility, which meant that these resource could not be invested in other projects which would further the Department's mission to protect and improve the environment. (See Finding of Fact No. 87) Although nothing can be done about that now, allowing the Appellant to continue to operate, even though his lack of attention to detail and unwillingness to respond quickly and take control of the situation, would inhibit the Department's ability to enforce the Act against other similarly irresponsible operators.

2000 EHB at 1057. In short, here, as in *Wagner*, the Department's order suspending the operators' permit was reasonable, appropriate, and necessary.

The Civil Penalty

The Department assessed nine penalties totaling $163,000 against the Hrivnaks for violations of the Storage Tank Act and the regulations promulgated thereunder. The Department relied upon a penalty assessment matrix. (Ex. C-126, C-139.) The Hrivnaks have not questioned the use of the matrix, and this Board has referred to it in the past when reviewing penalty assessments. *See, e.g., 202 Island Car Wash, L.P. v. DEP,* 2000 EHB 679.

The matrix directs the Department to calculate the base penalty for each violation based upon the seriousness of the violation. The Department then multiplies the base amount by a factor designed to reflect the duration of the violation. That product is in turn multiplied by a culpability factor. For "basic liability" (i.e. no level of willfulness), the product is not increased (i.e. it is multiplied by one). For a "negligent/reckless" violation (the person should have known the legal requirements), the product is doubled, and for a "deliberate" violation (actual knowledge of legal requirements coupled with conscious disregard), it is tripled.[1]

The only aspect of the penalties that the Hrivnaks have challenged is the Department's willfulness finding. They have not challenged the Department's conclusions regarding the seriousness of the violations or their duration. In other words, they simply assert that the unchallenged base penalty amounts should not have been doubled.

The Hrivnaks have not, however, provided a reasoned challenge to the Department's willfullness finding. Their only argument is that the Hrivnaks' violations were not willfull in the sense that they were neither deliberate nor intentional. The argument is not helpful because the Department did not in fact conclude that the violations were deliberate; it concluded that the violations were negligent. The Hrivnaks have not questioned the finding of negligence. They

[1] The matrix also allows for an increase in the penalty to reflect cost savings enjoyed by the violator, but that component was not used here. (Ex. C-126.)

have not challenged the Department's finding that they should have known the legal requirements that they are charged with violating, and indeed, such a challenge would have been fruitless given the stipulated facts set forth above. Even if we give the Hrivnaks' "post-hearing brief"[2] the most sympathetic possible reading, there is no basis for affording them any relief. The Hrivnaks merely assert that they are "the unfortunate victims of changing times which came upon them when they were no longer young." They point to the fact that they performed some equipment upgrades at the facility, that they have obtained multiple loans from the Commonwealth and used part of the proceeds to upgrade the facility, and that "since 1999, an era of substantial increase in the price of gasoline at the pumps, one could make a good profit in the retail sale of gasoline." None of these statements can be viewed as articulating an attack on the Department's finding that the Hrivnaks' multiple, serious violations that extended over considerable periods of time and past numerous Departmental warnings were anything but negligent. None of the statements put into question that the Hrivnaks should have known of the applicable legal requirements, but nevertheless violated them. In short, we have not been shown that there is any basis for reducing the civil penalty assessment. The civil penalty is reasonable and appropriate given the stipulated facts.

CONCLUSIONS OF LAW

1. The Department bears the burden of proof in this appeal. 25 Pa. Code § 1021.101(b).

[2] The Hrivnaks' submission, although prepared by counsel, is very short and written in the form of a letter. It does not contain any proposed findings of fact or conclusions of law. It does not attempt to contradict any of the specific findings proposed in the Department's brief. It does not contain any citations to the transcribed record because the Hrivnaks chose not to purchase the transcript or review the Board's copy of the transcript.

2. An order of the Department suspending operating permits pursuant to the Storage Tank Act must be both reasonable and appropriate and necessary to aid in the enforcement of the act. 35 P.S. § 6021.1309.

3. The Department properly suspended the Appellants' underground storage tank permits and directed the Appellants to cease operations because the Department's action was reasonable, appropriate, and necessary to aid in the enforcement of the Storage Tank Act.

4. The Hrivnaks have not provided the Board with any reasoned basis for reducing the civil penalty assessment. The civil penalty is reasonable and appropriate given the stipulated facts.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

HRIVNAK MOTOR COMPANY, JOHN HRIVNAK AND PEARL HRIVNAK	:	
v.	:	**EHB Docket No. 99-052-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 5th day of June, 2001, this appeal is hereby **DISMISSED.**

ENVIRONMENTAL HEARING BOARD

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Administrative Law Judge
Chairman

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

MICHAEL L. KRANCER
Administrative Law Judge
Member

DATED: June 5, 2001

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

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SECRETARY TO THE BOARD

EDWARD P. DAVAILUS and SANDRA DAVAILUS, CO-EXECUTORS OF THE LAST WILL AND TESTAMENT OF PAULINE DAVAILUS and DAVAILUS ENTERPRISES, INC.	:	**EHB Docket No. 96-253-MG**
v.	:	**Issued: June 6, 2001**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIROMENTAL PROTECTION	:	

OPINION AND ORDER ON MOTION FOR SUMMARY JUDGMENT

By George J. Miller, Administrative Law Judge

Synopsis

The Board denies the Department's motion for summary judgment in an action alleging a taking of the Claimants' property by the Department. There are significant factual matters in dispute concerning, among other things, the reasonableness of the investment-backed expectations of the Original Claimants and the question of whether the regulated wetland portion of the property should be considered to be separate from the entire tract for purposes of "taking analysis." Therefore summary judgment is inappropriate in this case.

The Board also declines to dismiss the Claimants' claim on the basis of issue or claim preclusion where the taking claim as expressed in this proceeding has not been previously litigated before the Board or the Commonwealth Court. At the time the matter

was commenced the courts of common pleas had jurisdiction to hear regulatory takings claims. Therefore the takings issue was not addressed in the Claimants' prior appeal with the Board which challenged a permitting action by the Department.

Finally, the Claimants' action is not barred by a statute of limitations because the Commonwealth Court deemed the matter to be timely filed when it ordered the case transferred from a court of common pleas to the Board.

OPINION

Factual and Procedural History

In 1965 Edward and Pauline Davailus (Original Claimants) purchased 256 acres in Covington Township, Lackawanna County. The site included both uplands and wetlands. In 1977 the Department granted Davailus a surface mining permit to authorize him to harvest peat from the wetland areas. After several years in operation, the Department informed Davailus that his peat extractions were no longer considered surface mining, and he instead needed to apply for a permit under the Dam Safety and Encroachments Act (Encroachments Act)[1] and the Department's wetland regulations promulgated in Chapter 105 of 25 Pa. Code. Davailus submitted an encroachment application which was denied by the Department in 1988. Not surprisingly, Davailus appealed this determination to the Board, which ultimately affirmed the Department's denial of the encroachment permit and effective revocation of the surface mining permit.[2]

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[1] Act of November 26, 1978, P.L. 1375, *as amended*, 32 P.S. §§ 693.1- 693.27.
[2] *Davailus v. DER*, 1991 EHB 1191.

The Board's decision was appealed to the Commonwealth Court which affirmed the Board in an unpublished opinion.[3]

During the pendancy of their appeal before the Board, the Claimants filed a petition for appointment of board of viewers in the Court of Common Pleas of Lackawanna County, alleging that the Department's permit denial constituted a compensable taking. Those proceedings were stayed pending the conclusion of the Claimants' litigation commenced at the Board. After the Supreme Court denied the Original Claimants' petition for allowance of appeal, the Department filed a motion before the Court of Common Pleas of Lackawanna County arguing that it did not have jurisdiction to hear the Claimants' takings claim. That court agreed and quashed the matter for lack of jurisdiction.

On appeal, the Commonwealth Court agreed that the common pleas court lacked jurisdiction, but held that the proper remedy was to transfer the matter to the Board rather than dismissing the appeal. The record was transmitted to the Board and docketed at EHB Docket No. 96-253-MG. But on June 11, 1997 the Pennsylvania Supreme Court agreed to hear the Claimants' appeal of the Commonwealth Court's decision. Later, on February 27, 1998, that court dismissed the appeal as improvidently granted.

The Claimants are the heirs of the Original Claimants. The Original Claimants died during the course of these proceedings. The Claimants have filed a statement of claim before the Board and discovery of the facts relevant to their claims is proceeding.

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[3] *Davailus v. Department of Environmental Resources,* No. 1826 C.D. 1991 (Pa. Cmwlth. September 4, 1992).

We turn now to our consideration of the Department's motion for summary judgment that was filed after the pleadings were closed. The grant of summary judgment is proper under Rule 1035.2 of the Pennsylvania Rules of Civil Procedure whenever (1) there is no genuine issue of material fact that could be established by additional discovery or expert report, or, (2) after the completion of discovery relevant to the motion, the party opposing the motion who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury.[4] The grant of summary judgment is warranted only in a clear case and the record must be viewed in a light most favorable to the non-moving party, resolving all doubts regarding the existence of a genuine issue of material fact against the grant of summary judgment.[5]

Takings Analysis

The Department argues that it is entitled to summary judgment in its favor because the denial of the Claimants' permit application to encroach upon wetlands for the purpose of harvesting peat moss does not constitute a taking of their property because the property as a whole still has economic value. The Claimants respond that the Department is not entitled to judgment on this issue, because when discovery has been completed, the evidence will show that the value of the wetland property subject to regulation by the Department has been rendered valueless by the Department's denial of a permit under the Encroachments Act so that the Claimants are entitled to compensation for the value of the

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[4] *Schreck v. Department of Transportation,* 749 A.2d 1041 (Pa. Cmwlth. 2000); *Kee v. Pennsylvania Turnpike Commission,* 743 A.2d 546 (Pa. Cmwlth. 2000).

[5] *See Young v. Department of Transportation,* 744 A.2d 1276 (Pa. 2000); *County of Adams v. Department of Environmental Protection,* 687 A.2d 1222 (Pa. Cmwlth. 1997).

regulated property containing the peat. In short, the Claimants contend, the Board must consider only the value of the regulated land and not the parcel as a whole in its takings analysis, as directed by the Commonwealth Court in *Machipongo Land and Coal Co. v. Department of Environmental Resources,*[6] a case involving coal reserves.

In order for an analysis of *Machipongo* to make sense, it is necessary to review other relevant cases from both Pennsylvania courts and the United States Supreme Court. Prior to the Commonwealth Court's decision in *Machipongo* the traditional test of whether or not a taking has occurred under Pennsylvania law was whether or not the owner has been deprived of all uses of the real property in question. In *Miller & Son Paving, Inc. v. Plumstead Township,* [7] the Supreme Court of Pennsylvania held that there was no temporary taking of a quarrying property because of the enactment of a township ordinance, later found to be invalid, which prohibited quarrying in the township. The Court expressed the rule in "takings" cases as the necessity of proving the following three conditions:

> (1) the interest of the general public, rather than a particular class of persons, must require governmental action;
> (2) the means must be necessary to effectuate that purpose; and
> (3) the means must not be unduly oppressive upon the property holder, considering the economic impact of the regulation, and the extent to which the government physically intrudes upon the property.[8]

Applying these principles, the Court rejected the quarrying company's contention that there had been a taking because it had been deprived of its right to quarry on the ground. To the contrary, the Court held that because there were other uses of the

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[6] 719 A.2d 19 (Pa. Cmwlth. 1998).
[7] 717 A.2d 483 (Pa. 1998).
[8] 717 A.2d at 486.

property that were unaffected by the ordinance no taking occurred. The Court noted that a taking does not result "merely because a regulation may deprive the owner of the most profitable use of his property."[9] In that opinion the Court distinguished a "taking" of the right to mine coal because such a taking would preclude the single use the property possessed. [10]

The Commonwealth Court appeared to have adopted this rule in decisions prior to its ruling in *Machipongo*. In *Mock v. Department of Environmental Resources*,[11] the Commonwealth Court held that the Department's denial of a permit to fill wetlands on their property to enable them to construct an auto repair shop was not a taking because there were other uses for the land that might not be precluded by the Department's regulations. However, the Court's decision that there was no taking also turned on the absence of evidence of Mock's "investment-backed expectations."

Evidence of the owner's investment-backed expectations may well have provided a different result in *Mock* under the decision of the United States Supreme Court in *Lucas v. South Carolina Coastal Council*.[12] In this decision the Supreme Court of the United States addressed two of the threshold issues for the parties in this appeal. The Court's holding addressed the question of when a regulatory taking may occur even though the

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[9] 717 A.2d at 486.

[10] The Commonwealth Court finding that there had been a taking of the quarrying property relied on dicta in one of its earlier decisions, *McClimans v. Board of Supervisors of Shenango Township*, 529 A.2d 562 (Pa. Cmwlth. 1987). That case held that a temporary taking would arise for the period of time that a zoning ordinance conclusively prevented the removal of coal from a coal estate. The Supreme Court's opinion in *Miller & Son Paving* stated in footnote 7 that reliance on *McClimans* was unwarranted because there was only one use for a coal estate. 717 A.2d at 847.

[11] 623 A.2d 940 (Pa. Cmwlth. 1993).

[12] 505 U.S. 1003 (1992).

state has acted in the exercise of its police powers. This is a threshold issue for the Claimants because the Department contends that no taking can occur because its denial of the permit under the Encroachments Act was an exercise of its police powers and that the wetland area in issue has always been subject to regulation under the law of riparian rights.

In *Lucas* the property owner was denied permission to construct homes on beachfront property by South Carolina's Beachfront Management Act resulting in a total deprivation of any use of the property by the owner. The Court rejected the state's contention that no taking had occurred because the Act was justified by an exercise of the state's police powers. Instead it reversed the South Carolina court's decision based on this theory and remanded the case for consideration of whether the owner's use-interests proscribed by the state were part of the owner's title to begin with. The Court explained that its "takings" jurisprudence has been guided by the understanding of our citizens regarding the state's power over the "bundle of rights" that they acquire when they obtain title to property. The Court said that it is common understanding that an owner holds title to property subject to the restrictions of the state law of nuisance. If the State's regulation would proscribe a use which is impermissible under the law of nuisance, no taking would occur. The law of nuisance would proscribe a productive use in any event. On the other hand, the Court said the fact that the particular use has long been engaged in by similarly situated owners ordinarily imports a lack of any common law prohibition. Accordingly, in this appeal, the fact that peat mining on the Claimants' property had been permitted under the Noncoal Mining Act may indicate that the peat mining activity was not legally prohibited at the time of purchase of the property so that the denial of a permit

to conduct the same activity under the newly adopted Encroachments Act resulted in a taking of a portion of the "bundle of rights" that the Claimants were entitled to exercise.

The Court's holding in *Lucas* related to a total regulatory taking of all of the property involved. However, the Court's opinion addressed the second threshold issue in this proceeding by of dicta in Footnote 7.[13] This issue is whether a regulated portion of the land can be considered as a separate property for purposes of the "taking analysis." In Footnote 7 Justice Scalia's opinion for the majority of the Court said that in the case of a regulation affecting only a portion of a tract of land "it is unclear whether we would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in value of the tract as a whole." Justice Scalia also suggested the following as an approach to this issue:

> The answer to this difficult question may lie in how the owner's reasonable expectations have been shaped by the State's law of property – i.e., whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land with respect to which the takings claimant alleges a diminution in (or elimination of) value. In any event, we avoid this difficulty in the present case, since the "interest in land" that Lucas has pleaded (a fee simple interest) is an estate with a rich tradition of protection at common law, and since the South Carolina Court of Common Pleas found that the Beachfront Management Act left each of Lucas's beachfront lots without economic value.

In this legal context the Commonwealth Court decided *Manchipongo Land and Coal Company, Inc. v. Department of Environmental Resources,*[14] involving a claim arising from the Department's determination that coal lands were not suitable for mining. The court denied the Department's motion for summary judgment, holding that there

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[13] 505 U.S. at 1016 n.7.

[14] 719 A.2d 19 (Pa. Cmwlth. 1998).

were material issues of fact to be decided as to whether or not this declaration was a taking of the coal reserves if the claimants could mine the coal reserves profitably and if coal reserves were recognized to be separate from the rest of the property for purposes of "taking analysis". Relying on the decisions of the United States Supreme Court in *Keystone Bituminous Coal Assn. v. De Benedictis*,[15] and in *Penn Central Transportation Company v. New York City*,[16] the Commonwealth Court adopted the formula for determining whether regulatory taking had occurred of a regulated property. That test is whether the regulation deprives the landowner of all economic viable uses of the property measured by what was taken (the numerator) against what was left (the denominator). If the result of this fraction is one, a taking has occurred; if less than one, no taking has occurred.[17] The key to the determination of whether a taking has occurred is the determination of the denominator, that is, what property rights have been left.

While this decision might be regarded as being applicable only to interests in coal and not to other minerals, the Court's opinion is written in terms of general application. After analyzing various approaches to determine what is the proper denominator for regulated land separate from unregulated portions of a tract, the Court adopted the following general rule:

> [W]e believe the property interest by regulation approach is the best one to determine the denominator, but with some important modifications to take into consideration the need for governmental regulation in the public interest. Although this approach tilts in the landowner's favor, historically the Takings Clause was designed to protect private citizens from governmental interference with property rights. Therefore, it makes sense for courts, at least initially, to tip the scales slightly in the plaintiff's favor.

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[15] 480 U.S. 470 (1987).
[16] 438 U.S. 104 (1978).
[17] 719 A.2d at 25-26.

> However, while the regulated land would first be considered under this approach, to determine whether it actually would be the denominator would depend on the answers the courts received to the following questions:
>
> - whether the regulated land had value prior to the regulation;
> - whether the regulated land has a separate use from the non-regulated contiguous parcel(s) – i.e., whether it may be profitably used if it is the only parcel; and
> - if the regulated land has value separate from the contiguous land, whether all of its economic benefit is gone.[18]

Applying this rule to the facts of *Machipongo*, the Commonwealth Court denied the motion for summary judgment because a hearing had to be held to determine whether the owners' interest met this test. Specifically, the Court said that evidence would have to be adduced as to whether the coal estate had value prior to the Department's designation of the land as unsuitable for mining, whether it had a separate use from the non-regulated contiguous land the coal owners owned, and whether all of its economic benefit was gone as a result of the regulation.

The Department argues in its reply brief that *Machipongo* should be limited to takings cases involving coal extraction. The *Machipongo* opinion itself acknowledges that Pennsylvania is unique in recognizing a separate estate in coal.[19] As indicated above, the Pennsylvania Supreme Court in *Miller & Son Paving* said that the Commonwealth Court had improperly applied a "takings" rule in a land use case involving quarrying that only applied to a separate coal estate. Thereafter, the Commonwealth Court

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[18] 719 A.2d at 28 (quotations and citations omitted).
[19] 719 A.2d at 28.

acknowledged that in land use cases there is a valid distinction between cases involving a coal estate and cases involving other natural resources. [20]

We reject this interpretation for a number of reasons. First, the Claimants are not arguing that peat constitutes a separate estate in land and that our analysis of its value is thereby limited.[21] Second, the Court's decision to adopt the "property-interest-by-regulation" approach did not hinge solely on coal as a separate estate. Finally, the principles adopted by the Commonwealth Court in *Machipongo* are similar to the principles expressed by Justice Scalia in *Lucas* and to some subsequent decisions reached by federal courts involving rights to fill wetlands. Following the Supreme Court's decision in *Lucas* federal courts have recognized a "taking" of wetland areas separate from the whole original tract purchased by the landowner. [22]

The cases which the Department cites to discredit *Machipongo* for other reasons do not support its position that this decision is not the law of Pennsylvania. Although *Mock v. Department of Environmental Resources,*[23] considered both the regulated wetlands and the contiguous unregulated property in determining that there was no regulatory taking, a primary basis for that decision was that there was no evidence that other alternate uses of the land would be prohibited.

In addition, the court's opinion in *Mock* relied in part on the absence of any evidence of the owner's investment-backed expectations and the fact that their

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[20] *Stabler v. Mt. Bethel Township*, 695 A.2d 882 (Pa. Cmwlth. 1997).

[21] Claimants' Brief in Opposition at 29.

[22] *See, e.g., Palm Beach Isles Associates v. United States,* 208 F.3d 1374 (Fed. Cir. 2000); *Florida Rock v. United States*, 45 Fed. Cl. 21 (1999); *Loveladies Harbor, Inc. v. United States,* 28 F.3d 1171 (Fed. Cir. 1994).

[23] 623 A.2d 940 (Pa. Cmwlth. 1993), *affirmed per curiam,* 667 A.2d 212 (Pa. 1995), *cert. denied,* 517 U.S. 1216 (1996).

expectations for use of the wetland surface could not have been reasonable because the use of the surface was limited by existing wetland and floodplain regulation. Those factors relate to the holding in *Lucas* that a use prohibited by the law of nuisance cannot be taken by an exercise of the police power and the importance of the property owners' investment-backed expectations.[24]

Similarly, in *Miller & Sons Paving*[25] the Pennsylvania Supreme Court did not address the so-called "denominator question" other than to note that the principle of a separate coal estate could not be applied to other minerals. In that case it appeared that there had to be an economic use for the surface of the property other than for quarrying and that a comparison of the regulated property to the mineral resource would result in a ratio of less than one. In this case, by contrast, whether there is an economic use for the surface of the regulated wetland and whether a comparison of the mineral resource to the total regulated wetland would result in a ratio of less than one are issues as to which the parties are pursuing discovery, and which must be resolved following a hearing on the merits.

We also reject the Department's contention that *Machipongo* is contrary to the decisions of the United States Supreme Court and the Pennsylvania Supreme Court. As indicated above, the decision in *Machipongo* is fully consistent with the decision of the United States Supreme Court in *Lucas*. While the traditional statement of the rule in *Miller & Son Paving* requiring a total taking of all uses is different from the principles

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[24] They also relate to the principle expressed in the Pennsylvania Supreme Court's opinion in *Miller & Son Paving* that the means must not be unduly oppressive on the property holder, considering the economic impact of the regulation.

[25] *Miller & Son Paving, Inc. v. Plumstead Township,* 717 A.2d 483 (Pa. 1998).

applied in *Machipongo*, the issue of separation of a regulated portion of the property was not considered and probably was not even relevant to the Pennsylvania Supreme Court's decision in *Miller & Son Paving*.

The Department also contends that the Supreme Court of Pennsylvania may reverse the Commonwealth Court in the appeal now pending before it following the trial of the *Machipongo* case. Until it does so, however, we will follow that decision. We see nothing in the principles expressed in that decision which is contrary to the principles expressed in *Miller & Son Paving* with respect to undue oppression of the property owners rights, the decision of the Supreme Court of the United States in *Lucas* or in subsequent federal decisions separating some wetland properties from the entire tract for purposes of "taking" analysis. While other federal courts have not found wetland properties separable for purposes of "taking analysis," even the Department's attempts to distinguish those decisions that do allow a separation of some wetlands from the entire tract demonstrate that the issue is factually intense so that factual differences may lead to distinctly different results. [26] Finally, the speculation as to whether the Supreme Court will affirm or remand *Machipongo* is hardly a basis for the grant of a motion for summary judgment.

The rule adopted in *Machipongo* requires us to consider a number of factual matters relating to the regulated wetland property and the contiguous unregulated land. For example, the question of whether the State's regulation and denial of the permit to mine peat may turn on whether the mining of peat under the circumstances may have been prohibited by existing law or regulation under the principles expressed in the United

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[26] See the Department's 57-page Reply Brief at pp. 15-24.

States Supreme Court's opinion in *Lucas* or may be unduly oppressive on the property holder under the principles expressed in the Pennsylvania Supreme Court's decision in *Miller & Son Paving*. Does the regulated land still have value as a contributor to the value to the upland properties as residences or may it have no value for mining under current economic circumstances or because the mining could not be conducted without use of the upland property? If the investment-backed expectations of the Original Claimants were to pursue both the goals of extracting peat and to create lakes as amenities for a housing development,[27] is there any basis for separating the regulated property from the entire tract for the purposes of taking analysis? Were these investment-backed expectations reasonable at the time the tract was purchased?[28] Did both the Original Claimants and regulatory authorities deal with the wetland property and the upland property as separate properties so that a division of the segments may be reasonable based on the conduct of the parties? Even if a division of the properties is proper for "taking analysis," will the numerator and the denominator equal one or less than one as required by the Commonwealth Court's analysis in *Machipongo*?

In sum, we will deny the Department's motion for summary judgment concerning the Claimants' taking claim. There are clearly many factual matters to be resolved. Without such information it is impossible to reach any conclusions concerning the economic impact of the Department's action upon the Claimants' property.[29]

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[27] The Department contends that this dual purpose in the use of the property was adopted by the Board in its previous adjudication. 1991 EHB at 1209 n.8.

[28] As to the reasonableness of such expectations in a wetland case, *see Robert Brace v. United States*, 48 Fed. Cl. 272 (2000).

[29] *See Domiano v. DEP*, 1999 EHB 408, in which the Board denied the Department's motion for summary judgment in a "takings" case for similar reasons.

The Department also argues that it is entitled to judgment in its favor because the permit to encroach upon the wetlands is a privilege, therefore no property right of Claimants has been taken by the Department. While the Department's characterization of a permit is obviously a correct statement of the law,[30] the Claimants are clearly *not* arguing that the encroachment permit is the property that was taken. Instead they are arguing that regulating their property by denying the encroachment permit deprives them of their investment-backed expectations so that they could realize the economic value of the wetland by mining peat so that they are accordingly entitled to compensation. Accordingly, we will not grant summary judgment on this basis.

The Department next contends that the Claimants' claims are barred by either res judicata, collateral estoppel or waiver. Specifically, the Department contends that the takings question was somehow raised in the Claimants' notice of appeal or pre-hearing memorandum filed in the appeal of the denial of their encroachment permit and revocation of their mining permit. Reviewing these materials it is clear that neither the Claimants, the presiding Board Member nor the Commonwealth Court believed or intended to resolve the question of whether the Claimants' land had been taken by regulation of the Department, thereby requiring compensation.

First, at the time the Claimants filed their initial appeal, it was widely believed that jurisdiction for the taking of the Claimants' land rested with the court of common pleas. Accordingly, the Claimants filed a petition for appointment of board of viewers on January 24, 1990 with the Court of Common Pleas of Lackawanna County, during the

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[30] *Tri-State Transfer Co. Inc. v. Department of Environmental Protection*, 772 A.2d 1129, 1132 n.3 (Pa. Cmwlth. 1999).

pendancy of their appeal before the Board.[31] Until the Commonwealth Court's decision in *Beltrami*[32] this was the only appropriate tribunal to decide the takings question. Therefore, the suggestion that the takings question was or could have been resolved before the Board at that time is without merit.

It is true, as the Department contends, that the Claimants raised a due process claim in support of their contention that the Department improperly revoked their mining permit. They argued that the Department's authority to revoke the permit was limited by due process unless the Claimants were compensated. The Board resolved this claim in the Department's favor by concluding that the Claimants did not have an absolute right to the mining permit:

> We also disagree with Davailus's argument that, under the Due Process clause, DER could only revoke the mining permit if it compensated Davailus. The mining permit was revoked because of a policy change, later codified by statutory change, which shifted peat extraction from DER's mining program to its wetlands program. Davailus is arguing that his pre-existing mining permit renders him immune from these changes, unless he is compensated. However, the granting of a permit under the environmental laws does not create a legitimate expectation that the permittee will be beyond the reach of new policies or statutory requirements for the duration of the permit.[33]

On appeal, the Commonwealth Court agreed with the Board's analysis and held that the Claimants did not have a vested right in their mining permit.[34] Clearly, these tribunals were not answering the question at issue here, namely did the Department's appropriate denial of the Claimants' encroachment permit result in a taking of their real estate. The

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[31] See Department Ex. 9.

[32] *Beltrami Enterprises, Inc. v. Commonwealth,* 632 A.2d 989 (Pa. Cmwlth. 1993), *petition for allowance of appeal denied,* 645 A.2d 1318 (Pa. 1994).

[33] *Davailus v. DER,* 1991 EHB 1191, 1212 (citations of footnotes omitted).

[34] *Davailus v. Department of Environmental Resources,* 1826 C.D. 1991, slip op. at 11 (Pa. Cmwlth. filed September 4, 1992).

Commonwealth Court even acknowledged the existence of the proceedings in the Court of Common Pleas of Lackawanna County, noting that it "would appear to be the proper forum to provide the relief Davailus ultimately wishes to obtain."[35] In short, the takings question presented to us now has never been previously adjudicated and is not identical to the due process claim raised by the Claimants in their 1988 notice of appeal. Therefore, neither res judicata nor collateral estoppel applies to bar the present action. Further, the Claimants could not have waived an issue before the Board that at the time the Board did not believe it had jurisdiction to resolve.

Finally, the Department contends that the Claimants' appeal should be dismissed because it was untimely filed pursuant to 25 Pa. Code § 1021.52(a), which requires appeals from Department actions to be filed within 30 days. We disagree.

This matter was transferred to the Board by the Commonwealth Court pursuant to Section 5103(a) of the Judicial Code.[36] In its opinion transferring the matter, the Commonwealth Court observed that the Claimants' petition for appointment of board of viewers was filed after the 30-day appeal period provided by the Environmental Hearing Board Act, but well within the 6-year statute of limitations imposed by the Eminent Domain Code. Noting that both of the Claimants' actions were commenced prior to the Commonwealth Court's ruling in *Beltrami,* it declined to apply the 30-day rule to prevent the transfer. The Commonwealth Court's Order was appealed to the Pennsylvania Supreme Court which declined to review the case on February 27, 1998.

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[35] *Id.* at 23 n. 19.
[36] 42 Pa. C.S. § 5103(a).

The Department contends that the Claimants had 30 days from February 27, 1998, to file their Statement of Claim with the Board. There is no support for this position in the Board's rules. First, the Claimants' takings action was commenced when it filed its petition in the court of common pleas. When the Commonwealth Court transferred the matter to the Board, the Judicial Code states that upon transfer a "matter shall be treated as if originally filed in the transferee tribunal on the date when first filed in a court . . . of this Commonwealth."[37] That court also held that the Claimants' petition was to be considered timely filed. This holding was in answer to the exact argument which the Department makes in its reply brief: that the Claimants' had 30 days from the Department's permit action to file their takings claim. The court disagreed with the Department and held:

> [W]e conclude that we cannot apply the thirty-day limitation to prevent the transfer of Davailus' claim. Equity demands that the EHB decide the issue of whether there was a taking, especially in light of this Court's statement on Davailus' permit denial appeal, which clearly indicated that the Common Pleas Court of Lackawanna County, "would appear to be the proper forum" for the condemnation action.[38]

We will not disturb the ruling of that tribunal. *See Domiano v. DEP*, 1999 EHB 408, 412-13 (rejecting a similar contention by the Department).

Second, no further action was explicitly required to continue the proceedings before the Board. Neither the Judicial Code nor the Board's rules require a litigant to re-file his case in another format in order for the transferee tribunal's jurisdiction to attach. Although analogous to a notice of appeal in terms of content, the Board's rules do not

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[37] 42 Pa. C.S. § 5103(a).

[38] *Davailus v. Department of Environmental Resources,* 1399 C.D. 1995, slip op. at 6 (Pa. Cmwlth. filed June 27, 1996).

have a specific requirement that a statement of claim be filed in a takings case. Instead, this tool has been utilized by the Board's administrative law judges to facilitate proceedings before the Board.

To sum, we will deny the Department's motion for summary judgment in its entirety. We therefore enter the following:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

EDWARD P. DAVAILUS and SANDRA DAVAILUS, CO-EXECUTORS OF THE LAST WILL AND TESTAMENT OF PAULINE DAVAILUS and DAVAILUS ENTERPRISES, INC.	:	
v.	:	**EHB Docket No. 96-253-MG**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIROMENTAL PROTECTION	:	

ORDER

AND NOW, this 6th day of June, 2001, the motion for summary judgment of the Department of Environmental Protection in the above-captioned matter is hereby **DENIED.**

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

DATED: June 6, 2001

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

For the Commonwealth, DEP:
Paul R. Brierre, Esquire
Northeast Region

For Claimants:
Timothy B. Fisher, II, Esquire
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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

DANIEL AND JOAN STERN	:	
	:	
v.	:	**EHB Docket No. 2000-221-K**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and WALNUT GLEN, INC., Permittee, and TREDYFFRIN TOWNSHIP MUNICIPAL AUTHORITY, Intervenor	:	**Issued: June 15, 2001**

OPINION AND ORDER ON THE DEPARTMENT'S MOTION TO DISMISS FOR LACK OF JURISDICTION, OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT AND APPELLANT'S MOTION FOR SUMMARY JUDGMENT

By Michael L. Krancer, Administrative Law Judge

Synopsis:

The Board denies the Department's Motion To Dismiss For Lack of Jurisdiction, Or In The Alternative, For Summary Judgment and denies the Appellants' Cross Motion For Summary Judgment. In March, 1999 the Department, by letter, granted a developer an exemption from submitting sewage planning modules and permitting under the Clean Streams Law and the Sewage Facilities Act for the proposed sewage facilities for the Danbury development. A neighbor, who had no notice of the 1999 action at the time, but subsequently became aware of it, brought to the Department's attention, in 2000, that, while the Department thought that the sewage system that it had reviewed and for which it had granted the exemption in 1999 was a gravity-only system, the system actually involved the use of individual grinder pumps. Detailed plans showing the system configuration were then submitted to the Department. After analyzing the grinder pump

configuration, the Department concluded in 2000 that the system, even as composed with grinder pumps, was exempt from submission of Sewage Facilities Act modules and Clean Streams Law permitting and the Department communicated that decision to both the developer and the neighbor by separate letters. The neighbor appealed both letters to the Board. The Department's claim that the 2000 action is not appealable because it only reaffirmed the 1999 decision and did not alter the *status quo* is rejected. A decision involves three component parts: (1) the input; (2) the deliberation and contemplation of the input; and (3) the conclusion. The 2000 decision was fundamentally and substantially different than the 1999 decision in that the input and the deliberative process involved was very different than in 1999. As such, the decision of 2000 is a separate decision and is appealable. Summary judgment is denied to both parties because of the substantial factual issues that are raised on either side and those issues, including, but not limited to, the relative qualifications of the competing experts and the credibility of witnesses, cannot and should not be resolved on the papers alone.

Procedural Background

The Notice of Appeal in this case involves the so-called Danbury Subdivision (Danbury), a prospective nine-unit single family homes development located in Tredyffrin Township, Chester County. Daniel and Joan Stern (Sterns) initiated this matter by filing a notice of appeal and a subsequent amended notice of appeal (collectively Notice Of Appeal or NOA) on October 23, and November 13, 2000 respectively. The Sterns' Notice Of Appeal challenges two Department letters dated September 21, 2000, one addressed to Mr. Charles P. Durkin, P.E. of Durkin Associates, Inc., (Durkin September 21, 2000 Letter or Durkin Letter) and the other to Mr. Stern (Stern September 21, 2000 Letter or Stern Letter). Mr. Durkin and his firm are the

engineering consultant for First Leader Development Corporation (First Leader) who was the developer of the land in question.

Both letters outline the Department's granting of an exemption under Section 207(b) of the Pennsylvania Clean Streams Law, 35 P.S. § 691.207(b)[1] and 25 Pa. Code § 71.51(a) and the Sewage Facilities Act[2] to First Leader from the submission of sewage planning modules and securing of CSL permits in connection with First Leader's building of Danbury. The Sterns maintain that the Department incorrectly granted the exemption to the developer and, under the circumstances, the developer must be required to submit planning modules and/or obtain a Clean Streams Law permit for proposed sewage facilities at Danbury.

In the Spring of 2001, First Leader sold its interest in Danbury to Walnut Glen, L.L.C. (Walnut Glen). On May 10, 2001, the Board granted Walnut Glen's Petition for Substitution Of Party and substituted Walnut Glen for First Leader as a party in this case. *See* 25 Pa. Code § 1021.54. Walnut Glen still plans to proceed with building Danbury. Tredyffrin Township filed a petition to intervene in the matter which was granted.

Discovery has now been completed and before us is the Department's Motion to Dismiss For Lack Of Jurisdiction Or, In The Alternative, For Summary Judgment, as well as the Sterns' Motion For Summary Judgment.[3]

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[1] The Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §§ 691.1- 691.1001 (Clean Streams Law or CSL).

[2] The Pennsylvania Sewage Facilities Act, the Act of January 24, 1966, P.L. (1965) 1535, *as amended*, 35 P.S. §§ 750.1-750.20a (Sewage Facilities Act or SFA).

[3] Citation form will be as follows: "NOA" refers to the Sterns' Notice of Appeal and Amended Notice of Appeal collectively; "DEPM" is the Department's Motion, "DEPB" will be the Department's brief in support of its Motion, and DEPRB will be the Department's Reply Brief; "SO/MSJ" is the Sterns' Opposition to the Department's Motion/Motion For Summary Judgment.

Factual Background

The Sterns live across the street from the proposed Danbury development and their complaint is that the sewerage plan calls for a pressure driven sewerage system, as distinguished from a passive, gravity-only fed system. That pressure driven system will be connected from the nine homes in Danbury to the sewer main running underneath Bodine Road at a point immediately next to the Sterns' home. The Department's action was wrong, according to the Sterns, because the sewage system proposed at Danbury uses pumps in such a fashion and configuration so as to constitute a pressurized sewer system with a force-main configuration as opposed to a gravity-only collection system and such a pressurized configuration as is to be used at Danbury cannot qualify for an exemption. Beyond the basic contention that, factually and legally, the particular pressure system and configuration to be used at Danbury does not qualify for an exemption, the Sterns contend that Danbury should be using a passive, gravity-only system. They allege that a gravity-only collection system is better suited for Danbury because, among other things, the topography of Danbury does not present a challenge to the use of a gravity-only system; a gravity-only system was initially considered by the developer as the correct and most technically feasible form of sewage system; groundwater conditions do not make it difficult to construct and maintain a gravity collection system; and there is no excessive rock excavation which makes the gravity collection system impractical. Moreover, the use of a pressure sewer system would result in over-capacity of the existing sewage collection system. This would, in turn, cause physical damage to the Sterns' collection facilities which consists of an eight-inch diameter terra cotta main. (Sterns' NOA)

In early 1999, before the Sterns ever became aware of the prospective Danbury project or its proposed plan for sewerage, First Leader requested that the Department exempt it from submitting sewerage planning modules and permitting under 25 Pa. Code 71.51(a), pursuant to section 207(b) of the Clean Streams Law, section 7(b)(5) of the Sewage Facilities Act, and 25 Pa. Code § 71.51(b). At that time, the Department *thought* that it was reviewing and considering for exemption a gravity sewerage system with no pumps, pumping or pressure. The form "mailer" contained in First Leader's Request for Planning Exemption application (1999 Request) drafted by First Leader's consultant, Charles Durkin Associates, Inc., on February 26, 1999, leaves blank the box designated, "Pump Station(s)/Force-Main". (Ex. C, SO/MSJ) Mr. John Veneziale, Sewage Facilities Planning Specialist, Department of Environmental Protection, who reviewed the 1999 Request, testified as follows regarding the 1999 Request:

> Q. There's nothing there on the box that says pump stations force-main; is there? It's blank.
> A. Correct.
> Q. That would imply to DEP that this is not going to be a force system. Right?
> A. Correct.
> Q. DEP would get this and think this is going to be a gravity system; wouldn't they?
> That would be reasonable for DEP to think that; wouldn't it?
> MR. GELBURD: Which?
> BY MR. STERN:
> Q. Wouldn't it be reasonable for DEP when they get this, to think this is a gravity system being proposed?
> You may answer.
> A. Yes.

(Ven. Tr. 189-90, SO/MSJ Ex. C)

> ....
> Q. And the way things are submitted here, at this point, it's looking like the developer is proposing a gravity system.
> Is that fair to say?
>
> A. Yes.

