Environmental Hearing Board

Adjudications and Opinions

2000
Volume I

COMMONWEALTH OF PENNSYLVANIA
George J. Miller, Chairman

MEMBERS

OF THE

ENVIRONMENTAL HEARING BOARD

2000

Chairman	George J. Miller
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Member	Michelle A. Coleman
Member	Bernard A. Labuskes, Jr.
Member	Michael L. Krancer
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FOREWORD

This volume contains all of the adjudications and opinions issued by the Environmental Hearing Board during the calendar year 2000.

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

2000 DECISIONS

UNITED STATES CONSTITUTION

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

PROTECT ENVIRONMENT AND CHILDREN EVERYWHERE	:	
v.	:	**EHB Docket No. 99-170-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: January 4, 2000**

OPINION AND ORDER ON MOTION TO DISMISS

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

Synopsis:

A motion to dismiss is granted. The jurisdiction of the Board does not attach until the Department takes an appealable action. The Department's advertising of a request for proposals in the Pennsylvania Bulletin for a reclamation project does not constitute a final, appealable action.

OPINION

The Department of Environmental Protection (the "Department") published notice in the July 31, 1999 issue of the Pennsylvania Bulletin of a request for proposals (RFP) to design and construct a project that would mitigate the effects of acid mine discharges from closed surface mines in Clarion Township, Clarion County. 29 Pa. Bull. 4148. The notice directed interested parties to contact the Department to obtain a copy of the actual RFP.

Protect Environment and Children Everywhere (PEACE) filed an appeal from the notice of the RFP on August 27, 1999. PEACE attached a copy of a page out of "The Environmental Protection Update," an informal newsletter published by the Department, to its notice of appeal. The page contained a short article that referred to the RFP notice.

The Department has moved to dismiss the appeal, arguing, among other things, that the RFP notice is not a final, appealable action. In response, PEACE acknowledges that it has appealed from the RFP. (Response, ¶ 2.) It argues that the RFP is a final, appealable action because it constitutes "a de facto termination" of, and is otherwise inconsistent with, a 1995 Consent Order and Adjudication (COA) that related to the same sites to which the RFP relates. PEACE asserts that the RFP violates the 1995 COA, and because the COA "is specifically in" this Board's jurisdiction, the Board may adjudicate the merits of the RFP. We agree with the Department and dismiss the appeal.

This Board only has jurisdiction to review final actions of the Department. 35 P.S. § 7514(a); 25 Pa. Code § 1021.2. To be appealable, an action must affect personal or property rights, privileges, immunities, duties, liabilities, or obligations of a person. 25 Pa. Code § 1021.2; *DER v. New Enterprise Stone and Lime Co.*, 359 A.2d 845, 847 (Pa. Cmwlth. 1976). An RFP is not such an action. It is not an offer; it is a request for offers. By its own terms, it does not commit the Department to do anything. (DEP Motion, Ex. C., ¶ I-6.) For example, the Department can reject all bids and decide to pursue an entirely different course of action. *See Conduit and Foundation Corporation v. City of Philadelphia,* 401 A.2d 376 (Pa. Cmwlth. 1979) (public officials may reject all bids). It is merely the announcement of the *possible* beginning of a process. As such, an RFP in and of itself does not affect anybody's legal rights and liabilities. *See Jenkins v. County of Schuylkill*, 658 A.2d 380, 383 (Pa. Super. 1995), *petition for allowance of appeal denied*, 666 A.2d 1056 (Pa. 1995) (unilateral termination of negotiations following a request for proposals does not create a cause of action for breach of a contact); *Facchiano v. Pa. Turnpike Commission*, 621 A.2d 1058, 1059 (Pa. Cmwlth. 1993) (disappointed bidders have no

expectation of receiving award and no legally cognizable injury). In short, it is not a final action that triggers this Board's jurisdiction.

PEACE seems to incorrectly believe that the RFP is an appealable action simply because it is reflective of what it perceives to be an underlying illegal course of action. Regardless of the Department's contemplations and intentions, however, the Department must actually do something that is appealable before our jurisdiction is triggered and we can review whether what the Department has done is proper. An internal decision to pursue a particular course of action is not enough. Thus, for example, it is the issuance of a compliance order, not a decision to issue a compliance order, that is appealable. Perhaps more closely analogous to the situation here, a Department letter stating that it is considering the possibility of taking enforcement action is not in and of itself appealable. *See E.P. Bender Coal Company v. DER*, 1991 EHB 790, 798-99; *Percival v. DER*, 1990 EHB 1077, 1107-08 (Department letters discussing, among other things, the possibility of future enforcement are not appealable actions); *see also Lower Providence Township Municipal Authority v. DEP*, 1996 EHB 1139, 1140-41 and *M. W. Farmer Co. v. DER*, 1995 EHB 29, 30, (stating that a notice of violation containing a list of violations, the mention of the possibility of future enforcement actions or the procedure necessary to achieve compliance is not an appealable action). Here, the Department has done nothing more than announce that it will consider proposals. That simply is not enough to constitute an appealable action.

PEACE's reliance on the 1995 COA as a basis for our jurisdiction is misplaced. PEACE has confused the basis for challenging a Departmental action with the action itself. The fact that the RFP may be contrary to the COA does not suggest in any way that the RFP is or is not a final action. They are two separate, unrelated issues. Again, without a triggering action, we are powerless to decide whether the Department is trending in a direction that is inconsistent with the COA, or a statute, regulation, or policy for that matter. The Department would need to

take some final, appealable action before this Board could act, and we have already explained that the RFP simply does not suffice.

To the extent that PEACE seems to suggest that we can enforce the COA or render a declaratory interpretation of the COA, it is black letter law that this Board has no such authority. *Empire Sanitary Landfill, Inc. v. DER*, 684 A.2d 1047, 1054-55 (Pa. 1996); *Costanza v. DER*, 606 A.2d 645, 647-48 (Pa. Cmwlth. 1992); *DEP v. Landmark International, LTD*, 570 A.2d 140, 142-43 (Pa. Cmwlth. 1990); *Nashotka v. DER*, 1991 EHB 1900, 1901-02; *Westinghouse Electric Corporation v. DER*, 1990 EHB 515, 517-18.

We do not know what remedies, if any, are available to PEACE in this situation. Perhaps it may pursue a civil lawsuit in court, *see* 35 P.S. § 691.601(c), or take advantage of procedures that exist under the Commonwealth Procurement Code, 62 Pa.C.S. § 101 et seq. We are certain, however, that no relief is available here.

Accordingly, we enter the following Order:

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

PROTECT ENVIRONMENT AND CHILDREN EVERYWHERE	:	
v.	:	EHB Docket No. 99-170-L
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 4th day of January, 2000, the Department's Motion to Dismiss is GRANTED. This 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: **January 4, 2000**

c: **For the Commonwealth, DEP:**
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JH:bap

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOAR

MORGAN BROTHERS BUILDERS, INC. & MICHAEL P. MORGAN	:	
v.	:	EHB Docket No. 99-194-K
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	Issued: January 13, 2000

OPINION AND ORDER ON MOTION TO EXTEND PRE-TRIAL DEADLINES

By Michael L. Krancer, Administrative Law Judge

Synopsis:

The Appellant's Motion to Extend Prehearing deadlines for 90 days is denied in part and granted in part.

Opinion

The procedural background of this matter was set forth in our Opinion and Order on DEP's Response to Petition For Supersedeas and we will not repeat it here. This Opinion and Order deals only with the pending Motion by the Morgan parties to extend all pretrial deadlines established in Prehearing Order No. 1 by 90 days.

The Notice of Appeal in this case was filed on September 20, 1999. Prehearing Order No. 1 was issued on September 23, 1999. It called for discovery to close on December 23, 1999, initial expert reports and answers to expert interrogatories to be filed by January 24, 2000 with reciprocation 30 days thereafter, and dispositive motions to be

filed by February 20, 2000 if there was no expert testimony and by March 23, 2000 if there was to be expert testimony.

By letter dated December 13, 1999 to the Board, received and filed on December 15th, counsel for Morgan and Morgan Brothers informed the Board that the parties had agreed to extend discovery for a period of thirty days to January 23, 2000.[1] Then, a day later, on December 16, 2000, Morgan and Morgan Brothers, Inc. filed a Motion to Extend Prehearing deadlines by 90 days across the board. Morgan and Morgan Brothers Builders, Inc. allege in their Motion that: (1) appellants have encountered unexpected difficulties in obtaining and reviewing client documents pertaining to this matter; and (2) appellants have encountered unexpected difficulties in obtaining and reviewing DEP documents pertaining to this matter.

DEP filed an Answer opposing the Motion on December 17, 1999. DEP's Answer states that the Morgan parties had conducted no discovery at all as of that date. DEP tells the Board that Morgan has had 90 days in which to conduct discovery but has not done so and that, therefore, to grant a blanket 90 day extension to all deadlines would be "highly prejudicial" to the interest of the Department in that the alleged "environmental harm and the existing [alleged] threat to the public health, safety and welfare continue to exist as a result of Morgan Brothers' failure to comply with the Department's Compliance Order." Also, DEP notes that the parties had agreed to extend the pretrial deadlines by 30 days.

[1] A letter from counsel for the Morgan parties dated December 17, 1999 clarifies that the parties had agreed to extend not only the discovery deadline by 30 days but also the other accompanying pretrial deadlines.

On the basis of the December 13th letter stating that the parties had agreed to a 30 day extension, the Board issued an Order dated December 17, 1999 extending discovery and other pretrial filing deadlines by the 30 days. Technically, though, since the Morgan Parties' Motion was not withdrawn, it and DEP's response thereto is still pending and we issue this Opinion and Order to clean-up the docket on that particular matter.

Generally, a request for a 90 day extension when the case is so fresh like this one would not be a problem. In our mind in this case, though, it is for a couple of reasons. First, obviously, DEP has objected. Second, there are circumstances here which raise our concern.

DEP's point is well taken that the Morgan parties at the time they requested the 90 day extension had not undertaken any efforts whatsoever at initiating discovery. This appeal was filed on September 20, 1999. It is anomalous for appellants, the parties who initiated the case in the first place, to have demurred from putting pen to paper with respect to discovery in the period of almost three months since their appeal was filed and to then put pen to paper pleading for an extension of discovery deadlines because of "unexpected difficulties in obtaining and reviewing DEP documents". This troubles us. The Morgan parties statement in their Motion that there have been unexpected difficulties in obtaining and reviewing client documents pertaining to this matter is even more disquieting. Admittedly, the precise nature of and reason for the "difficulty" is obscure on the papers but we are disturbed by the import of the statement that the appellant's own counsel is having trouble obtaining materials relating to the matter in litigation from his own client.

Litigation is serious and time consuming business. When a party chooses to litigate there is a responsibility to come forward and participate. Living up to that responsibility is important to the proper functioning of the litigation process. The ostrich strategy of litigation should not be countenanced by any court since it undermines the foundations of the litigation process.

All that being said, we are not prepared today to shut the door on the Morgan Parties' request. We will extend the Prehearing No. 1 deadlines by two months. The Morgan parties should be on notice, however, that we expect that there will be deliberate prosecution of and participation in their own appeal.

Accordingly, we issue the following Order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MORGAN BROTHERS BUILDERS, INC. & MICHAEL P. MORGAN	:	
v.	:	**EHB Docket No. 99-194-K**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

AMENDED ORDER REGARDIND EXTENSION OF PREHEARING DEADLINES

This order amends the Board's previous Order dated **December 17, 1999** on this subject. All pretrial deadlines in this matter shall be extended as follows:

1. All discovery in this matter shall be completed by **February 23, 2000**;
2. The party with the burden of proof shall serve its expert reports and answers to all expert interrogatories by **March 23, 2000**. The opposing party shall serve its expert reports and answers to all expert interrogatories within 30 days after receipt of the expert reports and interrogatories from the party with the burden of proof;

3. All dispositive motions in a case requiring expert testimony shall be filed by **May 23, 2000**. If neither party plans to call an expert witness, dispositive motions shall be filed by **April 24, 2000**.

ENVIRONMENTAL HEARING BOARD

MICHAEL L. KRANCER
Administrative Law Judge
Member

DATED: January 13, 2000

Via Telecopy and Regular Mail

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Southeast Region

For Appellants:
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WILLIAM T. PHILLIPY
SECRETARY TO THE BC

BITUMINOUS PROCESSING CO., INC.	:	
	:	
v.	:	**EHB Docket No. 99-172-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: January 18, 2000**
	:	

OPINION AND ORDER
ON MOTION TO DISMISS AN ISSUE

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

Synopsis:

A motion to dismiss an issue is granted. The Department's notice of intent to forfeit bonds does not constitute an appealable action.

OPINION

The Department of Environmental Protection ("the Department") sent Bituminous Processing Co., Inc. ("Bituminous Processing") a letter dated July 13, 1999 declaring the company's bituminous surface mining permit to be suspended based on violations set forth in previously issued compliance orders. The Department's letter also included a notice of intent to forfeit the bonds on the permit if Bituminous Processing failed to correct certain violations within 30 days.

Bituminous Processing filed a notice of appeal on September 2, 1999 challenging the Department's notice of intent to forfeit the bonds on the mining operation. Bituminous then amended its appeal on September 15, 1999 to include the Department's suspension of the

operating permit. The Department has filed a motion to dismiss Bituminous Processing's appeal of the Department's notice of intent to forfeit bonds. Specifically, the Department alleges that the notice of intent is not an appealable action that is reviewable by the Board.

This Board only has jurisdiction to review final actions of the Department. 35 P.S. §7514(a); 25 Pa. Code § 1021.2. To be appealable, an action must affect personal or property rights, privileges, immunities, duties, liabilities, or obligations of a person. 25 Pa. Code § 1021.2; *DER v. New Enterprise Stone and Lime Co.*, 359 A.2d 845, 847 (Pa. Cmwlth. 1976). In determining whether a particular Department letter is an appealable action, the Board will consider the substance of the letter itself. *Central Blair County Sanitary Authority v. DEP*, 1998 EHB 643, 646-47.

The present matter is identical in all material respects to the situation this Board confronted in *Percival v. DER*, 1990 EHB 1077. In *Percival*, we examined the language of a Department letter that expressly gave an appellant thirty days to correct violations at two coal mining sites before the Department would initiate bond forfeiture. The Board concluded that the letter was not a final appealable action of the Department and, therefore, was not reviewable by the Board. *Id.* at 1107-08.

Percival controls the outcome of this matter. Here, the Department's notice of intent states that, unless a list of four violations are corrected within thirty days, the Department will take action to forfeit Bituminous Processing's bond under the provisions of Section 4(h) of the Surface Mining Conservation and Reclamation Act, 52 P.S. § 1396.4(h). The notice of intent does not order Bituminous Processing to take any corrective action. Rather, the notice of intent simply warns Bituminous Processing of possible future Departmental action. This warning alone is not an appealable action of the Department. *See E.P. Bender Coal Company v. DER*, 1991 EHB 790, 798-99 (a Department letter which discusses, among other things, the possibility of future enforcement is not an appealable action).

Accordingly, we enter the following Order:

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

BITUMINOUS PROCESSING CO., INC.	:	
	:	
v.	:	**EHB Docket No. 99-172-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 18th day of January, 1999, the Department's Motion to Dismiss an Issue 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

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

MICHAEL L. KRANCER
Administrative Law Judge
Member

DATED: **January 18, 2000**

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

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PHILIP O'REILLY and NO-MART COALITION	:	
v.	:	**EHB Docket No. 99-166-L**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and JDN DEVELOPMENT COMPANY, INC., Permittee	:	**Issued: January 24, 2000**

OPINION AND ORDER
ON RULE TO SHOW CAUSE

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

Synopsis:

An unincorporated association is dismissed from a case for failing to obtain an attorney in accordance with the Environmental Hearing Board's Rules of Practice and Procedure at 25 Pa. Code § 1021.22(a) and (c).

OPINION

On August 25, 1999, Philip O'Reilly ("O'Reilly") filed a notice of appeal for No-Mart Coalition, an unincorporated association, challenging the issuance of an NPDES Permit to JDN Development Company, Inc. ("JDN"). O'Reilly subsequently amended the notice of appeal on September 9, 1999 to make his intention clear that there were two distinct appellants – O'Reilly and No-Mart Coalition. The Board formally corrected the caption to list the distinct appellants by Order dated December 14, 1999.

In the interim, the Board issued a Rule to Show Cause on December 3, 1999, which directed No-Mart Coalition to show why its appeal should not be dismissed for not being represented by counsel as required by Section 1021.22 of the Board's Rules of Practice and Procedure, 25 Pa. Code § 1021.22. O'Reilly responded on behalf of No-Mart to the Rule on December 31, 1999 asserting that No-Mart should remain as an appellant to the appeal acting through O'Reilly as "trustee ad litem" and disputing the constitutionality of the Board's rule requiring an association to be represented by an attorney. JDN has filed papers in support of dismissing No-Mart from the case.

Section 1021.22(a) and (c) of the Board's Rules of Practice and Procedure, 25 Pa. Code 1021.22(a) and (c), require an unincorporated association to be represented by an attorney in an action pending before the Board. The Rules provide as follows:

> § 1021.22(a). Parties, except individuals appearing on their own behalf, shall be represented by an attorney at all stages of the proceedings subsequent to the filing of the notice of appeal.
>
> § 1021.22(c). Groups of individuals acting in concert, whether formally or informally, shall be represented by an attorney admitted to practice law before the Supreme Court of Pennsylvania or by an attorney in good standing admitted to practice before the highest court of another state who has made a motion to appear specially in the case and agrees therein to abide by the Rules of the Board and the Rules of Professional Conduct.

Section 1021.125 of the Board's Rules of Practice and Procedure, 25 Pa. Code § 1021.125, grants this Board the authority to impose sanctions upon a party for failure to abide by a Board rule of practice and procedure. The sanctions may include the dismissal of an appeal. 25 Pa. Code §1021.125.

Here, No-Mart Coalition is in clear violation of the Board's Rules by failing to secure an attorney. Moreover, we are unwilling to allow O'Reilly to legally represent No-Mart Coalition because we would be authorizing the unlawful practice of law. *See* 42 Pa. C.S.A. § 2524; *and* 29 Pa. Bull. 4683-84, *Comments to the Proposed Revisions to the Board's Rules*. Thus, we are compelled to dismiss No-Mart Coalition as a separate party to this appeal. *See e.g. Potts Contracting Company Inc. v. DEP,* EHB Docket No. 97-236-C (opinion issued December 21,

1999); *Mountain Valley Management v. DEP*, EHB Docket No. 98-194-L (opinion issued May 25, 1999); *and Westmark Diversified v. DEP*;1997 EHB 295, 298. O'Reilly, of course, is permitted to pursue this appeal as an individual.

Accordingly, we enter the following Order:

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

PHILIP O'REILLY and NO-MART COALITION	:	
	:	
v.	:	**EHB Docket No. 99-166-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and JDN DEVELOPMENT COMPANY, INC., Permittee	:	

ORDER

AND NOW, this 24th day of January, 2000, No-Mart Coalition is dismissed as a party to this appeal. Philip O'Reilly remains a party as an individual acting on his own behalf. The following caption shall be reflected on all future filings with the Board:

PHILIP O'REILLY	:	
	:	
v.	:	**EHB Docket No. 99-166-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and JDN DEVELOPMENT COMPANY, INC., Permittee	:	

ENVIRONMENTAL HEARING BOARD

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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: January 24, 2000

See service list on next page.

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SECRETARY TO THE BOARD

PEOPLE UNITED TO SAVE HOMES and PENNSYLVANIA AMERICAN WATER COMPANY	:	
v.	:	**EHB Docket No. 95-232-R (Consolidated with 95-233-R, 95-223-R and 96-226-R)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION; EIGHTY-FOUR MINING COMPANY, Permittee; INTERNATIONAL UNITED MINE WORKERS OF AMERICA; and DISTRICT 2 UNITED MINE WORKERS OF AMERICA, Intervenors	:	**Issued: January 25, 2000**

OPINION AND ORDER ON MOTION TO CERTIFY INTERLOCUTORY ORDER

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

The appellant's motion to certify an interlocutory order for immediate appeal is denied as untimely and failing to meet the requirements of 42 Pa.C.S.A. § 702(b).

OPINION

This matter involves an appeal by People United to Save Homes (PUSH) from an underground coal mining permit revision issued by the Department of Environmental Protection (Department) to Eighty-Four Mining Company (Eighty-Four). The background of this appeal is set forth more fully in the Board's Adjudication of July 2, 1999. *See People United to Save*

Homes v. DEP, EHB Docket No. 95-232-R (Adjudication issued July 2, 1999).

In our July 2, 1999 Adjudication of this matter, the Board dismissed PUSH's appeal on all issues except one – the adequacy of the subsidence bond set by the Department. This matter was remanded to the Department for recalculation of the bond in accordance with the guidelines set forth by the Board in the Adjudication.

PUSH filed a petition for review of the Board's ruling to the Commonwealth Court, which was docketed at No. 2014 C.D. 1999. Eighty-Four filed a cross-petition at No. 2144 C.D. 1999. Subsequently, Eighty-Four filed a motion to quash both PUSH's petition for review and its cross-petition, asserting that the Board's July 2, 1999 ruling was not a final order because it had remanded the bond issue to the Department for further action. In an order dated September 21, 1999, Judge Morgan granted Eighty-Four's motion and quashed the appeals, holding that the Board's July 2, 1999 Adjudication was interlocutory. In a footnote to his order, Judge Morgan further stated as follows: "We note that upon calculation of the bond by the Department of Environmental Protection *and in the absence of any appeal of that calculation to the Environmental Hearing Board*, the Environmental Hearing Board's order of July 2, 1999 shall be deemed final and appealable." (Emphasis added) No request was made for reconsideration or clarification of Judge Morgan's order, and no party sought leave to appeal the order to the Supreme Court.

Following the issuance of the Board's July 2, 1999 Adjudication, but prior to Judge Morgan's order, PUSH filed with the Board a petition for award of attorney's fees and costs. Following Judge Morgan's order, the Department filed a motion to dismiss PUSH's petition without prejudice. Eighty-Four jointed in the motion. In an Opinion dated December 3, 1999, the Board dismissed the fees petition without prejudice based on the Commonwealth Court's

ruling that the July 2, 1999 Adjudication was not a final order.[1] PUSH then filed a petition for permission to appeal pursuant to Pa.R.A.P. 1311, which the Commonwealth Court denied on December 7, 1999.

By letter dated December 15, 1999, the Department revised Eighty-Four's mining permit to require a subsidence bond in the amount of $2,140,498.50. Eighty-Four has appealed this recalculation to the Board at Docket No. 99-262-R. PUSH is not a party to this appeal.

The matter presently before the Board is a motion by PUSH to amend the Board's December 3, 1999 order and to certify the July 2, 1999 Adjudication for immediate appeal pursuant to 42 Pa.C.S.A. § 702(b). Section 702(b) provides as follows:

> When a court or other government unit, in making an interlocutory order in a matter in which its final order would be within the jurisdiction of an appellate court, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the matter, it shall so state in such order. The appellate court may thereupon, in its discretion, permit an appeal to be taken from such interlocutory order.

42 Pa.C.S.A. § 702(b). Eighty-Four and the Department have filed responses opposing PUSH's motion.

We agree that the motion must be denied. Pa.R.A.P. 1311(b) states that an application for amendment of an interlocutory order to meet the requirements of 42 Pa.C.S.A. § 702(b) must be filed with the government unit *within 30 days after entry of the interlocutory order*. While PUSH states that it seeks to amend the Board's December 3, 1999 order, it is, in fact, the July 2, 1999 Adjudication which it is seeking to certify for immediate appeal. As such, its motion is

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[1] In order to recover costs and attorney's fees under the statutes involved in this appeal, a petitioner must establish, *inter alia*, that there has been a final order of the Board. *People United to Save Homes v. DEP*, EHB Docket No. 95-232-R (Consolidated) (Opinion issued December 3,

untimely.

If, on the contrary, it is seeking to certify the December 3, 1999 order for immediate appeal, its motion still must be denied since it fails to meet the criteria specified in Pa.C.S.A. § 702(b). The Board's December 3, 1999 order simply held that PUSH's petition for attorney's fees was premature in light of Judge Morgan's order. As Eighty-Four correctly notes, an immediate appeal from this ruling will not materially advance the ultimate termination of this matter since other dispositive issues, including the issue of the bond amount, will remain unresolved.

Therefore, the following order is entered:

1999), p. 3.

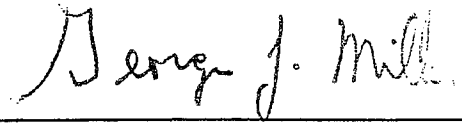
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PEOPLE UNITED TO SAVE HOMES and PENNSYLVANIA AMERICAN WATER COMPANY	:	
v.	:	**EHB Docket No. 95-232-R (Consolidated with 95-233-R, 95-223-R and 96-226-R)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION; EIGHTY-FOUR MINING COMPANY, Permittee; INTERNATIONAL UNITED MINE WORKERS OF AMERICA; and DISTRICT 2 UNITED MINE WORKERS OF AMERICA, Intervenors	:	

ORDER

AND NOW, this 25th day of January, 2000, People United to Save Homes' Motion to Certify Interlocutory Order is **denied**.

ENVIRONMENTAL HEARING BOARD



GEORGE J. MILLER
Administrative Law Judge
Chairman

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

MICHAEL L. KRANCER
Administrative Law Judge
Member

DATED: January 25, 2000

EHB Docket No. 95-232-R
(Consolidated with 95-223-R,
95-223-R and 96-226-R)

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

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WILLIAM T. PHILLIP
SECRETARY TO THE B

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: January 27, 2000**
	:	

OPINION AND ORDER ON MOTION FOR SUMMARY JUDGMENT

By Michael L. Krancer, Administrative Law Judge

Synopsis:

DEP's Motion for Summary Judgment under the Noncoal SMCRA bond forfeiture provision which calls for forfeiture of bonds upon a failure by the operator to comply with any requirement of the Act for which liability has been charged on the bond is granted in part and denied in part. Because of the dismissal of an earlier appeal involving some of the same issues, the doctrines of res judicata and collateral estoppel apply and certain of DEP's allegations that Kresge violated the Noncoal SMCRA to make those allegations are established and not contestable in this case. The *Kent Coal* doctrine does not apply to allow Kresge to relitigate the fact of those violations. Kresge's attempted assertion of the "impossibility" defense in this bond forfeiture case fails because the imposition of the defense is foreclosed by operation of res judicata and collateral estoppel and impossibility is not a defense to a bond forfeiture action.

However, Summary Judgement cannot be granted in full because there is no record information regarding the terms of the bond and whether the violations at issue are of the nature for which liability has been charged under the bond.

Procedural Posture

The motion dealt with here was filed by the Department of Environmental Protection (hereinafter referred to either as "the Department" or "DEP") seeking Summary Judgment on an appeal of a bond forfeiture action taken against Carl L. Kresge & Sons, Inc., ("Kresge"). Kresge appealed from both the Department's assessment of civil penalties and the bond forfeiture. Both actions of the Department were stated to have been taken under the authority of the Noncoal Surface Mining and Conservation and Reclamation Act, Act of December 19, 1984, P.L. 1093, *as amended*, 52 P. S. §§ 3301-3326 ("Noncoal SMCRA"). The appeal of the bond forfeiture was filed on March 1, 1999 and bears Docket No. 99-051. The appeal of the Civil Penalty Assessment was filed on July 29, 1999 and bears Docket No. 99-149. The two matters were consolidated by Order of the Board dated October 13, 1999. By Order dated November 8, 1999 the case was transferred from Judge Coleman to Judge Krancer. The instant motion deals only with the DEP's bond forfeiture action.

Factual and Legal Background.

Because DEP is relying, primarily, on the doctrine of "administrative finality" to support its Motion, we will need to discuss the facts of this matter in some detail. The undisputed and/or uncontestable facts at this stage of the proceedings are as follows. Kresge is a Pennsylvania Corporation with a principal place of business located at 1199 Laurel Run Road, Wilkes-Barre, Luzerne County, PA 18701. The Department issued

Mining Activity Permit No. 40960806 (Permit) on September 19, 1996, to Kresge for the operation of the Meadow Run Stone site located in Luzerne County, Bear Creek Township. This permit was issued under the Noncoal SMCRA. Kresge did not appeal the issuance of the Permit and, of course, the appeal period for the Permit is now long expired.

The Department issued Inspection Report Noncoal/Compliance Order 97-5-059-N ("CO No. 59") to Kresge on October 28, 1997. CO No. 59 was based upon inspections that had taken place on October 2nd and 15th , 1997. The Department stated, among other things, in the "inspection report" part of CO No. 59 that: (1) Kresge was the operator; (2) no mining activity had taken place in at least 30 days; (3) the operator had abandoned the site; (4) thus, the operator must backfill and final grade all affected areas by November 28, 1997. In the "Compliance Order" part of CO No. 59 the Department noted the violation that "operator has failed to backfill, close or otherwise permanently reclaim in accordance with approved plan in the surface mine permit on an operation which has permanently ceased" and thus the operator has violated 25 Pa. Code § 77.652.[1] Kresge was directed as follows: (1) "[o]perator shall backfill, close, or otherwise permanently reclaim affected area in accordance with approved plan in the surface mine

[1] 25 Pa. Code § 77.652, which is part of the regulations promulgated under the Noncoal SMCRA, states that:

> Operations that are permanently ceased shall be backfilled or closed or otherwise permanently reclaimed in accordance with this chapter and the permit. Underground openings, equipment, structures or other facilities not required for monitoring, unless approved by the Department as suitable for the postmining land use, shall be removed and the affected land reclaimed.

permit" and (2) Kresge must "backfill and final grade by November 28, 1997; reclaim by May 15, 1998".[2] Kresge did not appeal CO No. 59. The appeal period has expired.

Next, the Department issued another Inspection Report Noncoal/Compliance Order, No. 97-5-069-N ("CO No. 69"), to Kresge on December 10, 1997. CO No. 69 indicates that it is was issued based on an inspection of the site that day. The "inspection report" part of the CO states, among other things, that:

> [o]perator was issued compliance order 97-5-059-N on Oct. 28, 1997 for failing to backfill, close, or otherwise permanently reclaim an operation which has permanently ceased. Operator is being issued a failure to comply order because the affected area has not been backfilled and final graded. Affected area must be backfilled and graded immediately. Seeding must be conducted by May 15, 1998.

The "Compliance Order" part of CO No. 69 describes the violation as failure to comply with an order of the Department. Specifically, the operator had failed to comply with CO No. 59 in that the operator had failed to permanently reclaim an operation which has permanently ceased. The DEP, again, directed the operator to backfill, close or otherwise permanently reclaim the affected area immediately and to "reclaim" by May 15, 1998. We assume that the use of the term "reclaim" here means reseed.[3]

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[2] We note that there is also a notation in the Comments and Recommendations part of the Inspection Report of a notice of violation relating to an alleged failure to maintain proper records of blasting operations relating to two blasts which had supposedly taken place at the site within the past three years. 25 Pa. Code Section 77.565 of the Department's regulations relating to noncoal mining require that blasting records be "retained for at least 3 years." The narrative goes on to state that reports are to be received in the Pottsville Office by November 28, 1997. This particular matter, however, is not pursued by DEP in this Motion.

[3] We assume that the term "reclaim" means that Kresge is to reseed. The Order also states that "[o]perator will be assessed a civil penalty of $750/day until the site is backfilled and final graded." This particular matter is not dealt with in this part of the case. We are deciding here only the Department's motion for summary judgment on the bond forfeiture aspect of the case.

This time Kresge did appeal by pro se Notice of Appeal filed on January 20, 1998 and the appeal bore docket No. 98-013-C. However, as we will be discussing in more detail, and as will be of great import in this appeal, that appeal was dismissed because of Kresge's failure to obtain counsel as it was twice ordered to do by the Board. The dismissal order in docket No. 98-013-C is attached as an exhibit to DEP's brief. Although not mentioned in the parties' summary judgment papers, the Board's record of the No. 98-013-C appeal shows that the prominent contentions in the notice of appeal were that Kresge never mined at the site due to a zoning preclusion and the Township's refusal to grant a special exception, and that Kresge was precluded from performing any work on the site due to a Common Pleas Court injunction which Kresge asserted prevented it from doing anything on the property. Kresge was notified once and ordered twice to have counsel enter an appearance on the corporation's behalf in compliance with Board Rules, but the repeated request/orders were ignored. Thus, the appeal was dismissed by Order of the Board dated April 27, 1998.[4]

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[4] Under 25 Pa. Code Section 1021.109(a) the Board may take official notice of record facts reflected in the official docket of the Board. That rule has been applied by the Board before in the context of a summary judgment motion to look at the record docket of other appeals involving the same appellant. *See White Glove, Inc. v. DEP*, 1998 EHB 372, 375; *Babich v. DER*, 1994 EHB 541, 547 n. 2; *Dunkard Creek Coal, Inc. v. DER,* 1993 EHB 536, 540. Also, the Board issued a Rule To Show Cause in this case upon completion of the parties' briefing of this summary judgment motion, dated December 9, 1999 which ordered that either party with an objection to the Board's taking official notice under 25 Pa. Code Section 1021.109(a) of the record docket in No. 98-013-C to so notify the Board, by January 7, 2000, of any objection and to provide the Board with legal authority which it contended precluded the Board from taking such official notice. Both parties responded to the Rule in writing by stating that there was no objection to the Board taking official notice of the entire record docket in No. 98-013-C. Kresge's response to the Rule noted that there was no objection to the Board's taking such official notice "subject to the limitations" of 25 Pa. Section 1021.109(a) and 25 Pa. Code Section 1021.41. Obviously, our official notice is governed and limited by the very

While Kresge's appeal of CO No. 69 was still pending, the Department, by letter dated March 4, 1999, suspended the mining permit because, as set forth in the letter, the Department had determined that Kresge failed to comply, and further, had shown either a lack of ability or intention to comply with the "Surface Mining Conservation and Reclamation Act", the Clean Streams Law, and the rules and regulations of the Department. Specifically, it is stated in the letter that the violations noted in CO No. 59 and CO No. 69 remained unabated and, thus, the Department suspended the permit "in accordance with the Surface Mining Act, Section 4.3, 52 Pa. Code CSA 1396.4c".[5] The letter then notified Kresge that this action of the Department, namely, the permit

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Rule which so authorizes the Board to take official notice and under which we directed the parties to notify the Board whether there was any objection to doing so. Accordingly, the Board is taking official notice of not only the dismissal order which was attached as an exhibit to DEP's brief but also to the entire record docket in case No. 98-013-C.

The Board's record of the appeal of CO No. 69 shows that the appeal was filed, *pro se*, on January 20, 1998. Pre-Hearing Order No. 1 was issued on January 22, 1998. On that same day, the Honorable Judge Coleman directed a letter to the appellant noting that Kresge is not represented by counsel and that Rule 1021.22 (25 Pa. Code § 1021.22) requires that corporations to be represented by counsel. The letter concluded by requested that Kresge have counsel enter an appearance by February 23, 1998. When Kresge failed to respond, the Board on March 5, 1998 entered a Rule To Show Cause why the appeal should not be dismissed as a sanction for failure to comply with Rule 1021.22. The rule was made returnable on or before March 25, 1998. Kresge, again, did not respond even to the Rule to Show Cause. Thus, the Board entered a second Rule To Show Cause on March 30, 1998. When still no response was forthcoming, the Board entered its Order dismissing the case on April 27, 1998.

[5] This particular statutory reference is very confusing and seemingly misplaced because it is to the Coal SMCRA, Act of May 31, 1945, P.L. 1198, as amended, 52 P. S. §§1396.1-1396.19a, not the Noncoal SMCRA. As noted before, the permit was granted under the authority of the Noncoal SMCRA. Also, the reference just before the statutory cite in the letter to the "Surface Mining Conservation and Reclamation Act" is also a reference to the Coal SMCRA, not the Noncoal SMCRA. The Noncoal SMCRA is designated as the "Noncoal Surface Mining Conservation and Reclamation Act." 52 P.S. §3301.

suspension, could be appealed to the Board. The letter next changes the subject and addressed the bond. Kresge is given notice that the Department intends to forfeit the bond on the operation. The letter states that the operation has been affected by surface mining and has outstanding violations of the Clean Streams Law and the Surface Mining Act, specifically, the failure to comply with an order of the Department and failure to reclaim the Site. The Department's letter tells Kresge that unless the violations mentioned are corrected within thirty (30) days, the Department will take action to declare a forfeiture of the bond under the provisions of "Section 4(h) of the Surface Mining and Conservation and Reclamation Act".[6] The letter concludes by addressing the Kresge mining license as distinguished from the permit. The letter notifies Kresge that DEP intends to suspend Kresge's Surface Mining Operator's License due to Kresge's "lack of intention to comply with the Clean Streams Law and the Surface Mining Act." Kresge is offered the opportunity, pursuant to 25 Pa. Code § 87.20(b), to convene an informal conference with DEP prior to DEP's making any final decision regarding the license.[7]

Kresge did not appeal the permit suspension action taken in the Department's March 4, 1998 letter.

Finally, on January 27, 1999, the other shoe dropped and the Department followed through on its announced intention to have the Kresge bond forfeited. In its

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[6] Again, this is a citation to the Coal SMCRA, not the Noncoal SMCRA. The citation to Section 4(h) of the Surface Mining Act is to 52 P.S. §1396.4(h) which is part of the Coal SMCRA. The "bond forfeiture" provision of the Noncoal SMCRA, on the other hand, is Section 9(k) of the Noncoal SMCRA., 52 P.S. 3309(k).

[7] Once again, this citation to the "Surface Mining Act" is to the wrong Act.

bond forfeiture letter, the Department states that the action is necessary because of Kresge's numerous violations of the law which include:

1. Failure to complete reclamation of the mine site.
2. Failure to comply with an order of the Department.
3. Failure to show a willingness or intention to comply with the applicable laws and regulations.
4. Failure to pay outstanding civil penalties.
5. Such other violations identified in the numerous Inspection Reports, letters and Notices of Violation that were sent to Kresge.

As a result, says the Department in the letter, of Kresge's continued failure to correct the violations and to reclaim the area affected by the mining operations, the entire amount of the single $5,000 surety bond is declared by DEP to be forfeited. The Department's letter states that its action is in accordance with section 9 of the Noncoal Surface Mining Conservation and Reclamation Act and Chapter 77, Subchapter D, section 77.252 of the Regulations.[8] Kresge timely appealed the bond forfeiture to the Board and it is DEP's Motion for Summary Judgment, which is limited to the bond forfeiture action, which is before us to decide now.

Inasmuch as the DEP's action is premised upon the statutory and regulatory provisions just mentioned we will set forth those provisions as they will provide the backdrop for our further analysis. Section 9 of the Noncoal SMCRA is entitled "Bonding." Section 9(k) deals specifically with forfeiture. Section 9(k)(1) is the crucial subsection, and it provides as follows:

"(k) Forfeiture.—

[8] Unlike the references and citations in the Department's March 4, 1999 letter announcing DEP's intention to declare a bond forfeiture discussed above, the citations in the January 27, 1999 bond forfeiture letter are to the Noncoal SMCRA and the Noncoal SMCRA regulations, as opposed to the Coal SMCRA and its regulations.

(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).

25 Pa. Code § 77.252 provides as follows:

(a) The Department will forfeit the bond, or make an equivalent declaration for payment in lieu of bond for a permit if it determines that one of the following applies:

(1) The permittee has violated and continues to violate terms and conditions of the bond.
(2) The permittee has failed and continues to fail to conduct the mining or reclamation operations in accordance with the act, this chapter or the conditions of the permit.
(3) The permittee has abandoned the permit area.
(4) The permits for the area under the bond have been revoked, and the permittee has failed to complete the reclamation, abatement and revegetation required by the act, this chapter and the conditions of the permit.
(5) The permittee has failed to comply with a compliance schedule in a adjudicated proceeding, consent order or agreement approved by the Department.
(6) The permittee has become insolvent, or has a receiver appointed by the court; or a creditor of the permittee has attached or executed a judgment against the permittee's equipment, materials and facilities at the permit area or on the collateral pledged to the Department and the permittee cannot demonstrate or prove the ability to continue to operate in compliance with the environmental acts, the act, this chapter and the conditions of the permit.
(7) The permittee has failed to make payment in lieu of the bond.

(b) If the operator fails or refuses to comply with a provision of the act for which liability has been charged on the bond, the Department will declare the bond forfeited.

> (c) Upon certification of surety bond forfeiture by the Department, the Office of Attorney General will promptly collect the bond and pay the proceeds into the fund. Where the operator deposited cash or securities as collateral, the Department will sell the collateral and pay the proceeds into the fund or direct the State Treasurer to pay the proceeds into that fund.

25 Pa. Code § 77.252.[9]

The Parties' Arguments

DEP's Argument.

Quite understandably and predictably, the mainstay of DEP's legal argument focuses on the doctrine of administrative finality. DEP's brief argues that "it is established" that Kresge violated several provisions of the Noncoal SMCRA, the Clean Streams Law and the regulations, and that the DEP declared the bond forfeited as a result of these unabated violations. DEP contends that the violations are established by operation of the doctrine of administrative finality. DEP argues, in a nutshell, that CO No. 59, CO No. 69, and the March 4, 1999 letter were appealable actions and:

> the unabated and unappealed violations cited in [CO No. 59 and CO No. 69] were the basis for the Department's January 27, 1999 forfeiture. Therefore, Kresge's failure to appeal those actions of the Department made those Department actions administratively final. As such the doctrine of administrative finality prevents the Board from engaging in an examination of the January 27, 1999 forfeiture.[10]

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[9] DEP's motion for summary judgment and brief in support thereof are premised on the statutory provision and do not discuss the regulatory provisions. Thus, our subsequent analysis of whether DEP is entitled to summary judgment will be confined to the statutory provision.

[10] DEP's reference here to "unappealed" violations cited in [CO No. 59 and CO No. 69] is not quite correct in this context. Kresge did appeal CO No. 69. That appeal, however, as we have seen, was dismissed by an order of the Board. We will have more to say about that later as this situation is not adverse at all to DEP's reliance on the doctrine of administrative finality to support the bond forfeiture action. Also, DEP seems to be dropping here its prior reference to the suggestion that the "findings" outlined in the

DEP's brief does not elucidate on precisely what specific facts it contends are established nor is there an analysis of what it contends is established with reference to the five grounds for the bond forfeiture set forth in the January 27, 1999 bond forfeiture letter. In any event, DEP's brief then argues that section 9(k) of the Noncoal SMCRA imposes a mandatory duty on the Department to forfeit the bond if an operator fails or refuses to comply with any requirement of the Noncoal SMCRA for which liability has been charged on the bond. DEP, here, recognizes that there is no case law on that exact point under the Noncoal SMCRA so it relies upon language contained in the Coal SMCRA bond forfeiture provision which it says is "very similar" if not exactly the same as the bond forfeiture provision of the Noncoal SMCRA. DEP's reference to the Coal SMCRA bond forfeiture provision is to 52 P.S. § 1396.4(h), which provides, in pertinent part that, "(h) If the operator fails or refuses to comply with the requirements of the act in any respect for which liability is charged on the bond, the department shall declare such bond forfeited." 52 P.S. § 1396.4(h). The Department then cites several cases that it argues stand for the proposition that the duty to forfeit the bonds under 52 P.S. §1396.4(h) is mandatory, and "once the Department finds that the mining operator has failed to comply with the requirements of the Act in any respect", the bonds must be forfeited. These cases are *Snyder v. DEP*, 588 A.2d 1001 (Pa. Cmwlth. 1991); *Morcoal Co. v. DER,* 459 A.2d 1303 (Pa. Cmwlth. 1983) and *Lucky Strike Coal Co. v. DEP*, 1997 EHB 787. Thus, the argument goes, the duty to forfeit under the Noncoal SMCRA is likewise mandatory.

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letter dated March 4, 1998 became administratively final for the purposes of analyzing the motion at hand and its focus is solely on the violations cited in CO No. 59 and CO No. 69 as being the basis for DEP's January 27, 1999 bond forfeiture action.

DEP's Motion is supported by the Affidavit of Ms. Colleen Stutzman, the Surface Mine Conservation Inspector Supervisor who signed the inspection reports which were the respective parts of CO No. 59 and CO No. 69 and by various additional exhibits including: (1) the original Noncoal SMCRA permit issued to Kresge; (2) the certified mail copy and regular mail copy of CO No. 59; (3) the certified mail copy and regular mail copy of CO No. 69; (4) the certified mail and regular mail copy of the March 4, 1998 letter from DEP to Kresge; and (5) the certified mail copy of the January 27, 1999 bond forfeiture letter together with the copies of the certified mail ticket and the signed return receipt. The DEP brief attaches as an appendix a copy of the Board's April 27, 1998 Order dismissing the Kresge appeal of CO No. 69 for failure to obtain counsel.

Kresge sees things very differently. Kresge argues that based on the averments in its papers and DEP's papers, genuine issues of material fact exist as to all of the five averments which are the stated bases of DEP's January 27, 1999 bond forfeiture. Kresge's overarching theme is that the doctrine of administrative finality either does not apply or should not apply. The seminal factual and legal contentions Kresge asserts are that: (1) it did not conduct surface mining as defined by the Act and, therefore, the bond forfeiture is without merit because it is based on compliance orders that were wrongfully issued; and (2) because of a Common Pleas Court injunction Kresge was not permitted to do anything on the premises. Thus, Kresge argues, as it never mined the site, the Noncoal SMCRA does not apply, and, therefore, all compliance orders or other determinations of DEP under the putative authority of the Noncoal SMCRA are unsupportable. Accordingly, Kresge's argument goes, there is no jurisdiction or

authority for DEP to have issued the bond forfeiture.[11] Furthermore, Kresge contends that the court injunction "legally prevented the Appellant's compliance with any of the directives of DEP." This second point is in essence an "impossibility" defense.[12]

As to the statutory provision in question, 52 P. S. § 3309(k)(1), Kresge notes that DEP cites no case law at all under the Noncoal SMCRA bond forfeiture provisions that compels the conclusion that DEP's duty to forfeit is mandatory under the Noncoal SMCRA, and that there has never been such a case. We use the word "notes" here deliberately because Kresge does not provide us with any affirmative argument, based on statutory language or case law, that the bond forfeiture provisions of the Noncoal SMCRA containing the term "shall" must or should be read by the Board to mean "may" or in any other way contrary to how the DEP wants us to interpret the provision. Instead, Kresge's ties this point to its overarching theme because its brief tells us that the lack of such case law, "supports the proposition that this Board should consider the

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[11] Also, apparently as a subplot to this point, Kresge's brief states that "[f]urther, at all times relevant hereto, Appellant was the authorized agent of the landowner, Mr. Perugino." This thought is not expanded upon in any detail in the brief and we are not exactly sure how this concept fits in with Kresge's other arguments or how this factor relates to the specific statutes or regulations herein under consideration.

[12] As a corollary argument, or as additional support for the "impossibility" argument, Kresge cites a zoning ordinance which he says renders mining on the property an unauthorized use. He claims to have attempted to obtain a curative amendment in order to elevate mining to an authorized use, but has been rebuffed in any attempts to do so. Although not totally clear from Kresge's papers, it appears that Kresge is arguing that the zoning restriction, which bars mining on the property either establishes that mining in fact never took place on the property or that it was impossible for Kresge to have complied with the DEP direction to backfill or both. The first possibility suffers from a logical deficiency. The existence of a law proscribing an act does not thereby render the commission of the act so proscribed beyond human capability. As to the second possibility, we are not at all clear that even if mining were forbidden by zoning ordinance, the act of backfilling and reseeding would be likewise prohibited. In any

underlying bases of the forfeiture decision rather than perpetuate the injustice caused by DEP's previous compliance decisions."

Kresge's final argument is based on the Commonwealth Court decision of *Kent Coal v. DER,* 550 A.2d 279 (Pa. Cmwlth. 1988). Kresege's brief raises the *Kent Coal* issue by stating that, "[s]urprisingly, DEP fails to bring to the Board's attention the case of [*Kent Coal*] in which the Commonwealth Court found that a coal mining company charged with violations of environmental regulations could challenge the fact of violation as well as the amount of fine in an appeal from an assessment order, even though the company did not timely appeal from an earlier compliance order arising from the same alleged violation." Kresge then recites a sentence from the *Kent Coal* case. However, there is no analysis of the *Kent Coal* decision and the brief is barren of an explanation how, in Kresge's view, the *Kent Coal* doctrine applies in the circumstances we find here.

Kresge's reply brief is supported by the Affidavit of Carl L. Kresge in the capacity as President of Kresge; a copy of a Common Pleas Court Complaint brought by Bear Creek Township, filed on March 21, 1997, seeking an injunction ordering Kresge and various others which we assume are alleged to have an interest in the property or the activities thereon to: (a) "cease all mining activity on the premises"; and (b) that "defendants obtain all necessary Land Use Permits for the conduct of mining activities"; the resultant preliminary injunction issued by the Common Pleas Court on March 21, 1997, ordering that defendants are to: (a) cease all activity on the premises; (b) obtain all necessary Land Use Permits prior to initiating any further mining activities on the

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event, due to our disposition of this matter it is irrelevant which of the possibilities is

Premises; and, further, providing that the Order shall remain in full force and effect until such time as the Court specifically orders otherwise.

DEP's response brief, which was filed on December 20, 1999, merely restates its original position that administrative finality applies and the provisions of the Noncoal SMCRA bond forfeiture provisions call for mandatory forfeiture. Without waiving its overriding administrative finality argument, DEP notes that Kresge's argument relating to the injunction is an "impossibility" defense which does not apply in these circumstances. DEP's response brief does not even address Kresge's contention that the *Kent Coal* case allows Kresge to defeat administrative finality.

Legal Analysis

I. Summary Judgment Standard.

The Board's Rules require that "[m]otions for summary judgment or partial summary judgment and responses shall conform to Pennsylvania Rules of Civil Procedure 1035.1—1035.5 (relating to motion for summary judgment) except for the provision of the 30-day period in which to file a response." 25 Pa. Code §1021.73(b). Under the Pennsylvania Rules of Civil Procedure, a party may move for summary judgment "[after the relevant pleadings are closed, but within such time as not to unreasonably delay trial." Pa. R.C.P. 1035.2. When a motion for summary judgment is timely filed, the Board will assess it and "grant summary judgment only when the pleadings, depositions, answers to interrogatories and admissions of record, if any, show that there is no genuine issue of material fact in dispute and the moving party is, therefore, entitled to judgment as a matter of law." *County of Adams v. DEP*, 687 A.2d

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being posited.

1222, 1224 n. 4. (Pa. Cmwlth. 1997). *See* Pa. R.C.P. 1035.2. In order to reach this standard and prevail on a motion for summary judgment, the movant must meet the burden of setting forth "with adequate particularity the reasons for summary judgment [and, such] reasons must be apparent from the face of the motion." *Barkman v. DEP*, 1993 EHB 738, 745. Further, the Board cannot speculate or supply the legal or factual arguments lacking in the movant's motion. *See id.*, *Gambler v. DEP*, 1997 EHB 751, 754. Rather, when evaluating a motion for summary judgment, the Board must "view 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." *Pappas v. Asbel*, 724 A.2d 889, 891 (1999); (citing *Pennsylvania State University v. County of Centre*, 615 A.2d 303, 304 (1992); s*ee Wayne v. DEP*, Docket No. 98-175-R slip op. at 3. (Opinion issued June 10, 1999); *Bentley v. DEP*, Docket No. 98-058-MG slip op. at 3 (Opinion issued June 28, 1999).

II. What Facts, If Any, Are Established Through The Doctrine Of Administrative Finality and What Impact, If Any, Does the *Kent Coal* Decision Have

A. What is Administratively Final and Why.

As we discussed above, appellant never appealed CO No. 59. Thus, the matters asserted in that Order have become administratively final. CO No. 69 was appealed, but that appeal was eventually dismissed by the Board. This dismissal has very significant effects. A dismissal of an appellant's appeal as a sanction for having twice refused to even reply to orders of the Board to obtain counsel as required by Board rules is the equivalent of a sanctioned default judgment with prejudice and with full *res judicata* and collateral estoppel effects.

The Board's Rules direct us to the conclusion that the dismissal of Kresge's appeal of CO No. 69 is with prejudice. Under 25 Pa. Code Section 1021.120(b) a voluntary withdrawal by a party of an appeal prior to an adjudication is with prejudice unless specifically otherwise indicated by the Board. It would be anomalous indeed if a party who, like Kresge, had its appeal dismissed as a sanction for having repeatedly violated Board Orders were in a markedly better position in terms of what *res judicata* and collateral estoppel effect follows than a party who voluntarily withdraws its appeal. If that were the case then there would be a substantial tactical legal advantage to be gained by contumacious behavior and a sanction would be turned into a material reward.

That a default judgment in Pennsylvania is accorded full *res judicata* and collateral estoppel effect has long been the law of this Commonwealth. As our Supreme Court noted in *Zimmer v. Zimmer,* 326 A.2d 318 (Pa. 1974):

> This Court has long held that a judgment by default is *res judicata* and quite as conclusive as one rendered on a verdict after litigation insofar as a defaulting defendant is concerned. *See Devlin v. Piechoski*, 374 Pa. 639, 99 A.2d 346 (1953); *Exler v. Wickes Brothers*, 263 Pa. 150, 106 A. 233 (1919); *Stradley v. Bath Portland Cement Company,* 228 Pa. 108, 77 A. 242 (1910).

Zimmer v. Zimmer, supra, 326 A.2d at 320. Also, the Superior Court stated in *Morgan Guaranty Trust Company of New York v. Staats*, 631 A.2d 631 (Pa. Super. 1993):

> When a judgment by default becomes final, all the general rules in regard to conclusiveness of judgments apply. *See Zimmer v. Zimmer*, 457 Pa. 488, 326 A.2d 318 (1974) (a default judgment as a result of failure to answer is as conclusive as a judgment entered on a jury verdict). A default judgment is *res judicata* with regard to transactions occurring prior to entry of judgment. *Quaker City Chocolate & Confectionery Co. v. Warnock Bldg. Ass'n.*, 347 Pa. 186, 32 A.2d 5 (1943).

Morgan Guaranty, *supra*, 631 A.2d at 638.

The Supreme Court case of *Fox v. Gabler*, 626 A.2d 1141 (Pa. 1993), is instructive and illustrative of the situation Kresge now finds itself. In that case, Fox brought an action against Gabler for an accounting alleging that an agreement existed between the two whereby Fox advanced money to Gabler for Gabler to open a new bar and restaurant business and for which Fox was to receive a share of the profits. The Common Pleas Court, in response to Gabler's refusal to respond to discovery requests, sanctioned Gabler by entry of default judgment against him. The default judgment was affirmed and the Supreme Court denied review. The matter was then returned to the Common Pleas Court for a determination of damages. Gabler filed a motion for summary judgment at that time arguing that damages could not be awarded because the underlying agreement which Fox was relying upon was in violation of the Liquor Code which was a matter he raised in his initial pleadings. The trial court declined to rule on the Summary Judgment motion because it was not timely filed. The Superior Court, on appeal, held that Gabler's motion should have been granted. The Supreme Court reversed. The Court held that,

> ...[t]he judgment entered by default as a sanction, was affirmed by the Superior Court and we declined to accept further review. Accordingly, as between Appellant and Appellee, the judgment is final and conclusive not only as respects matters actually presented to sustain or defeat the right asserted in the earlier proceeding but also as respects any other available matter which might have been presented to that end.

Fox v. Gabler, 626 A.2d at 1143. The Court also said, in words applicable to this case, that, "[t]his [defense] is a defense which had already been raised in [Gabler's] answer and new matter to the original complaint, but because of [Gabler's] disobedience to discovery orders, was effectively abandoned by him through his conduct when the judgment by default was entered against him." *Id.* at 1144. While the Supreme Court recognized that the defense could, perhaps, be raised in a subsequent proceeding, that could only happen where the defense has not risen in the former pleadings and where the facts giving rise to the defense appear on the face of the record. As the Court stated,

> [Gabler's] conduct in the previous action was certainly the equivalent of ignoring a valid defense to [Fox's] action and our holding in [*Duquesne Light Co. v. Pittsburgh Railways*, 194 A.2d 319 (Pa. 1963)] is controlling and bars [Gabler] from relitigating the enforceability of the underlying contract via the Motion for Summary Judgment.

Id.

There is no question but the dismissal by this Board of Kresge's appeal was final in that any possible period of appeal to the Commonwealth Court of the Board's Order dismissing Kresge's appeal as a sanction had expired. *See* Pa. R. App. P. 903. Thus, under the maxims of the 25 Pa. Code §1021.120(b), *Zimmer v. Zimmer and Fox v. Gabler* cases as discussed above, that Order of dismissal is with prejudice as to the matters that Kresge raised in the appeal and entails res judicata and collateral estoppel effects. In short, the dismissal operates as and constitutes an adjudication on the merits as fully and completely as if the order had been entered after trial when the same claims are involved in both proceedings. [13]

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[13] Our treatment of this subject would not be complete unless we recognized and discussed the Third Circuit's opinion in *In Re Shirley Graves, Fleet Consumer*

Discount Co. v. Shirley Graves, 33 F.3d 242 (3rd Cir. 1994). In that case, the Third Circuit said "default judgments are not given preclusive effect in Pennsylvania's courts." 33 F.3d at 248. The *Graves* Court implied without actually using the word that the *Zimmer* case had been overruled noting that *Zimmer* was "unconvincing." *Id.* at 248 n. 11. We do not agree that *Zimmer* has been overruled by our Supreme Court.

In *Graves,* Ms. Graves was a non-record holder of an interest in the real estate upon which Fleet had foreclosed. Fleet obtained a default judgment against her in a state court foreclosure action without Graves having received personal notice of the foreclosure proceedings. The state courts did not allow the default judgment to be reopened even though, under Pennsylvania law, a non-record interest holder in a foreclosure action is entitled to actual personal notice of the foreclosure action and she had not received personal notice. Fleet attempted to seek relief from the automatic stay in Ms. Graves bankruptcy case. Graves argued in federal court that the state court default judgment was void as to her because she had not received personal notice as required by state law. Fleet asserted that under *Zimmer*, the state court default judgment on the foreclosure action precluded any inquiry into that matter. The Bankruptcy Court and the District Court agreed with Ms. Graves.

The Third Circuit, in upholding the District Court, said that, "Fleet's issue preclusion argument also fails because default judgments are not given preclusive effect in Pennsylvania" and that the *Zimmer* case was not "convincing" in this regard. *Id.* The Third Circuit cited two cases to support its conclusion, *Schubach v. Silver*, 336 A.2d 328 (Pa. 1975) and *GPU Industrial Intervenors v. Pennsylvania Public Utilities Commission*, 628 A.2d 1187 (Pa. Cmwlth. 1993). *Id.* Even though the *Graves* Court carefully avoided using the word "overruled", it in effect held that *Schubach* had overruled *Zimmer*. *Id.* at 248, 248 n. 11.