(Ven. Tr. 203, SO/MSJ Ex. C)

By letter dated March 10, 1999 from Jason Blackburn, Sewage Facilities Planning Specialist, to Mr. Durkin (March 10, 1999 Letter) the Department granted First Leader's 1999 Request. The March 10, 1999 Letter, of course, mentions nothing about pumps or force-mains because the Department did not understand that its decision on the 1999 Request involved any analysis on its part of how pumps or force-mains might impact this particular Request for Planning Exemption. No notice to either the public at large or the Sterns in particular was given of either the 1999 Request or of the Department's March 10, 1999 Letter. Mr. James Newbold, Regional Manager for the Water Quality Program of the Department's Southeast Regional Office, states in his affidavit that, "[i]n accordance with standard Department practice, notice of neither the Department's March 1999 Letter granting First Leader's planning and permit exemption...was published in the *Pennsylvania Bulletin*, and the Department has no intention of ever publishing notice [of it] in the *Pennsylvania Bulletin*. (DEPM ¶ 14, Newbold Affidavit, ¶ 10, Ex. 4, DEPM) It is not disputed that the Sterns did not appeal the Department's March 10, 1999 letter.

Mr. Stern first became aware of the proposed Danbury development in late 1998 or early 1999 from his attendance at a Tredyffrin Township Zoning Board meeting. (DEPM ¶ 7, Stern Tr. 49, Ex. 1, DEPM) It was apparently Mr. Stern who brought to DEP's attention that the proposed system for Danbury involved the use of individual grinder pumps. (DEPM ¶ 14, Stern Expert Report p. 3, SO/MSJ Ex. A) The record shows that on May 8, 2000 Mr. Durkin and Mr. Veneziale discussed this matter on the telephone. Mr. Veneziale's telephone log, which contains his contemporaneous notes of this telephone conversation, records that Mr. Durkin told Mr. Veneziale that he "did not

realize grinder pumps needed [a Clean Streams Law] permit" and that he, Mr. Durkin, will process an application. Mr. Veneziale's notes further reflect that he sent Mr. Durkin a blank Planning Module for Land Development as a follow-up to this conversation with Mr. Durkin. (Ven. Tr. 91-95 and Ex. 6, SO/MSJ Ex. C) Mr. Veneziale's transmittal memorandum to Mr. Durkin states as follows, "[p]er our tel. Con re: grinder pumps[,] Enclosed please find planning module application and WQM Part II application for the above ref. [i.e., Danbury] project". (SO/MSJ Ex. C, Ven. Dep. Ex. 7)

Mr. Veneziale testified about his telephone log entry and his transmission of the permit materials to Mr. Durkin at his deposition. Mr. Veneziale told Mr. Durkin that in light of the fact that the system involved grinder pumps that it may need a Clean Streams Law Permit. (Ven. Tr. 93-94) Mr. Durkin told Mr. Veneziale that he had been previously unaware that the grinder pumps necessitated a Clean Streams Law permit and in light of that revelation he, Mr. Durkin, "was going to comply with the process". (Ven. Tr. 113) Thus, Mr. Veneziale sent to Mr. Durkin the planning module application. (Ven. Tr. 94)

DEP, in its brief, states that at about this same time, Mr. Veneziale warned Mr. Durkin that the exemption outlined in the March 1999 Letter could be revoked. (DEP Brief pp. 4-5) Mr. Veneziale testified that he may have used the term "deceived" in describing this turn of events in the Spring of 2000 to Mr. Stern. Mr. Veneziale testified as follows:

> Q: Now do you remember in this conversation—Mr. Veneziale? Do you remember saying words to the effect, to [Mr. Stern], DEP doesn't like being deceived. Either this conversation or conversations in this time frame.

> A: I don't recall the specific time frame. I may have in fact used that word. I just don't specifically recall.
>
> ....
>
> A: Certainly, it was serious enough that if, and this is where it gets sketchy, but certainly, for us to send out the modules and imply that you need to fill out the modules, I wouldn't do that arbitrarily.

(Ven. Tr. 117-18)

New and previously unconsidered information regarding the sewage configuration for Danbury was submitted to the Department at about this time. (DEPB Brief p. 4) At least one of the items that now came to DEP's attention was an engineering drawing done by Durkin Associates, Inc. labeled, "Final Grading & Utilities, and Stormwater Management Plan, SWM-1, sheet 2 of 8, Revision No. 2 dated January 19, 2000 (Final GUSM Plan). (Stern Expert Report, Ex. C) This plan, which post-dates the Department's March, 1999 Letter, shows the contemplated use of a "Low Pressure Force-Main".

DEP's brief then describes what DEP did with this information.

> Mr. Veneziale brought Mr. Durkin's detail[ed] plans to his supervisor, Glen Stinson, who has thirty years' experience in sewage facilities planning. The two of them, in consultation with the [Department's] regional chief for CSL permitting, concluded that no "pump stations" existed, no separate CSL permit would be require[d] for the development, [and that] the 1999 exemption from planning and permitting was properly granted and had been and would remain in effect.

(DEP Brief p. 4) The substantive rationale for this decision is set forth in detail in the Department's papers and especially in the affidavits of Mr. Stinson and Mr. Newbold. Distilled to its most basic essence, the proposed system, with the use of individual grinder pumps, which have now been factored into the Department's consideration, do not constitute a "force-main" or a "main" as that term is used or interpreted by the

Department. Thus, even considering grinder pumps, the proposed system does not have to undergo the permitting and review requirements of Section 207 (a) and (b) of the Clean Streams Law. (Newbold Affidavit ¶ 8; Stinson Affidavit ¶ 14) They reason that: (1) laterals connecting individual homes do not constitute "mains" and so they are not "force-mains" even when individual grinder pumps convey sewage from individual homes directly into gravity mains; (2) "[p]ump stations" are units physically located outside the individual home lots and serving more than one home; (3) since it [the proposed sewerage system] does not involve a pump station or force-main as referred to in the CSL, construction of an addition to the sewer main to serve some of the Danbury homes, therefore, constitutes a "sewer extension" as defined in the Act 40 amendment to Section 1 of the CSL, 35 P.S. § 691.1; and (4) the Department does not itself require Water Quality Permits for, or review, the design, construction and connection of individual householder-owned laterals directly to a gravity-feed line absent demonstrable pollution or other violation of the CSL. Under those circumstances, as long as proper planning under the SFA is in place, which is the case as respects the Danbury subdivision, it is for the local authority to: (i) ensure that design of the lateral connection is appropriate; (ii) undertake oversight of construction so that it meets design requirements and does not otherwise create pollution; and (iii) see to it that the lateral connection is properly maintained. (Newbold Affidavit ¶¶ 8 (A) – (D); Stinson Affidavit ¶¶ 15-17; DEPM ¶ 27)

Based on this analysis, the Department, then, directed a second letter to Durkin dated September 21, 2000, *i.e.*, the Durkin September 21, 2000. The Durkin September 21, 2000 Letter states that it is "in reference to your submission of additional information, dated July 11, 2000, regarding [Danbury]." The "additional information" is defined as

two site plans, the Final GUSM Plan and another Plan referred to as an Improvement Construction Plan. The Durkin September 21, 2000 Letter, then, specifically describes that these plans show the "proposed sewage facilities involve the direct connection of 5 individual *grinder pumps* to an existing gravity sewer line and the direct connection of 4 individual *grinder pumps* to a proposed gravity sewer line." (*emphasis added*). The concluding paragraph of the Durkin September 21, 2000 Letter provides as follows:

> Based on our review of this information, no Department permits are required for the proposed sewage facilities to serve the project. Therefore, no planning modules are required to be submitted to the Regional Office of the Department of Environmental Protection. Also, our previous granting, in March of 1999, of an exemption request is still applicable.

(NOA Ex. A) The Department also directed a letter to Mr. Stern dated September 21, 2000, *i.e.*, the Stern September 21, 2000 Letter. The Stern September 21, 2000 Letter encloses a copy of the Durkin September 21, 2000 Letter. The Stern September 21, 2000 Letter states that, in the Durkin September 21, 2000 Letter:

> We indicate that no Department permit (Water Quality Management Permit Part II) is required for the construction or operation of the proposed sewage facilities to serve the project. We indicated that no further planning was required and that our granting of an exemption request back in March of 1999, was still applicable.

(NOA Ex. A) The Stern September 21, 2000 Letter then sets forth the often seen appeal paragraph which provides that, "any person aggrieved by this action may appeal [to the Environmental Hearing Board]". The Sterns have accepted that invitation and have appealed.

Motion To Dismiss For Lack of Jurisdiction

The Department's Motion to Dismiss For Lack of Jurisdiction contends that the only "action" by the Department in this case was the March, 1999 granting of the

exemption and that action is administratively final because the Sterns did not appeal therefrom. The Department argues that neither the Durkin September 21, 2000 Letter nor the Stern September 21, 2000 Letter are separately appealable. Basically, it argues that the Stern Letter and, by definition, its partner Durkin Letter, constitute simply a restatement or reaffirmation of the original exemption outlined in the March 1999 Letter. As such, argues the Department, the letter to Mr. Durkin of September 21, 2000, and its sister letter to Mr. Stern of the same date, do not constitute a decision or action which changed the *status quo* or affected anybody's rights and are not, therefore, final actions which are appealable under the Environmental Hearing Board Act, Act of January 13, 1988, P.L. 530, *as amended,* 35 P.S. §§ 7511-7514.

As can be observed from the recitation of the facts before us and the citations therein to the record, the parties have engaged in extensive discovery on the jurisdiction issue and both the Department and the Sterns have submitted extensive exhibits in their papers on this subject. Both the Department and the Sterns have asked the Board to review and consider those items in its deliberations on the Motion To Dismiss which we have done. Therefore, we will treat the Department's Motion To Dismiss For Lack Of Jurisdiction as a motion for summary judgment on that subject.[4]

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[4] There is ample precedent for treating the Motion To Dismiss here as a motion for summary judgment. In *White Glove, Inc., v. DEP*, 1998 EHB 372, the Board said that, "the evidence presented in support of the [Department's Motion To Dismiss] is of such a nature that the motion should be considered as a motion for summary judgment." *White Glove, Inc., v. DEP, supra,* at 374 n.3 (citing *Reading Anthracite Co. v. DEP*, 1997 EHB 581, 585 n.4). Just recently in *Ziviello v. DEP*, we stated that, "[s]ince the motion to dismiss was filed after the close of discovery and it was accompanied by depositions, answers to interrogatories and an expert report, the Board will treat the motion as a motion for summary judgment." *Ziviello v. DEP*, 2000 EHB 999, 1001. Similarly, in the *Stern* matter currently before the Board, the Department filed its Motion after the close of discovery and has supported its Motion To Dismiss with the deposition transcripts from Mr. Stern's, Mr. Durkin's and Mr. Veneziale's depositions. Thus, we will follow the

Our standard for review of motions for summary judgment has been set forth many times before. We will only grant summary judgment when the record, which is defined as the pleadings, depositions, answers to interrogatories, admissions, affidavits, and certain expert reports, show that there is no genuine issue of material fact *and* the moving party is entitled to judgment as a matter of law. *Holbert v. DEP*, 2000 EHB 796, 807-09 *citing County of Adams v. DEP*, 687 A.2d 1222, 1224 n. 4. (Pa. Cmwlth. 1997). *See* Pa. R.C.P. 1035.1. Also, when evaluating a motion for summary judgment, the Board views the record in a light most favorable to the non-moving party and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. *Holbert*, 2000 EHB at 808 (citations omitted).

The Board has recently outlined the following approach to analyzing whether the matter before us is an appealable action:

> 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'.

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guidance of *Ziviello* and *Reading Anthracite*, and consider the Department's Motion To Dismiss as a motion for summary judgment in accordance with Rule 1035.1 of the Pennsylvania Rules of Civil Procedure.

> 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). Thus we approach this question by reviewing the nature of DEP's action in the context of regulatory scheme and the circumstances to determine whether the action is appealable.

Felix Dam Preservation Association v. DEP, 2000 EHB 409, 421-22.

Viewing the record in the light most favorable to the Sterns, which we do for the purposes of analyzing the Department's Motion To Dismiss For Lack of Jurisdiction, we conclude that the decision outlined in the dual letters of September 21, 2000 constitutes an appealable decision. We think that the Department's view of the meaning of a decision in this case is too narrow. We view a *decision* as necessarily consisting of three components: (1) the input; (2) the deliberation and contemplation of the input; and (3) the conclusion. The Department here focuses only on the third component when it argues that we have no jurisdiction because the *conclusions* of the March, 1999 Letter and the 2000 Durkin and Stern Letters are the same. It is true that the *conclusion* of the March 1999 Durkin Letter and the 2000 Durkin and Stern Letters are the same, but the record presented to us, viewed at this point in the light most favorable to the Sterns, shows that the action or *decision*, taken as a whole, was qualitatively and substantively very different. Both the input and the deliberative processing of the input involved in the action taken in 2000 was vastly different than in 1999. Viewed as comprising all of its components, the decision made and action taken in 2000 was distinct and separate from the action and decision of 1999.

When this matter was first reviewed by the Department, it thought it was looking at an exclusively gravity fed sewer system. That conclusion is supported in the record by numerous sources. The application filed by Durkin left blank the check-box in the mailer portion labeled "Pump Station(s)/Force-Main". (Ex. C, SO/MSJ) Mr. Veneziale's testimony confirms that the Department thought that it was reviewing a gravity-only system. (Ven. Tr. 189-90; 203) The March 1999 Letter announcing the conclusion of the Department on the request for exemption mentions nothing about any pumps or pressure devices present in the system.

Then, sometime later, perhaps as late as May, 2000, the Department became aware that the sewerage system contemplated for Danbury was not a gravity-only system, that grinder pumps were part of the configuration. Engineering drawings were presented to the Department by both Durkin and Mr. Stern, which the Department had never seen before, which confirmed that the system was not a gravity-only system. Mr. Veneziale is clear that while DEP thought it was reviewing a gravity-only proposed system in connection with the 1999 Request, he came to know in 2000 that a gravity-only system was not what was actually being proposed. Mr. Veneziale testified as follows:

> BY MR. STERN:
> R. Wouldn't it be reasonable for DEP when they get this, to think this is a gravity system being proposed?
> [BY DEP COUNSEL]: You may answer.
> B. Yes.
> Q. But that's not what they were proposing. Correct?
> A. Correct.

(Ven. Tr. 190, SO/MSJ Ex. C)

This revelation was of no small consequence. Mr. Veneziale, acting on this new understanding of the Danbury configuration, led him to say to Mr. Durkin that there very well may be a requirement for permitting and planning and that a planning module and

water quality permit application should be submitted. Moreover, the Department told Mr. Durkin that the exemption previously granted may have to be rescinded. Durkin then did submit to the Department a planning module application and water quality permit application. Also, although the record is not entirely clear on what exact terminology Mr. Veneziale used in his description of this new set of circumstances in his conversations with Mr. Stern, Mr. Veneziale testified that he may have told Mr. Stern in the Spring of 2000 that the Department had been deceived over the nature of the sewerage configuration at Danbury. (Ven. Tr. 117-18)

The Department itself describes how a *new* and *different* review of this input data was undertaken in 2000. Mr. Veneziale took this new and different configuration to Mr. Stinson and the two of them, in consultation with the chief of Clean Streams Law permitting, concluded that, even with grinder pumps, the configuration was exempt from Clean Streams Law permitting. The detailed rationale for this conclusion is set forth in the Department's motion papers and in itself confirms that an entirely new and different review process had been undertaken. The decision outlined in the Durkin and Stern Letters of September 21, 2000 rests on a completely different analysis and rationale than does the decision outlined in the March 1999 Letter. The actual text of the Stern and Durkin Letters as compared to the March 1999 Letter shows this as well. The March 1999 Letter says nothing about grinder pumps or any pressurized configuration. The Durkin September 21, 2000 Letter specifically references grinder pumps.

To say that the Durkin and Stern Letters do nothing more than affirm the correctness of the earlier decision, or only reaffirm it, as the Department does, is too narrow a view. While the conclusion is indeed the same, the question being asked was totally different as was the process which had to be undertaken to answer the question.

We think the case of *Bethlehem Steel Corporation v. Department of Environmental Resources*, 390 A.2d 1383 (Pa. Cmwlth. 1978), is instructive on this point. *Bethlehem Steel* involved the concept of administrative finality. Bethlehem, based on newly performed emissions testing results, requested the Department to withdraw a certain extant Order regarding implementation of certain emissions control measures at the Bethlehem plant. *Id.* 1385-86. The Department directed a letter to Bethlehem declining to do so. *Id.* at 1386. Bethlehem then appealed. The Board dismissed the appeal on the basis that, under the concept of administrative finality, there was no jurisdiction in that the original Order from which Bethlehem sought relief was final. *Id.* at 1386-87. The Commonwealth Court, though, reversed the Board's decision on that point. It stated that:

> In contrast, Bethlehem, by entirely new proceedings before the DER is attempting to have applied to its Steelton operation a regulation not previously addressed by DER and which could not have been addressed because the rates of emission were concededly unknown when it originally sought and obtained a variance from a regulation that was thereafter at least arguably "clarified".

Id. at 1387. In *Olympic Foundry v. DEP*, 1998 EHB 1046, the Board observed in a context not dissimilar to the one here that, under *Bethlehem Steel*, "[t]he presentation of new information not previously considered by the Department might require it to fully consider a new submission." *Id.* at 1052 n.3.

In this case, as we have said, the Department was answering a fundamentally different question in 2000 than it did in 1999. We think that makes the 2000 decision substantially and qualitatively different, and that it cannot be viewed as merely a reaffirmation or restatement of the previous decision. This is not a case where the Department was presented by the applicant or a third party with some minor detail or

matter which it did not consider in making a previous decision. In this case the matter which had been presented, considered and upon which the Department reached a conclusion in 1999 was fundamentally different than what was presented, considered and upon which it reached a conclusion in 2000.

We also disagree with the Department's argument that the Durkin and Stern Letters are not appealable because they supposedly did not alter the *status quo*. First, we think that *Bethlehem Steel* dispenses with the notion that a decision refusing to alter the *status quo* is *per se* unappealable. The Board has so commented in the past. *See Martin v. DER*, 1984 EHB 736. Also, since the 2000 decision is separate from and different from the 1999 decision, this decision is appealable even if there were no change to the *status quo*. The Board has jurisdiction over decisions of the Department. 35 P.S. § 7514(a). In addition, viewing the record in the light most favorable to the Sterns, we cannot conclude that the Durkin and Stern Letters do not alter the *status quo*. The answer to the question of whether these letters alter the *status quo* is dependent upon the frame of reference from which one views the *status quo*. In other words, the *status quo* relative to whom—whose *status quo* are we talking about? From the perspective of the developer who requested the action in 1999 and Department who rendered the action, both being direct parties to that action, the action of 2000 did not alter the *status quo* of either of them. However, this is a *third party* appeal. The Sterns were not parties to or even privy to the application and the resultant action in 1999.

We do not think that the cases of *Franklin Township Municipal Sanitary Authority v. DEP*, 1996 EHB 942, or *Exeter Township, Berks County, Authority v. DEP*, EHB No. 98-154-C (opinion and order issued May 30, 2001), cited to us by the Department, compel the conclusion here that the Sterns' appeal must be dismissed. The

Department cites *Franklin Township Municipal Authority* for the proposition that a decision by the Department denying a request that it reconsider a standing decision is not appealable. Also, the Department cites *Exeter Township* as "reaffirming the principle that a letter from the Department, declining to alter a final decision in the face of new information which allegedly should change the result, is itself a final decision". (DEPRB p. 4) However, neither *Franklin Township Municipal Authority* nor *Exeter Township* were third party appeals. The Franklin Township Municipal Authority and the Department were the parties to the original action and the request for reconsideration of that action. Franklin Township Municipal Authority, as a direct participant in and recipient of the Department's action, had notice thereof. The same is so about *Exeter Township*. In *Exeter Township*, there were two Department letters. The first one, sent in April, 1998, announced the Department's decision on the amount of the subsidy which would be awarded to Exeter Township under its then pending Act 339 subsidy application. Exeter Township did not appeal that letter. The second Department letter, sent in August, 1998, from which the Township attempted to appeal, was nothing more than the transmittal letter enclosing the Act 339 subsidy check in conformance with the Department's April, 1998 letter. There was no evidence in that case, as there is in this case, that the Department, in its August, 1998 letter, had undertaken a totally different review and deliberation process over a totally different question than it had answered by the April, 1998 letter. *Exeter Township* does not reaffirm any blanket principle as stated by the Department—what it does is hold that, in that case, the second letter from the Department, under the particular facts presented in that case, did not constitute a separately standing appealable "decision" within the meaning of the Environmental Hearing Board Act. In this case, on the other hand, we are holding, for all the reasons

already stated and supported in the record, that the September 21, 2000 Letters do set forth an appealable decision within the meaning of the Environmental Hearing Board Act.

Also, those cases, and many of the cases of that genre, for example, *Lehigh Township v. Department of Environmental Resources*, 624 A.2d 693 (Pa. Cmwlth. 1993), turn on whether the original action from which reconsideration is sought was actually "final" or not. In that regard, the Board and Court focus on whether the language in the original action was equivocal regarding whether it was really a final decision. *See Lehigh Township*, *supra*, 624 A.2d at 696; *Exeter Township*, *supra*, at 7-8; *Franklin Township*, *supra*, at 945. In this case, on the other hand, being a third party appeal, the focus is not solely on whether the original action was worded so as to be sufficiently final. This case does not turn on whether the March 1999 Letter was equivocal as to its finality or not. Indeed, that question is really beside the point of whether the Sterns, third parties who had no contemporaneous notice of the March 1999 Letter, may appeal the Stern and Durkin 2000 Letters, to which they did have notice, which, although affirming the conclusion of the March 1999 Letter, answer a totally different question and rely on totally different grounds.

Finally, we think, when the record is considered in the light most favorable to the Sterns, they have at least alleged that the decision of 2000 does affect their personal or property rights, privileges, immunities, duties, liabilities or obligations. They allege that the use of pressure devices, *i.e.*, grinder pumps, at Danbury will damage their own sewage facilities. Being that the decision of 2000 is a distinct decision, it clearly allegedly impacts them and qualifies as being appealable as to them.

Motions For Summary Judgment

The Department's Motion For Summary Judgment argues that, even if the Board were to find that it had jurisdiction, the specific sewerage system proposed for Danbury is properly exempt from planning and permitting requirements under the Clean Streams Law and the Sewage Facilities Act. The exact basis for this assertion is both fact and law intensive. An important part of the factual and legal rationale for the assertion that, even as configured with pumps, the proposed system qualifies for the exemption has already been discussed as set forth in the affidavits of Mr. Stinson and Mr. Newbold. The key allegation, as we understand it, is that the lateral grinder-pump lines being used at Danbury do not constitute a "force-main" as that term is defined and used by the Department in the context of the Clean Streams Law or the Sewage Facilities Act.

The Department relies on at least the following train of circumstances to support the granting of the exemption: (1) the specific and exact mechanical configuration of the proposed sewage system at Danbury; (2) no sewage from any Danbury home will be under pressure when it enters the existing gravity sewer main; (3) Charles Durkin is a highly qualified engineer with many years of experience; (4) Mr. Durkin considered and rejected as infeasible a gravity-only system for Danbury; (5) the reasons for his rejection of a gravity-only system are good ones; (6) the Department's interpretation of the Clean Streams Law and the Sewage Facilities Act as not classifying individual grinder pumps connected to a sewage main by lateral lines as "pump stations"; (7) the Department likewise does not interpret the Clean Streams Law or the Sewage Facilities Act to classify individual lines connected to a single pump, which in turn connects to a sewage main to be a "pump station"; (8) the Department does not interpret the Clean Streams Law or the Sewage Facilities Act to classify individual lateral connections to a gravity sewage main

from a single-dwelling grinder pump to be a "force-main"; (9) a single-home lateral line is not any kind of "main", a "main" is a "pipe or circuit which carries the combined flow of tributary branches of a utility system; (10) Mr. Durkin was aware at all times of the Department's just mentioned interpretations of the Clean Streams Law and the Sewage Facilities Act; (11) the Tredyffrin Township Municipal Authority (TTMA) and thence the Valley Forge Sewer Authority (VFSA), the ultimate receivers of sewage from Danbury, are in compliance with the Clean Streams Law and its regulations; (12) there is not an existing and/or 5-year projected hydraulic and/or organic overload of the TTMA or VFSA collection, conveyance and treatment systems; (13) the TTMA and the VFSA have capacity to receive and treat sewage flow from Danbury; and (14) demands posed by Danbury would not create an immediate and/or 5-year projected hydraulic and/or organic overload of TTMA or VFSA. Each of these points is supported in the Department's Motion by affidavits or depositions in the record or, in one case by *Webster's Ninth New Collegiate Dictionary*, 1988 ed. (definition of "main").

The Department argues that the Sterns will be able to produce only one witness, Mr. Stern himself, who will be able to support the proposition that a lateral grinder-pump line should constitute a "force-main" in the sense in which the Department uses that term. Mr. Stern, though, according to the Department, is not qualified to render that opinion. In addition, the contrary position is supported by two affidavits: Mr. Stinson's and Mr. Newbold's.

The centerpiece of the Sterns' Motion is the detailed 12 page single-spaced "expert report" by Mr. Stern, who is a mechanical engineer with an impressive professional background. The expert report is accompanied by 14 separate engineering drawings, most, if not all of them, done by Durkin, that Mr. Stern uses to demonstrate his

points. Mr. Stern asserts that a passive, total gravity system for Danbury would be the most appropriate mode of sewage conveyance. Moreover, the system now being contemplated, involving pumps, would cause damage to their own sewage pipe. Also, Mr. Stern is of the opinion that a lateral grinder-pump line should be considered a "force-main" in the sense that the Department uses that term.

On a "macro" level, one of the purposes of setting forth in some detail as we did just above the intricacies of the parties' summary judgement positions is that the recitation itself demonstrates that the matters raised in the parties' cross motions for summary judgement cannot and should not be resolved on papers alone. To do so would be to conduct a trial on the papers and we decline to do so. *Smedley v. DEP*, 2000 EHB 84, 86-87 (trial on the papers is not appropriate). On a "micro" level, even the Department admits that the Sterns will be able to produce some evidence that a lateral grinder pump does constitute a "force-main" in the person of Mr. Stern. However, the Department discounts that by telling us that Mr. Stern's opinion should be ignored because Mr. Stern is not qualified to render that opinion and that opinion stands in opposition to two Department affidavits. On the other side, the Department certainly has come forth with a showing that it has evidence for its side of the case. Clearly, beyond the complex technical issues regarding the precise nature of the proposed Danbury sewerage system and the complex legal issues regarding the interpretation of the Clean Streams Law and the Sewage Facilities Act which flow therefrom, the competing qualifications of experts and the credibility of witnesses, including, of course, the experts,

is directly in play. Those kinds of questions cannot be decided on summary judgment. *Id.* (attempt to conduct trial on the papers of experts is not appropriate.)[5]

[5] We do note that a prominent theme of the Sterns' Motion for Summary Judgment is that a gravity-only system for Danbury would be a better idea. The Department is forced to contradict that position by telling us that Mr. Durkin, a highly qualified engineer with many years of experience with this sort of thing, looked at a gravity-only system and, for very good reason, rejected that idea for Danbury. At this point in the proceedings, we are not at all sure that this question, as it has been framed by the Sterns, has anything to do with this case. The question, as we see it, is whether the system, as proposed to be configured, qualifies or not for the exemption from planning and permitting which the Durkin and Stern 2000 Letters grant. That question seems to be different from the question of whether a gravity system or a system with grinder pumps would be the better idea.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DANIEL AND JOAN STERN	:	
	:	
a.	:	**EHB Docket No. 2000-221-K**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and WALNUT GLEN, INC., Permittee, and TREDYFFRIN TOWNSHIP MUNICIPAL AUTHORITY, Intervenor	:	

ORDER

AND NOW, this 15th day of June, 2001, the Department's Motion to Dismiss For Lack of Jurisdiction is **DENIED**. The Department's Motion For Summary Judgment is **DENIED**. The Sterns' Motion For Summary Judgment is **DENIED**.

ENVIRONMENTAL HEARING BOARD

MICHAEL L. KRANCER
Administrative Law Judge
Member

DATED: June 15, 2001

See following page for service list.

EHB Docket No. 2000-221-K

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

BENJAMIN A. and JUDITH E. STEVENS	:	
	:	
v.	:	**EHB Docket No. 2000-030-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and WASHINGTON TOWNSHIP MUNICIPAL AUTHORITY	:	**Issued: June 18, 2001**

OPINION AND ORDER ON MOTIONS FOR SUMMARY JUDGMENT

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

Synopsis:

The Board denies summary judgment motions in a third-party appeal challenging a municipal authority's right to apply treated sewage sludge to land because the motions either raise academic issues of no legal consequence or involve disputed issues of material fact.

O P I N I O N

By virtue of General Permit PAG-8, Coverage Approval PAG-08-3538, and a July 28, 2000 approval letter, the Washington Township Municipal Authority (the "Municipal Authority") has obtained approval to apply treated sewage sludge to farm fields located in Washington Township, Franklin County (the "site") that are next to property that is owned and occupied by Benjamin and Judith Stevens (the "Stevenses"). This appeal constitutes the Stevenses' challenge to the approval. We previously denied the Department of Environmental Protection's (the "Department's") motion to dismiss the Stevenses' appeal at *Stevens v. DEP*,

2000 EHB 438. We also previously denied the Stevenses' petition for supersedeas following a hearing and a site view. The Stevenses and the Municipal Authority have now filed comprehensive motions for summary judgment. The Department concurred, but did not join, in the Municipal Authority's motion. A previously scheduled hearing on the merits was postponed at all of the parties' request in order to give the Board an opportunity to rule upon the motions for summary judgment. For the reasons that follow, we deny the motions.

The Stevenses' Motion

The Stevenses argue that the Department has no legal authority to approve individual sites. They argue that the Department improperly used a program directive, the contents of which should have been promulgated as a regulation, and that the Department did not follow permitting procedures in approving the use of the site.

These arguments have no practical significance in this appeal. With regard to the Department's authority, we note that the Department's legal authority to *disapprove* a particular site is not implicated in this appeal because the Department approved the site. If, as the Stevenses contend, the Department lacks the authority to approve an individual site, the Municipal Authority may simply move forward and use the site. If the Department has no authority to issue individual site approvals as the Stevenses contend, it follows that no approval beyond that which was granted by virtue of the general permit and coverage approval is required. (We do not take the Stevenses to be arguing that the Department lacks the authority to authorize the use of site by way of general permits and coverage approvals.) If the Department does have the authority to approve individual sites, the Stevenses are incorrect and their argument does not stand in the way of the Municipal Authority using the site. Thus, under every possible scenario, the Stevenses' argument is of no consequence in this appeal. We, therefore, need not address it.

See Boyle Land and Fuel Co. v. DER, 1982 EHB 326, 327 (Board does not issue advisory opinions).

Along the same lines, the Stevenses' contention that the Department erred by relying upon an internal "program directive" has no practical significance. The program directive describes certain procedures that the Department has decided to follow in reviewing the use of individual sites. It is designed to give people like the Stevenses better notice and opportunity to comment upon and/or appeal from site decisions. Even if we assume *arguendo* that the Stevenses are correct and the contents of the program directive should have been promulgated as regulations, it does not follow that the Municipal Authority would be precluded from using the site. Rather, if we found that the Department erred in following the extra procedures outlined in the program directive, it follows that the Department gave *more* notice and conducted *more* review than was otherwise required by applicable regulations. To the extent the Stevenses suggest that they would have been deprived of appeal rights absent the extra procedures set forth in the program directive, that argument was dispelled by our earlier ruling in this case that the Stevenses have the right to appeal from the general permit and coverage approval upon receiving the notice that was given to nearby landowners pursuant to the regulations themselves. *Stevens*, 2000 EHB at 444-45. Thus, the attack on the program directive is purely academic and it would not be appropriate to address it in this appeal.

The Stevenses argue that the Department's approval of the particular site is in reality a "permit" and, therefore, it cannot be issued without undergoing all regulatory requirements pertaining to the issuance of solid waste "permits." To the extent that this argument has any legal merit, its resolution implicates disputed questions of fact. Summary judgment is, therefore, unavailable.

The Stevenses raise other myriad challenges to the Municipal Authority's application to land-apply sludge and the notice that the Stevenses received of the application. They assert that the application and the notice were incomplete, inaccurate, and not in conformance with applicable substantive legal requirements. For example, the Stevenses go into great factual detail about whether the Municipal Authority has accurately described the historical use of the site for sludge disposal. Without exception, the challenges implicate questions of material fact that are disputed by the Municipal Authority and the Department. Accordingly, we will resolve them following the evidentiary hearing and the proper pre- and post-hearing submittals mandated by the Board's rules. Pa. R.Civ.P. 1035.2; *Penn Argyl Borough v. DEP*, 1999 EHB 701.

Similarly, the Stevenses contend that the Department erred by allowing the Municipal Authority to apply sludge that contains pollutants that are health hazards. The Municipal Authority and the Department have, not surprisingly, disputed this contention, thereby rendering summary judgment inappropriate. Finally, the Stevenses claim that the approved land application has reduced the value of their property. Again, putting aide the legal pertinence of the issue, the critical fact of a reduction in value is the subject of dispute by the other parties. Summary judgment is, therefore, inappropriate. Pa. R. Civ. P. 1035.2.

The Municipal Authority's Motion

The Municipal Authority has also moved for summary judgment. Remarkably, the Stevenses filed a response stating that they have "no objection to the Board granting Washington Township Municipal Authority's Motion for Summary Judgment." This potentially fatal response is apparently based upon the Stevenses' misguided belief that granting summary judgment will have no legal effect because it would not prevent them from pursuing their claims against the Department. Although it is true that the Department did not join in the motion, if we were to

grant the Authority's motion, the effect would be quite the opposite of what the Stevenses envision; namely, a dismissal of their appeal. We could only grant the Authority's comprehensive motion if we conclude that the Department committed no errors. If the Department committed no errors, the appeal would be at an end.

Notwithstanding the Stevenses' ill-considered proclamation, it is clear to us from their own motion for summary judgment and the bulk of their response to the Municipal Authority's motion that the Stevenses wish to continue to pursue their appeal on the merits and did not intend to concede the points raised by the Authority. Accordingly, in the interests of fairness and to better reflect the true intention of the parties, we will not grant the Municipal Authority's motion based upon the Stevenses' statement.

Although we are reluctant to elevate form over substance, the Stevenses are correct in asserting that the motion for summary judgment must stand on its own merits, independent of the memorandum filed in support thereof. 25 Pa. Code § 1021.70(g); *Barkman v. DER*, 1993 EHB 738, 745; *County of Schuylkill v. DER*, 1990 EHB 1370, 1373. The Municipal Authority's motion does not support summary judgment. The motion describes the chronology of this matter (¶¶ 1-9), the standard for granting summary judgment (¶ 10, 12), and a few conclusory paragraphs alleging, *e.g.,* that the Authority "complied with all proper procedures" (¶ 11). The motion falls short of providing sufficient detail on specific legal and factual issues to justify granting summary judgment. It also is not enough to incorporate a lengthy record and/or substantial attachments without setting forth the necessary averments in the motion itself with adequate particularity. Even if we assumed that the Authority's allegations had adequate particularity, summary judgment would be inappropriate. As demonstrated by the preceding discussion of the Stevenses' motion, as well as the substance of the Stevenses' response to the Authority's motion (*see, e.g.,*

response to ¶ 11), the Authority's assertions are vigorously disputed by the Stevenses, and are inconsistent with evidence described by the Stevenses in their own motion.

Accordingly, we enter the following Order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BENJAMIN A. and JUDITH E. STEVENS	:	
	:	
v.	:	**EHB Docket No. 2000-030-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and WASHINGTON TOWNSHIP MUNICIPAL AUTHORITY	:	

ORDER

AND NOW, this 18th day of June, 2001, in consideration of the motions for summary judgment filed by the Stevenses and the Municipal Authority and the responses thereto, IT IS HEREBY ORDERED that the motions are **DENIED**.

ENVIRONMENTAL HEARING BOARD

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: June 18, 2001

See following page for service list.

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: June 19, 2001**

OPINION AND ORDER ON REQUEST TO APPEAL NUNC PRO TUNC

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

When an appeal is filed within 30 days of publication of a Department action in the *Pennsylvania Bulletin*, the appeal is timely notwithstanding the fact that the appellant received actual notice of the action more than 30 days prior to the filing of his appeal.

OPINION

This matter involves an appeal filed by William T. Hopwood from the Department of Environmental Protection's (Department) renewal of deep mine permit number 30841317 to Consol Pennsylvania Coal Company (Consol). The Department granted the renewal on January 29, 2001. Mr. Hopwood's appeal was filed on March 9, 2001. In his notice of appeal, Mr. Hopwood states that he received notice of the permit renewal at the end of January. Because his appeal was filed more than 30 days after he received notice of the Department's action, Mr.

Hopwood requests that he be allowed to file his appeal nunc pro tunc.

The Board's rules provide that any person aggrieved by an action of the Department, other than a person to whom the Department action is directed or issued, shall file his appeal with the Board within one of the following timeframes:

1) Thirty days after the notice of the action has been published in the *Pennsylvania Bulletin.*

2) Thirty days after actual notice of the action if a notice of the action is not published in the *Pennsylvania Bulletin.*

25 Pa. Code § 1021.52(a)(2).

Notice of Consol's permit renewal was published in the *Pennsylvania Bulletin* on February 24, 2001. Because Mr. Hopwood is not a person to whom the Department action (i.e. the permit renewal) was directed, he was required to file his appeal within 30 days of publication of the notice in the *Pennsylvania Bulletin. Lower Allen Citizens Action Group v. DER*, 546 A.2d 1330 (Pa. Cmwlth. 1998). The fact that he received actual notice of the permit renewal at the end of January is irrelevant under these circumstances. *Livingston v. DEP*, 1999 EHB 173, 174.

Since Mr. Hopwood's appeal was filed within 30 days of publication of the renewal notice in the *Pennsylvania Bulletin* his appeal is timely, and, therefore, we need not consider his request to file nunc pro tunc.

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 19th day of June 2001, the appellant's request to file his appeal nunc pro tunc is denied on the basis that his appeal is timely.

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Administrative Law Judge
Member

DATED: **June 19, 2001**

c:

DEP Bureau of Litigation
Attention: Brenda Houck, Library

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For Permittee:
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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

PETER BLOSE	:	
	:	
v.	:	**EHB Docket No. 98-034-R**
	:	**and 2000-275-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and SEVEN SISTERS MINING COMPANY, INC., Permittee	:	**Issued: June 22, 2001**

OPINION AND ORDER ON
MOTION TO REDESIGNATE DOCKET NUMBER,
MOTION FOR EVIDENTIARY HEARING,
BRIEFS REGARDING MOOTNESS OF DOCKET NO. 98-034-R and
MOTION TO WITHDRAW PETITION FOR
COSTS AND FEES WITHOUT PREJUDICE

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

The Department of Environmental Protection issued a revised surface coal mining permit. The Board had sustained Appellant's appeal of the original permit, suspended the permit, and remanded the matter to the Department. Appellant appealed contending that the Board should have instead revoked the permit. The Commonwealth Court, *sua sponte*, quashed Appellant's appeal on the basis that since the Board remanded the permit it was not a final Order and thus appealable. The Department's and Permittee's argument that the original appeal should be dismissed on the basis of mootness is denied. The Commonwealth Court has clearly opined that it wishes to discourage piece-meal appeals. The dismissal of the underlying appeal would likely result in an appeal of the Board's Order which could delay the resolution of the appeal of the

revised permit. It also has the potential to result in a waste of judicial and administrative resources. The interests of justice will best be served when appeals, if any, in these matters take place once the substantive issues are resolved by the Environmental Hearing Board.

OPINION

Although several opinions and adjudications have been issued in connection with the case at EHB Docket No. 98-034-R, a recitation of the procedural history is necessary to understand the disposition of the motions presently before the Board. In January 1998, the Department of Environmental Protection (Department) issued Surface Mining Permit (SMP) No. 03950113 to Seven Sisters Mining Company (Seven Sisters) for the purpose of conducting the surface mining of coal on a tract of land in Armstrong County known as the "Laurel Loop mine." In February 1998, Appellant Peter Blose, acting *pro se,* appealed the permit to the Environmental Hearing Board (Board). The appeal was docketed at EHB Docket No. 98-034-R. The notice of appeal contained four objections, but Mr. Blose subsequently abandoned two of them. Of the remaining two issues, one was dismissed on Seven Sisters' motion for summary judgment; the other was addressed in an adjudication issued by the Board on December 18, 1998. *Blose v. DEP*, 1998 EHB 1340.

Mr. Blose appealed the Board's grant of partial summary judgment, and the Commonwealth Court remanded the matter to the Board for a hearing on the issue of whether mining could be feasibly accomplished in view of the fact that the permit application depicted mining activities within unwaived occupied dwelling barriers. Following a hearing, in a second adjudication and order, dated March 7, 2000 (the March 7, 2000 adjudication and order), the Board sustained Mr. Blose's appeal on this issue and suspended the permit. The Board further remanded the matter to the Department to determine if Seven Sisters might be able to amend its

mining plan so as to comply with the Department's regulations but did not direct the Department to take any specific action. The Board also relinquished jurisdiction in the matter.

His appeal having been sustained, Mr. Blose nevertheless appealed the March 7, 2000 adjudication and order to the Commonwealth Court, asserting that the permit should have been revoked and not suspended. Seven Sisters filed a cross-petition for review of the Board's adjudication challenging Mr. Blose's standing. Mr. Blose filed a motion to quash Seven Sisters' cross-petition before the Commonwealth Court. In an unpublished memorandum opinion, the Commonwealth Court quashed both appeals *sua sponte*, holding that the Board's March 7, 2000 adjudication and order "is not a final [appealable] order as it does not bring about the end of the administrative proceeding. The order clearly remands the matter to the Department for the Department to again exercise its discretion . . . ." *Blose v. Department of Environmental Protection,* No. 834 C.D. 2000 and No. 911 C.D. 2000 (Pa. Cmwlth. filed February 2, 2001), *slip op.* at 7-8.

On remand from the Board, the Department issued a revised surface coal mining permit (the revised permit) for the Laurel Loop Mine on November 20, 2000. On December 19, 2000, Mr. Blose filed an appeal of the Department's issuance of the revised permit, which was docketed at EHB Docket No. 2000-275-R.

On March 14, 2001, Mr. Blose filed a Motion to Redesignate Docket Number, seeking to have all proceedings under Docket Number 2000-275-R transferred to Docket Number 98-034-R.[1] Mr. Blose contends that the Board has continuing jurisdiction over these proceedings under Docket Number 98-034-R based on the Commonwealth Court's ruling that the March 7, 2000

[1] We will treat the Appellant's motion as a Motion to Consolidate under 25 Pa. Code § 1021.80(a).

adjudication and order was not a final order. Both the Department and Seven Sisters oppose the motion.

We note, initially, that the Commonwealth Court ruled that the Board's March 7, 2000 adjudication and order was not final because the matter had been remanded to the Department for further action. The Department has now taken that action by issuing a revised permit. Because the Department's response to Mr. Blose's motion raised the issue of mootness, which Mr. Blose did not have an opportunity to address, the Board ordered the parties to file briefs on the issue of whether the appeal at Docket Number 98-034-R is moot. We now turn to that issue.

Mr. Blose argues that he has a due process right to enforce compliance with the Board's March 7, 2000 adjudication and order and that an evidentiary hearing must be held in order to determine whether the Department's action in issuing the revised permit complies with the Board's order. The Department and Seven Sisters assert that the issuance of the revised permit renders the prior action moot.

A matter becomes moot when an event occurs that deprives the Board of the ability to grant meaningful or effective relief. *See West v. DEP*, 2000 EHB 462 (An appeal of a compliance order the Department has withdrawn is moot because the Board cannot grant any meaningful relief regarding an order that no longer exists); *Kilmer v. DEP*, 1999 EHB 846 (same); *Ziviello v. DEP*, 1999 EHB 889 (Where a permittee withdrew its original approved nutrient management plan and the state approved a second plan, an appeal of the first plan is dismissed as moot since there is no effective relief the Board can grant); *Grazis v. DEP*, 1997 EHB 91 (An appeal of the Department's decision to revoke the inactive status of oil and gas wells was found to be moot when the Department subsequently reinstated the wells' inactive status.)

Here, the permit that is the subject of the first appeal no longer exists. It has been replaced by the revised permit. This matter is similar to that which arose in *Ziviello v. DEP*, 1999 EHB 889. In that case, the appellants appealed a nutrient management plan that had been approved in connection with the proposed operation of a hog farm. The first plan was subsequently withdrawn and a new plan was approved. The appellants appealed the second plan but asserted that the appeal of the first plan should not be dismissed. The Board disagreed and dismissed the appeal of the first plan as moot, holding that "there is no justification for the Board to adjudicate the merits of a plan which is no longer in effect." *Id.* At 893.

In support of his position that the appeal of the original permit is not moot, Mr. Blose argues that the issuance of a revised permit was not an "action pursuant to" the Board's March 7, 2000 adjudication and order. He asserts that before the Board can issue a final order at Docket No. 98-034-R, it must determine whether the Department's action of issuing a revised permit complies with the Board's March 7, 2000 adjudication and order. To this end, Mr. Blose contends that the Board must hold an evidentiary hearing.

Whether the Department's action of issuing a revised permit complies with the Board's March 7, 2000 adjudication and order has no bearing on whether the appeal of the original permit is moot. Issues raised in an appeal of a revised permit may not be imported to an appeal of the original permit. *See Ziviello, supra*; *Kilmer v. DEP*, 1999 EHB 846, 850 ("We think it would be a dangerous precedent to hold that a party's appeal of one DEP action can, in effect, sometimes cover subsequent, similar acts of the Department.")

In response to the statement that there is no effective relief that the Board can grant, Mr. Blose argues as follows: "Of course, there is effective relief which the Board can grant. If the Board finds the *revised* permit is in violation of the March 7, 2000 order, the [revised] permit can

be resuspended or revoked." (Blose Reply Brief regarding Mootness, p. 1) (emphasis added) By this statement, Mr. Blose himself acknowledges that there is no further relief the Board can grant with respect to the *original* permit, i.e. the subject of the appeal at Docket No. 98-034-R. His very statement acknowledges that the only relief the Board can grant relates to the revised permit, the subject of Docket No. 2000-275-R.

Mr. Blose argues that he has a due process right to enforce compliance with the Board's March 7, 2000 adjudication and order, and he is concerned that his due process rights might not be preserved in the appeal of the revised permit. At the heart of Mr. Blose's concern is the issue of standing. Mr. Blose survived a challenge by Seven Sisters to his standing in the first appeal. However, in the event the question of his standing is raised and successfully challenged in the second appeal, he contends he will have lost his due process right to insure that there is compliance with the March 7, 2000 adjudication and order.

We note, initially, that no motion challenging Mr. Blose's standing, much less a determination of such, has been filed in the second appeal.[2] Therefore, this argument may be premature. However, if the question of standing were properly raised in a motion and a determination were made that Mr. Blose does not have standing to challenge the revised permit, this defect cannot be cured by simply redesignating the matter under the old docket number. If Mr. Blose is found not to have standing to litigate the revised permit, he does not have standing under *either* Docket No. 98-034-R *or* Docket No. 2000-275-R.

---

[2] The issue of standing was raised in a motion to compel filed by Seven Sisters in March 2001. In its motion, Seven Sisters stated that certain information requested by interrogatories served upon Mr. Blose was relevant to the issue of standing. In particular, the questions were aimed at determining Mr. Blose's current place of residence. The Board granted the motion in part and ordered Mr. Blose to provide answers to some, but not all, of the disputed interrogatories.

Based on the foregoing discussion, it is apparent that the Department and Seven Sisters raise very strong arguments that Mr. Blose's initial appeal should be dismissed based on mootness. Nevertheless, Commonwealth Court's rulings in this specific case causes us to pause. Moreover, the clear reasoning underlying Commonwealth Court's most recent opinion in this matter leads us to conclude that another appeal to the Commonwealth Court while issues are still pending before this Board is not something the Commonwealth Court wishes to occur.

The dismissal of the underlying appeal would likely result in an appeal of the Board's Order which would surely delay the resolution of the appeal of the revised permit. It also has the very real potential to result in a monumental waste of judicial and administrative resources in addition to the added expenses the parties would incur. *Horsehead Resource Development Company, Inc. v. DEP*, 1998 EHB 1101, 1106. Therefore, we are absolutely convinced that the interests of justice will best be served when appeals, if any, in these matters take place after the substantive issues are resolved by the Environmental Hearing Board.

Accordingly, the following is entered:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PETER BLOSE	:	
	:	
v.	:	**EHB Docket No. 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 22nd day of June, 2001, it is ordered as follows:

1) Mr. Blose's Motion to Withdraw Petition for Costs and Fees Without Prejudice is **granted**.

2) Mr. Blose's Motion to Redesignate Docket Number is **denied**.

3) The parties are directed to file a joint proposed case management order on or before Monday, July 2, 2001 regarding the scheduling of any remaining pre-hearing deadlines and the scheduling of the matters for hearing.

ENVIRONMENTAL HEARING BOARD

THOMAS W. RENWAND
Administrative Law Judge
Member

DATED: June 22, 2001

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

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

STANLEY D. PETCHULIS, SR. and JUNE A. PETCHULIS, his wife	:	
v.	:	**EHB Docket No. 2001-036-K**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: June 27, 2001**

OPINION AND ORDER ON THE DEPARTMENT'S MOTION TO COMPEL APPELLANTS TO RESPOND TO THE DEPARTMENT'S FIRST SET OF INTERROGATORIES AND REQUEST FOR PRODUCTION OF DOCUMENTS AND COUNSEL FOR APPELLANTS' PETITION TO WITHDRAW AS COUNSEL

By Michael L. Krancer, Administrative Law Judge

Synopsis:

The Department's Motion To Compel Appellants To Respond To The Department's First Set of Interrogatories And Request For Production of Documents is granted in a case involving an appeal from a Department Order regarding an allegedly unsafe Dam. Also, the Appellants' counsel's Petition To Withdraw is granted.

PROCEDURAL AND FACTUAL BACKGROUND

Before us is the Department's Motion To Compel Appellants to Respond To The Department's First Set of Interrogatories And Request For Production of Documents filed on June 13, 2001. Also before us is the Petition To Withdraw filed by counsel for the Appellants which asks that we allow him to withdraw as counsel for Appellants in this case. We will grant both the Motion and the Petition.

This case involves an appeal by the Petchulises of a Department Order dated January 30, 2001 issued under the Dam Safety and Encroachments Act, Act of November 26, 1978, P.L. 1375, *as amended*, 32 P.S. § 693.1 *et seq.* (DSA). The Order alleges, among other things that: (1) the Petchulises are the owners of Mar Lin Dam (Dam) in Norwegian Township, Schuylkill County, Pennsylvania; (2) the Dam is a "Category 2" dam under the DSA meaning that in the event of its failure there is the potential for excessive economic loss and potential loss of life; (3) the Dam is a "high hazard dam" under the DSA because it is located as to endanger populated areas downstream; (4) the Petchulises are not operating and/or maintaining the Dam in a safe condition as required under the DSA; and (5) the Petchulises do not have an approved emergency action plan as is required under the DSA for the Dam. The Order requires the Petchulises to either rehabilitate or breach the Dam in accordance with an approved plan which they are to have drafted and submitted to the Department.

The Petchulises appealed the Order by Notice of Appeal filed by counsel on their behalf on February 14, 2001. Also, on February 14, 2001, the Petchulises filed a Petition for Supersedeas in this matter. A supersedeas hearing was scheduled for March 19, 2001. The Petition For Supersedeas was, however, withdrawn without prejudice on March 12, 2001 and the hearing was cancelled when it appeared that the Petchulises were undertaking to commission and submit an engineering submittal to the Department. The Department anticipated that the submission would address either the breaching or the rehabilitation of the Dam and contain time frames for the execution of whichever option the Petchulises chose.

By status report filed by Appellants' counsel on April 16, 2001, Appellants reported that "[t]he parties agreed that the engineer of appellants would be given time to redesign part of the dam and that he would be given time to do so. On April 11, 2001, the engineer informed the parties that he would need until May 29, 2001 to complete the design." The Department informed the Board by status report dated April 12, 2001 that the matter appeared like it would settle. The Appellants had agreed to submit to the Department an engineering report "containing a proposal and time frames for corrective actions on or before May 21, 2001". The Department reported that if the parties can reach agreement, the parties would enter into a Consent Order and Agreement.

Given this state of affairs, counsel for the Petchulises requested the Board to extend the deadlines for discovery, the filing of expert reports and dispositive motions outlined in Pre-Hearing Order No. 1 for 60 days beyond May 29, 2001 in order to allow time for the engineer to complete his work, submit it to the Department and for the Department to review the submission. The Board, in response, issued a First Order Extending Pretrial Deadlines, dated April 30, 2001, which established July 30, 2001 as the discovery deadline with all other deadlines timed from that date.

On May 8, 2001, the Department served upon counsel for the Petchulises its First Set of Interrogatories and Request For Production of Documents. (DEPM ¶ 1)[1] It is this set of discovery requests which is the subject of the Department's Motion to Compel.

On June 4, 2001 the Board received a letter dated May 31, 2001 from counsel for the Department requesting the Board to convene a status conference call because the submission it had received from the Petchulises was not in conformance with what the

[1] We will cite the Department's Motion to Compel as "DEPM".

Department had expected. The Department's letter stated that the Petchulises's submission did not contain a proposal for either breaching or rehabilitating the Dam nor did it contain time frames for the implementation of any corrective action.

A conference call was held on June 12, 2001. During that conference call, counsel for the Petchulises reported that the Petchulises were apparently caught off-guard as to the cost involved in taking remedial action regarding the Dam and that they were, on that basis, quite ambivalent about taking any such action. Given this relatively sudden and significant change in the course of the case, counsel for the Department inquired when the Department could expect to receive responses to the Department's outstanding discovery requests. Counsel for the Petchulises indicated that his clients were not fully cooperating with him with respect to litigation discovery obligations and that he may have to withdraw from this matter as their counsel. Counsel for the Petchulises was unable during the conference call to even give a time frame for when Appellants would respond to the Department's outstanding discovery requests. (DEPM ¶ 3)

The Department followed-up by filing its Motion to Compel on June 13, 2001. By Order dated June 14, 2001, the Board ordered that Appellants were to respond to the Department's Motion to Compel through counsel, if counsel was to continue to represent them, by 4:00 p.m. on Friday, June 22, 2001. The Order provided that if counsel is not to continue to represent the Petchulises, then a withdrawal of appearance was to be filed by that date and time and the Petchulises were to file their *pro se* response to the Department's Motion to Compel by then. The Order concluded by stating that if no response to the Department's Motion to Compel was filed by the ordered time and date that the Petchulises would be deemed to have waived the right to contest the Motion.

On June 20, 2001, counsel for the Petchulises filed the pending Petition to Withdraw Appearance. The Petition states that counsel met with the Petchulises on June 18, 2001 regarding the Board's June 14, 2001 Order and that "appellants determined to pursue a course which your petitioner considered imprudent in that they would not permit the DEP interrogatories to be answered as petitioner believed they should be answered". (PTW ¶ 3)[2] It is further stated that, "petitioner informed his clients that he could no longer represent them and informed them that they should respond in person to the interrogatories of DEP by 4:00 p.m., June 22, 2001." (PTW ¶ 4) The Petition further states that a copy of the Board's June 14th Order was provided to the Petchulises. (PTW ¶ 5) Finally, it is alleged that Petitioner's withdrawal as counsel for the Petchulises will not materially affect their interests "because they would base their action on their own opinions rather than his whether he represented them or did not represent them." (PTW ¶ 6)

As of this date, the Petchulises have neither responded to the Department's First Set of Interrogatories and Request For Production nor have they responded to the Department's Motion to Compel. The Petchulises did direct a handwritten letter dated June 11, 2001 to "The Honorable Michael L. Krancer". The letter states, among other things: that Mr. Petchulis is 66 years old and Mrs. Petchulis is 60 years old; they are honest citizens who have brought up 7 children; the Dam has never had a problem in the 36 years they have owned it; the Department is, presumably unfairly, requiring them to overhaul the Dam at a cost of $150,000 and they cannot afford to do so; they are willing to "work something but not at this price"; and if they had known about this kind of

[2] We will cite the Petition to Withdraw as "PTW".

problem they would never have bought the Dam. The letter concludes by stating that, "[s]o I'm pleading sir [with] you for any consideration [so] that we can resolve the conflict".

DISCUSSION

The Board sympathizes with the Petchulises and their situation. We are also cognizant of both litigation obligations and the potential hazard which, according to the Department, could be posed by the Dam in its present condition. As for litigation obligations, they have to be followed in order to maintain the integrity of and respect for our legal process. The 30 day time period for responding to the Department's discovery requests had just passed when the Department filed its Motion to Compel and has now long passed. Pa. R. Civ. P. 4006, 4009.12; 25 Pa. Code § 1021.111.[3] While the deadline for completion of discovery had been extended on April 30, 2001, that extension was obviously not a moratorium on discovery or a stay of the obligation to respond to discovery which may be served. Also, the tenor and direction of this litigation has taken a severe turn for the worse since then. There is no reason to believe that the Petchulises are taking any action to respond to the Department's discovery requests or taking any action to submit a remedial action plan for the Dam.

The lack of movement by the Petchulises is particularly problematic in this case which involves allegations of an unsafe dam which poses a potential threat of excessive economic loss and even loss of life in the event it fails. This concern is elevated during

[3] 25 Pa. Code §1021.33 which provides that when service is made by mail, as it was in this case, "3 days shall be added to the time required by this chapter for responding to the document." 25 Pa. Code § 1021.33. Under this Rule, the Petchulises's responses to the Department's discovery would have been due by on or before Monday, June 11, 2001 as the 33rd day fell on Sunday, June 10, 2001. *See* Pa. R. Civ. P. 106.

this seasonal period which brings with it frequent storms with heavy rains. The recent event of Tropical Storm Allison and the precipitation it brought with her exemplifies what we are referring to and underscores our concern with the situation as it stands now, *i.e.*, idle. Allison resulted in 7 deaths, the overflowing of Pennypack, Wissahickon and Neshaminy Creeks and their tributaries, and the declaration of portions of Montgomery and Bucks Counties, which are separated by just one County from Schuylkill County, as federal disaster areas. Undoubtedly as summer progresses we will see thunderstorms with their accompanying locally heavy downpours and flooding, and if recent history is any guide, perhaps additional Tropical Storms, or even Hurricanes, will make their way to the Northeast.

This litigation has had one major false start which has left the situation regarding the Dam in the same unaddressed condition now that it was when the Department issued the Order on January 30, 2001. There is no movement that we can see today toward composing a remediation plan. We are not willing to stand by and allow this matter to sit still.[4]

The Department's Motion is therefore granted and an Order will be entered accompanying this Opinion requiring the Petchulises to respond to the Department's First Set of Interrogatories and Requests For Production of Documents within 15 days of the date of the Order. The Petchulises are warned that failure to comply with a Board Order can, and probably shall, result in the imposition of sanctions pursuant to 25 Pa. Code § 1021.125. Sanctions may include, among other things, dismissal of their appeal.

---

[4] We are, of course, aware that the allegations in the Department's January 30, 2001 Order under appeal are only allegations at this point. Our declination to allow this matter to sit idle would also include receiving and hearing a renewal of the previously withdrawn Petition For Supersedeas if the Petchulises so desired.

The Petition to Withdraw is also granted. As of now, the Board has no Rule on Withdrawal of Appearance of Counsel. No motion or petition to withdraw is mandated. It would appear that counsel is free to withdraw at any time subject only to whatever provisions of the Pennsylvania Rules of Professional Conduct may apply to the situation, if any, and his or her own conscience. [5] Since counsel has petitioned for the withdrawal as opposed to merely filing a Notice of Withdrawal, we will include in our Order a provision granting the Petition. We will also, however, include in our Order on that subject a direction that counsel exercise his best efforts to see that a copy of this Opinion and Order is provided to the Petchulises.[6]

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[5] The Environmental Hearing Board Rules Committee is presently working on drafting and considering a new Rule regarding withdrawal of counsel. Under the present iteration of the draft, an attorney's appearance may not be withdrawn without leave of the Board unless another attorney substitutes for the original one and no delay is caused thereby. In considering motions of counsel for withdrawal, the Board would consider several factors including: (1) the reasons why withdrawal is requested; (2) whether any prejudice may be caused to the litigants; (3) whether the withdrawal would cause delay in resolution of the case; and (4) the effect of withdrawal on the efficient administration of justice. Also, if withdrawal of counsel would result in a party proceeding *pro se*, withdrawing counsel is to provide the Board with a single contact person for future service of all pleadings.

[6] As an additional precaution and since Appellants are now *pro se* upon entry of this Opinion and Order, the Board will be mailing a copy of this Opinion and Order directly to the Petchulises.

COMMONWEALTH OF PENNSYLVANIA
ENVIRIONMENTAL HEARING BOARD

STANLEY D. PETCHULIS, SR. and JUNE A. PETCHULIS, his wife	:	
v.	:	**EHB Docket No. 2001-036-K**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

And now this 27th day of June, 2001, it is HEREBY ORDRED as follows:

1. The Department's Motion To Compel Appellants To Respond To The Department's First Set of Interrogatories And Request For Production of Documents is GRANTED. The Petchulises shall provide full and complete responses to the Department's First Set of Interrogatories And Request For Production of Documents by no later than **Thursday, July 12, 2001**. **The Petchulises are advised that failure to comply with this Order will result in the imposition of sanctions which may include, among other things, dismissal of their appeal**.

2. The Petition of counsel for the Petchulises to Withdraw Appearance is GRANTED. Counsel is to exercise his best efforts to see that a copy of this Opinion and Order is provided to the Petchulises as soon after he receives it as is possible.

ENVIRONMENTAL HEARING BOARD

MICHAEL L. KRANCER
Administrative Law Judge
Member

DATED: June 27, 2001

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

EHB Docket No. 2001-036-K

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WILLIAM T. PHILLIPY
SECRETARY TO THE BO

VIRGINIA I. FRY	:	
	:	
v.	:	**EHB Docket No. 2000-235-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: July 9, 2001**

OPINION AND ORDER ON MOTION FOR SUMMARY JUDGMENT

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

Synopsis:

The Board declines to decide in the context of a motion for summary judgment whether a group of facilities supplying several mobile homes constitutes one water supply "system" due to several issues of disputed material fact.

OPINION

Virginia Fry originally owned and operated a mobile home park in Concord Township, Butler County. The park supplied its residents with drinking water from two on-site wells. Under pressure from the Department of Environmental Protection (the "Department") to obtain a water supply permit, Ms. Fry instead opted to sell a portion of the land containing eight service connections to her daughters. One well is now located on Ms. Fry's property, and one well is located on the daughters' property.

Ms. Fry takes the position that there are not enough mobile homes on the portion of the site she still owns to require a permit under the Safe Drinking Water Act, 35 P.S. §§ 721.1 – 721.17. The Department is of the view that Ms. Fry could not "split" her water system to avoid the permitting requirement, and that, notwithstanding the land transfer, there remains only one "system." Accordingly, the Department assessed a civil penalty against Ms. Fry of $5,000 for failing to obtain a permit, which is the action that gave rise to this appeal. The Department now moves for summary judgment,[1] which we deny.

The resolution of this appeal will ultimately turn on one issue: For purposes of the Safe Drinking Water Act, are the two wells (and the appurtenances thereto) at the site one "system" or two? If it is all one system, then that system falls within the Act's permitting requirement. If there are two separate systems, the permitting requirement does not apply.

The Act does not define a "system." The regulations promulgated under the Act, however, do. A "system" is defined as follows:

> A group of facilities used to provide water for human consumption including facilities used for collection, treatment, storage and distribution. The facilities shall constitute a system if they are adjacent or geographically proximate to each other and meet at least one of the following criteria:
>
> > (A) The facilities provide water to the same establishment which is a business or commercial enterprise or an arrangement of residential or nonresidential structures having a common purpose and includes mobile home parks, multi-unit housing complexes, phased subdivisions, campgrounds and motels.
> >
> > (B) The facilities are owned, managed or operated by the same person.

[1] Summary judgment is appropriate if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law based upon the undisputed facts. 25 Pa. Code § 1021.73 (*incorporating* Pa. R.C.P. 1035.1 – 1035.5.)

(C) The facilities have been regulated as a single public water system under the Federal act or the act.

25 Pa. Code § 109.1. A "facility" is a "part of a public water system used for collection, treatment, storage or distribution of drinking water." 25 Pa. Code § 109.1.

The first prerequisite to satisfying the definition of a system is that the facilities are "adjacent or geographically proximate to each other." The Department's motion only refers to the two wells. We have virtually no information of record regarding any other facilities and the physical and spatial relationship of those facilities. The only record evidence cited by the Department in support of its claim that the water sources are "geographically proximate" is that they are less than one mile from each other. (*See* Motion ¶ 11; Ex. C, p. 26 and Ex. 1.) Ms. Fry, of course, disputes that the wells are adjacent or geographically proximate. Thus, there is a genuine dispute regarding a critical fact, and we do not have enough information to resolve the dispute in the current context. This alone prevents the entry of summary judgment in favor of the Department.

Once we determine the threshold question of whether the group of facilities at issue are adjacent or geographically proximate, we must decide whether any one of three secondary questions regarding coverage can be answered in the affirmative. The first of the secondary prerequisites turns on whether the facilities in question provide water to the "same establishment." The "same establishment" may include "an arrangement of residential or nonresidential structures having a common purpose," which may in turn include "mobile home parks." 25 Pa. Code § 109.1. We are not certain what it means for an arrangement of residential structures to have a "common purpose," and we invite further treatment of that issue by the parties. In any event, the inquiry is obviously intensely factual.

The Department's motion focuses on the argument that all of the mobile homes at the site are part of the same establishment. The Department does not appear to contest that the site has been legally subdivided, but it directs our attention to the fact that there is only one road leading to all of the home sites, the fact that there are no signs delineating the sites owned by Ms. Fry and the sites owned by her daughters, and the fact that Butler County has issued one "mobile home park permit" for both parcels of land. In contrast, Ms. Fry lists numerous facts suggesting that the two parcels should not be treated as the "same establishment." Neither party cites any applicable or analogous precedent to guide us in the resolution of this issue.[2]

Inevitably, we will be required to decide whether the site constitutes the "same establishment" based upon the totality of the circumstances. In addition to the physical attributes of the site, which the Department emphasizes, and the legal ownership of the site, which Ms. Fry emphasizes, whether the residents have a well-founded sense of a common community could be helpful. We will also need to resolve apparently conflicting evidence regarding how the site is actually operated. For example, Ms. Fry's response to the motion states that garbage collection is separate, but she testified at deposition that all of the mobile home residents use a common dumpster. (DEP Motion Ex. C. at 45.) It may be that if the entire site is operated as if it is one community, there is a "common purpose" and all of the mobile homes are part of the "same establishment." We are not in a position to resolve these factual matters based upon the written record now before us.

In the alternative, many of the same facts -- currently disputed -- may factor into our determination of whether the water supply facilities (as opposed to the mobile home sites

[2] Indeed, the parties' papers do not cite any precedent on *any* of the specific issues that are implicated in this appeal.

themselves) are "managed or operated by the same person." *Id.* We do not have before us enough detail on how the facilities are actually run and by whom. Such a determination could turn on such mundane details as who calls the repairman when work needs to be done. Ms. Fry notes that the systems are operated separately, but there is at least some evidence of common management (*see, e.g.,* DEP Motion Ex. C. at 15 (residents of Ms. Fry's section call daughter to report problems), which is consistent with the fact that Ms. Fry lives in North Carolina but at least one of her daughters lives "right across the street" (Ex. C at 15).

The third of the secondary questions in the definition of "system" is whether the facilities "have been regulated as a single public water system under the Federal act or the [Pennsylvania] act." 25 Pa. Code § 109.1. The parties refer to the language but do not explain what it means. The Department seems to suggest that once a group of facilities is regulated as a single system, the group is always a single system if the requisite number of connections remain, regardless of subsequent events. It then points to a letter that the Department sent to Ms. Fry in 1991 concluding that she needed to obtain a permit as the basis for concluding that the system has been "regulated" since 1991. Ms. Fry responds that the site has never actually been regulated, citing as an example the fact that the Department's first appealable action regarding the site did not occur until the civil penalty of October 2000 that gave rise to this appeal. Indeed, she alleges that the Department worked with her on how to *avoid* regulation (*e.g.*, by selling off part of the property) rather than regulating the site prior to the subdivision. Once again, neither party cites any legal authority.

The meaning of the regulatory language is not immediately clear to us. Further, if some sort of active regulation is required for the language to apply, exactly what occurred here and whether that satisfies the regulatory definition is subject to genuine dispute.

In sum, this appeal is not ready for resolution based upon the disputed, incomplete record that is currently before us. There are significant gaps in the record and areas of conflicting evidence on important points. The legal arguments have not been fully developed or supported. Summary judgment under such circumstances may not be entered. Accordingly, we issue the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

VIRGINIA I. FRY	:	
	:	
v.	:	**EHB Docket No. 2000-235-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 9th day of July, 2001, the Department's Motion for Summary Judgment is **DENIED.**

ENVIRONMENTAL HEARING BOARD

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: July 9, 2001

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

JONAS and LYDIA ZOOK	:	
	:	
v.	:	**EHB Docket No. 2000-153-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and HILLTOP MINING, INC. Permittee	:	**Issued: July 10, 2001**

OPINION AND ORDER ON MOTION TO DISMISS OR, ALTERNATIVELY,TO LIMIT ISSUES

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

A mining company's motion to dismiss or, alternatively, to limit issues is granted in part and denied in part. In reviewing an application for Stage I bond release, the Department is required to consider not only whether the specified reclamation standards are met, but also whether the permittee has complied with the applicable statutes, regulations and permit conditions. With regard to the appellant-landowners' claims regarding water supply quality and quantity, factual issues remain in dispute and dismissal would be inappropriate. With regard to the appellants' claim regarding blasting damage, to the extent their claim is for monetary damages, that matter is outside the scope of the Board's jurisdiction. To the extent their claim is that bond release was inappropriate because the damage from blasting has not been corrected, factual issues remain in dispute and dismissal would be inappropriate. Finally, with regard to the

appellants' claims that they suffered financial loss to their business as a result of the mining company's actions, that matter is outside the scope of the Board's jurisdiction since the Board has no authority to award monetary damages.

OPINION

This matter involves an appeal by Jonas and Lydia Zook from the Department of Environmental Protection's (Department) release of Stage I bonds for Hilltop Mining, Inc. (Hilltop). Hilltop holds a permit to conduct surface mining activities on land owned by the Zooks in Summit Township, Somerset County.

Before the Board is a Motion to Dismiss or, Alternatively, to Limit Issues filed by Hilltop. Hilltop asserts that certain issues raised by the Zooks in their notice of appeal are outside the scope of a Stage I bond release and should, therefore, be dismissed. The objections raised by the Zooks that Hilltop seeks to dismiss are as follows:

1) Hilltop failed to install a water treatment system as per an agreement between the Zooks and Hilltop, known as the Spring Development Agreement.
2) Hilltop's mining operation and blasting caused damage to the Zooks' silo.
3) Hilltop's mining operation caused financial loss to the Zooks.
4) The quantity and quality of a spring, designated as SP-12, has been adversely impacted by Hilltop's mining operation.

The Department filed a memorandum of law in response to Hilltop's motion. In its memorandum of law, the Department neither opposes nor joins in Hilltop's motion but sets forth an explanation of the Department's bond release procedure and an overview of what it believes to be the relevant statutory and regulatory provisions. In addition, the Department contends that each of the disputed conditions was considered by the Department prior to its approval of Stage I

bond release. As to the Spring Development Agreement and SP-12, the Department determined that replacement water supplies provided to the Zooks were adequate in quality and quantity for their household and farming purposes. As to the blasting complaints, the Department's investigation determined that Hilltop's blasting activity during mining was unlikely to have caused any damage to the Zooks' silo. Finally, the Department contends it is without authority to compensate the Zooks for any financial loss they allege to have suffered as a result of the mining.

The Zooks filed no response to the motion, which we may deem to be an admission of all properly-pleaded facts set forth in the motion. 25 Pa. Code § 1021.70(d). However, in ruling on a motion to dismiss, we must view it in the light most favorable to the non-moving party.[1] The question before us is whether the objections raised by the Zooks are properly within the scope of an appeal of a Stage I bond release.

Standards for Stage I Bond Release

The standards for bond release are set forth in the regulations at 25 Pa. Code § 86.174. Stage I bonds may be released "[w]hen the entire permit area or a portion of a permit area has been backfilled or regraded to the approximate original contour or approved alternative, and when drainage controls have been installed in accordance with the approved reclamation plan." *Id.* at § 86.174(a). The Department may not release a bond, however, if the release "would reduce the amount of bond to less than that necessary for the Department to complete the approved reclamation plan; achieve compliance with requirements of the acts, regulations thereunder and the conditions of the permits; and abate significant environmental harm to air, water or land resources or danger to the public health and safety which may occur prior to the release of bonds from the permit area." *Id.* at § 86.172(c).

In reviewing a request for bond release, the Department must also consider the following factors:

1) Whether the permittee has met the criteria for bond release under § 86.172.
2) Whether the permittee has satisfactorily completed the requirements of the reclamation plan, or relevant portion thereof, and complied with the requirements of the acts, regulations thereunder and the conditions of the permit, and the degree of difficulty in completing remaining reclamation, restoration or abatement work.
3) Whether pollution of surface and subsurface water is occurring, the probability of future pollution or the continuance of present pollution, and the estimated cost of abating pollution.

Id. at § 86.171(f)(1).[2]

Thus, as the Department summarizes in its memorandum of law, in approving a request for Stage I bond release, the Department must determine not only that backfilling and drainage controls have been completed (§ 86.174(a)) but also whether applicable statutes, regulations and permit conditions have been met (§ 86.171(f)(ii)); whether pollution or a probability of pollution to surface and subsurface waters exists and the cost of abating pollution (§ 86.171(f)(iii); and whether sufficient bond remains to ensure full compliance with the statutes, regulations and permit conditions (§ 86,172(c)).

Water Supply

The Department states that water supply complaints, as to quality and quantity, are normally investigated independent of any review for Stage I bond release. In instances where

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[1] *Goetz v. DEP*, 1999 EHB 65, 67.
[2] *Riddle v. DEP*, EHB Docket No. 98-142-MG (Opinion issued April 30, 2001), p. 5-6.

water supply complaints remain unresolved when Stage I bond release is sought, the Department contends that release of the bond does not jeopardize the ability of the Department to ensure that water supply problems are corrected to the Department's satisfaction since the Department has the authority to issue an order under the Surface Mining Act directing the restoration or replacement of water supplies. The Department further notes that the regulations authorize only a partial release of bonds (up to 60%) at Stage I. Thus, asserts the Department, a Stage I bond release will ordinarily leave enough bond to correct any water supply problems.

In the present case, the Department states that it investigated the Zooks' water supply complaints prior to its review of the request for Stage I bond release and considers the matter to be resolved. According to the Department's memorandum, Hilltop drilled two replacement wells, developed a spring, and agreed to treat the water supplies with a chlorination unit. Since the Zooks have raised the issue of water supply quality and quantity in their notice of appeal, it appears that they do not believe the matter has been adequately resolved.

In its memorandum of law, the Department suggests that the Board defer ruling on that portion of the motion seeking dismissal of the water supply-related objections until after a hearing so that the record can be fully developed. We agree. Even though water supply issues may be investigated by the Department independently of Stage I bond release, the regulations do require the Department to consider whether pollution or potential pollution to surface and subsurface waters exists and whether applicable statutory provisions, regulations and permit conditions have been met in its review of a request for Stage I bond release. Since factual issues remain in dispute with regard to the Zooks' water supply objections, dismissal would not be appropriate. Therefore, Hilltop's motion to dismiss is denied as to the Zooks' objections regarding the Spring Development Agreement and SP-12.

Blasting

In its memorandum of law, the Department states that the Board has held that violations of regulations or permit conditions alleged to have occurred during mining are irrelevant to Stage I bond release and cites two Board decisions in the case of *Lucchino v. DEP* in support of this contention.[3] However, the *Lucchino* case involved a very different fact pattern. That case did not involve conditions that existed at the time of the bond release but violations that Mr. Lucchino alleged had occurred during the course of mining but were later corrected, such as property owner notification and absence of signs and markers for the permitted area. In the present case, the Zooks contend that the blasting damage in question has not been corrected. As the Board has previously held, "While the Department is authorized to grant the application for a Stage I bond release if the specified reclamation standard has been met, that does not mean that it is reasonable or appropriate to do so if the mining company has engaged in violations of the Act, the regulations, and the permit, which remain uncorrected."[4]

The Department cites the Board's decision in *Gates v. DER* as holding that the Department may release a bond notwithstanding the fact that blasting violations during mining have allegedly caused damage to a landowner's property.[5] This is an overly broad reading of *Gates*, which simply held that where blasting has caused damage to property located off the bonded area, the release of the mining bonds cannot be overturned on that basis since there is nothing in the bonds that obligates the permittee to satisfy the claim of a third party for damages that have occurred off the bonded area. Such a claim must be brought in civil court. In the present case, there is nothing in Hilltop's motion indicating that the alleged damage occurred off

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[3] *See Lucchino v. DEP*, 1999 EHB 214, 222, and *Lucchino v. DEP*, 1998 EHB 473, 483-84.
[4] *Riddle, slip op.* at 6.

the bonded area.

Finally, the Department cites the Board's decision in *Wayne v. DEP*, which dealt with an appeal of a Stage II and III bond release.[6] One of the objections raised by the appellant in *Wayne* was that a haul road constructed and used by the mining company to transport its equipment to and from the mine site had resulted in the collapse of her barn. The Department correctly notes that the Board held as follows: "To the extent Ms. Wayne is seeking redress from [the mining company] for the collapse of her barn, we agree with the Department that this Board is not the proper forum for resolution of her complaint. The Board's jurisdiction extends only to actions of the Department...."[7] However, the opinion goes on to state as follows: "However, to the extent Ms. Wayne is asserting that the Department should have withheld bond release due to alleged damage caused to her property by [the mining company's] use of the haul road, this clearly is an 'action' of the Department within the scope of the Board's review."[8]

Likewise, in the present case, to the extent the Zooks are seeking monetary damages from Hilltop for damage to their silo, this Board is not the proper forum for such relief. However, to the extent the Zooks are asserting that the Department should have withheld bond release due to the alleged damage to their property, this may very well be grounds for withholding release.

Because the extent of the Zooks' claim remains unclear and because there are factual issues surrounding this issue, the motion to dismiss this issue is denied.

Financial Loss

The Zooks assert in their notice of appeal that Hilltop's actions have caused financial loss

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[5] *Gates v. DER*, 1992 EHB 793, 796-97.
[6] *Wayne v. DEP*, 1999 EHB 395.
[7] *Id.* at 404.
[8] *Id.* at 404-05.

to their dairy business. To the extent the Zooks are seeking an award of monetary damages from the Board, we are without authority to issue such an award.[9] Because the Board is not the proper forum for seeking compensation for financial loss, Hilltop's motion to dismiss this issue is granted.

[9] Environmental Hearing Board Act, Act of July 13, 1988, P.L. 530, 35 P.S. §§ 7511 – 7516, at § 7514(a) (The Board has the power and duty to hold hearings and issue adjudications); *Carey v. DER*, 1987 EHB 791, 794.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

JONAS and LYDIA ZOOK	:	
	:	
v.	:	**EHB Docket No. 2000-153-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and HILLTOP MINING, INC. Permittee	:	

ORDER

AND NOW, this 10th day of July, 2001, Hilltop's Motion to Dismiss or, Alternatively, to Limit Issues is **granted in part** and **denied in part**. Hilltop's motion is granted with regard to the Zooks' claim regarding financial loss to their business. Hilltop's motion is denied with regard to all other issues.