The *Graves* Court's rationale in coming to its conclusion is important because it highlights the reason that we either do not agree with the Graves Court's evaluation of the effect on the *Zimmer* case of *Schubach* and *GPU*, or we think that the Third Circuit's conclusion and analysis of *Zimmer* are not germane or applicable to this case. The *Graves* Court reasoned that the *Schubach* case had adopted the principles of section 27 of the Restatement of Judgements ("Restatement"). Restatement section 27 states in pertinent part that, "when an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive on a subsequent action between the same parties, whether on the same or different claim." *Restatement of Judgments, §27 (1980)*. The *Graves* Court focused specifically on Comment e of Restatement section 27 which states that, "in a case of a judgment entered by confession, consent, or default, none of the issues is actually litigated. Therefore, the rule of this section does not apply with respect to any issue in a subsequent action." *Id.* cmt. e. The *Graves* court then reasoned that, in light of *Schubach's* endorsement of Restatement section 27 that *Zimmer* was "unconvincing" with respect to the *res judicata* and collateral estoppel effect of default judgments because *Zimmer* was decided in 1974, a year before the *Schubach* case was decided.

A close analysis shows that the *Graves* Court's proposition that *Schubach* overrules *Zimmer* with respect to the status accorded to default judgments is very problematic. The *Schubach* case had nothing to do with comment e Restatement section 27; indeed the *Schubach* Court never even mentions comment e. *Schubach* was a zoning case. The first action was a spot zoning action brought by opponents of the City of Philadelphia's rezoning of a single parcel of land from R-2 residential to C-2 industrial to accommodate a nursing home. The rezoned tract consisted only of the parcel which was to be the site of the nursing home. The challenge was upheld through the Pennsylvania Supreme Court which held that the City's actions under the circumstances presented constituted spot zoning. Next, several years later, the City tried a different tact and rezoned several contiguous parcels of land, including the parcel which would be the site of the nursing home, from R-2 to C-2. The same opponents of the nursing home challenged this rezoning as spot zoning, and sued again. In the second litigation the opponents tried to assert that the finding of spot zoning in the first litigation should be given full *res judicata* and collateral estoppel effect in the second litigation. The Supreme Court had no trouble dispatching that argument, noting that, as a general matter, zoning law is an area in which *res judicata* and collateral estoppel should be applied very sparingly because neighborhood composition and characteristics by nature change over time. *Schubach, supra*, 336 A.2d at 333. In that case, the nature of the neighborhood had changed. Also, the second time around, the area rezoned was not the same physical configuration as in the first case. Therefore, the inquiry presented in the second litigation was not the same as in the first litigation and the Court held that *res judicata* should not be applied. *Id.* at 334.

The *Schubach* Court did indeed cite Restatement of Judgements section 68, which is the predecessor of section 27, as being the law in Pennsylvania. However, comment e was not at all involved in the Court's analysis. Furthermore, the *Schubach* court stressed that it is the opportunity to have litigated the issue in the first case as the key to the analysis of whether the first judgement should be given preclusive effect in a second case. *Id.* at 334-35. The Court said, "...[f]or an issue to be binding in a subsequent proceeding the parties must have had an opportunity to 'actually litigate' the issue." *Id.* (emphasis added). Obviously, in *Schubach*, there was no opportunity to have litigated in the first zoning case whether spot zoning had occurred in the changed facts and circumstances presented in the second case. Thus, the case was not appropriate for *res judicata*. This is the context of the *Schubach* Court's citation of Restatement section 68.

Also, very important to our analysis of what impact, if any, *Schubach* had on *Zimmer* is the fact that the *Schubach* Court did not say that it was overruling in any respect its previous decision in *Zimmer*. Indeed, the *Zimmer* case has been cited with approval by, among others, the Superior Court in the 1993 *Morgan Guaranty* case which we have discussed and by the Supreme Court itself in the 1993 *Fox v. Gabler* case discussed above. Indeed, in *Fox v. Gabler*, decided in May of 1993, which was more than one year before the Third Circuit decided the *Graves* case, the Pennsylvania Supreme Court said, "[o]nce all direct appeals are exhausted from the entry of such a

Thus, it appears to us that the following facts, at a minimum, have become final and established and uncontestable by Kresge in this action via the operation of administrative finality and/or *res judicata*: (1) Kresge was an operator of the mine site under the Non-Coal SMCRA; (2) the operator, Kresge, failed to permanently reclaim an

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judgment, we long ago concluded that the judgment by default is *res judicata* and quite as conclusive as one rendered on a verdict after litigation insofar as a defaulting defendant is concerned." *Fox v. Gabler,* 626 A.2d at 1143 (*citing Zimmer v. Zimmer).* One can hardly conceive of a more ringing endorsement of the *Zimmer* case and a message to both the Pennsylvania bar and lower judiciary that *Zimmer* is still the law.

The second of the *Graves* Court's citations, to *GPU Industrial Intervenors v. Pennsylvania Public Utilities Commission*, 628 A.2d 626 (Pa. Cmwlth. 1992), also does not support the notion that *Zimmer* is no longer the law or that default judgments are not provided *res judicata* and collateral estoppel effect. First, obviously, the Commonwealth Court, being a subordinate court to the Supreme Court, cannot overrule or change a rule of law of the Supreme Court. Beyond that, however, the *GPU* case involved not a default judgment but a consent decree. The Court relied upon Comment e in concluding that a judgment entered by a consent decree was not to be given preclusive effect. *Id.* at 1193. The Commonwealth Court stated recently in this regard that, "[a] consent decree is not a legal determination of matters in controversy but is merely an agreement between the parties. It is in essence a contract binding the parties thereto." *Allison Park Contractors, Inc. v. Valley Forge Insurance Company*, 731 A.2d 234, 237 (Pa. Cmwlth. 1999) (*quoting Commonwealth v. Rozman*, 309 A.2d 197 (Pa. Cmwlth. 1973) *quoting GPU Industrial Intervenors v. Pennsylvania Public Utilities Commission).* Thus, there is case support for the conclusion that Comment e of Restatement section 27 is the law of Pennsylvania to the extent Comment e treats Consent Decrees. A Consent Decree, however, is much different from what we have here—a dismissal of appellant's case for failure to obey two Board Orders. Here we do not have "in essence a contract." We have a dismissal as a sanction for continued refusal of the appellant who brought the case to obey Board orders regarding the prosecution of the case.

For these reasons, we decline to agree with the Third Circuit's view that the status of *Zimmer* is diminished or reversed to the extent the *Graves* Court so concluded. For the same reasons we also decline to agree that the *Schubach* case commands a different result than the one arrived at here. *Schubach* itself, even though it did not deal with default judgments, stressed the "opportunity to actually litigate the issue" in the first action to be the key for application of *res judicata* and collateral estoppel in the second action. In the situation we have here, there is no question that Kresge was provided that opportunity. In fact, he received two engraved invitations to do so by the Board.

operation which has permanently ceased as required by law; and (3) Kresge failed to comply with an Order of the Department in that he failed to comply with CO 59.

We realize that Kresge in response to the motion for summary judgment on the bond forfeiture tries at this point in time to challenge DEP's authority to have issued either of the two Compliance Orders. Kresge attempts to argue here that it never performed any mining and that DEP did not have jurisdiction to issue either of the two Compliance Orders. Kresge also wants to interpose the "defense" of the Common Pleas Court injunction. These are exactly the same matters it pleaded in the appeal of CO No. 69 which was dismissed. Kresge cannot have free rein to litigate all these matters now because of its failure to appeal CO No. 59, and the dismissal of the appeal of CO No. 69.

Not only is this result in concert with the law on this subject but it is also hardly unfair or unjust. Kresge could very well have fully challenged the facts alleged and conclusion reached in both of DEP's Orders and interposed the matters then that he wants to now. Kresge did not appeal the first Order. Kresge was given every opportunity to fully litigate CO No. 69 but he declined and the appeal was dismissed. We also note that a prominent feature of the second Order was its allegation (now deemed uncontestable in this proceeding) that Kresge violated the first Order. This is a violation of a different nature altogether from the underlying mining-related violations charged in the Orders. A party may not engage in the "self-help" remedy of ignoring DEP orders. Such unilateral defiance of an Order does violence to our legal system and totally undermines it. If the recipient of an Order feels aggrieved by the Order and thinks there is a valid factual and/or legal reason that it should not have to comply with the Order, it can pursue remedies before this Board, including, among other things, seeking an order of

supersedeas, and if it pursues the appeal and is correct, such relief as is appropriate will be forthcoming. Kresge chose not to appeal CO No. 59 but to ignore it, thus giving rise to CO No. 69 citing him for, among other things, violating the first order by failing to comply with it. The history of the appeal of that second order has been recounted.

B. The *Kent Coal* Decision and Its Impact, If Any, On This Case.

Appellant Kresge directs our attention to the Commonwealth Court's decision in *Kent Coal Mining Co. v. DEP*, 550 A.2d 279 (Pa. Cmwlth. 1988), and the doctrine which it established arguing that *Kent Coal* provides that, in this case, even in the face of Kresge's failure to appeal CO No. 59 and the dismissal of the appeal of CO No. 69 the door is still open to Kresge for full litigation of the underlying factual bases (and presumably the legal bases as well) for those orders. This argument does not succeed.

In *Kent Coal*, the appellant received a Compliance Order pursuant to the authority of the Coal Surface Mining and Conservation Reclamation Act alleging that its blasting records documentation was deficient in that the company had failed to comply with a regulatory calibration requirement for such records. The Department's Order ordered the company to correct the deficiency as to future reports and to take certain other actions with respect to future blasting. Kent Coal did not appeal that Compliance Order. Later DEP assessed a civil penalty for the activity outlined in the original order. Kent Coal appealed the civil penalty assessment and challenged both the amount of the civil penalty and the fact of the alleged violation of the air blast calibration requirement.

The Department in a motion to limit issues argued that Kent Coal could not challenge the fact of the underlying violation regarding the deficiency in the blast documentation regarding calibration since that matter had been established by the operation of

administrative finality as a result of Kent Coal's failure to appeal the original compliance order. The Board held that the Department was correct. On appeal, the Commonwealth Court reversed on this point.

The Commonwealth Court's analysis of this question focused directly and specifically on the language of the Coal SMCRA, specifically section 18.4, which states as follows:

> In addition to proceeding under any other remedy available at law or in equity for a violation of a provision of this act, rule, regulation, order of the department, or a condition of any permit issued pursuant to this act, the department may assess a civil penalty upon a person or municipality for such violation. Such a penalty may be assessed whether or not the violation was willful. ... The person or municipality charged with the penalty shall then have thirty (30) days to pay the proposed penalty in full or, if the person or municipality wishes to contest either the amount of the penalty or the fact of the violation, forward the proposed amount to the 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, such bond shall be executed by a surety licensed to do business in the 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 thirty (30) days remit the appropriate amount to the person or municipality, with any interest accumulated by the escrow deposit. Failure to forward the money or the appeal bond to the secretary within thirty (30) days shall result in a waiver of all legal rights to contest the violation or the amount of the penalty.

52 P.S. § 1396.22 (*emphasis added*). In addition, the regulation governing the matter in *Kent Coal* read as follows:

> (a) The person charged with the violation may contest the penalty assessment or the fact of the violation by filing an appeal with the Environmental Hearing Board, including with the appeal an amount equal to the assessed penalty --

> to be held in escrow as provided in subsection (b) -- within 30 days from receipt of the assessment or reassessment.

25 Pa. Code § 86.202(a) (*emphasis added*).[14]

The Commonwealth Court held that under this statutory and regulatory framework, the language of the statute and the regulation required the conclusion that the appellant may challenge both the amount and the fact of the violation in the appeal of the penalty assessment. To that extent, then, the doctrine of administrative finality is statutorily altered. As stated by the Commonwealth Court, "[t]herefore, the statute permits the alleged violator to challenge 'the fact of the violation' when he or she challenges 'the amount of the penalty' -- that is, when the full order has been issued." *Kent Coal, supra*, 550 A.2d. at 281.

The Commonwealth Court noted that sound policy reasons lie behind the General Assembly's decision to alter the doctrine of administrative finality in this regard. The Court noted that the reason for doing so is eminently practical:

> If a penalty were small, a company or other alleged violator might reasonably decide to pay it, rather than go to the time and expense of pursing a challenge to the charge of the violation, even if the company believed that it had not committed a violation. Of course, if the penalty were large, the company would have every motive to contest the fact of the violation if it believed that it had an adequate defense. However, because DER does not assess a civil penalty when it issues the compliance order, the alleged violator does not have this possibly crucial information when deciding whether to appeal.

Id. at 281.

[14] Section 86.202 was amended in 1993 but the amendments do not affect our analysis of this matter.

Significantly, the *Kent Coal* rule has its limits. First, the *Kent Coal* analysis was highly dependent upon the presence of very specific statutory language that a party who is the recipient of a civil penalty assessment may challenge "either the amount of the penalty or the fact of the violation." The very foundation of the Court's analysis was dependent upon the very specific statutory and regulatory language in the Coal SMCRA regarding appeals of civil penalty assessments. Second, the Court provided an admonition that its opinion does not eviscerate the concept of administrative finality. Specifically, the Court noted:

> Although section 18.4 of SMCRA modifies the doctrine of administrative finality in the context of initial DER compliance orders followed later by civil penalty assessments, the section does not affect other preclusion doctrines that might apply. Thus, for example, if a coal company immediately appealed from a compliance order challenging the fact of the violation, and lost, the company would be precluded by the doctrine of collateral estoppel from challenging the fact of the violation in a later civil penalty proceeding. Section 18.4 of SMCRA is not designed to give a person charged with a violation of the Act two bites at the apple, but rather to assure, when that person takes his one bite, that the fruit is ripe.

Id. at 283. This delimitation of *Kent Coal* will become important to our disposition of Kresge's *Kent Coal* argument here.

Thus, the Commonwealth Court has provided contours and definition to the *Kent Coal* doctrine. Fundamentally, we need: (1) the predicate statutory/regulatory language; and (2) the absence of the application of any other doctrine of preclusion or administrative finality. In a sense, the second item acts to negate or "trumps" application of the Kent Coal doctrine, which means if there is present another operable preclusion doctrine, then *Kent Coal* is of no help to the party seeking to employ it. In other words,

Kent Coal may provide an absolute defense from attack by the forces of administrative finality to the front wall of the castle, but all the other walls, turrets, windows and doors of the castle are wide open and *Kent Coal* has nothing to do with them. Thus, our analysis in this case must be so directed.

Although appellant does not direct us to any cases outside of the section 18.4 of the Coal SMCRA context to which the Board has applied the doctrine of *Kent Coal*, there are such cases. The Board has applied the *Kent Coal* analysis to matters involving other statutes in which the key statutory language is the same as the language dealt with in *Kent Coal*. Each such case dealt with language in a statutory civil penalties section which provide a person to whom a penalty is issued the opportunity to challenge the amount of the penalty or the fact of the violations in an appeal of the civil penalty assessment. Thus, for example, the Board has applied the *Kent Coal* doctrine in appeals of civil penalty assessments under the Air Pollution Control Act in *F. R & S., Inc. d/b/a Pioneer Crossing Landfill v. DEP*, 1998 EHB 337; *White Glove, Inc. v. DEP*, 1998 EHB 372 [15];

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[15] The relevant part of the civil penalties section of the Air Pollution Control Act states that: "the person charged with the penalty shall then have thirty (30) days to contest the amount of the penalty *or* the fact of the violation to the extent not already established" 35 P.S. § 4009.1(b) (*emphasis added*). Interestingly, in the *White Glove* case, the Board held that, even under the *Kent Coal* analysis, the particular fact which appellant wanted to challenged in the later civil penalty assessment appeal was foreclosed from being challenged because the fact in question had been conclusively established by appellant's withdrawal of its prior appeal of the underlying order and the fact in question upon which the penalty had been based had been alleged in the order. As the Board reasoned in that case, under Board Rule 120(e) (25 Pa. Code § 1021.120(e)), the withdrawal of an appeal prior to an adjudication is a withdrawal with prejudice unless otherwise provided by the Board. Thus, under the principle of *res judicata*, a withdrawal with prejudice constitutes an adjudication of the merits as fully and completely as if the order had been entered after trial when the same claims are involved in both proceedings. (*citing Gambocz v. Yelencsics*, 468 F.2d 837 (3d Cir. 1972)). As then stated by the Board: "[w]hen the Appellant withdrew its appeal of the original Abatement Order, that withdrawal established the Appellant's ownership or operation of the gasoline dispensing facilities in

the Sewage Facilities Act in *Berwick Township v. DEP*, 1998 EHB 487[16] and the Solid Waste Management Act in *Booher v. DER*, 1990 EHB 285.[17]

The Board has not had occasion to analyze whether the *Kent Coal* analysis applies to the Noncoal SMCRA bond forfeiture provisions. Indeed, the Board has not even had occasion to analyze whether the *Kent Coal* doctrine would apply to the civil penalties provisions of the Non-Coal SMCRA. In any event, appellant argues that we do have the predicate regulatory language here in the regulations governing bond forfeitures under the Noncoal SMCRA. In this sense, Kresge focuses entirely and exclusively on the first question of the *Kent Coal* analysis in trying to convince us that the regulatory language applicable to bond forfeitures under the Noncoal SMCRA supports application of *Kent Coal* in this case. In short, Kresge wants us to do the same here with respect to the bond forfeiture provisions of the Noncoal SMCRA that was done in connection with the statutes involved in the cases cited above. Interestingly, however, Kresge points to no statutory language in the Noncoal SMCRA relating to bond forfeitures which it contends supports its position, but simply cites regulatory language. Kresge refers to two sections

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question as alleged in the Abatement Order." *White Glove*, 1998 EHB at 377. This result in *White Glove* is an application of the limit of the *Kent Coal* doctrine as prescribed by the *Kent Coal* Court itself when it wrote that its decision "does not affect other preclusion doctrines that might apply." *Kent Coal, supra*, 550 A.2d at 283.

[16] The relevant part of the civil penalties section of the Sewage Facilities Act states that: "If the person wishes to contest the penalty or the fact of the violation, the person shall have a right to appeal de novo pursuant to section 16 of this act [providing for the right of appeals]. . . ." 35 P.S. § 750.13a.(c)

[17] The civil penalties section of the Solid Waste Management Act states that: "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, the person shall within such 30 day period file an appeal with the Environmental Hearing Board." 35 P.S. § 6018.605.

in 25 Pa. Code §77.253, entitled "Procedures" which deals with procedures in the case of a bond forfeiture in support of its argument that the *Kent Coal* exception should be applied here. First is 25 Pa. Code § 77.253(a)(2) which provides that if a forfeiture is required, the Department will, "[a]dvise the permittee and surety of the right to appeal to the EHB..." 25 Pa. Code §253(a)(2). Second, we are referred to 25 Pa. Code Section 77.253(b), which states, "[t]he written determination to forfeit the bond, including the reasons for forfeiture, will be a final decision by the Department." 25 Pa. Code § 77.253(b).

We do not have to reach that question or perform that analysis, though, because there is another preclusion doctrine present which operates independently of the *Kent Coal* doctrine which is fatal to Kresge on this point.[18] Namely, as mentioned before,

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[18] Appellant's argument follows these lines which we paraphrase. As applied to the present case, the forfeiture decision is a final order by the DEP as was the civil penalty assessment in Kent Coal and, thus, failure to appeal the earlier compliance orders in the present case does not prevent a present appeal of the factual basis for the forfeiture determination. Also, as the Department must give written reasons for its decision of forfeiture, it follows logically that any appeal of the forfeiture would be with regard to the validity of the reasons therefore.

It is true that "the forfeiture decision is a final order by the DEP as was the civil penalty assessment in Kent." They are both final orders as stated. However, that is beside the point. All appeals are from final orders. The real question for our purposes, and the question which *Kent Coal* addressed, is, given that we are in an appeal of a final order, what matters are contestable? By the very specific language in the civil penalties section of the Coal SMCRA which allows the appellant to challenge both the amount of the penalty or the fact of the violation, the General Assembly created a limited exception to the doctrine of administrative finality so that the underlying alleged violation forming the basis for the civil penalty assessment could be contested at the appeal of the civil penalty appeal phase where the same facts were alleged in a previously unappealed compliance order.

We do note in this regard that the Board has decided a case which is contrary to Kresge's position on this point. In *Sky Haven Coal, Inc. v. DEP*, 1996 EHB 33, the

Board held that no *Kent Coal* type exception applied in an appeal of the denial of a bond release under the Coal SMCRA. In *Sky Haven*, the DEP had issued a letter refusing to release appellant's bonds. DEP's denial of release was based on the contamination of three springs which it blamed on the Sky Haven operation. In 1994 DEP had issued a compliance order to Sky Haven alleging that its operations had contaminated the three springs and ordering the company to treat the water. Sky Haven appealed but the appeal was dismissed as untimely. DEP then issued a civil penalty assessment against Sky Haven based on the contamination. Sky Haven appealed but later voluntarily dismissed its appeal for mootness because it had paid the penalty. In the subsequent bond release appeal Sky Haven argued that under the *Kent Coal* exception to the administrative finality doctrine it could contest the fact of the contamination of the three springs. Sky Haven pointed to 52 P.S. §1396.4(i) which provides that, "[s]hould any operator be aggrieved by any decision or action of the secretary with respect to the amount of any bond, the terms, conditions or release thereof, or any other matter related thereto, he may proceed to lodge an appeal with the [EHB] in the manner provided by law." 52 P. S. § 1396.4(i).

Judge Ehmann then compared that language to the language in the civil penalties section of the Coal SMCRA and its regulation which contains the "contest either the amount of the civil penalty or the fact of the violation" language and concluded that:

> The lack of the quoted phrase in [52 P.S. § 1396.4(i)] is crucial here because it was this phrase's existence in Section 18.4 which caused the Commonwealth Court to reach the result it reached in Kent Coal...Sky Haven seeks to expand the *Kent Coal* exception to cover the denial of a bond release under [52 P.S. § 1396.4(i)]. This language's absence is fatal to *Sky Haven's* argument....Although [52 P.S. § 1396.4(i)] does contain a provision allowing the miner aggrieved by a DEP action on a bond to appeal as to "release thereof, or any other matter relating thereto", there is nothing in this subsection allowing the contest of "the fact of the violation." Accordingly, there is nothing within this statute section to suggest a statutory modification of this doctrine as to bond release denials.

Sky Haven, id. at 37-38. The Board also looked at the regulation governing the release of coal bonds, 25 Pa. Code §171, and concluded that:

> In *Kent Coal* the Court also explicitly recognized that 25 Pa. Code § 86.202 recognized a right to contest the fact of the violation in civil penalty assessment appeals. Nothing in 25 Pa. Code §171 provides a similar exception as to a

several seminal findings of fact have become final and, indeed, adjudicated in the Department's favor by virtue of the dismissal of Kresge's appeal of CO No. 69 and the application of *res judicata* thereby. Among these findings, as already mentioned, are: (1) Kresge was an operator of the mine site under the Noncoal SMCRA; (2) Kresge failed to comply an an operator of the mine site under the Noncoal SMCRA; (3) Kresge failed to comply with an Order of the Department in that he failed to comply with CO No. 1; and (4) the operator, Kresge, failed to permanently reclaim an operation which has permanently ceased in violation of the law. DEP's forfeiture order is based on the findings that Kresge: (1) failed to complete reclamation of the mine site: (2) failed to comply with an Order of the Department; (3) failed to show a willingness or intention to comply with the applicable laws and regulations; (4) failed to pay outstanding civil penalties; and (5) committed such other violations identified in the numerous inspection reports, letters and Notices of Violation which have been sent. At a minimum, findings nos. 1 and 2 of the bond forfeiture letter, and the included corollary included in CO No. 69 that Kresge is the operator, are deemed established for the purposes of this motion via the operation of *res judicata.*[19] These findings are the essence and the heart of DEP's

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> denial of a bond release. Section 86.171(g) only states that appeals may be taken from DEP decisions to this Board.

Id. at 38.

[19] Taking the record in the light most favorable to the nonmoving party which we do when analyzing a summary judgment motion, we do not consider findings No. 3, 4 and 5 to have been established for present purposes. Finding No. 3, regarding the "failure to show a willingness or intention to comply", is a conclusion asserted here for the purposes of this action and this was not specifically part of the CO No. 69 proceeding. Our analysis of this matter does not depend upon whether Kresge has or has not shown a willingness or intention to comply with the law and we do not understand DEP to be

bond forfeiture action. Thus, *Kent Coal* does not open the door for Kresge to challenge those findings because this brings into play the explicit limitation announced by the

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arguing that the bond forfeiture provision of the Noncoal SMCRA requires this particular type of showing in this case.

As to finding No. 4 regarding failure to pay outstanding civil penalties, CO. No. 69, in the "order" portion of the document, states that "operator will be assessed a civil penalty of $750/day until the site is backfilled and final graded" and "operator will be assessed a civil penalty of $250/day until the shot reports are received in the Pottsville District Office." There is no direction there to pay; that is, no assessment of actual penalties. DEP has not directed our attention to anything in the record which shows or establishes that there has been an illegal or unjustified failure to pay outstanding penalties. Indeed, there is an appeal pending of DEP's civil penalty assessment. So, we are not considering finding No. 4 of DEP's January 27, 1999 bond forfeiture letter to have been established for the purposes of this action and this Motion.

As to finding No. 5, this seems to be a "catch-all" which really does not add any substance to DEP's case. DEP does not elucidate what exactly it is referring to in finding No. 5 either in the January 27, 1999 bond forfeiture letter or its Summary Judgment papers. To the extent this finding deals with the alleged violation regarding blasting reports, we do not consider that violation to be established at this point. The main reason for this is that the supposed violation is only noted in the "inspection report" part of CO No. 59 as a "violation" with the accompanying statement that the reports should be submitted. The "order" portion of CO No. 59 does not mention the blasting issue at all. In CO No. 69 the supposed blasting violation is noted again in the "inspection report" portion of the document and the "order" part of the document states that "operator will be assessed a civil penalty of $250/day until the shot reports are received in the Pottsville District Office." The record is not clear enough for us to come to a definitive conclusion about the legal or factual status of the blasting records matter for the purposes of analysis of this motion and, as stated before, DEP has not specifically pressed this particular point at this juncture.

In any event, as will be explained later, none of these matters amount to triable issues in this bond forfeiture proceeding as DEP's action of forfeiture can stand under the law even in their absence. The exact status and role and relevance, if any, of these matters, and any other matters, including whether they are subject to the application of administrative finality or *res judicata*, is open to argument and analysis by the parties and the Board in further proceedings in the civil penalty assessment part of this case. Likewise with respect to any other matter that DEP may in a later part of this proceeding contend is established by means of administrative finality and/or *res judicata*. Suffice it to say that, for now, the matters discussed in this note, including whether they are established or not by operation of a doctrine of preclusion, are extraneous to the ultimate determination of the instant matter.

Commonwealth Court that the *Kent Coal* doctrine does not affect other preclusion doctrines that might apply. Indeed, the Commonwealth Court cited as an example of the operation of another preclusion doctrine the situation where a coal company immediately appealed from a compliance order challenging the fact of the violation, and lost. In such case, noted the *Kent Coal* Court, the company would be precluded by the doctrine of collateral estoppel from challenging the fact of the violation in a later civil penalty proceeding. *Kent Coal, supra*, 550 A.2d at 283. Here, then, Kresge is so precluded.

As we have already alluded to in footnote No. 15, the Board applied this very concept in the *White Glove* case. In that case the appellant's appeal of an original compliance order was appealed but voluntarily dismissed. The compliance order had asserted that the appellant was the owner and operator of a certain facility under the Air Pollution Control Act. Then DER assessed a civil penalty, which White Glove appealed. In that proceeding, the appellant sought to challenge the assertion that it was the owner/operator of the subject facility. The Board held that it could not do so. The Board reasoned as follows:

> In this case, however, the issue of Appellant's liability under the APCA was conclusively established by its withdrawal of its prior appeal. Under the Board's rules at 25 Pa. Code § 1021.120(e), the withdrawal of an appeal prior to an adjudication is a withdrawal with prejudice unless otherwise provided by the Board. *Babich v. DER*, 1994 EHB 541, 548. Under principles of *res judicata*, a withdrawal with prejudice constitutes an adjudication of the merits as fully and completely as if the order had been entered after trial when the same claims are involved in both proceedings. *Gambocz v. Yelencsics*, 468 F.2d 837 (3d Cir. 1972). When the Appellant withdrew its appeal of the original Abatement Order, that withdrawal established the Appellant's ownership or operation of the gasoline dispensing facilities in question as alleged in the Abatement Order.

White Glove, 1998 EHB 372 at 377.[20]

This case is analogous to *White Glove* and *Kent Coal* does not provide for review here in this action of the matters that we have discussed are subject to finality.[21]

We conclude this discussion of administrative finality by addressing briefly Kresge's argument that because there are no decisions under 52 P.S. § 3309(k)(1), the bond forfeiture provision of the Noncoal SMCRA, holding that the duty to forfeit bonds is mandatory that this fact in and of itself supports the proposition that this Board should consider fully all of the underlying bases of the forfeiture decision. We disagree. We do not believe that the premise leads to or supports the conclusion. Kresge's argument that the Board should completely subordinate administrative finality and consider the entirety of all the underlying bases of the forfeiture decision simply because no cases have interpreted the mandatory clause of the Noncoal SMCRA is not persuasive. Although what Kresge has stated is a truth, that there are no such decisions, that fact obviously does not in itself demonstrate the existence of a statutorily or judicially created exception to

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[20] Also, the *White Glove* case is quite illustrative of the point noted earlier that Board Rule 120(b) (25 Pa. Code §1021.120(b)) commands the conclusion that the dismissal of Kresge's appeal be with prejudice. It would be completely anomalous if White Glove's voluntary dismissal is deemed to be with prejudice but Kresge's dismissal as a sanction for repeated contumacious behavior is deemed to be without prejudice. Rule 120(e) referred to in *White Glove* was recodified as Rule 120(b) in 1998. See 28 Pa. B. 4714 (1998).

[21] In addition, we think, but do not hold for present purposes, that the rationale of the *Sky Haven* case as discussed in footnote No. 18 would be applicable here to the analysis of the bond forfeiture provision of the Noncoal SMCRA. The statutory language of the Noncoal SMCRA bond forfeiture provision simply does not contain the same language regarding the ability to challenge the "amount of the penalty or the fact of the violation" as was so critical in the *Kent Coal* case and the cases applying *Kent Coal*.

the rule of administrative finality. In fact the one has nothing to do with the other. Therefore, the connection fails and the argument falls.

III. Kresge's Assertion of the Impossibility Defense.

Kresge challenges the bond forfeiture action on the basis that a Common Pleas Court injunction prevented it from doing anything on the site. This is Kresge's "impossibility" defense-- that is, in Kresge's view, it was impossible for it to have reclaimed the site because the injunction prevented any access to the site for that or any other purpose. This argument can be viewed either as an attempt to attack the bond forfeiture action by attacking the merits of the underlying CO No. 59 and CO No. 69 which form the basis of the bond forfeiture, or, alternatively, as a separately standing defense to the bond forfeiture action itself. Kresge is not entirely clear about which approach it is asserting, but we will presume Kresge to be utilizing both approaches. In either case, the argument does not succeed.

Kresge cannot in this bond forfeiture action allege the defense of "impossibility" to the underlying CO No. 59 and CO No. 69 as an attempt to render those Orders void and, from there, void the bond forfeiture. That route is not open due to the operation of administrative finality and *res judicata*. CO No. 59 was never appealed. In its appeal of CO No. 69, Kresge imposed the Common Pleas Court Injunction as a defense. However, as we have discussed, that appeal was dismissed and *res judicata* and collateral estoppel apply to the matters raised in that appeal. Thus, Kresge cannot assert the Common Pleas Court injunction in this appeal as a basis to undermine the validity of the two Orders.

To the extent the defense of "impossibility" can, conceptually, be viewed as a separately standing defense in this appeal to the bond forfeiture action, it fails also. In

short, "impossibility" is not a defense to a bond forfeiture action. The Board has long held that financial inability or lack of funds is not a defense to an action for bond forfeiture. *See Martin v. DER*, 1987 EHB 408; *Richter v. DER*, 1984 EHB 43. Quite recently, the Board talked about a physical inability to comply, as distinguished from a financial inability, as being the same thing with the same result in *Wasson v. DER*, 1998 EHB 1148, 1158. In that case, DEP forfeited bonds for the plugging of oil and gas wells. Wasson tried to stave off the forfeiture by arguing that his rights to due process and equal protection were violated by the forfeiture action because "he is physically and financially unable to comply with the reclamation and plugging requirements." The Board rejected that argument, saying "[a]ppellant's financial condition and physical condition is irrelevant in an appeal of a Department order or declaration of forfeiture." *Id.* The reason for this result is apparent and was explained in the *Wasson* case as follows:

> [t]he whole purpose behind a bonding requirement is to ensure that funds are available for reclaiming the site in the event the owner/operator lacks sufficient resources to do so himself. (citing *Richter v. DER*, 1984 EHB at 55). Were we to interfere with bond forfeiture where the owner/operator lacked the resources required to comply with Department orders, we would effectively eviscerate the central purpose behind the bonding requirement.

Wasson, 1998 EHB at 1159.

As the *Wasson* case instructs, physical inability to perform reclamation is not a defense to a bond forfeiture. We have a case here where, to paraphrase the *Wasson* case, the owner/operator lacks sufficient resources, in this case the resource being physical capability to do the job himself. The rationale of the *Wasson* case is not reversed because the physical inability is arguably based in a legal inability on account of an

injunction.[22] The case here, like *Wasson*, is among the situations which is precisely what the bonding requirement is intended to address. A case where the bonded party claims to be unable, for whatever reason, to perform the necessary cleanup or ameliorative activities is the classic case for application of the mechanism of the bond to do just that which he claims he cannot do but which must be done. This is precisely what the bond is for and what it is supposed to do. Indeed, it is hard to avoid thinking of Kresge's argument along these lines without reference to the time-honored adage that the argument here "proves too much." It is precisely the professed inability to do the necessary remedial work which itself creates the optimum climate for the bond to flourish in its intended function to come in and do the job. In this sense, in Churchillian terms, this is the bond's finest hour.

IV. Is DEP Entitled To Judgment As A Matter of Law Under the Bond Forfeiture Provision of the Noncoal SMCRA?

We turn our attention now to an analysis of the bond forfeiture provision of the Noncoal SMCRA with particular focus on the question whether DEP, in light of the

[22] The Board has read both the actual injunction and the papers submitted to the Common Pleas Court by the Township seeking the injunction which Kresge has included in its Summary Judgment papers. We will take at face value Kresge's assertion in its papers to the Board that the injunction is so broad as to prohibit it from setting foot on the property to do anything, even backfilling and reseeding. We so credit Kresge's assertion because of the principle that in a motion for summary judgment we view the record presented in the light most favorable to the non-moving party. DEP suggests in its Response to Kresge's brief that the injunction papers should not be interpreted so broadly and that the injunction does not proscribe reclamation of the Site. There is no need to resolve that possible issue because our treatment of this subject on this motion for summary judgment accords the most possible proscriptive effect to the injunction which is that which Kresge has propounded. In any event, based on our disposition of the matter, there is, of course, no triable issue with respect to the parameters of the injunction even if the Board could undertake an interpretation of it.

uncontested and uncontestable facts, is entitled to judgment as a matter of law under that statute.

We have already set forth the bond forfeiture provision of the Noncoal SMCRA which is at issue in this case. DEP is correct that the bond forfeiture provision of the Coal SMCRA is exactly the same; that provision states in pertinent part:

> (h) 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 bond forfeited..."

52 P. S. §1396.4(h).

DEP is also correct that the cases it cites do state that the duty of forfeiture is mandatory. *See Snyder v. DER*, 588 A.2d 1001,1005 (Pa. Cowls. 1991) ("DER has a mandatory duty to forfeit the bond once the department finds that the mining operator has failed to comply with the requirements of the Act in any respect"); *Morcoal v. DER*, 459 A.2d 1303, 1307 (Pa. Cmwlth. 1983) ("the statutory language in 52 P.S. § 1396.4(h) is mandatory"); *Lucky Strike Corp. v. DEP*, 1997 EHB 787, 803 (DEP has mandatory duty to forfeit the bonds on the basis of violations). The *Morcoal* case is especially instructive on this point because there the Commonwealth Court was addressing the appellant's argument that the Board should have made inquiry into whether alternative less stringent means of enforcement short of forfeiture could or should have been used. Under the seminal *Warren Sand and Gravel* case, which defines the Board's scope of review of DEP actions, where the DEP action is mandatory, the only inquiry of the Board is whether to uphold or vacate DEP's action; however, if the DEP action is discretionary, then the Board, in an appropriate case, may substitute its discretion for that of DEP.

Warren Sand & Gravel v. DER, 341 A.2d 556, 656 (1975). Thus, Commonwealth Court's analysis of this question in *Morcoal* turned on the "mandatory" versus "discretionary" demarcation. The Court rejected the argument in light of *Warren Sand & Gravel* reasoning that because DEP's duty to forfeit the bonds was mandatory, not discretionary, this was not a case where the Board could undertake the analysis appellant suggested of whether alternative less stringent means of enforcement short of forfeiture could or should have been used. *See Morcoal, supra*, 459 A.2d 1307-08 (*citing Warren Sand and Gravel v. DER*, 341 A.2d 556 (Pa. Cmwlth. 1975)).

As to the role of administrative finality with respect to violations and bond forfeitures, the *Lucky Strike* case is highly illustrative on that point since it involved a case, as DEP argues this one is, where the violations that were the basis for the mandatory duty of DEP to forfeit the bond or bonds became established or became uncontestable by the doctrine of administrative finality. In *Lucky Strike*, the Board said:

> Here the parties do not dispute that, before forfeiting the bonds, DEP issued compliance orders and civil penalty assessments against Lucky Strike and Beltrami with respect to the mine sites. Likewise, no one disputes that Lucky Strike and Beltrami failed to appeal the orders and assessments. Because the orders and assessments were appealable actions and because Lucky Strike and Beltrami failed to appeal them, it is final and unassailable that Lucky Strike and Beltrami violated the law as set forth by DEP in those orders and assessments. 35 P.S. 7514(c) (sic). Because of that, DEP is not only justified, but has a mandatory duty to forfeit the bonds. [*citing Snyder v. DER*].

Lucky Strike, 1997 EHB at 802-03.

Of course, as noted before, all of the statutory and case law that we have just discussed regarding the term "mandatory" is from the Coal SMCRA and not the Noncoal

SMCRA. DEP wants the Board to apply the same analysis to the Noncoal SMCRA bond forfeiture provision as has already been done with respect to the Noncoal SMCRA and come to the same result. There is no case yet which does that. Kresge tries to repel this argument but does not offer an affirmative reason why the Board should not do as DEP suggests.

Conceptually, 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. The two provisions are carbon copies of each other. We will not proceed to do that right now, though, because there is a significant open issue which could conceivably have an impact on our analysis of that aspect of the matter which needs closure first and which has both legal and factual components that prevents our granting summary judgment at this point. The Noncoal SMCRA, and indeed the Coal SMCRA for that matter, provides that the duty of mandatory forfeiture is triggered by a failure to comply with any requirement of the act for which liability has been charged on the bond. 52 P.S. §3309(k)(1)(emphasis added). The relevant Noncoal SMCRA regulation has that same language. 25 Pa. Code § 77.253(b). Here, we have not been instructed by either party about the possible legal significance of this particular aspect of the statutory and regulatory provisions. Moreover, the bond itself has not been presented. Thus, we do not know anything about what may or what may not be an item "for which liability has been charged under the bond" within the meaning of the statutory and regulatory provisions at issue in this case. There may or may not be disputed issues of

fact and/or law involved in this analysis. Suffice it say, however, that summary judgment as to this particular matter is premature at this time.

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 GRANTING SUMMARY JUDMENT IN PART
AND DENYING SUMMARY JUDGMENT IN PART (DOCKET NO. 99-051-K)

AND NOW, this 27th day of 2000, IT IS ORDERED that the Department of Environmental Protection's Motion For Summary Judgment in Docket No. 99-051-K is granted in part and denied in part.

The Motion is granted insofar as the doctrines of administrative finality, res judicata and collateral estoppel establish certain violations of the Noncoal SMCRA as outlined in the accompanying Opinion; the *Kent Coal* doctrine does not apply to permit Kresge to challenge the fact of those violations in this action; and Kresge's defense of "impossibility" cannot be maintained.

The Motion is denied insofar as there is no record information regarding the terms of the bond and whether the violations are of the nature for which liability has been

charged under the bond.

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: **January 27, 2000**

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

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

AINJAR TRUST, JOHN O. VARTAN, TRUSTEE,	:	
Appellant	:	EHB Docket No. 99-248-K
v.	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	Issued: January 31, 2000

OPINION AND ORDER ON MCNAUGHTON COMPANY'S PETITION TO INTERVENE

By Michael L. Krancer, Administrative Law Judge

Synopsis:

The developer whose new development is the subject of a DEP approved revision to the host Township's Act 537 Sewage Facilities Plan to accommodate the new development is permitted to intervene in the appeal by a third party of DEP's approval of the revision. The developer has interests that might be harmed in a substantial, direct, and immediate manner when a third party seeks to overturn DEP's approval of the Sewage Facilities Plan revision applicable to the new development

OPINION

Background

The facts stated herein are taken as alleged in the Notice of Appeal and the pending Petition to Intervene. The Ainjar Trust, John O. Vartan Trustee (Ainjar), has appealed the Department's November 13, 1999 approval of Susquehanna Township's

proposed Official Sewage Facilities Plan revision (hereinafter referred to as the "Official Plan Revision" or "Revision"). The appeal was filed on December 13, 1999. The Notice of Appeal alleges, among other things, that the Revision in question is aimed at accommodating a residential development being developed by the McNaughton Company ("McNaughton") located in Susquehanna Township.

Section 750.5 of the Sewage Facilities Act, which is the prime subject of this appeal, requires each municipality to adopt a "plan for sewage services for areas within its jurisdiction, [p]rovided however, [t]hat a municipality may at any time initiate and submit to the department revisions of the said plan." 35 P.S. §750.5, the Pennsylvania Sewage Facilities Act, the Act of January 24, 1966, P.L. (1965) 1535, *as amended*, 35 P.S. §§750.1-750.20a, §750.5 (Sewage Facilities Act).

As might be expected, McNaughton has requested permission to intervene and participate fully in this litigation by Petition to Intervene which was filed on January 11, 2000. According to the Petition, McNaughton is the owner and developer of the Margaret Grove Development which is the subject of the Revision. It is alleged that the Revision, whose approval is at issue in this appeal, was requested by McNaughton specifically to accommodate its proposed new Margaret Grove residential development. In fact, the Revision, which was based on documentation submitted on behalf of McNaughton to Susquehanna Township and subsequently by the Township to DEP, accommodates the sewage treatment needs for Margaret Grove.

McNaughton asserts as support for its right to intervene that: (1) McNaughton, as the developer of Margaret Grove, is an "interested party" because it stands to be harmed by direct operation of the Board's decision if the Board were to sustain the appeal and

overturn DEP's approval of the Revision applicable to Margaret Grove; (2) McNaughton has a "substantial interest" in the outcome of this appeal because it will impact how Margaret Grove's sewage is handled, (3) McNaughton's interest is "direct and immediate" because if the appellant succeeds in its appeal, the Department's approval of the Revision will be overturned leaving McNaughton without the necessary planning approval for sewage treatment on the Development, and (4) the Petition was timely filed.

Ainjar did not file an Answer to McNaughton's Petition; however, by letter dated January 25, 2000, it did inform the Board that it did not oppose McNaughton's intervention. The Department neither filed an Answer nor sent a letter regarding its position on McNaughton's Petition. Therefore, its silence is deemed acquiescence to the Petition.[1]

Standard for Intervention

The Environmental Hearing Board's Rules allow a person to "petition the Board to intervene in any pending matter prior to the initial presentation of evidence." 25 Pa. Code §1021.62 (a). When a person has properly filed a petition to intervene, the Board will grant intervention when that person is determined to be an "interested party." Environmental Hearing Board Act, Act of January 13, 1988, P.L. 530, *as amended*, 35 P.S. §§ 7511-7514, 35 P.S. §7514 (e); *Browning-Ferris, Inc., v. Department of Environmental Resources,* 598 A.2d 1057, 1060 (Pa. Cmwlth. 1991). An interested party

[1] The Board realizes that, under Rule 1021.62(d), a party "may", but is not required to, file an answer to a Petition to Intervene and that, under Rule 1021.70(e), a lack of response to allegations in a Motion may be deemed as an admission of those allegations for the purposes of deciding the motion. However, we think it is preferable, out of consideration for all parties in a case and the Board, for a party who has no objection to a Petition to Intervene to so advise the Board and the other parties by letter.

is "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.,* 598 A.2d at 1060-61; *Jefferson County v. Department of Environmental Protection*, 703 A.2d 1063, 1065 n. 2 (Pa. Cmwlth. 1997); *Heidelberg Township v. DEP*, EHB Docket No. 98-174-MG slip op. at 4 (opinion issued September 24, 1999); *Conners v. Commonwealth of Pennsylvania, State Conservatory Commission and Dauphin County Conservation District*, EHB Docket No. 99-138-L slip op. at 2 (opinion issued August 20, 1999). Further, the Board's recent decisions on intervention hold that "gaining or losing by direct operation of the Board's ultimate determination is just another way of saying that an intervenor must have standing." *Heidelberg Township*, EHB Docket No. 98-174-MG slip op. at 4 (quoting *Conners*, EHB Docket No. 99-138-L slip op. at 2). Similarly, the Commonwealth Court held that a person meets the criteria for intervention if it can satisfy the test for standing enunciated in *Wheeling Penn Parking Garage, William Penn Parking Garage v. City of Pittsburgh*, 346 A.2d 269, 280 (1975). *See Borough of Glendon v. DER*, 603 A.2d 226, 231.

To have standing, the appellant's interest must be aggrieved in a substantial, direct, and immediate manner. *See William Penn Parking Garage*, 346 A.2d at 280; *Conners*, EHB Docket No. 99-138-L slip op. at 3 (citing *Borough of Glendon*, 603 A.2d at 233; *Tortorice v. DEP*, 1998 EHB 1169, 1170); *Belitskus v. DEP*, 1998 EHB 846, 859 (citing *Barshinger v. DEP*, 1996 EHB 849, 853). "[T]he requirement of a 'substantial' interest simply means that the individual's interest must have substance – there must be

some discernable adverse effect to some interest other than the abstract interest of all citizens, in having others comply with the law." *William Penn Parking Garage*, 346 A.2d at 282; *Conners*, EHB Docket No. 99-138-L slip op. at 3 (citing *Darlington Township Board of Supervisors v. DEP*, 1997 EHB 934, 935). Further, a direct interest "simply means that the person claiming to be aggrieved must show causation of the harm to his interest by the matter of which he complains." *Id.* Finally, "[a]n immediate interest means one with a sufficiently close causal connection to the challenged action, or one within the zone of interests protected by the statute at issue." *Belitskus*, 1998 EHB at 859 (citing *William Penn Parking Garage*, 346 A.2d at 283; *Barshinger*, 1996 EHB at 853).[2]

DISCUSSION

Ainjar's appeal challenges solely the Department's approval of the Revision to Susquehanna Township's Official Plan which Revision deals specifically with McNaughton's Margaret Grove developement . As such, taking the Petition's allegations as true, it is clear that McNaughton meets the criteria for intervention. Ainjar's appeal, if successful in overturning the approval of the Revision, would most definitely harm McNaughton's interests in a substantial, direct, and immediate manner.[3]

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[2] For a recent application of this Intervention standard, see *Pennsburg Housing Partnership, L.P. v. DEP*, EHB Docket No. 99-216-K (opinion issued December 30, 1999).

[3] We take the allegations in the Petition to be true for present purposes of the analysis regarding whether McNaughton may intervene. Along the same lines, as we noted in the *Pennsburg* case referred to in Note No. 2 above, and we reiterate here because of the importance of the concept, we are limited here only to an analysis of whether, taking as true what Petitioner has stated in the Petition and what is reflected in Ainjar's Notice of Appeal, does McNaughton satisfy the test for intervention. Ainjar cited a host of alleged

McNaughton's interest is substantial. Ainjar's appeal relates to how sewage from McNaughton's development will be handled. Therefore, the outcome of the appeal will have a very significant, even seminal, effect on the property and the development. This appeal, if successful in overturning DEP's approval of the Revision will impact how McNaughton can develop its tract of land and, perhaps, even if it can develop its land. This is a very substantial interest indeed.

Besides having a substantial interest, McNaughton also has a direct and immediate interest. No collateral or intervening issues separate McNaughton's interest in the Revision and the harm to McNaughton that will result if DEP's approval of the Revision is overturned by the Board. *See Pennsburg Housing Partnership, L.P. v. DEP*, slip op. at 6 EHB Docket No. 99-216-K (opinion issued December 30, 1999) (citing *William Penn Parking Garage v. City of Pittsburgh,* 346 A.2d at 283-286). As McNaughton's brief points out, if Appellant succeeds on the appeal, "McNaughton will be left without the necessary planning approval for sewage treatment on the Margaret Grove property to permit development." Thus, continues McNaugton, "the causal connection between the decision in this case and the effect on McNaughton is clear, and McNaughton's interest in the outcome of the appeal is therefore direct and immediate." We agree. The effect, i.e., McNaughton's Margaret Grove development being left

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reasons it thinks that DEP's action in approving the Revision was improper. None of those reasons are discussed herein in connection with McNaughton's Petition because none of those allegations are important to our analysis of the pending Petition to Intervene. As we said in *Pennsburg*, "review and deliberation of those matters is to be the subject of future forensic combat. [McNaughton] is seeking here merely to enlist for that fight." *Pennsburg, supra, slip op.* at 2.

without the necessary planning approval, would flow spontaneously from a decision of this Board to overturn DEP's approval of the Revision.

We also note that McNaughton's Petition and brief suggest that the documentation, referred to as the "planning module", which formed the basis of the Revision, was submitted on behalf of McNaughton to Susquehanna Township and, subsequently, by the Township to DEP. Thus, McNaughton apparently had some role, and perhaps a major role, in developing the documentation which formed the basis for the Revision. As such, its participation in what will boil down to litigation about that documentation will be of assistance to the Board in resolving the issues presented by this appeal.[4]

For the reasons stated above, McNaughton's interest in this mater is substantial, direct, and immediate and therefore, it is an interested party, which may intervene and we enter the following order:

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[4] We do not mean to suggest here and we should not be interpreted as meaning that we view McNaughton's role in this regard as providing a detached perspective on the documentation and the Revision in order to impart to us its wisdom on the subject like a Delphic Oracle. Indeed, this entire Opinion has as its underlying premise that McNaugton is a very interested party with a particular position to advance in defending the Revision. Nevertheless, we think it is obvious that McNaughton's participation in this matter as a party will be of assistance in the manner described.

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

O R D E R AMENDING CAPTION

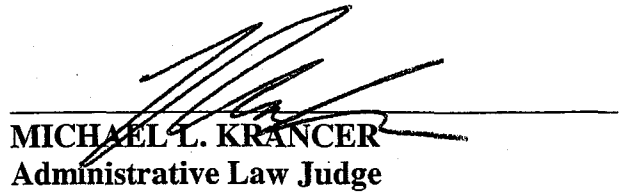
AND NOW, this 31st day of January, 2000 it is hereby **ORDERED THAT**:

(1) McNaughton's Petition to Intervene is **GRANTED**; and

(2) The caption of this matter is hereby amended as follows, which should be reflected on all future filings with the Board:

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

ENVIRONMENTAL HEARING BOARD



MICHAEL L. KRANCER
Administrative Law Judge
Member

DATED: January 31, 2000

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

WILLIAM A. SMEDLEY,

Appellant

v.

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION

EHB Docket No. 97-253-K

Issued: January 31, 2000

OPINION AND ORDER ON INTERNATIONAL PAPER'S MOTION IN LIMINE REGARDING THE TESTIMONY OF APPELLANT'S EXPERT

By Michael L. Krancer, Administrative Law Judge

Synopsis:

Permittee, International Paper's Motion In Limine to bar the testimony of Appellant Smedley's proffered expert is denied where it is clear that the Motion merely attempts to argue that the Appellant's proffered expert is wrong about his conclusions. The credibility and persuasiveness of expert testimony is not suited for disposition by Motion.

OPINION

Trial in this matter is set for February 15, 2000 through February 17, 2000. On January 28, 2000 Appellee/Permitee International Paper ("IP") filed three Motions In Limine seeking to exclude portions of Appellant Smedley prospective testimony and evidence. The filings were the following: (1) Motion In Limine Regarding Testimony and Exhibits On Compliance Issues: (2) Motion In Limine Regarding The Testimony of Dean "Rusty" Bottorf;[1] and (3) Motion In Limine

[1] DEP joins in this Motion.

Regarding The Testimony of Appellant's Expert. We have no reply yet from Smedley on any of these Motions In Limine but we can dispense with the Motion In Limine Regarding The Testimony of Appellant's Expert without one. It is denied without prejudice.[2]

This appeal relates to DEP's approval of what it and IP call a minor modification to IP's air pollution control permit to allow IP to burn a certain amount of Tire Derived Fuel ("TDF") along with coal as feedstock to IP's boilers. Broadly speaking, the Motion asks that we exclude in total the expected expert testimony of Smedley's proffered expert, Dr. Paul Connett. Very simply, and this is an oversimplification for the purposes of analysis of this Motion, Dr. Connett is being offered to testify, among other things, that the burning of TDF and coal at the IP plant will cause air pollution. IP states in its Motion that the "only authority for his conclusion that burning TDF with coal will cause air pollution are purported conclusions from a Draft Report by the United States Environmental Protection Agency entitled "Health Assessment Document for 2, 3, 7, 8 Tetrachlorodibenzo-p-Dioxin (TCDD) and Related Compounds."[3] Unless the Board is missing a nuance on which it can be corrected later this is an incorrect statement. Dr. Connett's expert report filed in this case reflects that he relies on the aforementioned Draft Report and a study entitled, "Burning Tires for Fuel and Tire Pyrolysis: Air Implications (EPA-450/3-91-024),

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[2] These Motions In Limine were not accompanied by briefs as is required under Board Rule 1021.74. The Motions, however, are written with copious citations to case law authority and rules which IP contends are applicable. Thus, the Motion has all the flavor of a brief. We are not overlooking this lack of compliance with our Rules at all but the matter is of no moment with respect to the disposition of the Motion In Limine Regarding the Testimony of Appellant's Expert since we are denying it for substantive reasons.

[3] The Draft Report has been designated by Smedley as proposed Exhibit A-3. DEP and IP have objected to the admissibility of this Draft Report on a number of grounds. To some degree the Motion In Limine is an attack on the admissibility of proposed Exhibit A-3. The parties should be clear that this Opinion does not address that question. That question will be left for trial.

December, 1991" (the December, 1991 Tire Pyrolysis Study"). The December, 1991 Tire Pyrolysis Study has been proffered by both IP and DEP as a proposed exhibits, namely proposed Exhibit IP-19 and proposed Exhibit C-19. In addition we note that in the proffered expert Affidavit/Report of Larry Laird, the Manager of Environment, Health and Safety at IP's plant, Mr. Laird states that the December, 1991 Tire Pyrolysis Study is a study that persons in the scientific community will accept and rely upon.

Thus, Dr. Connett is not relying only on the Draft Report but is also explicitly relying on the Tire Pyrolysis Study which has been proffered and endorsed by both DEP and IP in their pretrial submissions. This would be reason enough to deny IP's Motion.

IP goes on, however, in the Motion to talk about the details of the December, 1991 Tire Pyrolysis Study. Distilled to its basics, IP's argument is that Dr. Connett has misinterpreted the December, 1991 Tire Pyrolysis Study, he has mischaracterized it and he is wrong in his interpretation of what it says. On this basis IP's argues that Dr. Connett's opinion is not supported by the evidence and is, thus, inadmissible.

This particular aspect of IP's Motion is an attempt to conduct a trial of the experts on paper which we do not believe is appropriate. At best, this is material for IP's cross examination of Dr. Connett. Moreover, IP's proffered expert, Dr. Katheryn E. Kelly, can testify about where she thinks Dr. Connett is wrong and what she thinks is correct. The bottom line is that the entire thrust of IP's Motion is misplaced. The matters implicated are much more appropriately weighed by the finder of fact after hearing the expert testimony. As the Commonwealth Court said in a case being relied on by both DEP and IP for other evidentiary issues, *Duquesne Light Company v. Woodland Hills School District*, 700 A.2d 1038, 1047 (Pa. Commw. Ct. 1997) *allocatur denied*

724 A.2d 936 (Pa. 1998), "the question of whether the expert's opinion is convincing or credible is a matter for the jury." *Id. citing Foley v. Pittsburgh Des Moines Company*, 68 A.2d 517 (Pa. 1949).

The argument by IP in the Motion that Dr. Connett is wrong about his conclusion that TDF has a higher chlorine content than coal stands on the same footing. IP attaches an expert affidavit of Mr. Laird in which he renders an opinion that the chlorine content of the TDF used by the Lock Haven Mill is equal to or lower than the chlorine content of the coal used by the Lock Haven Mill. Obviously, Appellant disagrees and will challenge that conclusion. It is clear to us that we should not be resolving that issue on a Motion.[4]

For the reasons stated above, IP's Motion In Limine Regarding the Testimony of Appellant's Expert is denied and we enter the following order:

[4] Neither IP nor DEP is precluded by this Opinion and Order from its right at trial to challenge the admissibility of any Exhibit proffered by Smedley or the right to challenge the qualifications of Dr. Connett as an expert or to object to any aspect of Dr. Connett's testimony on whatever grounds either may deems appropriate.

WILLIAM A. SMEDLEY,	:	
	:	
Appellant	:	
	:	**EHB Docket No. 97-253-K**
v.	:	
	:	**Issued: January 31, 2000**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER DENYING INTERNATIONAL PAPER'S MOTION IN LIMINE REGARDING THE TESTIMONY OF APPEALLANT'S EXPERT

AND NOW, this 31st day of January, 2000 it is hereby **ORDERED THAT** International Paper's Motion is Limine Regarding the Testimony of Appellant's Expert is denied.

ENVIRONMENTAL HEARING BOARD

MICHAEL L. KRANCER
Administrative Law Judge
Member

DATED: January 31, 2000

VIA FAX AND FIRST CLASS MAIL

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

WILLIAM A. SMEDLEY,

Appellant

v.

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION

EHB Docket No. 97-253-K

Issued: February 7, 2000

OPINION AND ORDER DENYING MOTION IN LIMINE ON STANDING

By Michael L. Krancer, Administrative Law Judge

Synopsis:

DEP's Motion In Limine On Standing, in which Appellee/Permittee, International Paper, joins, seeking to bar Appellant Smedley from presenting any evidence at trial regarding standing is denied where the thrust of the motion is that Smedley waived the issue of standing by failing to include a recitation of that issue as a disputed issue in his Pre-Hearing Memorandum. Standing has been an issue recognized by DEP and IP in Summary Judgment Motion filings and in Pre-Hearing filings. DEP and IP assert no prejudice from Smedley's alleged oversight and the Board is loath to apply a waiver under these circumstances. Also, DEP's and IP's Motion seeks to relitigate the Summary Judgment practice on standing. Full litigation of that issue is better left for trial.

OPINION

In our January 31, 2000 Opinion and Order denying International Paper's ("IP") January 28, 2000 Motion In Limine seeking to bar the testimony of Appellant Smedley's

proposed expert, Dr. Paul Connett, we explained, very briefly, the background of this matter insofar as necessary to provide a context for our disposition of that Motion In Limine. We will not repeat that explanation here but we either assume the reader's familiarity with that discussion or direct the reader to our January 31, 2000 Opinion and Order to review it. This Opinion and Order deals with a Motion In Limine On Standing filed by DEP on February 1, 2000 in which IP joins. We have not received a response from Smedley to the Motion In Limine but as with the Motion In Limine regarding the proposed expert we are denying the Motion without one.