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: July 10, 2001

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

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SECRETARY TO THE BOA

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: July 11, 2001**

OPINION AND ORDER
ON MOTION TO REOPEN DISCOVERY

By George J. Miller, Administrative Law Judge

Synopsis:

The Board denies a motion to reopen discovery filed six months after the close of the period for discovery. The appellants, who wish to take a deposition of the Secretary of the Department of Environmental Protection, failed to provide an adequate reason why the deposition is necessary now and could not have been taken during the proper discovery period.

OPINION

Defense Logistics Agency (DLA or Appellant) has filed a petition to reopen discovery in order to take the deposition of the Secretary of the Department, David Hess. As discovery has been closed for quite some time, dispositive motions have been filed

and a hearing is scheduled, we do not believe that DLA has presented a compelling reason which would justify the reopening of discovery.

The facts, briefly, are as follows. In January, 2000, DLA, a unit of the United States Army, filed an appeal from an order of the Department which required it to take remedial action with respect to a large plume of non-aqueous phase liquid hydrocarbon underlying a major portion of South Philadelphia and facilities owned by DLA. Although DLA raised many objections to the issuance of the order, of importance here is its claim that the order represents bias and ill-will on the part of the Department toward DLA. During discovery DLA sought to depose then-Secretary Seif and other officials of the Department. The Department filed a motion to bar this discovery and by conference call the presiding administrative law judge heard argument on the matter. By order dated October 2, 2000, Judge Miller extended the time for discovery until November 30, 2000, and allowed DLA to propound written interrogatories to Secretary Seif, and permitted deposition of other Department officials. DLA made a strategic decision not to submit interrogatories to Secretary Seif, and no other extensions for discovery were requested by either party.

On June 7, 2001, DLA sought to reopen discovery on the basis of a letter from Secretary Hess[1] to Rear Admiral Raymond Archer III which urges the Admiral to discuss settling the case with him. DLA believes that language in this letter constitutes "unusual circumstances" as it represents "new and continuing evidence of bias and ill-will on the

---

[1] At the time the now Secretary Hess wrote this letter he was the Acting Secretary. The Pennsylvania Senate confirmed his appointment as Secretary on May 21, 2001. Accordingly, he is referred to in the following portions of this opinion as the Secretary.

part of [the Department] . . . ."[2] The Department opposes DLA's motion and characterizes the letter as merely an attempt to start settlement discussions which does not represent "unusual circumstances."

We have reviewed Secretary Hess's letter in its entirety and do not believe that its language is so inflammatory as to necessitate the reopening of discovery at this late date. Although DLA may understandably object to the characterization of its position by Secretary Hess, we believe that the letter was no more than an attempt to impress upon the Admiral the importance of discussing settlement. No sinister purpose on the part of Secretary Hess is readily apparent from the face of the letter.

Further, the issue which we are reviewing is whether or not the Department acted properly in December 1999, when it issued the remediation order to DLA. Therefore, events following the institution of litigation are of questionable relevance to that inquiry. DLA should understand that the institution of litigation is not warmly received by the target of the litigation, and that DLA's claim that the Department acted out of bias and ill will is likely to evoke a strong response. Finally, DLA had an opportunity to obtain discovery from former-Secretary Seif of the Department and for its own reasons chose not to.[3] We see no reason why it should not have to live with the consequences of that decision. Accordingly, DLA's motion is denied.

---

[2] DLA's Motion ¶ 8.

[3] The Department claims in its Answer to the motion that there is no suggestion that Secretary Hess was involved in the issuance of the order or in any other aspect of this case before sending this letter. (Answer,¶ 10) The Appellant disputes this in a "Reply" filed without obtaining leave of the Board as is required by the Board's Rules of Practice and Procedure at 25 Pa. Code § 1021.70(g). The Reply is therefore stricken in accordance with the Department's request. However, in issuing this order, we have given

We enter the following:

---

no consideration to whether or not Secretary Hess may have been involved in the issuance of the order.

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 11th day of July, 2001, the motion of Defense Logistics Agency in the above-captioned matter is hereby **DENIED**.

ENVIRONNMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

DATED: July 11, 2001

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

BRIAN AND LYNN MEASLEY et al.	:	
	:	
v.	:	**EHB Docket No. 2001-146-L**
	:	**(Consolidated with 2001-147-L,**
	:	**2001-148-L, and 2001-149-L)**
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	**Issued: July 24, 2001**
PROTECTION and SPRINGETTSBURY	:	
TOWNSHIP	:	

OPINION AND ORDER
ON PETITION FOR SUPERSEDEAS

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

Synopsis:

After balancing the applicable supersedeas criteria, a petition for supersedeas from the Department's approval allowing a township to begin the land application of class B biosolids is denied.

OPINION

The Department of Environmental Protection (the "Department") issued a coverage approval to Springettsbury Township ("the Township") under the general permit for the land application of non-exceptional quality sewage sludge. On June 1, 2001, the Department issued an approval letter authorizing the Township to land apply the biosolids on a site known as the Marstellar Farm, which is located in East Hopewell Township, York County. The Appellants, land owners adjacent or near to the Marstellar Farm, filed appeals of this approval, as well as petitions for supersedeas requesting that the Board stay any land application of biosolids pending a decision on the issues raised by the appeals. We held a hearing on the petitions for supersedeas

on July 13, 2001. The appeals (EHB Docket Nos. 2001-146-L through 2001-149-L) were subsequently consolidated.

This Board may grant a supersedeas upon cause shown. 35 P.S. §7514(d)(1). In making its decision, the Board must follow relevant judicial and Board precedent. *Id.*; 25 Pa. Code §1021.78. Among the factors to be considered are whether the petitioner will be irreparably harmed without a supersedeas, the likelihood that the petitioner will ultimately prevail on the merits of its appeal, and whether there is a likelihood of injury to the public or other specific parties if a supersedeas is or is not issued. *Id.* Although the decision to issue a supersedeas is ordinarily within the Board's discretion, a supersedeas will not be issued where pollution or injury to the public health, safety, or welfare exists or is threatened during the period when the supersedeas would be in effect. 35 P.S. §7514(d)(2). The petitioner bears the burden of proof. *Fifer v. DEP,* 2000 EHB 1234, 1237.

Where the mandatory prohibition against issuance of a supersedeas does not apply, the Board ordinarily requires that all statutory criteria must be satisfied. *Global Eco-Logical Services, Inc. et.al. v. DEP,* 1999 EHB 649, 651, *Svonavec, Inc. v. DEP,* 1998 EHB 417, 420. 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 the 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 Consumer Group,* 467 A.2d 805, 809 (Pa. 1983)(each criterion should be considered and weighed relative to the other criteria).

We first turn to the Appellants' likelihood of success on the merits. The Appellants have several objections to the Township's general permit and the Department's site-specific approval to land apply biosolids. Among the Appellant's objections are that the Township will apply biosolids to fields with slopes greater than 25 degrees in violation of 25 Pa. Code § 271.915(d)(1), the Township will apply biosolids on fields with a pH less than six in violation of 25 Pa. Code §§ 217.913(h), 271.915(e), and finally, that Chapter 275 applies to the Township's land application of biosolids, restricting the application of biosolids to within a 1000 feet from a water source, instead of 300 as feet required by Chapter 271. 25 Pa. Code § 275.202(3).

We find that the Appellants have failed to prove that any application slopes exceed 25 degrees or have an improper pH. Appellants' assertions that the Township's permit application lacked a registered professional engineer's seal and the map indicating the application areas lacked sufficient accuracy were also not proven. The Appellant' claim that sludge will be applied too closely to their water sources, however, is somewhat more problematic. There is no dispute that several of the fields slated for application are within 1000 feet of water sources.

Both the Township and the Department make arguments against the applicability of Chapter 275 in this particular case. The Township argues that, when there is a conflict between regulations, rules of statutory construction require that the Chapter 271 regulations, adopted later in time, should prevail over earlier regulations to the extent there is a conflict between the two. The Department argues extensively in its brief that Chapter 275 regulations do not apply to the Township's permit because these regulations remain in effect only for the limited purpose of regulating individual permits issued under Chapter 275.

The Board is not called upon to decide the case on the merits in the context of a supersedeas application. *Global Eco-Logical Services, Inc. and Atlantic Coast Demolition and Recycling, Inc. v. DEP,* 1999 EHB 649, 651. The Board is, at most, required to make a prediction based upon a limited record prepared under rushed circumstances of how an appeal might be decided at some indeterminate point in the future. *Id.* At this point in the proceedings, although the petitioners have raised an issue of potential concern, we are not prepared to say that they have sustained their burden of proving that they are likely to succeed on the merits of their argument that a 300-foot setback should have been applied.

The potential problem that has been highlighted by the petitioners is that there are two separate and somewhat contradictory regulatory programs that might be said to apply to the land application of sludge. Originally, the situation was regulated pursuant to 25 Pa. Code Chapter 275. Now, the Department has issued a general permit for land application, and it regulates land application pursuant to that permit and 25 Pa. Code Chapter 271. The difficulty arises because there is no regulation that expressly supports the Department's practice of regulating existing, individual permits under Chapter 275 but regulating site approvals under the general permit under Chapter 271. In fact, the leadoff provision in Chapter 275 reads: "A person or municipality may not land apply sewage sludge unless the person or municipality is operating under a permit for the land application of sewage sludge issued by the Department *under this article.*" (emphasis added) 25 Pa. Code §275.201. The conflict is significant here because Chapter 275 prohibits sludge application within 1000 feet of water sources. Chapter 271 has a setback of only 300 feet. *Compare* 25 Pa. Code §§ 275.202(3) and 271.915(c)(5).

The closest that the regulation comes to reconciling the dual programs is found at 25 Pa. Code § 271.903(e), which provides:

> The interim guidelines for the use of sewage sludge for agricultural utilization or land reclamation will remain in effect for the limited purposes of providing guidance for persons operating under, and for the enforcement of, individual solid waste permits issued prior to May 27, 1997, under Chapter 275 (relating to land application of sewage sludge) and beneficial use orders issued prior to May 27, 1997, under § 271.232 (Reserved).

The regulation says that the "interim guidelines" will continue to apply. It does not refer to the regulations themselves and it does not say that Chapter 271 is meant to supplant Chapter 275.

In arguing that it was free to disregard Chapter 275, the Department directs our attention to the preamble to 1997 amendments to the municipal waste regulations. The preamble refers to the deletion of several portions of Chapter 275, and states: "The remainder of Chapter 275, as amended by this rulemaking, will remain in effect for the limited purposes of regulating the operation and enforcement of individual solid waste permits issued under Chapter 275." 27 Pa. Bull. 521. Although a regulatory provision would have been preferable, this preamble language suggests that the petitioners have some possibility, but not a likelihood, of succeeding on the merits. The petitioners have not explained why we should disregard this expression of the Environmental Quality Board's intent.

In this appeal, there is some overlap between our consideration of likely success and irreparable harm. The setback from water sources is obviously founded upon the notion of preventing harm that could be associated with applying sludge too closely to water sources. The Department's witness acknowledged this concern at the hearing. It may be appropriate to presume some harm if sludge is to be applied in violation of a regulatory setback. *Cf. Harriman Coal Corp. v. DEP,* EHB Docket No. 2000-148-C (Opinion issued March 7, 2001). The problem here, of course, is that the petitioners have not succeeded in convincing us that the 1000-foot setback applies. Aside from a regulatory presumption that may or may not apply here, if it exists at all, there is no proof here of a threat of actual harm. We acknowledge that

testimony recounting previous storm events and the surface water runoff emanating from the Marstellar Farm, along with a videotape of surface-water runoff from a storm event. (Appellant's Exhibit 3). While we appreciate the documentation that was made of these previous meteorological events, this testimony gave little insight on how the Township's activities would adversely impact the Appellants' water sources or the environment as a whole. No relevant evidence was presented on the harmful nature of the biosolids in question or that they would be applied in a manner that would cause actual harm to the public health or the environment. We cannot find that there is a likelihood of injury to the public simply from the possibility that biosolids prepared and applied in accordance with applicable regulations and permit conditions may run off the application fields.

Finally, for the same reasons, there was no record evidence here of likely injury to the public or the environment more generally. The Township testified to its immediate need to use portions of the site, and the petitioners made no effort to contradict that testimony. Although we do not have the sense that the Township's need is critical, the showing of some immediate need certainly factors into our analysis.

In sum, the petitioners have raised a regulatory issue of some concern, but they have not shown a likelihood of success on the issue. They have not shown either a presumptive or actual threat of irreparable harm to themselves, the public, or the environment. They have fallen short of establishing a clear need for supersedeas relief, as required. *Fifer,* 2000 EHB at 1238. Accordingly, their petition for a supersedeas is denied as set forth in the Order that follows.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BRIAN AND LYNN MEASLEY et al.	:	
	:	
v.	:	**EHB Docket No. 2001-146-L**
	:	**(Consolidated with 2001-147-L,**
	:	**2001-148-L, and 2001-149-L)**
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	**Issued: July 24, 2001**
PROTECTION and SPRINGETTSBURY	:	
TOWNSHIP	:	

ORDER

AND NOW, this 24th day of July, 2001, the Appellants' petitions for supersedeas are hereby **DENIED**.

ENVIRONMENTAL HEARING BOARD

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: July 24, 2001

c: **DEP Litigation Library**
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SECRETARY TO THE B

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: August 22, 2001**

ADJUDICATION

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

Synopsis:

Nearby citizens challenge the Department's issuance of a major permit modification to a landfill allowing it to increase its average daily tonnage by 2,000 tons. A neighboring Township intervened on the side of the citizens. The citizens and the Township have standing. The Board agrees with the parties that it is appropriate to apply a substantive regulatory standard in place at the time of this Board's review but not at the time of the Department's action in this particular appeal. The permit modification is rescinded because the citizens proved by a preponderance of the evidence that the benefits to the public of the volume increase do not clearly outweigh the known and potential environmental harms of the increase.

FINDINGS OF FACT

1. The Department is the agency of the Commonwealth of Pennsylvania authorized to administer and enforce, *inter alia*, the Solid Waste Management Act, Act of July 7, 1980, P.L. 380, *as amended*, 35 P.S. § 6018.101 *et seq.* ("SWMA"); the Municipal Waste Planning, Recycling and Waste Reduction Act, Act of July 28, 1988, P.L. 556, No. 101, 53 P.S. § 4000.101 *et seq.* ("Act 101"); and the rules and regulations promulgated thereunder, including the Municipal Waste Regulations, 25 Pa. Code Chapters 271-285. (Joint Stipulations of the Parties ("Stip.") 1.)

2. Lisa and Steven Giordano (the "Giordanos") live at 209 Oak Grove Road, Morgantown, Robeson Township, Berks County, Pennsylvania. (Stip. 2.) The Giordanos own approximately 14 acres of land that abuts New Morgan Borough. (Stip. 4.)

3. Robeson Township (the "Township"), 2689 Main Street, Birdsboro, Berks County, Pennsylvania, is a municipality of the Commonwealth of Pennsylvania and is adjacent to New Morgan Borough. (Stip. 3, 5.)

4. The Conestoga Landfill (the "Landfill"), located in New Morgan Borough, Berks County, is operated by the New Morgan Landfill Company, Inc., which is a wholly-owned subsidiary of Allied Waste Industries, Inc. (Stip. 6, 7; Transcript ("T.") 1311-1312.) Allied acquired Browning-Ferris Industries ("BFI"), which is why BFI's name appears in the caption of this appeal. (T. 1311.) (Throughout the proceedings, the Board and the parties have referred to the permittee and the related corporate entities as "BFI," and that convention will be continued here.)

Scope of the Department's Review

5. The Department issued the initial permit for the Landfill on June 24, 1992 (Permit No. 10159). (T. 1288-1289; BFI Exhibit ("BFI Ex.") 1.)

6. BFI prepared and the Department reviewed a very extensive, thorough, and complete environmental assessment in connection with BFI's original permit application. (T. 866, 1214, 1219; BFI Ex. 2, 3.)

7. The environmental assessment considered that the Landfill's *maximum* daily tonnage was proposed to be 10,000 tons. (T. 1221; BFI Ex. 3, 21.)

8. The Landfill began receiving waste on January 6, 1994. (T. 157, 703, 1313.)

9. The permit has at all times allowed a maximum daily tonnage of 10,000 tons. (T. 1289; BFI Ex. 1.)

10. In August 1998, the Landfill applied for a permit modification that would allow it to increase its permitted average daily volume. (BFI Ex.12, 63.)

11. The permit modification did not seek to change anything other than the Landfill's permitted average daily volume. (T. 603.) Thus, it did not seek to otherwise alter the Landfill's design, footprint, disposal acreage, or maximum daily tonnage. (T. 603, 641, 852, 1225; BFI Ex. 12.)

12. The Department determined that the application was administratively complete on September 28, 1998. (T. 880; BFI Ex. 64.)

13. The Department performed another environmental assessment as part of its review of BFI's modification application. (BFI Ex. 14.) The assessment included a comparison of the harms and benefits of the volume increase. (BFI Ex. 14.)

14. In performing the environmental assessment, the Department limited its review to the sections of Form D (which relates to the environmental assessment) regarding traffic, planning, air quality, odors, and benefits. (Stip. 8.)

15. In performing its harms/benefits analysis, the Department only considered those items in the application forms that were related to the modification being requested; namely, an increase in average daily volume. (T. 865-867, 871.)

16. The Department also focused its review upon harms that had previously been shown to exist or potentially exist at the Landfill during the period of the Landfill's active operation. (T. 441, 505, 525-528, 567, 575.)

17. The Department considered the existing harms as the best indicators of what types of harms it would expect that would continue in the event of a permit modification. (T. 441-443, 505, 525-528, 575, 1240.)

18. Thus, for example, the Department did not consider increased off-site litter to be a harm or potential harm associated with the volume increase, because it had not been shown to be a harm in the past. (T. 429-430, 527-528.)

19. The Department also considered the fact that the Landfill had operated at a level higher than the average daily limit that it was seeking (but lower than its maximum limit (10,000 tpd)) without harm. (T. 443.)

20. Since its opening, the Landfill has not received any notices of violation ("NOVs") for noise, dust, off-site litter, vectors, birds, or truck traffic. (T. 539-540, 1343-1344.)

21. During the time that the volume increase has been in place, the Department has not been made aware of any evidence or complaints that the Landfill has had an adverse effect on geologic conditions, groundwater, scenic rivers, wetlands, parks, wildlife, water uses, recreation, historical resources, zoning, or land use. (T. 896-897, 914.)

22. The Department omitted several areas that it would have reviewed for a new landfill or landfill expansion in considering BFI's application. (T. 865-867.)

23. The Department did not consider that the impact of the volume increase would have any incremental adverse impact upon any local parks or any airports. (T. 438, 865-869, 908.)

24. The Department only required that certain parts of BFI's original environmental assessment be updated for the modification application (*e.g.*, it required BFI to submit a supplemental traffic study). (T. 1228-1229; BFI Ex. 12.)

25. The Department conducted an appropriately limited harms/benefits analysis of BFI's application. (Finding of Fact ("F.F.") 6-24.)

26. The Department informed BFI on August 2, 1999 that the Department had completed its harms/benefits analysis and that a permit modification would be issued shortly. (T. 396, 851, 858; BFI Ex. 14.)

27. The Department essentially combined the harms/benefits and the technical review into one review because the two analyses were largely the same in its view for this type of permit modification. (T. 849, 852, 880; BFI Ex. 14, 76.)

28. On August 4, 1999, the Department approved a major modification of the Landfill's permit (the "permit modification" or "modification"). (Stip. 9; T. 157, 396, 683, 858; BFI Ex. 15, 16.)

29. The permit modification increased the average daily volume that BFI could accept at the Landfill from 5210 tons per day ("tpd") to 7210 tpd (the "volume increase" or "tonnage increase"). (Stip. 9.) It is this permit modification that is the subject of this appeal, which has been filed by the Giordanos. (Stip. 10.) This Board granted the Township limited intervenor status on September 26, 2000. (Stip. 11.)

30. The Landfill has, in fact, operated at a higher average daily volume since the tonnage increase was permitted. (T. 685-686.)

Standing

31. The Giordanos live approximately two miles from the Landfill. (T. 136, 173.)

32. The Giordanos are residents of Robeson Township. (T. 135, 1041.)

33. The Giordanos have suffered malodors emanating from the Landfill at their residence, and the frequency and intensity of those episodes has increased since the volume increase. (T. 137-139, 162-70, 214, 260, 1013-1014, 1017, 1034, 1038, 1041.)

34. The malodor episodes have interfered with the Giordanos' ability to enjoy their property. (T. 138-139, 1034.)

35. Mr. Giordano has also smelled landfill odors while walking on trails in New Morgan Borough. (T. 1039-1040.)

36. The Giordanos have suffered litter at their property, and the amount of litter has increased slightly since the volume increase. (T. 140, 203-205, 1022-1023.)

37. The Landfill is the likely source of the litter due to the timing of the problem, the location where the litter accumulates, and the lack of other likely sources in the area in question. (T. 140-141, 1023, 1028, 1033.)

38. The litter has interfered with the Giordanos' enjoyment of their property. (T. 141.)

39. The Giordanos have suffered the noises of landfill operations at their property, and the frequency and intensity of the noise has increased slightly since the volume increase. (T. 141-142, 1041.)

40. The noise has interfered with the Giordanos' ability to enjoy their property. (T. 142.)

41. Neither the Giordanos nor other Township residents have suffered any significant ill-effects from any birds, insects, or vectors that are associated with the volume increase. No such effects have objectively interfered with the use and enjoyment of their property. (T. 142-144, 265, 308, 752-753.)

42. One Township resident, a Township supervisor, has been bothered by more noises from the Landfill since the volume increase. (T. 809-812.)

43. Robeson Township has received complaints from Township residents regarding increased truck traffic and odor associated with the Landfill operating at the increased volume authorized by the permit modification. (T. 263-265, 283-286, 289, 290, 754-755, 783-784, 951-952, 963, 1002-1003.)

44. Some Township residents have experienced malodors in Robeson Township associated with the Landfill operating at its increased volume. (T. 264-265, 286-287, 306-307, 340-343, 347, 750-751, 798, 804, 835-836.)

45. The Township's elected officials have an objectively reasonable concern that the volume increase will result in increased nuisances to Township residences such as odor, litter, and increased truck traffic. (T. 128, 951.)

46. The Township's board of supervisors has a duty to protect the health, safety, and welfare of its residents. (T. 750, 951, 1003.)

47. The Giordanos use an area affected by the volume increase and that use has been adversely affected. (F.F. 31-40.)

48. Township residents use an area affected by the volume increase and that use has been adversely affected. (F.F. 42-44.)

Township Notice

49. The Department notified Robeson Township of the proposed permit modification in advance of approving it and solicited the Township's comments. (T. 494, 512-515, 521, 541-543, 580, 789, 885; BFI Ex. 66.)

50. The letter announcing the meeting to comment on the application was sent to a Township Supervisor's home address by certified mail. (T. 756-758, 821; BFI Ex. 66.)

51. The letter was received on or about October 20, 1998. (T. 542, 757, 789; BFI Ex. 66.)

52. The meeting was held on November 5, 1998. (T. 490, 758; BFI Ex. 13, 66.)

53. Robeson Township did not contact the Department regarding the meeting or the permit application in general. (T. 543.)

54. A representative of Robeson Township could have attended the meeting, but did not. (T. 521, 583, 758.)

55. The supervisor who received the letter never told his fellow supervisors about the meeting. (T. 788.)

56. At the meeting that was announced in the letter, surrounding municipalities and counties were invited to, and did in fact, discuss and comment upon BFI's application. (T. 451-453, 513, 519-520, 874, 876, 1318.)

57. Caernarvon Township and the Berks County Planning Commission commented on BFI's application. (T. 513, 888.)

58. Representatives of Berks County, Caernarvon Township, and New Morgan Borough attended the meeting. (T. 520-521.)

59. Robeson Township did not submit any comments regarding BFI's application. (T. 888.)

60. Notice of the permit application was required to be published and was in fact published in the local newspaper for three consecutive weeks. (T. 515, 516; BFI Ex. 12.)

61. At least one of the supervisors was aware of BFI's pending application due to news reports. (T. 931.)

62. The Township received adequate notice and opportunity to comment upon the modification application. (F.F. 49-61.)

Harms/Benefits Analysis

Landfill Design

63. BFI's commitment to run a clean and safe landfill in accordance with applicable regulations is not in and of itself a benefit and it is not in any event associated with the permit modification. (T. 367.)

64. The Landfill and the access route thereto are adequately designed and operated to handle the increase in volume authorized by the permit modification in accordance with regulatory operating requirements. (T. 442-443, 1362 (previous operations above daily average); 532 (gas management); 725-726 (recycling services); T. 1089 (personnel and equipment); T. 1095 (leachate); T. 1097 (cap); T. 1098 (dust); T. 1099 (litter, revegetation); T. 725-726 (recycling services); T. 1112 (state-of-the-art facility); T. 1128 (equipment); T. 1138

(generally); 1212-1214 (design); T. 1221-1222 (equipment and personnel); T. 1247 (infrastructure); 1248 (gas management); 1295-1296 (leachate collection/treatment); T. 1307-1308 (litter collection); T. 1325-1337 (design, construction, and operation); T. 1386 (same); BFI Ex. 4, 9, 10, 11.)

Landfill Capacity

65. In addition to allowing faster waste disposal, the permit modification allows for thicker layers of waste. (T. 1126, 1143, 1159.)

66. Thicker layers of waste reduces the need for soil used for daily cover. (T. 1126.)

67. The use of less soil means that, theoretically, more waste can be disposed of in the same amount of space. (T. 1127, 1190, 1251.)

68. By filling up the Landfill more quickly, there is less opportunity for settling and decomposition before reaching final grade, which, theoretically, results in a loss of some capacity. (T. 686, 688, 1145-1149, 1367-1368, 1392, 1404, 1409-1410.)

69. When the differences in daily cover, settling, and trash placement are factored together, there will be no material difference between the total volume of waste disposed in the Landfill with or without the increase in average daily volume. (F.F. 65-68.)

Disposal Space Availability

70. The Landfill's ability to provide waste disposal capacity is a benefit. (T. 385, 854; BFI Ex. 14.)

71. The benefit of waste disposal capacity preexisted the permit modification, but less capacity was available on an average daily basis. (T. 385; BFI Ex. 1, 8.)

72. As a result of the permit modification, assuming that BFI were able to continue to take advantage of the increased permitted volume limit, the Landfill would fill up more quickly.

(T. 385-387, 1138.)

73. Filling up the Landfill more quickly will reduce BFI's ability to provide waste disposal capacity in the future. (T. 386-387, 1138.) Specifically, the volume increase reduced the life of the Landfill by approximately two years. (T. 662, 701, 711, 906, 1325.) Thus, more space is available now; less space will be available in the future.

74. The Department did not perform an analysis of whether the volume increase was actually needed. In other words, no "needs assessment" was performed, except for a determination that the Landfill was listed as a disposal site in several county solid waste management plans. (T. 461, 463, 467, 471-472, 612-616, 626, 848-850, 901, 904, 910; BFI Ex. 12, 42, 43, 49-51.)

75. The Department considered the need for the Landfill when it was originally permitted. (T. 1217.) The Department assumed that the fact that the Landfill was already provided for in county plans established the need for not only the Landfill, but future expansions or increases in average daily volumes as well. (T. 462, 466-467.)

76. There are multiple landfills in Berks County and in the area covered by the Department's Southcentral Regional Office. (T. 154, 417-418, 605, 845-846; BFI Ex. 54.)

77. The Department did not consider the availability of landfill space in the area in its review of BFI's permit modification application. (T. 475, 567, 605-606, 612, 845.)

78. The Department did not consider the average daily volume of other landfills in its review of BFI's permit modification application. (T. 610, 847-848.)

79. There is no evidence regarding the relative need for landfill space now as opposed to during what would have been the last two years of operation of the unmodified Landfill but for the permit modification.

80. There is not enough information to consider the short-term increase and concomitant longer-term loss of capacity as either a net harm or a net benefit. (F.F. 74-79.)

Host Fees

81. The Landfill has paid and will continue to pay substantial amounts of host fees that are higher than the amounts required by law to New Morgan Borough and Berks County, with or without the volume increase. (T. 403-404, 410-411, 660, 721; BFI Ex. 14.)

82. The volume increase will result in faster payment of the host fees, and the payments will end sooner. (T. 414, 665, 1424; BFI Ex. 23.)

83. Because of the faster payment of roughly the same amount of money, the volume increase will increase the net present value of the host fees paid to Berks County and New Morgan Borough. (T. 1415, 1418.)

Miscellaneous Community and Economic Benefits

84. The Landfill has provided numerous community and economic benefits over the years before and since the permit modification. (T. 368-369 (participation in adopt-a-highway program); 387 (upgrade to Mineview Road); 391-393, 659, 1313 (employment of 35 people); 717 (equipment purchases); 524-525, 717-719, 721, 723, 1230-1231, 1320, 1345-1346 (road and drainage improvements); 151-153 (school programs); 415-416 (recycling); 377-383, 719-721, 733-734; BFI Ex. 14, 62, 118 (cash donations and free services); 657-658 (creation of community environmental center).)

85. With only insignificant exceptions, these community and economic benefits did not result from the volume increase itself. (T. 389, 390-395, 416-417, 460, 534, 648-660, 717-718, 731-732, 1128, 1313.)

86. The volume increase has not significantly increased the miscellaneous community and economic benefits provided by the Landfill. (F.F. 85.)

Odors

87. The two major sources of malodors at a landfill are (1) waste exposed at the working face (the place where waste is actually being added to the landfill during daily operations), and (2) methane produced from anaerobic decomposition of waste in the landfill. (T. 623.) Leachate has not been a significant odor source at the Landfill. (T. 1110-1111, 1295-1296.)

88. Some odors directly associated with the working face of the landfill are inevitable, and are, in fact, produced at this Landfill. (T. 431, 624, 694, 1106-1107, 1133, 1188, 1293.)

89. The amount of odors at the working face are generally related to the size and management of the face. (T. 431, 624, 1107, 1133.)

90. The permit modification allowed for an increase in the size of the working face from 54,000 to approximately 59,000 square feet. (T. 1133-1134, 1186; BFI Ex. 77.) The typical size of the working face has, in fact, increased as a result of the modification. (T. 624.)

91. Odors at the working face are primarily controlled by placing soil over the waste on a daily basis ("daily cover"). (T. 1094.) They are also masked at the Landfill by a misting system. (T. 624, 1094, 1307.)

92. The volume increase has resulted in a slight increase in odors associated with the working face, but those odors will end sooner over the long term because of the faster closure of the Landfill. (F.F. 73, 88.)

93. The Landfill has an extensive system in place to control methane gas emissions. (T. 1090-1095, 1296-1298; BFI Ex. 9, 10.)

94. A gas collection system and a permanent cap are major tools used by the Landfill for odor control associated with landfill gas. (T. 1096-1097, 1125-1126, 1151, 1300, 1307; BFI 9, 10.)

95. The Landfill has received NOVs for failing to adequately control malodors. (T. 620-622, 1104; BFI Ex. 52.)

96. The odors that were the subject of the NOVs were primarily related to construction activities at the Landfill that exposed previously buried waste. (T. 434-437, 623, 628, 637-639, 707, 709, 1104-1106, 1116, 1232, 1369-1370.)

97. Filling up the new waste cells more quickly as a result of the volume increase means that the Landfill will need to tie into old cells more quickly. (T. 1139.)

98. The potential for odors associated with gas releases at construction activities will increase over the shorter term of landfill operations, but it will also end sooner. (F.F. 73, 97.)

99. Filling the Landfill at the faster rate authorized by the permit modification will result in the Landfill reaching final grades more quickly, which will, in turn, enable the Landfill to install gas collection and the permanent cap more quickly. (T. 1125-1126, 1248.)

100. During the shorter term of landfill operations effected by the modification, more gas will be produced. (T. 1143-1144, 1261.) The total amount of gas that will be produced over time by the Landfill, however, will not change as a result of the modification because the total amount of waste has not changed. (T. 1143, 1156, 1177, 1261, 1265.)

101. Landfill odors have been and will continue to be a partially mitigated harm caused by the Landfill. (T. 424, 532, 1260; BFI Ex. 14, 104.)

102. In the shorter term, off-site malodors associated with the Landfill have increased to a limited extent as a result of the volume increase, but the Landfill will produce about the same

amount of total malodors over the long term with or without the permit modification. (T. 112-113, 137-139, 162-170, 214, 260-265, 289, 308, 340-353, 750-751, 760, 798, 804, 835-836, 936-937, 950, 963-964, 996-997, 1013-1014, 1017, 1034, 1038, 1041, 1156; F.F. 33, 44.)

103. This concentration effect is neither a harm nor a benefit. (F.F. 73, 87 -102.)

Traffic

104. There are an additional 250 vehicle trips per day to and from the Landfill as a result of the tonnage increase (125 entering and 125 exiting). (T. 696; BFI Ex. 12.)

105. The local haul routes to the Landfill are very short. The Landfill is located close to major highways. (T. 505-506, 899, 1114, 1322-1324; BFI Ex. 21, 55, 56, 57.)

106. There are no school bus stops, historic structures, residential areas (excepting one house), or heavy pedestrian use along the haul routes. (T. 506-507, 899.)

107. The additional trucks entering and exiting the Landfill as the result of the volume increase will generate increased noise and emissions, but the impact of the increase will be minimal due to the short haul route. (T. 426-427, 505-508.)

108. No traffic problems have been reported to the Department since the volume increase went into effect. (T. 900.)

109. With isolated and minor exceptions, the volume increase has not resulted in a significant increase in inconvenience or danger associated with truck traffic. (T. 66, 71, 106, 112-113, 125, 209-210, 289, 311-312, 774, 833-834, 837, 936, 950, 973, 997-998, 1226.)

110. To the extent that the permit modification has concentrated any adverse isolated and minor effects of truck traffic over a shorter landfill life span, that concentration effect is neither a harm nor a benefit. (F.F. 104-109.)

Other Harms

111. As a result of the volume increase, the Landfill has needed to work its equipment more intensely. (T. 660.) This is neither a material harm nor a material benefit.

112. The more intensive use of the equipment means that it must be replaced more frequently. (T. 660.)

113. The increased use of the equipment will result in slightly more noise, more fuel consumption, and more mobile source emissions. (T. 697-699, 1162.) To the extent these effects have been concentrated, they will end sooner given the shorter life span of the facility.

114. The volume increase has not resulted in an increase in off-site litter other than a limited increase at the Giordanos' property. (T. 66, 106, 112-113, 115, 289, 936, 950, 997; F.F. 36, 37.)

115. The volume increase has not resulted in an increase in noise levels that are generally unacceptable to anyone other than the Giordanos and one Township Supervisor. (T. 112-113, 289, 809-812, 936, 950, 997, 1182-1183.)

116. The volume increase has not resulted in a significant increase in vectors or birds. (T. 106, 112-113, 289, 309, 325, 443, 753, 784-785, 936, 950, 998.) To the extent that the volume increase has concentrated any nuisance-type effects (litter, noise), the effects will end sooner and the concentration effect is neither a harm nor a benefit. (F.F. 111-116.)

Balancing

117. The volume increase authorized by the permit modification has not added any material harms or benefits to those already associated with the operation of the Landfill. (F.F. 63-116.)

118. The volume increase has had the effect of concentrating some of the preexisting

harms and benefits associated with the Landfill, particularly those associated with active operations due to the increased pace of operations. (F.F. 63-117.)

119. The concentration effect is neither a harm nor a benefit. (F.F. 63 -118.)

120. Viewed over the lifetime of the facility, any negligible harms or benefits associated with the volume increase, to the extent they exist at all, cancel each other out. (F.F. 63-119.)

121. The presiding administrative law judge conducted a site view on January 12, 2001, with representatives of all parties in attendance.

DISCUSSION

Standing – Giordanos

BFI previously challenged the Giordanos' standing to pursue this appeal in a motion for summary judgment. We denied the motion because there were disputed issues of fact that were material to the standing question. *Giordano v. DEP*, 2000 EHB 1184, 1188. We noted that BFI retained the right to challenge standing based upon evidence generated at the hearing on the merits. BFI has taken advantage of that opportunity, and it continues to challenge the Giordanos' standing. The Department does not challenge the Giordanos' standing.

As discussed in greater detail in *Giordano*, appellants in a third-party appeal from the Department's issuance of a permit have standing if (1) they use the area affected by the permitted activity, and (2) the permittee's conduct has (or will) adversely affect that use. *Giordano*, 2000 EHB at 1186-1187. Where standing is still questioned at the hearing on the merits, the appellants bear the burden of proving these criteria by a preponderance of the evidence. *Id.*, 2000 EHB at 1187; 25 Pa. Code § 1021.101.

The Giordanos have carried their burden in this case. They live approximately two miles from the Landfill. (F.F. 31.) They have suffered increased malodors, and a slight increase in

litter and noise at their property since the volume increase, all of which have reasonably interfered with their ability to enjoy their property. (F.F. 33-34, 36-40.) These adverse effects are sufficient to establish that the Giordanos have standing by virtue of their substantial, direct, and immediate interest. The Giordanos clearly have something to gain by having the permit modification rescinded. They have standing.

Standing – Robeson Township

Similarly, when we allowed Robeson Township to intervene in this appeal, *Giordano v. DEP,* 2000 EHB 1154, BFI retained the right to challenge the Township's standing based upon facts developed on the record. Again, BFI (but not the Department) maintains its attack on the Township's standing.

The Township is the municipality immediately adjacent to New Morgan Borough, the host municipality. (F.F. 3.) The Giordanos are residents of the Township. (F.F. 2, 32.) Township residents in addition to the Girodanos have suffered increased malodors and noise as a result of the volume increase. (F.F. 42-44.) The Township has a duty to protect the health, safety, and welfare of its residents. (F.F. 46.) Based upon a history of complaints, the Township has an objectively reasonable concern that nuisance-type problems associated with the volume increase will continue. (F.F. 43, 45.) These facts demonstrate that the Township has a substantial, immediate, and direct stake in the outcome of this appeal. The Township has standing. *See City of Scranton v. DEP*, 1997 EHB 985, 989-91 (discussing standing of nearby municipality).

What Regulatory Standard Applies

The Department approved BFI's permit modification in August 1999. We held in *Giordano,* 2000 EHB 1184, that the Department improperly relied upon a harms-versus-benefits

standard set forth in a guidance document that should have been in a regulation. *Id.*, 2000 EHB at 1188-1189. In the absence of that guidance document, the applicable regulations contained a somewhat different review standard, which required the Department to compare need to harms. 25 Pa. Code § 271.201(a)(3)(rescinded); *see Dauphin Meadows, Inc. v. DEP*, 2000 EHB 521, 528. Normally, then, there would be little doubt that BFI's application would be reviewed against the standards and regulations that were lawfully in place in the absence of the invalidated guidance document standard.

The question of what law to apply has been complicated in this proceeding, however, because the Environmental Quality Board passed new regulations governing the review of permit applications on December 23, 2000. 30 Pa. Bull. 6685 (December 23, 2000). Traditionally, this Board has reviewed Department actions to determine whether they were in accordance with the law in place at the time the Department took the action, regardless of subsequent changes in the law. *See, e.g., Eastern Consolidation and Distribution Services, Inc. v. DEP,* 1999 EHB 312, 328; *Herr v. DEP,* 1997 EHB 593, 596; *Harmar v. DER*, 1993 EHB 1856, 1900; *Fiore v. DER*, 1986 EHB 744, 752-53.

Notwithstanding this precedent, all four parties, including the Department, have agreed that this Board should apply the harms/benefits standard set forth in the regulations for the first time on December 23, 2000. Of course, we are not bound by the parties' agreement regarding a question of law, and we in fact commit error if we fail to make an independent determination of law. *Dauphin Meadows v. DEP*, EHB Docket No. 99-190-L (Opinion and Order issued February 8, 2001), *citing Martin v. Poole*, 336 A.2d 363, 365 n. 2 (Pa. Super. 1975) and *Enoch v. Food Fair Stores, Inc.,* 331 A.2d 912, 914 (Pa. Super. 1974). In this matter, however, we happen to agree with the parties.

In determining whether the Department committed an error of law, it is only necessary to look at the law in place at the time of the Department's action. This Board's role, however, goes beyond that of searching out Departmental errors. We must also determine whether any errors that may have occurred should make a difference in the final result. *O'Reilly v. DEP,* EHB Docket No. 99-166-L (Adjudication issued January 3, 2001). Even in the absence of errors, we must determine whether the Department's action is reasonable and appropriate. *Thomas F. Wagner, Inc. v. DEP*, 2000 EHB 1032, 1053, *aff'd*, 2187 C.D. 2000 (Pa. Cmwlth. April 13, 2001). Based upon these criteria, we must fashion appropriate relief, *e.g.*, determine whether a permit should be issued or an order should remain in place. In determining whether an error was material, whether an action is reasonable and appropriate, and particularly in fashioning appropriate relief, we agree with the parties that it may be entirely appropriate to apply new regulations in some cases.

It is particularly appropriate to apply the new regulatory standard in this appeal because the Department in fact applied the harms/benefits test contained in the new regulations even though the regulation had not yet been finalized. *Giordano*, 2000 EHB 1184. In other words, if we were to apply the regulations that were in place at the time the BFI modification was approved, we would not only be applying a standard that is now defunct, we would be applying a standard that the Department itself did not apply. Although it is not our intention to reward or encourage the use of a standard that was not properly promulgated at the time, under the unique circumstances of this appeal, using the new regulation seems to be the only logical, fair course. Accordingly, we will apply the substantive standard in the new regulations in conducting our *de novo* review of the permit modification. In other words, we will accede to the parties' request

and apply the harms/benefits test set forth in 25 Pa. Code § 271.127(c).[1]

Township Involvement

The Giordanos[2] argue that the modification must be nullified or at least remanded because the Township was not given an adequate opportunity to participate in the application review process. Their first complaint is that the Department absolutely *must* meet with all interested municipalities or it may not process an application. The regulations have never contained such a draconian requirement. Rather, a local municipality must be given a meaningful *opportunity* to participate in the process. The Township was given that opportunity here.

The Township never met with the Department because the Township chose not to do so. The Department actively sought out the input of local officials. It notified the Township by letter to a supervisor of the upcoming meeting with local officials to discuss the application. (F.F. 49-51.) That supervisor received the notice, but, in our view, inexcusably, failed to pass that information along to other Township officials. (F.F. 55.) The Township did not send a representative to the meeting, although many other local officials attended. The Township never subsequently asked to meet with the Department.

The Giordanos next argue that the Department did not give the Township proper notice of a meeting with concerned municipalities to discuss the application because notice was sent to

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[1] Although the validity of the new harms/benefits test has been challenged in other appeals currently pending before the Board, it has not been challenged here.

[2] The Girodanos and Robeson Township submitted joint post-hearing briefs. When referring to the parties' position in this matter, our reference to "the Girodanos" includes the Township. Similarly, there is little material difference between the positions advocated by BFI and the Department. When referencing an argument made by BFI, it should be assumed unless otherwise noted that the Department took the same position.

one of the Township's supervisor's home address instead of the Township office. Although a mailing to the Township's business address might have been preferable, we are not convinced that mailing to the supervisor's home constituted an error. The Giordanos have not directed our attention to any binding regulation requiring mailing to the Township's business office. Even if the Department erred, the error is exceedingly minor and does not in our view support any action on our part regarding the modification.

The Giordanos' remaining procedural arguments are based upon the December 23, 2000 revisions to 25 Pa. Code § 271.202, the regulation governing municipal involvement in the review process. They argue that the Department did not include enough attachments (*e.g.* a copy of the entire permit application) to its notice letter to municipalities, and that the Department should have held its municipality-involvement meeting before it concluded that the application was administratively complete.

As we understand the Giordanos' arguments on these points (*see* Brief at 47-48, 59-61; Reply Brief at 14), they do not contend that the Department violated Section 271.202 as it existed at the time of the Department's review. We do not independently detect any such shortcoming. Rather, the Giordanos argue that the process employed by the Department would not have passed muster under the regulation as revised. Since the Department did not commit a procedural error of the law as it existed at the time, and nothing in the new regulation compels us to conclude that its process was otherwise unreasonable or inappropriate in this regard, the only possible relevance of the new regulation is whether it should have some sort of impact upon the relief that we award.

Initially, we note that it will be the rare case where procedural changes of the magnitude of those at issue here would compel a nullification or remand of the permit. They certainly do

not compel such a result here. We agree with the Department that "[t]he fact that the parties concur that the Board should apply the new municipal waste regulations in this matter does not mandate that the Board should rigidly apply every procedural provision, no matter how inconsequential in this matter, of the new regulations." (Brief at 49.)

With regard to the attachments, although the Department did not attach the voluminous permit application to the notice letter, it brought them to the meeting itself. (T. 495, 498, 512-513.) The materials were public documents readily available for inspection at any time. Under these circumstances, they clearly had an adequate opportunity to comment.

With regard to the Giordanos' complaint that the Department should have met with municipalities before marking the application "administratively complete," the Giordanos have placed undue weight on the concept of administrative completeness. Administrative completeness is a processing tool designed to ensure that the applicant and permit reviewers do not get too far along in reviewing the substance of an application before it is clear that all of the information necessary for a complete review has been supplied. It is ultimately designed to avoid a waste of resources by both the applicant and the Department.

Once the Department determines that an application is complete, proceeds with its substantive review, and makes a decision on the merits of the application, the completeness determination has little relevance. This Board's function is to determine whether the permit was properly issued, not whether the Department correctly concluded years ago that all necessary forms had been submitted and that an application was otherwise "administratively complete." *Cf. PEMS v. DER*, 503 A.2d 477, 479 (Pa. Cmwlth. 1986)(denial of application because applicant did not supply information a moot point when information was provided at EHB hearing). The important issue now is whether Robeson Township was given an opportunity to

provide input, and we conclude that it was.

With regard to all of the alleged procedural defects, no purpose would be served by nullifying or remanding the permit modification on such grounds. The Township has obviously intervened and actively participated in this appeal. All five of its supervisors, its police chief, and its recently retired executive officer testified. Its grievances have been exhaustively aired in this case. There simply would be no point to requiring a meeting between the Township and the Department now. If the Township has concerns regarding ongoing operations at the Landfill, we are quite certain that the Department would be happy to meet with the Township at any time to discuss them.

The Giordanos rely heavily upon *Fontaine v. DEP*, 1996 EHB 1333. In that case we remanded a permit to the Department because a host county for the facility was not given personal notice of the application. 1996 EHB at 1343. The decision was based upon the applicant's failure to follow an important notification requirement in force at the time. There was no issue of a change in law. In this case, we are not convinced that there were any procedural errors regarding the regulation in force at the time of the Department's action, and even if there were, they were quite minor and do not justify relief in the Giordanos' favor. The Giordanos have also failed to explain to our satisfaction how or why the regulatory procedural revisions would justify a nullification or remand of the permit modification. *Fontaine* is simply not on point.

Harms/Benefits Analysis

BFI's application for a daily volume increase was an application for a "major modification." 25 Pa. Code § 271.144; *Giordano*, 2000 EHB at 1190. Therefore, BFI was required to perform an environmental assessment as part of its application. 25 Pa. Code §§ 271.126, 271.140; *Giordano*, 2000 EHB at 1191. The crux of the environmental assessment is set forth at 25 Pa. Code § 271.127(c):

> *Municipal waste landfills, construction/demolition waste landfills and resource recovery facilities.* If the application is for the proposed operation of a municipal waste landfill, construction/demolition waste landfill or resource recovery facility, the applicant shall demonstrate that the benefits of the project to the public clearly outweigh the known and potential environmental harms. In making this demonstration, the applicant shall consider harms and mitigation measures described in subsection (b). The applicant shall describe in detail the benefits relied upon. The benefits of the project shall consist of social and economic benefits that remain after taking into consideration the known and potential social and economic harms of the project and shall also consist of the environmental benefits of the project, if any.

In a case such as this one where a facility has previously been subject to an environmental assessment, the applicant is only required to submit assessment information that relates to the proposed modification. 25 Pa. Code § 271.126(c)(1); *Giordano*, 2000 EHB at 1191. Thus, in reviewing an application for a permit modification, this Board also limits its focus to the subject of the modification.[3] We do not evaluate the harms and benefits of the Landfill as a whole without the modification or even as modified. Our focus is on the modification in and of itself. In other words, the modification application is not in and of itself an excuse to reexamine the

[3] Our review consists of a *de novo* determination of whether the Department's action was lawful, reasonable, and appropriate. *Smedley v. DEP,* EHB Docket No. 97-253-K (Adjudication issued February 8, 2001) slip op. at 25-30; *O'Reilly v. DEP*, EHB Docket No. 99-166-L (Adjudication issued January 3, 2001) slip op. at 14. The Giordanos bear the burden of proof.

merits of the original permitting decision. Information and data describing the benefits and harms of the facility prior to the modification are relevant, but only indirectly. To be precise, such information does not directly form the basis for a decision regarding the modification, but it may be important in helping the reviewers predict the future effect of the modification. A review of the history of the facility helps to predict the future of the facility. *See Concerned Citizens of Earl Township v. DER*, 1994 EHB 1525, 1614 (absence of past problem supports prediction of no future problem). Thus, for example, the lack of past problems regarding birds at the Conestoga Landfill provided the evidentiary basis for the Department's conclusion in this case that the change permitted by the modification is also not likely to result in future bird problems. The absence of past bird problems is not determinative, but it is certainly, if indirectly, relevant.

The Giordanos have criticized the limited scope of the Department's review. They argue that the Department's review was focused too narrowly upon harms that had already presented themselves as a risk at the active landfill. We reject the argument. First, our review shows that the Department conducted an extensive review of voluminous application materials that was properly directed at issues reasonably likely to be of concern at this particular facility. (F.F. 10, 25.)

Second, at the risk of getting into semantics, it is not so much that the Department did not consider certain effects; rather, the record shows that it considered such effects but concluded they were not of concern. Third, the Girodanos have not pointed to any omission on the part of the Department in focusing its review that could have made a difference. For example, they complain that the Department did not consider the impact the modification would have concerning seagulls, but they failed to present proof that, had the Department considered

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25 Pa. Code § 1021.101(c)(2).

seagulls, it should have concluded that the modification should not be allowed. They complain that the Department did not consider impacts on parks or airports, but they do not take their complaint to the next and critical level, which is that, had the Department considered such impacts, or if this Board considers such impacts now, it would have made or would now make a difference. As we have said before, it is generally not enough for an appellant to prevail to pick at errors that the Department might have made along the way if the Department's final action is nevertheless appropriate. *See, O'Reilly, supra,* slip op. at 22.

Turning at last to the substance of the Department's review, as previously noted, the subject of the permit modification upon which we must focus our review is the increase in the average daily volume. The importance of this limited focus cannot be overstated because it defines the limits of our analysis and essentially dictates the result of the case. The question presented is whether the benefits of allowing the Landfill to accept an additional 2,000 tons per day of waste on average clearly outweigh the known and potential environmental harms of allowing the Landfill to accept an additional 2,000 tons per day of waste on average. 25 Pa. Code §§ 271.126(c)(2) and 271.127(c).

Allowing the Landfill to accept an additional 2,000 tons per day does two things: It increases the daily pace of operations at the Landfill and, as a result, it shortens the life of the Landfill. The light bulb burns brighter but it burns out more quickly. Therefore, another way to look at this case is to weigh the relative benefits and harms of permitting an increased pace of operations that results in a shortened life span. Unless those benefits clearly outweigh those harms, the modification may not be approved.

We see little in the way of benefits resulting from increasing the pace of Landfill operations and shortening its life span. The most important benefit that is associated with the

Landfill is its ability to provide waste disposal capacity. Disposal capacity at a facility that meets or exceeds regulatory criteria (F.F. 64) at an acceptable site is the key benefit provided by the Landfill. *See PEMS, supra,* 503 A.2d at 480 (landfill capacity is a benefit).

The modification has made more valuable disposal capacity available in the short term. That availability, however, has come at a price. The modification has shortened the Landfill's life span by approximately two years. Capacity that would have been available during those two years will have been used up.

Despite its importance, we have no way of knowing whether using up a given amount of disposal capacity[4] over a shorter period of time is, on balance, a benefit or a harm. The question of the relative availability of capacity implicates at least in part the need for the capacity now versus the need for capacity several years from now. The record shows that the Landfill is a designated disposal facility in some county plans, but there is no evidence that the additional 2,000 tons per day of disposal capacity is currently needed. What little evidence there is on this point is that there are quite a few landfills already providing capacity in the area. (F.F. 76.) There is no indication whether the unmodified Landfill was adequate to meet current needs. There is no evidence regarding projected supply and demand several years hence when capacity is lost that would have been available but for the modification.

The Department concedes that it made no determination of actual need for the short-term capacity increase, aside from checking that the Landfill as a whole was designated in county plans. There is no evidence that the Department considered long-term capacity needs. No thought was given to the need for the 2,000 tons per day increase itself. We are not suggesting

[4] The modification will not result in a material change in the total capacity of the Landfill one way or the other. (F.F. 69.) We, therefore, need not address the Giordanos' argument that

that the Department necessarily erred by giving short shrift to need here. *Caernavon Township Supervisors v. DEP,* 1997 EHB 217, 223 (not necessary to revisit need in application for landfill expansion); *Somerset County Commissioners v. DEP*, 1996 EHB 351, 375 (no requirement to show actual need under Act 101). *But see Florence Township v. DEP*, 1996 EHB 1379, 1390 (objection to expansion permit dismissed because Department adequately considered need). *See also* 25 Pa. Code § 271.127(b) (replacing old requirement that application shall demonstrate need with provision that applicant may demonstrate need). We are simply saying that it is difficult to consider opening up capacity now versus making that same capacity available later to be a net benefit without information regarding need now versus need later.

Thus, we are left with a theoretical benefit in the short term because valuable new capacity has been made available, and a theoretical harm down the road because valuable capacity that would have otherwise been available will have already been used up. We have no basis for concluding that the change in the timing of disposal capacity availability is a net harm or a net benefit, even though that is the single most important effect of the modification.

BFI relies on the increased net present value of host municipal benefit fees resulting from their concentrated payment as a benefit supporting its application. We have difficulty accepting BFI's argument that the increased net present value of the host municipality benefit fees is a benefit that necessarily results in allowing the modification. First, a major purpose of the municipal benefit fee is to provide an incentive to municipalities to host a waste disposal facility. Sections 102(a)(7) and 102(b)(7) of Act 101, 53 P.S. §§ 4000.102(a)(7), 4000.102(b)(7). Since the Landfill is already in place, this objective is not being served by the increased short-term fees associated with the permit modification.

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certain regulatory requirements were triggered by an increase in capacity at the Landfill.

Secondly, to the extent that fees are intended to be more than an incentive payment, we view them as being in the nature of compensation to a municipality and its residents for the inevitable inconveniences associated with having a landfill in the area. The fee is tied to the tonnage received at the landfill rather than segments of time to reflect the fact that a busier landfill entails greater inconveniences. When the fees are viewed in this light, we have conceptual difficulty in viewing the quicker payment of fees designed to compensate the municipalities for the quicker suffering of inconveniences as a major "benefit" that necessarily overcomes the "harms" as those terms are used in 25 Pa. Code § 271.127 in this case.

One of the overriding purposes of Act 101 is to preserve and protect landfill space. 53 P.S. § 4000.102. It simply strikes us as wrongheaded and inconsistent with that purpose to argue that landfill space should be consumed as quickly as possible so as to accelerate and maximize the payment of host fees to local municipalities. As set forth in section 102(a)(21) of Act 101,

> [u]ncontrolled increases in the daily volumes of solid waste received at municipal waste landfills have significantly decreased their remaining lifetime, disrupting the municipal waste planning process and the ability of municipalities relying on the landfills to continue using them. These increases have threatened to significantly and adversely affect public health and safety when municipalities find they can no longer use the facilities. Uncontrolled increases in daily waste volumes can also cause increased noise, odors, truck traffic and other significant adverse effects on the environment as well as on public health and safety.

53 P.S. § 4000.102(a)(21). *See also* 53 P.S. § 4000.1112 (placing restrictions on granting modifications allowing for increased volumes). In short, to the extent that faster payment of fees is a benefit at all, it is largely cancelled out by the local costs and inconveniences associated

therewith.[5]

We are not persuaded by BFI's argument that there are significant incremental environmental benefits associated with the faster pace of landfill operations authorized by the permit modification. BFI argues that filling up the Landfill faster will enable it to reduce odors. In fact, both of its consultants testified that the same amount of waste will produce the same amount of gas, which is the primary source of odors. (T. 1177, 1261.) At the risk of being repetitive, the only thing that has changed here is the *timing*. Accepting more waste more quickly will result in more gas generation more quickly but will also quicken implementation of gas controls. For example, the operation of this Landfill will require a certain number of construction events that will expose old waste. These events appear to be one of the primary causes of off-site malodors. The modification has not materially changed the number of events; it has merely concentrated them over a shorter period of time. Furthermore, the theoretical reduction in short-term odors -- if BFI's argument can be characterized as such -- has been disproven by actual events. We have found that there has, in fact, been a slight increase in short-term malodors associated with increased operations. (F.F. 92, 98, 101, 102.)

BFI points out that faster operations will result in thicker layers of waste and less use of soil. (T. 1126-1127.) We previously noted that we are not convinced that this reduced soil usage has materially increased the Landfill's capacity. BFI has not pressed that point, perhaps because an increase in capacity could have resulted in a rejection of its modification request. *See* 25 Pa. Code § 271.202(f) (no expansions allowed if more than 5 years of capacity remain). Instead, it

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[5] The fact is that BFI pays higher host fees than required by law is not relevant to assessing the benefits of the volume increase itself. Those fees will be higher than required with or without the volume increase. The effect of the volume increase is to change the *rate* of payment.

suggests that the conservation of soil itself is a benefit. We accept that it is a minor benefit. BFI adds that less soil layers will theoretically result in less leachate breakouts, but there is no evidence regarding the relative size and severity of the breakouts that will occur. Further, leachate has not been shown to be a problem at the Landfill, it is not a significant source of odor at the Landfill, and the Landfill has effective leachate control systems in place. Reducing a nonexistent problem can hardly be considered a benefit.

BFI has listed numerous community and economic benefits associated with the operation of the Landfill, and we do not question that it has been a good corporate citizen. The problem with BFI's presentation, however, is that we see little in the way of such benefits associated with the volume increase itself. The Giordanos have successfully demonstrated that there is little or no causative relationship between the tonnage increase and the miscellaneous social and economic benefits listed by BFI and the Department. With only *de minimus* exceptions,[6] the various social and community services and contributions provided by BFI are not tied in any way to the increase. (F.F. 84-86.) They would have been provided with or without the tonnage increase. The scope of operations and the economic boon provided by the Landfill (*e.g.*, employment, equipment purchases, etc.) are essentially unchanged. To the extent there has been any change at all, again, the effect is one of concentrating about the same amount of total benefits over a shorter period of time. Finally, we cannot resist noting the oddity of being asked to consider a $500 contribution to the local fire company to be a benefit justifying the modification when there was no considered attention given to the harm and/or benefit of using

[6] Landfill management used the fact of the volume increase to help persuade upper management to approve certain contributions. (T. 657-658, 717-718.) There was no testimony that the contributions would not have been made but for the modification. The contributions in question were relatively minor.

up landfill capacity worth millions of dollars at an accelerated rate.

Thus, when viewed in its proper perspective, which is the life of the facility, we do not consider the faster availability of the same amount of disposal capacity to necessarily be a net benefit. We do not consider the accelerated payment of host fees to be a net benefit. The environmental, social, and economic benefits of the volume increase are all but nonexistent.

We are having just as much difficulty discerning much in the way of harms resulting from the volume increase. Just as using up space more quickly is not a net benefit, neither is it a net harm. The record supports BFI's characterization of the Landfill as a state-of-the-art facility that is designed, operated, and equipped to handle up to 10,000 tpd of waste.

Furthermore, the types of harms referenced by the Giordanos are not the types of harms that tend to cause long-term environmental damage. There is no proof, for example, of an increased threat of groundwater contamination as a result of the volume increase. Rather, the harms are directly connected to active landfill operations. Once the operations stop, assuming proper closure, the types of harms at issue (smell, litter, noise) will stop.

Some of the harms alleged by the Giordanos have not even been shown to exist in the short term. For example, we have concluded that the volume increase has not resulted in any significant increase in vectors or traffic hazards. The only showing that the Giordanos have been able to make is that, to a very limited extent, the modification has increased malodors, off-site litter at their property, and noise. While these effects are enough to give them standing, absent a harms/benefits test, they would not have been enough to justify rescinding the modification. Not only are the incremental effects slight, as with the benefits, we are not convinced that the concentration of the harms is a net harm when viewed over the life of the facility. It is true that a couple of the harms have been concentrated, but they will end sooner.

The modification has increased malodors over the short term, but the malodors are likely to end sooner. The total amount of odor likely to be produced at the Landfill over the life of the Landfill has not changed. The modification has simply concentrated the nuisance-type effects. Nearby residents may be suffering somewhat more now, but their suffering will end sooner than if the modification had not been approved. Again, this change in the *timing* of the adverse effects leaves us to question whether there has been any *net* harm at all.

In the end, there are almost no incremental harms or benefits resulting from the modification. The only truly meaningful change effected by the modification is an accelerated consumption of valuable landfill space, but there is no basis for characterizing that change as a net benefit or a harm. To the extent the increased present value of host municipality benefit fees is a benefit, it is largely cancelled out by the increased costs and inconveniences associated with accelerated landfill utilization. The other harms and benefits associated with the increased volume have been concentrated but, over the long term, they are essentially unchanged. To the extent there has been any change, it is nominal. Therefore, we cannot say that the benefits of the volume increase clearly outweigh the harms. In a word, the benefits and harms, to the extent that they exist at all, are a wash.

We previously concluded that the Department erred by applying the harms v. benefits test that, at that time, was only set forth in a guidance document. *Giordano*, 2000 EHB 1184. Rather than remand for further consideration, we decided to resolve the appeal on the merits acting in our *de novo* capacity. *Id.* As set forth earlier in this opinion, the only logical course under the unique circumstances of this appeal is to evaluate the merits of the permit modification using the new regulation, which effectively cured the Department's reliance on the improperly promulgated guidance document. Under the new regulation, there is simply no basis

for finding as the Department did that the benefits of the modification to the public clearly outweigh the known and potential harms. Therefore, the modification cannot stand under 25 Pa. Code § 271.127(c).[7]

The Giordanos have continued to press their rather fantastic demand that, in sustaining their appeal, we should invalidate BFI's entire permit. In the alternative, they ask us to reduce BFI's daily volume downward to compensate for the period of litigation during which the Landfill operated at a level that we have now invalidated. Both requests are without merit. The only action at issue in this appeal was the permit modification. Without the modification, this permit reverts back to it status prior to the modification. The underlying permit has not and could not have been attacked in this appeal. That permit, with the average daily limit of 5,210 tons, stands. We also decline the invitation to give our ruling retroactive effect by decreasing future volume limits until a balance is achieved. The Giordanos could have sought, but did not seek, expedited review or a supersedeas. We are also not aware of any precedent for such an order, and we see no good reason to issue such an order here. Our Order will be effective in thirty days in order to give BFI a reasonable opportunity to adjust to the effect of our ruling.

CONCLUSIONS OF LAW

1. The Board has jurisdiction.

2. The Giordanos and Robeson Township have standing.

3. In this particular appeal, in conducting our review, it is appropriate to apply the

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[7] Both the Department and the Giordanos incorrectly cite our holding in our recent decision in *North American Refractories Co. v. DEP*, EHB Docket No. 99-199-L (Adjudication issued May 8, 2001) (*"NARCO"*). *NARCO* has no relevance here. That case addressed the level of deference that this Board must afford to the Department's *interpretation* of an ambiguous regulation. No one has raised a question of regulatory interpretation in this appeal. The instant appeal concerns the Department's *application* of a regulation, which has not been characterized

substantive regulatory standard in place at the time of our review as opposed to the standard in place at the time of the Department's action.

4. In this particular appeal, in conducting our review, it is appropriate to apply a procedural regulatory requirement regarding the order of permit review processes that were place at the time of the Department's action as opposed to the requirements in place at the time of our review.

5. The Department complied with applicable procedural requirements in reviewing BFI's permit application.

6. Robeson Township received adequate notice and was provided with an adequate opportunity to provide comment regarding BFI's application.

7. The limited scope of BFI's environmental assessment and the Department's review thereof were consistent with applicable regulatory requirements. 25 Pa. Code § 271.126(c). This Board must also limit its review of the assessment issues to the permit modification, as opposed to the Landfill as a whole.

8. Our review consists of a *de novo* determination of whether the Department's action was lawful, reasonable, and appropriate. The Giordanos bear the burden of proving that the Department's action was improper by a preponderance of the evidence. 25 Pa Code § 1021.101(c)(2).

9. The Giordanos have proven 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).

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as ambiguous, to a certain set of facts.

10. BFI's permit as it existed prior to the modification (i.e., with an average daily volume of 5,210 tons) remains in effect.

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 22nd day of August, 2001, this appeal is **SUSTAINED**. Effective in thirty (30) days, the permit modification is rescinded, and the Conestoga Landfill's average daily volume shall be 5,210 tons.

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: **August 22, 2001**

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

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOAR

LOWER PAXTON TOWNSHIP	:	
	:	
v.	:	**EHB Docket No. 2000-169-K**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: August 23, 2001**

OPINION AND ORDER ON LOWER PAXTON TOWNSHIP'S MOTION FOR SUMMARY JUDGMENT AND MOTION TO STRIKE

By Michael L. Krancer, Administrative Law Judge

Synopsis:

Lower Paxton Township's revised Act 537 Plan for 1999 proposed the use of so-called Actiflo technology to treat periodic sanitary sewer overflows. The Department denied the proposed Plan on the ground that Actiflo did not constitute "secondary treatment" as that term is defined under federal law and regulations which are incorporated by reference by state regulations. The Township's Motion for Summary Judgment is denied because the issue of whether Actiflo constitutes secondary treatment, and whether it qualifies for the secondary treatment percent removal modification, is a mixed question of law and fact and various important issues of fact remain in dispute or unclear on the record. Also, the Township is not entitled to judgment as a matter of law at this point in the proceedings.

Introduction

The ultimate issues in this case are whether the Actiflo treatment process that Lower Paxton Township proposed in its 1999 Act 537 Plan revision (1999 Plan) to use to treat periodic overflows of untreated sanitary sewer waste (SSOs) can be considered "secondary treatment" under the federal Clean Water Act (CWA or Clean Water Act) and the regulations promulgated thereunder regarding secondary treatment and, further, whether the Actiflo process can qualify for the secondary treatment percent removal modification provided in the federal secondary treatment regulations. The Pennsylvania regulations applicable here incorporate by reference the federal rules regarding secondary treatment, hence the focus on federal law and federal regulations. The Department rejected the Township's 1999 Plan because it contends that Actiflo, as the Township proposes to use it, cannot qualify as secondary treatment or, as a corollary, for the secondary treatment percent removal modification. The Township, of course, contends that Actiflo can so qualify and has moved for summary judgment on that question.

Factual and Procedural Background

Lower Paxton Township, through its Township Authority, owns and manages the Township's sewer system.[1] There are three main interceptors in the Township's system, the Spring Creek Interceptor, the Beaver Creek Interceptor, and the Paxton Creek Interceptor. The ultimate receiving treatment facilities for the Lower Paxton system are the Swatara Publically Owned Treatment Works (POTW) or the Harrisburg POTW.

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[1] Citation form will be as follows: Lower Paxton Township's Motion (LPTSJM); Lower Paxton Township's brief in support of its Motion (LPSJMB); the Department's response (DEPR); the Department's brief in support of its response (DEPRB); Lower Paxton's reply brief (LPR).

During very heavy rain, flows in the sewer system increase dramatically. This is due to so-called "infiltration and inflow" (I/I).[2] Neither the Swatara nor the Harrisburg POTWs have the capacity to treat or handle such increased flows. As a result, overflows of untreated flow occur upstream of the POTWs in Lower Paxton's various interceptors. These overflows are referred to as "sanitary sewer overflows" (SSOs) or peak excess flows. Lower Paxton has apparently been experiencing these SSO problems in its inceptors since at least 1995. The Township and the Department entered into a Consent Decree dated June 13, 1995 in Commonwealth Court which addresses elimination of overload conditions in the Beaver Creek Interceptor by no later than December 31, 2001.

Lower Paxton first undertook what it characterizes as an "aggressive" I/I reduction program to address the SSO problem. However, after attempting to reduce I/I for four years, Lower Paxton alleges that it became apparent that the I/I reduction program was more costly and more uncertain than other potential methods to address the SSO problem. Thus, the Township decided to propose to implement a combination of continued I/I reduction together with construction of facilities to treat peak excess flows to secondary treatment levels.

On March 9, 2000, the Township submitted to the Department its revised Act 537 Plan for 1999 (1999 Plan), the denial of which is the subject of this appeal. The 1999 Plan revision proposed the construction of a "trickling filter" on the Beaver Creek Interceptor. Both parties agree that a "trickling filter" constitutes secondary treatment. For the Paxton Creek Interceptor, Lower Paxton proposed to install an Actiflo treatment system for SSOs.

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[2] Although no precise definition of Infiltration/Inflow (I/I) has been offered, we understand the term to refer to the process whereby stormwater and/or groundwater enters the sewer facilities through breaches in the facilities including, but not limited to, cracked pipes or leaky manholes.

The Department rejected the Township's 1999 Plan revision via letter dated July 11, 2000. The Department's denial letter states, in part, that, "[y]our plan submission is disapproved because you have failed to establish technical suitability of a selected alternative [*i.e.*, Actiflo] for Paxton Creek basin." Furthermore, the Department's denial letter states, "the alternative selected to address the Paxton Creek basin [*i.e.*, Actiflo] proposes the specific use of technology not yet permittable with the Commonwealth."[3]

On June 15, 2001 Lower Paxton filed a Motion for Summary Judgment. The Department responded on July 9, 2001. The Township filed its reply on July 30, 2001. Also on July 30, 2001 the Township filed a Motion to Strike certain parts of the Department's response to its Motion for Summary Judgment. The Department replied to the Township's Motion to Strike on

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[3] Apparently, also by the time of the July 11, 2000 denial letter, the Township had abandoned its intention to implement a trickling filter for the Beaver Creek Interceptor. The July 11, 2000 denial letter states that,

> [a]dditionally, in the Beaver Creek basin, your plan's selected alternative is to construct a trickling filter sewage treatment plant for the purpose of treating excess sewage flows in the system. Again, as discussed during our meeting of June 20, 2000, you expressed intentions to no longer build the proposed established technology, favoring instead the same not yet permittable technology proposed for the Paxton Creek system.

LPSJM Ex. 11. The Department's denial letter of July 11, 2000 also left the door open to its revisiting the Actiflo issue. The letter states that, "[u]pon clarification of the status of this technology, Lower Paxton may resubmit an appropriate modified Act 537 Plan for the Department's review. Therefore, this plan is disapproved without prejudice to a future submission proposing the Actiflo treatment process. Since then, on November 9, 2000, Lower Paxton submitted a revised Act 537 Plan for 2000 dated September, 2000 (2000 Plan). The 2000 Plan proposes the use of Actiflo to treat SSOs on both the Paxton and Beaver Creek Interceptors. The 2000 Plan also includes an NPDES permit application for Actiflo. Although *via* letter dated April 3, 2001, the Department expressed its approval of the use of Actiflo as an interim measure to address SSOs through modification of the 1995 Consent Decree, it maintains that Actiflo cannot be permitted as secondary treatment. LPSJM Ex. 44; Exhibit A to Weaver Affidavit. The Department, thus, disapproved the Township's 2000 Plan via letter dated June 6, 2001. The Township appealed that denial to the Board and that case is docketed at EHB Docket No. 2001-152-K.

August 6, 2001.[4]

The Township argues that there are no issues of material fact relating to the nature of Actiflo and that it is entitled to judgment as a matter of law that Actiflo meets the terms of the federal secondary treatment regulation, including the secondary treatment percent removal modification which are incorporated into state law by reference.

Summary Judgment Standard

As we recently set forth in *Stern v. DEP*,

> Our standard for review of motions for summary judgment has been set forth many times before. We will only grant summary judgment when the record, which is defined as the pleadings, depositions, answers to interrogatories, admissions, affidavits, and certain expert reports, show that there is no genuine issue of material fact *and* the moving party is entitled to judgment as a matter of law. *Holbert v. DEP*, 2000 EHB 796, 807-09 *citing County of Adams v. DEP*, 687 A.2d 1222, 1224 n. 4. (Pa. Cmwlth. 1997). *See* Pa. R.C.P. 1035.1. Also, when evaluating a motion for summary judgment, the Board views the record in a light most favorable to the non-moving party and all doubts as to the existence of a genuine issue of material fact must be resolved against the moving party. *Holbert*, 2000 EHB at 808 (citations omitted).

Stern v. DEP, EHB Docket No. 2000-221-K (Opinion and Order issued June 15, 2001), slip op. at 12.

Discussion

Our focus is on the federal law and federal regulations in this case because the Commonwealth's regulations, which both parties agree are applicable here, incorporate by reference the federal law on secondary treatment. Specifically, 25 Pa. Code § 92.2c(a)(1) provides as follows:

> (a) *Sewage discharges.*
>
> (1) Sewage, except that discharged from a combined sewer overflow which is in compliance with § 92.21a(f) (relating to

[4] The Motion to Strike will be denied for the same reasons set forth in the discussion in *Ainjar v. DEP*, EHB Docket 99-248-K (Opinion and Order issued January 5, 2001) slip op. at 4-6.

> additional application requirements for classes of dischargers) under paragraph (2), or as provided in paragraph (3), shall be given a minimum of secondary treatment.

25 Pa. Code § 92.2c(a)(1). Then 25 Pa. Code § 92.2c(b)(1) provides as follows:

> (b) Secondary treatment for sewage is that treatment which accomplishes the following:
>
> (1) Compliance with the requirements of secondary treatment as defined by the administrator under section 304 of the Federal Act (33 U.S.C.A. § 1314). The regulations promulgated by the EPA in 40 CFR Part 133 (relating to secondary treatment regulations) including amendments thereto, are incorporated by reference.

25 Pa. Code § 92.2c(b)(1).

Although the parties have some disagreement over whether various other particulars of the state rules may differ in some minor manner from the federal law, both parties agree, and we do too, that federal law and federal regulations regarding secondary treatment are applicable to the determination of this case. Indeed, from the very beginning of this case both parties have agreed, as DEP phrased it in its status report to the Board dated October 16, 2000, that "the issues in this matter involve the interpretation of the federal secondary treatment regulations". DEPR Ex. 12 (DEP's October 16, 2000 status report to the Board). The Board has been advised from the early stages of this case by both parties through status reports that each party was seeking advisory opinions from the federal EPA regarding the federal secondary treatment rules and their potential applicability to Lower Paxton's proposed use of Actiflo which would potentially be dispositive of the issues raised in the case. Both parties have corresponded with the EPA and EPA has provided a written product on the matter which both sides claim supports their position and either, does not support, or totally refutes their opponent's position.

In order to provide context to and better address the questions presented in this appeal we

will provide a brief discussion of the history and background of the CWA and where "secondary treatment" fits therein.[5]

The federal Clean Water Act, 33 U.S.C. §§ 1251-1387, is intended, "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" by reducing and eventually eliminating the discharge of pollutants. 33 U.S.C. § 1251(a), (a)(1). The Act regulates the discharge of pollutants by establishing requirements for discharge that must be met by "point sources". *Id.* A "point source" is any discernable, confined and discreet conveyance from which pollutants are or may be emitted. 33 U.S.C. § 1362(14). The CWA mandates varying standards of technology-based treatment as the minimum requirement for different categories of point sources. 33 U.S.C. §§ 1311, 1314. Section 1311 distinguishes between point sources which are POTWs (Publicly Owned Treatment Works) and those which are not.[6]

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[5] We acknowledge with thanks the opinion of Judge Seymour of the United States Court of Appeals for the Tenth Circuit in *Maier et. al v. United States Environmental Protection Agency*, 114 F.3rd 1032 (1997) as we have borrowed heavily from the structure and approach of his discussion of the overall background of the CWA. *See Maier, supra* at 1032-35.

[6] POTWs are commonly referred to and known as sewage treatment plants. Sewage treatment plants receive human waste and are designed to treat the types of contamination found in human waste and which results therefrom which include biochemical oxygen demanding pollutants (BOD) such as nitrogen, suspended solids and pH. 23 COLUM. J. ENVIR. L. 137, 171 n. 179. Thus, the main function of treatment at POTWs is to address the removal of these biological pollutants which affect the oxygen content of wastewater. *Maier, supra*, 114 F.3d at 1035. Water uncontaminated with human waste contains dissolved oxygen which indigenous plant and animal life therein use to maintain survival. *Id.* The pollutants from human waste consume or "demand" this oxygen and take it away. *Id.* The rate at which dissolved oxygen is consumed is measured by "biochemical oxygen demand" commonly denoted as (BOD). *Id.* BOD actually involves the effect of two components of oxygen depletion which are CBOD (carbonaceous oxygen demand) and NOD (nitrogenous biochemical oxygen demand). *Id.* CBOD (or CBOD5) quantifies the amount of oxygen consumed by various microorganisms in metabolizing organic (carbon) matter in the wastewater. *Id.* at 1035 n. 3 *citing* 48 Fed. Reg. 52,272, 52,275 (November 16, 1983). On the other hand, NOD measures the oxygen consumed by other types of bacteria in converting ammonia to nitrite and then to nitrate. *Id.* That process of conversion is referred to as nitrification. *Id.* As we will see, EPA's Secondary Treatment Information Rule establishes limitations on CBOD. See 40 C.F.R. 133.102. This is because CBOD presents a more serious systemic problem and because the technology for measuring

Section 1311(b)(1)(A) requires that effluent limitations for sources other than POTWs be based upon the application of the best practicable control technology currently available as defined by the Administrator pursuant to section 33 USCS § 1314(b). Section 1311(b)(1)(B) applies to POTWs and it states that for POTWs effluent limitations are to be based upon "secondary treatment" as defined by the Administrator pursuant to section 33 USCS § 1314(d)(1).[7]

Section 1311(b)(1)(A) which authorizes or directs the Administrator of the EPA to define "secondary treatment" reads as follows that:

> (d) Secondary treatment information; alternative waste treatment management techniques; innovative and alternative wastewater treatment processes; facilities deemed equivalent of secondary treatment.
>
> (1) The Administrator, after consultation with appropriate Federal and State agencies and other interested persons, shall publish within sixty days after enactment of this title [enacted Oct. 18, 1972] (and from time to time thereafter) information, in terms of amounts of constituents and chemical, physical, and biological characteristics of pollutants, on the degree of effluent reduction attainable through the application of secondary treatment.

33 U.S.C. § 1314(d)(1). Other than Sections 1311(b)(1)(B) and 1314(d)(1), the CWA does not discuss or define the concept or "secondary treatment" any further. *Maier*, *supra*, at 1041.

Pursuant to Section 1311(b)(1) and 1314(d)(1)'s direction that the Administrator define

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CBOD has been more advanced and available than that for measuring NOD. *Maier*, *supra*, 114 F.3d at 1035 n. 4 *citing* 48 Fed. Reg. 52,272, 52,275 (November 16, 1983). The *Maier* case itself involved a citizens' suit to compel the EPA to establish secondary treatment levels for NOD. *Maier*, *supra*, 114 F.3d at 1032.