Distilled to its essence, the Motion and accompanying brief argue, first, that Smedley has not alleged facts which show that he has standing in that he is an aggrieved party who has an interest beyond that of the general public. In this regard DEP's discussion focuses on the case of *Andrew Saul v. DER*, 1990 EHB 281, wherein a person who lived 10 miles away from the site of six municipal waste incinerators was held to have failed to establish standing to challenge the permit for them, and the case of *Fred McCutcheon v. DER*, 1995 EHB 6, where a local firefighter was deemed not to have standing to challenge the DEP's approval of the use of a geomembrane tarpaulin as alternative daily cover even thought the membrane supposedly was more combustible than normal cover material and thus, supposedly, more prone to catching fire. The second argument in DEP's papers is that Smedley has waived his right to produce evidence of his standing because he did not allege these facts in his Notice of Appeal or in his Pre-Hearing Memorandum. Here DEP refers us to the provisions of Paragraph 4 of our standard Pre-Hearing Order No. 2 which provides that: "[a] party may be deemed to have abandoned all contentions of law or facts not set forth in its pre-hearing memorandum". DEP also point to our decision in *Oley Township v. DEP*, 1996 EHB

1098, wherein the Board said that: "[I]t has long been the law that issues not raised in a party's pre-hearing memorandum are waived". *Id.* at 1126.

We read the papers as being primarily based on the "waiver" theory even though this theory is presented second in order in DEP's papers. We look at the papers this way for four reasons. First, there has been summary judgment practice in this case already in which standing was a subject. Summary judgment was denied. Second, the Motion papers stress the viewpoint that Smedley's Pre-Hearing Memorandum was the straw that broke the camel's back on the standing issue because, from DEP's and IP's perspective, that filing was in such a form that the standing issue was waived by Smedley. Third, the relief requested is framed in terms of waiver. DEP and IP ask the Board to preclude Smedley from presenting any evidence of standing at the hearing because the Notice of Appeal and Pre-Hearing Memorandum contain no allegations regarding standing, i.e., Smedley has waived the issue. Finally, the Motion further argues, based on the theory that the matter of standing has been waived, that the Board cannot even delve into issues dealing with the merits of case because there is no jurisdiction because Smedley has no standing.

We think that DEP and IP have reached too far and will deny the Motion. Waiver is not a favored doctrine and we are loath to apply it here where to do so would be totally fatal to Smedley's case. Paragraph 4 of our Pre-Hearing Order says very clearly that a party "may" be deemed to have abandoned an issue not raised in the Pre-Hearing Memorandum and that the Board "may" sanction a party who fails to comply with the rules regarding the content of Pre-Hearing Memoranda. Also, Board Rule 1021.82(b) provides that the Board "may" impose sanctions on a party who does not follow the rules regarding the content of Pre-Hearing Memoranda including the preclusion of testimony.

Thus, the backdrop of our analysis is our wide discretion in this area even where there has been a failure to abide by the rules regarding the content of Pre-Hearing Memoranda.

We think that prejudice to the opposing party ought to be a very significant factor in any evaluation under our discretionary power to deem a waiver to have occurred. *See Lucchino v. DEP*, Docket No. 98-166-R slip op. at 4 (opinion issued September 10, 1999). (citing *Koretsky v. DER*, 1994 EHB 905, 909); *see Funk v. DER*, 1988 EHB 1242, 1244; *Reiner v. DER*, 1982 EHB 183, 200. DEP does not allege that it or IP is prejudiced by the pointed to omission from Smedley's Pre-Hearing Memorandum. We think this is reason enough to deny the Motion.

We do not think that it is surprising that DEP and IP do not claim to be prejudiced by Smedley's omission. As we noted before, standing was an issue addressed in the Motions for Summary Judgment filed by the Department and IP individually, which were ultimately denied by the Board. Thus, it is clear that standing has been an issue in which DEP and IP have engaged in discovery from early on in the case. This fact is also evident from not only DEP's and IP's Pre-Hearing Memoranda but also from this very Motion In Limine itself which attempts to present to the Board facts which DEP and IP contend defeat Smedley's standing. DEP and IP have been able to prepare a case on the standing issue and we think that fairness dictates that, at this juncture, all parties have a chance to present their case on the issue at trial and that we do not short circuit that process before hearing.

The *Oley* case cited by DEP is not supportive of DEP's and IP's point because that case is completely different, both legally and factually, from what we see here. *See Oley Township v. DER*, 1996 EHB 1098. In *Oley*, a permittee, for the very first time in its Post-Hearing Brief tried to assert that the Appellant had no standing. *See id.* at 1126. The Board noted that standing has been treated under Pennsylvania law as akin to an

affirmative defense. *See id.* at 1127. As such, it must be raised by the party asserting a lack of standing in early pleadings at the trial level or else it is waived on appeal. *See id.* In the context of Board litigation, therefore, the defense of lack of standing must be raised by dispositive motion or in a party's Pre-Hearing Memorandum or it is waived. *See id.* IP and DEP have certainly successfully preserved their respective positions that Smedley does not have standing. However, their proposed use of the *Oley* case to preclude Smedley from producing evidence at trial showing standing stands *Oley* on its head.[1]

Having expressed our views on the "waiver" contention, the other portion of DEP's Motion and Brief deal with whether, as a matter of fact, Smedley has standing under the law as interpreted by the Board and the Commonwealth Court. We see here either an attempt to relitigate the Motion for Summary Judgment or an effort to conduct a trial on the standing issue on paper. As we stated in connection with our denial of the Motion In Limine regarding the expert testimony of Dr. Connett, we feel that a Motion In Limine is ill suited for that task.

For the reasons stated above the Department's Motion in Limine on Standing which Appellee IP joined is denied and we enter the following order:

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[1] Interestingly *Oley* also undermines DEP's and IP's contention in the Motion that the notion of standing is jurisdictional. *Oley* at least in the context of the setting of that case, instructs that standing is not jurisdictional at all under Pennsylvania law. The *Oley* case contains a detailed discussion contrasting the principle of standing under Pennsylvania law, which, it says, is not jurisdictional versus the principle of standing under federal law, which it says, is jurisdictional. We will delve into that question in more detail if need be at a later time. Suffice it to say for now that the *Oley* case fails to support the underlying thrust of DEP's and IP's Motion of several levels. Thus, ironically, the *Oley* case cited by DEP and IP is actually much more supportive of what would be Smedley's position on this Motion than it is of DEP's and IP's position.

WILLIAM A. SMEDLEY,	:	
	:	
Appellant	:	
	:	**EHB Docket No. 97-253-K**
v.	:	
	:	**Issued: February 7, 2000**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER DENYING THE DEPARTMENT OF ENVIRONMENTAL PROTECTION'S MOTION IN LIMINE ON STANDING JOINED BY INTERNATIONAL PAPER

AND NOW, this 7th day of February 2000, it is hereby **ORDERED THAT** for the reasons outlined in the accompanying Opinion, the Department's Motion in Limine on Standing in which Appellee IP joins is denied.

ENVIRONMENTAL HEARING BOARD

MICHAEL L. KRANCER
Administrative Law Judge
Member

DATED: February 7, 2000

VIA FAX AND FIRST CLASS MAIL

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WILLIAM T. PHILLIPY I
SECRETARY TO THE BOA

WILLIAM A. SMEDLEY	:	
	:	
v.	:	**EHB Docket No. 97-253-K**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and INTERNATIONAL PAPER COMPANY, Permittee	:	**Issued: February 14, 2000**

OPINION AND ORDER ON MOTION IN LIMINE ON THE ADVERSE INTEREST RULE

By Michael L. Krancer, Administrative Law Judge

Synopsis:

DEP's Motion In Limine On The Adverse Interest Rule is granted in part and denied in part. The Motion is **granted** insofar as Smedley is precluded from designating DEP witnesses as being "hostile" or as having an "adverse interest" and thus from "calling DEP employees as if on cross-examination" in his case-in-chief. DEP witnesses, functioning in their role as government employees, are not considered to be "hostile" or "adverse" within the meaning of the rule that permits such witnesses to be examined as if on cross-examination. The Motion is **denied** insofar as it is considered to be a blanket request that Smedley's counsel not be allowed to use the device of leading questions of DEP personnel at trial during his case-in-chief. Pennsylvania Rule of Evidence 611(c) permits the use of leading questions to witnesses that fall into one or more of the three following categories: (1) a hostile witness; (2) an adverse party; or (3) a witness identified with an adverse party. DEP is an "adverse party" meaning a party on the opposite side

of the issues raised by Smedley and, thus, a DEP witness is one that is "identified with an adverse party". Since DEP is an adverse party, the use of leading questions will not be precluded as an absolute matter. However, the latitude provided for the use of leading questions to DEP witnesses will be considered narrow and will be monitored closely at trial.

Background

DEP's February 7, 2000 Motion In Limine On The Adverse Interest Rule and a supporting memorandum of law thereon which we deal with here has the following background. Appellant Smedley listed several Department witnesses in its Pre-Hearing Memorandum who are to be presented in Smedley's case-in-chief. At the pre-trial conference held with the Board and the parties on Monday, February 7, 2000, counsel for the Department requested a ruling at that time that counsel for Smedley not be permitted to call DEP personnel in his case-in-chief as if on cross-examination and ask the Department witnesses leading questions. The Board stated a preliminary indication, but not a ruling, that it would allow Smedley's counsel to ask the Department witnesses leading questions based on our reading of Pennsylvania Rule of Evidence (hereinafter "PRE") 611(c). However, at the same time, the Board stated that it would review the Motion In Limine on the matter which DEP's counsel stated would be forthcoming and which DEP's counsel stated would bring to the Board's attention to the case law and arguments DEP contends support an evidentiary ruling in its favor on that question. No response to DEP's Motion was filed by either Smedley or Permittee, International Paper.

On February 10, 2000, the Department filed its Motion. The relief requested in the Motion is that the Board "preclude the Appellant and/or International Paper from calling any Department employees as if on cross-examination at the hearing." As will be discussed in more detail, the very title of the Motion and the relief requested is framed in terms that we find we

must transcend. We think that the question whether Smedley may call DEP witnesses as if on cross-examination is different from the question whether Smedley's counsel may use the device of leading questions during his examination of DEP witnesses. Thus, the Motion is granted in part and denied in part.[1] The Motion is granted insofar as Smedley may not call DEP witnesses as "adverse" or "hostile" witnesses "as if on cross-examination" at trial, but denied to the extent the Motion seeks to completely bar Smedley's counsel from using leading questions in his examination of DEP witnesses.

Analysis

The Board has read each of the cases cited in DEP's Brief, *i.e.*, *Claim v. DER*, 1995 EHB 436; *Wood v. DER*, 1994 EHB 347; and *Wyant v. DER*, 1988 EHB 986. Those cases hold, in short, that DEP employees, in their role as government employees, are not witnesses with an adverse interest and, thus, they cannot be considered as hostile or adverse witnesses allowing them to be the subject of being "called as if on cross-examination." These cases are born from the case of *Pittsburgh Miracle Mile v. Board of Property Assessment*, 294 A.2d 226 (Pa. Cmwlth. 1972) in which the Commonwealth Court upheld a trial court's refusal to allow a taxpayer litigant to call a member of the local Board of Property Assessment as if under cross-examination in the taxpayer's challenge to the Board's tax assessment. *Id.* at 231. The Court noted that "[l]iterally, a member of the assessment board has no interest adverse to a property owner because he has no personal interest in the outcome." *Id.*

This intellectual underpinning of the *Miracle Mile* has followed through in Board decisions such as *Claim, Wood and Wyant*. In those cases, as DEP correctly points out, DEP

[1] This Opinion on the Motion In Limine is necessarily that of the undersigned Member of the Board only.

witnesses have not been allowed to be considered "adverse" and, therefore, have not been allowed to be called as if on cross-examination. The focal point of the inquiry and the lynchpin of the analysis under these cases is 42 Pa.C.S.A. §5935, which provides in relevant part that a party may call as a hostile witness and examine "as if on cross-examination" any person "whose interest is adverse to the party calling him as a witness." *Id.* Under that rule, the nature of the adverse interest of the witness is considered from the point of view of whether the witness stands to gain or lose, usually, but not always, in a financial sense, by the outcome of the litigation. There is a discussion of what "adverse interest" means in this context in the case of *Suckling v. Pennsylvania T. & F. Casualty Insurance Company*, 233 A.2d 279 (Pa. 1967), which is cited by the *Miracle Mile* court for this point. In *Suckling*, the Court said that, "[t]he true test of the interest of a witness is that he will either gain or lose, as the direct legal operation and effect of the judgment, or that the record will be legal evidence for or against him in some other action." *Suckling, supra* at 281 (*citing Dillon's Estate*, 111 A. 919 (Pa. 1920) *citing Braine v. Spalding*, 52 Pa. 247, 248, 249 (1866)). Also, an "adverse interest" is described as being of a nature and quality that the witness is himself or herself "involved in the event of the suit in the sense that, by operation of the judgment there entered, either a legal right or liability of the witness will be acquired, lost, or materially affected. *Suckling, supra* at 281-82 (*citing Dinger v. Friedman*, 123 A. 641 (Pa. 1924)).

Looked at in this way, a government employee whose agency has taken an action which is being challenged in litigation does not have an "adverse interest". This is because the government employee does not personally stand to gain or lose either a right or, obviously, financially, from the outcome of the litigation. This is so, virtually by definition, since the government employee is viewed as being duty-bound to be detached and disinterested in the

performance of his or her function and to be acting in an even-handed way as to all citizens, including, by the way, corporate citizens. The outcome of the litigation is not viewed as affecting the government employee-witness' legal rights nor are their interests promoted or hindered by the success or failure of either side in the litigation. Hence, such witnesses are not considered "adverse" in the sense in which that term is used in 42 Pa.C.S.A. §5935. The result is that a government employee witness is outside the scope of persons subject to being called as if on cross-examination under 42 Pa.C.S.A. §5935. This is the result that was followed in the Board cases cited to us by DEP.

We do not disturb any of that case law or analysis here. However, as we will elaborate on below, that case law and analysis are somewhat beside the point of the determination being made here. PRE 611(c) provides as follows:

> **Leading Questions**. Leading questions should not be used on direct or redirect examination of a witness except as may be necessary to develop the witness' testimony. Ordinarily, leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party or a witness identified with an adverse party, interrogation may be by leading questions; a witness so examined should usually be interrogated by all other parties as to whom the witness is not hostile or adverse as if under redirect examination.

PRE 611(c).[2]

Thus, under PRE 611(c), a party is allowed to use leading questions of a witness who is in one or more of the three following categories: (1) a hostile witness; (2) an adverse party; or (3) a witness identified with an adverse party. We think that there is a great significance to the use of the terms "adverse party" in this context. The cases cited by DEP and the rule involved in

[2] The Pennsylvania Rules of Evidence are relatively new, having become effective on October 1, 1998.

those cases relate to an adverse witness, meaning, as discussed before, a person who stands to gain or lose from the outcome of the litigation. The focus is on the witness personally and his or her personal relationship to the litigation. It is that relationship which determines whether that individual witness is to be considered as "adverse" and thus be fair game for being called as if on cross-examination under 42 Pa.C.S.A. §5935. That situation is certainly covered by at least the first category of witnesses outlined in PRE 611(c).

We agree with DEP that the DEP witnesses should not be considered as adverse witnesses in that sense. However, that is not what we are dealing with here. We are dealing with "witnesses identified with an adverse party" under PRE 611(c). That is a different situation. The inquiry under the third category of witnesses in PRE 611(c) is not directed at the personal leanings or interest of the witness in question, but simply whether the party with whom that witness is identified is an adverse party.

The meaning of the term "adverse party" was not addressed in DEP's motion. This is a matter upon which there is not a plethora of writing that we have uncovered in our review of this matter which has admittedly been somewhat expedited due to the circumstances. There is a discussion of this in the case of *Carey v. Schuldt*, 42 F.R.D. 390 (D. La. 1967), in which the court was addressing the issue of what is an "adverse party" in the context of the then existing version of Federal Rule of Civil Procedure 33 which allowed interrogatories to be served on an "adverse party". That Court stressed that an "adverse party" in the litigation sense is to be contrasted from the dictionary definition of one "having opposing interests". *Id.* at 393. The Court stated that:

> The judicial definition of 'adverse' parties is those parties who are on opposite sides of an issue raised by the pleadings or otherwise presented by the record. *Smigiel v. Compagnie De Transports Oceaniques*, 183 F. Supp. 518 (E. D. Pa. 1960); *Piro v. Port Lines*,

> 22 F.R.D. 231 (E.D.N.Y. 1958); *Kestner v. Reading Co.*, 21 F.R.D. 303 (E. D. Pa. 1957); *Cooke v. Kilgore Manufacturing Co.*, 15 F.R.D. 465 (N. D. Ohio 1954). This serves well as a general principle. But it requires explanation, which has not been forthcoming, for proper application to specific situations. In determining 'adversity', the focus is on issues not interests. Conflicting interests, without more, does not constitute 'adversity'. To be 'adverse' the parties must oppose each other on an issue in the case. 'Adversity' does not mean that one party must be seeking a judgment or recovery against the other party. But it does mean that one party strives to win a point at issue at the expense of the other. When two parties are contesting an issue, and the outcome of the litigation will be, or may be, different as to either party due to the determination of that issue, then they are 'adverse' within the meaning of Rule 33."

Carey v. Schuldt, *supra* at 393. The Court in *Powell v. Willow Grove Amusement Park*, 45 F.R.D. 274 (E. D. Pa. 1968), dealing also with the meaning of the concept "adverse party" in the context of Federal Rule 33 agreed with the *Carey* Court's formulation of the term's meaning. Before quoting the language we just did from the *Carey v. Schuldt* case, the *Powell* Court stated that:

> ...the rule refers not to parties whose interest in the result of the litigation may be adverse but to parties who are on the opposite sides of an issue raised by the pleadings or otherwise presented by the record. *Kestner v. Reading Co.*, 21 F.R.D. 303, 304 (E. D. Pa. 1957); *Hagans v. Ellerman & Bucknell Steamship Co.*, 318 F.2d 563, 587 (3rd Cir. 1963); *Weitort v. A. H. Bull & Co.*, 192 F. Supp. 165, 168 (E. D. Pa. 1961).

Powell v. Willow Grove Amusement Park, *supra* at 276.

We realize that the context of the inquiry into the meaning of the term "adverse party" is not exactly the same here as it was in the *Schuldt* or the *Powell* cases. Nevertheless, we find those discussions to be very helpful. In our case, DEP is on the opposite side of Smedley with respect to the essential issue in the case which is the propriety of DEP's issuance of the minor modification to International Paper's air quality permit. Smedley contends that DEP's issuance

the minor modification was an abuse of discretion, arbitrary and capricious and otherwise contrary to law. Quite obviously, DEP contends just the opposite, that its issuance of the minor operating permit modification was entirely appropriate, within its discretion and supported by law. With respect to the numerous sub-issues raised by the pleadings or otherwise presented by the record which are encompassed within the overarching issue in the case Smedley and DEP are in opposition to each other in that both are striving to win their points at issue at the expense of the other party. Litigation is by nature a zero-sum game to the parties in the case. Despite the notion that DEP witnesses are themselves not adverse or hostile in the traditional sense of the use of that word, DEP, as a party, is out to win the litigation which it can do only by having Smedley lose it. Smedley, on the other hand, is out to win the litigation which he can do only by having DEP lose it. Thus, DEP is an adverse party to Smedley within our view of the meaning of that term in a litigation context. Moreover, obviously, the DEP witnesses are by definition "identified with" DEP. Thus, the DEP witnesses are "identified with an adverse party" within the ambit of PRE 611(c).

Our focus, then, is not whether DEP witnesses can "be called as if on cross-examination" as "adverse" or "hostile" witnesses. The import of this decision is not to so hold, and we do not do so. The language regarding "being called as if on cross-examination" and "adverse" witness and "hostile" witness is not on the point of our disposition of this Motion. We are simply saying that, per PRE 611(c), counsel for Smedley may use the device of leading questions as a mechanism for his examination of DEP witnesses. This is not the same as saying that counsel for Smedley may treat DEP witnesses as "adverse" and call DEP witnesses "as if on cross-examination". In this sense, the very title of DEP's Motion, *i.e.*, "Motion In Limine On the Adverse Witness Rule" is off the mark. The issue of whether DEP witnesses are "adverse" as

that term has been used in this context is off center from our disposition of this matter. All we are doing is determining that Smedley's counsel may use leading questions when he examines DEP witnesses in his case-in-chief. Or, put another way, we are declining to prohibit absolutely Smedley's use of leading questions.

Although we are declining to prohibit absolutely Smedley's counsel from using leading questions during his examination of DEP witnesses in his case-in-chief, consistent with this Opinion and its underpinnings and the historical background from which this question arises, Smedley's use of this mechanism will be closely monitored and regulated by the Board. The DEP witnesses are not personally "adverse" or "hostile" in the sense that term has come to mean in our jurisprudence. Thus, although leading questions may be used as an examination tool, the examination of these witnesses is not to be considered the same as an examination of a witness who is from a personal standpoint "hostile" or "adverse" in the sense of a person who stands to gain or lose by the outcome of the litigation. The DEP witnesses are public officials who acted within the scope of their governmental duties even if their actions turn out in retrospect, as Smedley contends, to have been an abuse of discretion, arbitrary and capricious or contrary to law. They are not persons whose actions in connection with the matter under litigation advanced their personal agendas or whose personal agendas will be advanced or retarded by the outcome of this litigation. Thus, the latitude given is to be considered by Smedley as narrowly confined and the leeway limited. Obviously, also, DEP and/or Permittee, International Paper, are free to interpose objections during Smedley's examination of DEP witnesses, including the objection that Smedley has veered across the line of the latitude provided regarding the use of the

mechanism of leading questions.[3]

Before we close, we discuss two points raised by DEP. First, we acknowledge DEP's point that the commentary to PRE 611(c) notes that the Rule "is consistent with Pennsylvania law" and "is also consistent with 42 Pa. C.S.A. §5935, which authorizes the calling and cross-examination of an adverse party or a person having an adverse interest." DEP's point is, again, that the case law it cites and the principles it argues are left intact by the enactment of PRE 611(c). The outcome of this Motion is totally consistent with those observations.

Second, we have considered and hereby decline DEP's invitation to bar Smedley outright from using the device of leading questions under our discretionary power to regulate trial presentation set forth in PRE 611(a). DEP argues that the case would move more efficiently if the Board exercised its power under PRE 611(a) to prohibit Smedley from using leading questions. DEP says that the testimony of the Department witnesses, by whomever called, will be presented, and that it would be more efficient, less confusing and less vexing to the witnesses to not allow Smedley to call the DEP witnesses as if on cross-examination. Again, we do not view Smedley's use of the device of leading questions as the same as "calling DEP witnesses as if on cross-examination" with the meaning that phraseology has come to entail over history. In any event, we think that Smedley should be given the right to try his case the way he deems appropriate. After all, as DEP and International Paper have noted in previous pre-trial submissions, Smedley has the burden of proof. We note in addition that Smedley has the burden of proceeding as well. It is only fair that Smedley and his counsel be allowed the opportunity to

[3] It is not possible, desirable or productive in the context of a written decision on a pre-trial Motion In Limine to try to provide a complete and all-encompassing pronouncement of which leading questions we will allow and which leading questions we will not allow. That policing job necessarily has to be undertaken during and in the context of the action of the trial.

exercise the judgment to present the case in the manner they choose to do so as long as that manner is in conformance with applicable Rules. Again, though we note that the Board, as it always does and as is consistent with its function as a trial court and its discretion under PRE 611(a), will enforce appropriate limitations and controls over Smedley and all parties' presentations. Also, as already noted, we encourage DEP and International Paper, and Smedley for that matter, to interpose whatever objections at trial any party deems appropriate.

We have provided this written decision on the question raised by DEP instead of leaving it to deal with in the context of the pressure and rush of an ongoing trial because we have a Motion at hand by DEP to do so received just before trial and we thought that biting the bullet and dealing with the matter in this fashion would be of more assistance to the parties in preparation of their trial presentations which are scheduled to begin in just a few days. We realize that there will be much more written on this particular subject by litigants, scholars and courts as time goes on. Indeed, this subject would be perfectly suitable for a long Law Review article. We have endeavored here to call the matter as we see it on an expedited basis within days of the start of the trial on a Motion filed in anticipation of trial. We trust that this Opinion has provided some guidance to the parties in that respect.

Accordingly, we enter the following Order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

WILLIAM A. SMEDLEY	:	
	:	
v.	:	**EHB Docket No. 97-253-K**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and INTERNATIONAL PAPER COMPANY, Permittee	:	

ORDER

AND NOW, this 14th day of February, 2000, the Motion In Limine On The Adverse Interest Rule is **granted** insofar as Smedley is precluded from designating DEP witnesses as having an "adverse interest" and thus "calling Department employees as if on cross-examination" in his case-in-chief. The Motion is **denied** insofar as it is considered to be a blanket request that Smedley's counsel not be allowed to use the device of leading questions of DEP personnel at trial during his case-in-chief. Smedley's counsel will be allowed to use the device of leading questions in his examination of DEP personnel within the confines of PRE 611(c) and propriety as discussed in more detail in the accompanying Opinion and subject to DEP's and International Paper's right to object at trial to any question posed during Smedley's Counsel's examination.

ENVIRONMENTAL HEARING BOARD

MICHAEL L. KRANCER
Administrative Law Judge
Member

DATED: February 14, 2000

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

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WILLIAM T. PHILLIPY II
SECRETARY TO THE BOA

SCOTT TOWNSHIP ENVIRONMENTAL PRESERVATION ALLIANCE	:	
v.	:	**EHB Docket No. 99-048-MG**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: February 15, 2000**

OPINION AND ORDER ON MOTION FOR SUMMARY JUDGMENT

By George J. Miller, Administrative Law Judge

Synopsis:

A letter to the Department purporting to be a private request under the Sewage Facilities Act[1] was both procedurally and substantively deficient in that the request was not first made to the municipality and contained no description of the requested revision. The letter therefore cannot be a valid private request under the Sewage Facilities Act to which the Department had a duty to respond. Accordingly, the Department's motion for summary judgment is granted. It is unnecessary to decide whether the Department's failure to respond to this purported private request is an action of the Department over which the Board has jurisdiction.

BACKGROUND

On July 28, 1993, the Department of Environmental Protection (Department) approved Scott Township's Sewage Facilities Plan Update Revision (1993 Plan). The 1993 Plan proposed

the construction of a centralized sewage collection and treatment system to serve portions of Scott Township, a municipality located in Lackawanna County, Pennsylvania. On October 22, 1998, the Scott Township Environmental Preservation Alliance (Preservation Alliance or STEPA)[2] submitted a one page letter to the Department which requested the Department to order Scott Township to revise its Official Sewage Facilities Act Plan. (Appellant's Response, Exhibit B) The Preservation Alliance submitted a three page letter on the same date to the Scott Township Board of Supervisors (Supervisors) advising the Supervisors that the Preservation Alliance was appealing the Department's recent re-approval of the Township's Plan and requesting the Department to order the Township to revise its Plan. (Appellant's Response, Exhibit C) This letter sought, among other things, cooperation from the Township in working with the Preservation Alliance to devise a lower cost alternative to the existing plan but did not propose a detailed alternative which the Township might adopt.

The Department made no response to the purported private request letters. As a result, on March 5, 1999, the Preservation Alliance filed a Notice of Appeal/Petition for Mandamus with the Board at EHB Docket No. 99-048-MG challenging the Department's failure to respond to the Preservation Alliance's purported private request letter dated October 22, 1998.[3] In addition, an amended notice of appeal was filed on March 24, 1999 attaching an alternate sewage

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

[2] The Preservation Alliance is comprised of residents and homeowners in the areas covered by Scott Township's Official Sewage Facilities Act Plan.

[3] On October 23, 1998, the Preservation Alliance filed another notice of appeal with the Board at EHB Docket No. 98-209-MG. On June 17, 1999, the Board granted the Department's motion to dismiss that case, holding that the Board has no jurisdiction over (1) an appeal from a letter from Department's counsel which neither changes the *status quo ante* nor imposes new obligations through its issuance and (2) an appeal filed by persons who chose not to take a timely appeal from the Department's approval of the Township's Official Sewage Facilities Act Plan. *Scott Township Environmental Preservation Alliance v. DEP*, EHB Docket No. 98-209-MG (Opinion issued June 17, 1999).

management plan (STEPA Sewage Plan), dated February 26, 1999. (Appellant's amended notice of appeal, Exhibit J) Thereafter, the Preservation Alliance sent a letter referencing a "2nd [Private] Request" to the Township's counsel on June 23, 1999. (Appellant's Response, Exhibit D) Attached to the letter was the STEPA Sewage Plan previously submitted to the Township's counsel and attached to the amended notice of appeal. By letter dated August 19, 1999, the Township's counsel rejected the Appellant's request on the basis that the request was procedurally defective and that the Appellant's claims--that the present Plan is too expensive and it does not adequately protect the environment--are not valid grounds for a private request. (Appellant's Response, Exhibit E) STEPA then sent a letter, dated September 17, 1999, to the Department requesting the Department to direct the Township to grant the Preservation Alliance's private request. (Appellant's Response, Exhibit F)

Currently before the Board is a motion for summary judgment and supporting memorandum of law filed by the Department.[4] The Supervisors and the Scott Township Sewer and Water Authority join in the Department's motion. The Preservation Alliance filed a response and supporting memorandum of law and the Department filed a reply memorandum. The parties also filed a joint stipulation waiving any right they may have to object to the Board's consideration of various documents attached to legal memoranda filed by the parties. The oral argument was held before Administrative Law Judge George J. Miller on January 14, 2000 on the issue of whether the Appellant's request to the Township and the Department can be characterized as meeting the requirements of a private request.

[4] The Department originally filed its motion as a motion to dismiss for lack of jurisdiction. The parties filed a stipulation on October 29, 1999, consenting to the Board's consideration of the Department's motion to dismiss as a motion for summary judgment.

DISCUSSION

The Board may grant summary judgment where the pleadings, depositions, answers to interrogatories, and admissions of record, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Pa.R.C.P. 1035.2; *County of Adams v. Department of Environmental Protection*, 687 A.2d 1222 (Pa. Cmwlth. 1997). The party moving for summary judgment has the burden of proving the non-existence of any genuine issue of material fact. *Kilgore v. City of Philadelphia*, 717 A.2d 514 (Pa. 1998). The record must be viewed in the light most favorable to the non-moving party and summary judgment may be granted only in cases where the right is clear and free from doubt. *Id.*

In its motion, the Department argues that: (1) the Board has no jurisdiction in this matter because the Department has not taken an action from which an appeal can be taken; (2) the Board has no authority to issue a writ of mandamus; and (3) the Preservation Alliance's October 22, 1998 letter constitutes a challenge to the Department's approval of the 1993 Plan rather than a private request. In its response to the motion, the Preservation Alliance contends that it is challenging the methodology and impact of the Township's implementation of the 1993 Plan rather than the Department's previous approval of the Plan. It argues that: (1) the Board has jurisdiction to review the Department's response to a private request; (2) it filed a private request in compliance with the Sewage Facilities Act[5] and applicable regulations; and (3) the Department's motion assumes facts in dispute and should be denied.

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

The Board's Jurisdiction

The Department argues that its failure to respond to the Preservation Alliance's October 22, 1998 letter is not an action subject to review by this Board because it is not an "action" over which the Board has jurisdiction under the provisions of Section 4 of the Environmental Hearing Board Act.[6] This contention presents a difficult question with respect to the Board's jurisdiction over "non-action" by the Department. Section 5(b) of the Sewage Facilities Act, 35 P.S. § 750.5(b) unambiguously provides that the Department "shall" act with regard to a private request within the time period specified in that section. In the event the Department fails to act in accordance with the statute within the specified time limits, Section 5(b.2) permits the landowner making a private request to initiate an action in mandamus against the Department. 35 P.S. § 750.5(b.2). Section 4(a) of the Environmental Hearing Board Act, 35 P.S. § 7514(a), states as a general rule that the Board has the power and duty to hold hearings and issue adjudications on "orders, permits or decisions of the department." Since a decision not to respond to a private

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[6] Environmental Hearing Board Act, Act of July 13, 1988, P.L. 530, *as amended*, 35 P.S. §§ 7511-7516 at § 7514. The Department also argues that the Preservation Alliance's request for the Board to compel the Department to order Scott Township to revise its Official Sewage Facilities Act Plan is a request in equity and is also beyond the jurisdiction of this Board. The Department correctly points out that the Board is not statutorily authorized to exercise judicial powers in equity. *Marinari v. Department of Environmental Resources*, 566 A.2d 385 (Pa. Cmwlth. 1989).

However, the Board has the authority to direct the Department to take proper action if the Preservation Alliance has filed a valid private request in accordance with the Act and its regulations. In *Pequea Township v. Herr,* 716 A.2d 678 (Pa. Cmwlth. 1998), the Court affirmed the Board's order granting the appellant's motion for summary judgment and ordering the Department to issue a letter approving the appellant's planning module as a revision to the township's official sewage facilities plan. The Court noted that "although the [B]oard stated that it was 'acting in equity,' we find this to be harmless error as the [B]oard was acting within the scope of its authority in modifying the [D]epartment's action and directing the [D]epartment as to the proper action to be taken." 716 A.2d at 687. Where the Board finds, based on the evidence presented at a hearing on the merits, that the Department has abused its discretion, then the Board may properly substitute its discretion for that of the Department and order the relief

request, as required by the Sewage Facilities Act, would be a failure to perform a ministerial duty, a failure to perform that duty might be viewed, as Appellant contends, as a decision of the Department subject to the Board's jurisdiction.

Requirements of a Private Request

We need not decide this jurisdictional issue because we conclude that the letters issued by the Preservation Alliance prior to taking this appeal cannot meet even the procedural requirements of a private request. The Act provides the procedure for filing a private request where a landowner can show that the municipality's sewage plan is not being implemented or is inadequate to meet the landowner's sewage disposal needs. 35 P.S. § 705.5(b). First, a resident of the municipality must demand in writing that the municipality implement or revise its official plan. The municipality must either refuse in writing or fail to reply in either the affirmative or negative within 60 days. Only then may the resident of the municipality file a private request with the Department requesting that the Department order the municipality to revise its official plan if the resident can show that the official plan is "inadequate to meet the resident's . . . sewage disposal needs." 35 P.S. § 705.5(b).

The request to the Department must contain a description of the area of the municipality in question and a list of all the reasons why the plan is believed to be inadequate. 35 P.S. § 705.5(b); 25 Pa. Code § 71.14(a). The private request must contain evidence that the municipality has refused in writing to revise its plan. 25 Pa. Code § 71.14(b). The landowner must notify the municipality, official planning agency within the municipality and planning commission with area wide jurisdiction in writing of the filing of the request with the

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requested. *See also Warren Sand & Gravel Co., Inc. v. Department of Environmental Resources*, 341 A.2d 556, 565 (Pa. Cmwlth. 1975).

Department at the same time notice is sent to the Department. 35 P.S. § 705.5(b); 25 Pa. Code § 71.14(a).

Upon receipt of a private request, the Department must notify the municipality that written comments may be submitted to the Department no later than 45 days after the Department's receipt of the private request for revision. 35 P.S. § 750.5(b.1). The Department must render a decision and inform the person requesting the revision and the appropriate municipality in writing within 120 days after either receipt of the comments or the expiration of the 45 day comment period when no comments have been received. If the Department refuses to order a requested revision, it must notify the person making the request in writing of the reasons for the refusal. *Id.*

The Preservation Alliance's Requests

We agree with the Department that the Preservation Alliance's October 22, 1998 letter does not constitute a private request. The letter is procedurally deficient in that, among other things, the Preservation Alliance failed to seek satisfaction from the Township prior to making an application to the Department. The letter is substantively deficient in that it does not contain any of the information required by the Act and the regulations for the Department to consider when reviewing a private request. Most specifically it was not accompanied by attachments or exhibits specifying what revision to the plan was being proposed. The letter merely states that STEPA "does not believe that the current official Sewage Facilities Plan adequately addresses the resident's sewage disposal needs."

It appears from documents filed with the Board during the course of this appeal that four months or more after this appeal was filed the Preservation Alliance attempted to correct these deficiencies by submitting a description of an alternate sewage facilities plan (STEPA Sewage

Plan) with the amended notice of appeal. Thereafter, it asked the Township to amend the Township's Plan to adopt this alternate plan but the Township rejected the Appellant's request. Following this refusal, the Preservation Alliance submitted an "amended" request to the Department to require the Township to adopt the STEPA Sewage Plan. The Department denied this request on the ground that these documents did not constitute a private request under the Act. Whether or not the Department abused its discretion in refusing this private request is the subject of a subsequent appeal filed by the Preservation Alliance with the Board at EHB Docket 99-239-MG.

We cannot consider these events which led to the subsequent appeal as curing the procedural defects in the October 22, 1998 letters purporting to be a private request. The timing and content of those letters prevent them from meeting the requirements of a private request as identified in the Act and its regulations. However, the question of whether or not the amended private request meets the requirements of the Sewage Facilities Act may have to be considered in the appeal docketed at EHB Docket 99-239-MG. The documents attached to the amended request indicate that the requests made to the Township and to the Department at least meet the timing requirements for a private request under the Act and the Department's regulations. Whether the documents can meet the substantive requirements of a private request is another question.

Since the Appellant's October 22, 1998 letter fails to constitute a private request in accordance with the procedural and content requirements set forth at 35 P.S. §§ 750.5(b), (b.1) and (b.2) and 25 Pa. Code §§ 71.14(a) and (b), we have no choice but to grant the Department's motion for summary judgment.

Accordingly, we enter the following:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

SCOTT TOWNSHIP ENVIRONMENTAL PRESERVATION ALLIANCE	:	
v.	:	EHB Docket No. 99-048-MG
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 15th day of February, 2000, IT IS HEREBY ORDERED that the Department's motion for summary judgment is **GRANTED** and this 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: February 15, 2000

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

For the Commonwealth, DEP:
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Northeast Region

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Philadelphia, PA

For Scott Township Board of Supervisors:
Michael A. Giannetta, Esquire
MURPHY PIAZZA & GENELLO, P.C.
Scranton, PA

For Township Sewer Authority:
David J. Tomaine, Esquire
Carbondale, PA

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WILLIAM T. PHILLIPY I
SECRETARY TO THE BOA

WILLIAM A. SMEDLEY	:	
	:	
v.	:	**EHB Docket No. 97-253-K**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and INTERNATIONAL PAPER COMPANY, Permittee	:	**Issued: February 15, 2000**

OPINION AND ORDER ON DEP's AND INTERNATIONAL PAPER COMPANY'S MOTION IN LIMINE REGARDING THE TESTIMONY OF DEAN "RUSTY" BOTTORF

By Michael L. Krancer, Administrative Law Judge

Synopsis:

DEP's and International Paper Company's (IP) Motion In Limine Regarding the Testimony of Dean "Rusty" Bottorf is granted in part and denied in part. Under Pennsylvania Rule of Evidence 701, Mr. Bottorf will be allowed to testify about his perceptions and observations about weather conditions or emissions from IP's Lock Haven Plant. He can also testify in the form of opinions or inferences but only those opinions and inferences that are rationally based on his perception and that are helpful to a clear understanding of his testimony or the determination of a fact in issue. However, Mr. Bottorf, who is not an expert, and is not being offered as an expert, will not be allowed to testify about matters which are within the realm of an expert such as the recognition and identification of or the nature, quality, behavior, characteristics, impact or effects of so-called (and alleged) "thermal inversions" or "atmospheric inversions". Pennsylvania Rule of Evidence 702 requires expert testimony for those matters.

Background

The Department filed a Motion In Limine Regarding the Testimony of Dean "Rusty" Bottorf on January 25, 2000. IP joined in that Motion. Appellant Smedley filed his response on February 14, 2000. Trial in this matter is scheduled to start tomorrow, February 16, 2000. DEP and IP's Motion seeks to bar the testimony of Mr. Bottorf. The theory is that his expected testimony is in the realm of expert testimony in the field of meteorology or atmospheric science or other technical or scientific discipline or disciplines. They say that he is neither identified by Smedley in his pre-trial filings as an expert nor is he, as a matter of fact, an expert in the field of meteorology or atmospheric sciences or any related field. DEP and IP expect that Mr. Bottorf will testify about meteorological or atmospheric phenomena or conditions referred to as "thermal inversions" or "atmospheric inversions" in the area of the IP's Lock Haven plant. It is this plant which is the subject of the challenged minor operating permit modification. They also think he will try to testify, in the form of opinion, about the impact of these thermal inversions or atmospheric inversions, reacting in concert with emissions from IP's Lock Haven plant, on human health and/or the environment. DEP and IP argue that only an expert in meteorology or other discipline can testify about thermal inversions or their effect. In response, Smedley states that Mr. Bottorf is not being offered as an expert but will testify only about his factual observations and opinions as a resident of the Lock Haven area. Smedley states that he does not intend to demand scientific explanations or expert opinion from Mr. Bottorf regarding thermal inversions. Also, Smedley contests DEP's and IP's assertion that only an expert could testify about thermal inversions.

Analysis

Neither the proponent nor the opponent of Mr. Bottorf's testimony has provided us with a

discreet definition of what a "thermal inversion" or an "atmospheric inversion" is. We glean from the discussion in the papers filed that the phenomenon is a meteorological or atmospheric condition.[1] We have found a few references to the term "inversion" or "temperature inversion" in the context of air or atmospheric conditions in our cases. In *DER v. Franklin Plastics Corporation*, 1994 E.H.B. 100, a case dealing with malodors allegedly emanating from a particular plant, the term "inversion" was described as, "a temperature-related phenomenon [that occurs] on a regular basis in the area of the [plant in question] when there is no wind speed and the humidity is high, trapping contaminants instead of allowing them to disperse into the atmosphere." *Id.* at 119. In *Empire Sanitary Landfill v. DER*, 1994 E.H.B. 30, another case dealing with an alleged malodor emanating in that case from a landfill, it was noted that "such inversions do not occur if there is wind." *Id.* at 50. The phenomenon of "inversions" was also discussed in some technical detail in *West Penn Power v. DER*, 1978 E.H.B. 287 at 304-06; 310-11. That case involved a request by West Penn Power for a variance from the Department's regulation governing allowable emissions of sulfur dioxide from a particular boiler in a West Penn Power Company plant. *Id.* at 288.

In addition, National Oceanic and Atmospheric Administration ("NOAA") Technical Memorandum NWS SR-145, "A Comprehensive Glossary of Weather Terms For Storm Spotters", which is available on the world wide web, defines "inversion" to mean:

> "[g]enerally, a departure from the usual increase or decrease in atmospheric property with altitude. Specifically, it almost always refers to a temperature inversion, i.e., an increase in temperature with height, or to the layer within which such an increase occurs. An inversion is present in the lower part of a cap. See Fig. 6, sounding".

---

[1] The papers are not totally clear on whether an "atmospheric inversion" and a "thermal inversion" are distinct conditions or whether these are two terms that define the same phenomenon.

Id., http://www.nwsnorman.noaa.gov/severewx/branick2c.html. (the "NOAA Definition") The Figure 6, souding, which is refereed to in the NOAA Definition is a graphical plot of the "sounding" and the textual explanation reads:

> Figure 6 – Sounding. Plotted sounding from Oklahoma City, OK at 7 AM CDT, 8 June 1974. Horizontal lines represent height in pressure coordinates (millibars, or mb); diagonal lines represent temperature. Heavy solid lines show the vertical profile observed termperature (right) and dew point (left). The blue line shows the temperature that a parcel of surface air would have if it were heated to about 38 degrees C (100 F, the forecast high that day), and then lifted.
>
> This is a typical loaded gun sounding. A temperature inversion exists near 850 mb; the cap is represented by the warm layer above it, wherein the parcel would be cooler than the surrounding air (red area). Above the cap, the parcel would be warmer than the surrounding air and thus would accelerate upward (i.e., instability). At these levels, (above about 690 mb), positive area is seen as the green area. This area is related directly to the convective available potential energy or CAPE. The Lifted Index (LI) is shown by the temperature difference at 500 mb; in this case, it would be the amount minus 6. The convective temperature is found using the dotted lines; surface air would have to heat to about 43 C (109 F) to rise above the cap. This value assumes no subsequent changes in the sounding - a bad assumption on this day since a tornado touched down at the location of the sounding later that afternoon, despite surface temperatures in the 90s.

This Figure 6 is attached to this Opinion and Order. It can be found at http://www.nwsnorman.noaa.gov/severe/bran.2f6.html.

Our own research into this topic does provide us, then, with a very general notion of what an "inversion" is on a theoretical level so as to enable us to better deal with the motion at hand. This background is also demonstrative of why we think that the subject matter of thermal or atmospheric inversions, their propensity to be present in a specific area, their identification as being present in a specific area and, if present, their impacts or effects, especially in terms of potential risk, if any, to health or the environment with reference to a specific set of man made air emissions is an extremely highly technical area. Indeed, that is, perhaps, an understatement.

It is clear that this subject matter is extremely technically complex involving various technical disciplines and areas of expertise. This subject matter is, necessarily, within the command, if it is to anyone, not of lay persons but of experts.

We believe that, under Pennsylvania Rule of Evidence ("PRE") 701, Mr. Bottorf can testify about his perceptual observations relating to the weather. For example, if he saw clouds he can testify about clouds; if he saw fog he can testify about fog; if he saw smoke emanating from the IP plant he can testify about that. He can also testify about what he observed the clouds or the fog or the emissions from the IP plant doing. He can also testify in the form of opinions or inferences but only those opinions and inferences that are rationally based on his perception and that are helpful to a clear understanding of his testimony or the determination of a fact in issue. To go beyond that, however, would require an expert and Mr. Bottorf is not an expert.

There are really two levels of inquiry here. First is the recognition or identification of a "thermal inversion" or an "atmospheric inversion" or the conditions which favor the formation of these phenomena at the specific locus of this IP plant. The next level of inquiry, even given that a "thermal inversion" or an "atmospheric inversion" exists or may exist or may form in the area of this IP plant, is what impact or effect, if any, does that situation have with respect to this DEP permit minor modification decision.

The recognition or identification of a "thermal inversion" or an "atmospheric inversion" or the conditions which favor the formation of these phenomena in the area of the IP plant appears to us to not be the proper subject of the opinion of a lay witness under PRE 701. We do not believe that these matters are within the scope of knowledge or understanding of a layperson. We think that the previous treatment of the subject of inversions in our cases, the NOAA Definition of inversion, and the Figure 6 that we have discussed above show that even

identifying an inversion is an extremely technical undertaking involving measurements of various technical parameters, interpretations of the data, or empirical interpretation which, in our view, calls for specialized scientific and technical education, training, expertise and experience. These matters would involve knowledge and capability possessed only by and testimonially communicable under our Rules of Evidence only by a person with specialized knowledge beyond that possessed by a layperson, *i.e.*, one who qualifies as an expert under PRE 702. The field in question would be at least meteorology and/or atmospheric science but could involve other disciplines as well.

Thus, although we will allow Mr. Bottorf to provide his observations and perceptions of conditions in the area of the IP plant, we will not allow him to cross the line into offering an opinion that any particular set of observations can be identified as, or constitute, or are associated with a "thermal inversion" or an "atmospheric inversion", or whether any particular atmospheric or meteorological conditions favor the formation of these phenomena. It is clear to us that if Appellant wishes to try to establish the existence of "thermal inversions" or "atmospheric inversions" or atmospheric or meteorological conditions favorable to their formation in the area of the IP plant he needs to offer the testimony of an expert or experts for that.

Even if we were to allow Mr. Bottorf to go that far on an extremely broad interpretation of the scope of the lay witness opinion rule of PRE 701, it would be of no use to Smedley because we think that the second half of the inquiry, i.e., the effect or impact of "thermal inversions" or "atmospheric inversions" with respect to this particular permitting decision by DEP is way beyond the proper line for a lay witness. That linkage clearly requires an expert to offer his or her opinions. Thus, we will also not allow Mr. Bottorf to provide an opinion about the effect of any supposed connection between the weather conditions that he may have observed

over the years and risks to public health or the environment.

Smedley's papers put it this way,

> [t]he existence of atmospheric inversions is relevant and material because inversions prevent dispersion of air pollutants emitted from the IP facility resulting in greater risk to public health and the environment in the direction of the concentrated plume. Mr. Bottorf's factual observations of atmospheric inversions occurring frequently in the Lock Haven area, as evidenced by smoke stack plumes leveling off and traveling in undispersed form down the valley clearly make the existence of Appellants alleged fact that such inversions occur more likely than not.

Smedley, Memorandum of Law at 2. This construct would require expert testimony on several levels. Mr. Bottorf, as has been stated, can testify about his observations about the weather or about stack plumes leveling off and traveling down the valley. However, the opinion that inversions prevent dispersion of air pollutants in this case from this IP plant is a matter that needs expert testimony from a witness or witnesses trained in meteorology, atmospheric sciences and/or air dispersion modeling or similar discipline. Also, the further opinion that this phenomenon results in greater risk to public health or the environment also requires expert testimony from one or more witnesses trained in a field such as risk analysis or risk assessment or other applicable area of expertise. Thus, if Appellant wishes to try to establish that "thermal inversions" or "atmospheric inversions" have a deleterious effect on health and/or the environment through their reaction in relation to emissions from the IP plant, he needs to offer the testimony of one or more experts for that proposition as well. Mr. Bottorf cannot do that.

Smedley argues that he would only be offering Mr. Bottorf to establish a "relevant fact" based on eyewitness observation. The deficiency in this argument is discussed above. The alleged "relevant fact" Smedley is referring to is the existence of the meteorological or atmospheric phenomenon called a "thermal inversion" or an "atmospheric inversion". As stated, Smedley would need expert testimony to establish the presence of inversions in this particular

area. Then, the supposed fact would only be arguably relevant at all if some link or connection was proffered between the existence of the meteorological or atmospheric phenomenon in this specific location, the IP plant emissions, and a deleterious effect, if any, on human health and the environment. As we see it, that is a very technically complex circuit which could be attempted to be completed only with the use of one or more experts trained in various fields of expertise.

For the foregoing reasons, we enter the following Order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

WILLIAM A. SMEDLEY	:	
	:	
v.	:	**EHB Docket No. 97-253-K**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and INTERNATIONAL PAPER COMPANY, Permittee	:	

ORDER

AND NOW, this 15th day of February, 2000, the DEP's and International Paper Company's Motion In Limine Regarding the Testimony of Dean "Rusty" Bottorf is **granted in part and denied in part**. The Motion is denied to the extent it seeks to completely bar Mr. Bottorf from testifying at trial with respect to his perceptual observations about the weather or IP Plant emissions. He can also testify in the form of opinions or inferences but only those opinions and inferences that are rationally based on his perception and that are helpful to a clear understanding of his testimony or the determination of a fact in issue. The Motion is granted to the extent that Mr. Bottorf will not be permitted to provide opinions in the realm of an expert such as recognition and identification of, or the nature, quality, behavior, characteristics or impact or effects of a "thermal inversion" or "atmospheric inversion".

ENVIRONMENTAL HEARING BOARD

MICHAEL L. KRANCER
Administrative Law Judge
Member

DATED: **February 15, 2000**

Via Telecopy and First Class Mail

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

For the Commonwealth, DEP:
Dawn Herb, Esquire
Northcentral Region

For Appellant:
Mick G. Harrison, Esquire
Berea, KY
c/o Fax No. (570)398-2014

For Permittee International Paper Company:
Mark J. Shaw, Esquire
MacDONALD ILLIG JONES & BRITTON
Erie, PA

Figure 6 - Sounding

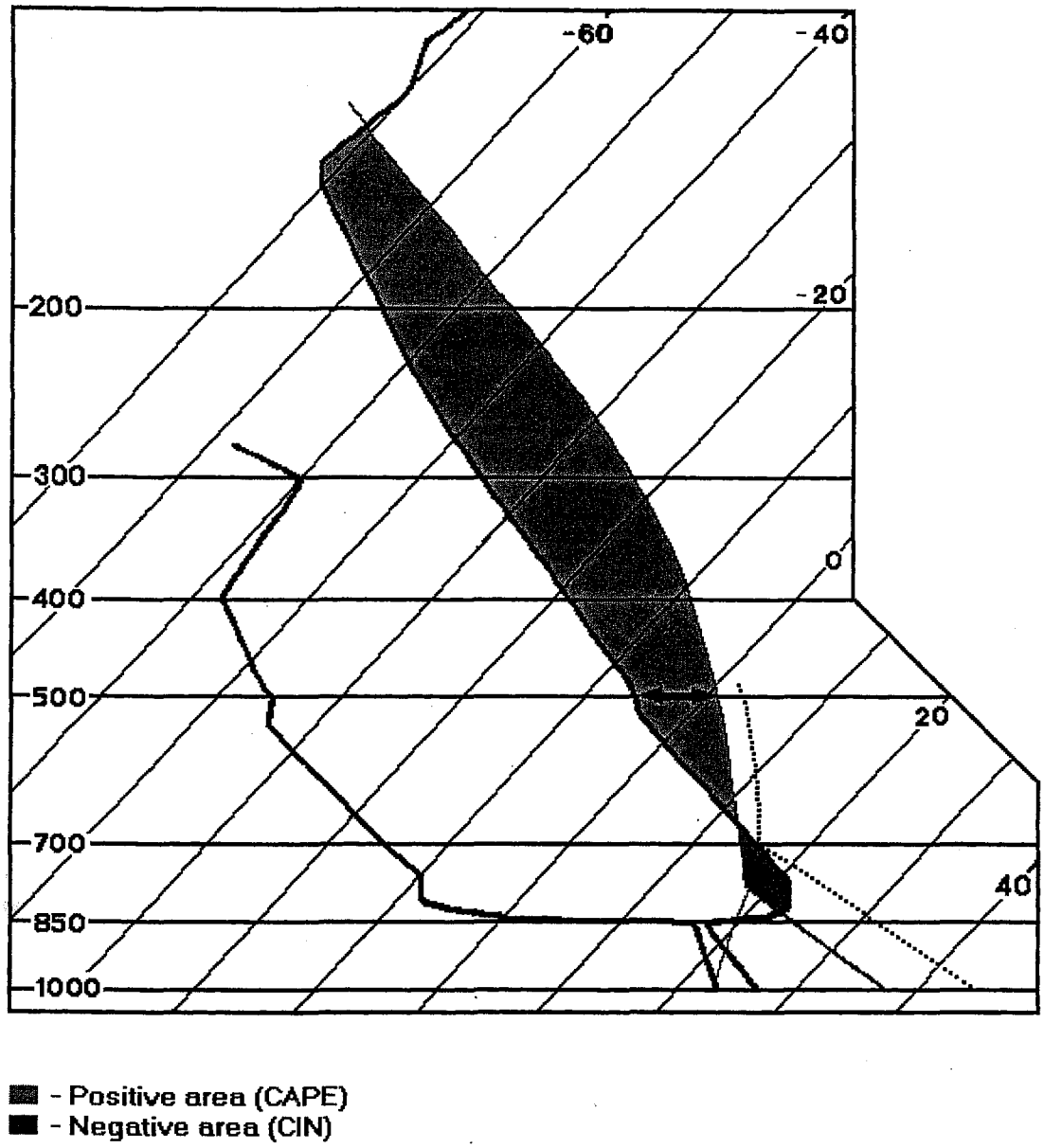

Figure 6 - Sounding. Plotted sounding from Oklahoma City, OK at 7 AM CDT, 8 June 1974. Horizontal lines represent height in pressure coordinates (millibars, or mb); diagonal lines represent temperature. Heavy solid lines show the vertical profile of observed temperature (right) and dew point (left). The blue line shows the temperature that a parcel of surface air would have if it were heated to about 38 degrees C (100 F, the forecast high that day), and then lifted.

This is a typical loaded gun sounding. A temperature inversion exists near 850 mb; the cap is represented by the warm layer above it, wherein the parcel would be cooler than the surrounding air (red area). Above the cap, the parcel would be warmer than the surrounding air and thus would accelerate upward (i.e., instability). At these levels, (above about 690 mb), positive area is seen as the green area. This area is related directly to the convective available

potential energy or CAPE. The Lifted Index (LI) is shown by the temperature difference at 500 mb; in this case, it would be about minus 6. The convective temperature is found using the dotted lines; surface air would have to heat to about 43 C (109 F) to rise above the cap. This value assumes no subsequent changes in the sounding - a bad assumption on this day since a tornado touched down at the location of the sounding later that afternoon, despite surface temperatures in the 90s.

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOAR

UNITED REFINING COMPANY	:	
	:	
v.	:	**EHB Docket No. 99-187-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: February 15, 2000**

OPINION AND ORDER ON MOTION TO DISMISS

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

Synopsis:

An appeal from a Department letter informing the permit applicant that its application is incomplete because the project in question is subject to New Source Review is dismissed because the letter does not constitute a final action.

OPINION

United Refining Company ("United") has applied for a plan approval under the Air Pollution Control Act, 35 P.S. § 4001 *et seq.*, for an expansion project at its Warren refinery. The Department sent a letter to United dated August 4, 1999, which concluded that the expansion project is subject to special requirements and procedures known as New Source Review ("NSR"). In light of the applicability of NSR, the Department informed United that its application is incomplete. United appealed from the letter. The Department over United's objection has moved to dismiss the appeal. We grant the Department's motion.

This Board has held repeatedly that we will not review the many interim decisions made by the Department during the processing of a permit application, not because they have no impact, but because they are not final. *County of Dauphin v. DEP,* 1997 EHB 29, 33; *Svonavec, Inc. v. DEP*, 1997 EHB 537, 541-542; *Epstein v. DER*, 1994 EHB 1471, 1475; *County of Clarion v. DER*, 1993 EHB 573, 576; *New Hanover Corporation v. DER*, 1989 EHB 1075, 1077. *Accord, Conrail, Inc. v. DEP*, 1998 EHB 427, 432 (DEP letters identifying omissions in plans submitted by party pursuant to an order are not final actions). As we said in *Phoenix Resources, Inc. v. DER*, 1991 EHB 1681:

> [I]t was never intended that the Board would have jurisdiction to review the many provisional, interlocutory "decisions" made by [DEP] during the processing of an application. It is not that these "decisions" can have no effect on personal or property rights, privileges, immunities, duties, liabilities or obligations; it is that they are transitory in nature, often undefined, frequently unwritten. Board review of these matters would open the door to a proliferation of appeals challenging every step of [DEP's] permit process before final action has been taken. Such appeals would bring inevitable delay to the system and involve the Board in piecemeal adjudication of complex, integrated issues. We have refused to enter that quagmire in the past ... and see no sound reason for entering it now.

1991 EHB at 1684.

United would have us disregard this long line of case because an NSR applicability determination could have dramatic consequences and the Department has given every indication that it will not change its mind, but this misses the point. Any number of the Department's decisions during a permit review could have costly, real-world consequences, but this Board will not review them in a piecemeal fashion. Although NSR applicability is certainly likely to be one issue raised when the Department takes final permitting action (and we do not even know that for certain), there may be other important issues lurking of which we are not aware. We chose to review all of the issues at once, or not at all. In short, the permit review process must be brought to close before this

Board will get involved. Until then, there has been no final action. We note that the Appellant can resolve these uncertainties by asking the Department to take final action on its application and then seeking review of the Department's denial of its application.