[7] Interestingly, when Congress first passed the CWA, it contained a provision which would have phased in a requirement that POTWs implement a more stringent standard that "secondary treatment" referred to as "best practicable waste treatment technology". 33 U.S.C. § 1311(b)(2)(B) (1973)(repealed); *see also* S. REP. NO. 92-414, at 43 (1972), reprinted in 1972 U.S.C.C.A.N. 3668, 3709 ("Publicly-owned treatment systems must meet the secondary treatment requirement of Phase I and, in Phase II, the mandate requires the best practicable treatment ...."). In 1981 Congress passed the Municipal Wastewater Treatment Construction Grant Amendments of 1981, Pub. L. No. 97-117, § 21(b), 95 Stat. 1623, 1632 (1981) which repealed Section 1311(b)(2)(B) and limited the application of the stricter standard to federally-funded POTWs. *See Maier*, *supra* at 1035.

"secondary treatment", the EPA first promulgated regulations setting forth what "secondary treatment" is in 1973. 38 Fed. Reg. 22298; 48 Fed. Reg. 52259. That regulation was referred to as the "Secondary Treatment Information Regulation" borrowing from the terminology used in CWA Section 1314(d)(1). 48 Fed. Reg. 52259. Today's version of the secondary treatment regulation or the secondary treatment information regulation is set forth at 40 CFR Part 133, 40 CFR §§ 133.100-105. The relevant portions of the federal regulations involved in this case are 40 C.F.R. §§ 133.102 and 133.103(d) which provide as follows:

> The following paragraphs describe the minimum level of effluent quality attainable by secondary treatment in terms of the parameters—BOD5, SS and pH. All requirements for each parameter shall be achieved except as provided for in §§ 133.103 and 133.105.
>
> (a) BOD5.
> (1) The 30-day average shall not exceed 30 mg/l.
> (2) The 7-day average shall not exceed 45 mg/l.
> (3) The 30-day average percent removal shall not be less than 85 percent.
> (4) At the option of the NPDES permitting authority, in lieu of the parameter BOD5 and the levels of the effluent quality specified in paragraphs (a)(1), (a)(2) and (a)(3), the parameter CBOD5 may be substituted with the following levels of the CBOD5 effluent quality provided:
> (ii) The 30 days average shall not exceed 25 mg/l.
> (iii) The 7-day average shall not exceed 40 mg/l.
> (iv) The 30-day average percent removal shall not be less than 85 percent.
>
> (b) SS.
> (1) The 30 day average shall not exceed 30 mg/l.
> (2) The 7-day average shall not exceed 45 mg/l.
> (3) The 30-day average percent removal shall not be less than 85 percent.
>
> (c) pH. The effluent values for pH shall be maintained within the limits of 6.0 and 9,0 unless the publicly owned treatment works demonstrates that: (1) Inorganic chemicals are not added to the waste stream as part of the treatment process; and (2) contributions from industrial sources do not cause the pH of the effluent to be less than 6.0 or greater than 9.0.

40 C.F.R. § 133.102; and

(d) *Less concentrated influent wastewater for separate sewers.* The Regional Administrator or, if appropriate, State Director is authorized to substitute either a lower percent removal requirement or a mass loading limit for the percent removal requirements or a mass loading limit for the percent removal requirements set forth in §§ 133.102(a)(3), 133.102(a)(4)(iii), and 133.105(e)(1)(iii) provided that the permittee satisfactorily demonstrates that: (1) The treatment works is consistently meeting, or will consistently meet, its permit effluent concentration limits but its percent removal requirements cannot be met due to less concentrated influent wastewater, (2) to meet the percent removal requirements, the treatment works would have to achieve significantly more stringent limitations than would otherwise be required by the concentration-based standards, and (3) the less concentrated influent wastewater is not the result of excessive I/I. The determination of whether the less concentrated wastewater is the result of excessive I/I will use the definition of excessive I/I in 40 CFR 35.2005(b)(16) plus the additional criterion that inflow is nonexcessive if the total flow to the POTW (i.e., wastewater plus inflow plus infiltration) is less than 275 gallons per capita per day.

40 C.F.R. § 133.103(d).

There is no separate definition of "secondary treatment" in Part 133. Section 133.102 of the secondary treatment regulation establishes base gross numerical effluent discharge limitations for BOD5 and TSS which because of the numerical limitations so established are referred to in short-hand as the "30/30" limitations. Also, this section of the secondary treatment regulation establishes a percentage removal requirement for BOD5 and TSS of 85% removal and a limitation on pH in the effluent of between 6.0 to 9.0 is established under normal circumstances. Section 133.103(d) provides for a percent removal modification in the case of certain special circumstances, *i.e.*, less concentrated influent from separate sewers.

The Rule does not define or prescribe any particular technology or method that is to be used to attain the numerical limits set forth therein. Historically, the secondary treatment rule has never dictated what particular technology or technique was "secondary treatment" nor has EPA ever so directed. Instead, "secondary treatment" has been "defined" as certain numerical levels

that must be met. The original Secondary Treatment Regulation, promulgated in 1973, "defined" "secondary treatment" to mean the attainment of specified numerical limits of biological oxygen demand (BOD5), and suspended solids (TSS) and 85% removal of the same pollutants measured over a period of 30 consecutive days. *See* 48 Fed. Reg. 52259 (November 16, 1983).

The Township claims that Actiflo is eligible to be considered as secondary treatment under the secondary treatment rule and that the Section 133.103(d) percent removal modification is applicable to Actiflo. Fundamental to the Township's argument is that secondary treatment as outlined in the Rule has nothing to do with any particular technology or technique but, instead, is keyed only on meeting the numerical standards outlined in 40 C.F.R. § 133.102 and 133.102(d). The Township relies on this argument because, unlike traditional secondary treatment methods which rely on biological processes to effectuate treatment, Actiflo is not a biological process. The Department, on the other hand, seems to be arguing that the qualitative nature of the technology or technique being used has some bearing on the question whether something is or is not secondary treatment. The Department's papers reiterate over and over again its allegation that Actiflo is not designed to provide secondary treatment *of any type. See; e.g.,* DEPR ¶¶ 14, 20, 36. It is true that the Department grudgingly admits that it is at least conceivable that something other than biological treatment could conceivably be considered secondary treatment. The Department states that, "although the Rule does not specify what treatment technology constitutes secondary treatment, the regulation does require treatment beyond primary treatment whether biological or otherwise. At present, the state of the art secondary treatment is biological treatment" and, further, that, "biological treatment is presently the most cost effective and efficient secondary treatment that we know of." DEPR ¶¶ 56, 58. Thus, to the Department, secondary treatment other than biological treatment is like the unicorn: it may exist but they have

not seen one. As to Actiflo, DEP maintains that it has looked at it and it is not a non-biological process that can be considered as secondary treatment.

To put it another way, the Township argues that it is only what comes out of the black box that determines whether there has been secondary treatment and that what is inside the black box effectuating the treatment is totally irrelevant. The Department thinks that what is inside the black box effectuating the treatment as well as what comes out after treatment is important in determining whether what is inside qualifies as being considered secondary treatment. The Department further thinks that Actiflo is not a technology or technique that is allowed inside the black box. Also, the Department alleges that, in any event, Actiflo cannot even effectuate treatment such that the effluent coming out of the black box will meet the numerical levels set forth in the Secondary Treatment Information Rule.

The Township's argument that secondary treatment is based on what comes out of the black box only and has nothing to do with what is inside has some appeal. As we have outlined, the Secondary Treatment Information Rule itself neither today, nor historically, has it ever prescribed or proscribed any particular technique as coming within the ambit of secondary treatment. The concept of secondary treatment in the regulations has always been defined by reference to the attainment of particular treatment levels. In addition, EPA has historically emphasized that the choice of what particular treatment technology or method to employ as secondary treatment is left to the facility. In 1975, EPA published a work entitled "Alternative Waste Management Techniques for Best Practicable Waste Treatment" (referred to by EPA and hereinafter as BPWTT) directed to federally-funded POTWs. This work was published under the mandate to EPA set forth in 33 U.S.C. § 1314(d)(1) which is the same section under which the EPA promulgated the original 1973 Secondary Treatment Information Rule. The BPWTT,

although primarily directed to dealing with federally-funded POTWs' efforts to meet the more stringent requirement of "best practicable technology" discussed also the concept of "secondary treatment". The BPWTT did not either qualify or disqualify any specific techniques or technologies as being able to be considered "secondary treatment". 48 Fed. Reg. 52260 (November 16, 1983). The Agency further said in its Preamble to the 1983 proposed amendment to the Secondary Treatment Information Regulation that, "[t]he BPWTT document reviewed alternative techniques available for achieving secondary treatment, including biological treatment such as the use of (waste stabilization) ponds, activated sludge, and [trickling filters], but left the basic decisions on the choice of a technology or alternative waste management technique to a case-by-case cost-effectiveness analysis." *Id.*

Apparently in 1972 when Congress passed the CWA, in 1973 when the first Secondary Treatment Information Rule was promulgated and in 1975, when EPA published the BPWTT, the generally accepted and conventional approach to secondary treatment was the use of a biological process. The Agency noted in its 1983 Preamble to the proposed amendments to the Secondary Treatment Information Rule that the BPWTT,

> identified three types of biological treatment systems for achieving secondary treatment; activated sludge, trickling filters, and ponds. All three types of biological treatment were in general use in 1975 and prior to the passage of the [CWA] either as sole processes or in combination; however, the activated sludge process is by far the most typical or "standard" method in use.

48 Fed. Reg. 52261 (November 16, 1983).

Today, secondary treatment has become a term of art. As Judge Seymour commented in *Maier*, "the phrase 'secondary treatment' has an independent meaning apart from its statutory context". *Maier*, *supra*, 114 F.3d at 1042. Whether erroneously or not, secondary treatment has become virtually synonymous with biological treatment. The literature is replete with references

to secondary treatment as being biological treatment. On page 75 of the EPA NPDES Permit Writers' Manual it is stated that, "[a]n important aspect of municipal wastewater is that it is amenable to biological treatment. The biological treatment component of a municipal treatment plant is termed secondary treatment and is usually preceded by a simple settling (primary treatment)." DEPR Ex. 28. In the 1998 EPA publication entitled "How Wastewater Treatment Works...The Basics" it is stated that "the secondary stage of treatment removes about 85 percent of the organic matter in sewage by making use of the bacteria in it." DEPR Ex. 29. The 2000 EPA publication entitled "Progress In Water Quality, An Evaluation of the National Investment in Municipal Wastewater Treatment", states that, "[s]econdary treatment, in contrast [to primary treatment] yields a much cleaner effluent because it uses biological processes to break down much of the organic matter contained in the wastewater before allowing the wastewater to leave the facility". DEPR Ex. 30.

In addition, Courts, scholarly journals of environmental law and environmental treatises have all talked about secondary treatment and biological treatment as being one and the same. Judge Seymour in *Maier* writes that, "secondary treatment generally refers to a process of physical and biological treatment of wastewater to remove pollutants which deplete the water's oxygen content and increase its acidity. *Maier*, *supra* 114 F.3d at 1035 n.2. Paul S. Weiland, writing in the 2000 *Harvard Environmental Law Review*, states that, "[p]rimary treatment is a physical process that allows organic solids to settle out of wastewater. Secondary treatment is a biological process that utilizes microorganisms to remove dissolved organics from wastewater. 24 HARV. ENVTL. L. REV. 237, 242 (2000) *citing* Penelope Revelle & Charles Revelle, *The Environment; Issues and Choices For Society,* 289-90 (3d ed. 1988).[8]

[8] The 1981 amendment to the CWA did incorporate some qualitative parameters with respect not to secondary treatment but as to treatment which would be considered the "equivalent

As we see it though, the question is not, as the Township seems to put it, whether, in isolation, can some non-biological treatment process be eligible for being considered secondary treatment. As we said, DEP admits that the answer to that hypothetical question is yes. The question as we see it at this point is whether this particular non-biological treatment system, *i.e.*, Actiflo, under the circumstances the Township proposes to use it, can be considered as secondary treatment. This question is a mixed question of fact and law. The answer is dependent upon a

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to secondary treatment." In 1981, as we have discussed in Footnote No. 7, Congress passed the MWTCGA. As we discussed there, a prominent feature of the MWTCGA is that it relieved non-federally funded POTWs from the requirement that they be subject to the requirement to "apply best practicable waste treatment technology". Another feature of the MWTCGA is that it specifically stated that *biological* treatment facilities such as oxidation ponds, lagoons, and ditches and trickling filters are deemed "the equivalent" of secondary treatment. The Act states as follows:

> (4) For the purposes of this subsection, such biological treatment facilities as oxidation ponds, lagoons, and ditches and trickling filters shall be deemed the equivalent of secondary treatment. The Administrator shall provide guidance under paragraph (1) of this subsection on design criteria for such facilities, taking into account pollutant removal efficiencies and, consistent with the objective of the Act, assuring that water quality will not be adversely affected by deeming such facilities as the equivalent of secondary treatment.

33 U.S.C. § 1314(d)(1). The Secondary Treatment Information Rule was amended to reflect this statutory amendment. The primary denouement of this generation of amendments resulted in today's regulations regarding the definition of and standards for "facilities eligible for treatment equivalent to secondary treatment". See 40 CFR §§ 133.101, 105. In short, facilities that are eligible for treatment as equivalent to secondary treatment are provided less stringent numerical standards than those set forth in 40 C.F.R. § 133.102. 40 C.F.R. § 133.105. To be considered a facility eligible for treatment equivalent to secondary treatment a facility must employ: (1) a trickling filter or waste stabilization pond, both biological methods of treatment as we understand it, is used as the principal process; or (2) provide significant biological treatment of municipal wastewater. 40 C.F.R. § 133.101(g)(1). Also, the Rule defines "significant biological treatment" to mean, "the use of an aerobic or anaerobic biological treatment process in a treatment works to consistently achieve a 30-day average of at least 65 percent removal of BOD5." 40 C.F.R. § 133.101(k). Thus, facilities considered "equivalent to secondary treatment" are provided a modification from the secondary treatment numerical limits outlined in 40 CFR § 133.102 but the rub is that in order to be considered the equivalent to secondary treatment there must be significant biological treatment involved in the process. These provisions are not applicable to Actiflo since there is no biological treatment involved in Actiflo. Thus, if Actiflo comes within

close examination of exactly what Actiflo does and how it does it and, then, application of those facts to the law, *i.e.*, the secondary treatment rule. However, at this stage of the proceedings, the record is in dispute about exactly what Actiflo is and, perhaps more importantly with respect to application of the secondary treatment rule, what it is not. Also, the record is insufficient to reveal what Actiflo does and, again, perhaps more importantly for purposes of application of the secondary treatment rule, how it does whatever it does.

The parties do agree on this much about Actiflo—it is not based on biological treatment. That, though, is about all they agree on about Actiflo. The Township alleges that, "Actiflo is a trademark name of a treatment process utilizing physical and chemical treatment. It is a high rate "ballasted flocculation" treatment process capable of treating BOD5 and TSS in municipal wastewaters on an intermittent basis." LPMSJ ¶ 7. The Township's 1999 Plan describes Actiflo as "high rate, ballasted settling" and as "physical-chemical treatment consisting of screening, high-rate ballasted settling". LPR, Affidavit of Jeffrey Wendle, P.E., Ex. 1, 1999 Plan pp. 8-7, 5-15. Actiflo is also described as "involv[ing] a high rate physical/chemical treatment process manufactured by Kruger, Inc., capable of reducing BOD5, TSS, fecal coliform, metals and organic nutrient levels." LPR, Affidavit of William R. Weaver, Ex. A., Response of the Department to Lower Paxton's Request For Admission No. 79.

The Department denies the essence of even these general descriptions. The Department alleges that Actiflo is designed to treat only the suspended solids (TSS) in the wastewater. DEP alleges that Actiflo is not designed to treat BOD5 and that any removal of BOD5 which may occur happens coincidentally during the settling process and varies depending upon the amount of BOD5 associated with those solids that can be settled by Actiflo. DEPR ¶ 7. Furthermore, the

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any modification of the numerical standards set forth in 40 C.F.R. § 102 it must be through 40 C.F.R. § 133.103(d).

Department asserts that Actiflo is "only primary settling technology". DEPR ¶ 37. Timothy Carpenter, a Permits Engineer in the Department's Water Management Program, states in his affidavit submitted with the Department's Response to the Township's Summary Judgment Motion that,

> Actilfo process is not a biological process but is rather a physical-chemical process that primarily provides solids separation by using a physical-chemical method that agglomerates solids by chemical addition followed by high-rate settling to separate the easily removed solid particles from the wastewater. Any reduction in oxygen demanding pollutants that occurs in Actiflo is only incidental and is associated with the physical solids separation that is used. Actiflo does not use any biological activity or add any oxygen to the wastewater to deal with the oxygen demanding dissolved pollutants that are a major component of untreated sewage.

Carpenter Affidavit, DEPR Ex. 5.

These essentially factual disputes about the very nature of Actiflo must be resolved through a factual record to be developed at trial in order for us to apply the facts to the law.

Also, we cannot say that the Township is entitled to judgment as a matter of law on the legal questions presented even ignoring that some of the Township's legal arguments are dependent upon facts which are either in dispute or not yet fully developed. The Township cites two cases in support of its argument that the Secondary Treatment Information Rule establishes only effluent limitations as the basis for determining whether something qualifies for being considered secondary treatment and that the nature of the technology or technique being employed is totally irrelevant, *American Iron & Steel Institute v. EPA*, 543 F.2d 521, 528 (3rd Cir. 1976) *and Crown Simpson Pulp Co. v. Costle*, 599 F.2d 897, 902 (9th Cir. 1979) in that order. Neither of these cases address the POTW Secondary Treatment Information Rule. Both deal with effluent limitations for non-POTW sources under 33 U.S.C. § 1311(b)(1)(A) and 1314(b). As we discussed before, the POTW secondary treatment rule comes from 33 U.S.C. §§

1311(b)(1)(B) and 1314(d)(1). The CWA contains a structural dichotomy between sources other than POTWs and POTWs. More than that, the CWA established a substantive dichotomy in the way non-POTWs and POTWs were to be handled. Indeed, 33 U.S.C. § 1314(b), which applies to non-POTWs, is specifically entitled "effluent limitations". In contrast, the co-relative provision regarding POTWs, Section 1314(d), refers to "Secondary Treatment Information Rule" being promulgated by the Administrator of EPA. We are reluctant, therefore, to transfer whatever lesson may be contained in the *Crown Simpson* or *AISI* cases to the POTW setting.

It is not at all clear to us at this point that the test for qualifying as secondary treatment can be as completely content neutral as the Township claims. The history of the development of the Secondary Treatment Information Rule shows that from its very inception, EPA did not countenance any technology for secondary treatment that involved dilution of contaminants. For instance, the 1983 proposed amendments to the Secondary Treatment Information Rule make clear and reiterate that the central purpose of the percent removal requirement which was part of the original Secondary Treatment Information Rule in 1973 was to achieve two basic objectives: "(1) to help encourage municipalities to correct excessive I/I (inflow and infiltration) to their sanitary sewer systems, and (2) to help prevent intentional dilution to influent wastewater." 49 Fed. Reg. 37010 (September 20, 1984). These fundamental precepts, encouragement to municipalities to correct excessive I/I and abhorrence of dilution as a solution, have been repeated by the Agency again and again in its various amendments over the years to the Secondary Treatment Information Rule. *See, e.g.*, 49 Fed. Reg. 37010, 37010 (September 20, 1984); 50 Fed. Reg. 23382 (June 3, 1985); 52 Fed. Reg. 4224 (June 27, 1989).

The Department in this case has claimed that Actiflo is nothing more than a dilution technology, especially with respect to BOD5. DEPR ¶ 7, DEPRB p. 10-11. Also, the parties

dispute whether Actiflo actually treats BOD at all. The Township alleges that it does but the Department alleges that it does not. *Compare* LPSJM ¶ 7 with DEPRB ¶ 7. The Department alleges that any amelioration in oxygen demanding contaminants that may take place in concert with Actiflo is merely coincidental to the separation and dilution which takes place. Given the history of the POTW Secondary Treatment Information Rule and the specific words of the regulation itself, it would be difficult to imagine that a procedure that either did not treat BOD, or effectuated a reduction of BOD through dilution only, could be considered secondary treatment. That question is not amenable to resolution at this stage on summary judgment.

Also, the Department has claimed that Actiflo is nothing more than a "band-aid" for the Townships fundamental systemic I/I problem which it has refused to deal with. That issue requires trial. We cannot resolve it on the papers.

Moreover, there is a definition of "primary treatment" in the regulations which does involve the dictation of certain specific qualitative techniques or technologies. The regulations define "primary or equivalent treatment" as "treatment by screening, sedimentation, and skimming adequate to remove at least 30% of the biochemical oxygen demanding material and of the suspended solids in the treatment works influent, and disinfection, where appropriate. 40 C.F.R. § 125.58(r). Thus, it is not inconceivable that those methods that are specified to be primary treatment are not to be considered as appropriate secondary treatment. In any event, the record is not clear whether, and if so, to what extent, Actiflo may be based on treatment by screening, sedimentation, and skimming.

There are also unresolved factual and legal issues regarding whether Actiflo can qualify for the percent removal modification set forth in 40 C.F.R. § 133.103(d). The percent removal

modification in 40 C.F.R. § 133.103(d) allows, under certain special circumstances, a lower percent removal of BOD5/CBOD5 and SS than the 85% removal prescribed in the general Secondary Treatment Information Rule of 40 C.F.R. § 133.102(a)(3), (a)(4)(iii), (b)(3). In other words, 40 C.F.R. § 133.103(d) acts as a variance or waiver provision for the usual secondary treatment percent modification requirement in the case of special circumstances. The special circumstances for application of the 40 C.F.R. § 133.102(d) percent removal modification is the presence of less concentrated influent wastewater for separate sewers along with three other factual predicates that are set forth in the regulation. The percent removal modification of 40 C.F.R. § 133.103(d) applies only to the percent removal parameter on BOD and SS and not to 30/30 numerical limitations on BOD or SS or to the pH limitations established in 30 C.F.R. § 133.102.

First, the Department, again, is arguing that the threshold question for application of the percent removal modification is that the treatment be secondary treatment in the first place. That either the same or a close relative to the mixed question of law and fact regarding whether, qualitatively, Actiflo, is the type of treatment that can be considered secondary treatment, that we have already discussed and that we are not able to resolve at this point. Also, the Department seems to be arguing that in order to qualify for the percent removal modification as to less concentrated influent wastewater there must be a demonstration that the technology achieves 85% removal under normal operating conditions. This particular point is hard to glean from the regulations and will require further development if the Department is to win it. In any event, we cannot now rule on that question one way or the other.

Also, it is not clear on this record that the Actiflo process can actually meet the 30/30 numerical limitations for BOD5 and TSS, which are not modified by 40 C.F.R. § 133.103(d), and

the modified percent removal limitations set forth in 40 C.F.R. § 133.103(d). This issue remains an open one and it will have to be resolved at trial.

In addition, there are three factual predicates to entry into the percent removal modification coverage: (1) the treatment works is consistently meeting, or will consistently meet, its permit effluent concentration limits but its percent removal requirements cannot be met due to less concentrated influent wastewater; (2) to meet percent removal requirements, the treatment works would have to achieve significantly more stringent limitations than would otherwise be required by the concentration-based standards; and (3) the less concentrated influent wastewater is not the result of excessive I/I. 40 C.F.R. § 133.103(d)(1)-(3). The regulation provides that the determination of whether the less concentrated wastewater is the result of excessive I/I will use the definition of excessive I/I in 40 C.F.R. § 35.2005(b)(16) plus the additional criterion that inflow is nonexcessive if the total flow to the POTW (*i.e.*, wastewater plus inflow plus infiltration) is less than 275 gallons per capita per day. 40 C.F.R. § 133.103(d). The incorporation of the requirement that in order to qualify for the percent removal modification, the less concentrated influent must not be the result of excessive I/I reflects the EPA's consistent position since the first Secondary Treatment Information Rule was promulgated in 1973 that one of the purposes behind having a percent removal requirement is to help encourage municipalities to correct excessive I/I to their sanitary sewer systems. *See* 49 Fed. Reg. 37010, 37010 (September 20, 1984); 50 Fed. Reg. 23382 (June 3, 1985); 52 Fed. Reg. 4224 (June 27, 1989).

The Department alleges that the less concentrated influent is due to excessive I/I. Both parties have submitted various affidavits and documentation on that issue. We cannot resolve that issue on the papers. Nor can we conclude on the basis of the papers that the other two factual predicates have been established.

The Township's own 1999 Plan highlights that this case cannot be resolved now on summary judgment in the Township's favor. The 1999 Plan states directly that the Actiflo process does not meet the secondary treatment requirements. On page 5-15 of the Plan, the Township states that, "[b]ecause BOD removal capabilities of this type of system do not meet secondary treatment requirements, it [meaning Actiflo] is not currently approved for this purpose in Pennsylvania, nor is it currently approved by EPA on a national basis." Then, on page 8-7 the Township's Plan states that, "[t]he peak treatment facility using high-rate ballasted settling (e.g., Actiflo) is not currently approved by either EPA or DEP because it does not meet secondary treatment standards." DEPR Ex. 19; LPR Wendle Aff., Ex. 1. Also, Mr. Wendle testified in deposition testimony given on April 11, 2001 that he did not consider Actiflo to be secondary treatment for standard sewage sludge. DEPR Ex. 23 (Wendle Dep. Tr. p. 89).

The Township submits with its response papers the affidavit of Mr. Jeffery G. Wendle, P.E which he executed on July 30, 2001. Mr. Wendle asserts that those statements are merely the reiteration of what he was told by a Department staff member. He further states that, subsequently, he had occasion to review existing Actiflo performance data and that based thereon he concludes that, "unfortunately, while the 85 percent removal of TSS is achievable with Actiflo, BOD removal falls short of 85 percent removal on regular domestic wastewater". He then conclusorily states that, he did not mean to say that the 30/30 BOD/TSS concentration limits could not be met during peak flow events, "nor did it consider that the Actiflo facility was eligible for a percent removal waiver for dilute wastewater." Then he says that, "Actiflo *could* be eligible for less restrictive percent removal limits as allowed under federal regulation." *(emphasis added)*

This discourse in which the Plan's author either clarifies, as the Township would call it, or contradicts or disputes his own statements in the Plan, as the Department would likely call it, underscores why a trial is necessary. The affidavit is confusing and even baffling. The Plan as written does not attribute the statements that Actiflo does not qualify for consideration as secondary treatment to an official of the Department as the affidavit now asserts. Also, Mr. Wendle first says that Actiflo is, then he says it could be eligible for the percent removal modification. Besides being internally inconsistent as to whether Actiflo is, or could be, so eligible, there is no explanation in support of either proposition.

We need to hear and see Mr. Wendle talk about these and other matters in order to evaluate his credibility. Moreover, we need to do so as to all of the other witnesses and expert witnesses whose written work has been placed before us, in the summary judgment papers of both sides. As the Township has pointed out in a separate motion to strike parts of the Department's summary judgment response papers, the Department too has submitted numerous expert and other affidavits containing conclusory statements and/or opinions of law.

Indeed, both parties' submissions are comprised in large part of dueling affidavits and expert affidavits or reports which conclude either that Actiflo is, in the case of the Township, or Actiflo is not, in the case of the Department, secondary treatment and within the coverage of the secondary treatment percent removal modification rule. As we recently reiterated in *Stern v. DEP*, EHB Docket No. 2000-221-K (Opinion and Order issued June 15, 2001), slip op. at 22-23, we will decline to conduct a trial on the papers. This is especially true where, as here, much of the papers are expert and other competing affidavits. In such cases, the credibility of witnesses is an important subject which needs to be evaluated. *Id. See also, Defense Logistics Agency v. DEP*, EHB Docket No. 2000-004-MG slip op. at 6 (Opinion and Order issued April 16,

2001)(Chairman Miller writing that where resolution of the case requires the Board to consider disputed facts and to make judgments concerning the credibility of witnesses, summary judgment is inappropriate).

The fact that this case is not appropriate for summary judgment is further supported by the various correspondence both parties have had with EPA on the question of the secondary treatment regulations with respect to Actiflo. Both parties in this case sought advice and guidance from EPA on whether Actiflo could qualify as secondary treatment and whether it could qualify for the secondary treatment percent removal modification. Six letters, spanning a period from September 6, 2000 to March 2, 2001, both to and from EPA on this subject, have been presented by both parties as exhibits to their respective motion papers. DEPR Ex. 15 and LPSJM Ex. 18 (September 6, 2000 from Mr. Hall to Mr. Cook, EPA Headquarters), LPB Ex. 22 (October 12, 2000 from Mr. Weaver of Lower Paxton Township to Mr. Cook), DEPR Ex. 16 and LPSJM Ex. 23 (October 17, 2000 from Mr. Cook to Mr. Hall), DEPR Ex. 17 and LPB Ex. 33b (March 2, 2001 from Ms. Regas, Acting Assistant EPA Administrator to Congressman George W. Gekas), DEPR Ex. 18 and LPSJM Ex. 24 (October 16, 2000 from Mr. Marrocco to Mr. Cook). DEPR Ex. 20 and LPSJM Ex. 29 (November 16, 2000 from Mr. Oberdick of DEP to Mr. Cook). Both parties claim that EPA vindicates their positions and either does not support or refutes their opponent's. The Township, in its reply brief, claims that "it is inconceivable that the Department would claim that EPA's letters support DEP's position." LPR p. 16. Thus, the Township disputes even that the Department could dispute the Township's reading of the EPA pronouncements.

Clearly, there is a dispute about what the EPA correspondence means and how it applies to this case. At this point, the only thing that is clear about the EPA correspondence is that it is

unclear. The Township itself seems to so admit as it informed the Board by status report dated June 29, 2001, which post-dates any correspondence to or from EPA which the parties have presented, that, "the parties have been unable to schedule a meeting with EPA Headquarters and Region III, *so that EPA may further explain and clarify its letter regarding the permitability of peak excess flow treatment plants*." DEPR Exs. 26, 29 (*emphasis added*).

In addition, although both parties presume that the EPA correspondence does have some lesson to be applied in this case, although they would have us apply diametrically opposed ones, we are not sure at all whether the EPA correspondence in the form it has been presented to us has any impact on the specific decision we have to make in this case. In this vein, the Department disputes even that the correspondence to and from EPA can be characterized as being about Actiflo since the original letter from Mr. Hall to Mr. Cook dated September 6, 2000 seeking EPA's input does not even mention the word Actiflo or describe Actiflo with any particularity. To the extent the proffered EPA correspondence means anything, we cannot rely on it as a basis to support summary judgment.

A case we find somewhat enlightening in arriving at the determination that this cannot be a summary judgment case is *Starrett v. United States of America, Department of the Navy*, 847 F.2d 539 (9th Cir. 1988). This involved the question whether the Navy's process of demilling old ammunition at its base in Bangor, Washington constituted secondary treatment. Demilling involved drilling holes in old rockets and passing steam through to liquify the explosive material and then separating that explosive material from the water. The wastewater from this operation was strained through a cheesecloth and then piped into a sump and finally pumped into a trench. *Id.* Suit was brought by a nearby landowner whose well had allegedly been contaminated by the Navy's demilling operation at Bangor.

The District Court dismissed the case under the exception to the Federal Tort Claims Act's discretionary function exception which immunizes the federal government for actions performed which are based on its exercise of or performance of a discretionary function. *Id.* at 540-41. On appeal, the Ninth Circuit first held that the discretionary function exception did not apply because an Executive Order, which had been issued by President Johnson in 1965, required that the Executive Branch shall follow all water pollution control laws and regulations including provision for secondary treatment for all wastes. *Id.* at 541-542. As to the issue of whether the demilling process constituted secondary treatment, the Court concluded that this was a disputed issue and one that was inappropriate for summary judgment reasoning as follows:

> There is some question whether the trench method of waste disposal for the demilling process included secondary treatment. See 33 U.S.C. § 1314(d)(4) (describing "ditches" as the equivalent of secondary treatment, provided that discharge emission is reduced to levels specified by regulation); 40 C.F.R. § 133.105 (1987)(detailing those standards). Whether the trench system satisfied the requirement of 'secondary treatment' is a question of fact which depends on evidence of the actual emission of contaminants into the groundwater.

Id. at 542. We do have more on the record here than in *Starrett*, much more. However, as we have said, we are loath to try our cases on papers and affidavits. Also, as did the *Starrett* Court, we believe that the issue of whether Actiflo, as proposed to be used here, constitutes secondary treatment is a matter that must be subject to trial.

In conclusion, only a trial can flush out whether Actiflo, as it would be used here, is or is not a non-biological method of treatment which can be considered secondary treatment and whether it comes within the ambit of the secondary treatment percent removal modification. We will need a trial to determine whether Actiflo is the unicorn which, as the Department asserts, is

only a "fabulous monster", or, whether, on the other hand, it is "as large as life, and twice as natural", as the Township asserts.[9]

[9] Lewis Carroll, *Alice In Wonderland*, Second Edition, Edited by Donald J. Gray, p. 175.

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

LOWER PAXTON TOWNSHIP	:	
	:	
v.	:	**EHB Docket No. 2000-169-K**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 23rd day of August, 2001, the Township's Motion for Summary Judgment is **DENIED** and the Township's Motion To Strike filed on July 30, 2001 is **DENIED**.

ENVIRONMENTAL HEARING BOARD

MICHAEL L. KRANCER
Administrative Law Judge
Member

DATED: **August 23, 2001**

c: **DEP Bureau of Litigation**
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WILLIAM T. PHILLIPY II
SECRETARY TO THE BOAI

KIM GRAVES and BOB NORTH, INC.	:	
	:	
v.	:	**EHB Docket No. 2000-189-MG**
	:	**(Consolidated with EHB Docket**
	:	**Nos. 2000-217-MG and**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**2000-219-MG)**
	:	
	:	**Issued: August 28, 2001**

OPINION AND ORDER ON MOTION FOR PARTIAL SUMMARY JUDGMENT

By George J. Miller, Administrative Law Judge

Synopsis:

The Board grants in part and denies in part a motion for partial summary judgment in an appeal of an order which revokes the appellants' storage tank permits and orders leak detection records and a limited release investigation. The Board grants the motion inasmuch as the facts underlying its enforcement action have been largely established by the appellants' failure to appeal an earlier civil penalty assessment and administrative order. However, the Board denies the Department's motion for summary judgment which asks the Board to find as a matter of law that its order revoking the storage tank permits for one of the appellants' facilities was necessary to aid in the enforcement of the Storage Tank and Spill Prevention Act. Instead the Board finds that this determination is very factual in nature and not appropriate for summary judgment in this case.

OPINION

This matter is one of a series of appeals challenging civil penalty assessments and a compliance order for alleged violations of the Air Pollution Control Act[1] and the Storage Tank and Spill Prevention Act (Storage Tank Act)[2] at two retail gasoline facilities owned and/or operated by Kim Graves, an individual and Bob North, Inc., a corporation (collectively, Appellants). This motion concerns a compliance order dated July 31, 2000, which was appealed to the Board and docketed at 2000-189-MG. Paragraph 1 of that order revoked the operating permits for the Appellants' underground storage tanks located at their retail facility known as "the Hook Road facility," and ordered the Appellants to cease operation and empty the tanks within 48 hours of receiving the order.[3] In its motion the Department contends that this paragraph was necessary as required by the Storage Tank Act therefore its action was appropriate as a matter of law.

The grant of summary judgment is proper under Rule 1035.2 of the Pennsylvania Rules of Civil Procedure whenever (1) there is no genuine issue of material fact that could be established by additional discovery or expert report, or, (2) after the completion of discovery relevant to the motion, the party opposing the motion who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury.[4] The grant of summary judgment is warranted only in a clear case and the record must be

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[1] Act of January 8, 1960, P.L. (1959) 2119, *as amended,* 35 P.S. §§ 4001- 4106.
[2] Act of July 6, 1989, P.L. 169, *as amended,* 35 P.S. §§ 6021.101-6021.2104.
[3] The order contained other provisions which are not at issue in this motion.
[4] *Schreck v. Department of Transportation,* 749 A.2d 1041 (Pa. Cmwlth. 2000); *Kee v. Pennsylvania Turnpike Commission,* 743 A.2d 546 (Pa. Cmwlth. 2000).

viewed in a light most favorable to the non-moving party, resolving all doubts regarding the existence of a genuine issue of material fact against the grant of summary judgment.[5]

The facts alleged by the Department in its motion are as follows. The Appellants own a retail gas station located at Hook and Calcon Hook Roads in Delaware County, Pennsylvania (the Hook Road facility). The Department inspected that station on February 18, 1997, February 3, 1999, and February 9, 1999. On each of those occasions the Department requested leak detection records for the facility which the facility failed to produce. Failing to maintain and produce leak detection records constitutes a violation of the Department's storage tank regulations.[6] Additionally, during the February 3 inspection, the Department found that the storage tank systems had not been upgraded as required by the storage tank regulations. In order to compel the Appellants to comply with the upgrade requirements, the Department filed a petition for an injunction in the Court of Common Pleas of Delaware County. On the day of the hearing on this motion the Appellants produced an affidavit declaring that the upgrades had been completed, which was later confirmed by the Department.

On October 29, 1999, the Department issued a civil penalty assessment to the Appellants. The assessment charged that:

- The facility was inspected on February 3, 1999, and the upgrades to the underground tank system which were required by the regulations to be installed by December 22, 1998, had not been installed.

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[5] *See Young v. Department of Transportation*, 744 A.2d 1276 (Pa. 2000); *County of Adams v. Department of Environmental Protection,* 687 A.2d 1222 (Pa. Cmwlth. 1997).

[6] *See* 25 Pa. Code §§ 245.435, 245.441, 245.442.

- The facility was again inspected on February 9, 1999, and the tanks were still in operation even though the upgrades had not been completed, nor could the attendant supply the inspector with leak detection records for the system.

Accordingly, the Department charged the Appellants with a civil penalty of $132,000 for the unlawful operation of the storage tanks, and for failing to properly conduct leak detection. The Appellants did not appeal this order.

The Department has continued in its efforts to review leak detection records for the Hook Road facility. Although the Department has received some records, to date it alleges it has never received complete information which demonstrates that leak detection is being properly conducted at the facility.

The Appellants also own a retail gasoline station on Market Street in Linwood, Delaware County, known as the "Market Street facility." The Market Street facility has an even longer and more egregious history of non-compliance with the storage tank regulations spanning from 1994 to the present.

To summarize, in August 1994 the Department issued a compliance order to the Appellants which required them to cease operating the Market Street facility until numerous technical activities were performed, including a site characterization and remedial actions in response to gasoline contamination at the site. The Appellants neither appealed nor complied with this order. In January, 1995 the Department filed a petition to enforce the 1994 order with the Commonwealth Court. That tribunal issued several orders which required the Appellants to perform a site characterization and remediation at the Market Street facility. Faced with the Appellants' failure to abide by these orders, the court, by order dated July 29, 1999, ordered the Appellants to either sell or lease Market

Street or contract with a competent remediation contractor to perform the site characterization and remedial action. To date, no characterization or remediation has been performed.

Analysis of any enforcement action by the Department necessarily has two lines of inquiry. First, has the Department established the facts which necessitated enforcement action, and second, based on those facts, was the Department's enforcement action appropriate.

Here, many of the facts necessitating some enforcement action by the Department have been established. The Appellants failed to appeal an October 1999 civil penalty assessment which charged them with failing to produce leak detection records at Hook Road. Similarly, the Appellants never appealed a 1994 administrative order issued for the Market Street facility which established serious violations of the Storage Tank Act and its regulations necessitating a site characterization and remediation activity. The courts of the Commonwealth have held in several different contexts that the failure to appeal an administrative action "forecloses any attack on its content or validity in an enforcement proceeding."[7] This includes an attack by a subsequent appeal.[8] For example, in *Martin*

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[7] *Commonwealth v. Derry Township*, 351 A.2d 606, 610 (Pa. 1976); *Martin v. Department of Environmental Resources*, 548 A.2d 672, 675 (Pa. Cmwlth. 1988); *Department of Environmental Resources v. Williams*, 425 A.2d 871, 873 (Pa. Cmwlth. 1981).