Although it should go without saying, we nevertheless want to make it clear that we express no opinion whatsoever on the merits of United's arguments, and today's ruling in no way precludes United from reasserting them if and when the appropriate time comes.

Accordingly, we issue the following order:

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

UNITED REFINING COMPANY	:	
	:	
v.	:	**EHB Docket No. 99-187-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 15th day of February, this 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: February 15, 2000

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

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bap

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

JEFFREY A. SEDER	:	
	:	
v.	:	**EHB Docket No. 98-058-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and DONALD AND JOAN SILKNITTER, Permittees	:	**Issued: February 24, 2000**

OPINION AND ORDER ON MOTION TO STRIKE

By George J. Miller, Administrative Law Judge

Synopsis:

The Board grants a motion to strike the testimony of a witness who was not identified as a potential witness in a pre-hearing memorandum because his testimony does not rebut any testimony presented by the Department or the permittee and he should have been listed in the appellant's pre-hearing memorandum. The Board denies a motion to strike a court opinion appended to the appellant's post-hearing brief because the Board intended to admit into evidence the full series of court orders of related proceedings in federal court at the time of the hearing on the merits based on the Department's offer of those orders.

OPINION

This matter involves an appeal of a permit to modify a dam for the generation of electric power. Jeffrey A. Seder (Appellant), a neighboring landowner, objected to the Department's issuance of the permit on a variety of grounds, including the claim that all affected property owners had not joined in the permit application.

A hearing on the merits was held on November 30 and December 1, 1999, before Administrative Law Judge George J. Miller. At the hearing, over the objection of the Department of Environmental Protection, Judge Miller heard the testimony of Thomas Rehill, subject to a motion to strike in order for the parties to discuss the legal issues involved in more detail. (N.T. 338) The Appellant's post-hearing brief was received by the Board on January 27, 2000. In that brief the Appellant relied upon the testimony of Mr. Rehill. Additionally, the Appellant appended, as an exhibit, an opinion from the United States District Court for the Middle District of Pennsylvania dated June 4, 1992. This opinion is part of related litigation involving a prior permit issued for the hydroelectric dam project.

The Department moves to strike both the court opinion and the testimony of Mr. Rehill. For the reasons that follow, we will grant the Department's motion to strike the testimony of Mr. Rehill, but deny the motion to strike the court opinion. We will first consider the propriety of Mr. Rehill's testimony as rebuttal.

The Board requires that all potential witnesses be identified in a party's pre-hearing memorandum. *See* 25 Pa. Code § 1021.82. Mr. Rehill was not identified as a potential witness in the Appellant's pre-hearing memorandum or its addendum. Accordingly, his testimony could only be admitted if he qualifies as an appropriate rebuttal witness. However, the Board, like a trial court, may exclude testimony presented by a party as rebuttal from a witness not identified in a pre-hearing memorandum if the testimony could have been presented during that party's case-in-chief. *Plumstead Township v. DER*, 1995 EHB 741; *see also Downey v. Weston*, 301 A.2d 635 (Pa. 1973); *Del-Aware Unlimited, Inc. v. Department of Environmental Resources*, 508 A.2d 348 (Pa. Cmwlth.), *petition for allowance of appeal denied,* 523 A.2d 1132 (Pa. 1986). The exclusion of such testimony is within the discretion of the Board. *Del-Aware Unlimited, Inc.*

After carefully reviewing the transcript, we conclude that Mr. Rehill's testimony is not proper rebuttal and should have been offered in the Appellant's case-in-chief.

At the hearing, the Appellant indicated that the purpose of Mr. Rehill's testimony was to rebut testimony of Donald Martino, Chief of the Department's Division of Dam Safety, concerning the operation of the headgate and its relationship to the flow of water in Buck Run and the millrace.[1] Mr. Martino was called by the Appellant as his witness. Mr. Rehill testified that he was familiar with the operation of the headgate from the early 1960s because his aunt and uncle owned the property that contained the dam and millrace. (N.T. 341) He testified that the headgate was routinely kept as far "down as we could get it" but that it would be opened to reduce the volume of water coming over the breast of the dam after storm events. (N.T. 342-43)

We do not believe that Mr. Rehill's statement is inconsistent with Mr. Martino's testimony. On redirect by the Appellant, Mr. Martino stated that it was his assumption, based on representations from the Silknitters (Permittees) that prior to 1984 that the headgate was used for "purposes of maintenance, for raising and lowering the pool. . . . [T]hey used to use that headgate to pass some moderate amount of flood flows to alleviate flooding on their property." (N.T. 134-35) He also clearly stated that he was personally unfamiliar with the operation of the headgate prior to 1984 when the Permittees initially approached the Department about a permit. (N.T. 128)[2] Further, the Department elicited very little testimony concerning the headgate when it

---

[1] The headgate diverts the flow of water from Buck Run into the millrace before the water in Buck Run goes over the adjoining dam. Opening the headgate permits a flow of water into the millrace. This flow of water powers the turbines of the Permittee's small hydroelectric facility. After flowing through the turbines, the water continues through a tailrace which runs parallel to Buck Run, through the property of both the Permittees and adjoining property owned by the Appellant, where it re-enters Buck Run. (See Martino, N.T. 82-84; Ex. B-1)

[2] The Appellant also elicited testimony on redirect that the headgate had been "refurbished." (N.T. 125)

cross-examined Mr. Martino.[3] Most of his discussion related to the current operation of the headgate as it related to the operation of the hydroelectric project. There was no explicit discussion of the operation of the headgate prior to the issuance of the permit during cross examination by the Department. Therefore, we can not identify any testimony that Mr. Rehill might rebut concerning the operation of the headgate. Indeed, Mr. Martino's testimony is consistent with Mr. Rehill's.

To the extent that the Appellant is relying upon Mr. Rehill's testimony to establish that the operation of the headgate is related to the flow in the tailrace which has allegedly changed since the permit was issued, this question should have been anticipated by the Appellant in his case-in-chief. (See Notice of Appeal, ¶ 7(c)).[4] The Appellant's primary claim that he will be adversely affected by the issuance of the permit was that his use of his property downstream from the dam and millrace is adversely affected by a higher level of water in the tailrace than that which existed under the prior owner's use of the headgate. He complained that this higher level of water interfered with his training of race horses in the land area between the tailrace and the main flow from the dam to Buck Run. The Appellant makes the argument in his post-hearing brief that the permit results in an infringement of the Appellant's riparian rights by changing the flow of the millrace and states "were it not for the Silknitters' Project, the headgate would be closed, precluding the additional flow of water into [the Appellant's] millrace." (Appellant's

[3] Mr. Martino was called by the Appellant and cross-examined by the Department and the Permittees. He was not re-called as a witness for the Department in its case.

[4] Paragraph 7(c) of the Appellant's amended notice of appeal charges that "The Department failed to adequately consider the adverse consequences caused to the downstream portions of Buck Run . . . including but not limited to the Appellant's loss of the use and enjoyment of Buck Run." An alleged loss of flow in Buck Run could be encompassed by this objection. As the presiding administrative law judge observed it is "common sense application of knowledge that if you increase the flow into the millrace by raising the gate that the level of water is going to increase." (N.T. 345).

Post-Hearing Brief at 16 n. 24)

We believe that it should have been no surprise to the Appellant that the operation of the headgate has an effect on the amount of water in the millrace. To the extent to which the permit results in a different operation of the headgate should have been developed by the Appellant in his case-in-chief because it relates directly to the Appellant's claim that he will be adversely affected by the issuance of the permit. The Appellant presented no expert testimony that the extent of any increase in flow in the millrace was caused by the change in operation of the headgate and not other factors. We therefore will strike the testimony of Thomas Rehill.

We next turn to the issue of the federal court opinion appended to the Appellant's post-hearing brief. It is axiomatic that documents attached to briefs are not evidence and can not be considered part of the record in an appeal before the Board. *See, e.g., Gasbarro v. DEP*, 1998 EHB 670. However, the document which the Appellant seeks to include with his brief is one of the myriad of decisions from the federal courts in litigation related to the Permittees' earlier permit for the project. In his post-hearing brief it is used to provide support for background material that the Appellant feels is important to our consideration of the present permit action. Although the opinion was not included in the exhibits submitted to the Board at the hearing, the Appellant argues that the Board should regard this opinion as part of the record in this case. We agree.

At the hearing we admitted into evidence opinions from both the Appellant and a packet of opinions from the Department. The Department initially objected to the introduction of the opinions by the Appellant on the grounds that "We intend to offer a package of all the federal orders available, in which they would be included." (N.T. 257)[5] When the Department's

[5] The Board did admit into evidence the two opinions proffered by the Appellant.

package was proffered the Appellant's counsel asked "The only question I have is whether this is the full series of opinions from the prior litigation?" to which the Department counsel replied "It is everything that I could find in published form or through [Lexis-Nexis]." (N.T. 291) The Board admitted the package offered by the Department believing it to be the *entire* series of court opinions in order to "take official notice of those [federal] proceedings" because the Department wanted the Board to "get the entire picture." (N.T. 291; 257) Therefore, the Board admitted the package in order to understand the full background of the dispute. Accordingly, we decline to strike the June 4, 1992 opinion.[6]

For the foregoing reasons, we enter the following:

[6] We caution both parties that these opinions were admitted only for the purpose of background information and that the Board is not bound by any of the factual determinations made by the federal courts concerning this matter.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

JEFFREY A. SEDER	:	
	:	
v.	:	**EHB Docket No. 98-058-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and DONALD AND JOAN SILKNITTER, Permittees	:	

ORDER

AND NOW, this 24th day of February, 2000, the motion of the Department of Environmental Protection to strike the testimony of Thomas Rehill is hereby **GRANTED**. The motion to strike Exhibit A of the Jeffrey A. Seder's Post Hearing Brief is **DENIED**.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

DATED: February 24, 2000

Via Fax and Regular Mail to:

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

For the Commonwealth, DEP:
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Southeast Region

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

POTTS CONTRACTING CO., INC.	:	
	:	
v.	:	**EHB Docket No. 97-236-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and HL&W COAL COMPANY, Permittee	:	**Issued:** February 25, 2000

OPINION AND ORDER ON PETITIONS FOR RECONSIDERATION

By Michelle A. Coleman, Administrative Law Judge

Synopsis:

The Board denies two petitions for reconsideration. The Board will not reconsider a final order where the petitions for reconsideration were filed more than 10 days after the Board issued the order, where the petitions fail to state "compelling and persuasive" reasons for reconsideration, and where one petition was filed by a non-lawyer on behalf of a corporate appellant.

OPINION

This appeal arose from a notice of appeal filed on behalf of Potts Contracting Company, Inc. (Appellant) by Joyce Potts Lengel (Potts Lengel), Appellant's vice president, challenging the Department's October 3, 1997, issuance of an underground coal mining permit and a

National Pollution Discharge Elimination System Permit (NPDES) permit.[1] The Department issued the permits to HL&W Coal Company (Permittee) for a mining operation in Tremont Township, Schuylkill, County. In the notice of appeal, Appellant asserts that the Department's decision to issue the permits resulted from fraud, collusion, conspiracy, usurpation of corporate opportunity, and other malfeasance.

On April 14, 1999, Permittee filed a motion for sanctions and memorandum of law. In those documents, Permittee requested that we dismiss Appellant's appeal because Potts Lengel failed to comply with discovery orders, agreements, and deadlines; Appellant was no longer represented by counsel; and Potts Lengel failed to show that she had the authority to appeal on behalf of Appellant. Since Appellant failed to respond to Permittee's motion, we deemed the facts alleged in the motion to be admitted. On December 21, 1999, we issued an opinion and order granting Permittee's motion for sanctions and dismissing Appellant's appeal.

On January 18, 2000, Potts Lengel filed a lengthy letter with the Board (Potts Lengel's petition for reconsideration), asserting that the facts that the Board relied on in the opinion and order dismissing her appeal were incorrect. Specifically, she argued that she had complied, for the most part, with the discovery order; that Appellant was represented by counsel; and that she did have the authority to file a notice of appeal on behalf of Appellant. On page 3 of her letter, Potts Lengel stated that James Munnis withdrew as Appellant's lawyer. However, on the following page, she stated that Munnis was deciding whether to appeal Appellant's dismissal. Potts Lengel requested that she be given a 60-day extension to file an appeal in light of the complications with Appellant's representation.

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[1] The facts surrounding the filing and perfection of the appeal are set forth in greater detail in our June 8, 1998 opinion and order denying Permittee's motion for judgment on the pleadings, at 1998 EHB 589-591. Among other things, Permittee has questioned Potts Lengel's authority to file an appeal on behalf of Appellant.

On January 19, 2000, the Board issued an order that stated that we would treat Potts Lengel's letter as a petition for reconsideration and set a deadline for responses. In addition to copying the other counsel in the case, we also sent copies of the order to Munnis and Potts Lengel.

On January 20, 2000, Munnis filed a document entitled "Appeal of Appellant" (Munnis's petition for reconsideration).[2] There, he requested that the case be reopened because Appellant was in the midst of an investigation and expected to uncover records concerning the ownership of land and minerals involved in the litigation, a county lease of the land, and alleged improprieties by the Department concerning "denial of the permit of the land in question."[3] (Munnis's petition for reconsideration, p. 1.)

Permittee and the Department filed responses on February 2, 2000. In their responses, Permittee and the Department argued that the Board should deny Potts Lengel's petition for reconsideration because it was untimely, filed by a non-lawyer on behalf of a corporation, and did

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[2] Although Munnis called his filing an "appeal," he did not seek to appeal a separate Department action. Instead, his filing bore the docket number for this appeal and requested that we "reopen" that appeal. Where, as here, an individual seeks to contest a final order of the Board, he must either file a petition for reconsideration with the Board, pursuant to Section 1021.124 of the Board's rules, 25 Pa. Code § 1021.124, or appeal the Board's decision to Commonwealth Court, pursuant to Rule 1511 of the Pa. R.A.P. Because Munnis called his filing an "appeal" of the Board's decision, but filed it with the Board, the Board had one of its assistant counsel contact him to inquire whether he meant the filing to be a petition for reconsideration, which could be filed with the Board, or an appeal of the decision, which had to be filed with Commonwealth Court. Munnis stated that he meant for the filing to be a petition for reconsideration, and the Board has treated it accordingly.

[3] Presumably, Munnis was referring to either the NPDES permit or the underground coal mining permit that the Department issued to Permittee HL&W. No other permit action was involved the appeal at EHB Docket No. 97-236-C. However, the Department *granted* both of these permits; it did not deny either one. Or perhaps Munnis confused Appellant's appeals of Permittee's permits at this docket number with Appellant's appeal of the denial of its own underground mining permit application, at EHB Docket No. 97-234-C. The latter appeal is still pending.

not provide compelling and persuasive reasons for reconsideration. As for Munnis's filing, Permittee interpreted it as an appeal of our order and argued that we should deny it because any appeal had to be filed with the Commonwealth Court. The Department's response did not address Munnis's filing.

Section 1021.124 of the Board's rules of practice and procedure, 25 Pa. Code § 1021.124, sets forth the criteria for reconsideration of final orders such as our opinion and order dismissing Appellant's appeal. Section 1021.124 provides, in pertinent part:

> (a) A petition for reconsideration of a final order shall be filed within 10 days of the date of the final order. Reconsideration is within the discretion of the Board and will be granted only for compelling and persuasive reasons. These reasons may include the following:
>
> (1) The final order rests on a legal ground or a factual finding which has not been proposed by either 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 a reversal of the Board's decision
>
> (iii) Could not have been presented earlier to the Board with the exercise of due diligence.

Neither of the petitions for reconsideration allegedly filed on Appellant's behalf meet the standards for reconsideration detailed in Section 1021.124. Among other things, both petitions were filed after the 10-day limit for filing petitions for reconsideration expired.

Munnis's petition for reconsideration also fails to show that "compelling and persuasive" reasons exist for reconsidering the order. It never asserts, for instance, that the Board's opinion and order rests on factual or legal issues not proposed by the parties; that the actual facts differ from those set forth in the Board's decision; or that the records Appellant hopes to obtain as a result of its investigation could not have been presented to the Board earlier had Appellant exercised due diligence. Similarly, the facts alleged in the petition would not warrant reversal of

our decision dismissing Appellant's appeal. The facts alleged in the petition go to the merits of the case. Munnis asserts that Appellant has an investigation underway that will lead to documents showing that "the land, lease and permit have been improperly taken from Allen Potts (deceased) and [Appellant]." (Munnis's petition for reconsideration, p. 2.) However, Appellant's appeal was dismissed as a sanction for Appellant's repeated violations of the Board's rules of practice and procedure. The fact that Appellant might have prevailed had we proceeded to a hearing on the merits is irrelevant if dismissal was appropriate based upon Appellant's violations of the Board's rules. Significantly, Munnis's petition never denies that Appellant engaged in the violations of the Board's rules outlined in our decision, nor does it argue that dismissal was a disproportionate sanction given those violations.

As for Potts Lengel's petition for reconsideration, we could not consider it even if it were timely filed. Even assuming Potts Lengel were otherwise authorized to speak on behalf of Appellant, she does not have the authority to represent Appellant in proceedings before the Board. The Board has repeatedly warned Potts Lengel and Appellant that the Board's rules require that corporations be represented by counsel. *See, e.g.,* Board's November 18, 1997, letter to Appellant. Indeed, one of the grounds we identified when we dismissed Appellant's appeal was Appellant's failure to conform to this requirement. *Potts Contracting Company, Inc. v. DEP,* slip op. at 3, EHB Docket No. 97-236 (opinion issued December 21, 1999).

Furthermore, even assuming we were to reconsider our opinion and order, we would still dismiss Appellant's appeal. In its motion for sanctions, Permittee averred that Munnis had withdrawn as Appellant's counsel on or about February 1, 1999. (Motion for sanctions, p. 6, ¶ 18, and p. 11, ¶¶ 37 and 40.) Permittee also averred that Appellant failed to file its pre-hearing memorandum, and that Potts Lengel refused to produce corporate records legitimately requested

of her. (Motion for sanctions, p. 7, ¶¶ 21 and 22, and p. 10, ¶ 36.) We relied on these facts in granting Permittee's motion for sanctions and dismissing Appellant's appeal. *Potts Contracting Company, Inc. v. DEP,* slip op. at 3-5, EHB Docket No. 97-236 (opinion issued December 21, 1999). Although Appellant failed to file a response to the motion for sanctions, Potts Lengel's petition for reconsideration now seeks to challenge the facts asserted in the motion for sanctions. It is too late for her to contest those facts, however. As we noted in our opinion and order, the factual averments in the motion are deemed admitted pursuant to Section 1021.64(d) of the Board's rules, 25 Pa. Code § 1021.64(d), by virtue of Appellant's failure to respond to the motion.[4] *Potts Contracting Company,* slip op. at 2.

Based on those facts, we remain convinced that our opinion and order dismissing Appellant's appeal was correctly decided. As we explained in the opinion and order, by failing to be represented by counsel, Appellant violated Section 1021.22 of the Board's rules, 25 Pa. Code § 1021.22;[5] by failing to file a pre-hearing memorandum, Appellant violated Section 1021.82 of our rules, 25 Pa. Code § 1021.82;[6] and, by failing to respond to Permittee's request for corporate records from its vice-president—Potts Lengel—Appellant violated Section

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[4] Section 1021.64(d) provides, in pertinent part:

> A party failing to respond to a ... motion shall be deemed in default and at the Board's discretion sanctions may be imposed under § 1021.125 (relating to sanctions). The sanctions may include treating all relevant facts stated in the ... motion as admitted.

[5] Section 1021.22(b) provides, in pertinent part, "Corporations shall be represented by an attorney of record admitted to the practice before the Supreme Court of Pennsylvania."

[6] Subsection (a) of Section 1021.82 lists items that the pre-hearing memorandum must contain. Subsection (b), which follows, states that the Board may impose sanctions on parties which fail to comply with the requirements of subsection (a).

1021.111(a) of the Board's rules, 25 Pa. Code § 1021.111(a).[7] *See Potts Contracting Company,* slip op. at 2. We also noted in that opinion that the Board has previously dismissed appeals where an appellant has failed to file a pre-hearing memorandum or where corporate defendants have refused to be represented by counsel. *Id.*, at 3. Given Appellant's repeated and persistent violation of the Board's rules and orders, dismissal of its appeal was an appropriate sanction.

Accordingly, we enter the following order:

[7] Section 1021.111(a) provides that, ordinarily, the Pennsylvania Rules of Civil Procedure govern discovery in Board proceedings. Pa. R.C.P. 4009.12(a), meanwhile, provides that parties receiving a request for documents must either file objections, produce the documents, or make the documents available.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

POTTS CONTRACTING CO., INC.	:	
	:	
v.	:	**EHB Docket No. 97-236-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and HL&W COAL COMPANY, Permittee	:	

ORDER

AND NOW, this 25th day of February, 2000, it is ordered that Potts Lengel's petition for reconsideration and Munnis's petition for reconsideration are **denied**.

ENVIRONMENTAL HEARING BOARD

GEORGE J. MILLER
Administrative Law Judge
Chairman

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

MICHAEL L. KRANCER
Administrative Law Judge
Member

DATED: February 25, 2000

See following page for service list.

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Southcentral Region

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and
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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOAR

ALBERT H. WURTH, JR., et al.	:	
	:	
v.	:	**EHB Docket No. 98-179-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and EASTERN WASTE OF BETHLEHEM, INC., Permittee and CITY OF BETHLEHEM, Intervenor	:	**Issued:** February 29, 2000

OPINION AND ORDER ON MOTIONS FOR SUMMARY JUDGMENT

By George J. Miller, Administrative Law Judge

Synopsis:

The Board denies the motion for summary judgment filed by third party appellants in an appeal of the reissuance of a landfill permit from the City of Bethlehem to a private landfill operator. The appellants failed to sustain their burden of demonstrating that they were entitled to judgment in their favor concerning their allegations that the Department failed to appropriately consider the compliance history of the permit applicant, county and sub-county waste plans, recycling provisions, leachate storage, needs analysis, environmental assessment and public notice and comment. The Board grants the permittee's motion seeking dismissal of the appeal on the basis that the appellants have no standing to pursue this appeal. There is insufficient evidence in the record which shows that the permit reissuance caused a direct injury to an interest of the individual and organizational appellants.

OPINION

Before the Board are motions for summary judgment filed by Eastern Waste of Bethlehem, Inc. (Permittee) and Albert H. Wurth, Jr., Margaret "Greta" Browne, Guy Gray, Bethlehem Landfill Emergency Committee, CIVIS, Lehigh Valley Greens, and SAVE (collectively, Appellants). These motions arise from an appeal filed on September 11, 1998, which objected to the reissuance of a solid waste permit from the City of Bethlehem to the Permittee by the Department of Environmental Protection.

The background facts are as follows. On January 22, 1998, the Permittee and the City of Bethlehem entered into a landfill purchase agreement to buy the City of Bethlehem Landfill located in Lower Saucon Township, Northampton County. On April 3, 1998, the Permittee submitted an application for reissuance of the solid waste disposal permit for the Bethlehem Landfill as required by the Department's solid waste regulations promulgated pursuant to the Solid Waste Management Act, Act of July 7, 1980, P.L. 380, *as amended*, 35 P.S. §§ 6018.101-6018.1003. The Department reissued the permit to the Permittee on July 17, 1998. On September 16, 1998, the Appellants filed a notice of appeal, listing twelve objections to the reissuance to the Permittee. On December 17, 1998, the City of Bethlehem (Intervenor) was permitted to intervene.

After the close of discovery, the Permittee and the Appellants filed motions for summary judgment. In their motion, the Appellants seek judgment in their favor on each of their objections to the action of the Department. The Permittee seeks dismissal of the appeal on the basis that none of the Appellants have standing to appeal and also seeks judgment in its favor on each of the objections

raised by the Appellants.[1]

The Board's consideration of motions for summary judgment is governed by Rules 1035.1 through 1035.5 of the Pennsylvania Rules of Civil Procedure (Pa. R.C.P.). 25 Pa. Code § 1021.73(b). It is only appropriate to grant summary judgment in cases where there are no genuine issues of material facts in dispute. *Kilgore v. City of Philadelphia*, 717 A.2d 514 (Pa. 1998). The moving party has a heavy burden to demonstrate that it is clearly entitled to judgment in its favor as a matter of law. *Id.*; *Washington v. Baxter*, 719 A.2d 733 (Pa. 1998). Judgment will only be granted in the clearest of cases which are free from doubt. *Levdansky v. DEP*, 1998 EHB 571. To prove that there are no material facts in dispute, the moving party must support its factual averments with evidence from the record. The record for the purposes of summary judgment is defined as the pleadings, depositions, answers to interrogatories, admissions and affidavits as well as signed reports of expert witnesses. Pa. R.C.P. No. 1035.1. The record must be viewed in the light most favorable to the non-moving party. *Kilgore*.

A non-moving party also has a burden in order to resist a motion for summary judgment. That party may not simply rest upon the allegations or denials of the pleading but must file a response clearly identifying one or more issues of fact arising from evidence in the record which controverts the evidence cited in support of the motion and shows that there is a genuine issue for hearing. Pa. R.C.P. No. 1035.3; *O.S.C. Co. v. Lackawanna River Basin Sewer Authority*, 551 A.2d 376 (Pa. Cmwlth. 1988); *Clever v. DEP*, EHB Docket No. 98-086-MG (Opinion filed October 26,

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[1] The Intervenor responded in opposition to the Appellants' motion but expressed no position relative to the Permittee's motion. The Department has not expressed to the Board a position on either motion.

1999); *see also Throop Property Owner's Ass'n. v. DEP*, EHB Docket No. 97-164-C (Opinion issued December 22, 1999)(a party responding to a motion for summary judgment bears the responsibility to sift through the evidence and present its best case especially in a case where it bears the burden of proof).

With these standards in mind, we turn to our consideration of the motions before us.

Appellants' Motion

The Appellants seek judgment in their favor on each of their objections to the permit reissuance.[2] In order to grant judgment the Appellants must show that there are no material facts in dispute and that as a matter of law the Department abused its discretion by reissuing the permit to the Permittee.[3] An abuse of discretion is defined as:

> [M]ere difference of opinion, or even a demonstrable error in judgment, is insufficient under Pennsylvania decisional law to constitute an abuse of discretion; such abuse comes about only where manifestly unreasonable judgment, partiality, prejudice, bias, ill-will, misapplication or overriding of the law, or similarly egregious transgressions on the part of DER . . . can be shown to have occurred.

Sussex, Inc. v. DER, 1984 EHB 355, 366. With this standard in mind, we turn to each objection of the Appellants and the evidence they have provided in support of each of their arguments.

---

[2] In both their motion and their response to the Permittee's motion the Appellants have urged us to keep in mind their lack of counsel in this matter. We have overlooked many technical and procedural defects in their pleadings. 25 Pa. Code § 1021.104. However, we have often warned parties that they assume the risk of their lack of legal expertise when they elect to proceed in a matter before the Board without representation by an attorney. *Santus v. DER*, 1995 EHB 897. *See also Lucchino v. DEP*, 1996 EHB 583.

[3] We note that as third-parties the Appellants bear the burden of proof. 25 Pa. Code § 1021.101(c)(2).

Compliance History

The Appellants first contend that the Department erred in reissuing the permit because of the compliance history represented in the permit application. Specifically, they argue that the reporting of compliance history and identification of interests by the Permittee was inadequate; the Department failed to use its authority to request information; and the Department should have denied the permit reissuance because of the violations which were reported by the Permittee. We find that the Appellants have failed to sustain their burden of demonstrating that the Department abused its discretion.

The Department reissued the landfill permit to the Permittee pursuant to 25 Pa. Code § 271.221. That section requires, among other things, that an applicant not filing an entirely new permit application submit a statement identifying the applicant as defined by Section 271.124 of the regulations and compliance information as required by Section 271.125 of the regulations. 25 Pa. Code § 271.221 (b)(4)(ii)(A).

Section 271.124 requires that corporate applicants identify, among other things, information of parent corporations of the applicant, including the ultimate parent corporations and United States subsidiary corporations of the applicant and the applicant's parent. 25 Pa. Code § 271.124 (b)(2). First, the Appellants contend that the statement of identification submitted by the Permittee was incomplete because subsidiaries of the Permittee's parent corporation which were listed in filings with the United States Security and Exchange Commission were not included with the application filed with the Department. However, the Appellants have failed to specify which subsidiaries were not included with the application and should have been under Section 271.124. This only requires

the identification of solid waste processing or disposal facilities in Pennsylvania which the applicant or certain related parties owned or operated in the last ten years. 25 Pa. Code § 271.124(e). The only evidence from the record they have proffered in support of this contention are comments submitted to the Department by SAVE, Inc. (Appellants' Motion Ex. 7) and Form HW-C from the permit application where the Permittee detailed its parent corporation, subsidiary and compliance information. (Appellants' Motion Ex. 2) Neither of these documents support the contention that the Permittee failed to supply information required by the solid waste regulations.

Second, the Appellants contend that information required under Section 271.125 was incomplete because the Permittee did not include a list of entities identified under Section 271.124 which were *not* involved in compliance actions and that certain information such as permit numbers were missing, and that there was limited information concerning entities outside the Commonwealth of Pennsylvania.

We do not believe that there is a requirement for a permittee to *restate* entities identified under Section 271.124 which were *not* involved in compliance actions. It is not a great leap of logic for the Department to simply assume that those entities listed as required by Section 271.124, but not noted in filings related to Section 271.125 are not involved in compliance actions as defined by that section. Further, as with the Appellants' claim under Section 271.124, the Appellants have failed to specify exactly what information was not reported by the Permittee and how the Department should have made a different decision on the application had it considered the lacking information. Therefore we can not grant summary judgment on this issue.

Next the Appellants contend that the Department failed to use its authority under 25 Pa. Code

§ 271.3, to request additional information from the Permittee. This argument, too, must fail. First, we do not believe that Section 271.3, necessarily *requires* the Department to request additional information; rather, it simply provides the Department with the authority to do so when, in its judgment, additional information is necessary to properly evaluate a permit application. *See Throop Property Owner's Ass'n. v. DEP*, EHB Docket No. 97-164-C (Opinion issued December 22, 1999). Second, the only additional information which the Appellants specifically suggest should have been requested concerns "Environmental Opportunities Funds, which have, within the 10-year review period, been principal shareholders of the company." (Appellants' Brief at 8) The Appellants do not provide any evidence which supports this factual allegation, nor evidence which demonstrates that the Permittee was required to provide information concerning this entity either because it is a current principal shareholder which must be reported under 271.124(b)(2), or if it was a solid waste processing or disposal facility *in the Commonwealth* under 271.124(e). *See Wurth v.* DEP, EHB Docket No. 98-179-MG (Opinion issued October 21, 1999). There is no explicit requirement that entities which were only past shareholders be identified, unless they are related to a solid waste processing or disposal facility in Pennsylvania, and the Appellants have not shown this to be the case.

Finally, the Appellants argue that, in view of the Permittee's compliance history the Department should not have reissued the permit pursuant to Section 503 of the Solid Waste Management Act, Act of July 7, 1980, P.L. 380, *as amended*, 35 P.S. 6018.503. We can not say that as a matter of law the Department abused its discretion in reissuing the permit to the Permittee in spite of its compliance history.

Section 503 of the Solid Waste Management Act defines the Department's authority in permitting actions under the act. 35 P.S. § 6018.503. Under that section the Department *may* deny a permit application if it finds that an applicant has failed to comply with state and federal environmental statutes or has shown a lack of ability or intention to comply with those statutes. 35 P.S. § 6018.503(c). The Department *shall* deny a permit where an applicant or certain related parties has engaged in unlawful conduct under the Solid Waste Management Act. 35 P.S. § 6018.503(d).[4] However, even where an applicant has engaged in such conduct, the Department has the discretion to grant a permit where the application "demonstrates to the satisfaction of the department that the unlawful conduct has been corrected." 35 P.S. § 6018.503(d).

We have reviewed the Form HW-C submitted by the Appellants in support of their position that the Department should have denied the application. (Appellants' Motion Ex. 2) While it is true that there are several pages of various enforcement actions at the many facilities related to the Permittee, there is nothing which evidences "manifestly unreasonable judgment, partiality, prejudice, bias, ill-will, misapplication or overriding of the law, or similarly egregious transgressions" on the part of the Department in reissuing the landfill permit. *Sussex, Inc. v. DER,* 1984 EHB 355, 366.

Waste Planning

The Appellants argue that the transfer of the landfill permit has an effect on the county and sub-county plans in effect for the City of Bethlehem. In response, the Permittee provided evidence that the landfill is provided for in both the Lehigh County and Northampton County Solid Waste

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[4] This section of the act is commonly referred to as the "permit bar" provision.

Management Plans. (Permittee's Motion ¶¶ 76-80)[5] The Appellants have not stated with particularity how the change of the identity of the operator of the landfill has any effect on the obligations under these plans. The Department's regulation governing permit reissuances requires a new operator to assume responsibilities under "the act, the environmental protection acts, this title and the terms and conditions of the permit . . . " 25 Pa. Code § 271.221(b)(1). Certainly this would include any obligations under the relevant waste planning documents.

The Appellants also suggest that because the Permittee intends to accept waste which is not provided for in the county planning documents that the permit reissuance has "interfered with" county planning in contravention of 25 Pa. Code § 271.201(b), because the City of Bethlehem no longer controls waste disposal as "joint planner and facility operator."

Section 271.201(b) provides that a permit application must demonstrate that:

> (1) The facility is expressly provided for in the approved host county plan, and the approved plan designates that facility to receive that waste volume . . .
>
> (2)The facility meets the following if the facility would receive waste that is not provided for in the approved plan for the host county:
>
> (i)The *proposed facility* will not interfere with implementation of the approved host county plan or another county . . .
>
> (ii)The *proposed facility* will not interfere with municipal waste . . . disposal in the host county.
>
> (iii)No site in a county where the waste was generated is more suitable . . .

25 Pa. Code § 271.201(b)(emphasis added). We do not believe this regulation explicitly applies to

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[5] These averments and exhibits in support thereto, were incorporated by the Permittee into its response to the Appellants' motion.

the facts of this case. Where a permittee assumes all of the responsibilities and obligations under a transferred permit pursuant to Section 271.221, it would not be logical for the Department to review the application as if it were a completely new permit application. Such a requirement would make the reissuance regulation mere surplusage. *See Tinicum Township v. DEP*, 1997 EHB 1119,1138 (declining to interpret a regulation in such a way as to render it meaningless). Even so, reading Section 271.201(b) in context, it seems to apply to new, *proposed* facilities, not an existing facility where only the operator of the landfill is changing.[6] Further, the assumption of obligations required by Section 271.221 would require the Permittee to honor any obligations in the permit or regulations regarding waste planning documents. Therefore, the Appellants have failed to demonstrate that the Department abused its discretion as a matter of law and that they are entitled to summary judgment on this issue.

We also find that the Appellants argument that the transfer of the permit from a municipal operator to a private operator invalidates a sub-county plan pursuant to 25 Pa. Code 272.233(b)(3)(ii), such that the Department abused its discretion in reissuing the permit is without merit. We do not believe that this regulation applies at all in the context of this case. First, Section 272.233 is entitled "Facilities *developed* pursuant to sub-county plans." (Emphasis added.) Since the Bethlehem Landfill is an existing facility already included in host county plans, it is not being developed pursuant to a sub-county plan. Second, under the plain language of the regulation it is inapplicable here. Subsection (b) states that a plan "shall explain *how it will not interfere* with the design, construction, operation, financing or contractual obligations of a municipal processing or

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[6] We note that the landfill is provided for in two host county plans.

disposal facility . . . which meets *one or more* of the following . . ." Subparagraph (3)(ii) is one of this listed criteria and describes a facility which is "owned by a local public agency other than the county in which the facility is located." 25 Pa. Code § 272.233(b)(3)(ii). Even assuming ownership by a local public agency was the only type of facility mentioned in the regulation,[7] the fact that the operator of the landfill has changed at most means that it is no longer necessary for the sub-county plan to describe how it will not interfere with the operation of the facility. We fail to see how the permit transfer in some way invalidates this plan.

Recycling

The Appellants contend that the permit transfer was improper because the City of Bethlehem continues to operate the recycling center at the landfill site. The Appellants contend that this is a violation of 25 Pa. Code §§ 273.331-273.332 and 272.245. We do not believe that it is an abuse of discretion for the Department to transfer the permit to the Permittee even if the City of Bethlehem continues to operate the recycling center.

First, Section 272.245 of the regulations governs the submission of implementing documents by a county which show that it is implementing its county plan. The Appellants have not explained why they think this regulation was violated, and it is not obvious to us that it applies. *See, e.g.*, *Lucchino v. DEP*, 1996 EHB 583 (the Board will not guess what a party's position is on an issue); *Barkman v. DER*, 1993 EHB 738, 745 (a motion for summary judgment must set forth, with adequate particularity, the reasons for summary judgment).

We also fail to see a violation of Sections 273.331 and 273.332. Section 273.331 requires an

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[7] The regulation defines four classes of facilities which must be addressed in a sub-county plan.

operator to salvage and recycle waste materials, and describes requirements for doing so. 25 Pa. Code § 273.331. Section 273.332 requires an operator to establish a recycling collection center. 25 Pa. Code § 273.332. Although the regulation places responsibility upon the operator to provide this center, it places no requirement upon the Permittee to actually operate the facility itself. There is nothing which precludes it from making an arrangement with another entity to do so. Therefore, as a matter of law, the Department did not abuse its discretion in reissuing the landfill permit to the Permittee even if the City of Bethlehem continues to operate the recycling center.

Leachate Collection, Storage and Pretreatment

The Appellants argue that the Department erred in reissuing the landfill permit to the Permittee with what the Appellants characterize as a "continued exemption" from the on-site leachate storage requirements found in 25 Pa. Code § 273.275, that the Department allowed the City of Bethlehem when it operated the landfill. The Permittee responds that it entered into a wastewater treatment agreement with the City that preserves the status quo of the leachate storage and treatment by providing 300,000 gallons of off-site storage daily at the City of Bethlehem's sewage treatment facility.

While we express no opinion concerning the legality of the Department's action in allowing an alternative leachate storage provision in the landfill permit in the first place,[8] we find that the Appellants have failed to demonstrate that merely approving a change in the ownership of the

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[8] If the arrangement violated 25 Pa. Code 273.275, the issue should have been addressed when the permit was originally issued. *Yourshaw v. DEP*, 1998 EHB 37(in the case of an appeal of a permit reissuance or renewal, the appellant may challenge only those issues which have arisen between the time the permit was first issued and the time it was reissued or renewed).

landfill permit containing this unusual provision amounts to an abuse of discretion on the part of the Department. While there may be sound policy reasons for not allowing such an arrangement, as the Appellants describe in their brief, we can not say that a potentially unwise decision by the Department is so manifestly unreasonable that the permit transfer must be voided. The Appellants' motion on this issue is denied.

Needs Analysis and Environmental Assessment

The Appellants contend that the Department should not have reissued the permit without requiring the Permittee to conduct a needs analysis and an environmental assessment pursuant to 25 Pa. Code §§ 271.201 and 271.126. The Permittee responds that the Department was not required to engage in either analysis by the regulation concerning permit reissuance. 25 Pa. Code § 271.221.

As we explained above, where an applicant agrees to accept all of the permit conditions and other responsibilities and obligations pursuant to 25 Pa. Code § 271.221(b)(1), the Department's regulations do not require the same level of review for a permit reissuance as they do for a new permit application. The Appellants allude to "significant" changes in the operation of the landfill, but fail to specify exactly what those operational changes are and demonstrate with particularity that those changes exceed the scope of the current permit. Therefore we can not say that as a matter of law the Department should have required a new needs analysis and environmental assessment and can not grant the Appellants' motion on that basis.

Rights of the Host Municipality

The Appellants argue that because of an agreement between the Permittee and the host municipality, Lower Saucon Township, there is a violation of the public notice provision of 25 Pa.

Code § 271.141 and the Department failed to protect the right of the host community to participate in future permit decisions concerning the site.

Section 271.141 of the Department's regulations provide that:

> An applicant for a . . . permit reissuance . . .shall publish once a week for 3 consecutive weeks a notice in a newspaper of general circulation in the area where the facility or proposed facility is located. The notice shall meet the following requirements.
>
> . . . .
>
> (2) State that the host municipality and county may submit comments to the Department within 60 days of receipt of the application . . . recommending conditions upon, revisions to and approval or disapproval of the permit . . . with specific reasons described in the comments.

25 Pa. Code § 271.141(a)(2). Reading the plain language of this regulation, a violation of the regulation would occur if an applicant either failed to provide notice or the notice which it did provide did not comport with the notice described by the regulation. There is no language which *requires* a municipality to provide comments to the Department, nor does there appear to be a duty upon the Department to force a municipality to do so. Therefore, if a municipality voluntarily enters into an agreement which may limit the scope of comments it may submit to the Department, there is nothing in this regulation which precludes it from doing so, or requires the Department to deny a permit in the event that such an agreement exists. This regulation has nothing to do with the issue of "whether the community can contract away its rights and the rights of its citizens and future elected governments granted it under state authority." (Appellants' Brief at 17) Rather it simply describes the content of the notice which must be provided when certain permitting events occur at the landfill.

Since the Appellants have failed to describe a violation of 25 Pa. Code § 271.141 we deny

their motion for summary judgment on this issue.

Department Response to Public Comment

The Appellants finally contend that the Department failed to respond to all of the comments made by citizens concerning the application for permit reissuance. We disagree.

Section 271.143 of the Department's regulations require it to consider written comments received at a public hearing held in connection with the permit application and to prepare a summary of the comments and respond to them. *See Throop Property Owner's Ass'n. v. DEP*, 1998 EHB 618. The Appellants contend that the Department failed to respond to concerns regarding the Permittee's compliance history, the Bethlehem sub-county plan, needs analysis and environmental assessment, and the host community agreement. We find that the Department adequately addressed each of these issues in the Comment Response document drafted following the public hearing held in connection with the permit application. (Permittee Motion Ex. 2(c)). For example, although the comment does not specifically name the sub-county plan, the Department's answer to Comment 1 deals with disposal capacity and county municipal waste planning issues. The Department's answer to concerns regarding an environmental assessment is found in Comment 12. Concerns regarding incomplete compliance history information was addressed in Comments 5 and 14, where the Department noted that it had received additional compliance history information from the Permittee and was satisfied.

These responses may not be as detailed or have reached the conclusions that the Appellants might have wished for. However, this Board has held that in considering public comments the Department is not required to accept or adopt those comments. *County Commissioners, Somerset*

County v. DEP, 1996 EHB 351 (the Department did not fail to consider public comments simply because it came to a different conclusion than that advocated by the commentators). This Board has also held that the Department acted within its authority in issuing a permit even "in the face of strenuous local government objections." *New Hanover Township v. DER*, 1991 EHB 1234.

For the aforementioned reasons the Appellants' motion for summary judgment is denied.

Permittee's Motion

The Permittee seeks to dismiss each of the individual Appellants and the organizational Appellants on the basis that none have the requisite direct, substantial and immediate interest in the subject matter of this appeal. After carefully reviewing the evidence presented we do not believe that either the individual or the organizational Appellants have standing to pursue this appeal.

The purpose of the standing doctrine in the context of proceedings before the Board is to determine whether an appellant is the appropriate party to seek relief from an action of the Department. *Valley Creek Coalition v. DEP,* EHB Docket No. 98-228-MG (Opinion issued December 15, 1999). In order to have standing to challenge a Department action, an appellant must be "aggrieved." *Florence Township v. DEP,* 1996 EHB 282. Accordingly, an appellant must show that he has a "substantial" interest in the subject matter of the particular litigation which surpasses the common interest of all citizens in seeking compliance with the law; a "direct" interest that was harmed by the challenged action; and an "immediate" interest that establishes a causal connection between the action complained of and the injury they suffered. *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 346 A.2d 269 (Pa. 1975). An organization may have standing either in its own right or as a representative of its members if at least one of the individual members has a direct,

immediate and substantial interest in the outcome of the litigation. *Valley Creek*; *Raymond Proffit Foundation v. DEP*, 1998 EHB 677.

Each of the individual Appellants in this matter, Albert Wurth, Guy Gray and Margaret Browne, answered interrogatories and deposition questions concerning their standing to pursue this appeal. Citing deposition testimony and answers to interrogatories, the Permittee argues that none of the individuals articulated a specific interest that was unique to that individual compared to other individuals in the community affected by the landfill. The Permittee further contends that even if one of the individuals articulated a unique harm, there is insufficient evidence of a causal connection between the harm alleged and the action of the Department. The Appellants argue that they do have standing, and cite to the deposition transcripts.

Each of the individual Appellants answered interrogatories posed by the Permittee which asked that they a) state their interest in challenging the Department's action; b) explain how the Department's action caused harm to that interest; and c) explain the causal connection between the action and the interest. Each individual provided identical answers:

> I am interested in not seeing the DEP allow Eastern to own and operated the Bethlehem landfill without a thorough review . . . because I am aware that my community's environment is protected largely through the efforts of DEP. If DEP acts arbitrarily . . or is lax in its enforcement of the PA regulations . . . I am placed in jeopardy.
>
> I am also concerned about the economic risk to which the DEP's action has subjected me as a resident of Bethlehem.
>
> I believe that the DEP has failed to protect my community and me by not adhering to the PA regulations regarding permit reissuances . . . [I]f Eastern [has a history of noncompliance] it is reasonable to assume that it may jeopardize the public health and welfare and may create economic liability for itself as well as all Bethlehem residents -- - of which I am one. . . .

> The causal connection is this: If DEP had not granted the permit reissuance to Eastern, the concerns that I and others have raised regarding Eastern operating the Bethlehem landfill – which were, in part, addressed above – would not exist.

(Permittee Motion Exs. 20-23)

In depositions, the individuals were asked further questions about their bases for standing, and provided the following evidence. Guy Gray lives approximately four miles from the landfill and is the co-owner of a business known as the Green Café which is somewhat closer. (Appellants' Response Ex. 13 at 8) Gray is an avid bicyclist and bikes in the Bethlehem area. (Appellants' Response Ex. 13 at 9) He bikes and canoes along the Lehigh River which is near the landfill, although not visible from it. (Appellants Response Ex. 13 at 20, 36) He testified that he is affected by the ownership of the landfill because it potentially affects the quality of the environment in the local area, including those places where he bikes and canoes. (Appellants' Response Ex. 13 at 12) He is concerned that the improper handling of leachate could degrade the quality of the Lehigh River and the Saucon Creek, especially during a storm event. (Appellants' Response Ex. 13 at 21, 37, 43) Gray also testified that he is interested in promoting recycling and the reduction of waste because these things affect the quality of the local environment. (Appellants' Response Ex. 13 at 13) When the landfill was owned by the City he felt he had more influence over City decision making to promote recycling and waste reduction. His ability to influence decision making is now hampered because the landfill is owned by a private party. (Appellants' Response Ex. 13 at 17)

Albert Wurth lives and works within a five mile radius of the landfill. (Appellants' Response Ex. 11 at 40-43) He also uses the area around the Lehigh River for recreational purposes. (Appellants Response Ex. 11 at 24, 27, 71) He frequents roads used by landfill trucks. (Appellants'

Response Ex. 11 at 20) He believes that he is a user of the landfill inasmuch as he puts his trash out to be picked up in front of his house. (Appellants' Response Ex. 11 at 77) There is no evidence that his trash actually goes to this landfill. He makes general statements that he believes that the landfill operation impacts on the quality of air and water and could affect his quality of life. (Appellants' Response Ex. 11 at 75) He stated that he uses the wastewater treatment system which could be adversely affected by improperly handled leachate from the landfill which is discharged in the POTW. (Appellants' Response Ex. 11 at 76) He stated that he is not physically affected at his home. (Appellants' Response Ex. 11 at 18)

Greta Browne, who is married to Guy Gray, testified that she lives and works close to the landfill in an area known as the "southside." (Appellants' Response Ex. 12 at 8) She co-owns the Green Café. (Appellants' Response Ex. 12 at 5) Browne testified that traffic and air quality are potentially affected because the southside is the closest community to the landfill. (Appellants' Response Ex. 12 at 19) She noted the possibility that the landfill could have an effect on creeks and rivers, but did not mention that she used either of these resources. (Appellants' Response Ex. 12 at 16)

Where an appellant's standing is challenged in a motion for summary judgment filed after the close of discovery, that appellant must adduce admissible evidence from the record demonstrating the bases for its standing or the appeal will be dismissed. *E.g., Environmental Outreach v. DER*, 1992 EHB 904; *see also* Pa. R.C.P. No. 1035.3. There has been extensive discovery on this issue largely in the form of interrogatories and deposition, yet Appellants have failed to proffer sufficient evidence in response to the Permittee's motion to support their standing to pursue this appeal.

The Board has also held many times that standing can not be conferred when an appellant alleges a general interest in protecting the environment, but fails to specifically demonstrate how that interest is adversely impacted by the Department's action. *Chestnut Ridge Conservancy v.* DEP, 1997 EHB 45; *Concerned Citizens of Earl Township v. DER*, 1992 EHB 645; *Anthony v. DER*, 1976 EHB 334.

The Appellants argue that the character of the owner of the landfill is critical to the quality of the operation of the landfill. The proper operation of the landfill of necessity has an impact on the members of the community which it serves and who live and work in proximity of the landfill. The Appellants further allege that they are users of the landfill because the solid waste management plan of the City of Bethlehem designates the landfill for disposal of their municipal solid waste and designates the landfill for recycling; they are users, customers and "shareholders" of the publicly owned treatment works (POTW) which has been designated as a discharge site for leachate from the landfill; they are responsible for the operation of the recycling center because it is still being operated by the city at city expense. The Permittee counters that these interests are shared by all citizens of the City of Bethlehem and are therefore too broad to be considered "substantial" under the *William Penn Parking* test.

The Appellants point out that the mere fact that an interest is shared by many does not mean that it is not "substantial." *Blose v. DEP*, 1998 EHB 635, *rev'd on other grounds,* No. 287 C.D. 1999 (Pa. Cmwlth. filed July 1, 1999). We agree. However they must nevertheless demonstrate that as individuals they have something to gain or lose by the outcome of the litigation relative to a property interest, personal privilege, immunity, duty, liability, or obligation. Each of the interests

articulated by the Appellants are those which affect them as citizens rather than as individuals and as such are best addressed by the legislative process rather than by the judicial process.

Even if we held that the Appellants had provided sufficient evidence concerning their interests which they wish to protect, the record is devoid of any evidence which explains how these interests are adversely impacted by the action of the Department in reissuing the permit to the Permittee for the operation of the landfill. The Commonwealth Court recently emphasized the critical importance of this element of causation in determining whether or not a party has standing to pursue an appeal. In *George v. Pennsylvania Public Utility Commission*, 735 A.2d 1282 (Pa. Cmwlth. 1999)(*en banc*), the court dismissed the petitioner's appeal of the notice provided to ratepayers concerning the restructuring of rates for electricity because the petitioner failed to show that but for the inadequate notice, additional ratepayers would have participated in the proceedings. *See also Tessitor v. Department of Environmental Resources,* 682 A.2d 434 (Pa. Cmwlth. 1996)(appellant failed to articulate how the Department's issuance of a permit to improve bridges, culverts, ramps and other structures of a busway will directly degrade air quality).

The Appellants did argue that they believed that the improper handling of leachate which will be discharged into the POTW could degrade the water resources in the area. However, they did not provide any evidence which indicates that it is likely that leachate will be improperly handled. It is necessary to proffer evidence which demonstrates that there is a "substantial probability" that the resulting harm would materialize. *Tessitor v. DER*, 1995 EHB 603, *aff'd,* 682 A.2d 434 (Pa. Cmwlth. 1996). Although an appellant need not prove his case to demonstrate standing, an alleged

aggrievement must be more than speculative.[9] There is no evidence in the record of where the leachate may discharge into a waterway that is used by one of the Appellants. There is no evidence which suggests that if there were an improper handling of leachate into the POTW that the Appellants' water or sewer would be adversely affected or that their sewage rates would go up. Similarly, there is no specific evidence describing the nature of the truck traffic related to the landfill.

Finally, the Appellants cite the Supreme Court's decision in *Application of Biester*, 409 A.2d 848 (Pa. 1979), and argue that the Board can find standing based on the more liberal standard of that decision. In that case the court held that standing could be found in a class of exceptional cases where, although the degree of causal connection between a governmental action and the injury asserted by an appellant is small, those most directly and immediately affected are "beneficially affected as opposed to adversely affected" and the governmental action would otherwise escape judicial review. 409 A.2d at 852; *see also Sprague v. Casey*, 550 A.2d 184 (Pa. 1988); *Faden v. Philadelphia Housing Authority*, 227 A.2d 619 (Pa. 1967); *City of Harrisburg v. DER*, 1994 EHB 155. A court must also consider the "appropriateness of judicial relief, the availability of redress through other channels, or the existence of other persons better situated to assert the claim." *Biester*, 409 A.2d at 852. This principle is often referred to as "taxpayer standing."

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[9] The Appellants cite to the United States Supreme Court decision in *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973), which has been cited with approval by the Pennsylvania Supreme Court in *William Penn Parking Garage*. While that case did provide a very liberal application of the standing doctrine, the Court noted that their review was predicated upon the standard of review for a motion to dismiss and implied that they may not find standing based on the current evidence if they were deciding a motion for summary judgment.

The Appellants have failed to demonstrate that they fall into this exception. The record is devoid of any evidence that there are not better situated individuals or groups which could challenge the action of the Department. Certainly there could be individuals whose property or recreational use of natural resources are more specifically impacted by the landfill. Further, we do not believe that this action of the Department is so unique that it would otherwise escape judicial review. The Board has certainly heard third party appeals relating to permit transfers. *E.g., Barshinger v.* DEP, 1996 EHB 849. Accordingly, we find that the *Biester* standard does not apply.

We turn next to the standing of the organizational Appellants: the Lehigh Valley Greens (LVG), Citizens for a Vital Southside (CIVIS), SAVE, Inc., and Bethlehem Landfill Emergency Committee (BLEC). The Permittee argues that none of these Appellants have alleged a claim of standing in their own right, but only derivitatively through individual members. In their response to the Permittee's motion the Appellants have not argued or presented any evidence which would support organizational standing for these groups. Therefore they must show that they have at least one member who has standing in order to have derivative standing to continue the appeal. *Raymond Proffit Foundation v. DEP*, 1998 EHB 677.

Each of the organizational Appellants signed a stipulation which stated that each had members other than the individual Appellants, but that in exchange for avoiding further discovery of these members the organization "represents that none of the Unidentified Members have any information or documents in their possession which are relevant to this appeal or which might give rise to relevant information . . . ." (Permittee Motion Exs. 28 –30) Accordingly, LVG, CIVIS and SAVE have based their standing upon the standing of Greta Browne, Guy Gray and Albert Wurth.

Since we have found that none of these individuals have standing, we must also dismiss the appeals of these organization Appellants.

The remaining organizational Appellant, BLEC, produced the testimony of Joseph Colosi in support of its standing. He lives and owns rental properties close to the landfill in an area known as the "southside."(Appellants Response Ex. 9 at 17) Colosi further noted that he canoes on the Lehigh River but didn't make a specific connection to the landfill. (Appellants Response Ex. 9 at 18) He is not aware of a direct impact except for trucks, but couldn't identify landfill trucks near his home. (Appellants Response Ex. 9 at 26) Applying the same standards that we outlined above, we also find that there is insufficient evidence to conclude that Joseph Colosi has standing to pursue this appeal. Accordingly, we must dismiss the appeal of BLEC.[10]

We therefore enter the following:

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[10] Because of our disposition of the Permittee's motion we need not specifically address the other arguments made by the Permittee relative to the objections on the Appellants' notice of appeal. However we would comment that the claim that the Appellants' objections concerning the compliance history materials is "moot" because the stock of the Permittee was sold to another corporation lacks merit. The sale of the Permittee's stock subsequent to the permit's reissuance is not relevant to the issue of whether the Department's action was appropriate at the time. *Cf. North Pocono Taxpayers' Assn. v. DER*, 1994 EHB 449 (violations which occur after the approval of a permit are irrelevant; they do not show that the permit should not have been issued). In addition, Section 503 (e)(6) of the Solid Waste Management Act, 35 P.S. § 6018.503(e)(6), specifically authorizes the revocation of a permit where the facility is operated pursuant to a permit or license that was not granted in accordance with the law. We could therefore direct the Department to revoke the permit even though there has been a subsequent change in the parent company.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ALBERT H. WURTH, JR., et al.	:	
	:	
v.	:	**EHB Docket No. 98-179-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and EASTERN WASTE OF BETHLEHEM, INC., Permittee and CITY OF BETHLEHEM, Intervenor	:	

ORDER

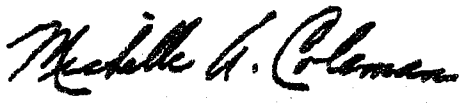
AND NOW, this 29th day of February, 2000, upon consideration of the motions for summary judgment filed in the above captioned matter, the Board hereby orders that:

1. The motion for summary judgment filed by the Appellants is **DENIED**.
2. The motion for summary judgment filed by the Permittee is **GRANTED**.
3. The appeal of the Appellants is hereby **DISMISSED**.

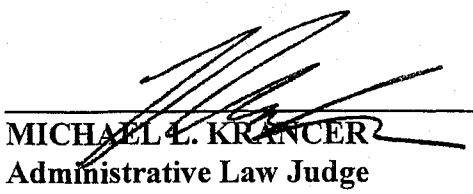
ENVIRONMENTAL HEARING BOARD

GEORGE J. MILLER
Administrative Law Judge
Chairman

THOMAS W. RENWAND
Administrative Law Judge
Member



MICHELLE A. COLEMAN
Administrative Law Judge
Member



MICHAEL L. KRANCER
Administrative Law Judge
Member

DATED: February 29, 2000

ML/rk

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ALBERT H. WURTH, JR., et al.	:	
	:	
v.	:	**EHB Docket No. 98-179-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and EASTERN WASTE OF BETHLEHEM, INC., Permittee and CITY OF BETHLEHEM, Intervenor	:	

OPINION OF ADMINISTRATIVE LAW JUDGE
BERNARD A. LABUSKES, JR.
CONCURRING IN THE RESULT

I concur with the conclusion that Appellants' appeal should be dismissed because the Appellants lack standing. I express no opinion regarding the merits of the Appellants' motion for summary judgment.

The causation analysis mandated by *William Penn Parking Garage* will obviously vary from case to case. In this particular appeal, the Appellants complain about potential future adverse effects. Therefore, in order to determine whether they have standing, we need to answer two questions: First, will the alleged adverse effects occur as a result of the challenged act, and second, if they do occur, will the Appellants be among those who will be personally harmed?

Regarding the first question, in order to withstand a standing challenge, particularly at a preliminary stage such as the motion for summary judgment that is under consideration here, a party

is not required to prove that the adverse effects will in fact occur as a result of the challenged action. That determination must await the hearing on the merits. Rather, in a case such as this one, the party should only be required to point to record evidence that there is an objectively reasonable threat that adverse effects will occur as a result of the action. *See Friends of the Earth v. Laidlaw Environmental Enterprises*, 120 S.Ct. 693 (2000). In other words, the party need not show that there is a substantial likelihood the adverse effect will occur as a result of the action. That would be too demanding a showing for the standing analysis. Instead, in my view, he must only show that he has more than subjective apprehensions. He must show that the likelihood of the alleged adverse effects occurring is not merely speculative. As a practical matter, in most standing cases that come before this Board where future harm is at issue, particularly when standing is raised in a prehearing motion, I would suspect that we will simply assume that the alleged harm will result from the action in question so long as proper allegations have been made.