[8] *Id. See also Department of Environmental Resources v. Landmark International, Ltd.* 570 A.2d 140, 142 (Pa. Cmwlth. 1990)("Since the consent order is the equivalent of an order from which no appeal was taken, any collateral attack on the content or validity of the order in an enforcement proceeding is barred."); *Department of Environmental Resources v. Wheeling-Pittsburgh Steel,* 348 A.2d 765 (Pa. Cmwlth. 1975), *affirmed,* 375 A.2d 320 (Pa. 1977); *County of Beaver v. Pennsylvania Public Utility Commission*, 369 A.2d 509, 512 (Pa. Cmwlth. 1977)("[W]hen a party chooses not to appeal an

v. Department of Environmental Resources,[9] the Commonwealth Court held that a mine operator's failure to appeal the non-renewal of his license precluded him from attacking its validity in the form of a defense to a later order of the Department which required him to complete backfilling and restoration of an area affected by mining. Accordingly, the Appellants may not now contest the findings of the Department in the unappealed civil penalty assessment or administrative order. Therefore, to the extent the Department seeks judgment on the basis for its finding of liability for certain violations of the Storage Tank Act at the Appellants' two facilities, the motion is granted.

However, we will not grant judgment on the second prong of the analysis which is the appropriateness of the Department's enforcement action. The Department argues that the Appellants' obdurate behavior at Market Street coupled with their continued failure to provide adequate leak detection records for the Hook Road facility more than justify the revocation of the Hook Road tank permits as a matter of law. For the purposes of this motion, we disagree.

Although the Board is quite empathetic to the Department's frustration in acquiring the Appellants' compliance with the laws of this Commonwealth, we will not grant its motion at this time. As we explained our decision disposing of motions for summary judgment in *Wagner v. DEP*,[10] Section 1309 of the Storage Tank Act authorizes the Department to "issue such orders as are *necessary* to aid in the enforcement

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administrative order imposing some obligation upon it, that party cannot contest the unappealed order in some future proceeding.")

[9] 548 A.2d 672 (Pa. Cmwlth. 1988).

[10] 1999 EHB 681. On the merits, the Board affirmed the suspension of the appellant's storage tank permits for violations of the Storage Tank Act and its regulations. That adjudication was later affirmed by the Commonwealth Court. *Wagner v. DEP,* 2000 EHB 1032, *affirmed,* 2187 C.D. 2000 (Pa. Cmwlth. filed April 3, 2001).

provisions of this act."[11] Although it appears that this order may be appropriate in view of the Appellants' continuing refusal to comply with the Storage Tank Act and its regulations, because the Appellants were largely unrepresented during these proceedings, we will allow them to present evidence that the Department's action was too extreme given the circumstances. For example, although the Appellants' conduct at Market Street is more than egregious, it is not clear to the Board the extent to which that behavior should be considered when evaluating the appropriateness of the permit revocation at Hook Road. Further, unlike the situation in *202 Island Car Wash, L.P. v. DEP*,[12] there has been no evidence that leak detection is not being performed at all or is being improperly performed, nor is there evidence of a release or other contamination at the Hook Road site as a result of the Appellants' failure to produce adequate leak detection records. That is, the failure to produce records in this case may be little more than a serious paperwork violation if the evidence at the hearing reveals that leak detection has in fact been properly performed and no release has occurred. In that circumstance, permit revocation may be more excessive than necessary to enforce the Storage Tank Act. In sum, although not dispositive of the question of whether or not the revocation order was "necessary" these factors may be persuasive on that question.

We therefore enter the following:

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[11] 35 P.S. § 6021.1309 (emphasis added).
[12] 2000 EHB 679, 696-99.

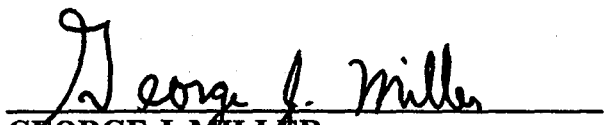
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

KIM GRAVES and BOB NORTH, INC.	:	
	:	
v.	:	**EHB Docket No. 2000-189-MG**
	:	**(Consolidated with EHB Docket**
	:	**Nos. 2000-217-MG and**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**2000-219-MG)**
	:	
	:	

ORDER

AND NOW, this 28th day of August, 2001, the motion for partial summary judgment by the Department of Environmental Protection is hereby **GRANTED** as to the Appellants' liability for violations of the Storage Tank Act and it regulations, but **DENIED** as to the necessity of the Department's action in revoking the storage tank permits.

ENVIRONMENTAL HEARING BOARD



GEORGE J. MILLER
Administrative Law Judge
Chairman

THOMAS W. RENWAND
Administrative Law Judge
Member

EHB Docket No. 2000-189-MG
(Consolidated with 2000-217-MG
and 2000-219-MG)

MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

MICHAEL L. KRANCER
Administrative Law Judge
Member

DATED: **August 28, 2001**

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

For the Commonwealth, DEP:
Anderson L. Hartzell, Esquire
Wm. Stanley Sneath, Esquire
Douglas G. White, Esquire
Southeast Region

Appellant:
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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOAR

KIM GRAVES and BOB NORTH, INC.	:
	:
v.	: **EHB Docket No. 2000-189-MG**
	: **(Consolidated with EHB Docket**
	: **Nos. 2000-217-MG and**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	: **2000-219-MG)**
	:
	: **Issued: August 28, 2001**

OPINION AND ORDER ON MOTION FOR SUMMARY JUDGMENT

By George J. Miller, Administrative Law Judge

Synopsis:

The Board grants the Department's motion for summary judgment on the question of the appellants' violation of an Air Pollution Control Act and the regulations thereunder, for failing to timely install a Stage II vapor recovery collection system at two retail gasoline stations. In their notice of appeal, the appellants admit that the collection systems were not installed until after the deadline provided in the Department's regulations. Therefore there is no question of material fact in dispute and summary judgment is appropriate.

OPINION

This matter is one of a series of appeals challenging civil penalty assessments and a compliance order for alleged violations of the Air Pollution Control Act[1] and the

[1] Act of January 8, 1960, P.L. (1959) 2119, *as amended,* 35 P.S. §§ 4001- 4106.

Storage Tank and Spill Prevention Act[2] and the regulations promulgated pursuant to those statutes, at two retail gasoline facilities owned and operated by Kim Graves, an individual and Bob North, Inc., a corporation (collectively, Appellants). This motion concerns a civil penalty assessment dated September 19, 2000, which was appealed to the Board and docketed at 2000-219-MG. That order assessed a civil penalty in the amount of $86,465 for failing to install Stage II vapor controls at the two gasoline stations by November 15, 1992. The sole question for our consideration is whether the Appellants violated the Air Pollution Control Act regulations and its regulations as a matter of law.

The grant of summary judgment is proper under Rule 1035.2 of the Pennsylvania Rules of Civil Procedure whenever (1) there is no genuine issue of material fact that could be established by additional discovery or expert report, or, (2) after the completion of discovery relevant to the motion, the party opposing the motion who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury.[3] The grant of summary judgment is warranted only in a clear case and the record must be viewed in a light most favorable to the non-moving party, resolving all doubts regarding the existence of a genuine issue of material fact against the grant of summary judgment.[4]

The Department argues that there are no issues of fact in dispute because the material facts proving liability are established by the operation of administrative finality

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[2] Act of July 6, 1989, P.L. 169, *as amended*, 35 P.S. §§ 6021.101-6021.2104.

[3] *Schreck v. Department of Transportation,* 749 A.2d 1041 (Pa. Cmwlth. 2000); *Kee v. Pennsylvania Turnpike Commission*, 743 A.2d 546 (Pa. Cmwlth. 2000).

[4] *See Young v. Department of Transportation*, 744 A.2d 1276 (Pa. 2000); *County of Adams v. Department of Environmental Protection,* 687 A.2d 1222 (Pa. Cmwlth. 1997).

due to the Appellants' failure to appeal earlier compliance orders. However, we need not reach this issue because the Appellants have admitted the facts necessary to conclude that they violated the air pollution regulations. Therefore there is no material fact in dispute on this point.

The deadlines for the installation of Stage II vapor controls are found at 25 Pa. Code § 129.82, which provides, in relevant part:

> After the date specified in paragraph (1), (2) or (3), an owner or operator of a gasoline dispensing facility subject to this section may not transfer or allow the transfer of gasoline into a motor vehicle fuel tank unless the dispensing facility is equipped with a Department approved and properly operating Stage II vapor recovery or vapor collection system. . . .
>
> (1) This paragraph applies to gasoline dispensing facilities located in areas classified as moderate, serious or sever ozone nonattainment areas . . . including the counties of Berks, Bucks, Chester, Delaware, Montgomery, Philadelphia with monthly throughputs greater than 10,000 gallons (37,850 liters). . . .
>
> . . .
>
> (ii) Facilities which dispense greater than 100,000 gallons (378,500 liters) of gasoline per month, based on average monthly sales for the 2-year period immediately preceding November 15, 1992, shall achieve compliance by November 15, 1993.[5]

Subsection (b) further requires operators to install the required vapor collection systems and to adequately maintain and operate them.[6]

The Appellants operate two gasoline facilities. One, located in Linwood, Pennsylvania is referred to as the "Market Street facility."[7] The second facility is located in Sharon Hill, Pennsylvania and is referred to in the Department's motion as the "Hook Road facility." Both gasoline stations are located in Delaware County which brings them

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[5] 25 Pa. Code § 129.82(a)(1).
[6] 25 Pa. Code § 129.82(b).
[7] *See, e.g.*, Notice of Appeal ¶ 2; Department Ex. I.

into the purview of Section (a)(1) of the regulation. In a request for admissions, the Appellants admitted that both facilities dispense more than 100,000 gallons of gasoline per month based on the average monthly sales for the two-year period immediately preceding November 15, 1992.[8] Accordingly, the Appellants were required to install Stage II vapor control systems no later than November 15, 1993.[9]

In their notice of appeal challenging the civil penalty assessment, the Appellants state that the Stage II controls were not installed at the Hook Road facility until October 26, 1994, and at the Market Street facility until December 15, 1994.[10] An appellant is deemed to have admitted facts which are averred in his notice of appeal.[11] Accordingly, since the Appellants were required by law to install those systems by November, 1993, there is no outstanding material fact in controversy concerning their violation of the regulation. Accordingly, we grant summary judgment on this question.

The Appellants argue in their notice of appeal that the Department acted inappropriately by waiting for six years to assess a civil penalty against them for violating Section 129.82, and that the amount of the penalty is excessive. These issues remain for our consideration at the hearing on the merits.

Accordingly, we enter the following:

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[8] Department Ex. A, ¶ 8.
[9] 25 Pa. Code § 129.82(a)(1)(ii).
[10] Notice of Appeal ¶ 10; Department Ex. I.
[11] *Allegro Oil & Gas, Inc. v. DER*, 1998 EHB 790.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

KIM GRAVES and BOB NORTH, INC.	:	
	:	
v	:	**EHB Docket No. 2000-189-MG**
	:	**(Consolidated with EHB Docket**
	:	**Nos. 2000-217-MG and**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**2000-219-MG)**
	:	
	:	

ORDER

AND NOW, this 28th day of August, 2001, the Department of Environmental Protection's motion for summary judgment on the issue of whether Kim Graves and Bob North, Inc. violated 25 Pa. Code § 129.82, IT IS HEREBY ORDERED that the motion is **GRANTED**.

ENVIRONMENTAL HEARING BOARD

GEORGE J. MILLER
Administrative Law Judge
Chairman

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

EHB Docket No. 2000-189-MG
(Consolidated with 2000-217-MG
and 2000-219-MG)

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

MICHAEL L. KRANCER
Administrative Law Judge
Member

DATED: **August 28, 2001**

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

For the Commonwealth, DEP:
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Wm. Stanley Sneath, Esquire
Douglas G. White, Esquire
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Appellant:
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WILLIAM T. PHILLIPY
SECRETARY TO THE BC

STINE FARMS AND RECYCLING, INC.	:	
CLAYTON STINE, JR., and MICHAEL STINE	:	
	:	
v.	:	**EHB Docket No. 99-228-L**
	:	**(consolidated with 2000-003-L)**
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	**Issued: September 4, 2001**
PROTECTION	:	

ADJUDICATION

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

Synopsis:

The Appellants operated a stump grinding and disposal operation. The wooden materials that they had amassed at their site caught on fire and burned for 79 days. The Board dismisses their appeal from the Departmental order directing them to stop accepting new material at the site, remove existing materials from the site, and take certain measures to prevent future fires. The appellants' activities are not outside of the Department's regulatory authority under various statutory exemptions for agricultural activities. The Board reduces the penalty of $124,000 assessed against the corporate appellant for open burning violations and failing to comply with a Department order to $115,000 because a $1,000 penalty, not a $10,000 penalty, is reasonable and appropriate for one of the violations on one of the days at issue.

FINDINGS OF FACT

1. The Commonwealth of Pennsylvania, Department of Environmental Protection (the "Department"), is the agency with the duty and authority to administer and enforce the Solid Waste Management Act, Act of July 7, 1980, P.L. 380, *as amended*, 35 P.S. § 6018.101 *et seq.* ("Solid Waste Act" or "SWMA"); the Air Pollution Control Act, Act of January 8, 1960, P.L. 2119 (1959), *as amended*, 35 P.S. § 4001 *et seq.* ("Air Pollution Control Act"); Section 1917-A of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, *as amended*, 71 P.S. § 510-17 ("Administrative Code"); and the rules and regulations promulgated pursuant to those statutes. (Joint Stipulation of the Parties, Paragraph A, No. 1 (hereinafter "Stip. 1.")

2. Stine Farms and Recycling, Inc. ("Stine Farms") is a Pennsylvania corporation with a registered address of R.R. 2, Box 2127, Bangor, Pennsylvania 18013. (Stip. 2.)

3. Clayton Stine, Jr. is an adult individual who lives in Bangor, Pennsylvania. Clayton Stine, Jr. owns property off Gravel Hill Road, Township Route 694 located in Lower Mount Bethel and Upper Mount Bethel Townships, Northampton County, Pennsylvania (the "Property"). Clayton Stine, Jr. is also Chief Executive Officer of Stine Farms. (Stip. 3.)

4. Michael Stine is an adult individual who lives in Bangor, Pennsylvania. Michael Stine is the son of Clayton Stine, Jr. and works for Stine Farms or Clayton Stine, Jr. on the Property. (Stip. 4.) (Stine Farms, Clayton Stine, Jr., and Michael Stine are hereinafter collectively referred to as the "Stines.") (Stip. 5.)

5. The Stines operate a stump grinding and stump disposal operation on the Property. The Stines also conduct farming operations on the Property. (Stip. 6; T. 450.)

6. From 1988 through 1990, the Department took a number of enforcement actions against Stine Farms and Clayton Stine, Jr., including issuing orders to Stine Farms and Clayton Stine, Jr.

on May 23, 1990, September 12, 1990, and October 3, 1990:

a. On May 23, 1990, the Department issued a field compliance order for the dumping of solid waste (including construction/demolition waste and contaminated soil) and the operation of a solid waste disposal facility at the Property without having obtained permits from the Department for such conduct;

b. On September 12, 1990, the Department issued a field compliance order for the dumping of solid waste (including construction/demolition waste), burning of solid waste, and the operation of a solid waste disposal facility at the Property without having obtained permits from the Department for such conduct; and

c. On October 3, 1990, the Department issued an order for the dumping of solid waste (including construction/demolition waste and residual waste), burning of solid waste, and the operation of a solid waste disposal facility at the Property without having obtained permits from the Department for such conduct.

(Stip. 7; Commonwealth Exhibits ("C. Ex.") 1, 2, 3.)

7. Clayton Stine, Jr., acting in his individual capacity and as an agent of Stine Farms, appealed the October 3, 1990 order to this Board, which docketed the appeal at EHB Docket No. 90-395-B. A supersedeas hearing was held before the Board on December 10, 1990 and the supersedeas was denied. On March 13, 1991, the Board issued an opinion on the petition for supersedeas. The Board rejected Stine's argument that his activities were limited to the receipt of "clean fill" and thus were exempt from the permit requirements of the Solid Waste Management Act. (*Clayton Stine v. DER*, 1991 EHB 398, 400-402; Stip. 8.)

8. On or about August 31, 1990, Stine Farms submitted to the Department for approval an application for a permit for a construction/demolition waste processing facility. This application

was determined by the Department to be incomplete and was subsequently withdrawn by Stine Farms. (Stip. 9.)

9. On December 10, 1992, the Department, Stine Farms, and Clayton Stine, Jr. entered into a Consent Order and Agreement. The December 10, 1992 CO&A required, *inter alia*, that Stine Farms and Clayton Stine, Jr.:

> cease the open burning and/or disposal of all solid, residual and/or hazardous waste, including but not limited to stumps and land clearing debris, on the property.

(Stip. 10.)

10. In 1993, Michael Stine contacted the Department regarding a tree stump chipping operation for the purpose of producing a mulch material product for off-site sale and reuse. On or about July 15, 1993, the Department responded to this inquiry, *inter alia*, as follows:

> [DEP] does not normally require a waste processing permit for the chipping of tree stumps, provided the chipped material is for off-site use, and not disposed of on site. Please be advised that any nuisances created by this operation will subject you to the applicable penalty provisions of the Solid Waste Management Act and regulations.

(Stip. 11; C. Ex. 5.)

11. The Stines have accumulated numerous large stockpiles of stumps, woodchips, and other debris on the Property. (Stip. 12; Notes of Transcript from the hearing on the merits ("T.") 415, 417; Notes of Transcript from the supersedeas hearing ("S.T.") 61-62; C. Ex. 44-A, 44-B.)[1]

12. The Stines have represented that the stumps, woodchips, and other debris accepted at the Property are used as fill or are chipped, ground, or otherwise processed into woodchips or mulch for on-site and off-site reuse. While some of the stumps, woodchips, and other debris may

[1] The parties stipulated (T. 16-17) that the transcript and exhibits from the supersedeas

have initially been properly used as clean fill or shipped off-site, much has been placed in piles on the Property. (Stip. 13.)

13. In May 1998, a fire started to burn within piles of stumps, woodchips, and other debris on the Property. On May 20, 1998, the Department issued a field compliance order to Stine Farms requiring Stine Farms to extinguish the fire. The Order cited Stine Farms for violations of the Air Pollution Control Act and the regulations promulgated thereunder, including open burning violations under 25 Pa. Code § 129.14. (Stip. 14.)

14. The May 1998 fire at the Property generated smoke and odors that were detectable off-site. (T. 157.)

15. On or about July 8, 1999, another fire ignited within the piles of stumps, woodchips, and other debris on the Property. (Stip. 15.)

16. The fire burned continuously from July 8, 1999 through September 24, 1999. (Stip. 15; T. 57, 96, 224, 248, 257.)

17. The fire caused air contaminants (including smoke and odors) to be emitted to the atmosphere which were detected both on and off the Property. The fire required the efforts of the Department's emergency response team and as many as 200 firefighters to bring it under control, and generated public complaints of smoke and odors in nearby communities located in Pennsylvania and New Jersey. (Stip. 15; T. 13, 36-38, 42, 50, 113-114; C. Ex. 43-9.)

18. On July 8 and 9, 1999, representatives of the Department inspected conditions at the Property and determined that the fire constituted open burning and was producing air contaminants, including smoke and odors, that were emanating from the Property and were detectable off the Property. (Stip. 16.)

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hearing would be part of the record for purposes of preparing this Adjudication.

19. The smoke did not contain any constituents that were inconsistent with burning wood. (T. 56, 82-83.)

20. The Stines responded quickly to the fire, and they were involved in the initial efforts to control the fire. (T. 43-44, 452.) Among other things, a bulldozer line was put in around the burning materials on the night of the July 8 to help prevent the fire from spreading. (T. 41-42, 48, 68, 453.)

21. At the Department's request, the Stines built and used a quench pit (a pit filled with water) on site to extinguish some of the burning materials. (T. 47-48.)

22. The Stines utilized heavy construction equipment (e.g., a bulldozer, front-end loader, and a trackhoe) to break up the pile of material in order to help control the fire. (T. 48-49.)

23. At least one of the Stines' trucks was used to haul water to the site for use in quenching the fire. (T. 49-50, 78.)

24. On July 9, 1999, the Department issued an order to Stine Farms ("July 9, 1999 Order") finding that the site conditions constituted violations of Section 4008 and 4013 of the Air Pollution Control Act, 35 P.S. §§ 4008 and 4013, and 25 Pa. Codes §§ 121.7 and 129.14. (Stip. 17.)

25. The July 9, 1999 Order required Stine Farms to, *inter alia*:

a. immediately take all reasonable measures to extinguish the fire, including but not limited to, the continued application of water to the fire;
b. immediately cease accepting additional stumps, woodchips and other debris onto the property until the fire is completely extinguished;
c. immediately take all reasonable measures to prevent and minimize the potential for fire within the stockpiles of stumps, woodchips and other debris that currently exist at the property; and
d. within thirty (30) days of issuance of this Order, Stine shall prepare and submit to DEP for approval a hazard prevention plan.

(Stip. 18.)

26. Paragraph 3 of the July 9, 1999 Order provided as follows:

> Existing Stumps and/or Debris: Stine shall immediately take all reasonable measures to prevent and minimize the potential for fire with the stockpiles of stumps and other debris that currently exist at the property, including:
>
> a. stockpiles shall have a horizontal area not greater than 2500 square feet.
> b. stockpiles shall have a vertical area not greater than 15 square feet.
> c. stockpiles shall be separated by at least 50 horizontal feet measured from the base of the stockpile....

(C. Ex. 9.)

27. The July 9, 1999 Order was not appealed to this Board. (Stip. 19.)

28. The fire which the Department first observed on July 9, 1999 covered approximately five acres and generated a large cloud of heavy smoke that extended several hundred feet into the air. (T. 37-38, 224.) The smoke was very intense, varied in color from white to almost black, and drifted towards the Delaware River. (T. 42-43, 82.) The stockpiles in the burning area at the time were up to 15 to 20 feet high. (T. 41.) The fire produced smoke that could be seen and smelled for miles around. (T. 113-114, 138-139, 158-159; C. Ex. 17, 39.)

29. Nearby residents suffered as a result of the fire. Although the intensity and ill-effects of the fire would ebb and flow, residents regularly found themselves in clouds of smoke and smoke odors that irritated their eyes and breathing passages and otherwise repeatedly interfered with their enjoyment of their homes, inside and out. (T. 56, 113-114, 116, 222-233, 242, 246-248, 250, 255-263.)

30. The fire caused soot to accumulate on neighbors' properties. (T. 247, 259.)

31. The amount of time that off-site smoke was detectable varied widely from a few moments of detectable odor to days at a time. (T. 232-233, 242, 248.)

32. The fire burned without any controls or fire-fighting efforts on the evening of July 11,

and smoke and odors were traveling off of the site. (T. 118-119; C. Ex. 45.) Visible flames erupted from one area. (T. 118; C. Ex. 45.)

33. When advised of the situation by a Department inspector on July 11, Clayton Stine appeared to be unaware of the problem. (T. 118-119.)

34. Departmental representatives inspected the Property and generated inspection reports on at least July 12, 16, 17, 19, 20, 21, 22, and 23. (Stip. 20, 21; C. Ex. 10, 17, 21, 22, 23, 28, 38, 39, 45.)

35. Smoke and malodors were detectable off-site on numerous occasions. (C. Ex. 9, 17, 18, 19, 20, 21, 25, 27, 30, 45-52, 56.)

36. The Department received complaints from as far away as New Jersey concerning the fire as late as August 24. (T. 50-52, 59-60.)

37. The Stines continued to fight the fire throughout the summer, but frequently with less than adequate equipment. (T. 51-52, 74, 76, 81, 84-85, 94.)

38. Approximately one acre of the fire area was smoking and some flames were still visible as of August 30. (C. Ex. 30.)

39. The fire was not extinguished until tropical storm Floyd dumped several inches of rain in mid-September 1999. (T. 57.)

40. The counties in the area of the site were in either a drought emergency or warning during the summer of the fire. (T. 58.)

41. On at least July 12, 16, 17, and 19, 1999, Stine Farms, as a result of inadequate employment of heavy equipment, application of water, manpower, and level of effort in general, failed to take all reasonable measures to extinguish the fire as required by the July 9, 1999 Order. (T. 109-111, 116-124, 142-145, 161-163, 180, 194, 456, 489; C. Ex. 10, 17, 20-21, 38-39, 45.)

42. On at least July 12, 16, 19, 20, 21, 22, and 23, Stine Farms accepted truckloads of stumps, woodchips, and other debris for dumping at the Property in violation of the July 9, 1999 Order. (T. 14-15, 101, 110-111, 116-132, 142-143, 166-168, 181-182, 472; C. Ex. 10, 12, 17, 21, 22, 23, 28, 38, 39, 43-15, 43-16, 43-19, 43-20, 43-21, 45.)

43. On or about July 20, 1999, Mr. Stine told one of the Department inspectors that he would lose $93,000 if he did not dump several new loads of waste material on the property from a grubbing job. (T. 347; C. Ex. 20, 21.)

44. On July 29, 1999, the Department issued a notice of violation to Stine Farms for the violations on July 12, 16, 17, 19, 20, 21, 22 and 23. The July 29, 1999 NOV stated that the conduct violated the July 9, 1999 Order and the Air Pollution Control Act. (Stip. 22.)

45. The Stines also accepted stumps and other debris for dumping at the Property on July 24 and 30 and August 20. (C. Ex. 28, 39.)

46. On July 27, 1999, the Department filed a petition to enforce in the Court of Common Pleas of Northampton County because of Stine Farms' failure to comply with the July 9, 1999 Order. Specifically, the Department averred that Stine Farms had failed to take all reasonable measures to extinguish the fire and that Stine Farms continued to accept stumps, woodchips, and other debris at the Property. (Stip. 23.)

47. On August 20, 1999, a hearing was held before the Honorable James C. Hogan on the Department's Petition to Enforce. The Court made the following findings, *inter alia*, and ordered Stine Farms to comply with the July 9, 1999 Order:

a. the fire and smoke caused by the fire constituted a danger to the community;
b. the fire constituted a public nuisance, air pollution, and may cause soil pollution;
c. the pollution was caused by Stine Farms;
d. the emissions, including malodors and air contaminants, are detectable off the Property, and interfere with the reasonable enjoyment of persons in the vicinity of

the Property and persons within the area the emissions may flow;

e. the emissions may be determined to cause damage to property and are deleterious to human health.
f. the emissions violate Section 4008 of the Air Pollution Control Act and constituted unlawful conduct under the Act;
g. Stine Farms had not taken all reasonable measures to extinguish the fire;
h. Stine Farms continued to accept additional stumps, woodchips and other debris onto the Property despite the fact that the fire was not completely extinguished;
i. Stine Farms had not taken all reasonable measures to prevent and minimize the potential for fire with the stockpiles of stumps, woodchips and other debris that currently exist on the Property; and
j. the stumps, woodchips, and other debris placed on the Property are wastes.

(Stip. 24.)

48. During the period of the fire, as well as on September 27, October 4, 18, and 27, November 10 and 23, and December 13, 1999, Departmental inspections revealed that the Stines had not taken all reasonable measures to prevent and minimize the potential for fire within the stockpiles of stumps, woodchips, and other debris that existed on the Property because the Stines had not complied with the size and volume limitations and separation distances pertaining to the stockpiles as required in the July 9, 1999 Order. (T. 101, 169-172, 177-178, 492; C. Ex. 11, 13, 31, 33, 34, 35, 36.)

49. The November 10 and 23, 1999 inspections revealed that newly accepted stumps, woodchips, and other debris were being placed on the Property in piles that did not comply with the size limitations and separation distances specified in the July 9, 1999 Order. (C. Ex. 35, 36.)

50. During the December 13, 1999 inspection, smoke emissions emanated from two areas in the stockpiles of stumps, woodchips, and other debris. Departmental representatives directed the Stines to immediately take appropriate action to extinguish this fire. (T. 108; C. Ex. 13.)

51. On October 4 and December 15, 1999, the Department issued notices of violation to Stine Farms for the violations on September 27, October 4, 18, and 27, November 10 and 23, and

December 13, 1999 as well as for not submitting or implementing a final hazard prevention plan as required by the July 9, 1999 Order. These notices of violation stated that the conduct of the Stines violated the July 9, 1999 Order and the Air Pollution Control Act. (Stip. 31.)

52. Stine Farms eventually submitted a final hazard prevention plan as required by the July 9, 1999 Order (Stip. 30), but not within the time period specified in that order (T. 112). Stine Farms has yet to fully implement the hazard prevention plan. (T. 113, 153.)

53. The Department has expended a considerable amount of man-hours and resources. (Stip. 27.)

54. On October 13, 1999, the Department issued to Stine Farms an assessment of civil penalty in the amount of $124,000 for violations of the Air Pollution Control Act, including open burning, occurring from July 8, 1999 to September 24, 1999. The October 13, 1999 Civil Penalty was appealed by Stine Farms to this Board and is docketed at EHB Docket No. 99-228-L. (Stip. 28.)

55. The Department assessed $2,000 a day for 17 of the 79 days that the fire burned based upon the days of off-site detectable odors documented by the Department. (T. 286-287, 336; C. Ex. 40.)

56. The Department assessed $10,000 a day for the nine days when Departmental inspection reports documented violations of the Department's July 9, 1999 Order, as follows:

- July 12, 16, 17, 19 – minimal fire fighting efforts;
- July 12, 16, 19, 20, 21, 22, 23 – accepting waste materials at the site; and
- September 27 – failure to configure piles to reduce potential for more fires.

(C. Ex. 12.)

57. On December 31, 1999, the Department issued an Order ("December 31, 1999 Order") to the Stines requiring them to, *inter alia*, cease the transportation to, dumping, disposal, and burning of stumps, woodchips, and other debris on the Property. The Order also requires the Stines to remove all stumps, woodchips, and other debris currently existing on the Property. (Stip. 32.)

58. The December 31, 1999 order had the same requirements as the July 9 order, but it added requirements that a specific amount – 4,000 cubic yards per week – of on-site materials were to be reconfigured and 4,000 cubic yards of material were to be removed per week, and the Stines were to keep records documenting their efforts. (Stip. 33; T. 106-107; C. Ex. 8, 14.) The July 9 order was only issued to Stine Farms; the December 31 order was issued to all of the Appellants. (C. Ex. 8, 14.)

59. On January 12, 2000, the Stines appealed the Department Order to this Board, which docketed the appeal at 2000-003-L. (Stip. 34.) The Board subsequently consolidated the appeal from the order and the appeal from the civil penalty assessment.

60. On March 13, 2000, the Stines filed a petition for supersedeas with the Board in which they sought relief from Paragraph 1 of the Department order, which directed them to "[i]mmediately cease the transportation to, dumping, disposal and burning of stumps, woodchips and other debris on the Property." (Stip. 36.)

61. The Board denied the petition on March 27, 2000 after a hearing. (Stip. 38.)

62. The stumps and debris that the Stines accept at the Property are generated in the course of grubbing for land developments. (T. 423, 451-453, 470-471.)

DISCUSSION

I. Regulatory Authority

The Stines argue that the "Department lacks regulatory jurisdiction to impose penalties in this case." (Brief at 32.)[2] They allege that the Department lacks authority in three respects: (1) the Department lacks authority under the Air Pollution Control Act because the Stines' chipping of wood stumps constitutes the production of agricultural commodities; (2) the Department lacks authority under the Solid Waste Management Act because the wood stumps that they handle constitute agricultural waste; and (3) a penalty may not be assessed against Stine Farms because of the Right to Farm Act. We reject all three contentions.

The Air Pollution Control Act, 35 P.S. § 4001 *et seq.*, does not apply to "the production of agricultural commodities." 35 P.S. § 4004(a). The phrase "production of agricultural commodities" is defined to include the following:

> (1) The commercial propagation, production, harvesting or drying on the premises of the farm operation or the disposal of residual materials resulting from the commercial propagation, production, harvesting or drying on the premises of the farm operation of the following:
>
> (vi) Timber, wood and other wood products derived from trees.

35 P.S. § 4004(b)(1)(vi). The exemption only applies to the production of certain defined products "on the premises of the farm operation." The Stines' storage and chipping of construction/demolition waste does not constitute a "farm operation." It is a facility whose only function is to handle waste generated at other locations and brought onto the Property for processing. Such waste processing facilities do not constitute "farm operations" within the

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[2] The Stines have not vigorously challenged the Department's December 31, 1999 order although it is the subject of one of the consolidated appeals. They do not articulate any challenge to that order in their post-hearing brief, and instead focus their efforts on the appeal from the civil penalty assessment. To the extent they intended their regulatory-authority

meaning of the Act's exemption. *Cf.* Section 103 of the Solid Waste Management Act, 35 P.S. § 6018.103 (quoted below at fn. 4), Section 2 of the Right To Farm Act, 3 P.S. § 952 (quoted at fn. 5). Futhermore, the mulch produced by the Stines is derived from construction/demolition waste. It is true that the waste includes wood from what was once trees, but the connection between the mulch produced by the Stines and trees is too indirect to fall within the statutory exemption. It is also true that the Stines conduct some traditional farming activity on their property, but those operations are not connected with or integrated into the separate chipping operations.[3] Finally, we find it inconceivable that the Legislature in creating an exemption for the production of agricultural commodities would have intended to deprive the Department of the authority to order the Stines to stop a major fire in their wood waste storage piles.

With regard to the Stines' theory under the Solid Waste Management Act, 35 P.S. § 6018.101 *et seq.*, the civil penalty was not issued pursuant to that statute, and the Stines have not articulated any objection to the order. Even if the theory was properly at issue, the Act merely exempts "agricultural waste produced in the course of normal farming operations" from the *permitting* requirements that would otherwise apply to waste processing. 35 P.S. § 6018.501(a). There is no exemption for agricultural waste from the entire statute, and no prohibition on the sort of compliance order issued here. *See* 35 P.S. § 6018.602 (enforcement orders). Furthermore, the Stines have previously admitted that the clearing and grubbing waste brought onto the site is regulated waste under the Act. (F.F. 9.) We held in *Clayton Stine v. DER*, 1991

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arguments to apply to the order, they are rejected for the reasons set forth in the text.

[3] The Department's civil penalty relates to the piles of wood waste. We are not convinced that those piles are really part and parcel of the chipping operation, as opposed to a separate disposal operation. The Department, however, did not press that point at the hearing or the results. (*But see* S.T. 9.) The agricultural exemption, if it applied at all, would only relate to the chipping operation.

EHB 398, 400-402, that the same material constituted regulated construction/demolition waste. *See also Fifer v. DEP*, 2000 EHB 1234, 1248 (woody material stored at the appellants' facility for processing into mulch is regulated waste). The material cannot at once constitute regulated waste and exempt agricultural waste. Finally, the stumps and debris that the Stines accept at their property are generated in the course of grubbing for land developments (F.F. 62), not "normal farming operations" as that phrase is defined in the Act.[4] Among other things, the debris was not generated in the process of producing or preparing anything for market.

Thirdly, the Department's enforcement activity against the Stines was not precluded by the Right To Farm Act, 3 P.S. § 951 *et seq.* That act by its own terms places no limitation on the Commonwealth's authority to protect the public health, safety, and welfare, and does not defeat the intent of any statute or regulation except nuisance ordinances as they apply to normal agricultural operations. 3 P.S. §§ 954(a) and 956(b). *See Weimer v. DER*, 1994 EHB 1850, 1865-66 (DER order not precluded by act, which was intended to limit the circumstances under which farms could be subjected to nuisance suits and ordinances). Furthermore, the act is limited to "normal agricultural operations," 3 P.S. § 952, and the Stines' activities do not constitute such operations.[5]

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[4] Normal farming operations are "[t]he customary and generally accepted activities, practices and procedures that farms adopt, use, or engage in year after year in the production and preparation for market of poultry, livestock, and their products; and in the production, harvesting and preparation for market of agricultural, agronomic, horticultural, silvicultural and aquacultural crops and commodities; provided that such operations are conducted in compliance with applicable laws, and provided that the use or disposal of these materials will not pollute the air, water, or other natural resources of the Commonwealth." 35 P.S. § 6018.103.

[5] The Act defines "normal agricultural operation" as "[t]he customary and generally accepted activities, practices and procedures that farmers adopt, use or engage in year after year in the production AND preparation for market or poultry, livestock and their products and in the production and harvesting of agricultural, agronomic, horticultural, silvicultural and aquicultural crops and commodities...." 3 P.S. § 952.

II. The Civil Penalty

The Department's $124,000 civil penalty assessment against Stine Farms consists of a $34,000 penalty for the open burning of the stumps and debris and a $90,000 penalty for violations of the July 9, 1999 Order. The Department calculated the $34,000 portion of the penalty by multiplying $2,000 per day times 17 days of violations. (T. 286; C. Ex. 40.) Although it was stipulated that the fire at the site burned continuously from July 8, 1999 to September 24, 1999, the Department selected 17 days because, on those days, Department inspectors were present at the site, they determined that there were open burning and air pollution violations, and they had documented them in their inspection reports. (T. 286.) The Department arrived at a daily penalty of $2,000 using the guidance for open burning violations in the Bureau of Air Quality's "Guidance for Application of Regional Civil Assessment." (T. 286.) In calculating the $90,000 portion of the penalty attributed to violations of the July 9, 1999 Order, the Department considered the factors listed in Section 9.1 of the Air Pollution Control Act. (T. 299, 306; C. Ex. 40, 41, p. 3.) Based on the factors listed in Section 9.1 of the Air Pollution Control Act, the Department concluded that a penalty of $10,000 was appropriate for each day Stine Farms violated the July 9, 1999 Order. (T. 299-300; C. Ex. 40.) To arrive at the total amount of the penalty attributable to the violations of the July 9, 1999 Order, the Department multiplied the daily penalty of $10,000 per day by nine days of violations of the order. (T. 299-300; Ex. C.40.) The Department selected the number of days by examining the inspection reports submitted by Department inspectors and determining which reports indicated that Stines Farms was not making reasonable efforts to put out the fire, that trucks loaded with stumps were being accepted onto the site, and/or that the Stine Farms had failed to segregate the piles of stumps to prevent new fires. (T. 301.)

The first step in our review of a civil penalty assessment is to determine whether the underlying violations of the law giving rise to the assessment in fact occurred. *Farmer v. DEP*, EHB Docket No. 98-226-L, slip op. at 13 (Adjudication issued March 26, 2001); *202 Island Car Wash, L.P. v. DEP*, 2000 EHB 679, 702. Here, the first portion of the Department's assessment is for open burning giving rise to air pollution. The parties have stipulated that a fire burned continuously from July 8 through September 24, 1999. (F.F. 16.) The parties have also stipulated that the fire emitted air contaminants into the atmosphere that were detected off-site. (F.F. 17.) The Northampton County Court of Common Pleas has already found that the open burning constituted a public nuisance, air pollution, and a violation of Section 4008 of the Air Pollution Control Act, 35 P.S. § 4008. (F.F. 47.) Indeed, Stine Farms has not contested the fact of the open burning violation or its responsibility therefor. (T. 29, 281-281.) We do not independently question that the open burning constituted a violation. *See, inter alia*, 25 Pa. Code § 129.14 (prohibiting open burning).

The second step in our review of a penalty assessment is to ensure that the penalty is lawful. Section 9.1 of the Air Pollution Control Act, 35 P.S. § 4009.1, authorizes the Department to assess a civil penalty of up to $25,000 per day for violations of the Act. The fire burned for 79 days. The Department assessed a penalty for 17 of those days. The Department assessed a penalty of $2,000 for each of those days, which is less than ten percent of the statutory maximum. The penalty is less than ten percent of the maximum statutory penalty. Stine Farms has not pointed to any other legal infirmity associated with the amount of the penalty. We conclude that the penalty amount is consistent with the law.