These points are illustrated in *Tessitor v. DER*, 1995 EHB 603, *aff'd*, 682 A.2d 434 (Pa. Cmwlth. 1996). In that case, the parties were denied standing not so much because they were not among those who would be personally harmed, but because the harmful effect alleged (degradation of air quality) was not causally related to the challenged action (issuance of a permit to improve bridges, culverts, etc.). 1995 EHB at 610. The causal link between the action and the alleged effect was simply too remote and speculative. Thus, the case did not need to primarily focus on whether the air quality degradation would personally affect the appellants.

It is only after the first question is answered in the affirmative that the Board needs to determine whether the party is among those who would be personally harmed by the alleged adverse

effects. This is where we need to examine factual questions such as the party's proximity to the site, use of natural resources in the area, and the like.

This appeal is an example of a case where it is not necessary to examine whether the Appellants are among those who would be harmed by the adverse effects. Their proximity to the landfill and use of local resources never becomes relevant here because, even applying the very low standard of an objectively reasonable threat, they have failed to show that their fear that the permit transfer will result in the adverse effects that they have alleged is more than mere speculation and conjecture. They have failed to credibly allege that there is any realistic threat that the claimed adverse effects will occur as a result of the permit transfer. Put simply, they have not credibly alleged that the permit transfer will result in harm to **anybody**. Their own unique circumstances never become an issue.

The Appellants' allegation of harm to local resources illustrates this point. The Appellants seem to allege that the new owner, motivated as it is by profit motive, will be more likely to run the landfill in a way that results in environmental damage. This is simply not credible based upon the record that has been developed here. The Department has **not** changed any of the operational terms or conditions of the permit. To the contrary, in order to obtain the reissued permit, the new owner was required to expressly commit to complying with the terms and conditions of the preexisting permit. Whatever requirements that existed that were in place which were designed to minimize, for example, odors, are still in place in the reissued permit. If the new owner fails to comply with those provisions, it will be subject to the same enforcement action as the original owner would have been subject to. Thus, the only action that is appropriately at issue in this case is the permit reissuance,

not whether this landfill should have been permitted in the first place.

The Appellants appear to concede as much, but instead essentially argue that **any** private owner with a profit motive will run this site differently than the municipal owner. They do not attempt to argue, for example, that this owner has demonstrated such an inability or unwillingness to comply with the law that future violations at this site are a virtual certainty. They do not point to a single fact that is specific to **this** new owner. Not only do I view the Appellants' assertions that **any** private owner will cause the alleged harms as groundless speculation, I repeat that the new owner will be constrained by existing legal requirements designed to prevent generalized harm. To the extent that the new owner tried to expand those legal limits, the Appellants may have an appealable action at that point. To the extent that the new owner stays within those preapproved limits, there is no cognizable harm.

Similarly, the Appellants assert that the new owner may wish to accept more waste and/or waste from additional areas, but again, the permit terms regarding waste volume limits have not changed, and the operator's duties under the permit and applicable plans regarding the approved sources of waste have not changed. To the extent that volumes increase within the limits of existing permit requirements, the Appellants essentially challenge the existing limits, and it is too late for that. Once again, the new ownership in and of itself has not resulted in an adverse effect that is properly the subject of this appeal. Furthermore, the Appellants fail to credibly allege that there is any realistic, objectively reasonable threat to anybody as a result of the alleged increased volume within the limits of the preexisting permit terms. That the increased volumes (speculation in itself) will in turn result in noticeable increased truck traffic or jeopardize capacity that would have

otherwise been available to local community are purely speculative given the record that has been developed in this case. Taken together, the Appellants' arguments regarding changed or increased volume of trash amount to no more than subjective apprehensions. I reach the same conclusion with regard to all of the other adverse effects alleged by the Appellants.

In sum, we need not address whether the Appellants are among those who are personally harmed because, here, the Appellants have failed to credibly allege that there is a reasonable threat of any harm flowing from the ownership change in and of itself to anybody. Therefore, the Appellants' use of local resources, proximity to the landfill, and those sorts of considerations are simply irrelevant in this case.

Finally, I agree with the majority's holding that the standing analysis is ripe for determination at this juncture in this appeal. We have held that an appellant is not required to allege material facts showing that it has standing in its notice of appeal. *Tessitor v. DER*, 1995 at 606. The party or parties on the other side of the caption must put the matter at issue. The Permittee has done that here. Having done so, the issue has been the subject of extensive discovery and briefing. The Appellants have not convincingly asserted that there are disputed issues of material fact regarding the standing issue. They have not asked to conduct additional discovery. Little or nothing would be served by taking further evidence on this question. Although the matter of standing may not always be ripe for determination in the context of a summary judgment motion or at the conclusion of discovery, it is here.

Accordingly, I join with the majority's order granting the Permittee's motion for summary judgment on standing grounds and dismissing the appeal.

ENVIRONMENTAL HEARING BOARD

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: February 29, 2000

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PETER BLOSE	:	
	:	
v.	:	**EHB Docket No. 98-034-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, and SEVEN SISTERS MINING COMPANY, INC.	:	**Issued: March 7, 2000**

ADJUDICATION

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

The Board sustains a third-party appellant's *pro se* appeal on the basis that the Department did not follow the regulatory language in granting a surface coal mining permit. The regulations provide that the applicant must demonstrate that the coal mining activities can be feasibly accomplished. Because the Department erred in finding that surface coal mining activities can be feasibly accomplished where mining activities are proposed within 300 feet of occupied dwellings located on the permit area for which waivers have not been obtained, the permit is remanded for further consideration.

PROCEDURAL HISTORY

This case involves a third party *pro se* appeal of the issuance of Coal Surface Mining Permit No. 0390113 (permit) by the Department of Environmental Protection (Department) to

Seven Sisters Mining Company, Inc. (Seven Sisters). The permit authorizes Seven Sisters to conduct surface coal mining activities at a surface mine located in Burrell and Southbend Townships, Armstrong County. This mine is commonly known as the Laurel Loop mine.

Mr. Peter Blose filed a notice of appeal, a petition for temporary supersedeas and a petition for supersedeas on February 26, 1998. Pursuant to an agreement by the parties, Mr. Blose subsequently filed a motion requesting an expedited hearing on the merits and withdrew four of the six objections listed in his notice of appeal. The two remaining objections were: (1) the effectiveness of clay seals in preventing pollution to waters of the Commonwealth; and (2) the presence of dwelling barriers inside the permit area in violation of 25 Pa. Code §§ 86.37(a)(2) and 86.37(a)(5)(v). Seven Sisters filed a motion for summary judgment requesting the Board to dismiss the appeal for lack of standing or grant summary judgment on the two remaining issues because no material facts were in dispute since the permit does not allow the Permittee to mine within 300 feet of an occupied dwelling. The Board denied Seven Sisters' motion with regard to standing, determining that Mr. Blose had standing based on his recreational use of the surface creek and its watershed. *Blose v. DEP*, 1998 EHB 635. The Board also denied the motion with regard to the first objection, determining that Seven Sisters failed to clearly demonstrate it was entitled to summary judgment on the factually specific issue regarding the effectiveness of the clay seal. *Id.* However, the Board granted the motion with regard to the second objection, dismissing Mr. Blose's contention that Seven Sisters would not feasibly accomplish its mining activities if it did not mine within 300 feet of several dwellings because the Department seemingly had not taken any action which allowed any mining activities within 300 feet of any dwelling. *Id.* at 639, 640. A hearing was held on the remaining issue regarding the effectiveness

of the clay seal. In the Adjudication following the hearing, the Board determined that although Mr. Blose had standing to challenge the permit, he had failed to demonstrate that the use of a clay seal would cause pollution to Crooked Creek and its watershed. *See Blose v. DEP*, 1998 EHB 1340.

Mr. Blose appealed the Board's Opinion and Order on the Permittee's motion for summary judgment to the Commonwealth Court. After oral arguments, the Court issued an unreported memorandum opinion holding that the Board improperly dismissed the issue relating to the feasibility of mining and remanded the matter to the Board. *Blose v. Department of Environmental Protection*, No. 287 C.D. 1999 (Pa. Cmwlth. filed July 1, 1999). Another hearing was held before Administrative Law Judge Thomas W. Renwand so that the parties could present evidence concerning the feasibility of mining for the record.[1] The parties filed post-hearing and reply briefs. Pursuant to a Board Order, the parties also filed supplemental briefs addressing the applicability of 25 Pa. Code § 86.103(d) to this appeal.[2]

The record consists of the transcripts totaling 398 pages, 43 exhibits, a joint stipulation and a joint stipulation in lieu of testimony. For the reasons that follow, the above-captioned appeal is sustained, Surface Mining Permit No. 0390113 is suspended, and the permit is

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[1] Prior to the second hearing, Mr. Blose filed a petition for supersedeas which the Board denied. *See Blose v. DEP*, EHB Docket No. 98-034-R (Opinion issued July 28, 1999).

[2] In its supplemental brief, Seven Sisters again challenges Mr. Blose's standing to raise his objection relating to the feasibility of mining. Under *Oley Township v. DEP*, 1996 EHB 1098, 1126-1127, a challenge to standing must be raised earlier than in a supplemental brief filed after the conclusion of a hearing. Moreover, as the Commonwealth Court noted when Seven Sisters argued before the Court that Mr. Blose did not have standing to raise his second objection, the Board already has determined that Mr. Blose has standing to challenge the Department's issuance of the permit. *See Blose v. Department of Environmental Protection*, No. 287 C.D. 1999 (Pa. Cmwlth. filed July 1, 1999), n.4.

remanded to the Department for further consideration in accordance with the reasoning set forth in this Adjudication. After a full and complete review of the record, we make the following Findings of Fact:

FINDINGS OF FACT

Parties

1. The Department of Environmental Protection (Department) is the agency with the duty and authority to administer and enforce the Surface Mining Conservation and Reclamation Act, Act of May 31, 1945, P.L. 1198, *as amended*, 52 P.S. §§ 1396.1-1396.19a (Surface Mining Act); The Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §§ 691.1-691.1001 (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. §§ 510-517 (Administrative Code) and the rules and regulations promulgated thereunder. (DEP-PHM ¶ 1)[3]

2. Mr. Peter Blose is a private individual with a mailing address of P.O. Box 37, Apollo, PA 15613. (DEP-PHM ¶ 2)

3. Seven Sisters Mining Company, Inc. (Seven Sisters), is a corporation with a mailing address of U.S. Route 22, Delmont, PA 15626. The President of Seven Sisters is Mr. Daryll Jacobs. Seven Sisters has been engaged in the business of mining coal and non-coal

[3] References to pre-hearing stipulations filed on June 26, 1998, consisting of excerpts from the parties' pre-hearing memoranda which were agreeable to all parties and which were contained in the Department's pre-hearing memorandum, will be denoted as (DEP-PHM ¶ __); references to the Joint Exhibits submitted to the Board in this matter will be denoted as (Ex. J-__); references to the transcript of the hearing will be denoted as (N.T. __); references to Mr. Blose's Exhibits will be denoted as (Ex. A-__); and references to the Department Exhibits will be denoted as (Ex. C-__).

minerals in Pennsylvania pursuant to License No. 1-01907. (DEP-PHM ¶ 3)

Permit

4. On January 30, 1998 the Department issued Coal Surface Mining Permit No. 03950113 (permit) to Seven Sisters, for what is commonly known as the Laurel Loop mine. (DEP-PHM ¶ 4; Ex. J-3)

5. The Laurel Loop mine is located in Burrell and South Bend Townships, Armstrong County. (DEP-PHM ¶ 5; Ex. J-3)

6. The permit covers 93 acres and Seven Sisters could affect up to 34.5 acres for coal removal. However, pursuant to Authorization To Mine Permit No. 1-01907-03950113-01, the issued permit only authorizes surface mining activities on Phase I of the mine, an area covering 12.2 acres, with 3.5 acres of coal removal. (DEP-PHM ¶ 6; Ex. J-3)

7. Seven Sisters owns the minerals which underlie the Laurel Loop permit area pursuant to a deed of severance and it has a means of access to and from the mine site. (DEP-PHM ¶¶ 14, 16)

8. Pursuant to the Laurel Loop permit, Seven Sisters proposes to remove the Lower Kittanning coal seam and sandstone and shale which overlie the Lower Kittanning coal. (N.T. 89-90; DEP-PHM ¶ 7)

9. The area covered by the Laurel Loop permit includes the Laurel Loop Hunting Camp. The Camp consists of numerous privately-owned occupied dwellings and a larger number of unimproved lots. (N.T. 93-94; DEP-PHM ¶ 15)

Background

10. The review of the application took ten months, which is somewhat longer than the

normal review period. (N.T. 99)

11. The Department received numerous comments from the public during the permit review. (N.T. 96-98; DEP-PHM ¶ 18)

12. On April 3, 1995, Seven Sisters first submitted the Laurel Loop permit as a non-coal permit. It proposed to mine Vanport limestone and the Lower Kittanning coal. (N.T. 90-91; DEP-PHM ¶ 9)

13. The Department returned the initial application because it lacked the right of entry documents required for a non-coal mining permit application. (N.T. 90; DEP-PHM ¶ 10)

14. On June 15, 1995, Seven Sisters resubmitted the Laurel Loop permit as a coal permit. (N.T. 90-91; DEP-PHM ¶ 11)

15. The Department returned this application to Seven Sisters because, among other reasons, it proposed to mine limestone units which were below the coal to be mined and deficiencies existed in the reclamation plans. (N.T. 90-91; DEP-PHM ¶ 12)

16. Seven Sisters again submitted a Laurel Loop coal mining application on December 22, 1995. The Department accepted this application for review on January 2, 1996. (DEP-PHM ¶ 13; Ex. J-1)

17. A public conference was held on March 28, 1996. (N.T. 97; DEP-PHM ¶ 19)

18. Concerns expressed by the public included prevention of water pollution, protection of Crooked Creek State Park, surface disruptions caused by mining, mining of the Vanport limestone, site access, and the adequacy of reclamation after mining.(N.T. 98; DEP-PHM ¶ 20)

19. During the review of the permit application, the Department was aware of a

dispute concerning the size of the dwelling barriers. Seven Sisters asserted that, based on certain deeds, a 150 foot barrier applied to occupied dwellings rather than the 300 foot barrier established by the statute and the Department's regulations. The Department was obviously troubled by the fact that mining activities were proposed within dwelling barriers as evidenced by several letters from the Department to Seven Sisters stating that no mining will be permitted within 300 feet from any dwellings unless waivers are obtained. (Ex. A-14, A-15, A-17-22)

20. At the time the permit was issued, mining activities were located within 300 feet of seven dwelling barriers on the Permit Map. (Ex. J-2b, A-30)

21. Since the issuance of the permit, two of the seven dwelling barriers have been removed as a result of legal action in the Armstrong County Court of Common Pleas. (Ex. C-4)

22. Mr. J. Scott Roberts, a Professional Geologist, is the Permits Chief in the Department's Greensburg District Office. He has been the Permits Chief since 1993, and has also served as acting Permits Chief of the Department's Ebensburg District Office and Acting District Mining Manager of the Greensburg District Office. His duties include interpreting and applying the mining regulations. Mr. Roberts was involved with the review of the permit as Mr. Gardner's supervisor and he has been to the site on numerous occasions. (N.T. 296-302; Ex. C-2)

23. The Board recognized Mr. Roberts as an expert in mining and reclamation. (N.T. 301-302)

24. Mr. Michael D. Gardner was the lead technical reviewer of the permit application for the Laurel Loop mine. He is a Professional Geologist and Hydrogeologist 2 and has been continuously employed by the Department for the past fifteen years. One of Mr. Gardner's tasks

as a hydrogeologist is to conduct a technical review of surface mining permit applications submitted to the Department. Mr. Gardner has reviewed approximately one hundred surface mining permits in the last fifteen years and has testified as an expert witness in the field of hydrogeology in proceedings before the Board. (N.T. 85-86, 324-328; J.S. ¶¶ 25-29; Ex. C-3, J-4)

25. The Board recognized Mr. Gardner as an expert in the field of hydrogeology and mining and reclamation. (N.T. 88-89, 329-330)

26. Pursuant to settlements approved by the Armstrong County Court of Common Pleas and entered as orders of that Court on March 3, 1999 and July 23, 1999, the dwellings on Permit Map Lot Nos. 12 and 10, respectively, were removed Seven Sisters obtained a dwelling barrier waiver from the property owners on Permit Map Lot No. 2 in February of 1999 and a waiver from the property owner on Permit Map Lot No. 7 in April of 1999. Seven Sisters granted a waiver in April of 1999 as the property owner of Permit Map Lot No. 19. (N.T. 351-353; Ex. C-4, C-5)

27. A joint stipulation in lieu of testimony indicates that each owner of the remaining five occupied dwellings at Laurel Loop has no intention of voluntarily granting a dwelling barrier waiver, release or variance or to otherwise permit any mining activities of any kind within 300 feet of their dwelling or to sell their dwelling in the near future. (Joint Stipulation in Lieu of Testimony)

Dwelling Barriers

28. The purpose of a dwelling barrier is to provide a buffer between the mining activities and the dwelling itself. (N.T. 302, 303)

29. An occupied dwelling is a permanent structure inhabited by people. (25 Pa. Code § 86.1; N.T. 303)

30. Dwelling barriers can be waived by the property owner of an occupied dwelling. (N.T. 302, 303)

31. A permit application will not be approved unless the application affirmatively demonstrates and the Department finds, in writing, that the proposed permit area is not within 300 feet from any occupied dwelling, unless a waiver is obtained. (25 Pa. Code § 86.37(a)(5)(v))

32. The Laurel Loop permit approved by the Department is not in conformance with this regulation because proposed mining activities are located within 300 feet from several occupied dwellings which are located on the permit. (Ex. J-2b)

"Feasibly Accomplish" Mining Activities

33. The purpose of 25 Pa. Code § 86.37(a)(2) is to ensure compliance with the statute and the Department's regulations by requiring mining activities to be feasibly accomplished. (N.T. 306-307) Mr. Roberts and Mr. Gardner testified that the "feasibly accomplished" requirement involves a technical review of the site and a look at the practicality of the plans to see whether the operation and reclamation plan can be accomplished. (N.T. 307-308, 328-329)

34. The term "feasible" means "capable of being done or carried out." *See* Webster's Ninth New Collegiate Dictionary.

35. In assessing whether mining could be feasibly accomplished in accordance with 25 Pa. Code § 86.37(a)(2), Mr. Gardner considered that the haul road could be constructed and would be stable and not steep, the block cut method of mining which was proposed was appropriate for the site, and the proposed mining equipment was appropriate. (N.T. 344-347)

36. Mr. Roberts testified that under 25 Pa. Code § 86.37(a)(2), the Department does not specifically consider dwelling barriers when deciding whether the operation and reclamation plan for the entire site could be feasibly accomplished. (N.T. 310) Mr. Roberts testified that the reason for not considering dwelling barriers during the review of surface mine permit applications under 25 Pa. Code § 86.37(a)(2) is because what is being evaluated are the impacts that would occur if the entire area is affected and mined. (N.T. 310)

37. Operators also revise erosion and sedimentation plans when seeking an authorization to mine. (N.T. 311-312, 358)

38. Mr. Roberts testified that under 25 Pa. Code § 86.37(a)(2), the Department does not specifically consider dwelling barriers when deciding whether the operation and reclamation plan for the entire site could be feasibly accomplished. (N.T. 310)

Laurel Loop Permit

39. Mining activities, such as sedimentation and treatment ponds, topsoil and spoil piles, and diversion ditches and erosion controls, are proposed within 300 feet of dwelling barriers for which waivers have not been submitted, contrary to the Department's findings. (N.T. 249-257; Ex. J-2b, A-30)

40. Despite the Department's concerns regarding the possibility that property ownership may change between the time a waiver is granted and when the operator decides to mine a particular area, a valid waiver remains in effect against subsequent owners who had actual or constructive knowledge of the existing waiver at the time of purchase. 25 Pa. Code § 86.102(9)(ii)(A).

41. Where mining activity is located within a dwelling barrier area, waivers *must be*

submitted with the permit application. 25 Pa. Code § 103(d).

Miscellaneous

42. Monitoring of an existing private water supply well is not a surface mining activity under the Department's regulations. (25 Pa. Code § 87.1; N.T. 313-314)

43. The primary purpose for requiring the monitoring of existing private water wells is to protect the private water supply. An individual property owner's refusal to permit an existing private water supply well to be monitored would not prevent the issuance of a permit. However, the property owner's refusal would make it difficult to detect any impacts to the private water supply well as a result of mining. A dwelling barrier will not preclude water monitoring since the landowner only has to grant access to the private water supply well so that a sample can be obtained. (N.T. 361-363)

DISCUSSION

As a third-party appellant challenging the issuance of a permit, Mr. Blose bears the burden of proof in this appeal. 25 Pa. Code § 1021.101(c)(2); *James E. Wood v. DER*, 1994 EHB 347. Mr. Blose must establish by a preponderance of the evidence that the Department abused its discretion in issuing the permit by acting arbitrary, capricious, or contrary to law. 25 Pa. Code § 1021.101(a); *See Oley Township v. DEP*, 1996 EHB 1098. The issues currently before the Board are whether Seven Sister's proposed mining activities can be feasibly accomplished in accordance with 25 Pa. Code § 86.37(a)(2) and whether the Department abused its discretion in violation of 25 Pa. Code §§ 86.37(a)(5)(v), 86.103(a) and 86.103(d) by issuing a surface mining permit where mining activities are proposed inside dwelling barriers within the surface mining permit.

In his post-hearing briefs, Mr. Blose contends that mining activities proposed inside dwelling barriers should be a factor when the Department analyzes whether mining activities can be feasibly accomplished pursuant to 25 Pa. Code § 86.37. Mr. Blose argues that the Department should not issue a surface mining permit if the permit application includes future proposed mining activities inside dwelling barriers, if, at the time the permit is issued, the permittee has not obtained dwelling barrier waivers. The Department and the Permittee disagree. The Department states in its post-hearing briefs that it interprets 25 Pa. Code § 86.37 to require a comprehensive analysis of whether a proposed mining operation can be carried out in compliance with the law and regulations. The Department argues that various barriers where mining is prohibited, including occupied dwelling barriers, are not part of this review because those barriers are protected by other statutory and regulatory provisions. The Department interprets the relevant regulations to allow it to issue a surface mining permit which includes proposed mining activities within barrier areas, but to require the operator to obtain an authorization to mine during the second permitting step after the permit is issued. Seven Sisters argues that the Department has consistently interpreted the regulations and its interpretation is well known within the mining community.

The permit as issued only authorizes surface mining activities on Phase I of the mine, an area covering 12.2 acres, with 3.5 acres of coal removal. (DEP-PHM ¶ 6; Ex. J-3) Seven Sisters owns the minerals which underlie the Laurel Loop permit area pursuant to a deed of severance and it has a means of access to and from the mine site. (DEP-PHM ¶¶ 14, 16) Pursuant to the permit, Seven Sisters proposes to remove the Lower Kittanning coal seam and sandstone and shale which overlie the Lower Kittanning coal. (N.T. 89-90; DEP-PHM ¶ 7) The area covered

by the Laurel Loop permit includes the Laurel Loop Hunting Camp. The Camp consists of numerous privately-owned occupied dwellings and a larger number of unimproved lots. (N.T. 93-94; DEP-PHM ¶ 15)

The review of the permit application took ten months, which is somewhat longer than the normal review period, and the Department received numerous comments from the public during the permit review.[4] (N.T. 96-98; DEP-PHM ¶ 18) On April 3, 1995, Seven Sisters first submitted the Laurel Loop permit as a non-coal permit. It proposed to mine Vanport limestone and the Lower Kittanning coal. (N.T. 90-91; DEP-PHM ¶ 9) The Department returned the initial application because it lacked the right of entry documents required for a non-coal mining permit application. (N.T. 90; DEP-PHM ¶ 10) On June 15, 1995, Seven Sisters resubmitted the Laurel Loop permit as a coal permit. (DEP-PHM ¶ 11; N.T. 90) During the time the Department reviewed the permit, the Department was aware of a dispute concerning the size of the dwelling barriers. Seven Sisters asserted that, based on certain deeds, a 150 foot barrier applied to occupied dwellings rather than the 300 foot barrier established by the statute and its regulations. In a letter dated July 3, 1995, the Department returned this application to Seven Sisters because, among other reasons, it proposed to mine limestone units which were below the coal to be mined and deficiencies existed in the reclamation plans. (N.T. 90-91; DEP-PHM ¶ 12; Ex. A-14) The letter specifically stated:

> Your application contains conflicting information on the sizes of dwelling barriers. Be advised that, pursuant to Department

[4] A public conference was held on March 28, 1996. (N.T. 97; DEP-PHM ¶ 19) Concerns expressed by the public included prevention of water pollution, protection of Crooked Creek State Park, surface disruptions caused by mining, mining of the Vanport limestone, site access and the adequacy of reclamation after mining. (N.T. 98; DEP-PHM ¶ 20)

> Regulations, releases are required for any mining activities within 300 feet of any dwellings. In addition, your application identifies mining activities within several house barriers but you have provided no executed waivers. Please submit waivers for these dwellings or revise your application to delete mining activities in these areas. (Emphasis in original)

(Ex. A-14, ¶ 2)

The Department sent a letter, dated August 31, 1995, to Seven Sisters explaining:

> I agree that if no activities were requested within the barrier distance around homes, your application would be received and reviewed. However, before authorizing mining within those barriers, we do need to come to some resolution of the issue regarding the 300 foot barrier from the Non-Coal Act versus the 150 foot barrier noted in your deed.

(Ex. A-15)

Seven Sisters again submitted a Laurel Loop coal mining application on December 22, 1995. Where the application directed the mining operator to attach any notarized written waiver from the current owner in the event that any surface mining activities are to be conducted within 300 feet from any occupied dwelling, Seven Sisters responded that "any variances needed will be submitted with the appropriate bonding increment." (Ex. J-1, Module 4, ¶ 4.3 and A-17) In a Department memorandum, the permit reviewers were aware of the fact that Seven Sisters' application "included 300 foot barrier's [sic] around all dwellings on [the] map and [they] DID NOT bond anything inside of the barrier zone. Module 4 says they will submit releases if needed . . . (NOTE: Diversion ditches, etc. are still shown inside of 300 feet)." (Emphasis in original)(Ex. A-18) The Department accepted the application for review on January 2, 1996. (DEP-PHM ¶ 13; Ex. J-1)

The Department subsequently sent a correction letter to Seven Sisters which addressed

areas that were potentially unsuitable for mining. The letter stated:

> [I]t is the Department's position that no mining will be permitted within 300 feet unless the applicable releases are obtained . . . as this subject will play a very important role in your plans as well as the Department's review of such items as hydrology and the erosion and sedimentation control plan, it is important that we are kept apprised of any and all developments concerning this subject. Note that major revisions will be required if variances are not submitted.

(Ex. A-19, ¶ 2)

In response to the Department's correction letter, Seven Sisters sent a letter identifying corrections and additions to the application. The letter stated, "At this point in time, we are not revising our original E&S Plan due to the fact that the operator is still pursuing the variances for these structures." (Ex. A-20, ¶ 2)

The Department sent a pre-denial letter, dated May 8, 1996, to Seven Sisters indicating that one or more of the responses to the Department's correction letter were inadequate. (Ex. A-21) Included in the list of outstanding deficiencies under the heading "General" was the following: "Please indicate the status of your attempts to obtain dwelling releases. If this does not appear feasible, revise all applicable modules and submit a revised Operations and Erosion and Sedimentation Control Plan." The response to the pre-denial letter from Seven Sisters stated that "Seven Sisters Mining Co., Inc. will be attempting to obtain dwelling releases after the permit is issued or very near to the issuance of a permit." (Ex. A-22)

The permit was issued on January 30, 1998. (Ex. J-3) At that time, Seven Sisters had not yet obtained any dwelling barrier variances. It was not until April of 1999 that Seven Sisters submitted to the Department copies of waivers that were received "thus far" from property

owners. (Ex. A-28, C-4) Pursuant to settlements approved by the Armstrong County Court of Common Pleas and entered as orders of that Court on March 3, 1999 and July 23, 1999, the dwellings on Permit Map Lot Nos. 12 and 10, respectively, were removed Seven Sisters obtained a dwelling barrier waiver from the property owners on Permit Map Lot No. 2 in February of 1999 and a waiver from the property owner on Permit Map Lot No. 7 in April of 1999. Seven Sisters granted a waiver in April of 1999 as the property owner of Permit Map Lot No. 19. (N.T. 351-353; Ex. C-4, C-5)

At the hearing on the merits held on September 3, 1999, Mr. Blose called no witnesses to testify other than himself. He testified in a narrative format and entered numerous documents into evidence.[5] Seven Sisters did not call any witnesses to testify on its behalf. (N.T. 301-201)

Mr. J. Scott Roberts and Mr. Michael D. Gardner testified on behalf of the Department. Mr. Roberts, a Professional Geologist, is the Permits Chief in the Department's Greensburg District Office. He has been the Permits Chief since 1993, and has also served as acting Permits Chief of the Department's Ebensburg District Office and Acting District Mining Manager of the Greensburg District Office. His duties include interpreting and applying the mining regulations. Mr. Roberts was involved with the review of the permit as Mr. Gardner's supervisor and he has been to the site on numerous occasions. (N.T. 296-302; Ex. C-2) About a month before the permit was issued, he was given a special assignment in the Ebensburg District Office. (N.T. 313) The Board accepted Mr. Roberts as an expert in mining and reclamation. (N.T. 301-302)

Mr. Gardner was the lead technical reviewer of the permit application for the Laurel Loop mine. He is a Professional Geologist and Hydrogeologist 2 and has been continuously employed

[5] The parties stipulated to the authenticity of the documents.

by the Department for the past fifteen years. One of Mr. Gardner's tasks as a hydrogeologist is to conduct a technical review of surface mining permit applications submitted to the Department. Mr. Gardner has reviewed approximately one hundred surface mining permits in the last fifteen years and has testified as an expert witness in the field of hydrogeology in proceedings before the Board. (N.T. 85-86, 324-328; J.S. ¶¶ 25-29; Ex. C-3, J-4) The Board recognized Mr. Gardner as an expert in the field of hydrogeology and mining and reclamation.[6] (N.T. 88-89, 329-330)

A joint stipulation in lieu of testimony was submitted at the time of the hearing. The parties agreed that if five named witnesses were called to testify at a hearing, each witness would testify as follows:

> He or she is the owner of an occupied dwelling at Laurel Loop and has no intention of voluntarily granting a dwelling barrier waiver, release or variance or to otherwise permit any mining activities of any kind within three hundred feet of their dwelling or to sell their dwelling in the near future.

Dwelling Barriers

The Department contends that the internal procedure for obtaining a surface mining permit from the Department is a two-step process. (N.T. 304) The first step involves the issuance of a surface mining permit, which demonstrates that the mining operator met the various technical requirements. (N.T. 304) In order to actually mine the parcel, the operator must

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[6] Both during the hearing and in his post-hearing brief, Mr. Blose objected to Mr. Gardner's testimony on the basis that his testimony was not adequately reflected in his report. (Appellant's post-hearing brief at 4-5; N.T. 338-344) After Judge Renwand sustained Mr. Blose's objection, Mr. Gardner did not render any expert opinion concerning whether mining could be feasibly conducted. He offered factual testimony relating to how he assessed whether mining could be feasibly accomplished as part of his review of the application. His testimony pertaining to erosion and sedimentation controls and certain documents was offered to rebut Mr. Blose's testimony on these issues. (N.T. 347-351, 354-361) Mr. Gardner offered proper factual and rebuttal testimony.

obtain an authorization to mine, which demonstrates that the operator has adequately bonded the site, complied with the various barrier restrictions and insurance and licensing requirements.[7] (N.T. 304)

The purpose of a dwelling barrier is to provide a buffer between the mining activities and the dwelling itself. (N.T. 302, 303) An occupied dwelling is a permanent structure inhabited by people. (25 Pa. Code § 86.1; N.T. 303) Dwelling barriers can be waived by the property owner of an occupied dwelling. (25 Pa. Code § 86.102(9)(ii); N.T. 302, 303) According to the Department, waivers are typically submitted to the Department when the authorization to mine is issued rather than when the surface mine permit is issued and it is supposedly not unusual for dwelling barrier waivers to be submitted throughout the life of the permit. (N.T. 305-306) Mr. Gardner testified that surface mining permits showing mining activities within 300 feet of an occupied dwelling have been approved without waivers, but authorizations to mine were not granted unless waivers were submitted. (N.T. 387-388)

The Department's own regulations explicitly provide that a permit application cannot be approved unless the application affirmatively demonstrates and the Department finds, in writing, that the proposed permit area is not within 300 feet from any occupied dwelling unless a waiver has been obtained. 25 Pa. Code § 86.37(a)(5)(v). The Laurel Loop permit approved by the Department is not in conformance with this regulation because proposed mining activities are located within 300 feet from several occupied dwellings which are located on the permit. (Ex. J-

[7] Mr. Roberts testified that the phrase "bonding increment is . . . a slang term for the authorization to mine" since once a bond is filed and approved by the Department, the operator is then authorized to mine the bonded area on the permit. (N.T. 321) The phrase "authorization to mine" does not appear in the regulations.

2b)

"Feasibly Accomplish" Mining Activities

The Department is required to document and support that mining activities can be feasibly accomplished in that proposed mining activities are not permitted within 300 feet of any occupied dwelling, except where variances have been obtained. 25 Pa. Code §§ 86.37(a)(2) and 86(a)(5)(v). The relevant portions of Section 86.37 are as follows:

> (a) A permit or revised permit application will not be approved unless the application affirmatively demonstrates and the Department finds, in writing, on the basis of the information in the application or from information otherwise available, which is documented in the approval, and made available to the applicant, that the following apply:
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> . . .
>
> (2) the applicant has demonstrated that the coal mining activities can be *feasibly accomplished as required by the act and this chapter* under the operation and reclamation plan contained in the application.
>
> . . .
>
> (5) The proposed permit area is not one of the following:
>
> . . .
>
> (v) Within 300 feet (91.44 meters) from any occupied dwelling, except as provided for in Subchapter D [areas unsuitable for mining: §§ 86.101-86.130].

25 Pa. Code § 86.37. (Emphasis added)

The purpose of 25 Pa. Code § 86.37(a)(2) is to ensure compliance with the Surface Mining Conservation and Reclamation Act[8] and its accompanying regulations by requiring mining activities to be feasibly accomplished. (N.T. 306-307) The term "feasibly" is not defined in any relevant statute or regulation. The statutory rules of construction also apply to the construction of regulations. *F.O.P. Lodge No. 5 v. City of Philadelphia*, 590 A.2d 384 (Pa.

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

Cmwlth. 1991). The Board must follow the plain language of a statute where its words are clear and unambiguous. Statutory Construction Act, Act of December 6, 1972, P.L. 1339, 1 Pa. C.S. §§ 1501-1991, at § 1921(b). According to common and approved usage, the term "feasible" means "capable of being done or carried out." *See* Webster's Ninth New Collegiate Dictionary.

Mr. Roberts and Mr. Gardner testified that the "feasibly accomplished" requirement involves a technical review of the site and a look at the practicality of the plans to see whether the operation and reclamation plan can be accomplished. (N.T. 307-308, 328-329) Determining whether the proposed operation can be feasibly accomplished is done throughout the permit application stage. (N.T. 336) The factors the Department considers when assessing whether mining activities could be feasibly accomplished include topography, slopes, soils, geology, hydrology, proposed equipment, amount and location of spoil, location of ponds, revegetation plans and post-mine land uses. (N.T.309-310, 328-329) The sources of information available to the Department when evaluating whether the operation could be feasibly accomplished included the permit application and field visits. (N.T. 336-337) In assessing whether mining could be feasibly accomplished at the Laurel Loop mine, Mr. Gardner considered that the haul road could be constructed and would be stable and not steep, the block cut method of mining which was proposed was appropriate for the site, and the proposed mining equipment was appropriate. (N.T. 344-347)

Mr. Roberts testified that under 25 Pa. Code § 86.37(a)(2), the Department does not specifically consider dwelling barriers when deciding whether the operation and reclamation plan for the entire site could be feasibly accomplished. (N.T. 310) Mr. Roberts testified that the reason for not considering dwelling barriers during the review of surface mine permit

applications under 25 Pa. Code § 86.37(a)(2) is because what is being evaluated are the impacts that would occur if the entire area is affected and mined. (N.T. 310) The Department purports to ensure compliance with the occupied dwelling barrier requirements identified in 25 Pa. Code §§ 86.37 and 86.102 when the authorization to mine is granted. (N.T. 310-311) Mr. Roberts testified that it is appropriate for dwelling barrier waivers to be submitted at the time the authorization to mine is granted because: (1) it is at that time that the operator decides to mine that particular parcel; (2) it is at that time that the Department calculates the amount of bond needed to ensure proper reclamation of the site; and (3) a significant amount of time may pass and a prior owner's waiver at the time the permit was issued would not be valid or binding on a subsequent owner at the time the authorization to mine is granted. (N.T. 304-305) Operators also revise erosion and sedimentation plans when seeking an authorization to mine. (N.T. 311-312, 358)

Additionally, the Department decided that mining was feasible since Seven Sisters was only authorized to conduct mining activities on a portion of the Laurel Loop mine designated as Phase I and no occupied dwelling barriers were located within Phase I. (N.T. 332-335; Ex. C-5) Mr. Gardner testified that mining will not necessarily occur on the entire permit area because: (1) market conditions could preclude the company from wanting to mine any or all of the entire permit; and (2) dwelling barrier waivers might not be received from the current owners. (N.T. 335) Mr. Gardner concluded that mining could be feasibly accomplished regardless of whether the dwelling barriers are waived because he takes into consideration whether the failure to obtain a waiver will present any problems. (N.T. 387) As for the proposed mining activities that exist within the barrier areas, Mr. Gardner testified that activities such as ditches can be moved 100

feet one way or the other without causing any problems. (N.T. 353-354)

Laurel Loop Permit

The Department concluded that "[t]he operation and reclamation plans as described in Modules 6 through 15 and 17 through 23 demonstrate that the proposed surface coal mining activities can be feasibly accomplished in accordance with the act and regulations (86.37(a)(2))." (Ex. A-25, ¶ 2) Based on the information presented in Modules 4, 6, 9, 10 and 13, the Department further concluded that "there are no coal mining activities proposed. . . . within 300 feet of any occupied dwelling . . . except where variances have been approved in accordance with Chapter 86, Subchapter D (86.37(a)(5))." (Ex. A-25, ¶ 5) The Department's conclusions are erroneous. What became obvious during the hearing was that mining activities, such as sedimentation and treatment ponds, topsoil and spoil piles, and diversion ditches and erosion controls, are proposed within 300 feet of dwelling barrier areas for which waivers have not been submitted, contrary to the Department's findings and contrary to 25 Pa. Code § 86.37(a)(5)(v). (N.T. 249-257; Ex. J-2b, A-30)

As the Commonwealth Court noted, "the fact that the Permit prohibits mining within 300 feet of an occupied dwelling has nothing to do with whether the Department complied with the requirements of 25 Pa. Code 86.37(a)(2)." *Blose v. Department of Environmental Protection*, No. 287 C.D. 1999 (Pa. Cmwlth. filed July 1, 1999), n.3. The Department's interpretation of its own regulations is entitled to great weight and will not be disregarded unless clearly erroneous. *Hatchard v. Department of Environmental Resources*, 612 A.2d 621 (Pa. Cmwlth. 1992), *petition for allowance of appeal denied*, 622 A.2d 1378 (Pa. 1993); *Kise v. DER*, 1992 EHB 1580. However, we need not give deference to the Department's construction of a regulation

where the interpretation is contrary to the plain meaning of the language of the regulation. *Tri-State Transfer Co. v. Department of Environmental Protection*, 772 A.2d 1129 (Pa. Cmwlth. 1999). This is the case here.

We disagree with the Department's determination that mining could be feasibly accomplished according to the Laurel Loop mine permit application. In 25 Pa. Code § 86.37(a)(2), the phrase "feasibly accomplished" modifies the subsequent phrase "as required by the act and this chapter," meaning Chapter 86 of the Pennsylvania Code. Therefore, when determining whether mining activities are capable of being done to completion, the Department must heed 25 Pa. Code §§ 86.37(a)(5)(v) and 86.102, which proscribe mining within 300 feet from any occupied dwelling unless a waiver is obtained, and consider whether mining activities are proposed inside dwelling barriers.

Section 102 provides that waivers are granted by the property owner. 25 Pa. Code § 86.102(9)(ii). Section 102 also instructs that: "A valid waiver shall remain in effect against subsequent owners who had actual or constructive knowledge of the existing waiver at the time of purchase." 25 Pa. Code § 86.102(9)(ii)(A).[9] Despite the language of the regulation, the Department proposes that the appropriate time to evaluate the operator's proposed mining area with respect to barriers is after the surface mining permit is issued when the operator seeks authorization to mine. The Department argues that its interpretation is practical due to the fact that an operator may not have decided when or if it will actually mine a particular area and it is

[9] Section 86.102(9)(ii)(B) provides that: "Subsequent owners shall be deemed to have constructive knowledge if the waiver has been properly filed in public property records or if the surface mining operations have proceeded to within the 300 foot (91.44 meters) limit prior to the date of purchase." 25 Pa. Code § 86.102(9)(ii)(B).

possible that property ownership may change during this period which, according to the Department, would mean that a new waiver from the current owner would be needed. The Department's argument fails in light of the plain meaning of 25 Pa. Code § 86.102(9)(ii)(A).

Section 86.103 provides the procedure for implementing the requirements of Section 86.102 during a permit review:

> (a) Upon receipt of a complete permit application for surface mining operations, the Department will review the application to determine whether the surface mining operations are limited or prohibited under § 86.102 (relating to areas where mining is prohibited or limited) on the lands which would be disturbed by the proposed operation.
>
> . . .
>
> (d) When the proposed surface mining operations would be conducted within 300 feet (91.44 meters) measured horizontally of any occupied dwelling, the applicant shall submit **with the application** a written waiver as specified in § 86.102(9).

25 Pa. Code § 86.103.[10] (Emphasis added)

In its supplemental brief, the Department points out that the requirements of 25 Pa. Code § 86.103(a) must be satisfied before 25 Pa. Code § 86.103(d) becomes relevant. According to the Department, subsection (d) is applicable only when the areas where mining is prohibited or limited under 25 Pa. Code § 86.102 "would be disturbed by the proposed operation." 25 Pa. Code § 86.103(a). The Department contends that since Seven Sisters has precluded lands within 300 feet of occupied dwellings from being disturbed by the proposed operation, the permit reviewer did not need to address 25 Pa. Code § 86.103(d). However, proposed mining activities are located on the mining operations map within dwelling barriers where waivers have not been

[10] 25 Pa. Code §§ 86.102 and 86.103 have been amended since the permit in this case was issued. *See* 29 Pa. Bull. 5289, 5296 (1999). However, the changes are not germane to the applicability of those regulations in this matter.

obtained. (Ex. J-2B, A-30) The wording of 25 Pa. Code § 103(d) is explicit—since mining activity is located within dwelling barrier areas located on the permit, waivers should have been submitted with the permit application.

During both the hearing and in the post-hearing briefs, the parties cited to *Thompson Brothers Coal Co., Inc. v. DEP*, 1998 EHB 991, *aff'd* No. 2763 C.D. 1998 (Pa. Cmwlth. filed May 11, 1999) and *Chestnut Ridge Conservancy v. DEP*, 1998 EHB 217, in support of various arguments. All parties, as well as the Board, agree that barrier areas are included within the area of a surface mining permit. In *Thompson Brothers Coal Co., Inc. v. DEP*, 1998 EHB 991, *aff'd* No. 2763 C.D. 1998 (Pa. Cmwlth. filed May 11, 1999), the Department denied a bond release due to the existence of an acid mine discharge on the permit site. The permittee argued that the discharge, which was within a barrier area of the surface mining permit, was not within the scope of the permit and the Department therefore should not have denied the permittee's request for bond release. The Department interpreted the regulations to mean that the permit covers the entire area within the permit borders, but certain sections within the permit--such as the area within 100 feet of a roadway or stream or within 300 feet of a dwelling--may not be physically disturbed unless certain conditions are first met. The Board held that the Department's interpretation of 25 Pa. Code §§ 86.37 and 86.102 was reasonable and that barrier areas are part of the surface mine permit area. 1998 at EHB at 996-999. However, there are two important distinctions between *Thompson Brothers* and the case presently before us. First, the permittee in *Thompson Brothers* did not propose any mining activities inside the barrier areas. Second, the issue in *Thompson Brothers* was whether a permittee could avoid responsibility under § 316 of the Clean Streams Law, 35 P.S. § 619.316, for treatment of an acid mine discharge which

occurred within the borders of its permit but fell within a barrier area.[11]

Mr. Blose contends that *Chestnut Ridge Conservancy v. DEP*, 1998 EHB 217, provides support for concluding that a permit may not be issued prior to obtaining waivers when mining activities are proposed inside barrier areas. Mr. Blose's reliance on *Chestnut Ridge Conservancy* is misplaced--he asserts that the Board revoked the permit in that case because a single dwelling barrier blocked the access road into the mine site. The decision in that case was actually based on the Board's finding that the permittee had failed to demonstrate that it had a legal means of access to the permit site due to a property dispute involving the access road. The Board determined that the Department erred in issuing the permit without adequately considering the fact that the permittee had not demonstrated that it had the right to build a haul road to allow access to the site. *Chestnut Ridge Conservancy v. DEP*, 1998 EHB 358. The permit issuance resulted in a specific violation of the Department's noncoal mining regulation since the operator had no way to enter or to leave the site. As a result, it was not reasonable to conclude that mining could be accomplished. *See also Jefferson County Commissioners v. DEP*, EHB Docket No. 96-061-MG (Opinion issued July 16, 1999); *Bentley v. DEP*, EHB Docket No. 98-058-MG (Opinion issued June 28, 1999).

The regulations in the present matter clearly indicate that mining feasibility must be demonstrated prior to the issuance of a permit. The regulations also clearly specify that mining activity is prohibited inside an occupied dwelling barrier unless a waiver is obtained prior to permit issuance. Section 86.37(a)(2) applies to permit issuance and makes no mention of the

[11] Section 316 of the Clean Streams Law, 35 P.S. § 619.316, imposes strict liability on a permittee for treating pollution which occurs within its permit area. *Thompson Bros.*, 1998 EHB at 1001.

authorization to mine. 25 Pa. Code § 86.37(a)(2). Mining activities that are prohibited cannot be "feasibly accomplished." The fact that Phase I of the permit contains no dwelling barriers is not relevant since 25 Pa. Code § 86.37(a)(2) applies to the entire permit. The Department's interpretation in this instance led to the issuance of a permit which included at least seven dwelling barriers inside the permit area. Proposed mining activities existed within dwelling barrier areas. According to the joint stipulation in lieu of testimony, the owners of the five remaining dwelling barriers have no intention of granting a waiver. Without waivers, Seven Sisters' mining application and the detailed mining operations map is a mere theoretical plan.[12]

During the review of the Laurel Loop mine permit application, the Department clearly was troubled by the fact that mining activities were proposed within dwelling barriers. This is verified by the letters from the Department to Seven Sisters requesting waivers for such mining activities. The Department's argument that it will not approve mining in these areas of the permit until waivers are obtained or the mining plan is altered would seem to protect the public. Unfortunately, such a procedure is neither authorized by the statute nor its accompanying regulations; in fact, it contravenes explicit regulatory language. Therefore, if the Department believes that its alternative is advantageous, which it very well may be, the Department should

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[12] The concurring opinion of Judge Labuskes states with considerable justification that we need not reach the question of whether mining is feasible under 25 Pa. Code § 86.37(a)(2) in view of our holding that the permit was improperly issued without requiring that the necessary waivers from homeowners be submitted with the permit application as required by 25 Pa. Code §§ 86.37(a)(5)(v), 86.102(9) and 86.103. We hold that the failure to meet this requirement also means that mining is not feasible in the sense that regulatory requirements cannot be met because the Commonwealth Court's Opinion requires us to consider that question. In other contexts, we may limit the concept of "feasibility" to whether or not mining is feasible from a technical engineering point of view.

amend its regulations before the appropriate venue--the Environmental Quality Board.[13]

The Board voided a solid waste management permit under circumstances similar to those found in the present appeal. *New Hanover Township v. DEP*, 1996 EHB 668, *aff'd* 2081 C.D. 1996 (Pa. Cmwlth. filed August 19, 1997). In that case, the Board determined that the permit had been issued without adequate information as to the final design of the proposed landfill since a number of conditions had been placed in the permit which essentially authorized construction and operation of a landfill which had yet to be designed. The Department has a duty to approve permits which are based upon a final, approvable design. 1996 EHB 668. The Board has held that where the effect of conditions and interpretations is to produce an illegal action, they cannot be sanctioned. *Id.* at 686 (citing *County of Schuylkill v. DER*, 1989 EHB 1241, 1267). Judge Myers, writing for the Board, stated that although the Department's interpretation of its regulations is certainly entitled to deference, this cannot be used "as a convenient broom to sweep illegalities and abuses of discretion under an administrative rug." *New Hanover Township*, 1996 EHB at 686. In the present appeal, the Department, under the guise of regulatory interpretation, is clearly contravening the language of its regulations. This we simply cannot endorse.

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[13] Lastly, the issue of monitoring private wells was raised during the hearing on the merits. Monitoring of an existing private water supply well is not a surface mining activity under the Department's regulations. (25 Pa. Code § 87.1; N.T. 313-314) The primary purpose for requiring the monitoring of existing private water wells is to protect the private water supply. An individual property owner's refusal to permit an existing private water supply well to be monitored would not prevent the issuance of a permit. However, the property owner's refusal would make it difficult to detect any impacts to the private water supply well as a result of mining. A dwelling barrier will not preclude water monitoring since the landowner only has to grant access to the private water supply well so that a sample can be obtained. (N.T. 361-363)

Conclusion

Because the Department erred in finding that surface coal mining activities can be feasibly accomplished where mining activities are proposed within 300 feet of occupied dwellings located on the permit area for which waivers have not been obtained, we find it appropriate to sustain the Appellant's appeal and to suspend and remand the permit to the Department. Seven Sisters may be able to amend its mining plan so as to comply with the Department's regulations. Accordingly, we make the following:

CONCLUSIONS OF LAW

1. Mr. Blose, as a third-party appellant challenging a permit issued by the Department, bears the burden of proof in this appeal. 25 Pa. Code § 1021.101(c)(2); *James E. Wood v. DER*, 1994 EHB 347.

2. Mr. Blose established by a preponderance of the evidence that the Department abused its discretion in issuing the permit by acting contrary to law. 25 Pa. Code § 1021.101(a); *See Oley Township v. DEP*, 1996 EHB 1098.

3. The Department's interpretation of its own regulations is entitled to great weight and will not be disregarded unless clearly erroneous. *Hatchard v. Department of Environmental Resources*, 612 A.2d 621 (Pa. Cmwlth. 1992), *petition for allowance of appeal denied*, 622 A.2d 1378 (Pa. 1993); *Kise v. DER*, 1992 EHB 1580. Here, we need not give deference to the Department's construction of a regulation where the interpretation is clearly contrary to the plain meaning of the language of the regulation. Statutory Construction Act, Act of December 6, 1972, P.L. 1339, 1 Pa. C.S. §§ 1501-1991, at § 1921(b); *Tri-State Transfer Co. v. Department of Environmental Protection*, 772 A.2d 1129 (Pa. Cmwlth. 1999).

4. Dwelling barrier areas where mining activities are prohibited are located within the boundaries of a surface mining permit and may not be affected by mining activities unless a waiver is obtained from the owner of the dwelling prior to the issuance of the permit. 25 Pa. Code §§ 86.37(a)(5) and 86.102(9); *Thompson Brothers Mining Co., Inc. v. DEP*, 1998 EHB 991, *aff'd* No. 2763 C.D. 1998 (Pa. Cmwlth. filed May 11, 1999).

5. When determining whether mining activities can be feasibly accomplished, the Department must look to 25 Pa. Code §§ 86.37(a)(5)v) and 86.102.

6. Where mining activities are proposed within dwelling barrier areas, waivers must be submitted with the permit application according to the plain language of the regulations. 25 Pa. Code §§ 86.102(9)(ii)(A) and 86.103.

7. The Department abused its discretion by determining that Seven Sisters' proposed coal mining activities at the Laurel Loop mine can be "feasibly accomplished" pursuant to 25 Pa. Code § 86.37(a)(2) and should not have granted the permit since mining activities are proposed within 300 feet of occupied dwellings located on the permit area for which waivers have not been obtained.

Accordingly, we enter the following:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PETER BLOSE	:	
	:	
v.	:	**EHB Docket No. 98-034-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, and SEVEN SISTERS MINING COMPANY, INC.	:	

ORDER

AND NOW, this 7th day of March, 2000, Surface Mining Permit No. 0390113 is **suspended** and the appeal in the above-captioned matter is **remanded** to the Department of Environmental Protection for reconsideration consistent with this Adjudication. Jurisdiction is relinquished.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

Thomas W. Renwand

THOMAS W. RENWAND
Administrative Law Judge
Member

EHB Docket No. 98-034-R

MICHELLE A. COLEMAN
Administrative Law Judge
Member

MICHAEL L. KRANCER
Administrative Law Judge
Member

DATED: **March 7, 2000**

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

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jlp

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

PETER BLOSE	:	
	:	
v.	:	**EHB Docket No. 98-034-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and SEVEN SISTERS MINING CO., Permittee	:	

CONCURRING OPINION OF ADMINISTRATIVE LAW JUDGE BERNARD A. LABUSKES, JR.

I concur with the majority's conclusion that the Department erred by failing to require the applicant to demonstrate compliance with 25 Pa. Code §§ 86.37(a)(5)(v), 86.102(9), and 86.103 before issuing the Laurel Loop permit. In my view, however, it is not necessary to consider the dwelling-barrier issue in the context of the feasibility analysis mandated by 25 Pa. Code § 86.37(a)(2).

ENVIRONMENTAL HEARING BOARD

Bernard A. Labuskes

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOARD

NORTH AMERICAN REFRACTORIES CO.	:	
	:	
v.	:	**EHB Docket No. 99-253-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: March 13, 2000**

OPINION AND ORDER ON MOTION TO DISMISS

By George J. Miller, Administrative Law Judge

Synopsis:

The Board grants a motion to dismiss an appeal of a letter to an appellant which declines to include an air quality source as an "inactive" source in a Title V permit. The Department has not yet issued the Title V permit which is still under review, therefore the letter is not a final action of the Department and not appealable to the Board.

OPINION

Before the Board is a motion to dismiss filed by the Department of Environmental Protection, which seeks dismissal of the an appeal filed by North American Refractories Co. (Appellant), seeking review of a letter from the Department concerning the status of two tunnel kilns under the Air Pollution Control Act.[1] The Department urges dismissal of the appeal on the basis that it does not represent a final action of the Department. For the reasons that follow, we agree.

The Appellant owns and operates a refractory brick manufacturing facility located in

[1] Act of January 8, 1960, P.L. (1959) 2119, *as amended,* 35 P.S. §§ 4001- 4106.

Millcreek Township, Lebanon County. The facility includes, among other equipment, two tunnel kilns used to produce refractory shapes, designated as No. 1 kiln and No. 2 kiln. No. 1 kiln was shut down in September 1998. No. 2 kiln has been out of operation since spring 1997.

The Appellant is in the process of securing a single Title V operating permit[2] for the multiple air pollution sources of the facility. As part of this process, the Appellant requested that the Department include No. 1 and No. 2 kilns as "inactive sources" in the Title V permit. On November 17, 1999, the Department responded via letter that the kilns could not be designated as inactive because the Appellant had failed to submit timely deactivation/maintenance plans as required by the Department's regulations. As a consequence, any reactivation of the kilns would be subject to the more stringent regulatory requirements of a new source. To date, the Department has not issued a Title V permit for the Appellant's facility.[3]

The Department argues that the appeal of the November 17, 1999 letter should be dismissed, because it is not a final action of the Department but merely states the Department's opinion concerning the status of the kilns as part of the Title V permitting process. In response the Appellant contends that the letter is a final action of the Department because it will not reconsider its position.

It is axiomatic that the Board has jurisdiction over appeals from *final* actions of the Department which adversely affect an appellant. *Borough of Ford City v. DER,* 1991 EHB 169; *see also* Rule 1021.2(a) (defining "action"). The Board recently addressed a determination by the Department similar to that which faces us here in *United Refining Co. v. DEP*, EHB Docket No. 99-187-L (Opinion issued February 15, 2000). In that case the Department sent an applicant a

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[2] Title V refers to Title V of the Clean Air Act Amendments of 1990, 42 U.S.C. §§ 7661-61f.

[3] The Department and the Appellant are also in litigation before the Board concerning the timeliness of the Appellant's application for an emission reduction credit for the No. 2 kiln at EHB Docket No. 99-199-MG. The Appellant has also applied for an emission reduction credit for the No. 1 kiln which the Department is currently reviewing.

letter stating that its air plan approval application was incomplete because the project was subject to new source review. The Board rejected the argument that the letter constituted a final action because the Department's position concerning the applicability of new source review would have "dramatic consequences" and that the Department "has given every indication that it will not change its mind." The Board concluded that the letter was one of the myriad "provisional, interlocutory 'decisions' made by DEP during the processing of an application." Slip op. at 2 (*quoting Phoenix Resources, Inc. v. DER*, 1991 EHB 1681, 1684). Accordingly, the Board would not review the Department's determination until the permitting process was completed.

There is no significant difference between the facts of *United Refining* and those that face us here. The Department's November 1999 letter simply informed the Appellant that it would not include the kilns as "inactive sources" for the purposes of the Title V permit as one of the many determinations that the Department makes in the processing of any permit application. Air quality permit applications are particularly complex, and the involvement of the Board prior to the issuance of a final permit would make that process even more complex. The Department's motion to dismiss is granted.[4]

We therefore enter the following:

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[4] The Appellant filed a motion to strike portions of the affidavit of Ronald Davis, P.E., Chief of the Engineering Services Section of the Department's Air Quality Program, which was appended to the Department's motion in support of certain factual allegations. The Appellant contends that certain statements concerning the Department's regulations are in the nature of legal conclusions and were improperly included in the affidavit.

While we did not rely on any of the allegations concerning the regulations relevant to the merits of the substantive claims of the Appellant in granting the Department's motion, we note that the inclusion of citations to regulations upon which the Department's technical staff relied in reaching their decisions is not necessarily improperly included in an affidavit. In fact, in its response to this motion the Department states that the citations were not offered for legal conclusions, but for the stated basis of the Department's opinion. The Board is certainly not bound to any erroneous interpretation of regulation by the Department. We therefore decline to strike this material from Mr. Davis' affidavit.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

NORTH AMERICAN REFRACTORIES CO.	:	
	:	
v.	:	**EHB Docket No. 99-253-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 13th day of March, 2000, the Department of Environmental Protection's motion to dismiss in the above-captioned appeal is hereby **GRANTED**, and the appeal of North American Refractories Co. is **DISMISSED**.

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: **March 13, 2000**

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

For the Commonwealth, DEP:
Craig Lambeth, Esquire
Southcentral Region

For Appellant:
Daniel P. Trocchio, Esquire
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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOAR

RICHARD SOLOMON and SOLOMON INDUSTRIES, INC.	:	
v.	:	**EHB Docket No. 96-138-C**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: March 13, 2000**

OPINION AND ORDER ON MOTION FOR SUMMARY JUDGMENT

By The Board

Synopsis:

A motion for summary judgment in an appeal of a permit renewal denial and closure order issued under the Solid Waste Management Act, Act of July 7, 1980, P.L. 380, *as amended*, 35 P.S. §§ 6018.101-6018.1003 (Solid Waste Management Act) is granted in part and denied in part.

The Department has established that permittee engaged in particular violations set forth in a consent order and agreement, and a consent assessment of civil penalty; whether the permittee engaged in additional violations asserted by the Department and whether those violations that are established justify the Department's actions involve disputed questions of material fact so that summary judgment is not appropriate on those issues. There are also disputed issues of fact regarding whether the Department acted with improper motive.

The Department's motion is granted with respect to Appellants' *res judicata*, improper notice, estoppel, taking, contractual impairment, and timeliness arguments. The Department's motion is denied in all other respects.

OPINION

This appeal concerns a June 21, 1996, letter from the Department of Environmental Protection (Department) to Richard Solomon (Solomon), the president and chief executive officer of Solomon Industries, Inc. (Industries), regarding a solid waste transfer facility (facility) Industries owns in Wilkes-Barre, Luzerne County. The letter informed Solomon that the Department denied Industries' application for a permit renewal (renewal), and the letter ordered Industries to close the facility in accordance with section 279.262 of the Department's regulations, 25 Pa. Code § 279.262.

On June 25, 1996, Solomon and Industries (collectively, Appellants) filed a notice of appeal challenging the Department's decision to deny the renewal and issue the closure order. We have issued one prior decision in this appeal, an opinion and order denying a petition for supersedeas filed by Appellants. *See Solomon v. DEP,* 1996 EHB 989.

The Department filed a motion for summary judgment, together with a supporting memorandum of law. In its motion, the Department argues that it is entitled to summary judgment on each of the objections that Appellants raised concerning the closure order and permit denial. Appellants filed a response and memorandum of law in opposition arguing that the Department is entitled to summary judgment on none of its objections.

The Board may grant summary judgment where the pleadings, depositions, answers to interrogatories, and admissions of record--and affidavits, if any--show that no genuine issue exists as to any material fact and that the moving party is entitled to judgment as a matter of law. Pa. R.C.P. 1035.2; *County of Adams v. DEP,* 687 A.2d 1222 (Pa. Cmwlth. 1997). When

deciding motions for summary judgment, we view the record in the light most favorable to the nonmoving party and will enter summary judgment only where the right is clear and free from doubt. *Ducjai v. Dennis*, 656 A.2d 102 (Pa. 1995).

I. The Department lacks the authority to deny Industries' permit renewal application and issue the closure order under the Solid Waste Management Act, the Clean Streams Law, or the Department's regulations.

In its motion for summary judgment, the Department argues that it had the authority to deny Industries' renewal and issue the closure order under sections 503(c) and 503(d) of the Solid Waste Management Act, 35 P.S. §§ 6018.503(c) and 6018.503(d), based on Appellants' compliance history as a matter of material fact. Appellants dispute that the facts support the violations and argue that the doctrine of *res judicata* bars the Department from taking the actions appealed from.

A. Which violations has the Department established in its motion?

In its motion, the Department argues that the closure order and denial of the renewal were justified based on Industries' compliance history. The Department points to numerous alleged violations in support of its position. Although Industries insists that it engaged in none of the alleged violations, the Department has established that many--but not all--of the violations occurred.

1. VIOLATIONS THE DEPARTMENT HAS ESTABLISHED

i. violations that Industries allegedly admitted in a July 10, 1989, consent order and agreement

The Department states in its motion that Industries engaged in "nearly 200" operational violations at its facility from March 1985 through December 1988. In support of its position, the Department points to a July 10, 1989, consent order and agreement, where--according to the Department--Industries admitted to the violations. However, in their response and memorandum in opposition to the Department's motion, Appellants deny that Industries engaged in the

violations alleged and deny that Industries admitted the violations in the July 10, 1989, consent order and agreement.

The July 10, 1989, consent order and agreement between the Department and Industries lists 162 separate acts of Industries violating the Solid Waste Management Act, the Department's solid waste regulations, and Industries' permit conditions. Those violations are summarized in Appendix I of this opinion. In many instances, the acts or omissions alleged violate both regulations and permit conditions, or multiple provisions of either one. Although Appellants now seek to deny the violations, Industries admitted in the July 10, 1989, consent order and agreement that the findings in the consent order were true and correct. (Supersedeas Ex. C-8, p. 1.)[1] Since Industries did so, the consent order is an admission and is adequate support for the averments in the Department's motion.

Where a motion for summary judgment has been made and properly supported, a party opposing summary judgment must show by specific facts in the depositions, answers to interrogatories, admissions, or affidavits that there is a genuine issue for trial. *Marks v. Tasman*, 589 A.2d 205, 206 (Pa. 1991). Therefore, Appellants could not rest upon a mere denial, but had to provide support for their denial of the facts in the Department's motion. Pa. R.C.P. 1035.3(a). Since Appellants failed to do so, the Department has established that the violations listed in the July 10, 1989, consent order and agreement occurred for purposes of its motion.

ii. violations that Industries admitted in the November 5, 1991, consent assessment of civil penalty (November 5, 1991, consent assessment)

[1] Both the Department and Appellants incorporated certain documents admitted at the supersedeas hearing into their motion or response by reference. Those exhibits are identified as "Supersedeas Ex. ___," while exhibits attached to the motion or response are identified as "Motion Ex. ___." Commonwealth exhibits are identified as "Ex. C-___," while Appellant exhibits are labeled "Ex. P-___." "N.T..___" denotes references to the transcript in the supersedeas hearing.

The Department avers that Solomon admitted to other violations as part of a November 5, 1991, consent assessment. In support of its position, the Department cites paragraph H of the November 5, 1991, consent assessment, where--the Department contends--Industries admitted that it engaged in 11 separate violations of the Department's regulations, the July 10, 1989, consent order and agreement, or the provisions of its solid waste permit. However, in their response, Appellants deny that they engaged in the violations alleged and deny that they admitted them in the November 5, 1991, consent assessment. Appellants failed to provide any support for their position, however.

The November 5, 1991, consent assessment lists 11 separate acts or omissions by Industries which violate the Department's regulations, the July 10, 1989, consent order and agreement, or the provisions of Industries' solid waste permit. (Supersedeas Ex. P-4, ¶ H.) Those violations are summarized at Appendix II of this opinion. Although Appellants now seek to deny the violations, Industries expressly admitted that it "caused or allowed" them in paragraph H of the November 5, 1991, consent assessment. Thus, paragraph H is an admission, the allegations concerning the violations made in the Department's motion are properly supported, and Appellants could not rebut them with a mere denial. Since Appellants failed to provide any support for their denial, the Department has established that the violations listed in the November 5, 1991, consent assessment occurred for purposes of its motion.

2. OTHER CLAIMED VIOLATIONS

The Department's justification for its failure to renew the permit and the issuance of the closure order was based on certain other violations which it claims occurred after the 1991 consent assessment. Appellants dispute that these violations occurred. The evidence with respect to these asserted violations indicates only that there are disputed issues of fact as to

whether and to what extent they occurred. We will resolve these issues following a hearing on the merits rather than discussing the conflicting evidence here.

B. Does the doctrine of *res judicata* prevent the Department from considering any of the violations established in its motion as part of Industries' compliance history?

In their memorandum in opposition to the Department's motion, Appellants argue that, under the doctrine of *res judicata*, the Department cannot consider any violation listed in the July 10, 1989, consent order and agreement; a March 13, 1991, consent adjudication and order (March 13, 1991, consent order); or the November 5, 1991, consent assessment (collectively, "the consent documents"). The Department insists that *res judicata* does not apply here because the consent documents are not final judgments upon the merits by a tribunal of competent jurisdiction. In *Balent v. City of Wilkes-Barre*, 669 A.2d 309 (Pa. 1995), the Supreme Court summarized the law on *res judicata* as follows:

> *Res judicata*, or claim preclusion, is a doctrine by which a former adjudication bars a later action on all or part of the claim which was the subject of the first action. Any final, valid judgment on the merits by a court of competent jurisdiction precludes any future suit between the parties of their privies on the same cause of action. *Res judicata* applies not only to claims actually litigated, but also to claims which could have been litigated during the first proceeding if they were part of the same cause of action.

669 A.2d at 313 (citations omitted).

Claim preclusion does not apply here because the potential claims resolved by the consent documents are different from the claim involved in this appeal. For *res judicata* to apply, four conditions must exist:

1. Identity of the thing sued upon or for;
2. Identity of the cause of action;
3. Identity of the persons or parties to the action;
4. Identity of the quality of or capacity of the parties suing or being sued.

Patel v. Workmen's Compensation Appeal Board (Sauquoit Fibers Co.), 488 A.2d 1177, 1179 (Pa. Cmwlth. 1985). In the consent documents, Appellants admitted to particular violations and agreed to pay a penalty or undertake certain action.

This appeal, however, involves a different claim. Appellants challenge the Department's decision to issue them a closure order and deny their application for a permit renewal. While Appellants' previous violations are relevant in determining whether the Department erred by denying the permit renewal and issuing the closure order, the claim here is not identical to those resolved in the consent documents, as is required for claim preclusion.

II. Was the Department estopped from making the legal and factual determinations that served as the basis for the closure order and denial of the renewal?

In their notice of appeal, Appellants allege that the Department erred by denying the renewal and issuing the closure order because the Department was estopped from making the legal and factual findings upon which the order was based. Specifically, Appellants contend that they detrimentally relied on official statements of Department personnel that were inconsistent with the findings in the order.

The Department argues in its legal memorandum that, under the terms of the July 10, 1989, consent order and agreement and November 5, 1991, consent assessment, it could consider the violations admitted in those documents as part of Industries' compliance history. However, Appellants argue in their memorandum in opposition that the Department agreed not to consider those violations. According to Appellants, the July 10, 1989, consent order and agreement and November 5, 1991, consent assessment are contracts, and the Department violated those contracts by considering the violations.

While Appellants contend that the Department agreed consent order and agreements that it would not consider the violations in the July 10, 1989, consent order and agreement or November 5, 1991, consent assessment when determining Industries' compliance history, Appellants failed to cite any provisions of those documents in support of that proposition. Instead, they point to testimony of persons involved in the formulation of the July 10, 1989,

consent order and agreement and November 5, 1991, consent assessment and consent order and agreements, and they argue that we should consider parol evidence because the documents are "ambiguous."[2]

We conclude that the Department is not estopped from considering this past conduct because the agreement does not bar the Department from this action and any reliance on claimed oral representations was not reasonable under the circumstances. The Commonwealth Court succinctly summarized the doctrine of equitable estoppel in *Hauptman v. Department of Transportation*, 429 A.2d 1207, 1210 (Pa. Cmwlth. 1981):

> The underlying premise of the estoppel cases is that the doctrine of estoppel *may* be applied to a Commonwealth agency, in cases in which it has intentionally or negligently misrepresented some material fact, knowing or having reason to know that another person will justifiably rely on that misrepresentation, and where that other person has been induced to act to his detriment because he did justifiably rely on that misrepresentation.

Appellants suggest that the Department should be estopped from considering the violations resolved in the consent order and consent assessment because Industries only entered into the consent order and agreements because it relied on representations by Department personnel that the Department would not subsequently consider the violations as part of Appellants' compliance history. However, even assuming that Department personnel made the representations alleged, the Department would not be estopped because Appellants reliance on those representations would not have been reasonable.

Neither the November 5, 1991, consent assessment nor the July 10, 1989, consent order and agreement preclude the Department from considering the violations in subsequent permitting decisions. The November 5, 1991, consent assessment provides that "the Department only

[2] Appellants refer to a March 13, 1991, consent adjudication and order during the course of this argument. However, that document was neither admitted in the supersedeas hearing nor incorporated in the response to the motion. Significantly, Appellants' memorandum in opposition neglects to cite where in the record the March 13, 1991, consent order and agreement appears.

waives its right to bring an action for civil penalties.... Nothing herein shall be construed to imply that the Department waives any other rights which it may have concerning said violations...." (Supersedeas Ex. P-4, p. 6, ¶ T.) Although the July 10, 1989, consent order and agreement does not contain an express reservation, it does provide:

> This Consent Order and Agreement shall constitute the entire integrated agreement of the parties. No prior or contemporaneous communications ... shall be admissible for purposes of determining the meaning or extent of any provisions herein in any litigation or any other proceeding.

(Supersedeas Ex. C-8, p. 22, ¶ 16.)

Given the language in the consent order and agreements, Industries would have been unreasonable to assume that the Department would not consider the violations--even if Department personnel had previously assured Industries that the Department would do so. The November 5, 1991, consent assessment expressly provides that the Department was only waiving its right to bring an action for civil penalties. Therefore, Industries would have been unreasonable to assume that, in exchange for signing the agreement, the Department would also waive its right to consider the violations as part of Appellants' compliance history.

Similar reasoning applies to the July 10, 1989, consent order and agreement. Although that document provides that it constitutes the entire integrated agreement of the parties, yet says nothing that would imply that the Department waived its right to consider the violations as part of Appellants' compliance history. Given the language in the document, Industries would have been unreasonable to assume that, by signing it, the Department agreed that it would not consider the violations in the document as part of Industries' compliance history.

III. Did the Department's actions constitute a "taking" without just compensation?

In their notice of appeal, Appellants argue that the Department deprived Industries of all economically viable use of its property interest in the facility and its permit without substantially

advancing any legitimate state objective, working a "taking" of Appellants' property without just compensation in violation of the 14th Amendment and Article I, section 10, of the Pennsylvania Constitution.

In its motion, the Department argues that it did not take Appellants' property because the permit denial and closure order did not result in a physical invasion to Industries' property, they did not deny Appellants all use of Solomon's property, and they were necessary to protect a legitimate state interest and not unduly oppressive. In their response and memorandum in opposition, however, Appellants argue that:

1. They "invested at least . . . $1,200,000 to develop the Transfer Station with the expectation that they could operate their business in compliance with the terms of their permit and the pertinent laws and regulations of the Commonwealth"; (Memorandum in opposition, p. 51)

2. The Department's action "is a blatant attempt to deny Appellants the benefit of its [sic] general contracts, the benefit and property interest in its contract with the City of Wilkes-Barre and the beneficial use of its property"; (Memorandum in opposition, p. 52.)

3. The Department has destroyed Appellants' reasonable expectations to use its entire permitted capacity to recoup its investments.

There is no merit to Appellants' "takings" argument. The "takings" clauses in the United States and Pennsylvania Constitutions are virtually identical. Both provide that "private property may not be taken" by the state "without just compensation." Pa. Const. art. I, § 10, and U.S. Const. amend. V. To determine whether a "taking" has occurred under the Pennsylvania Constitution, Pennsylvania courts apply the same test used to determine whether a taking has occurred under the United States Constitution. *Mock v. Department of Environmental Resources*, 623 A.2d 940, 947 n.10 (Pa. Cmwlth. 1993), *aff'd* 667 A.2d 212 (Pa.1995), *cert. denied* 517 U.S. 1216 (1996).

An individual claiming that the government has taken his property through regulation must first establish that he has a compensable property interest. *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003 (1992). The Department's action here relates to the permit for the

facility, not the facility itself. As the Commonwealth Court recently explained in *Tri-State Transfer Company v. Department of Environmental Protection*, 722 A.2d 1129 (Pa. Cmwlth. 1999), a permit for a solid waste transfer facility is not "property" for purposes of the "takings" clauses.

IV. Did the Department impair Appellants' contractual obligations?

Appellants allege in their notice of appeal that the denial and closure order violated Article I, section 10, of the U.S. Constitution and Article I, section 17, of the Pennsylvania Constitution because the Department's action substantially impairs Appellants' rights under preexisting contracts without advancing a legitimate state objective. In its memorandum in support, the Department argues that, even if its action interfered with Appellants' contract rights, the action did not violate the contracts clauses because the interference would result from a valid exercise of the police power and would result from regulation not legislation.

Article I, section 10 of the United States Constitution provides: "No state shall ... pass any ... law impairing the obligation of contracts." Article 1, section 17 of the Pennsylvania Constitution contains an almost identical guarantee: "No ... law impairing the obligation of contracts ... shall be passed." While we have been unable to find any case law expressly addressing the issue, the protection against impairment of contracts afforded by the Pennsylvania Constitution appears to be no broader than that afforded by the U.S. Constitution. Even where Pennsylvania courts confront impairment of contracts claims brought under the Pennsylvania Constitution, in addition to the U.S. Constitution, they rely heavily on the U.S. Supreme Court's case law construing the U.S. Constitution. *See, e.g., Empire Sanitary Landfill v. Department of Environmental Resources,* 684 A.2d 1047, 1059 (Pa. 1996)

There is no merit to Appellants' impairment of contracts challenge. The contracts clauses only prohibit *legislative* action interfering with contracts. In *Central Land Co. Of West Virginia v. Laidley*, 159 U.S. 103 (1895), the United States Supreme Court wrote:

> In order to come within the provision of the Constitution of the United States, which declares that no state shall pass any law impairing the obligations of

> contracts, not only must the obligation of contract be impaired, but it must have been impaired by some act *of the legislative power* of the state....

159 U.S. at 109 (40 L. Ed. 91, 94) (emphasis added). Thus, where the actions of executive and administrative departments of the government interfere with contracts, they do not ordinarily violate the contracts clause. *New Orleans Waterworks Co. v. Louisiana Sugar-Refining Co.*, 125 U.S. 18, 30 (1888). And, even where legislative action affects existing contract rights, the action violates the contract clause only if the impairment to the contract outweighs the necessity of the legislative action and the benefit to the public good. *Empire Sanitary Landfill*, 684 A.2d at 1059.

Since the Department's decision to issue the closure order and deny the renewal permit is an administrative action--not a legislative one--the action does not violate the contracts clause of either the Pennsylvania or the U.S. Constitutions. Furthermore, even if it were a legislative action, the public interest in ensuring compliance with reasonable solid waste regulation would more than offset any resulting interference with Appellants' contracts.

V. Did the Department fail to act on Industries' permit application within the time frame required by law, and, if so, what effect does that have on the Department's denial of the application?

In their notice of appeal, Appellants allege that the Department erred by denying the permit renewal application because it failed to reach its decision within the time required by law. (Notice of appeal ¶ 14(b).) However, in its memorandum in support of summary judgment, the Department argues that Appellants were not entitled to a permit renewal and its review of the permit renewal application took longer than expected because it had to investigate allegations of additional Industries violations that arose as it reviewed the application. Appellants argue in their memorandum in opposition that the Department erred by denying the permit renewal because it failed to make its decision within six months, as required by 25 Pa. Code § 271.203(a)(2).

Here again, the Department is entitled to summary judgment. Whether the Department rendered its decision within six months, as required by § 271.203(a)(2), is irrelevant for purposes of Appellants' appeal. To prevail in an appeal of a Department permitting decision, the permit

applicant must not only show that the Department erred when it decided on the application; he must show that he is entitled to the permit he seeks. *Sanner Brothers Coal Co. v. DER*, 1987 EHB 202; *Al Hamilton Contracting Co. v. DER*, 1992 EHB 1458. We have previously held that failure to act on a permit application under section 271.203(a)(2) does not amount to a deemed approval of the application. *See Grand Central Sanitary Landfill, Inc. v. DER*, 1993 EHB 357, 374. Therefore, the fact that the Department failed to act on the permit application within six months does not show that Industries was entitled to the permit renewal it seeks.

VI. Did the Department have to provide Appellants with notice and an opportunity for a hearing before taking its actions?

In their notice of appeal, Appellants argue that the denial and closure order deprived Appellants of their "liberty" to do business without notice or an opportunity to be heard, in violation of the due process guarantees of the 14th Amendment to the U.S. Constitution and Article I, Section 1, of the Pennsylvania Constitution. Appellants also argue that the Department violated the Administrative Agency Law, Act of June 4, 1945, P.L. 1388, *as amended*, 2 Pa. C.S.A. § 101- 754 (Administrative Agency Law), and section 4 of the Environmental Hearing Board Act, 35 P.S. § 7514, for the same reason. The Department argues that Appellants' due process rights are adequately protected by their right to appeal to the Board, and that the Board's appeal process comports with the Administrative Agency Law and the Environmental Hearing Board Act.

The Department did not deprive Appellants of their liberty without providing them a meaningful opportunity to be heard. Even assuming that Appellants have the requisite "liberty" interest to bring them within the due process guarantees they cite, Appellants have a full and fair opportunity to raise their claims in their appeal before the Board. Indeed, Appellants' only dissatisfaction with their appeal to the Board appears to be that it comes after the Department has acted. That alone, however, does not raise due process concerns. In *Hudson v. Palmer*, 468 U.S. 517 (1984), the Supreme Court noted that "intentional deprivations do not violate [due process] provided [that] adequate state postdeprivation remedies are available. [For] intentional, as for

negligent deprivations . . . the State's action is not complete until and unless it provides or refuses to provide a suitable postdeprivation remedy." 468 U.S. at 533. The remedy of appealing the Department's action to the Board is certainly adequate within this light. Indeed, both the Commonwealth Court and the Board have repeatedly held that the fact that an appeal to the Board is a postdeprivation remedy does not raise due process concerns. *See, e.g., Commonwealth v. Derry Township, Westmoreland County,* 314 A.2d 874, 877-878 (Pa. Cmwlth. 1973) *aff'd* 351 A.2d 606 (Pa. 1976); *Commonwealth, Department of Environmental Resources v. Borough of Carlisle*, 330 A.2d 293, 297 (Pa. Cmwlth. 1974); *Empire Sanitary Landfill, Inc. v. DER*, 1991 EHB 102, 119-120; and *Krause v. DEP*, 1997 EHB 1108, 1113. Section 4(c) of the Environmental Hearing Board Act, 35 P.S. § 7514(c), provides that, while the Department may take an action without a hearing beforehand, the action becomes final only after affected persons have an opportunity to appeal to the Board. And where an appellant might be irreparably harmed by the Department's action before the Board could rule on his appeal, the Board's rules provide for a supersedeas and even a temporary supersedeas. *See* 25 Pa. Code §§ 1021.76-1021.79.

Similarly, Appellants cannot prevail on their claims that the Administrative Agency Law and section 4 of the Environmental Hearing Board Act, 35 P.S. § 7514, required that the Department hold a hearing before denying the permit or issuing the closure order. The only provision of the Administrative Agency Law that suggests that the Department might have to hold a hearing before taking an action is section 504 of the Administrative Agency Law, 2 Pa. C.S.A. § 504. It provides, "No adjudication of a Commonwealth agency shall be valid as to any party unless he shall have been afforded reasonable notice of a hearing and an opportunity to be heard." However, subsection 4(c) of the Environmental Hearing Board Act provides, "The department may take an action initially *without regard to 2 Pa. C.S.A. Ch. 5 Subch. A*, but no action of the department adversely affecting a person shall be final as to that person until the person has had the opportunity to appeal the action to the board. . . ." (Emphasis added). Since section 504 of the Administrative Agency Law falls within "2 Pa. C.S.A. Ch. 5 Subch. A" (and

is, in any event, inconsistent with the language of section 4 of the Environmental Hearing Board Act), section 504 does not apply to Department actions.

It should also be apparent, based on the foregoing discussion, that the Department's action does not violate section 4 of the Environmental Hearing Board Act. Appellants contend that, because they were required to comply with the Department's actions even prior to the Board hearing their appeal, the Department's actions were "final" before Appellants had an opportunity to appeal, in violation of subsection 4(c). But Appellants are mistaken. The fact that they have a right to challenge a Department action under subsection 4(c) does not necessarily mean that they need not comply with the action in the meantime. Indeed, were we to construe section 4(c) in the manner Appellants suggest, the supersedeas provisions in subsection 4(d) of the Environmental Hearing Board Act, 35 P.S. § 7514(d) would be nonsensical.[3] (If an appellant were not ordinarily required to comply with a Department action while his appeal was pending, he would never have to request a supersedeas.) The rules of statutory construction provide that, when ascertaining legislative intent, one must presume that the General Assembly did not intend an absurd result. 1 Pa. C.S.A. § 1922(1).

VII. Was the Department's action reasonably related to legitimate state interests?

In their notice of appeal, Appellants argue that the Department violated their right to substantive due process under the 14th Amendment to the U.S. Constitution and Article I, section 1, of the Pennsylvania Constitution because the closure order and renewal denial are unrelated to legitimate state interests. In its motion for summary judgment, the Department argues that Appellants cannot prevail on this issue because the state's inherent police powers include the power to regulate matters affecting the health, safety, and general welfare of its citizens. In their response and memorandum in opposition, Appellants argue that the Department's action is unrelated to a legitimate state interest because the Department's decision

[3] Subsection 4(d) provides that "[n]o appeal shall act as an automatic supersedeas" and lists the factors the Board will consider when deciding whether to grant a supersedeas.

to deny the permit renewal was based, at least in part, on Appellants' refusal to agree to a settlement concerning the alleged violations involving the Gleason property. In support of their position, Appellants point to testimony from William Tomayko, a program manager with the Department, stating that one of the reasons the Department denied Appellants' permit renewal was Appellants' failure to settle these violations. (Supersedeas transcript, p. 359.) Appellants also point to testimony from Solomon stating that Department officials told him that the permit renewal would be issued if Industries agreed to pay a $50,000 fine and sign a consent order. (Supersedeas transcript, p. 359.)

Whether state regulation in the area of social and economic activity violates the due process clause turns on whether a rational relationship exists between the state action and a legitimate state interest. *Novak v. Unemployment Compensation Board of Review*, 457 A.2d 610, 612 (1983); *Gambone v. Commonwealth*, 101 A.2d 634, 636-637 (Pa. 1954). We have previously held that the regulation of solid waste is a legitimate state interest. *See Empire Sanitary Landfill v. DER*, 1991 EHB 102, 121. Therefore, to withstand Appellants' challenge, the Department need only show that the permit denial and closure order is rationally related to the regulation of solid waste.

A rational relationship clearly exists between the two. Since the state has an interest in regulating solid waste, it follows that the state also has an interest in ensuring compliance with its solid waste regulations. Considering a permittee's compliance history when making subsequent permitting decisions is a rational means of ensuring that solid waste facilities comply with the relevant regulations.

Similar reasoning applies to the closure order. Since the state has the power to regulate processing and disposal of solid waste in the first instance, it follows that the state also has the power to ensure that a facility which loses its solid waste permit properly disposes of any waste remaining at the facility.

The Department, therefore, could have considered Industries' compliance history when deciding whether to deny Industries' permit renewal application. However, whether the

Department's decision was in fact based on Industries' compliance history—or was based instead on Industries' refusal to agree to a consent order and assessment for the alleged Gleason violations—remains at issue. The Third Circuit Court of Appeals has stated that

> allegations that the government's actions in a particular case were motivated by bias, bad faith, or improper motive, such as partisan political reasons or personal reasons unrelated to the merits of the plaintiff's application, may support a finding of substantive due process violation.

Midnight Sessions, Ltd. v. City of Philadelphia, 945 F.2d 667, 682 (3d Cir. 1991), *cert denied,* 503 U.S. 984 (1992).[4]

The testimony Appellants point to from the supersedeas hearing is sufficient to thwart the Department's motion for summary judgment on the issue of retaliatory motive. As noted earlier in this opinion, when deciding motions for summary judgment, we must view the record in the light most favorable to the nonmoving party. The testimony Appellants point to in support of their motion could conceivably be sufficient at hearing to support their allegations concerning abuse of discretion. Therefore, we deny this aspect of the Department's motion for summary judgment.

VIII. Did the Department's action result from selective application of the law, retaliatory animus, or other unlawful considerations?

In their notice of appeal, Appellants argue that the renewal denial and closure order violate equal protection provisions of the 14th Amendment to the U.S. Constitution and Article I of the Pennsylvania Constitution because the Department's action resulted from selective application of the law. The Department disputes the selective enforcement claim in its memorandum in support and notes that Appellants could not identify a single facility treated

[4] Significantly, *Midnight Sessions* was also a case in which a frustrated permit applicant alleged that its permit was denied for reasons other than the merits of its application (although in *Midnight Sessions* the permit at issue was a dance hall permit).

differently under similar circumstances. (*See* memorandum in support, pp. 40-41.) In support of its position, the Department points to paragraphs 25 and 26 of Appellants' May 22, 1997, answers to interrogatories. (Motion Ex. K, pp. 17-18.) There, Appellants state that they were still trying to identify the facilities and would supplement their answer when they did so. They did not supplement their answer, however.

In their response and memorandum in opposition, Appellants argue that Industries was subject to disparate treatment because the Department issued the permit denial and closure order without first giving Industries an opportunity to contest the alleged violations upon which the order was based. Specifically, Appellants contend that the Department should have issued Industries notices of violation for the alleged violations before denying the renewal or issuing the closure order. According to Appellants, the Department treated them in a "disparate" manner because it sometimes issues notices of violations to others. The testimony Appellants point to from the supersedeas hearing is sufficient to thwart the Department's motion for summary judgment on the issue of differential treatment. The standard for reviewing Appellants' equal protection claims under the Pennsylvania Constitution and United States Constitution is identical: Equal protection analysis under the Pennsylvania Constitution tracks the analysis used by the United States Supreme Court when reviewing equal protection claims under the 14th Amendment to the United States Constitution. *James v. Southeastern Pennsylvania Transportation Authority*, 477 A.2d 1302 (Pa. 1984). That analysis is directed at every form of state action--legislative, executive, and judicial. *Shelley v. Kraemer,* 334 U.S. 1 (1948). And it not only proscribes the enactment of discriminatory laws, but also the discriminatory enforcement of laws that are not discriminatory on their face. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

The testimony Appellants point to in support of their motion could conceivably be sufficient to support their allegations concerning selective enforcement at hearing. Therefore, we deny this aspect of the Department's motion for summary judgment.

IX. Conclusion

The Department and Appellants disagree on one further matter. In its motion and memorandum in support, the Department argues that, notwithstanding the fact that it failed to prove all the violations alleged as its basis for denying Appellants permit renewal, the Board could substitute its discretion for that of the Department, and grant summary judgment to the Department, if we determine that the closure order and denial of the renewal would have been justified even if they were based solely on the violations established in its motion.

Appellants disagree. They argue that the most we could grant the Department is partial summary judgment if the Department fails to prove any of the violations which allegedly served as the basis for its action. According to Appellants, the Board "may not speculate as to whether the officials at DEP would have reached the same conclusion and issued the decision if they relied upon one-third or two-thirds of the alleged violations as opposed to 100% thereof." (Memorandum in opposition, p. 19.)

The Board has the power of *de novo* review. Where the Department abuses its discretion, the Board may substitute its own. *Warren Sand & Gravel Co., Inc. v. Department of Environmental Resources*, 341 A.2d 556, 565 (Pa. Cmwlth. 1975). However, the fact that the Board *may* substitute its discretion for that of the Department does not mean that it *must*. The Commonwealth Court has held that, even where the Board may substitute its discretion for that of the Department under *Warren Sand,* the Board is not required to do so. *See Western Hickory Coal Co. v. Department of Environmental Resources*, 485 A.2d 877, 878-879 (Pa. Cmwlth. 1984).

However, the question of whether the Department's actions were reasonably tailored to Appellants' violations can be determined only after a hearing on the merits. Therefore, we shall proceed to a hearing on the merits on those issues remaining in the appeal: whether Industries engaged in the alleged violations that the Department failed to establish in its motion for summary judgment; and whether the closure order or denial of the renewal resulted from selective application of the law, retaliatory animus, or other unlawful considerations.

Accordingly, we enter the following order:

APPENDIX I

Violations listed in the July 10, 1989, consent order and agreement

Date	Conduct	Violation	Established by
3/22/85	improper salvaging	25 Pa. Code § 75.21(o)(1)	Supersedeas Ex. C-8, ¶ F
3/22/85	bulky wastes not controlled properly	25 Pa. Code § 75.27(l)	Supersedeas Ex. C-8, ¶ F
3/22/85	areas of building (and loading area) not properly maintained	25 Pa. Code §§ 75.27(l), 75.27(e)	Supersedeas Ex. C-8, ¶ F
3/22/85	baler in use while push pits operating	permit condition no. 11	Supersedeas Ex. C-8, ¶ F
6/5/85	bulky wastes not controlled properly	25 Pa. Code § 75.27(l)	Supersedeas Ex. C-8, ¶ G
6/5/85	effluents not properly collected and disposed of	25 Pa. Code § 75.27(r); permit condition no. 3	Supersedeas Ex. C-8, ¶ G
6/5/85	areas of building not properly maintained	25 Pa. Code § 75.27(l); permit condition no. 2	Supersedeas Ex. C-8, ¶ G
6/5/85	plumbing not properly maintained, floors have standing water	25 Pa. Code § 75.27(f); permit condition no. 3	Supersedeas Ex. C-8, ¶ G
10/8/95 and/or 11/5/85	areas of building not properly maintained	25 Pa. Code § 75.27(l); permit condition no. 2	Supersedeas Ex. C-8, ¶ H
10/8/95 and/or 11/5/85	plumbing not properly maintained, floors have standing water	25 Pa. Code § 75.27(f); permit condition no. 3	Supersedeas Ex. C-8, ¶ H
10/8/95 and/or 11/5/85	baler in use while push pits operating	25 Pa. Code § 75.27(a); permit condition no. 11	Supersedeas Ex. C-8, ¶ H
2/11/86	building not properly maintained	25 Pa. Code § 75.27(l); permit condition no. 2	Supersedeas Ex. C-8, ¶ H
2/11/86	storage facilities not adequate and secure	25 Pa. Code § 75.27(e)	Supersedeas Ex. C-8, ¶ H
2/11/86	operation not in accordance with permit conditions and approved design plans	25 Pa. Code § 75.27(m) and 610(2) of the Solid Waste Management Act	Supersedeas Ex. C-8, ¶ H
6/16/87	inadequate procedure for minimizing fire hazard	25 Pa. Code §§ 75.21(1)(1) through 75.21(1)(3)	Supersedeas Ex. C-8, ¶ J.1
6/16/87	areas of the building/equipment not maintained	25 Pa. Code § 75.27(l); permit condition no. 2	Supersedeas Ex. C-8, ¶ J.2
6/16/87	unloading area not adequate and secure	25 Pa. Code § 75.27(e)	Supersedeas Ex. C-8, ¶ J.3
6/16/87	solid waste not baled and removed from facility at end of day	permit condition no. 2	Supersedeas Ex. C-8, ¶ J.4
6/16/87	waste storage facility was not adequate and secure	25 Pa. Code § 75.27(h)	Supersedeas Ex. C-8, ¶ J.5
6/16/87	operation not in accordance with permit conditions and approved design plans	25 Pa. Code § 75.27(m)	Supersedeas Ex. C-8, ¶ J.6
6/18/87	operation not in accordance with permit conditions and approved design plans	25 Pa. Code § 75.27(m)	Supersedeas Ex. C-8, ¶ J.6
6/18/87	waste storage facility was not adequate and secure	25 Pa. Code § 75.27(h)	Supersedeas Ex. C-8, ¶ J.5
6/18/97	solid waste not baled and removed from facility at end of day	permit condition no. 2	Supersedeas Ex. C-8, ¶ J.4

Date	Conduct	Violation	Established by
6/18/87	areas of the building/equipment not maintained	25 Pa. Code § 75.27(l); permit condition no. 2	Supersedeas Ex. C-8, ¶ J.2
6/18/87	unloading area not adequate and secure	25 Pa. Code § 75.27(e)	Supersedeas Ex. C-8, ¶ J.3
7/9/87	inadequate procedure for minimizing fire hazard	25 Pa. Code §§ 75.21(1)(1) through 75.21(1)(3)	Supersedeas Ex. C-8, ¶ J.1
7/9/87	areas of the building/equipment not maintained	25 Pa. Code § 75.27(l); permit condition no. 2	Supersedeas Ex. C-8, ¶ J.2
7/9/87	unloading area not adequate and secure	25 Pa. Code § 75.27(e)	Supersedeas Ex. C-8, ¶ J.3
7/9/87	solid waste not baled and removed from facility at end of day	permit condition no. 2	Supersedeas Ex. C-8, ¶ J.4
7/9/87	waste storage facility was not adequate and secure	25 Pa. Code § 75.27(h)	Supersedeas Ex. C-8, ¶ J.5
7/9/87	operation not in accordance with permit conditions and approved design plans	25 Pa. Code § 75.27(m)	Supersedeas Ex. C-8, ¶ J.6
7/9/87	residue and effluent from baler and the drainage of storage pad and system were blocked and inoperable	permit condition no. 3	Supersedeas Ex. C-8, ¶ J.7
7/14/97	operation not in accordance with permit conditions and approved design plans	25 Pa. Code § 75.27(m)	Supersedeas Ex. C-8, ¶ J.6
7/14/97	waste storage facility was not adequate and secure	25 Pa. Code § 75.27(h)	Supersedeas Ex. C-8, ¶ J.5
7/14/87	solid waste not baled and removed from facility at end of day	permit condition no. 2	Supersedeas Ex. C-8, ¶ J.4
7/14/87	inadequate procedure for minimizing fire hazard	25 Pa. Code §§ 75.21(1)(1) through 75.21(1)(3)	Supersedeas Ex. C-8, ¶ J.1
7/17/87	inadequate procedure for minimizing fire hazard	25 Pa. Code §§ 75.21(1)(1) through 75.21(1)(3)	Supersedeas Ex. C-8, ¶ J.1
7/17/87	areas of the building/equipment not maintained	25 Pa. Code § 75.27(l); permit condition no. 2	Supersedeas Ex. C-8, ¶ J.2
7/17/87	unloading area not adequate and secure	25 Pa. Code § 75.27(e)	Supersedeas Ex. C-8, ¶ J.3
7/17/87	solid waste not baled and removed from facility at end of day	permit condition no. 2	Supersedeas Ex. C-8, ¶ J.4
7/17/87	waste storage facility was not adequate and secure	25 Pa. Code § 75.27(h)	Supersedeas Ex. C-8, ¶ J.5
7/17/87	operation not in accordance with permit conditions and approved design plans	25 Pa. Code § 75.27(m)	Supersedeas Ex. C-8, ¶ J.6
7/20/87	failure to use effective vector control	25 Pa. Code § 75.21(p); permit condition no. 4	Supersedeas Ex. C-8, ¶ J.8
7/20/87	malodor present on and off the facility	25 Pa. Code § 75.28(a); permit condition no. 2	Supersedeas Ex. C-8, ¶ J.9.
7/20/87	operation not in accordance with permit conditions and approved design plans	25 Pa. Code § 75.27(m)	Supersedeas Ex. C-8, ¶ J.6
7/20/87	waste storage facility was not adequate and secure	25 Pa. Code § 75.27(h)	Supersedeas Ex. C-8, ¶ J.5
7/20/87	solid waste not baled and removed from facility at end of day	permit condition no. 2	Supersedeas Ex. C-8, ¶ J.4
7/20/87	inadequate procedure for minimizing fire hazard	25 Pa. Code §§ 75.21(1)(1) through 75.21(1)(3)	Supersedeas Ex. C-8, ¶ J.1
7/20/87	areas of the building/equipment not maintained	25 Pa. Code § 75.27(l); permit condition no. 2	Supersedeas Ex. C-8, ¶ J.2

Date	Conduct	Violation	Established by
7/20/87	unloading area not adequate and secure	25 Pa. Code § 75.27(e)	Supersedeas Ex. C-8, ¶ J.3
6/30/88	tipping areas not clean and waste not stored in containers	25 Pa. Code § 279.201(b)(2); permit condition no. 2	Supersedeas Ex. C-8, ¶ M.1
6/30/88	commercial, demolition, and unapproved wastes accepted at facility	25 Pa. Code § 279.201(b)(2); permit condition no. 10	Supersedeas Ex. C-8, ¶ M.2
6/30/88	upper push pit connected to a baler rather than a container/compacter	25 Pa. Code § 279.201(b)(2); permit condition no. 11	Supersedeas Ex. C-8, ¶ M.3
6/30/88	constructing building and altering push pits without notification to Department or permit	25 Pa. Code § 279.201(b)(2); permit condition no. 15	Supersedeas Ex. C-8, ¶ M.4
6/30/88	sign did not meet content and information standards	25 Pa. Code § 279.211(a)	Supersedeas Ex. C-8, ¶ M.5
6/30/88	access roads did not meet design criteria	25 Pa. Code § 279.213(a) through (g)	Supersedeas Ex. C-8, ¶ M.6
6/30/88	solid waste spread outside of loading containers and waste, including segregated wastes, not stored in containers	25 Pa. Code § 279.201(b)(2); 279.216(f); permit condition no. 2	Supersedeas Ex. C-8, ¶ M.7
6/30/88	areas of the building and containment structure not clean	25 Pa. Code §§ 279.201(b)(2) and 279.217(a); and permit condition no. 2	Supersedeas Ex. C-8, ¶ M.8
6/30/88	areas of the building and containment structure not clean	25 Pa. Code §§ 279.201(b)(2) and 279.217(a); and permit condition no. 2	Supersedeas Ex. C-8, ¶ M.8
6/30/88	surface water not managed	25 Pa. Code §§ 279.232(1) through 279.232(3)	Supersedeas Ex. C-8, ¶ M.9
6/30/88	adequate fire and safety equipment not available	25 Pa. Code §§ 279.242(a) through 279.242(d)	Supersedeas Ex. C-8, ¶ M.10
6/30/88	failure to implement effective vector control and prevent public nuisances	25 Pa. Code §§ 279.201(b)(2); 279.219(a) and 279.219(b); and permit condition no. 4	Supersedeas Ex. C-8. ¶ M.14
6/30/88	approved contingency plan not at facility and not implemented	25 Pa. Code §§ 279.243(a) through 279.243(c)	Supersedeas Ex. C-8, ¶ M.11
9/6/88	surface water not managed	25 Pa. Code §§ 279.232(1) through 279.232(3)	Supersedeas Ex. C-8, ¶ M.9
9/6/88	access roads did not meet design criteria	25 Pa. Code § 279.213(a) through (g)	Supersedeas Ex. C-8, ¶ M.6
9/6/88	sign did not meet content and information standards	25 Pa. Code § 279.211(a)	Supersedeas Ex. C-8, ¶ M.5
9/6/88	upper push pit connected to a baler rather than a container/compacter	25 Pa. Code § 279.201(b)(2); permit condition no. 11	Supersedeas Ex. C-8, ¶ M.3
9/6/88	failure to implement effective vector control and prevent public nuisances	25 Pa. Code §§ 279.201(b)(2); 279.219(a) and 279.219(b); and permit condition no. 4	Supersedeas Ex. C-8. ¶ M.14
9/20/88	failure to implement effective vector control and prevent public nuisances	25 Pa. Code §§ 279.201(b)(2); 279.219(a) and 279.219(b); and permit condition no. 4	Supersedeas Ex. C-8. ¶ M.14
9/20/88	upper push pit connected to a baler rather than a container/compacter	25 Pa. Code § 279.201(b)(2); permit condition no. 11	Supersedeas Ex. C-8, ¶ M.3
9/20/88	sign did not meet content and information standards	25 Pa. Code § 279.211(a)	Supersedeas Ex. C-8, ¶ M.5
9/20/88	access roads did not meet design criteria	25 Pa. Code § 279.213(a) through (g)	Supersedeas Ex. C-8, ¶ M.6
9/20/88	surface water not managed	25 Pa. Code §§ 279.232(1) through 279.232(3)	Supersedeas Ex. C-8, ¶ M.9
10/5/88	surface water not managed	25 Pa. Code §§ 279.232(1) through 279.232(3)	Supersedeas Ex. C-8, ¶ M.9
10/5/88	access roads did not meet design criteria	25 Pa. Code § 279.213(a) through (g)	Supersedeas Ex. C-8, ¶ M.6
10/5/88	sign did not meet content and information standards	25 Pa. Code § 279.211(a)	Supersedeas Ex. C-8, ¶ M.5

Date	Conduct	Violation	Established by
10/5/88	commercial, demolition, and unapproved wastes accepted at facility	25 Pa. Code § 279.201(b)(2); permit condition no. 10	Supersedeas Ex. C-8, ¶ M.2
10/5/88	tipping areas not clean and waste not stored in containers	25 Pa. Code § 279.201(b)(2); permit condition no. 2	Supersedeas Ex. C-8, ¶ M.1
10/5/88	upper push pit connected to a baler rather than a container/compacter	25 Pa. Code § 279.201(b)(2); permit condition no. 11	Supersedeas Ex. C-8, ¶ M.3
10/5/88	constructing building and altering push pits without notification to Department or permit	25 Pa. Code § 279.201(b)(2); permit condition no. 15	Supersedeas Ex. C-8, ¶ M.4
10/5/88	solid waste spread outside of loading containers and waste, including segregated wastes, not stored in containers	25 Pa. Code § 279.201(b)(2); 279.216(f); permit condition no. 2	Supersedeas Ex. C-8, ¶ M.7
10/5/88	areas of the building and containment structure not clean	25 Pa. Code §§ 279.201(b)(2) and 279.217(a); and permit condition no. 2	Supersedeas Ex. C-8, ¶ M.8
10/5/88	failure to prevent fugitive dust emissions	25 Pa. Code §§ 279.201(b)(2), 279.218(a), and 279.218(b); and permit condition no. 5	Supersedeas Ex. C-8, ¶ M.13
10/5/88	failure to implement effective vector control and prevent public nuisances	25 Pa. Code §§ 279.201(b)(2); 279.219(a) and 279.219(b); and permit condition no. 4	Supersedeas Ex. C-8. ¶ M.14
10/5/88	plumbing not maintained and floors not well drained	25 Pa. Code §§ 279.201(b)(2) and 279.217(c); permit condition no. 3	Supersedeas Ex. C-8, ¶ M.15
10/5/88	litter not controlled and collected	25 Pa. Code §§ 279.221(a) through 279.221(c)	Supersedeas Ex. C-8, ¶ M.17
10/5/88	permanent area markers and benchmarks not adequately installed, posted or maintained	25 Pa. Code § 279.211(b)	Supersedeas Ex. C-8, ¶ M.18
10/5/88	wheel curbs and tie downs not utilized at the unloading pits	25 Pa. Code § 279.216(c)	Supersedeas Ex. C-8, ¶ M.21
10/5/88	attendant or signs to direct vehicles not present	25 Pa. Code § 279.216(d)	Supersedeas Ex. C-8, ¶ M.22
10/5/88	proper barriers not installed and access not controlled when attendant not present	25 Pa. Code §§ 279.212(a) through 279.212(c)	Supersedeas Ex. C-8, ¶ M.19
10/5/88	internal communications or alarm system inoperable	25 Pa. Code § 279.242(a)(1)	Supersedeas Ex. C-8. ¶ M.23
10/5/88	operation not conducted in an enclosed building or as approved by the Department	25 Pa. Code § 279.215(a)	Supersedeas Ex. C-8, ¶ M.20
10/26/88	operation not conducted in an enclosed building or as approved by the Department	25 Pa. Code § 279.215(a)	Supersedeas Ex. C-8, ¶ M.20
10/26/88	proper barriers not installed and access not controlled when attendant not present	25 Pa. Code §§ 279.212(a) through 279.212(c)	Supersedeas Ex. C-8, ¶ M.19
10/26/88	wheel curbs and tie downs not utilized at the unloading pits	25 Pa. Code § 279.216(c)	Supersedeas Ex. C-8, ¶ M.21
10/26/88	attendant or signs to direct vehicles not present	25 Pa. Code § 279.216(d)	Supersedeas Ex. C-8, ¶ M.22
10/26/88	permanent area markers and benchmarks not adequately installed, posted or maintained	25 Pa. Code § 279.211(b)	Supersedeas Ex. C-8, ¶ M.18
10/26/88	litter not controlled and collected	25 Pa. Code §§ 279.221(a) through 279.221(c)	Supersedeas Ex. C-8, ¶ M.17
10/26/88	failure to implement effective vector control and prevent public nuisances	25 Pa. Code §§ 279.201(b)(2); 279.219(a) and 279.219(b); and permit condition no. 4	Supersedeas Ex. C-8. ¶ M.14
10/26/88	plumbing not maintained and floors not well drained	25 Pa. Code §§ 279.201(b)(2) and 279.217(c); permit condition no. 3	Supersedeas Ex. C-8, ¶ M.15

Date	Conduct	Violation	Established by
10/26/88	failure to prevent fugitive dust emissions	25 Pa. Code §§ 279.201(b)(2), 279.218(a), and 279.218(b); and permit condition no. 5	Supersedeas Ex. C-8, ¶ M.13
10/26/88	areas of the building and containment structure not clean	25 Pa. Code §§ 279.201(b)(2) and 279.217(a); and permit condition no. 2	Supersedeas Ex. C-8, ¶ M.8
10/26/88	solid waste spread outside of loading containers and waste, including segregated wastes, not stored in containers	25 Pa. Code § 279.201(b)(2); 279.216(f); permit condition no. 2	Supersedeas Ex. C-8, ¶ M.7
10/26/88	constructing building and altering push pits without notification to Department or permit	25 Pa. Code § 279.201(b)(2); permit condition no. 15	Supersedeas Ex. C-8, ¶ M.4
10/26/88	upper push pit connected to a baler rather than a container/compacter	25 Pa. Code § 279.201(b)(2); permit condition no. 11	Supersedeas Ex. C-8, ¶ M.3
10/26/88	tipping areas not clean and waste not stored in containers	25 Pa. Code § 279.201(b)(2); permit condition no. 2	Supersedeas Ex. C-8, ¶ M.1
10/26/88	commercial, demolition, and unapproved wastes accepted at facility	25 Pa. Code § 279.201(b)(2); permit condition no. 10	Supersedeas Ex. C-8, ¶ M.2
10/26/88	sign did not meet content and information standards	25 Pa. Code § 279.211(a)	Supersedeas Ex. C-8, ¶ M.5
10/26/88	access roads did not meet design criteria	25 Pa. Code § 279.213(a) through (g)	Supersedeas Ex. C-8, ¶ M.6
10/26/88	surface water not managed	25 Pa. Code §§ 279.232(1) through 279.232(3)	Supersedeas Ex. C-8, ¶ M.9
11/14/88	surface water not managed	25 Pa. Code §§ 279.232(1) through 279.232(3)	Supersedeas Ex. C-8, ¶ M.9
11/14/88	access roads did not meet design criteria	25 Pa. Code § 279.213(a) through (g)	Supersedeas Ex. C-8, ¶ M.6
11/14/88	sign did not meet content and information standards	25 Pa. Code § 279.211(a)	Supersedeas Ex. C-8, ¶ M.5
11/14/88	commercial, demolition, and unapproved wastes accepted at facility	25 Pa. Code § 279.201(b)(2); permit condition no. 10	Supersedeas Ex. C-8, ¶ M.2
11/14/88	tipping areas not clean and waste not stored in containers	25 Pa. Code § 279.201(b)(2); permit condition no. 2	Supersedeas Ex. C-8, ¶ M.1
11/14/88	upper push pit connected to a baler rather than a container/compacter	25 Pa. Code § 279.201(b)(2); permit condition no. 11	Supersedeas Ex. C-8, ¶ M.3
11/14/88	constructing building and altering push pits without notification to Department or permit	25 Pa. Code § 279.201(b)(2); permit condition no. 15	Supersedeas Ex. C-8, ¶ M.4
11/14/88	solid waste spread outside of loading containers and waste, including segregated wastes, not stored in containers	25 Pa. Code § 279.201(b)(2); 279.216(f); permit condition no. 2	Supersedeas Ex. C-8, ¶ M.7
11/14/88	areas of the building and containment structure not clean	25 Pa. Code §§ 279.201(b)(2) and 279.217(a); and permit condition no. 2	Supersedeas Ex. C-8, ¶ M.8
11/14/88	failure to implement effective vector control and prevent public nuisances	25 Pa. Code §§ 279.201(b)(2); 279.219(a) and 279.219(b); and permit condition no. 4	Supersedeas Ex. C-8. ¶ M.14
11/14/88	plumbing not maintained and floors not well drained	25 Pa. Code §§ 279.201(b)(2) and 279.217(c); permit condition no. 3	Supersedeas Ex. C-8, ¶ M.15
11/14/88	litter not controlled and collected	25 Pa. Code §§ 279.221(a) through 279.221(c)	Supersedeas Ex. C-8, ¶ M.17
11/14/88	permanent area markers and benchmarks not adequately installed, posted or maintained	25 Pa. Code § 279.211(b)	Supersedeas Ex. C-8, ¶ M.18
11/14/88	proper barriers not installed and access not controlled when attendant not present	25 Pa. Code §§ 279.212(a) through 279.212(c)	Supersedeas Ex. C-8, ¶ M.19

Date	Conduct	Violation	Established by
11/14/88	operation not conducted in an enclosed building or as approved by the Department	25 Pa. Code § 279.215(a)	Supersedeas Ex. C-8, ¶ M.20
12/15/88	operation not conducted in an enclosed building or as approved by the Department	25 Pa. Code § 279.215(a)	Supersedeas Ex. C-8, ¶ M.20
12/15/88	litter not controlled and collected	25 Pa. Code §§ 279.221(a) through 279.221(c)	Supersedeas Ex. C-8, ¶ M.17
12/15/88	permanent area markers and benchmarks not adequately installed, posted or maintained	25 Pa. Code § 279.211(b)	Supersedeas Ex. C-8, ¶ M.18
12/15/88	plumbing not maintained and floors not well drained	25 Pa. Code §§ 279.201(b)(2) and 279.217(c); permit condition no. 3	Supersedeas Ex. C-8, ¶ M.15
12/15/88	failure to implement effective vector control and prevent public nuisances	25 Pa. Code §§ 279.201(b)(2); 279.219(a) and 279.219(b); and permit condition no. 4	Supersedeas Ex. C-8. ¶ M.14
12/15/88	areas of the building and containment structure not clean	25 Pa. Code §§ 279.201(b)(2) and 279.217(a); and permit condition no. 2	Supersedeas Ex. C-8, ¶ M.8
12/15/88	solid waste spread outside of loading containers and waste, including segregated wastes, not stored in containers	25 Pa. Code § 279.201(b)(2); 279.216(f); permit condition no. 2	Supersedeas Ex. C-8, ¶ M.7
12/15/88	constructing building and altering push pits without notification to Department or permit	25 Pa. Code § 279.201(b)(2); permit condition no. 15	Supersedeas Ex. C-8, ¶ M.4
12/15/88	upper push pit connected to a baler rather than a container/compacter	25 Pa. Code § 279.201(b)(2); permit condition no. 11	Supersedeas Ex. C-8, ¶ M.3
12/15/88	tipping areas not clean and waste not stored in containers	25 Pa. Code § 279.201(b)(2); permit condition no. 2	Supersedeas Ex. C-8, ¶ M.1
12/15/88	commercial, demolition, and unapproved wastes accepted at facility	25 Pa. Code § 279.201(b)(2); permit condition no. 10	Supersedeas Ex. C-8, ¶ M.2
12/15/88	access roads did not meet design criteria	25 Pa. Code § 279.213(a) through (g)	Supersedeas Ex. C-8, ¶ M.6
12/15/88	surface water not managed	25 Pa. Code §§ 279.232(1) through 279.232(3)	Supersedeas Ex. C-8, ¶ M.9
11/14/88	wheel curbs and tie downs not utilized at the unloading pits	25 Pa. Code § 279.216(c)	Supersedeas Ex. C-8, ¶ M.21
11/14/88	attendant or signs to direct vehicles not present	25 Pa. Code § 279.216(d)	Supersedeas Ex. C-8, ¶ M.22
12/15/88	wheel curbs and tie downs not utilized at the unloading pits	25 Pa. Code § 279.216(c)	Supersedeas Ex. C-8, ¶ M.21
12/15/88	attendant or signs to direct vehicles not present	25 Pa. Code § 279.216(d)	Supersedeas Ex. C-8, ¶ M.22
12/15/88	proper barriers not installed and access not controlled when attendant not present	25 Pa. Code §§ 279.212(a) through 279.212(c)	Supersedeas Ex. C-8, ¶ M.19
12/29/88	surface water not managed	25 Pa. Code §§ 279.232(1) through 279.232(3)	Supersedeas Ex. C-8, ¶ M.9
12/29/88	access roads did not meet design criteria	25 Pa. Code § 279.213(a) through (g)	Supersedeas Ex. C-8, ¶ M.6
12/29/88	commercial, demolition, and unapproved wastes accepted at facility	25 Pa. Code § 279.201(b)(2); permit condition no. 10	Supersedeas Ex. C-8, ¶ M.2
12/29/88	tipping areas not clean and waste not stored in containers	25 Pa. Code § 279.201(b)(2); permit condition no. 2	Supersedeas Ex. C-8, ¶ M.1
12/29/88	upper push pit connected to a baler rather than a container/compacter	25 Pa. Code § 279.201(b)(2); permit condition no. 11	Supersedeas Ex. C-8, ¶ M.3
12/29/88	constructing building and altering push pits without notification to Department	25 Pa. Code § 279.201(b)(2); permit condition no. 15	Supersedeas Ex. C-8, ¶ M.4

Date	Conduct	Violation	Established by
	or permit		
12/29/88	solid waste spread outside of loading containers and waste, including segregated wastes, not stored in containers	25 Pa. Code § 279.201(b)(2); 279.216(f); permit condition no. 2	Supersedeas Ex. C-8, ¶ M.7
12/29/88	areas of the building and containment structure not clean	25 Pa. Code §§ 279.201(b)(2) and 279.217(a); and permit condition no. 2	Supersedeas Ex. C-8, ¶ M.8
12/29/88	operating beyond hours set forth in the permit	25 Pa. Code § 279.201(b)(2) and permit condition no. 12	Supersedeas Ex. C-8, ¶ M.12
12/29/88	failure to implement effective vector control and prevent public nuisances	25 Pa. Code §§ 279.201(b)(2); 279.219(a) and 279.219(b); and permit condition no. 4	Supersedeas Ex. C-8. ¶ M.14
12/29/88	plumbing not maintained and floors not well drained	25 Pa. Code §§ 279.201(b)(2) and 279.217(c); permit condition no. 3	Supersedeas Ex. C-8, ¶ M.15
12/29/88	all putrescible wastes not removed within 24 hours	25 Pa. Code §§ 279.201(b)(2) and 279.217(b); and permit condition no. 2	Supersedeas Ex. C-8, ¶ M.16
12/29/88	litter not controlled and collected	25 Pa. Code §§ 279.221(a) through 279.221(c)	Supersedeas Ex. C-8, ¶ M.17
12/29/88	permanent area markers and benchmarks not adequately installed, posted or maintained	25 Pa. Code § 279.211(b)	Supersedeas Ex. C-8, ¶ M.18
12/29/88	operation not conducted in an enclosed building or as approved by the Department	25 Pa. Code § 279.215(a)	Supersedeas Ex. C-8, ¶ M.20
12/29/88	wheel curbs and tie downs not utilized at the unloading pits	25 Pa. Code § 279.216(c)	Supersedeas Ex. C-8, ¶ M.21
12/29/88	attendant or signs to direct vehicles not present	25 Pa. Code § 279.216(d)	Supersedeas Ex. C-8, ¶ M.22
12/29/88	proper barriers not installed and access not controlled when attendant not present	25 Pa. Code §§ 279.212(a) through 279.212(c)	Supersedeas Ex. C-8, ¶ M.19

APPENDIX II

Violations listed in the November 5, 1991, consent assessment

Date	Conduct	Violation	Established by
7/24/89	transportation equipment containing solid waste entering facility later than allowed	permit condition no. 12; ¶ 2(b) of the 10 July 1989 consent order	Supersedeas Ex. P-4, ¶ H.1.a
7/24/89	transportation equipment leaving facility later than allowed	permit condition no. 12; ¶ 2(b) of the 10 July 1989 consent order	Supersedeas Ex. P-4, ¶ H.1.b
7/24/89	no perimeter fence	25 Pa. Code § 279.212(a) through (c); ¶ 2(k) of the 10 July 1989 consent order	Supersedeas Ex. P-4, ¶ H.1.c.
7/24/89	processed municipal waste in baler along with fiberglass waste	permit condition no. 11; ¶ 2(c) of the 10 July 1989 consent order	Supersedeas Ex. P-4, ¶ H.1.d.
9/8/89	transportation equipment containing solid waste entering facility later than allowed	permit condition no. 12; ¶ 2(b) of the 10 July 1989 consent order	Supersedeas Ex. P-4, ¶ H.2.a.
9/8/89	transportation equipment leaving facility later than allowed	permit condition no. 12; ¶ 2(b) of the 10 July 1989 consent order	Supersedeas Ex. P-4, ¶ H.2.b.
5/30/90	plumbing not maintained and floor not well drained	25 Pa. Code § 279.217(c); permit condition no. 3; ¶ 2(h) of the 10 July 1989 consent order.	Supersedeas Ex. P-4, ¶ H.3.a.
9/11/90	accepting unapproved wastes	25 Pa. Code § 279.201(c) and (e); permit condition no. 10; ¶ 2(a) of the 10 July 1989 consent order.	Supersedeas Ex. P-4, ¶ H.4.a.
10/17/90	failing to prevent fugitive emissions	25 Pa. Code § 279.218(a) and (b); permit condition no. 5; ¶ 2(f) of the 10 July 1989 consent order.	Supersedeas Ex. P-4, ¶ H.5.a.
12/5/90	municipal waste remained on site at end of day	permit condition no. 2; ¶ 2(d) of the 10 July 1989 consent order	Supersedeas Ex. P-4, ¶ H.6.a
3/20/91	failing to control blowing litter	25 Pa. Code § 279.221(a); ¶ 2(1) of the 10 July 1989 consent order	Supersedeas Ex. P-4, ¶ H.7.a.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

RICHARD SOLOMON and SOLOMON INDUSTRIES, INC.	:	
v.	:	**EHB Docket No. 96-138-C**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: March 13, 2000**

ORDER

AND NOW, this 13th day of March, 2000, IT IS ORDERED that the Department's motion for summary judgment is granted in part and denied in part, as follows.