The third and final step in our review of the civil penalty is to determine whether the amount is reasonable and appropriate. *Farmer*, slip op. at 13-14. In determining the amount of

the penalty, the Act directs the Department to consider the following factors:

- willfulness of the violation
- damage to the air, soil, water, or other natural resources or their uses
- financial benefit to the violator in consequence of the violation
- deterrence of future violations
- cost to the Department
- the size of the facility
- the facility's compliance history
- the severity of the violation
- the duration of the violation
- the degree of cooperation exhibited by the violator
- the speed with which compliance is achieved
- whether the violation was voluntarily reported
- other factors unique to the violator
- other relevant factors

35 P.S. § 4009.1. In performing our review, this Board does not start from scratch. We do not set an amount that we might have independently arrived at had we been working from a clean slate. *202 Car Wash, L.P.*, 2000 EHB at 690. Rather, we review the amount assessed by the Department in light of the statutory criteria to ensure that it is reasonable and appropriate and modify an assessment which we find to be unreasonable. *Id.*

The Department's assessment of $2,000 for 17 of the 79 days of the fire is reasonable and appropriate. While Stine Farms is not accused of deliberately starting the fire, its conduct in accumulating massive and improperly organized and managed waste piles made a fire by spontaneous combustion or some other mechanism a virtual inevitability. (T. 91.) *See also Wood Processors, Inc. v. DER*, 1991 EHB 607, 612 (dangers of wood waste storage include spontaneous combustion). Given the condition of the site, a major fire was only a question of time. Creating such a condition, particularly in light of the previous fires at the facility, was negligent, if not reckless. *Farmer,* slip op. at 15 (recklessness is a conscious disregard of the fact that one's conduct may result in a violation; negligence is conduct which reasonably could have

been foreseen and prevented through the exercise of reasonable care).

With respect to damage to the environment, the smoke from the fire was not shown to contain toxic constituents, and there has been no showing of permanent damage. On the other hand, the fire was extensive, persistent, and malodorous. It made the neighbors of the site miserable for extended periods of time. The Department received numerous complaints from the public.

A significant penalty is necessary to deter future violations. Although Stine Farms has been ordered to stop taking new materials, there are thousands of cubic yards of material remaining at the site that must continue to be managed properly if future fires are to be avoided. Of course, there is also a general deterrence value in sending the same message to similar solid waste processing facilities. Operators of such facilities should be aware that the failure to manage the sites in such a way as to minimize fires could very well be costly in terms of penalties.

We do not have any information which would indicate that Stine Farms achieved a financial benefit as a result of the fire itself. Similarly, although we do not doubt that the Department incurred substantial costs in connection with controlling the fire, we do not have any specific cost data. The parties' stipulation that the Department "expended a considerable amount of man-hours and resources" is not particularly helpful.

Aerial photographs (C. Ex. 44-A, 44-B) dramatically depict the extensive size of the facility spawning the fire. Perhaps more significantly, there are thousands of cubic yards of material on the site, which, as previously noted, made the outbreak of a fire a virtual certainty given the way the material was managed.

The facility had already established a problematic compliance history before the outbreak

of this fire. (F.F. 6-14.) The Department properly considered that the fire giving rise to the penalty was not the first fire at the facility. There had already been warnings and danger signs. Stine Farms was cited for unpermitted dumping and open burning as early as 1990. Stine Farms' compliance problems continued thereafter and included a fire giving rise to an order in May 1998.

Stine Farms' cooperation was somewhat mixed. It assisted in putting out the fire, and we do not question that it expended considerable resources in the effort. Some of the inspections revealed that Stine Farms was actively engaged in fire control. (See, e.g., F.F. 20-23.) There is no indication that it ever interfered with or hindered the operations of Departmental or fire-fighting personnel. On the other hand, the speed with which compliance was achieved here was unacceptably slow. Stine Farms was never entirely successful in extinguishing the fire, which was only put out in the end by the rain produced by a tropical storm. The record is replete with evidence of less than adequate effort (e.g. F.F. 32, 33, 41), which is one of the reasons that the fire lasted as long as it did, and the amount of the penalty for the fire itself should reflect that fact. In sum, considering all of the statutory criteria, a $2,000 penalty, which is less than ten percent of the statutory limit, for a mere 17 of the 79 days of the fire is, if anything, more than reasonable.

The Stines complain in their post-hearing brief that there was not enough evidence presented at the hearing to determine which of the 79 days of open burning the Department used to come up with the 17 days that it used to calculate the penalty. The Stines stipulated that the fire burned continuously for 79 days. (Stip. 15.) At the hearing, counsel for the Stines stated as follows:

> We will begin by conceding the 17 days, the $34,000 penalty for the days in

> which smoke resulting from this activity left the premises. We will concede that. And there will be no objection from us that on those 17 specific days the Air Pollution Control Act was, in fact, violated through no we would submit intentional acts on the part of the Appellant.

(T. 29.) Given these stipulations, it is too late at this point for the Stines to complain regarding the failure to identify which 17 days were used to calculate the penalty. Given the concessions, it would have been a waste of the parties' and this Board's resources for the Department have gone through the inspection reports on the record to identify the specific 17 days used for calculation purposes.

Turning to the second component of the civil penalty, the Department assessed $10,000 for each of the nine days that it found that Stine Farms violated the Department's July 9, 1999 Order. As set forth in our findings of fact, we have determined that the Department has carried its burden of proving that the violations in fact occurred. (F.F. 41, 42, 48.) Specifically, Stine Farms committed the following violations:

Date	Minimal Activity	Additional Dumping	Improper Stockpile Management
July 12	x	x	
July 16	x	x	
July 17	x		
July 19	x	x	
July 20		x	
July 21		x	
July 22		x	
July 23		x	
September 27			x

Thus, in violation of the July 9 order, with some overlap, Stine Farms failed to (1) take all reasonable measures to extinguish the fire on at least four days, (2) cease accepting additional stumps or other debris onto the property until the fire was completely extinguished on at least seven days, and (3) take all reasonable measures to prevent and minimize the potential for fire

within the stockpiles of stumps and other debris on at least one day. These violations of the order constituted violations of the law, 35 P.S. § 4008, and justified the imposition of a civil penalty.

The penalty of $10,000 for each of the days on which the violations occurred was well within the statutory maximum of $25,000 for each day for each violation. 35 P.S. § 4009.1. Stine Farms has not cited any other legal infirmity with the amount of the penalty. It only remains, then, to determine whether the penalty amount is reasonable and appropriate considering the guiding statutory criteria.

Stine Farms did not accidentally accept new loads of stumps and other debris. It did so in knowing violation of the order. Indeed, Mr. Stine told one of the Department inspectors that he stood to lose $93,000 if he did not continue to accept the material. (F.F. 43.) We find that this deliberate defiance of the order is intolerable and factors heavily in favor of the $10,000 penalty assessed by the Department for each of the seven days on which it occurred.

Absent mitigating circumstances not present here, the penalty for the dumping violations arguably should not have been any lower than the cost savings enjoyed by the violator. Mr. Stine made no attempt at the hearing to retract or explain away his statement that he would have lost $93,000 if he had complied with the dumping prohibition. We take it at face value. The applicable portion of the penalty was only $70,000. Thus, it was arguably less expensive for Stine Farms to violate this provision of the order than it was to comply with it. Any penalty of less than $93,000 for the dumping violations is more indulgent than reasonably necessary.

By, quite literally, adding more potential fuel to the fire, the acceptance of additional material increased the hazard presented by the site. Although there is no evidence that the material was added to piles that were actually on fire, given the Stines' history of poor site

management, *any* addition of material to the site was cause for future, if not imminent, concern.

The dumping was done by Stine trucks. Thus, it was diverting resources away from fighting the fire. The dumping occurred repeatedly. Truckloads of material were dumped. Stine Farms demonstrated no cooperation in curbing the dumping. The material remains on site. Stine Farms obviously did not voluntarily report the dumping. In fact, there is some evidence that it engaged in a rather sophomoric attempt to hide it. (C. Ex. 21.) In sum, considering all of the statutory criteria, a penalty of $10,000, which is less than one half of the statutory maximum, for each of the seven days of dumping was reasonable and appropriate, even without considering the other violations that occurred on three of those days.

We need not address the allegation of minimal activity on July 12, 16, and 19 because the Stine's illegal dumping on those days alone justified the $10,000 daily penalty assessed by the Department. The Department also assessed $10,000 for failing to "take all reasonable measures to extinguish the fire" on July 17. There is very little record evidence regarding that date. There is some evidence of the Stines' efforts of a more general nature that includes July 17, but little that is specific to that date. What evidence there is suggests that two to three workers were engaged in fire-fighting activities. (C. Ex. 20, 38.) The sparse evidence shows that, although limited equipment was being used and the work was somewhat sporadic, some effort was being made. It appears that about two hours were spent actually fighting the fire, with most of the time devoted to fixing broken equipment. The Department has not proven that a $10,000 penalty for the deficient level of effort on July 17 was reasonable and appropriate. We conclude that a $1,000 penalty better reflects a proper application of the statutory criteria for the violation of that date, and reduce the penalty accordingly.

Finally, the Department assessed a $10,000 penalty for Stine Farms' failure to reorganize

its stockpiles to minimize the potential for fire as of September 27. The July 9 order required Stine to reduce the potential for growth of the ongoing fire or future fires by decreasing the size of its stockpiles and separating them. (F.F. 26.) As of September 27, the size limits and separation distances had not been met. One pile was at least 20 times the maximum approved size. (T. 169, 171, 176-178; C. Ex. 11.) A greater number of smaller piles is instrumental in being able to stop a fire if one starts. (T. 492.) It keeps it from spreading. Thus, Stine Farms' failure to reconfigure its piles was creating a hazardous condition with the potential for increased damage to the environment. Its failure to remedy a known hazardous condition was at least negligent, and perhaps even reckless given the known and realized risk already manifested at the site. At least some of the piles observed on September 27 were grossly in excess of the unappealed size limitations in the July 9 order. It is important to deter future violations by Stine Farms and others of storage pile size limits in order to prevent small fires from becoming catastrophes. The violations observed on September 27 were actually reflective of a longstanding problem at the site. Putting aside the precise size limitations in the July 9 order, a reasonable and compliant operator would never have allowed the stockpiles to grow to the size that they did. In consideration of all of these factors, a penalty of $10,000 for the failure to reorganize the piles as mandated by the July 9 order as observed on September 27 was reasonable and appropriate.

The Stines assert that the Department failed to carry its burden of proving enough specifics regarding the nine days of violations for failing to comply with the July 9 order. We agree that there is insufficient proof to conclude that Stine Farms expended such an inadequate effort on July 17 that a $10,000 penalty is reasonable and appropriate for that date. The record, however, amply supports the proposed penalty for the other eight days. The Stines' effort to have

the Department's compliance specialist testify from memory on the stand about all of the details concerning the days in question was of no consequence. Although we are not overly concerned with the Department's exact methodology in arriving at a penalty amount given our *de novo* review, we are quite satisfied that the Department, primarily through the efforts of its compliance specialist, gave due consideration to the statutory criteria in arriving at the amounts assessed. (T. 272-414.)

CONCLUSIONS OF LAW

1. The Board has jurisdiction over this matter. 35 P.S. § 7514.

2. The Department bears the burden of proof in the appeal of the assessment of a civil penalty. 25 Pa. Code § 1021.21.101(b)(1).

3. The Department bears the burden of proof in an appeal of an order. 25 Pa. Code § 1021.21.101(b)(4).

4. With regard to the civil penalty, the Department must prove by a preponderance of the evidence that the Appellants violated the law and that the penalty assessed is lawful, reasonable, and appropriate. *See Farmer v. DEP,* EHB Docket No. 98-226-L, slip. op. at 13 (Adjudication issued March 26, 2001); *202 Island Car Wash, L.P. v. DEP*, 2000 EHB 679.

5. The Board's review is *de novo*. *O'Reilly v. DEP*, EHB Docket No. 99-166-L, slip op. at 36 (Adjudication issued January 3, 2001).

6. In assessing the amount of the civil penalty, the Department, and this Board in conducting its review, must consider the willfulness of the violation, damage or injury to the environment, the benefit to the violator, the cost to the Department of enforcement, and several other relevant factors listed in Section 9.1 of the Air Pollution Control Act, 35 P.S. § 4009.1.

7. The Department had the regulatory authority to take the subject enforcement actions

under the Air Pollution Control Act because the exemption for the production of agricultural commodities did not apply.

8. The Department had the regulatory authority to issue the order under the Solid Waste Management Act because the permitting exemption for certain agricultural waste did not apply.

9. The Department's enforcement actions were not precluded by the Right To Farm Act.

10. The violations underlying the civil penalty assessment occurred, the penalty amout is lawful, and for every date except July 17, it was reasonable and appropriate.

11. A penalty of $1,000 was reasonable and appropriate for the violation that occurred on July 17.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

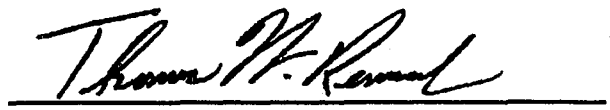
STINE FARMS AND RECYCLING, INC.	:	
CLAYTON STINE, JR., and MICHAEL STINE	:	
	:	
v.	:	**EHB Docket No. 99-228-L**
	:	**(consolidated with 2000-003-L)**
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION	:	

ORDER

AND NOW, this 4th day of September, 2001, the appeal from the Department's compliance order of December 31, 1999 is **DISMISSED**. The Department's assessment of civil penalty is reduced from $124,000 to $115,000, and the appeal from the assessment is in all other respects **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: **September 4, 2001**

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

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Northeast Region

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WILLIAM T. PHILLIPY
SECRETARY TO THE BO

ENVIRONMENTAL & RECYCLING SERVICES, INC.	:	
v.	:	**EHB Docket No. 2000-172-C**
	:	**(Consolidated with 2000-213C)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: September 7, 2001**

OPINION AND ORDER
ON MOTION IN LIMINE

By Michelle A. Coleman, Administrative Law Judge

Synopsis:

Appellant's motion in limine seeking sanctions pursuant to 25 Pa. Code § 1021.111 and Pa. R. Civ. P. 4019 for the Department's failure to comply with discovery requests is granted in part and denied in part.

OPINION

Appellant Environmental & Recycling Services, Inc. ("ERSI") is a Pennsylvania corporation that owns and operates a construction/demolition landfill located in Taylor Borough, Lackawanna County, Pennsylvania under Solid Waste Permit No. 100932, issued by the Department of Environmental Protection ("DEP") to ERSI in October 1995 pursuant to DEP's authority under the Solid Waste Management Act, 35 P.S. § 6018.101 *et seq.* and implementing regulations. This matter concerns the denial of ERSI's application for an increase in the permitted average daily volume of waste which may be disposed at the ERSI landfill.

I. Procedural Background

In April 1999, ERSI submitted an application to DEP for a minor permit modification seeking an increase in the permitted average daily volume limit from 800 tons/day to 1350 tons/day.[1] By letter dated August 4, 2000, DEP returned, but did not explicitly deny, ERSI's application for a minor modification. On August 11, 2000, ERSI filed a notice of appeal of the August 4th letter, which appeal was docketed at EHB Docket No. 2000-172-C. Subsequently, in a letter dated September 14, 2000, DEP confirmed that in returning ERSI's application under cover of the August 4th letter, DEP intended to deny that application. ERSI filed a timely appeal of the September 14, 2000 letter, docketed at EHB Docket No. 2000-213-C, and the two appeals were consolidated by Order dated November 9, 2000.

At the request of the parties, the Board extended the deadline for completing discovery in the consolidated matter until December 22, 2000. Discovery was completed, and the date set for filing dispositive motions passed without any motions being filed. At the request of ERSI's counsel, the hearing on the merits (originally set for July 2001) was rescheduled for September 10, 2001, and the parties were ordered to file pre-hearing memoranda by August 21, 2001. ERSI filed its pre-hearing memo and proposed exhibits on August 21, 2001; the Department filed its pre-hearing memo on August 22, 2001 and its proposed exhibits on August 23, 2001.

Presently before the Board is a motion in limine filed by Appellants on August 30, 2001. Given the proximity of the hearing—set to begin on September 10, 2001—the Board ordered DEP to submit any opposition papers by September 5, 2001. *See* 25 Pa. Code § 1021.74(c). DEP timely submitted a brief in opposition, oral argument was held on September 6, 2001, and we now grant the motion in part and deny it in part.

---

[1] *See* 25 Pa. Code § 271.222 (permittee shall file an application for a permit modification with DEP prior to conducting solid waste disposal activities that are not approved in the permit).

II. Relevant Factual Background

Discovery in proceedings before the Board is generally governed by the Pennsylvania Rules of Civil Procedure. *See* 25 Pa. Code § 1021.111(a). In its motion, ERSI alleges that DEP has failed to comply with Pa. R. Civ. P. 4006, 4009.12, and 4007.4. ERSI contends it has been prejudiced by DEP's failure to comply with discovery obligations and seeks sanctions pursuant to Rule 4019. Specifically, ERSI requests that we preclude DEP from calling at trial certain witnesses listed in DEP's pre-hearing memorandum, and that we prevent DEP from introducing at trial certain documents provided to ERSI for the first time as part of DEP's pre-hearing memo.

On October 10, 2000, ERSI served interrogatories which, *inter alia*, requested the identity of: (i) all persons who participated in any manner in the review of ERSI's permit modification application; (ii) all persons known to DEP "which have knowledge relevant to the matters in this action"; and (iii) "any and all persons who you [DEP] intend to call as witnesses at the hearing in this matter." DEP responded in early November 1999 by identifying five DEP employees who had participated in the application review. In response to the general question concerning identity of persons with knowledge, however, DEP objected that the "information is equally available to both parties," and provided no information in response.

During the eight months from close of discovery until pre-hearing memos were filed, DEP did not supplement or amend its interrogatory answers. Nevertheless, in its pre-hearing memo DEP identified seven witnesses it intended to call at trial on its behalf which were not identified in DEP's interrogatory answers.[2]

Similarly, ERSI served document requests on DEP in early October 1999 which asked, *inter alia*, for: (i) all documents examined as part of the review of ERSI's application; (ii) DEP's

[2] Five of the witnesses were citizens of Taylor Borough who reside near the ERSI landfill, one was a Taylor Borough councilman, and one was a DEP employee who performed inspections at the landfill.

"entire investigation file relating to ERSI"; and (iii) all documents which DEP "intend[s] to rely upon or introduce into evidence at the hearing of this matter."[3] DEP scheduled a review by ERSI of the "Department's records related to ERSI," which was conducted in November 1999. DEP's identical response to every document request asserted that the review "will provide counsel with access to the documents requested." DEP did not supplement its responses to ERSI's document requests, yet DEP's pre-hearing memorandum included as proposed exhibits various internal memoranda regarding conditions at the ERSI landfill not previously served on ERSI. DEP also proposed to submit at trial unidentified photographs which were not included with its pre-hearing memorandum and were not previously served on ERSI.

In opposition to the motion, DEP argued that it did not violate the discovery rules because it posed valid objections to the subject interrogatories, and because appending requested documents to DEP's pre-hearing memorandum was, in its view, an acceptable means of supplementing its responses.[4] DEP noted that Mr. Leskosky's name was mentioned at several depositions of DEP employees and listed on various documents produced to ERSI, thus putting ERSI on notice that he was a person with relevant knowledge. DEP also argued that even if it did violate the discovery rules, a sanction prohibiting Mr. Leskosky and Mr. Mekilo from testifying would be too harsh under the circumstances. DEP pointed out that ERSI did not file a motion to compel more complete answers to the interrogatories, and that DEP did not violate any Board order. Finally, DEP emphasized that the testimony of Messrs. Leskosky and Mekilo was integral

[3] In addition, ERSI served deposition notices on DEP employees who reviewed the modification application which included requests for all personal files of each employee being deposed.

[4] DEP opposed the motion with respect to two of the seven challenged witnesses and to all the challenged documents except the unidentified photographs. In its brief, DEP represented that it only intended to call John Leskosky, a DEP employee, and John Mekilo, a Taylor Borough councilman. *See* DEP Opposition Brief, at 1. DEP also stated that it would not attempt to introduce the unidentified "photographs" included in its list of proposed exhibits. *Id.* at 5 n.3.

to certain aspects of its case.[5]

III. Discussion

The "integrity of the adjudication process requires that all parties promptly and with thoroughness respond to discovery requests." *Hein v. Hein*, 717 A.2d 1053, 1056 (Pa. Super. 1998). Thus, in the absence of a valid objection, a party must answer each interrogatory "fully and completely," Pa. R. Civ. P. 4006(a)(2), and produce not only the requested documents but also identify documents not produced and the basis for non-production. Pa. R. Civ. P. 4009.12(b). Further, Rule 4007.4 imposes an obligation on a party to seasonably amend prior discovery responses when the party learns either that the prior response was incorrect when made or is no longer true. Pa. R. Civ. P. 4007.4(2); *see also* Pa. R. Civ. P. 4007.4(1) (party is "under a duty seasonably to supplement [its] response with respect to any question directly addressed to the identity and location of persons having knowledge of discoverable matters").

There is no doubt that DEP was obligated to identify the challenged witnesses. ERSI's interrogatories requested the names of all persons with relevant knowledge. Given DEP's intention to call such witnesses at trial, the agency must believe that each of them possesses knowledge relevant to the issues in this appeal. None of the objections posed by DEP—the request was unreasonable, unduly burdensome, and outside the scope of discovery—are well-founded. As such, DEP was obliged to identify these persons in its interrogatory response or in a timely supplement to that response. Similarly, the challenged documents are clearly within the scope of ERSI's propounded document requests, and DEP had a duty to produce them when

[5] ERSI claims it did not file a motion to compel because it was misled by DEP's assertion that the information sought was "equally available to both parties." A motion to compel would surely have resolved these issues long before the hearing date. Although the Rules place the burden of supplementing incomplete discovery responses on the answering party, see Pa. R. Civ. P. 4007.4 Explanatory Note (obligation to supplement is automatic), the Rules also provide the means for a party who receives obviously inadequate discovery responses to obtain relief from the Board. *See* 25 Pa. Code § 1021.72.

requested or to *seasonably* supplement its prior production. Including information in the pre-hearing memorandum is not the proper way to supplement answers to interrogatories or document requests. *See, e.g., City of Harrisburg v. DER, et al.*, 1993 EHB 226, 227 n.1. Consequently, DEP's identification of persons with relevant knowledge, and its production of previously-requested documents, for the first time in its pre-hearing memorandum were clear violations of the discovery rules.

Rule 4019(a) of the Pennsylvania Rules of Civil Procedure authorizes the imposition of sanctions for failure to comply with the discovery rules. Rule 4019(i) specifically states:

> A witness whose identity has not been revealed as provided in this chapter shall not be permitted to testify on behalf of the defaulting party at the trial of the action. However, if the failure to disclose the identity of the witness is the result of extenuating circumstances beyond the control of the defaulting party, the court may grant a continuance or other appropriate relief.

Pa. R. Civ. P. 4019(i). In addition, Rule 4019(c) specifically authorizes the Board to enter an order prohibiting the offending party from introducing in evidence designated documents where a party has failed to permit inspection as requested under Rule 4009. *See, e.g., Greenwood v. DEP*, 1993 EHB 342 (precluding introduction of evidence at merits hearing which was not properly disclosed by appellant in response to discovery requests).

The imposition of sanctions under Rule 4019 is within the discretion of the Board, however, when a discovery sanction is imposed it must be appropriate to the magnitude of the violation. The appropriateness of the sanction is assessed in light of four factors: (1) the prejudice caused to the opposing party and whether the prejudice can be cured; (2) the defaulting party's willfulness or bad faith; (3) the number of discovery violations; and (4) the importance of the precluded evidence. *See Hein*, 717 A.2d at 1056; *Steinfurth v. Lamanna*, 590 A.2d 1286, 1288-89 (Pa. Super. 1991); *Pride Contracting, Inc. v. Biehn Construction, Inc.*, 553 A.2d 82, 83-84 (Pa. Super.), *appeal denied*, 565 A.2d 1167 (Pa. 1989).

Under the circumstances of this case, we believe that the appropriate sanction is to prevent DEP from introducing, or referring in any manner, at trial to the documents which Appellants seek to exclude in their motion in limine.[6] However, DEP will be allowed to call Messrs. Leskosky and Meliko as witnesses at trial. We reach this conclusion after balancing the four factors listed above.

Appellant has been prejudiced by DEP's failure to comply with its discovery obligations by providing full and fair disclosure early in the proceedings. DEP's attempt to supplement discovery responses at the last minute in its pre-hearing memorandum flies in the face of the duty to *seasonably* supplement found in Rule 4007.4. Indeed, a fundamental purpose of the discovery rules "is to prevent surprise and unfairness and to allow a fair trial on the merits." *Linker v. Churnetski Transportation, Inc.*, 520 A.2d 502, 503 (Pa. Super.), *appeal denied*, 533 A.2d 713 (Pa. 1987). Moreover, DEP's disregard of its duty to supplement prior incomplete/incorrect responses verges on willfulness. DEP argued that several of the challenged documents were "received by the Department after Appellant's discovery requests" and DEP "cannot reasonably be expected to notify appellants any time the contents of its files change after the Appellants conduct a file review." DEP Brief, at 5. This assertion is puzzling, given the automatic obligation to supplement; Rule 4007.4 is clearly designed to prevent such gamesmanship.

On the other hand, DEP points out that it did not violate any discovery orders, and that it has not engaged in repeated violations. *See DER v. Chapin & Chapin, Inc.*, 1992 EHB 751, 755 (noting that in practice sanctions are not usually imposed unless a party defies a discovery order). DEP also argued that the testimony of the two witnesses is very important to its defense, an assertion which was not contested by Appellant. The Board must approach with caution the

[6] The documents excluded are Exhibits 9, 17, 32, 34, 36, 37, and 38 as labeled in the proposed list of exhibits attached to DEP's pre-hearing memorandum. At oral argument, Appellant withdrew its challenge to the map, and DEP indicated that it would not seek to introduce any photographs.

exclusion of integral evidence as a sanction for discovery violations, particularly where no motion to compel was filed and no Board orders have been violated. *Cf. Steinfurth*, 590 A.2d at 1288 (sanction excluding expert testimony that was tantamount to dismissal should only be imposed in extreme circumstances). Nevertheless, we will not allow DEP to escape sanctions on the ground that its behavior could have been worse. The sanction imposed here is necessary to express the Board's disapproval of DEP's behavior in this case, and to discourage such dilatory tactics in other proceedings. *See Chapin & Chapin, Inc.*, 1992 EHB at 755-56.

Accordingly, we enter the following order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ENVIRONMENTAL & RECYCLING SERVICES, INC.	:	
v.	:	**EHB Docket No. 2000-172-C**
	:	**(Consolidated with 2000-213C)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: September 7, 2001**

ORDER

AND NOW, this 7th day of September, 2001, it is hereby ordered that:

1. Appellant's motion in limine is granted in part and denied in part;

2. DEP is prohibited from introducing into evidence at trial, and from referring in any manner at trial, to the following documents, which were attached as proposed exhibits to DEP's pre-hearing memorandum:

Exhibit 9	October 7, 1998 memo from Leskosky to Henke, et al.;
Exhibit 17	June 4, 1999 memo w/atts. from Leskosky to Sloan and Pounds and Trash Truck Inspection Program Report from Leskosky to Tomayko, et al.;
Exhibit 32	July 20, 2000 memo w/att. from Lehman to Leskosky;
Exhibit 34	August 7, 2000 memo from Leskosky to Messinger;
Exhibit 36	October 6, 2000 memo from Tomayko to McDonnell, M. Carmon, et al.;
Exhibit 37	December 4, 2000 memo w/att (12/5/00 handwritten note) from Leskosky to Tomayko, Lehman, et al.;
Exhibit 38	December 18, 2000 letter from J. Bontrager to R. Wallace; and

3. Appellant's motion is denied with respect to the exclusion at trial of the testimony of John Leskosky and John Mekilo, and DEP may call these two witnesses at trial.

ENVIRONMENTAL HEARING BOARD

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: September 7, 2001

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

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bap

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WILLIAM T. PHILLIPY
SECRETARY TO THE BO

RICHARD and CATHY MADDOCK	:	
	:	
v.	:	**EHB Docket No. 2000-145-L**
	:	**EHB Docket No. 2000-164-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and CONSOL COAL COMPANY, Permittee	:	**Issued: September 12, 2001**

OPINION AND ORDER ON MOTIONS TO EXCLUDE EXPERT TESTIMONY

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

Synopsis:

The Department and the Permittee's motions to exclude expert testimony are granted. The expert report was offered over eight months past the deadline for exchanging expert materials set forth in the Board's orders and one month before a hearing on the merits, and the Appellants have offered no legitimate reasons for the Board to allow the expert testimony.

OPINION

Appellants, Richard and Cathy Maddock, informed the Board by letter dated August 14, 2001 of their intention to offer Mr. John Hempel as an expert witness at the September 17, 2001 hearing on their appeals docketed at EHB Docket Numbers 2000-145-L and 2000-164-L. Mr. Hempel's expert report was attached to the Maddocks' letter. On September 5, 2001, Permittee, Consolidation Coal Company ("Consol"), filed a motion to exclude the expert report and testimony of Mr. Hempel offered by the Maddocks. On September 10, 2001, the Department also filed a motion to exclude the expert report and testimony of Mr. Hempel. On September 11, 2001, at the direction of the Board, the Maddocks filed a response to Consol's and the Department's motions.

Consol and the Department both argue that allowing the expert report and testimony of Mr. Hempel unfairly prejudices their ability to have a fair hearing on the merits and should be excluded because his expert report was submitted long after such expert reports should have been submitted and just prior to hearing. In response, the Maddocks claim that they had no way of knowing in advance that a test would show that their water source has a high sulfate problem. Therefore, Maddocks argue that they could not predict what kind of expert they would need months before this test was completed.

In the Board's August 4, 2000 pre-hearing order, the Maddocks were required to serve their expert reports and answers to all expert interrogatories by December 4, 2000. The Maddocks did not inform the parties of their intention to offer Mr. Hempel as an expert witness until at least August 14, 2001, more than eight months past the deadline set by the Board in its August 4, 2000 order and a month before the hearing on the merits scheduled to begin on September 17, 2001.

A fundamental purpose of the discovery rules "is to prevent surprise and unfairness and to allow a fair trial on the merits." *Linker v. Churnetski Transportation, Inc.* 520 A.2d 502, 503 (Pa.Super.), *appeal denied,* 533 A.2d 713 (Pa. 1987). The nature of proceedings before this Board, more often than not, turns on conflicting expert testimony offered by opposing parties. To allow a party to produce such an expert, with the merits hearing approaching, when it could have hired the expert and produced his report sooner, unnecessarily precludes or severely limits an opposing party's ability to prepare for that expert testimony. Previous Board precedent supports a finding of prejudice to Consol and the Department where the late inclusion of such an expert report would be allowed. *Ponoqualine Fish Assoc. v. DER,* 1993 EHB 924, 936 (prejudice found and motion to exclude granted where expert report was identified less than a month prior to hearing), *North Pocono Taxpayer's Association North Pocono C.A.R.E. v. DER,* 1993 EHB 578 (Board excluded expert report submitted after deadline and just days before hearing.) *See also Environmental Recycling Services, Inc. v. DEP,* EHB Docket No. 2000-172-C (Opinion and order issued September 7, 2001) (Board excluded documentary evidence offered by the Department for the first time in its pre-hearing memorandum.)

The Maddocks have not offered any legitimate reason for this Board to allow the late inclusion of Mr. Hempel's expert report and testimony. Regardless of *the Department's* position or the adequacy of the Maddocks' replacement water supply, the Maddocks have complained about their supply from the inception of these appeals. More generally, the hydrogeological relationship between the well and the mine sites has been at issue in the appeals from the beginning. If the Maddocks intended to present expert opinion regarding that relationship, they needed to advise the other parties of that intent long before August 14, 2001.

Accordingly, we enter the following order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

RICHARD and CATHY MADDOCK	:	
	:	
v.	:	**EHB Docket No. 2000-145-L**
	:	**EHB Docket No. 2000-164-L**
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION and CONSOL COAL	:	
COMPANY, Permittee	:	

ORDER

AND NOW, this 12th day of September 2001, the Department and Consol Coal Company's motions to exclude the expert report and testimony of Mr. John Hempel are hereby **GRANTED.**

ENVIRONMENTAL HEARING BOARD

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

Via fax

DATED: **September 12, 2001**

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WILLIAM T. PHILLIPY I
SECRETARY TO THE BOA

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**EHB Docket No. 2000-198-CP-K**
v.	:	**Issued: September 13, 2001**
ANDREW LENTZ	:	

OPINION AND ORDER ON THE DEPARTMENT'S MOTION TO DEEM MATTERS SET FORTH IN THE DEPARTMENT'S REQUEST FOR ADMISSIONS DIRECTED TO COMPLAINANT ADMITTED AND ITS MOTION TO COMPEL ANSWERS TO DEP'S FIRST SET OF INTERROGATORIES

By Michael L. Krancer, Administrative Law Judge

Synopsis:

The Department's two discovery motions, i.e., its Motion to Deem Matters Set Forth In The Department's Request For Admissions Directed to Complainant Admitted and its Motion to Compel Answers to DEP's First Set of Interrogatories are granted. The defendant never responded to either discovery request or to the Department's two Motions.

OPINION

This is an action in the nature of a Civil Complaint for penalties under the Clean Streams Law filed by the Department as Plaintiff against defendant Lentz. Before the Board are two discovery motions of the Department filed on August 16, 2001 to which the defendant filed no response. First is a Motion to Deem Matters Set Forth In The Department's Request For Admissions Directed to Complainant Admitted (to be cited as DEPMRFA).[1] Second is a Motion

[1] It would appear that, maybe, there may be an error in the title given to this Motion. It probably ought to refer not to Requests For Admission Directed *To* Complainant but to Requests

to Compel Answers to DEP's First Set of Interrogatories (to be cited as DEPMI).

The Motion with respect to the requests for admission states that the Department served its requests for admissions on June 8, 2001. DEPMRFA2 ¶ 7. Lentz allegedly received the requests on June 12, 2001. *Id.* The signed certified mail return receipt showing delivery on June 12, 2001 is attached to the Motion as Exhibit A. DEPMRFA Ex. A. This Exhibit shows that the mailing was made to Andrew Lentz, P.O. Box 364, Thomasville, PA 17364-0364. The delivery receipt shows the signature of Judy Domborwski. Lentz failed to respond to the Department's requests for admission by the time allotted for response by the Pennsylvania Rules of Civil Procedure and has not responded to the requests as of the date the Department filed its motion. DEPMRFA ¶ 10.

The motion with respect to the interrogatories alleges that the Department served its first set of interrogatories on July 5, 2001 and that defendant, Lentz, received them on July 6, 2001. DEPMI ¶ 7. The signed return receipt shows that the material was addressed to Andrew Lentz, Morningstar Marketplace, 5309 Lincoln Highway West, P.O. Box 364, Thomasville, PA 17364-0364. The receipt indicates receipt on July 6, 2001 by "Andrew William" with the signature which appears to read "Andrew W. Lentz". Lentz failed to respond in any way to the Department's Interrogatories by the time allotted for response by the Pennsylvania Rules of Civil Procedure and he had not responded as of the date of the Motion. DEPMI ¶ 11

Not only did Lentz not respond to the two sets of discovery requests, he also did not respond to the Department's two Motions. Under Rule 1021.72(a), a response to a discovery motion is due within 15 days of service. 25 Pa. Code § 1021.72(c). Under Rule 1021.33(a) that time period is extended to 18 days because the two Motions were served by mail. 25 Pa. Code §

For Admission Directed From (or By) Complainant.

1021.33(a). The Motions' Certificate of Service indicates that they were served by mail to Andrew Lentz, Morningstar Marketplace, 5309 Lincoln Highway West, P.O. Box 364, Thomasville, PA 17364-0364 on August 16, 2001. Thus, the 18 day time frame expired on Monday, September 3, 2001 which was the legal holiday of Labor Day. Thus, Lentz's responses to the Motions were due on Tuesday, September 4, 2001. No responses were filed by then and none have been filed since then. Accordingly, we will deem all facts asserted in the Department's two motions to be admitted. 25 Pa. Code § 1021.70(f).

The Department's two motions are meritorious. However, we do note that there is some discrepancy with respect to the address which the Department has used to post materials to Lentz. The earlier posting of the Requests for Admission bore the address of P.O. Box 364, Thomasville, PA 17364-0364 while the later postings of both the Interrogatories and the two motions to compel has the longer address of Morningstar Marketplace, 5309 Lincoln Highway, P.O. Box 364, Thomasville, PA 17364-0364. In any event, both discovery items were received and neither were returned to the Department as undeliverable. Even though the return receipt for the Requests was signed by a Judy Dombrowski and not Lentz, the return receipt for the Interrogatories was actually signed by Mr. Lentz so he is obviously there.

Lentz has demonstrated his contempt and lack of respect for as well as his lack of intention to comply with both the Pennsylvania Rules of Civil Procedure and the Board's Rules.

We do note, though, that the motion with respect to the requests for admission is superfluous. Rule 4012(a) provides that, "...the matter is admitted unless, within thirty days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission an answer verified by the party or an objection..." Pa.R.Civ.P 4014(a). Thus, failure to answer at all

renders the request admitted by operation of the Rule. Rule 4014(c) deals specifically with the Court's possibly ordering that requests for admission are deemed admitted. Under that Rule, where a party *has* answered or objected to a request for admission, but the propounding party deems the objection baseless or the answer insufficient, the propounding party may move to determine the sufficiency of the answer or objection. Assuming the Court has not found any objections to be justified, if it determines that the answer does not comply with the Rule, it may either order the responding party to serve an amended answer or it may order that the matter is deemed admitted. Pa.R.Civ.P. 4014(c). In this case, Lentz's failure to respond in any way to the Department's requests for admission render the requests admitted as a matter of Rule 4014(a) without the need for the Court's additional imprimatur. In any event, there are no objections by Lentz to the requests and no answers are certainly not in compliance with Rule 4014. So, we will also order the matters in the Department's requests admitted since Lentz has demonstrated that ordering him to serve "amended answers" would be a waste of time.

Lentz will be ordered to serve responses to the Department's First Set of Interrogatories within 15 days of the date of this Order. His failure to comply with that Order will result in the imposition of sanctions including, but not limited to, issuance of an Order precluding Mr. Lentz from presenting any evidence in this matter either as to liability or amount of penalty. *See DEP v. Tessa, Inc.*, 2000 EHB 280, 296-299.

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 10th day of September, 2001, upon consideration of the Department's Motion to Compel Answers to DEP's First Set of Interrogatories and its Motion To Deem Matters Set Forth In the Department's Request For Admissions Directed To Complainant (sic) Admitted, it is HEREBY ORDERED that Mr. Lentz shall serve full and complete answers to the Department's First Set of Interrogatories within 15 days of the date of this Order or by on or before 5:00 p.m. **Friday, September 28, 2001**. The Department shall notify the Board by telecopy on **Monday, October 1, 2001** whether it contends that Lentz is not in compliance with this Order and its basis for contending that Lentz is in non-compliance. If the basis for contending non-compliance is that answers have been rendered but they are not full and complete, the Department's September 27th telecopy shall so state and it shall then promptly bring a Motion to Compel with respect to any responses that it contends are insufficient. In the event Mr. Lentz fails to follow this Order of the Board, either by failing to file answers at all or filing answers that are not full and complete, the Board will impose sanctions upon Mr. Lentz which could include, among other things, issuance of an Order precluding Mr. Lentz from presenting any evidence in this matter either as to liability or amount of penalty. *See DEP v. Tessa, Inc.*, 2000 EHB 280, 296-99.

ENVIRONMENTAL HEARING BOARD

MICHAEL L. KRANCER
Administrative Law Judge
Member

DATED: September 13, 2001

See following page for service list.

c: **For the Commonwealth, DEP:**
Alexandra Chiaruttini, Esquire
Southcentral Region

Defendant:
Mr. Andrew Lentz
Morningstar Marketplace
5309 Lincoln Highway West
P.O. Box 364
Thomasville, PA 17363-0364

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