1. The Department's motion is granted with respect to:

    a. The Department's contentions that:

        i. Industries engaged in the violations listed in the July 10, 1989, consent order and agreement;

        ii. Industries engaged in the violations listed in the November 5, 1991, consent assessment;

    b. Appellants' contentions that:

        i. the doctrine of *res judicata* prevents the Department from considering any of the violations listed in the July 10, 1989, consent order and agreement; the March 13, 1991, consent adjudication and order; and the November 5, 1991, consent assessment;

        ii. the Department had to provide them with notice and an opportunity to be heard before issuing the permit denial and closure order;

        iii. the Department's action was not reasonably related to legitimate state interests;

        iv. the Department was estopped from making the legal and factual determinations that served as the basis for the closure order and denial of the renewal;

v. the Department's actions constitute a "taking" without just compensation;

vi. the Department impaired Appellants' contractual obligations;

vii. the Department erred by failing to act on the its permit renewal application within the time required by law;

2. The Department's motion is denied in all other respects.

ENVIRONMENTAL HEARING BOARD

GEORGE J. MILLER
Administrative Law Judge
Chairman

THOMAS W. RENWAND
Administrative Law Judge
Member

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: March 13, 2000

See last page for service list.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

RICHARD SOLOMON and SOLOMON INDUSTRIES, INC.	:	
v.	:	**EHB Docket No. 96-138-C**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: March 13, 2000**

OPINION OF ADMINISTRATIVE LAW
JUDGE MICHAEL L. KRANCER
CONCURRING IN PART AND DISSENTING IN PART

I respectfully concur in part and join the dissent in part.

I agree with the dissent that the analysis of *Nanty-Glo* should be dealt with in the Opinion and Order on summary judgment. The *Nanty-Glo* issue was a prominent part of both parties' briefing and I think that it should be dealt with head on. I do not share the view, to the extent this is the view of the dissent, that it must be dealt with, but I do believe that it ought to be in this case.

My view, though, is the opposite of the dissent's on the ultimate conclusion to be reached on that question. I think we should apply the *Nanty-Glo* rule. I do not read either *Snyder* or *Peoples Natural Gas* as an affirmative prohibition to our applying *Nanty-Glo*. I think that we may do so, and I would do so. I would not grant summary judgment where the sole support for the contention that there is an absence of a genuine issue of material fact is the oral testimony,

either through testimonial affidavits or deposition testimony. That is especially so in a case where the credibility of the witness is a point directly in issue.

The specific application of the *Nanty-Glo* rule would have to be dealt with on a case-by-case basis. That is, after all, how all of our Courts of Common Pleas and Appellate Courts deal with *Nanty-Glo* every day. In that regard, I do agree with the process undertaken by Judge Coleman in Part C. 2 of the dissent of how the *Nanty-Glo* analysis would apply in this case if it were being applied. I do not fully agree with the result of that process. I agree that the blowing litter allegation is supported at this point only by evidence that would not allow summary judgment on that point at this time. I also agree that the admission of Solomon in testimony at the Supersedeas hearing regarding the waste from Hanover Township would be dispositive on that matter. I would not be ready to enter summary judgment on the alleged violation of 25 Pa. Code §279.251. That regulation requires that a daily operational record be kept which shall include a recordation of, among other things, "[t]he type and weight or volume of the solid waste received". The focus here in on the weight record for the day of February 22, 1996. Having reviewed the relevant portion of the transcript of the Supersedeas hearing, I would not be convinced, for summary judgment purposes, that the record that was maintained which showed 64.86 tons of waste came in on that day did not comply with that regulation. I would need to hear more about the nature of Solomon's record-keeping practices in general and more legal and factual briefing regarding the specific regulation at issue.

In this case, one major ultimate issue is whether DEP acted precipitously under the circumstances in denying the renewal of the permit, and whether its actions were based on a retaliatory motive. This issue requires a hearing, whether or not some, all, or none of the alleged violations are established via summary judgment practice. While the issue of the violations and

whether they are established has a very close functional relationship with this ultimate issue, I do see the two issues as being ontologically distinct. In other words, even if all the violations are established via summary judgment, the issue of whether DEP's action was appropriate would still require a hearing. This is the basis of my belief that we can and should deal specifically and discretely with the issue of the violations and whether or not they occurred as part of the summary judgment process. But, as noted before, I would perform that analysis applying the *Nanty-Glo* rule.

Thus, I do concur with the majority that the matter should go to hearing but for slightly different reasons and on slightly different terms.

ENVIRONMENTAL HEARING BOARD

MICHAEL L. KRANCER
Administrative Law Judge
Member

DATED: March 13, 2000

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

RICHARD SOLOMON and SOLOMON INDUSTRIES, INC.	:	
v.	:	**EHB Docket No. 96-138-C**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: March 13, 2000**

OPINION OF ADMINISTRATIVE LAW JUDGE MICHELLE A. COLEMAN, CONCURRING IN PART AND DISSENTING IN PART

I agree with much of the majority opinion. However, I respectfully disagree with the majority on several key points. I also believe that the Board fails to address several essential issues raised by the parties and fails to adequately explain its reasons for other aspects of the decision.

I. VIOLATIONS ALLEGED TO HAVE OCCURRED AFTER THE 1991 CONSENT ORDER AND AGREEMENT

In its motion for summary judgment, the Department alleges that it had the authority to deny Industries' renewal and issue the closure order based on Industries' compliance history. The Department identified all of Industries' alleged violations and requested summary judgment on all of them. Although the majority opinion addresses some of the alleged violations in detail, it provides virtually no explanation for the Board's decision to deny the Department's motion for summary judgment on those violations alleged to have occurred after the 1991 consent order and agreement (recent violations). The Board simply writes,

> Appellants dispute that these violations occurred. The evidence with respect to these asserted violations indicates only that there are disputed issues of fact as to

> whether and to what extent they occurred. We will resolve these issues after a hearing on the merits rather than discussing the conflicting evidence here.

Supra p.6.

How did the majority conclude that material issues of fact remain? They do not say. The fact that they do not explain the reasoning for this conclusion is problematic in itself. Administrative tribunals have a duty to address the issues put before them, and to explain the reasons for their decisions. However, the absence of an explanation is particularly troublesome here, where the Board's conclusion is incorrect and appears to involve a marked departure from Board precedent.

A. Lack of an adequate explanation

"A venerable principle of administrative law admonishes that an agency must set forth clearly the grounds for its decision." *Village of Winnetka, Illinois v. FERC*, 678 F.2d 354, 357 (D.C. Cir. 1982). "The reasoning must demonstrate that the agency responded to the arguments presented to it." 2 Charles H. Koch, Jr., *Administrative Law and Procedure* § 5.67 (2d ed. 1997) (supp. 1999).

The requirement that administrative tribunals provide the reasons for their decisions serves a number of purposes:

> Reasons are essential to adequate opportunity for judicial review both in advising the parties as to the basis for the decision so that they might craft [an] adequate challenge and in giving the reviewing court a measure of the case and the accuracy of the agency's decisionmaking. ...
>
> An explanation requires the decisionmaker to confront the arguments against their position. Reasons should evidence the agency's consideration of the relevant factors. Adequate explanation serves to satisfy interested members of the public and preclude perfunctory decisionmaking. Carefully articulated reasons provide a special safeguard against unfair and secret government action while imposing little burden on the process. Indeed the very process of expressing a reason is usually of great assistance to sound decisionmaking. Disappointed parties, whether they plan further proceedings or not, deserve to have the satisfaction of knowing why they lost their case.

> A particularly important goal of reasoning is to facilitate the law-giving function of formal adjudication [in which] the agency ... evolves a body of law....

2 Charles H. Koch, Jr., *Administrative Law and Procedure* § 5.67 (2d ed. 1997).

In its motion and supporting memorandum of law, the Department addressed the recent violations in detail, submitting affidavits, exhibits, and other documents in support of its position that the violations occurred. In their response and memorandum in opposition, Appellants raised two arguments concerning the allegations concerning the recent violations in the Department's motion. First, they argued that the Board could not grant summary judgment on these issues because the Department relied on testimonial affidavits and testimony from transcript of the supersedeas hearing to support some of its allegations. According to Appellants, the *"Nanty-Glo"* rule prevents the Department from relying on these documents to support its motion for summary judgment, and therefore, material issues of fact remain concerning the violations. Second, Appellants argued that, even if the Department did consider the testimonial documents, material issues of fact would remain, precluding summary judgment on the recent violations.

The Board concludes that material issues of fact remain with respect to all of the recent violations, but does not explain why. It does not say whether it accepted Appellants' *Nanty-Glo* argument, whether material issues of fact remain even considering the testimonial documents, or whether it decided that material issues of fact remain for some reason other than those raised by Appellants. We do not know that the Board employed the correct criteria for determining whether material issues of fact remain simply because we do not know what criteria the Board used. The Board's failure to divulge the reasoning behind its conclusion not only deprives the Department of any meaningful opportunity to challenge the Board's reasoning, it also creates significant problems if the Commonwealth Court was to review the decision. *See e.g. Pennsylvania Social Services Local 668 v. Labor Relations Board*, 392 A.2d 256, 260 (Pa. 1978)

("In order for review to be meaningful, the agency adjudication must contain statements of the reasons and basis for the decision which are sufficient to demonstrate to the appellate court that the adjudication was not an abuse of discretion.")

B. The Department established that at least some of the recent violations occurred

I agree with the majority's conclusion with respect to some of the recent violations: the Department failed to establish that some of them occurred. However, the Department did establish that some of the other recent violations occurred.

1. Recent violations that the Department established

a. Violations concerning blowing litter

The Department avers that Industries violated 25 Pa. Code § 279.221(a) and paragraph 2(i) of the July 10, 1989, consent order and agreement by allowing litter to blow off-site on April 22 and 26, 1996. (*See* motion, para. 74; memorandum, pp. 20-22.) In support of its position, the Department points to an affidavit by Charles Rodgers, a Department Solid Waste Specialist. Although Appellants' memorandum in opposition denies that Rodgers witnessed any litter blow off-site, Appellants failed to cite any support for that position.

Section 279.221(a) of the Department's regulations provides that an operator of a transfer facility "may not allow litter to be blown or otherwise deposited off-site." Paragraph 2(i) of the July 10, 1989, consent order and agreement, meanwhile, provides that Industries must "control blowing litter and provide for its collection in accordance with 25 Pa. Code § 279.221(a) through (c)." (Supersedeas Ex. C-8, p. 15, ¶ 2(i).)

The Department has shown that Industries violated section 279.221(a) of the regulations and paragraph 2(i) of the July 10, 1989, consent order and agreement because the Department established that Industries allowed litter to blow off-site. In paragraph 9 of the Rodgers affidavit, which the Department cites in support of its motion, Rodgers states:

> On April 22 and 26, 1996, I inspected the [Industries] facility . . . and observed litter, primarily newspaper from recyclables stored at the facility, blown off-site, into trees, and onto neighboring property.

(Motion Ex. H, Rodgers affidavit, ¶ 9.)

Because the Department properly supported its averment that litter blew off-site, Appellants had to provide support for their denial to rebut Rodgers's statement. Since Appellants failed to do so, no issue of material fact remains, and the Department established that Industries violated 25 Pa. Code § 279.221(a) and paragraph 2(i) of the July 10, 1989, consent order and agreement.

b. Violations concerning Industries' receipt of waste from Hanover Township

The Department avers that Industries violated condition 9 of its permit and paragraph 2(a) of the July 10, 1989, consent order and agreement because Industries had municipal waste from Hanover Township—including household garbage, appliances, and other items—at the facility on April 25, 1996. (Motion, para. 75-77; memorandum, pp. 20-22.) In support of its position, the Department points to paragraph 10 of the affidavit by Charles Rodgers and to testimony by Solomon at the supersedeas hearing in this appeal. Although Appellants contend that Rodgers never saw waste from Hanover Township at the facility, they failed to cite any support for their position. Instead, they argued that they were entitled to accept the waste under the terms of their permit. (Response, ¶¶ 75-77.)

Condition 9 of Industries' permit provides that "the processing and transfer of municipal waste is limited to that municipal waste which is generated within the City of Wilkes-Barre." (Supersedeas Ex. P-2.) Similarly, paragraph 2(a) of the July 10, 1989, consent order and agreement provides that Industries would "only process and transfer residentially generated waste from the City of Wilkes-Barre." (Supersedeas Ex. C-8.) Therefore, Industries would have violated condition 9 of the permit and paragraph 2(a) of the consent order if it accepted

municipal waste from outside the City of Wilkes-Barre. The exhibits the Department cites in support of its position show that Industries did just that.

In paragraph 10 of his affidavit, Rodgers states:

> On April 25, 1996, I inspected the [Industries] facility ... and observed municipal waste including household garbage and bulky items, such as appliances, from Hanover Township, Luzerne County, Pa....

(Motion Ex. H, p. 3, ¶ 10.) The waste Rodgers describes is "municipal waste" within the meaning of the Department's municipal waste management regulations. Section 271.1 of those regulations, 25 Pa. Code § 271.1, provides that municipal waste includes "garbage, refuse, ... and other material ... resulting from operation of residential, municipal, commercial or institutional establishments and from community activities...." Household garbage and discarded appliances clearly fall within this definition. Since Rodgers states that the waste is from Hanover Township, and Appellants failed to produce any support for their denial of his averment, the Department established that Industries accepted municipal waste from outside Wilkes-Barre in violation of condition of 9 of its permit and paragraph 2(a) of the July 10, 1989, consent order and agreement.

Furthermore, even assuming that we could not consider Roger's affidavit for some reason, Solomon's testimony at the supersedeas hearing would still be sufficient support for the Department to have established this violation. There, Solomon admits that he accepted municipal waste from Hanover Township. While testifying about a notice of violation Industries received in 1996, Solomon admits:

> I brought in non-putrescible flood waste from Hanover Township. I allowed it to dump at the transfer station. I guess somebody—some of the politicians complained to DER about it and they questioned me about it. I admitted it to them and they gave us an NOV.

(N.T. 124-25).

c. Violation of 25 Pa. Code § 279.251 arising from Industries' failure to accurately report the amount of waste the facility received

The Department contends that Industries violated section 279.251(b)(1) of the Department's regulations, 25 Pa. Code § 279.251(b)(1), by failing to accurately report the amount of waste the facility received on February 22, 1996.[5] In support of its position, the Department points, among other things, to testimony from Department Compliance Specialist Reno Ducceschi at the supersedeas hearing about certain statements made by Solomon concerning his calculation of the amount of waste Industries received. In their response and memorandum in opposition, Appellants assert that the evidence in the record does not support the Department's allegations. However, they failed to provide an alternative version of the facts or any support for it.

Section 279.251(b)(1) provides that transfer facilities must maintain a daily operational record specifying the weight or volume of solid waste received. In the portion of Ducceschi's testimony that the Department cites in support of its motion, Ducceschi testifies that Solomon told him that he no longer had some of the receipts he used to calculate the amount of waste Industries received, and that the figure he reported in the daily operational record was "a very rough estimate." (N.T. 262) Appellants failed to either admit or deny the Department's averments, and failed to provide any support to rebut the Ducceschi testimony.

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[5] The Department also alleges that the same conduct violates 25 Pa. Code § 279.251(c). However, even assuming Industries failed to accurately report the amount of waste it received, that would not necessarily mean that Industries violated section 279.251(c). Section 279.251(c) provides that operators of waste transfer facilities "must maintain accurate operational records sufficient to determine whether municipal waste is being stored *in accordance with Chapter 285, Subchapter A* (relating to storage of municipal waste)." (Emphasis added.) None of the regulations in that subchapter pertain to accurately measuring waste. Therefore, even assuming

Ducceschi's testimony establishes that Industries violated section 279.251(b)(1). Under section 279.251(b)(1), Industries had a duty to enter the "weight of volume of the solid waste received." Nevertheless, Solomon concedes that, when he prepared the daily operational report for February 22, 1996, the figure he entered was "a very rough estimate." Industries either failed to weigh the waste it received, or Solomon failed to use those weights when he calculated the daily total for Industries' operations report. Instead, he guessed. This is entirely inadequate to satisfy section 279.251(b)(1).

2. Recent violations that the Department did not establish

a. alleged violations concerning the processing of solid waste outside the permitted area

The Department argues that, on March 21, 1995, Industries processed solid waste outside the permitted area, in violation of 25 Pa. Code § 279.216(f), condition 11 of its permit, and paragraph 2 of the July 10, 1989, consent order and agreement. In support of its position, the Department points to an April 6, 1995, notice of violation issued to Industries for the alleged violation, and an affidavit by Charles Rodgers, a Department Solid Waste Specialist. (Motion, ¶ 73; Motion Ex. H, ¶ 8; Supersedeas Ex. P-7.) However, neither the notice of violation nor the Rodgers affidavit are adequate support for the averments in the Department's motion.

The Department cannot rely on the notice of violation because the "record" for purposes of ruling on a motion for summary judgment consists only of the pleadings, depositions, answers to interrogatories, admissions, affidavits, and expert reports. *See* Pa. R.C.P. 1035.1. Since the notice of violation does not fall within any of these categories, we may not consider it when ruling on the Department's motion. *City of Scranton v. DEP*, 1997 EHB 985, 1004-5.

Industries' measurements are inaccurate, the Department would not necessarily have shown that Industries violated section 279.251(c).

As for the Rodgers affidavit, to the extent it supports the proposition that Industries allowed the storage or processing of waste outside the permitted area, the affidavit is not based on personal knowledge, as required. Pa. R.C.P. 1035.4 provides, among other things, that affidavits submitted in support of a motion for summary judgment "shall be made on personal knowledge." The language in Rodgers's affidavit shows that Rodgers did not personally know whether solid waste was stored or processed outside the permitted area on March 21, 1995. The Department cites paragraph 8 of the affidavit, where Rodgers states:

> On March 21, 1995, I understand that a representative of DEP inspected the [Industries] facility and determined that [Industries] allowed the storage and processing of solid waste outside the approved storage area. I am aware that on April 6, 1996, DEP issued a notice of Violation for this violation. Subsequent to that date, I inspected the facility to verify that this violation had been corrected.

(Motion Ex. H, ¶ 10.) The language in the affidavit shows that Rodgers's statement that solid waste was outside the approved storage area was *not* based on his personal knowledge. As a result, Pa. R.C.P. 1035.4 precludes us from considering those averments in support of the Department's motion.

b. alleged illegal dumping by Industries on property owned by David W. Gleason (Gleason)

The Department also failed to establish that Industries illegally dumped waste on the Gleason property. While the Department did show that Industries dumped material on the Gleason property, there is conflicting testimony as to the nature of that material.[6] As the Department admits in its motion, Solomon has testified that the material was "clean fill."

[6] The Department avers numerous times in its motion that *its personnel determined* that Industries' activities at the Gleason site violated the Solid Waste Management Act. That, however, is insufficient to show that Industries actually violated the Act. The Board must draw its own legal conclusions from the facts presented to it. It cannot simply defer to the legal conclusions of Department personnel--especially where the facts upon which the Department personnel based their opinions have not been put before the Board.

(Motion, ¶ 34(b); N.T. 156-58.) The Department, however, insists that the material was waste collected in a City of Wilkes-Barre municipal cleanup; that the waste collected included wood, plaster, metals, and other construction/demolition waste; and that no "clean fill" was separated from the materials collected. Thus, we have a dispute as to a material issue of fact: the nature of the material dumped on Gleason's property. Solomon has testified that it is clean fill; the Department insists it is not. Since there is a material issue of fact remaining, the Department is not entitled to summary judgment on this issue.[7]

c. alleged violation of section 279.214 of the Department's regulations, 25 Pa. Code § 279.214, concerning inaccurate weighing of waste received on February 22, 1996.

The Department contends that Industries violated section 279.214 of its regulations, 25 Pa. Code § 279.214, because Industries failed to accurately weigh the waste entering the facility on February 22, 1996. Appellants, however, insist that the evidence in the record does not support the Department's position.

Section 279.214 of the Department's regulations provides that "solid waste delivered to [a transfer] facility shall be accurately weighed or otherwise accurately measured prior to unloading." Although the Department avers that Industries violated section 279.214 in its motion, the Department failed to adequately support its position. The Department relies on three major sources of support:

> (i) testimony from Brian Bower, a PennDOT Motor Carrier Enforcement Officer, concerning the amount of waste brought to Industries' facility;

[7] The Department established that, at the same time Industries dumped the materials, Industries paid $36,000 to Gleason and the business he operated on site, in 10 checks for goods and services Industries never received. (N.T. 158-63.) While these checks may create an *inference* that Industries' dumping at the site was unlawful, they do not conclusively settle the issue. There remains a material issue of fact concerning the nature of the materials dumped on Gleason's property.

(ii) Solomon's own testimony concerning his calculation of the weight of the waste; and,

(iii) testimony from Department Compliance Specialist Reno Ducceschi concerning statements by Solomon about the amount of waste Industries received.

For the reasons that follow, none of these sources is adequate support for the Department's motion.

i. testimony from Brian Bower concerning the amount of waste brought to Industries' facility

The Department points to testimony from Brian Bower, a PennDOT Motor Carrier Enforcement Officer, to support its allegations that Industries violated section 279.214 of its regulations. Bower testified that, on February 22, 1996, he weighed four trucks at the Wilkes-Barre Public Works Garage just before and just after the trucks delivered waste to Industries. (N.T. 208-213.) He used the same methodology Industries claimed to use when it weighed the trucks. (Motion Ex. F: Blaine Affidavit, ¶ 2; Lewis Affidavit, ¶ 2; Smith Affidavit, ¶ 2; Walkowiak Affidavit, ¶ 2.) Although Bower's measurement for the empty weight of each truck was within 100 to 150 pounds of the empty weight recorded by Industries--an acceptable difference, according to Bower--the loaded weight he recorded for each truck was at least 1,000 to 1,300 pounds less than the loaded weight recorded by Industries. (N.T. 217-218; supersedeas hearing Ex. C-4 and Ex. C-5.)

The Department insists that the discrepancy between Bower's figures and those reported by Industries shows that Industries failed to accurately weigh the waste, as required by section 279.214. But that conclusion does not necessarily follow from the fact that Bower's weights for the loaded trucks differed from those measured by Industries. To show that Industries' weights were inaccurate, the Department not only had to establish that Bower's weights differed from Industries'; it also had to show that Bower's figures were *more reliable* than Industries'. The Department failed to address this latter issue in its motion and memorandum in support. Therefore, Bowser's testimony is inadequate support for the Department's motion and a material issue of fact remains, precluding summary judgment.

ii. Solomon's own testimony concerning his calculation of the waste coming to the facility on February 22, 1996

The Department also points to testimony from Solomon to support its contention that Industries failed to accurately weigh the waste, as required by section 279.214. In that testimony, Solomon recounts a conversation he had with Department Compliance Specialist Reno Ducceschi about weights Industries reported in its daily operational report for February 22, 1996. (N.T. 186-88.) According to Solomon, he told Ducceschi that he calculated the amount of incoming waste by adding the weights Industries received from the four trucks Bower weighed, plus additional waste delivered by a number of small haulers. (N.T. 186-187) However, when Ducceschi asked to see the receipts from the small haulers, Solomon replied that he no longer had them. (N.T. 188)

Solomon's testimony does not necessarily show that Industries violated section 279.214. We cannot validly conclude that Industries must have inaccurately weighed waste simply because Solomon could not produce receipts for some of the waste when the Ducceschi requested them. At most, Solomon's failure to produce the receipts creates an *inference* that the weight Industries measured or reported is inaccurate. However, a mere inference is inadequate to support a motion for summary judgment.

iii. testimony from Department Compliance Specialist Reno Ducceschi concerning his conversations with Solomon about the amount of waste Industries received on February 22, 1996

The Department also points to testimony of Ducceschi to show that Industries violated section 279.214. In that testimony, Ducceschi states that he spoke with Solomon about Solomon's calculation of the amount of waste Industries reported in its daily operational report. According to Ducceschi, Solomon told him that he no longer had some of the receipts used to calculate the amount of waste Industries received, and that the figure he reported was "a very rough estimate." (N.T. 262) Appellants failed to either admit or deny the Department's averments, and failed to provide any support to rebut the Ducceschi testimony.

Ducceschi's testimony concerning the missing receipts is insufficient to establish a violation of section 279.214 for the same reason that we held that Solomon's testimony concerning the missing receipts does not show a violation of the same regulation: Solomon's failure to produce the receipts creates, at most, an *inference* that the weight Industries measured is inaccurate.

Nor does Ducceschi's testimony that Solomon admitted that the daily operational report contained a "very rough estimate" of the amount of waste received show that Industries violated section 279.214. Section 279.214 requires only that waste be accurately weighed prior to unloading. One cannot validly conclude that Industries failed to accurately weigh the waste simply because the amount of waste reported in the daily operational report is a very rough estimate. Industries could have weighed each delivery of waste correctly and then simply neglected to account for all deliveries when it compiled its daily report. Accordingly, Ducceschi's testimony is inadequate to support the Department's motion.

B. The *"Nanty-Glo"* rule

The Department relied on testimonial affidavits or supersedeas testimony as support for certain aspects of each of the alleged violations discussed above. In their response and memorandum in opposition, Appellants argue that we could not grant summary judgment on any of the recent violations because the *Nanty-Glo* rule precluded the Board from granting summary judgment where the moving party relies on oral testimony. Curiously, the majority opinion never expressly addresses Appellants' *Nanty-Glo* argument. However, the Board never rejected that argument either, and it denied the Department's motion with respect to each and every violation to which Appellants raised the *Nanty-Glo* argument. Furthermore, as I have shown above, the Department did establish that three classes of the recent violations occurred when we consider the testimonial documents that it submitted in support of its motion. Presumably, therefore, the Board denied the Department summary judgment with respect to the recent

violations because it accepted Appellants' argument that the *Nanty-Glo* rule precluded the Board from granting summary judgment where the motion was supported by testimonial documents. If this is the majority's reasoning—and it certainly appears to be—then the majority is wrong.

1. The *Nanty-Glo* rule does not apply to proceedings before the Board

The *Nanty-Glo* rule, derived from the holding in *Nanty-Glo v. American Surety Co.*, 163 A. 523 (Pa. 1932), "prevents the entry of summary judgment where the moving party relies exclusively on oral testimony, either through testimonial affidavits or deposition testimony, to establish the absence of a genuine issue of material fact." 6 Pennsylvania Standard Practice 2d *Summary Judgment* § 32:108 (1994). However, the Commonwealth Court held in *Snyder v. Department of Environmental Resources*, 588 A.2d 1001, (Pa. Cmwlth. 1991), *appeal dismissed as improvidently granted,* 632 A.2d 308 (Pa. 1993), that the *Nanty-Glo* rule does not apply to proceedings before the Board.

In *Snyder,* mine operators argued, among other things, that the Board erred in granting summary judgment against them because the only support for some aspects of the motion were testimonial affidavits. Although the Supreme Court had reaffirmed the *Nanty-Glo* rule shortly before *Snyder*, the Commonwealth Court dispatched with the mine operators' objection in short order, writing:

> Despite this recent affirmance of *Nanty-Glo,* this Court has held that the rule has no application to administrative proceedings. *Peoples Natural Gas Co. v. Pennsylvania Public Utility Commission*, 554 A.2d 585 (Pa. Cmwlth. 1989). The Court explained that because the purpose of the *Nanty-Glo* rule was to reserve question of credibility for the jury, it had not application to an administrative proceeding in which the administrative law judge or administrative body served as the factfinder. *Id.* at 589.

588 A.2d at 1004.[8] The Commonwealth Court has not re-examined whether the *Nanty-Glo* rule applies to administrative proceedings since *Snyder*. Therefore, *Snyder* and *Peoples Natural Gas* remain good law.

Furthermore, the Board has expressly addressed the *Nanty-Glo* question at least six times since the Commonwealth Court handed down its decision in *Snyder*. In each instance, the Board unequivocally rejected the proposition that the *Nanty-Glo* rule applies to Board proceedings.[9] Although administrative tribunals like the Board are not bound by *stare decisis*, we do have a duty to render consistent opinions, and must either follow, distinguish, or overturn our own precedent. *See, e.g., Standard Fire Insurance Company v. Insurance Department*, 611 A.2d 356,

[8] As *Snyder* indicates, the requirements when an administrative tribunal sits as the factfinder are less rigorous than those when a judge or jury serves as the factfinder in a court of law. For instance, the Commonwealth Court has held that the Board can decide cases based on a "cold record"—that is, where none of the Board members deciding the case were Board members at the time of the hearing. *See Lucky Strike Coal Co. v. Department of Environmental Resources,* 547 A.2d 447 (Pa. Cmwlth. 1988) Similarly, the Supreme Court has held that, where a referee of the Unemployment Compensation Review Board (UCRB) determines that a witness is credible after presiding over a hearing on the merits, the UCRB can reject his determination—even if none of the members of the UCRB were present at the hearing and the UCRB provides no reason for rejecting the referee's determination. *See Peak v. Unemployment Compensation Review Board,* 501 A.2d 1383, 1388-89 (Pa. 1985).

There is an important distinction between credibility determinations made by the Board and those made in a court of law. In a court of law, the finder of fact—whether judge or jury—is present at the hearing. That is not generally true in Board hearings. When the Board adjudicates a hearing on the merits, the Board as a whole is the finder of fact. Yet it is very unusual to have more than one Board Member present at a hearing. Nevertheless, if a majority of Board Members chose to reject the credibility determination made by a Board Member presiding at the hearing on the merits, they could conceivably do so—even if they were not present at the hearing themselves.

[9] *See Gambler v. DEP*, 1997 EHB 914, 918; *LCA Leasing, Inc. v. DEP,* 1996 EHB 1053, 1056 n.1; *Marsolino Coal and Coke, Inc. v. DER*, 1995 EHB 578, 588; *DER v. East Penn Manufacturing Co., Inc.*, 1995 EHB 259, 269; *Envyrobale Corporation v. DER*, 1994 EHB 1842, 1845; *Cratty, Gower & Hyduke, Inc. v. DER,* 1991 EHB 979, 982-983.

359 (Pa. Cmwlth. 1992), and *Bell Atlantic-Pennsylvania, Inc. v. Public Utilities Commission*, 672 A.2d 352, 354 (Pa. Cmwlth. 1995). As one commentator explains,

> Neither the Constitution nor general administrative law prohibits an agency from deviating from prior precedent but there is some general requirement of consistency. At least, the law requires an explanation for deviations from past practices.
>
> ...
>
> The key is whether the agency has adequately explained its rejection of precedent or a change of position in a particular case. A court "may require the agency to provide a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored." A sound explanation is the safest way to avoid arbitrariness.

2 Charles H. Koch, Jr., *Administrative Law and Procedure* § 5.67 (2d ed. 1997) (quoting *Citizens Awareness Network, Inc. v. U.S. Nuclear Regulatory Commission,* 59 F.3d 284, 290 (1st Cir. 1995)).

Because the *Nanty-Glo* rule does not apply to proceedings before the Board, the Department could rely solely on testimonial affidavits and the supersedeas testimony to support assertions in its motion for summary judgment.

2. Even assuming that the *Nanty-Glo* rule did apply to Board proceedings, the Department would have established that some of the recent violations occurred

I explained above that the Department provided adequate support to establish that three classes of the recent violations occurred: the violations concerning blowing litter; the violations concerning Industries' receipt of waste from Hanover Township; and the violations concerning Industries' failure to accurately report the amount of waste the facility received, as required by 25 Pa. Code § 279.251. The Department relied on testimonial affidavits or testimony from the supersedeas hearing to support each one of these violations. However, even assuming the *Nanty-Glo* rule applied in Board proceedings, the Department would still have sufficient support to establish that two of the three classes of violations occurred.

The *Nanty-Glo* rule only bars summary judgment where the movant relies on a testimonial affidavit or deposition testimony to support an essential part of the motion. The Department's motion relies on a testimonial affidavit alone with respect to only one class of the recent violations, the violations concerning the blowing litter. The Department's assertions concerning Industries' receipt of waste from Hanover Township, by contrast, are supported not only by Rogers's affidavit; they are supported by Solomon's admission on the stand during the supersedeas hearing. As the Commonwealth Court made clear in *Department of Environmental Resources v. Bryner,* 613 A.2d 43 (Pa. Cmwlth. 1992), a party can support a motion for summary judgment with an admission even if the admission appears in a document that would ordinarily be barred as support under the *Nanty-Glo* rule.

Similar reasoning applies to the support the Department relied on for its assertions concerning Industries' alleged failure to accurately report the amount of waste the facility received, as required by 25 Pa. Code § 279.251. The Department did not rely on a testimonial affidavit or deposition testimony to support its assertions with regard to these violations. Instead, the Department relied on Ducceschi's testimony at the supersedeas hearing. This testimony was taken before a Board member and was subject to cross-examination. In other words, it was subject to the exact same credibility checks that it would be if elicited at the hearing on the merits. Therefore, the *Nanty-Glo* rule would not bar the Department from relying on that testimony as support for its motion.

II. APPELLANTS' TAKINGS CLAIMS

In their notice of appeal, Appellants argue that the Department deprived Industries of all economically viable use of its property interest in the facility and its permit without substantially advancing any legitimate state objective, working a "taking" of Appellants' property without just compensation in violation of the 14th Amendment and Article I, section 10, of the Pennsylvania

Constitution. (Notice of appeal, p. 16.) In its motion, the Department argues that it did not take Appellants' property because the permit denial and closure order did not result in a physical invasion to Industries' property, they did not deny Appellants all use of Solomon's property, and they were necessary to protect a legitimate state interest and not unduly oppressive.

In their response and memorandum in opposition, Appellants argue that:

1. They "invested at least . . . $1,200,000 to develop the Transfer Station with the expectation that they could operate their business in compliance with the terms of their permit and the pertinent laws and regulations of the Commonwealth"; (Memorandum in opposition, p. 51)

2. The Department's action "is a blatant attempt to deny Appellants the benefit of its [sic] general contracts, the benefit and property interest in its contract with the City of Wilkes-Barre and the beneficial use of its property"; (Memorandum in opposition, p. 52.)

3. The Department has destroyed Appellants' reasonable expectations to use its entire permitted capacity to recoup its investments.

The majority opinion only really addresses Appellants' claim that the Department's action effected a taking of Industries' property interest in the permit. However, the order grants the Department summary judgment with respect to all of Appellants' takings claims.

I agree with the majority's conclusion that Appellants could not prevail on their takings claim concerning the permit because, under *Tri-State Transfer Company v. Department of Environmental Protection*, 722 A.2d 1129 (Pa. Cmwlth. 1999), a permit for a solid waste transfer facility is not "property" for purposes of the "takings" clauses. I also agree with the majority's conclusion that Appellants could not prevail on their other takings claims. However, I think the Board should have explained its reasons for granting summary judgment on them.

Appellants' response and memorandum in opposition argue that the Department's action worked a taking with respect to Appellants' contracts—including the City of Wilkes-Barre contract. The majority opinion does not address this issue. However, the Department is entitled

to summary judgment on this issue because Appellants failed to preserve any objections that they may have had regarding the Department's action working a "taking" on their contracts. Appellants confined the "takings" challenge in their notice of appeal to the effect of the Department's action on Industries' facility and its preexisting permit. As the Board has often noted, an appellant waives any issues not raised in its notice of appeal. *Pennsylvania Game Commission v. DER*, 509 A.2d 877, 885-886 (Pa. Cmwlth. 1986) *aff'd*, 555 A.2d 812 (Pa. 1989).

Appellants also argued that the permit denial effected a taking of Industries' transfer facility. The majority explains that the Department did not take Industries' facility because "the Department's action relates to the permit for the facility, not the facility itself." However, because regulatory takings are almost by definition indirect, I think some additional explanation is necessary. In my view, Appellants cannot prevail on their takings claim concerning the facility because the Department's action did not affect the fair market value of the facility.

Where, as here, the alleged taking does not involve a physical invasion, the value of a taking is ordinarily equal to the difference between the fair market value of the property before and after the government action constituting the taking. *Mazur v. Commonwealth,* 134 A.2d 669 (Pa. 1957); *Westinghouse Air Brake Co. v. Pittsburgh*, 176 A.13 (Pa. 1934).[10] The "fair market value" is the price a willing purchaser would pay a willing seller. *Confederation Life Insurance Company v. Morrisville Properties,* 715 A.2d 1147, 1154 (Pa. Super. 1998).

The Department's action did not affect the fair market value of the facility. By denying Industries a renewal permit, the Department has only precluded *Industries* from using the

[10] There are exceptions where the fair market value would be difficult to ascertain or its application would result in manifest injustice to the owner or the public. *See U.S. v. 564.54 Acres of Land,* 441 U.S. 506, 510-513 (1979); *U.S. v. 50 Acres of Land*, 469 U.S. 24, 29-31 (1984). However, those exceptions do not apply here.

property as a transfer facility (and only for the time being). Others could still purchase the facility, apply for a permit, and operate the facility. And whether Industries had a permit to operate the facility or not, the prospective purchaser would have to go through the permitting process himself if he wished to operate the transfer facility.[11] Thus, whatever the consequences for Appellants, the Department's action did not diminish the value of the facility to potential buyers. If the State revokes a driver's license, precluding the driver from operating his car, the revocation does not affect the fair market value of the car. So too, if the Department strips Industries of the authority to operate the waste transfer facility, the Department has not affected the fair market value of the facility itself.

ENVIRONMENTAL HEARING BOARD

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: March 13, 2000

[11] Section 279.201(a) of the Department's regulations, 25 Pa. Code § 279.201(a) provides, "A person or municipality may not ... operate a transfer facility unless the Department has first issued a permit *to the person or municipality* for the facility...." (Emphasis added.)

EHB Docket No. 96-138-C
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COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION,	:	
	:	**EHB Docket No. 98-239-CP-K**
Plaintiff	:	
	:	
v.	:	**Issued: March 15, 2000**
TESSA LTD.,	:	
	:	
Defendant	:	

OPINION AND ORDER DENYING DEP'S MOTION FOR PARTIAL DEFAULT ADJUDICATION AS TO LIABILITY, SCHEDULING HEARING AND IMPOSING SANCTION UPON DEFENDANT TESSA

By Michael L. Krancer, Administrative Law Judge

Synopsis:

The Board denies a Motion for Default Adjudication as to Liability on DEP's Complaint for assessment of civil penalties under the Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §§ 691.1- 691.1001 ("Clean Streams Law") because defendant had filed an answer before indicating that it would not defend the matter any further, thus distinguishing the present situation from Board precedent in which a default adjudication as to liability was entered where the defendant had failed to file any answer. However, the defendant will be sanctioned for its failure to file its Pre-hearing Memorandum as required by Pre-Hearing Order No. 2 by an order precluding it from presenting any evidence either as to liability or amount of penalty at the hearing of this matter. The sanction does not preclude Tessa and/or its counsel from appearing at

the hearing and, through counsel, from undertaking activities at the hearing such as cross-examination of DEP's witnesses, challenging the admissibility of evidence and presenting legal argument.

BACKGROUND

The Department of Environmental Protection (Department) initiated this matter on December 23, 1998, by filing a Complaint for Assessment of Civil Penalties against Tessa Ltd. (Tessa) pursuant to sections 605 and 611 of the Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §§ 691.1- 691.1001 (Clean Streams Law), §§ 691.605, 691.611. The complaint alleges Tessa's failure to follow specific provisions of its National Pollution Discharge Elimination System ("NPDES") Permit (Permit) to discharge treated leachate from the Miquon Landfill (Landfill) to an unnamed tributary of the Schuylkill River known locally as Manor Creek. The 15-paragraph Complaint culminates in a prayer for the Board to assess a civil penalty pursuant to Section 605(a) of the Clean Streams Law in the amount of $73,900.

The heart of DEP's Complaint is set forth in paragraphs 5 through 11, which state as follows:

5. Tessa owns an 80.48 acre tract of land on Hagys Mill Road, Whitemarsh Township, of which 25.3 acres encompass the Miquon Landfill ("Landfill"), which was used to dispose of construction/demolition and municipal waste from the 1940's to the late 1960's. The Landfill was unregulated during its use.

6. On June 12, 1996, the Department issued NPDES Permit PA0056367 ("Permit") to Tessa for approval to discharge treated Landfill leachate to an unnamed tributary of the Schuylkill River, known as Manor Creek.

7. Part C of the Permit, Other Requirement No. 13, Part 1, required Tessa to submit a Part II Water Quality Management Permit ("Part II Permit") application for construction of leachate treatment facilities within six months of issuance of the Permit, by December 12, 1996. As of the date of this Complaint, Tessa has not submitted a Part II Permit Application, in violation of the requirement for a Permit.

8. Part C of the Permit, Other Requirement No. 13, Part 2, required Tessa to begin construction of leachate treatment facilities within three months of issuance of the Part II Permit. As of the date of this Complaint, Tessa has not begun construction of leachate treatment facilities, in violation of the requirements of the Permit.

9. Part C of the Permit, Other Requirement No. 13, Part 3, required Tessa to complete construction of the leachate treatment facility within twelve months of issuance of the Part II Permit. As of the date of this Complaint, Tessa has not completed construction of leachate treatment facilities, in violation of the requirements of the Permit.

10. Part C of the Permit, Other Requirement No. 13, Part 4, required Tessa to achieve compliance with the effluent limits contained in the Permit within 24 months of issuance of the Permit, by June, 1998. As of the date of this Complaint, Tessa has not achieved compliance with the effluent limits, in violation of the requirements of the Permit.

11. Section 611 of the Clean Streams Law states, in pertinent part, that "it shall be unlawful to fail to comply with any...order or permit or license of the Department. 35 P.S. §691.611

DEP Complaint, Paragraphs 5-11 (hereinafter cited as "C ¶__"). The remainder of the Complaint alleges that: (1) Tessa's failure to comply with the conditions of the Permit constitutes unlawful conduct under Section 611 of the Clean Streams Law (C ¶12); (2) Tessa's failure to comply with the condition of the Permit subjects Tessa to civil penalties under Section 605 of the Clean Steams Law (C ¶13); (3) Section 605 of the Clean Streams Law authorizes civil penalties of up to $10,000 per day for each violation (C ¶14); and (4) DEP has determined that a civil penalty of $100 per day is appropriate and that since Tessa has been in violation of the conditions of the Permit for 739 days, i.e., since December 12, 1996, the resulting civil penalty is $73,900 (C ¶15).

On February 2, 1999, Tessa filed an Answer Containing New Matter to Complaint For Assessment of Civil Penalties. This document is separated into an Answer section and a New Matter section. The Answer section sets forth numbered paragraphs 1 through 15 which set

forth, paragraph by paragraph, answers to the 15 paragraphs in DEP's Complaint. The Answer section also contains a "Wherefore" clause in which Tessa requests the Board to "deny and dismiss the Complaint". The New Matter section contains 33 separately numbered paragraphs that will be discussed in more detail later. (The Answering paragraphs will be cited as "A ¶__" and the New Matter paragraphs will be cited as "NM ¶__").

Tessa admitted the allegations of paragraphs 5 through 11 in its Answer except that, as to Paragraph 5, Tessa qualified its admission by noting that the Landfill operated from 1958 to 1970 as opposed to "the 1940s to the late 1960s" as stated in DEP's Complaint. Tessa, however, in answering paragraphs 12 and 13 states that "it is denied within the context of this Complaint, that Tessa, Ltd. failed to comply with permit conditions and accordingly Tessa, Ltd. has not committed any unlawful conduct under the Clean Streams Law as cited or otherwise. In further answer, Defendant avers its position in its New Matter". Tessa admits paragraph 14 of the Department's Complaint, that Section 605 of the Clean Streams Law authorizes civil penalties of up to $10,000 per day for each violation. Tessa states that no answer is required to DEP's statement of its determination of the amount of the penalty and it restates its previous answer to paragraphs 12 and 13 that Tessa denies, within the context of this Complaint, and its Answer and New Matter that it is in violation of the conditions of the Permit. Tessa also states in this paragraph that DEP has abused its discretion in making a determination that any penalty is proper under the facts of the case and, then, Tessa refers to "its position" in its New Matter.

Tessa's New Matter alleges circumstances which Tessa alleges places DEP's allegations in a light in which Tessa's conduct should not be considered violations of the Permit or, even if its conduct is in violation of the Permit, little or no penalty assessment is appropriate.[1]

The New Matter in its various paragraphs tells the following story. The Landfill is located on a larger tract of land in Whitemarsh Township on which Tessa was planning to construct a residential development in cooperation with another developer. NM ¶¶1-6. The seep which is the focus of the matter has been known to DEP for 25 years. NM ¶8. In 1988, in response to citizen complaints DEP issued a Notice of Violation regarding the seep to the then owner of the land, Miquon Development Corporation. NM ¶9. In 1989 Miquon Development Corporation, who then owned the land, retained an environmental consulting firm to investigate the landfill seep. NM ¶11. EPA was also aware of the seep and supposedly concluded that it did not consist of harmful or threatening compounds. NM ¶12.

In 1990, the land was conveyed to Tessa. NM ¶13. In 1991 DEP received notice that Tessa intended to develop the land. *Id.* In 1994 EPA reported to Whitemarsh Township that its investigation and testing revealed no unusual levels of contaminants in the soil or the surface water and further advised the Township that it was taking no action with respect to the landfill or the conditions created as a result of the landfill. NM ¶14. DEP has been aware since 1991 of Tessa's plans and contractual commitments to develop the tract. NM ¶15.

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[1] We note that under our present rules, a New Matter is not permitted in response to a DEP Complaint. *See* Board Rule 1021.57(e), 25 Pa. Code § 1021.57(e).

In 1994, American Resource Consultants, Inc. ("ARC"), which had been retained by Tessa to deal with the environmental issues pertaining to the development of the tract, submitted a permit application to DEP for an NPDES Permit to treat the leachate seep. NM ¶16. DEP sent Tessa a draft of NPDES Permit PA0056367 on July 20, 1995. NM ¶18. Upon receipt of the draft permit, ARC promptly advised Tessa of its serious concerns with the permit conditions. NM ¶19. The conditions were allegedly onerous, burdensome and unnecessary. *Id.* Among the allegedly excessive conditions in the draft permit were conditions that would require expenditure of funds for monthly laboratory costs of approximately $2,000 per month. *Id.* DEP was on notice of the serious negative financial condition of Tessa at this time and DEP has been updated on Tessa's precarious financial condition up to and including the time of the filing of DEP's Complaint. NM ¶20. In August, 1995 DEP was expressly requested by representatives of Tessa to not issue NPDES Permit No. PA0056367. The basis of the request was that the developer could not afford to incur any of the expenses associated with the conditions of the Permit and that the Permit requirements and conditions were unnecessary and burdensome considering the composition of and effects of the leachate and the cost effective alternatives. NM ¶21.

DEP was aware then and at the time of the filing of the New Matter that it issued the Permit on the basis that the leachate seep was initial discharge as opposed to the remediation of a condition which had continued for at least the preceding 25 years. NM ¶22. On January 2, 1996 DEP was again notified by Tessa that it was effectively bankrupt and had no funds with which to comply with or to appeal the NPDES Permit which Tessa had requested DEP not to issue. NM

¶24. Nevertheless, DEP proceeded and on March 4, 1996 issued the final version of the Permit with certain inconsequential revisions. NM ¶¶23, 25. [2]

In May of 1997 DEP began issuing Notices of Violation ignoring all data and notices referred to in the previous paragraphs of the New Matter. NM ¶26. On November 13, 1997 DEP confirmed to Tessa its knowledge of Tessa's inability to comply with the conditions of the Permit as a result of its precarious financial condition as well as DEP's knowledge that the underlying real estate development transaction was not yet consummated but was proceeding to finalization pending approval by Whitemarsh Township. NM ¶27. DEP was on notice that a conditional vendee of a part of the proposed development tract agreed that the Permit was excessive and burdensome and that the conditional vendee had refused to accept a transfer of the Permit. NM ¶28. DEP was aware that if the transaction proceeded to settlement that there may be a potential availability of some limited funds and, therefore, it had elected to proceed with the Civil Complaint for the mere purpose of injecting itself into the settlement to acquire money, the payment of which would have no effect upon remediating the seep. NM ¶29.

Tessa alleges that, under these circumstances, DEP's actions: (1) oppose the "overview" of DEP to serve the public fairly and honestly; (2) oppose an objective of the Clean Streams Law to prevent pollution; (3) have no purpose relative to the mission of DEP and the purpose of the Clean Streams Law. NM ¶¶30-32. Tessa alleges finally that, under the circumstances, DEP breached an obligation of good faith in light of its knowledge of the surrounding circumstances by not suspending the Permit which it allegedly improvidently granted and DEP should have properly interjected itself as a regulatory agency into the solution by cooperating with the

[2] It is not so stated in the Tessa New Matter, but it does not appear that Tessa appealed the issuance of the Permit. DEP, in paragraph 23 of its Reply to Tessa's New Matter,

developer, the conditional vendee and Whitemarsh Township to assure that the tract was developed and that funds realized from the development of the tract were apportioned justly and applied to every proper purpose including remediation of the Landfill seep. NM ¶33.

Tessa's New Matter requests the Board to: (1) enter an order under 35 P.S. § 691.4(3) finding that the objectives of the Clean Streams Law are not served by the Civil Complaint; (2) suspend the Permit and require DEP to modify the Permit consistent with the objective of the Clean Streams Law to remediate the leachate seep; (3) adhere to the statements and purposes of the DEP as required by the legislature of Pennsylvania to work effectively, honestly and openly with Pennsylvania citizens and to work as partners with Tessa, the conditional vendee and the developer to prevent further pollution of Manor Creek and to restore this natural resource by modifying the Permit and arrive at a cooperative negotiated conclusion whereby the leachate seep from the Landfill is remediated by cost and environmentally effective methods; and (4) to deny and dismiss the Complaint.

The Department filed its Reply to New Matter of Tessa on February 18, 1999. This Reply, of course, denied and contested most of the allegations contained in the Tessa New Matter.

The Board entered Pre-Hearing Order No. 2 in this case on November 2, 1999. That Order called for the Department to submit its Pre-Hearing Memorandum by December 1, 1999, and for Tessa to file its Pre-Hearing Memorandum by December 15, 1999. Also, the Order scheduled trial in the matter for January 18-19, 2000. The Department filed its Pre-Hearing Memorandum on December 15, 1999. In contrast, Tessa's counsel filed a letter with the Board on December 13, 1999, with carbon copies to DEP's Office of Chief Counsel, Paul M. Rettinger,

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affirmatively alleges that, "Tessa did not appeal the Final Permit".

Esquire, counsel for DEP in this case, and John L. Alliger, identified as the President of Tessa, Ltd., which stated as follows:

> This firm represents the defendant, Tessa, Ltd. in the above-captioned matter. Pursuant to Judge Miller's Order dated November 2, 1999, the defendant is directed to file its PreTrial Memorandum of Law on or before December 15, 1999. Our firm has been directed by the President of Tessa that the corporation is insolvent and that we are to take no further action in the defense of this matter.
>
> The action arises out of a NPDES permit issued on June 12, 1996 and expiring on June 12, 2001. The permit relates to an 80 acre tract previously owned by the defendant located at the intersection of Hagy's Mill and Manor Roads in Whitemarsh Township. The defendant purchased the tract in January, 1990, and thereafter sought to develop it for residential housing. Ultimately, the costs of development exceeded the defendant's resources. The defendant applied for the permit in 1995 but soon thereafter requested that the Department not issue the permit since it was unable to pay for the costs of compliance. Notices of violation followed the issuance, followed by a fine assessment. In December, 1998, the above-captioned action was filed followed by an Order issued January 19, 1999, wherein the Department ordered Tessa to comply with the permit and set forth dates for construction events.
>
> The defendant's position in negotiations with the Department has been that it cannot simultaneously pay to undertake the actions necessary to comply with the NPDES permit, consent to pay fines and defend itself in this action. It has asked the Department to agree to a continuance of this matter pending the outcome of treatment with a condition that the Complaint be withdrawn upon proof of successful treatment and provision for the continuance thereof. That offer has been rejected.
>
> I have made the President of the defendant aware of the consequences of failing to defend this action, however, he believes he has no alternative.

On December 20, 1999, DEP filed a Notice of Praecipe For Entry of Default Judgment. Tessa acknowledged receipt of this Notice of Praecipe but did not respond to it. Specifically, counsel for Tessa directed a letter to counsel for the Department dated December 22, 1999, which is carbon copied to the presiding Judge of the Board, which states in full as follows:

> John Alliger tells me he is in receipt of the Department's Ten Day Notice of Default. He continues to fail to see how a judgment against the insolvent corporation will work to alleviate the leachate seep. He maintains the position

> that the best solution in this matter is for the corporation to work with the Department on a treatment plan and for the corporation to thereafter implement that plan all without the current specter of litigation overhanging the process.
>
> He has asked for the opportunity to sit down with you, Jesse Goldberg and Steve O'Neil to see if a treatment plan can still be pursued.

Tessa did not file a responsive pleading to the Department's Notice of Praecipe.

On January 10, 2000, in light of the correspondence received, the Board issued an Order Canceling Hearing and Directing Department to File a Motion For Default Judgment. On January 12, 2000, the Department filed its Motion For Entry of Default Adjudication as to Liability. The Department's Motion argues that a default judgment as to liability should be entered against Tessa as a sanction for Tessa's failure to comply with Pre-Hearing Order No. 2. The Department argues that the sanction of a Default Adjudication is appropriate here because: (1) Tessa has not filed a Pre-hearing Memorandum to date; (2) by letter dated December 13, 1999, Tessa's counsel informed the Board that it had been directed by Tessa to "take no further action in defense of this matter."; (3) on December 17, 1999, the Department sent a Notice of Praecipe for Entry of Default to John Alliger, President of Tessa, and to Tessa's counsel; (4) by letter to the Department dated December 22, 1999, Tessa acknowledged receipt of the Notice of Praecipe for Entry of Default; and (5) by telephone conversation on January 3, 2000, counsel for Tessa confirmed with the Department that she would not appear on the scheduled hearing date. Tessa filed no response whatsoever to DEP's motion for default adjudication.

DISCUSSION

The Department has invited us to enter default judgment as to liability as a sanction. DEP cites the case of *DER v. Marileno Corporation and Cuyhoga Wrecking Corporation,* 1989 EHB 206, as exemplary of that approach in a case such as this one. The *Marileno* case as well as

a handful of other Clean Streams Law civil penalties cases do indeed involve entry of default judgment as to liability as a sanction for failure to file an answer. See *DER v. Allegro Oil and Gas Company*, 1991 EHB 34; *DER v. Canada-Pa., Ltd.*, 1987 EHB 177. The instant case, though, is not a perfect match with *Marileno*, *Allegro* or *Canada-Pa.* because each of those cases involved a failure of the defendant to file an answer to the Complaint for civil penalties whereas in this case defendant did file an Answer.

In the face of the defendant having failed to file an answer in each of the *Marileno* line of cases, the Board applied a mix of Board Rules and Pennsylvania Rules of Civil Procedure to arrive at entering a default adjudication as to liability. There was a pronounced emphasis in each of those cases that the default adjudication was being entered as a sanction. In *Canada-Pa.*, the Board analyzed the issue as follows:

> The Board's authority to issue a default adjudication is found in various of its Rules of practice and procedure. Rule 21.64(d) of the Board's Rules of practice and procedure, which applies generally to pleadings before the Board, provides that:
>
> > Any party failing to respond to a complaint, new matter, petition, or motion shall be deemed in default and at the Board's discretion sanctions may be imposed in accordance with §21.124 of this title (relating to sanctions); such sanctions may include treating all relevant facts stated in such pleading or motion as admitted.[3]
>
> The Rule applying specifically to complaints for civil penalties, Rule 21.66(c), states that:
>
> > Any defendant failing to file an answer within the prescribed time shall be deemed in default and, upon motion made, all relevant facts stated in the complaint for civil penalties may be deemed admitted. Further, the Board may impose sanctions for failure to file an answer in

[3] That Board Rule now appears in slightly different form but not in different substance as Board Rules 1021.71(f) and 1021.73, 25 Pa. Code § 1021.71(f) and 25 Pa. Code § 1021.73.

> accordance with § 21.124 of this title (relating to sanctions).[4]

These two Rules must also be construed in light of Rule 21.124 which states:

> The Board may impose sanctions upon a party for failure to abide by a Board order or Board rule of practice and procedure. Such sanctions may include dismissal of any appeal or an adjudication against the offending party, orders precluding introduction of evidence or documents not disclosed in compliance with any order, barring the use of witnesses not disclosed in compliance with any order, barring an attorney from practice before the Board for repeated or flagrant violations of orders, or such other sanctions as are permitted in similar situations by the Pennsylvania Rules of Civil Procedure for practice before the Court of Common Pleas.[5]

(Emphasis added [by the *Canada-Pa.* Board]).

> A recognition of the sanctions authorized by the Pennsylvania Rules of Civil Procedure is also necessary in interpreting these rules. Most relevant to the issue before the Board is Pa. R.C.P. 1037, which provides for the entry of a default judgment in instances where a party fails to answer a complaint within the required time. Interpreting these rules in pari materia, we hold that the Board has the authority to issue a default adjudication where a defendant fails to answer a complaint for civil penalties.

Canada-Pa., supra at 183-84.

Upon this analysis, the Board entered a default adjudication as to liability. It appears that the essence of the Board's analysis in that case was the entry of the default judgment as a sanction. Indeed, the Board stated that:

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[4] That Board Rule now appears in slightly different form but not in different substance as Board Rule 1021.57(d), 25 Pa. Code § 1021.57(d).

[5] The Board Rule on sanctions is now Board Rule 1021.125, 25 Pa. Code § 1021.125 and the new Rule is exactly the same as the old one except that the new Rule deletes the reference to barring an attorney from practice before the Board for repeated or flagrant violations of orders as a potential sanction.

> The Board, in the instant case, is taking the unusual step of entering a default adjudication against the Defendant in a civil penalties case. While we are mindful that the Department bears the burden of proof under Rule 21.101(b)(1) in such cases and recognize that Defendant is not represented by counsel, we believe that the issuance of a partial default adjudication is appropriate under the circumstances. Flagrant disregard for the administrative law process cannot be permitted to serve as the means for hindering or halting the process.

Id. at 183 (footnote omitted).

The Board's analysis in *Marileno* was very similar and relied on the *Canada-Pa.* analysis. Again, in *Marileno*, the defendant failed to file an answer. In *Marileno,* the Board's analysis went along the following lines:

> The Board's authority to issue a default adjudication is found in various sections of its rules of practice and procedure. Rule 21.64(d), relating to pleadings, provides that:
>
> > Any party failing to respond to a complaint, new matter, petition or motion shall be deemed in default and at the Board's discretion sanctions may be imposed in accordance with § 21.124 of this title (relating to sanctions); such sanctions may include treating all relevant facts stated in such pleading or motion as admitted.
>
> Rule 21.66(c) applies specifically to civil penalty complaints and states:
>
> > Any defendant failing to file an answer within the prescribed time shall be deemed in default and, upon motion made, all relevant facts stated in the complaint for civil penalties may be deemed admitted. Further, the Board may impose sanctions for failure to file an answer in accordance with § 21.124 (relating to sanctions).
>
> Finally, Rule 21.124 outlines the Board's ability to impose sanctions as follows:
>
> > The Board may impose sanctions upon a party for failure to abide by a Board order or Board rule of practice and procedure. Such sanctions may include the dismissal of any appeal or an adjudication against the offending party, orders precluding introduction of evidence or documents not disclosed in compliance with any order, barring the use of witnesses not disclosed in compliance with any order, barring an attorney from practice before the Board for repeated or flagrant violation of orders, or such other sanctions as are permitted in similar situations by the

> Pennsylvania Rules of Civil Procedure for practice before the Court of Common Pleas.
>
> (Emphasis added [by the *Marileno* Board]).
>
> Because Pa. R.C.P. No. 1037 allows a court to enter a default judgment where a party fails to answer a complaint within the required time, the Board has the authority under 25 Pa. Code §21.124 to issue a default adjudication where a defendant fails to respond to a complaint for civil penalties. *DER v. Canada-Pa., Ltd.*, 1987 EHB 177.

DER v. Marileno, *supra* at 209.

Before we leave the discussion of the *Canada-Pa.* and *Marileno* cases we note the important fact that in both cases the Board determined that it could not enter the amount of the penalty by default. *Marileno, supra,* 1989 EHB 206, 212; *Canada-Pa., supra,* 1987 EHB 177, 186. Both cases noted that a separate penalty hearing must be held.

The next case in the line, *Allegro*, was an interesting variation on the theme. Not a variation, though, on the theme that the defendant had not filed an answer. The Board noted that: "[w]hen duly served parties fail to file answers, default judgments are authorized to be entered, but only after compliance by the complainant with Pa. R.C.P. 237.1, which requires that DER mail Allegro a Notice of Praecipe for Entry of Default Judgment." *Allegro*, 1991 EHB 34, 41. The Board went on to determine that the proper notices had been filed and that, therefore, default judgment as to liability was proper. *Id.* at 41-42, 44-45. DER, though, tried to go further and argued that the Board could go ahead and assess the penalty in the default adjudication as part of a ministerial function under Pennsylvania Rule of Civil Procedure 1037(b)(1). *Id.* at 41-42. DEP made this argument in the face of the *Canada-Pa.* and *Marileno* cases which determined that there would have to be a separate hearing to set the penalty. The *Allegro* Board specifically noted that both the *Canada-Pa.* and *Marileno* decisions had made the point that while the Board could enter a default adjudication as to liability, it could not do so with respect to the penalty

because of the statutory requirement that the Board weigh various subjective factors in establishing the amount of the penalty. *Allegro, supra at 42* . Not surprisingly, the Board declined DER's invitation on the following grounds:

> DER's argument miscasts our role as to civil penalty actions of the type before us in this matter. We are not legislatively charged with the duty to review DER's assessments, but are directed to conduct our own assessment of an appropriate civil penalty through the hearing procedure. To do this we must consider the evidence offered by the parties and exercise our discretion to determine the appropriate amount of such a penalty. This independent adjudicatory function is not performed if we adopt the procedure outlined in Pa. R.C.P. 1037(b)(1).

Id. at 42.

What is very interesting, though, is that the *Allegro* decision is written by Judge Ehmann as the opinion of the Board but he, in fact, held a dissenting view on the issue propounded by DER regarding the fixing of penalties by default. In essence, Judge Ehmann thought that DER had "gone a bridge too far". As Judge Ehmann put it:

> Moreover, we are surprised that DER would ask us to adopt the procedure set forth in Pa. R.C.P. 1037(b)(1) in these cases, in light of problems with the bankruptcy issues which our use of such procedures would resurrect for DER where it proceeds against a bankrupt. As we said in *Marileno, supra*:
>
> > [W]e believe that the filing of a civil penalties complaint is an attempt to fix damages for violations of a police power statute and not an attempt to collect a money judgment. We conclude this action seeks to enforce the Commonwealth's police and regulatory power and is, therefore, exempted from the automatic stay provisions.
>
> We believe that our use of the procedure set forth in Pa. R.C.P. 1037(b)(1) would give credence to the argument that actions of the instant type are suits to collect money damages and thus subject to an "automatic stay". Such a finding is hardly in DER's interest. *Marileno, supra,* and the instant opinion should end such arguments.

Allegro, supra at 42-43. Judge Ehmann said further that:

> I would let DER lie in the bankruptcy "bed" created by its decision to use this approach. I would also grant DER a judgment for the amount sought in its Complaint by interpreting "after hearing" as used in both statutes in light of Pa. R.C.P. 1037(b)(1) to allow entry of such a judgment in the limited circumstances created by Allegro's total silence in this case. Allegro could then challenge that decision in a variety of ways if it wished to do so. I do not write for myself alone, we are a Board. Accordingly, I acknowledge the position of the other Board members with the respect to which it is entitled. While I thus dissent on this question of judgment for a specific amount, this opinion is not a final order on this issue. Accordingly, I have set forth my position on this matter in this footnote rather then in a formal dissenting opinion.

Allegro, *supra* at 43 n.1.

As we have noted and emphasized, the journey taken by the Board's rationale in the *Allegro*, *Marileno* and *Canada-Pa.* cases starts with the defendant having failed to file an answer. Also, each of these cases make it clear, as highlighted in our discussion of Judge Ehmann's opinion in *Allegro*, that the Board cannot assess the penalty by default. The establishment of the penalty amount must be the subject of a hearing *See Allegro, supra* 1991 EHB 34, 41-43; *Marileno, supra,* 1989 EHB 206, 212; *Canada-Pa.*, supra 1987 EHB 177, 186. These factors are important to our disposition of this matter.

After carefully scrutinizing and contemplating the *Marileno* case cited by DEP as well as the *Canada-Pa.* and *Allegro* cases and other research, we are not convinced that the common thread in those cases, i.e., that no answer had been filed, was not of critical importance to the path of the rationale and the results reached. Thus, we are not convinced that entry of a default adjudication as to liability is the right disposition here in light of the filing of an answer in this case.

A "default" commonly refers to matters where no answer has been filed. Moreover, our Rules use the term "default" in this context only in connection with and in reference to the defendant "failing to file an answer". 25 Pa. Code § 1021.57(d). DEP has not explained in its

Motion or brief in support thereof the significance, or, from its point of view, the lack of significance, of Tessa having filed an Answer to the Complaint. Without a clearly elucidated and convincing basis for us to enter a default adjudication as to liability in a case where an answer has been filed, we decline to do so.

Thus, however inviting it might be to enter a default adjudication as to liability, upon deep and contemplative reflection, we think that if we did so here we would have gone a bridge too far.

However, that does not mean that the record as set forth herein has no consequence. As noted before, a hearing would be necessary in this case even if DEP's Motion had resulted in the entry of a default adjudication. Also, as noted before, Tessa failed to file its Pre-Hearing Memorandum as required by Pre-Hearing Order No. 2. Thus, we will promptly reschedule the previously cancelled hearing and a sanction will be imposed on Tessa, pursuant to 25 Pa. Code § 1021.125, that it will be precluded from presenting any evidence on liability or on the amount of penalty at the hearing. The sanction applied will apply to Tessa's presentation of evidence but will not bar Tessa and/or its counsel from appearing at the hearing and, through counsel, from undertaking activities at the hearing such as cross-examination of DEP's witnesses, challenging the admissibility of evidence and presenting legal argument.

Accordingly, we enter the following Order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
v.	:	**EHB Docket No. 98-239-CP-K**
TESSA LTD.	:	

ORDER

AND NOW, this 15th day of March, 2000, upon consideration of the Department of Environmental Protection's January 12, 2000 Motion For Entry of Default Adjudication as to Liability ("Motion") as a sanction, the Motion is **denied**. However, upon consideration of the Motion and the following: (a) the defendant, Tessa Ltd., Inc., failed to file its Pre-Hearing Memorandum as required by Pre-Hearing Order No. 2 dated November 2, 1999; (b) the defendant did not respond to the Department's Praecipe Motion for a Default Adjudication filed December 20, 1999 receipt of which was acknowledged by the defendant; (c) the defendant informed the Board twice in letters that it no longer intended to defend against the Department's Complaint; (d) on January 3, 2000, the defendant's counsel informed counsel for the Department that she would not appear at the hearing which, at that time, was scheduled to commence on January 18, 2000 per Pre-Hearing Order No. 2; (e) as a result the Board issued an Order dated January 10, 2000 canceling that hearing and allowing the Department to file a Motion for Entry

of Default Adjudication as to Liability; and (f) defendant filed the aforesaid Motion on January 12, 2000 to which the defendant did not respond, it is HEREBY ORDERED as follows:

1. A hearing in this matter is scheduled for **Friday, April 7, 2000 commencing at 9:30 a.m.** in Courtroom No. 1, Environmental Hearing Board, 2nd Floor, Rachel Carson State Office Building, 400 Market Street, Harrisburg, PA.

2. Pursuant to Board Rule 1021.125, 25 Pa. Code § 1021.125, as a sanction for its failure to abide by the Board's Pre-Trial Order No. 2 and other Board rules of practice and procedure outlined above, defendant Tessa Ltd., shall be precluded from presenting any evidence at said hearing. The sanction so imposed will apply to Tessa's presentation of evidence but does not bar Tessa and/or its counsel from appearing at the hearing and, through counsel, from undertaking activities at the hearing such as cross-examination of DEP's witnesses, challenging the admissibility of evidence and presenting legal argument.

ENVIRONMENTAL HEARING BOARD

MICHAEL L. KRANCER
Administrative Law Judge
Member

DATED: March 15, 2000

c: For the Commonwealth, DEP:
Paul Rettinger, Esquire
Southeast Region

For Defendant:

Janet E. Amacher, Esquire
TRUEBLOOD & AMACHER
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WILLIAM T. PHILLIPY I
SECRETARY TO THE BOA

WHITEMARSH DISPOSAL CORPORATION, INC. & DAVID S. MILLER	:	
v.	:	**EHB Docket No. 97-099-L (Consolidated with 98-169-L & 98-078-CP-L)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: March 20, 2000**

ADJUDICATION

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

Synopsis:

The Board upholds a Department order directing a private sewerage facility to cease discharging, as well as the Department's refusal to renew the facility's NPDES permit. The facility's permit provided that it was an interim facility that was to be shut down when alternate municipal facilities became available. The Board finds that the Department correctly concluded that such alternate facilities are available. The Board modifies the order to give the plant's operator 180 rather than 90 days to cease discharging. The Department's actions were further justified in this case because of the rundown condition of the plant, the operator's poor compliance history, the operator's demonstrated unwillingness and inability to comply with the law, and its destitute financial condition and lack of institutional controls.

The Board assesses a $250,000 civil penalty against Whitemarsh for failing to maintain the facility, exceeding its discharge limits, failing to notify the Department of the problems, and operating without a permit. The Board rejects the Department's argument that David Miller is liable for penalties as the alter ego of Whitemarsh, but assesses a $17,000 penalty against Miller for his active participation in one of the violations.

I. INTRODUCTION

This case involves three appeals that have been consolidated: one from an administrative order (Docket No. 97-099-L), one from a permit denial (Docket No. 98-169-L), and one that involves a complaint for civil penalties (Docket No. 98-078-CP-L). The five-day hearing in September 1999 generated a transcript of 1641 pages and 71 exhibits, which together with the pleadings constitute the record in this case.

II. FINDINGS OF FACT

A. Background and Chronology

1. The Commonwealth of Pennsylvania, Department of Environmental Protection (the "Department"), is the agency with the duty and authority to administer and enforce the Clean Streams Law, the Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. § 691.1 *et seq.* ("Clean Streams Law"); Section 1917-A of the Administrative Code of 1929, P.L. 177, *as amended*, 71 P.S. § 510-17 ("Administrative Code"), and the rules and regulations promulgated under those statutes. The Department is the agency of the Commonwealth with the authority to implement the National Pollutant Discharge Elimination System ("NPDES") permitting program pursuant to the federal

Clean Water Act, 33 U.S.C. § 1251, and the Clean Streams Law. (Joint Stipulation [hereinafter "Stip."] B.1.)

2. The Defendant-Appellant Whitemarsh Disposal Corporation, Inc. ("Whitemarsh"), is a Pennsylvania corporation registered to do business in Pennsylvania with an address of 530 Pennsylvania Avenue, Fort Washington, Pennsylvania 19034. (Stip. B.2.)

3. Whitemarsh owns and operates a sewage treatment plant (the "Plant") and the sewage collection system tributary to the Plant located at 430 Pennsylvania Avenue in the Fort Washington area of Whitemarsh Township, Montgomery County. (Stip. B.3.)

4. On March 11, 1986, the Department issued NPDES Permit No. PA0046779 (the "Permit") to Whitemarsh, which authorized Whitemarsh to discharge treated sewage from the Plant to Sandy Run Creek, a water of the Commonwealth. (Stip. A.1, B.19; Commonwealth Exhibit [hereinafter "C. Ex."] 7.)

5. Whitemarsh did not file an appeal with the Board from the issuance of the Permit. (Stip. B.5.)

6. On August 12, 1991, the Department renewed the Permit for a five-year term. (Stip. A.2, B.4; C. Ex.8.)

7. Whitemarsh did not appeal the 1991 renewal. (Stip. B.6.)

8. Whitemarsh did not file a timely application for renewal of the Permit, so it expired by its own terms on August 12, 1996. (Stip. A.3-5, B.8.)

9. Whitemarsh has been discharging without a permit since August 13, 1996. (C. Ex. 5, 6, 8, 77.)

10. On October 21, 1996, the Department notified the Defendants that the Permit had expired. (Stip. B.9.)

11. On April 4, 1997, the Department issued an administrative order (the "Order") to Whitemarsh, which required that "WDC [Whitemarsh] shall, within thirty (30) days of receipt of this Order, submit to the Department a plan to cease and desist from the discharge of sewage to the Waters of the Commonwealth by no later than ninety (90) days from WDC's receipt of this Order." (Stip. A.7, B.10, B.11.)

12. Whitemarsh filed a timely appeal from the Order. The appeal was docketed at EHB Docket No. 97-099-L. (Stip. B.12.)

13. Whitemarsh has never submitted a plan to the Department in accordance with the Order. (Notes of Transcript [hereinafter "T."] 1227.)

14. Whitemarsh and the Department had a series of meetings and discussions following the issuance of the Order. The parties' attempt to resolve their differences was unsuccessful because Whitemarsh wanted the option of rehabilitating the Plant and keeping it operating indefinitely, but the Department wanted the Plant to be eventually closed down. (T. 1243-1248, 1476-1483; Appellant's Exhibit [hereinafter "A. Ex."] 3, 25.) (Three years later, as we prepare this adjudication, the parties' respective positions remain essentially unchanged.)

15. During the course of the meetings and discussions, Whitemarsh sent to the Department an application to renew the permit after it had expired, which the Department determined was administratively complete on or about July 22, 1997. (T. 1230, 1242; A. Ex. 4.)

16. Continuing efforts to resolve the dispute were unsuccessful (T. 1243), and

Whitemarsh's renewal application was denied slightly more than one year later, on August 4, 1998. (Stip. B.13.)

17. Whitemarsh filed a timely appeal from the denial of the permit renewal, which we docketed at EHB Docket No. 98-169-L. (Stip. B.14.)

18. The Department filed a complaint for civil penalties against Whitemarsh and David S. Miller ("Miller") on April 29, 1998. We docketed the civil penalties case at EHB Docket No. 98-078-CP-L. The three cases are now consolidated at 97-099-L.

19. Both the original Permit (Part C, Paragraph B, page 14 of 14) and the 1991 Permit renewal (Part C, Paragraph 2, page 14 of 14) (hereinafter collectively referred to as "Condition C. 2") contained the following provision:

> This permit authorizes the discharge of treated sewage until such time as facilities for conveyance and treatment at a more suitable location are installed and are capable of receiving and treating the permittee's sewage. Such facilities must be in accordance with either the applicable municipal official plan adopted pursuant to Section 5 of the Pennsylvania Sewage Facilities Act, the Act of January 24, 1956, P.L. 1535, as amended, or a comprehensive Water Quality Management Plan as set forth in Section 91.31 of the Rules and Regulations of the Department. When such municipal sewerage facilities become available, the permittee shall provide for the conveyance of the sewage to these sewerage facilities, abandon the use of the sewage treatment plant thereby termininating the discharge authorized by this permit, and notify the Department accordingly.

(Stip. B.7.)

20. Both the Order and the permit denial relied in part upon Condition C.2. (C. Ex. 1, 3.)

21. Both the original Permit and the 1991 renewal contained the following provision:

> The permittee shall at all times maintain in good working order and properly operate all facilities and systems (and related appurtenances) for collection and treatment which are installed or used by the permittee for water pollution control and abatement to achieve compliance with the terms and conditions

of the permit. Proper operation and maintenance includes but is not limited to effective performance based on designed facility removals, adequate funding, effective management, adequate operator staffing and training, and adequate laboratory and processing controls including appropriate quality assurance procedures. This provision includes the operation of backup or auxiliary facilities or similar systems when necessary to achieve compliance with this permit.

(Stip. A.19; C. Ex.7, 8, Part B, Section I.G.)

22. Both the Order and the permit denial cited Whitemarsh for failure to properly maintain and operate the Plant as required by the Permit. (C. Ex.1, 3.)

23. The Order was also based on the following findings:

a. Discharge without a permit;
b. Discharge of inadequately treated sewage;
c. Failure to monitor and report; and
d. Failure to retain certified operators at all times.

(C. Ex. 1.)

24. The permit denial was also based on the following additional findings:

a. The Plant's location in a "built-up area";
b. The Plant's compliance history;
c. Failure to comply with orders;
d. Lack of confidence in Whitemarsh's management and the institutional arrangements between Whitemarsh and its users; and
e. Whitemarsh's demonstrated lack of ability or intention to comply with the law.

(C. Ex. 3.)

B. The Plant

25. The Plant receives sewage from a sewage collection system which serves the following commercial establishments, all of which are located in Whitemarsh Township:

The Cherry Tree (formerly Clarion, formerly Days, formerly Sheraton Hotel) at 530 Pennsylvania Avenue (the "Hotel")
Mobil Gas Station No. 16723, at 524 Pennsylvania Avenue
Executive Plaza office complex, at 540 Pennsylvania Avenue

Washington Tower Apartments, at 491 Bethlehem Pike.

(Stip. A. 62, B.20.)

26. The Plant, hotel, gas station, and office building are located at the edge of Whitemarsh Township. Across Pennsylvania Avenue is Upper Dublin Township. (Stip. A. 40.)

27. The location of the Plant is a busy commercial district that may be characterized as a built-up area. (T. 1249; C. Ex. 11.) Numerous buildings are located in both directions on Pennsylvania Avenue and the surrounding streets, most of which are already connected to municipal sewers. (C. Ex. 11, 43; A. Ex. 24A; T. 1249.)

28. The Plant is located in a flood-prone area, and in fact, has been flooded repeatedly. (T. 40-41, 167-168, 387, 391-395, 564, 1585.)

29. The Plant is not built to withstand flooding conditions. (T. 388, 391, 395, 454, 1454, 1517.)

30. The Plant was originally permitted and built in the 1960s to serve its four users and has served in that capacity ever since. (T. 944, 1512, 1564-1565; C. Ex. 41.)

31. There is no evidence of any written service agreements between Whitemarsh and the Plant's users. (T. 927, 1019; C. Ex. 63.)

32. The Plant's users have been notified that the Plant's permit renewal has been denied. (T. 1251-1252; C. Ex. 50.) None of the users have moved to intervene or have otherwise participated in this action.

33. The Plant utilizes a three-step treatment process: aeration, clarification, and then disinfection. (T. 234.)

34. When it is operating, the Plant treats approximately 16,000 to 19,000 gallons of sewage per day. (T. 311.)

35. When operated as designed, sewage from the Plant's four users flows into the Plant's influent manhole, then a wet well, and it then is processed through a comminutor, which processes large solids and debris. The Plant is an activated sludge facility, which means that the sewage is then aerated by the use of a blower in a series of tanks in which microorganisms in the presence of oxygen are used to treat the sewage. The contents of the aeration tank are referred to as "mixed liquor." The flow then enters a clarifier, where sludge is allowed to settle out. Return sludge pumps return some of the activated sludge back to the aeration tanks. Some of the sludge is diverted to waste sludge holding tanks for disposal off-site. Clarified effluent flows from the clarifier to and through the chlorine contact tank, and it is then discharged into Sandy Run. (T. 234-237, 418, 501, 522, 597-604; C. Ex. 73.)

C. Availability of Municipal Sewage

36. On April 24, 1992, Upper Dublin Township acquired a privately held sewage collection and treatment system in Upper Dublin Township ("Upper Dublin Sewage System"). (Stip. A. 41; T. 541-542.)

37. The Upper Dublin Sewage System includes a sewer line that extends along Pennsylvania Avenue to a point approximately 400-500 feet from the Plant. (T. 533; C. Ex. 11, 43; A. Ex. 24A.)

38. The sewer line is located at least in part on the Whitemarsh Township side of Pennsylvania Avenue. (T. 540.)

39. The Upper Dublin Sewage System's collection system and treatment plant constitute facilities for the conveyance and treatment of sewage. (Stip. B.43.)

40. A 400-500 foot line would need to be installed to hook the Plant up to the Pennsylvania Avenue sewer line. (T. 563.) Shorter lines would be needed to directly hook up the gas station, Hotel, and office building to the Pennsylvania Avenue line. (C. Ex. 43; A. Ex. 24A.)

41. Upper Dublin Township has performed a preliminary survey which suggests that it will be possible to gravity-feed sewage from the Plant to the Pennsylvania Avenue sewer line. (T. 543-544, 559-562, 564.) A formal engineering study would be necessary to confirm that a gravity-feed would be possible. (T. 544, 562.) No such study has been performed. (T. 1537-1538.) In the event a gravity system did not work, Whitemarsh Plant sewage could be pumped to the Pennsylvania Avenue line. (T. 543, 894.)

42. An intermunicipal sewage agreement between the townships of Whitemarsh and Upper Dublin could be prepared to include the Plant's users' sewage in the Upper Dublin Sewage System. (Stip. A.45.)

43. Whitemarsh Townhip, where the Plant is located, has entered into agreements with other buildings and businesses in the immediate vicinity of the Plant pursuant to which the sewage generated at those buildings is treated by the Upper Dublin Sewage System. (T. 469-470.)

44. Sewage generated by other properties in the immediate vicinity of the Plant and in Whitemarsh Township is in fact treated by Upper Dublin Township by way of its Pennsylvania Avenue sewer line. (T. 1512.)

45. Although a specific final plan would be subject to the final approval of the

Township's governing body, Whitemarsh Township has expressed its willingness to enter into discussions leading to an agreement for Upper Dublin Township to treat the sewage of the Plant's users. (T. 470.)

46. Whitemarsh Township representatives have advised Whitemarsh representatives of the Township's willingness to enter into discussions leading to such an agreement. (T. 473.)

47. From a planning perspective, there is no currently known impediment to connecting all of the users of the Plant to the Upper Dublin Sewage System by way of the Upper Dublin sewer line located along Pennsylvania Avenue. (T. 474, 1038.)

48. It would also be possible to hook up the Washington Tower Apartments to Whitemarsh Township's own municipal sewer system. (T. 474, 476.)

49. Both the Upper Dublin and Whitemarsh Township sewage systems have adequate capacity available to treat the Plant's users' sewage. (T. 474, 483, 543.)

50. Upper Dublin Township would need to seek the permission of Whitemarsh Township before allowing the Plant's users to hook up to its system. (T. 548.)

51. Upper Dublin Township would need to review specific engineering plans before allowing the Plant's users to hook up to its system. (T. 549.)

52. Upper Dublin Township would require the Plant's users to pay a connection fee of $5,800 per Equivalent Dwelling Unit (EDU) before allowing them to hook up to its system. (T. 549, 551.)

53. At the current rate of $5,800 per EDU, the Hotel connection fee to the Upper Dublin System could be as high as several hundred thousand dollars. (T. 977.)

54. Upper Dublin Township has indicated its reluctance to negotiate a reduction in the connection fee or to allow an extended payment plan. (T. 1497.)

55. Subject to final governmental approvals, engineering drawings, and payment of the connection fee, Upper Dublin Township is willing to accept the Plant's users' sewage. (T. 549.)

56. Whitemarsh has made no effort to date to connect its users to the Township's systems. (T. 890-892.)

57. Whitemarsh Township's Official Sewage Facilities Plan notes that the Plant "has reached its hydraulic and organic capacity and is currently being operated on an interim basis until it can be phased into a regional wastewater system." (C. Ex. 41.)

58. The Upper Dublin System and the Whitemarsh Township municipal system are accounted for in their respective township's official sewage facilities plans. (Stip. A. 41, 48, 49; T. 547, 1043, 1075; C. Ex. 5, 6, 41.)

59. Neither the Whitemarsh Township nor the Upper Dublin Township Official Plan specifically provides for the hookup of the sewage currently being treated by the Plant to the Upper Dublin Sewage System or Whitemarsh Township's system. (C. Ex. 41, 58; T. 556.)

60. Procedures are available for revising the official plans to allow for the closure of the Plant and diversion of its sewage. (T. 1031-1039.)

61. If sewage is to be routed through the Plant as a pumping station (as opposed to a treatment facility), obtaining access to municipal sewer lines will be facilitated by the fact that Whitemarsh has an easement over property owned by the Hotel between the Plant and Pennsylvania Avenue which gives it the right to install and maintain a sewer line. (T. 910-913; C. Ex. 5, 6, 66.)

62. The Apartments also hold an easement for installing a sewer line which extends from the apartments to Bethlehem Pike, which would facilitate access to the Whitemarsh Township municipal system. (T. 914-920; C. Ex. 67-70.)

63. Before the sewage currently treated at the Plant could be diverted to the Upper Dublin and/or Whitemarsh Township systems, some or all of the following would need to occur:

a. Sewage facilities planning approval by the municipalities involved and the Department;

b. Execution of intermunicipal agreements;

c. Engineering the connection;

d. The possible need to obtain additional access/property rights;

e. Construction; and

f. Payment of connection fees.

(Findings of Fact ("F.F.") 36-62.)

64. Municipal sewerage facilities for the conveyance and treatment at a location more suitable than that of the Plant that are capable of receiving and treating the sewage that is now being treated by Whitemarsh are available. (F.F. 36-63.)

65. Other than a municipal connection, the only other identified means of complying with the Order to cease discharging would be to either (1) haul the Plant's users' sewage away in trucks to an approved treatment facility (T. 1212-1213), or (2) terminate all flow from the Plant's users.

66. It would cost tens of thousands of dollars to haul the sewage currently being treated at the Plant to an authorized treatment facility. (T. 1372.)

67. Hauling sewage is a reasonable stop-gap measure if municipal connection is not completed by the time Whitemarsh ceases discharging pursuant to this Adjudication.

D. Operations

68. The Plant requires a blower to perform proper aeration. The Plant's blower broke down during the week of June 15, 1996 and was not replaced and operating until September 26, 1996. (T. 373, 405; C. Ex. 14, 16.)

69. At some point after it started operating without a functional blower, the Plant went "septic," which is to say that there was a lack of sufficient oxygenation which resulted in improper treatment and high sulfides in the discharge. (T. 457.)

70. David Miller learned at least as early as July 25, 1996 that the blower was broken. (Stip. A.16.)

71. The Plant violated its permitted effluent limits during the time that the blower was broken. (C. Ex. 14, 16, 46.)

72. Whitemarsh did not notify the Department that its blower was broken and that secondary treatment was not being attained. (T. 75-77, 80, 458, 771.)

73. Part A, Paragraph II.D.1(a) of the Permit required that Whitemarsh orally notify the Department within 24 hours, and in writing within 5 days, of becoming aware of "actual or anticipated non-compliance with any terms or condition of this permit which may endanger health or the environment." (Stip. A. 21.)

74. The Department issued an unappealed compliance order to Whitemarsh on September 24, 1996. (C. Ex. 5, 6, 26, 27; Stip. B. 24.)

75. The September 24, 1996 order found that the Plant was not being operated properly, the aeration tanks were full of septic sewage, and the Plant's equipment was flooded, damaged, and broken. The order required both immediate and long-term remedial measures. (C. Ex. 26.)

76. Employees of WasteOps, Incorporated ("WasteOps") served as the contract certified operators of the Plant from 1990 to 1996. (T. 361, 430.)

77. WasteOps quit working for Whitemarsh because WasteOps was not being paid on a timely or regular basis. (T. 389, 414, 421, 423-424, 431, 434; C. Ex. 14, 17.) WasteOps was never fully paid for the work that it performed for Whitemarsh. (T. 424.)

78. From November 18, 1996, when WasteOps quit, until April 1997, when Michael DiSantis (another certified operator) became involved, Miller and Hotel employees ran the Plant on their own. (T. 201, 775-776, 842-843.) No one was consistently doing sampling, monitoring, or any of the things that certified operators are expected to do. (T. 778.) One employee who was operating the Plant was unable to perform proper sampling when asked to do so by Department personnel. (T. 631-634; C. Ex. 20, 25.)

79. Prior to DiSantis's involvement, Miller was not knowledgeable about all aspects of what he was supposed to do and not do in running the Plant. (T. 784, 940.)

80. Whitemarsh has operated the Plant without certified operators on numerous occasions and for extended periods of time. (T. 93, 775, 1483-1487; C. Ex. 5, 6, 19, 20.)

81. Michael J. DiSantis is currently employed as the Operations Manager for Miller Environmental, Inc. (no relationship to David Miller), a contract operations company that operates and maintains wastewater facilities for various clients. (T. 195.) He is a certified wastewater

treatment plant operator. (T. 195.)

82. DiSantis and employees under his direction currently act as the certified operators for the Plant. (T. 199.) DiSantis first became associated with the Plant on May 1, 1997. (T. 201.) Throughout much of his tenure at the Plant, DiSantis contracted to visit the Plant three days a week and perform limited duties and provide limited advice on running the Plant. (T. 203.) DiSantis's firm, however, currently provides operational staff to Whitemarsh seven days a week. (T. 199.)

83. DiSantis stopped working for Whitemarsh on at least one occasion because he was not being paid. (T. 208; C. Ex. 24.) Whitemarsh regularly did not pay DiSantis's bills on time. (T. 210.) DiSantis now only works at the Plant if he is paid in advance on a monthly basis. (T. 210.)

84. Prior to DiSantis's operation of the Plant seven days a week, he noticed and documented chronic, unexplained, unacceptably low levels of mixed liquor suspended solids ("MLSS"). (T.251; C.Ex. 54, 71, 72.) Low MLSS leads to inadequate treatment. (T. 252.)

85. Low MLSS levels also indicate that sludge is being removed from the system, yet Disantis did not observe any proper wasting of the sludge, which indicates that sludge was either being discharged to the stream or was otherwise being improperly wasted. (T. 251-253; C. Ex. 71, 72.)

86. The low MLSS problem disappeared when DiSantis assumed seven-day operation of the Plant. (T. 254.) DiSantis never determined exactly where the sludge went. (T. 254.)

87. Miller has been unresponsive in dealing with problems with the Plant brought to his attention by DiSantis. (T.341.)

88. Miller had also been unresponsive or slow to respond to problems brought to his attention by WasteOps. (T. 365.)

89. According to DiSantis, whose testimony we credit, the chemical feed pump used at the Plant is " a Mickey Mouse feed pump. I mean, I have never seen one like that in any other wastewater treatment plant. It's very inadequate. They are hard to adjust, hard to keep running. They are throw-away pumps." (T. 227-229.)

90. Despite numerous requests from DiSantis, Whitemarsh never bought a pH buffer, which is necessary for proper testing as required by the Permit. (T. 267.)

91. Whitemarsh's dissolved oxygen ("DO") meter has been out of service for months at a time. (T. 267.)

92. The Plant has discharged inadequately treated sewage, or allowed raw sewage to discharge directly to the receiving stream, on numerous occasions. (E.g., September 5, 1996 (T.27, 58, 70, 277, 290-291, 345, 390; C. Ex. 12); September 1996 (T.72, 508; C. Ex. 18, 25); April 1997 (T. 345, 616, 621-622; C. Ex. 22, 25); March 30, 1998 (C. Ex. 19); June 1999 (T.690; C. Ex. 55); August 27, 1999 (C. Ex. 61).)

93. On at least two occasions, Whitemarsh allowed raw sewage to discharge to the ground in close proximity to the receiving stream. (C. Ex. 20, 21, 53.)

94. The Plant has discharged effluent in violation of its permit limits on many occasions. (E.g., June - September 1996 (T. 386; C. Ex. 46); September 5, 1996 (T. 34; C. Ex. 12); September 19, 1996 (T. 82; C. Ex. 18); May- September 1998 (T. 126; C. Ex. 20); September 1998-April 1999 (T. 215; C. Ex. 53, 54); May 1999 (T. 281).)

95. The Plant did not have any effluent limit violations in July or August 1999, by which time DiSantis had taken over seven-day operation of the Plant and a hearing had been scheduled in this matter. (T. 326.)

96. Whitemarsh failed to notify the Department of its failure to comply with its permit on numerous occasions. (T. 75-76, 97, 100, 129, 457, 650-653; C. Ex. 5, 6, 19, 20.)

97. Whitemarsh has failed to submit Discharge Monitoring Reports (DMRs) either at all or in a timely manner as required by its permit on several occasions. (T. 420-421, 444, 776, 1495; C. Ex. 5, 6.)

98. Whitemarsh has violated its permit numerous times by failing to sample its discharge at the intervals required in the Permit. (T. 221; C. Ex. 53, 54.)

99. Whitemarsh has failed to maintain the Plant in good working order and properly operate all facilities and systems on many occasions. (E.g., Summer 1996, no aeration blower [T. 363], September 1996, lack of aeration, no biological treatment taking place [T. 72-73, 507; C. Ex. 25]; November 14-18, 1996, excess chlorination [T. 85, 89; C. Ex. 19]; April 11, 1997, excess sludge accumulation and discharge [T. 617; C. Ex. 25]; January 13, 1998, manhole filled with solids [T. 96; C. Ex. 19]; March 30, 1998, improper repair of broken sewer line [T. 100, 108; C. Ex. 19, 21]; October 13, 1998, no dissolved oxygen (DO) meter [C. Ex. 20]; October 19, 1998, improper chlorination (feeding chlorine into contact tank through a five-gallon pail with a hole punched in it) [T. 115, 117; C. Ex. 19, 20]; October 21, 1998, no aeration blower [T. 120, 137, 172; C. Ex. 19, 20, 55]; October 23, 1998, no dissolved oxygen meter [C. Ex. 20]; December 30, 1998, chlorine pump not operable [T. 118; C. Ex. 19]; January 1999, chlorine pump out of service for 18 days, return

sludge pump not working for 6 days, which resulted in solids flowing into stream [T. 267; C. Ex. 53]; November 1998, inoperable DO meter [C. Ex. 53]; September 1998, failure to maintain a proper level of mixed liquor suspended solids [T. 251-67; C. Ex. 53, 54]; January 1998, insufficient detention time in chlorine contact tank, no pH meter [C. Ex. 53]; May 12, 1998, leak in scum line [T. 232, 247-48; C. Ex. 54]; July 1998, insufficient biomass to treat incoming sewage [T. 251-52; C. Ex. 71]; October 23, 1998, inability to test for pH, DO [T. 633]; November 1998, return sludge pump running dry, allowing sludge to accumulate in the clarifier [T. 270-72; C. Ex. 54]; September 1999, comminutor out of service [T. 309]; April 1997, influent pumps not working [T. 343].)

100. The logbook maintained at the Plant by Whitemarsh evidences a longstanding pattern and practice of failing to operate the Plant properly in accordance with its permit and to maintain the Plant in good working order. (T. 635-650; C. Ex. 55, 60, 77.)

101. The Commonwealth prepared a videotape of the Plant that was filmed on September 24, 1996 and April 11, 1997. The tape showed several examples of how Whitemarsh was failing to maintain the Plant in good working order and to operate it properly on those dates. (T. 517-529, 595-614, 621-628; C. Ex. 22.)

102. As recently as September 1999, the time of the hearing in this matter, the Plant was in a state of disrepair. (T. 1414-1424, 1440, 1446; C. Ex. 76, 77, 78.)

103. Whitemarsh has made some repairs to the Plant (T. 964-965, 1465-1471; A. Ex. 23), but extensive rehabilitation and upgrades would still be needed if the Plant were to continue in service (T. 960; A. Ex. 21).

104. The Plant currently needs at least a backup blower, backup return sludge pump,

improved piping and valving, an effluent meter, better chlorination system, flow equalization, diffusers, alarm system, probably dechlorination equipment (depending upon the requirements in a hypothetical new permit), and possibly sand filters. (T. 333-334, 600, 660-662.)

105. The Plant building (as distinct from the equipment in the Plant) has not reached the end of its useful life, and with necessary upgrades, could have lasted another 20 to 30 years. (T. 354.)

106. No one has calculated the cost of the necessary upgrades to the Plant. (T. 353.) It would be impossible to do so because the nature of the upgrades that would be required by a renewed permit are unknown.

107. Whitemarsh's users have not been paying into a reserve for needed upgrades. (T. 1018.) The users' rates have not been recalculated since the time when Miller took over in 1996. (T. 928, 1017.)

108. Whitemarsh cannot be counted upon to provide reliable sewage treatment in the future. (F.F. 68-107.)

109. Whitemarsh has demonstrated a lack of ability or intention to comply with the law. (F.F. 68-108.)

110. The Plant has caused and is likely to continue to cause actual pollution and a danger of pollution of the waters of the Commonwealth. (F.F. 68-109.)

E. Financial condition

111. Whitemarsh has substantial unpaid debts. (Stip. A. 97-102, 105.)

112. Since 1996, corporations controlled by Miller that have owned or operated the Hotel

(a user of the Plant) have advanced funds and provided or payed for services for the benefit of Whitemarsh without any agreement to do so and without expectation of repayment. (Stip. A. 59, 60, 63, 77, 78, 84.)

113. Since 1996, Miller has personally advanced funds and provided or paid for services for the benefit of Whitemarsh without any agreement to do so and without expectation of repayment. (Stip. A. 79, 81, 86.)

114. At all relevant times and up to and including the time of the hearing, Whitemarsh has been chronically late in paying the vendors who provide it with services and supplies that are essential to the operation of the Plant. (T. 788-789, 805-806; C. Ex. 14, 15, 16.)

115. In April 1999, Whitemarsh's contract lab stopped performing analyses due to nonpayment of fees. (T. 280; C. Ex. 53.)

116. The power company has found it necessary to turn off power to the Plant due to nonpayment. (T. 283, 287.) In June 1999, power to the Plant was shut off for two days, during which time raw sewage flowed to the stream. (T. 290-291.)

117. Whitemarsh does not have enough money to pay its large, outstanding legal bills. (T. 970, 1492.)

118. Whitemarsh has not been accruing a reserve to pay for future rehabilitation of the Plant. (T. 789-790, 1018.)

119. Since Miller's involvement, Whitemarsh has been accruing expenses at a rate far greater than its income can bear. (T. 789.) Over time the users have not paid their fees consistently or in a timely manner. (T. 187-188, 946, 1202, 1218-1219.)

120. Whitemarsh has not had its own bank account since 1997 because it does not have any money to put in an account. (T. 806.) In Miller's words, "Whitemarsh has no money." (T. 819.)

121. Whitemarsh's financial condition is insufficient to ensure reliable sewage treatment in the future. (F.F. 111-120.)

F. David Miller

122. Miller was the General Manager of Whitemarsh as of September 1, 1996. (Stip. B. 28; T. 1495.)

123. As General Manager of Whitemarsh, it was stipulated that Miller has authority and responsibility for operations, maintenance, and repairs at the Plant. (Stip. B. 38.) There is no one higher than Miller in the chain of command. (T. 765; C. Ex. 5, 6.)

124. The parties stipulated that, as General Manager of Whitemarsh, Miller has had authority and responsibility for operations, maintenance, and repairs at the Plant. (Stip. B.39.) There is no evidence that Miller was an officer of Whitemarsh. He was not a shareholder of Whitemarsh.

125. On July 25, 1996, Miller met with a WasteOps representative and gave him a check for $5,000 as partial payment owed for past services provided to Whitemarsh, and he directed WasteOps to have the broken blower repaired. (T. 364, 368, 384, 406-407, 423, 435, 437, 456, 1517-19, 1578; C. Ex. 13, 14.)

126. During the July 25, 1996 meeting between Miller and WasteOps, Miller identified himself as the person who would be managing Whitemarsh. (T. 437, 460-461.) Miller and

WasteOps discussed the broken blower and resultant lack of plant aeration, and other equipment that needed to be purchased or repaired. (Stip. B.16; T. 434-435.) Miller was aware that the broken blower was a serious problem that would lead to inadequate treatment. (T.367, 435.)

127. WasteOps did not send the blower for repair until late August 1996 due to WasteOps's concerns about whether Whitemarsh would pay for the repair. Despite requests from WasteOps, Miller refused to advance any money prior to repair of the blower. (T. 369, 384.)

128. WasteOps ultimately decided to have the blower repaired and risk not getting paid for it by Whitemarsh. (T. 371.)

129. The repaired blower was ready to be installed on September 18, 1996, but the Department asked that it not be installed immediately for fear of a pollutional discharge to the stream. (T. 508.) The blower was reinstalled on or about September 26, 1996. (T. 804-805.)

130. Miller's first actual exposure to the Plant was on July 25, 1996. (T. 937.) Prior to that he had no knowledge regarding sewage treatment plants. (T. 938, 940.)

131. Since June 1996, Miller has been the president and the sole officer and shareholder of Keystone Group, Incorporated ("Keystone"). (Stip. A. 57; T. 761.)

132. Keystone is the sole shareholder of Whitemarsh. (T. 761, 817, 844.) The Whitemarsh shares are its only asset. (T. 816-817.) Keystone became the shareholder of Whitemarsh no later than September 1, 1996. (T. 1583.)

133. Miller did not evaluate the quality of Whitemarsh's operations or its compliance status before Keystone acquired the Plant. (T. 758.) Miller conducted no due diligence regarding the Plant. (T. 758.)

134. Whitemarsh has not paid any dividends since Miller's involvement. It has not elected any officers. It has not subjected its records to a review by an accountant. There have been no corporate meetings. (T. 761-762.)

135. Miller has personally made up for Whitemarsh's shortfall between expenses and income on several occasions. (T. 790-791, 807.)

136. Whitemarsh has paid for services that are unrelated to its operation. (T. 796, 801; C. Ex. 35.)

137. Miller personally, and other corporations affiliated with Miller, have frequently paid Whitemarsh's expenses. (T. 806-808, 812-815, 819, 823; C. Ex. 36, 37, 38.)

138. Funds from the various corporations associated with Miller have been intermingled, and no accurate bookkeeping has been maintained. (T. 819-823, 827, 829, 836, 1129; C. Ex. 38.)

139. Whitemarsh has not filed any tax returns since Miller's involvement. (T. 843.)

140. Whitemarsh does not keep a separate set of books from the other corporations that are affiliated with Miller. (T. 818, 835-837.)

141. Employees of Miller's other corporations have performed services for Whitemarsh without being compensated by Whitemarsh. (T. 843.)

142. Sam Parker, an employee of one of Miller's companies, who is not a certified operator, participated in the operation of the Plant on days when a certified operator was not available. Parker was not able to perform correct pH testing in accordance with the Permit. (T. 631-633.)

III. DISCUSSION

A. The Order and Permit Renewal Denial

The defining issue in this case is whether "municipal sewerage facilities" that are "capable of receiving and treating the permittee's sewage" are "available." Whitemarsh's original NPDES permit contained the following provision:

> This permit authorizes the discharge of treated sewage until such time as facilities for conveyance and treatment at a more suitable location are installed and are capable of receiving and treating the permittee's sewage. Such facilities must be in accordance with either the applicable municipal official plan adopted pursuant to Section 5 of the Pennsylvania Sewage Facilities Act, the Act of January 24, 1956, P.L. 1535, as amended, or a comprehensive Water Quality Management Plan as set forth in Section 91.31 of the Rules and Regulations of the Department. When such municipal sewerage facilities become available, the permittee shall provide for the conveyance of the sewage to these sewerage facilities, abandon the use of the sewage treatment plant thereby terminating the discharge authorized by this permit, and notify the Department accordingly. This permit shall then, upon notice from the Department, terminate and become null and void, and shall be relinquished to the Department.

(Part C, Paragraph B, page 14 of 14.) The same provision was carried through in the Permit when it was renewed in 1991. (Part C, Paragraph 2, page 14 of 14.) Thus, if appropriate alternative facilities have become "available," the Permit would suggest that Whitemarsh must "provide for the conveyance of the sewage to these [alternate] sewerage facilities," abandon the use of its plant, terminate its discharge, and notify the Department that it has taken these actions.

Whitemarsh does not appear to have directly challenged the legality of the provision, and indeed, is precluded from doing so in any event by the doctrine of administrative finality due to Whitemarsh's failure to appeal from the original permit issuance and its renewal. *Tinicum Township v. DEP*, 1996 EHB 816, 827. Thus, in *Martin v. DEP*, 1996 EHB 1076, the Department

issued water discharge permits to a mobile home park which authorized the operation of a private sewer plant. In language nearly identical to Condition C.2, the permits provided that the plant would need to be abandoned when public sewerage became available. The mobile home park owner did not appeal the permits. Several years later, the local township supplemented its official Act 537 plan to provide for the construction of a municipal sewage collection and treatment system that would serve the area that included the mobile home park. The park owner appealed the Department's approval of the township's supplement. The Department filed a motion for summary judgment which argued that the park owner was precluded by the doctrine of administrative finality from challenging the township's inclusion of the mobile home park in the proposed township plant's service area because the owner was, in effect, challenging the permit conditions that required abandonment of the private plant when municipal treatment became available.

The Board granted the Department's motion on this issue. In language that is very helpful here, we ruled as follows:

> The Board grants the Department's motion because Appellants had an opportunity to challenge the inclusion of the private sewage system in the municipal sewage plan through conditions set forth in previously issued permits. As noted earlier Appellants admitted that Paragraph 15 of the 1986 Water Quality Management Part II and Condition G of the renewed Part I NPDES originally issued in 1986 and renewed in 1992 specifically stated that when the municipal sewage facilities became available the sewage from the private system was to be conveyed to the municipal facilities and the private system abandoned. Since the permits were issued to [the mobile home park], [the park owner was] clearly aware of the fact that the sewage treatment facility for the mobile home park would be eliminated once the municipal facilities had the capacity to receive and treat sewage from [the park.] The permits were final actions and Appellants had the opportunity to file an appeal regarding any aspect of the permit at the time of original issuance or renewal. Since Appellants failed to appeal these conditions of the permits when they were originally issued or renewed, they are precluded from raising the issue of the inclusion of the mobile home park within the sewer service

> area of the township's collection system because it could have and should have been raised in 1986 or 1992.

1996 EHB at 1081-1082.

Similarly, if Whitemarsh wanted to challenge the contingent status of its facility, it needed to do so when its permits were issued. It is too late to do so now. Since it is foreclosed from challenging the legality of the permit condition, Whitemarsh is left to argue in this appeal that the factual predicates to the operation of the provision have not been met. In other words, Whitemarsh argues that appropriate alternate facilities are not in fact available.

If Whitemarsh is wrong, there is really very little left about which to argue. A condition in Whitemarsh's permit indicates quite clearly on its face that the Plant was always intended to be a facility that would only be used until municipal facilities became available. A great deal of attention has been paid in this appeal to whether the Plant is in good shape, whether proper management and institutional arrangements are in place, whether Whitemarsh has the financial wherewithal to carry on, and the like. In the final analysis, none of that really matters. The Whitemarsh facility could be a new, state-of-the-art facility with limitless resources and eminently qualified management, but if appropriate municipal sewerage were available, the Plant's discharge would need to be terminated.

Thus, in *Interstate Traveller's Services v. DER*, 1981 EHB 187, the Department issued a permit to ITS to operate a private sewage treatment plant until facilities became "available for conveying the sewage to and treating it at a more suitable location," at which point the Department could order an interconnection. When a new municipal facility was built in the area, the Department ordered the ITS plant to shut down. This Board upheld the Department's order. Although the parties "debated long and well the question of whether [the ITS plant was] an 'interim plant'," we

stated as follows:

> We believe that DER has the authority to order, under proper circumstances, a consolidation of a small package sewage treatment plant into a larger more comprehensive area plant whether or not the small plant has been specifically designated as "interim" by the parties. In construing the Pa. Sewage Facilities Act...and the Clean Streams Law...DER can properly decide as a policy matter to oppose the proliferation of sewage treatment plants.

1981 EHB at 191-192 (footnote and citations omitted).

Unlike the Whitemarsh Plant, the Interstate Traveller's Services plant was operating without serious violations, was minimally adequate to do the job, and was not yet paid for. 1981 EHB at 192. Nevertheless, this Board upheld the Department's abandonment order. *Interstate Traveller's Services* supports the Department's action in this case. Indeed, this case presents much stronger circumstances supporting the Department's order given (1) Permit Condition C.2, (2) Permit B, Part I.G. together with the Plant's fundamentally poor condition, and (3) Whitemarsh's extensive history of lack of compliance, which will be discussed in detail below.

We conclude that capable municipal sewerage facilities more suitable for the treatment of the flow currently being treated at the Plant are in fact available. There is a municipal sewer line on Pennsylvania Avenue, the very street where the Plant and three of the four Plant users are located. The line carries sewage to a municipal facility that has adequate capacity and is otherwise fully capable of handling the users' sewage. (F.F. 37, 49.) *See Martin v. DEP,* 1996 EHB 1076, 1081 (alternate facilities "available" if they have adequate capacity); *Pennsbury Village Condominium v. DEP*, 1976 EHB 369, 370-71 (alternate facilities are available if they can accommodate present and future sewage from the permittee).

Although the apartment complex is somewhat further removed, we are satisfied with the

testimony that indicated that the complex's sewage could be transported to either the Pennsylvania Avenue line directly or via parts of the Whitemarsh system, or to Whitemarsh Township's system, which we also conclude is a system that is available and capable of receiving the apartments' sewage. (F.F.48, 49.) Both the Upper Dublin and Whitemarsh Township systems are accounted for in their respective official municipal sewage facilities plans. (F.F. 58.)

Whitemarsh is entirely correct in pointing out that much work needs to be done to reroute sewage to the municipal facilities. Any change in sewage handling obviously requires that certain administrative and technological measures be carried out. Before the sewage can be rerouted, planning approvals must be obtained. Agreements will need to be signed, the rerouting must be engineered properly, construction of new lines may be necessary, and connection fees will need to be paid. Whitemarsh is incorrect, however, in suggesting that the fact that these tasks must be performed means that alternative facilities are not "available." We do not interpret the permit provision to mean that Whitemarsh is only required to cease discharging if the equivalent of a switch can be thrown to divert flowing sewage from one pipeline to another.

The Department has never suggested that Whitemarsh's sewage discharge could be instantly terminated. The Department's order did not require the immediate cessation of the Plant's discharge. It required the submission of a plan that would describe how Whitemarsh would terminate its discharge. Requiring Whitemarsh to take appropriate measures with some advance warning and pursuant to an acceptable plan of action was an appropriate exercise of the Department's discretion.

Where the Department abused its discretion, slightly, was in requiring that the Plant cease its

discharge in 90 days. Regardless of whether Whitemarsh or its users do the work (the Order does not specify who must reroute the sewage), we do not believe that it is realistic to expect that a system that has been operated for 30 years be completely eliminated or reconfigured in three months. As already noted, in order to reroute the sewage, Whitemarsh (or more likely its users) will need to go through a planning process. It (or they) will need to execute contracts and hire engineers who will design the system changes. Those designs will need to be approved. The parties will need to obtain funding to connect to the municipal facilities. Of course, time is needed for actual construction after all of the preliminaries have been taken care of. Although it is not completely inconceivable that all of this could be accomplished in 90 days, it is unrealistic.

The Department acted appropriately in requiring that sewage be hauled away if Whitemarsh is not ready to shut down in time. Although it is true that haulage is readily available, the Department acknowledged that requiring immediate off-site treatment would have been unreasonable. (T. 1212-1213.) We agree. Of course, if Whitemarsh and/or its users do not proceed with reasonable dispatch with their rerouting plans, haulage should eventually be required, but we will keep the date for hauling sewage the same as the date for ceasing the discharge, which means that we move commencement of the duty to haul to 180 days after this Adjudication.

Having found an abuse of discretion on the part of the Department, we substitute our discretion and hold that Whitemarsh must still submit an acceptable plan as required in the Department's order within thirty days. The plan must provide that Whitemarsh will begin immediately taking those measures necessary to effect the termination of its treatment service upon

the Department's approval of its plan, and work diligently toward ceasing its discharge as soon as possible, but in no event should its discharge continue after 180 days of the date of this adjudication, even if that requires daily hauling of sewage to an approved treatment facility. This gives not only Whitemarsh, but its users, adequate advance notice that they must make alternate arrangements. Of course, if Whitemarsh fails to comply with its most recent permit terms in the interim, it will be subject to civil penalties and other sanctions. In other words, this Adjudication does not in any way authorize or justify any violations of the law over the course of the next 180 days.

It is true that it will not be known whether all of the prerequisites to rerouting the users' sewage can be satisfied until Whitemarsh and/or its users move forward. Some of the prerequisites, such as planning approval, are partly outside of their control. But there is no question in our view that Whitemarsh has been properly ordered to terminate its operation as a treatment facility. In the unlikely event that the affected parties truly find it impossible to reroute their sewage despite their best good faith efforts, they might have a defense to enforcement and contempt actions in Commonwealth Court. Unless the Department takes future, final, appealable actions, however, that issue is beyond our jurisdiction and control. Our role is limited to determining whether the order to cease discharging violated the law or was an abuse of discretion, and other than the compliance deadline, we conclude that it was not.

Whitemarsh complains about the inordinate cost of connecting to the municipal systems. Ordinarily, this sort of argument would be precluded by the fact that economical and technical feasibility are not relevant in Board cases. *Heidelberg Heights Sewerage Company v. DEP*, 1998

EHB 538, 542-43; *Agmar Sewer Company v. DEP*, 1997 EHB 433, 438. The question here is whether this case should be treated any differently based on an argument that feasibility is an aspect of "availability" as the term is used in Whitemarsh's permit.

The Department suggests that the feasibility of a municipal connection is not even at issue here because its order merely requires the Plant to cease discharging. The order stops short of actually requiring an interconnection. Although the argument has some facial appeal, unless the users shut their doors or haul sewage away in trucks, the practical effect of the order is to mandate the commencement of work ultimately directed toward connection to a municipal system. It would be inappropriate for us to ignore the practical implication of the order. Although the order does not say interconnection is required, it necessarily follows from its issuance. In any event, we are still left with the availability question.

Whitemarsh has failed to articulate its position on economic issues with anything approaching a reasonable degree of clarity, but to the extent that it challenges the feasibility of requiring it (or its users) to connect to the municipal system, we are guided by the Pennsylvania Supreme Court's decision in *Ramey Borough v. Commonwealth, Department of Environmental Resources,* 351 A.2d 613 (Pa. 1976). That case involved a DER order to a small, impoverished borough to build a sewage plant because residences in the borough were discharging untreated sewage via a common sewer line directly into a stream. The borough argued that it could not possibly comply with the order for financial reasons.

The Supreme Court affirmed the order of the Commonwealth Court, which had affirmed this

Board's rejection of the Borough's financial impossibility defense. In language that controls our decision here, the Supreme Court held as follows:

> Our inquiry at this juncture, however, is not to determine whether Ramey can afford to build such a treatment plant.... The Act provides a procedure by which appeals may be taken to attack the validity or content of DER orders. This is such an appeal.
>
> ... Nothing in the Act limits the DER to issuing orders only to municipalities which can afford to take the corrective measures necessary. In fact, the economic condition of the municipality is not a major factor in the DER's statutorily governed decision to issue an order.
>
> The ability of a municipality to comply with a DER order, for technological or economic reasons, may be relevant in a proceeding to enforce a DER order. This is not such an action however. The appeal from the issuance of the order serves only to determine the validity and content of the order.
>
> If, at some future date, the Commonwealth seeks to enforce such an order by mandamus, contempt or other action, courts would then be required to examine the municipality's ability to comply with the order. Such consideration here, however, would be premature.

351 A.2d at 614-615 (footnotes and citations omitted). In going on to reject the borough's claim that the order was unconstitutionally unreasonable because it would bankrupt the borough, the Court held:

> [T]his argument of doom is not ripe for decision. As the Commonwealth Court stated in rejecting this argument:
>
> > "[A]t the current stage of the proceedings, the construction, financing and operating cost projections are only estimates which may or may not prove to be accurate if and when the facility is actually constructed. Consequently, these estimates are speculative in nature, and a constitutional challenge cannot be sustained on the basis of supposition and speculation as to future events."
>
> The township has not yet fully investigated state and federal funding

> opportunities, alternate methods of financing, or alternate means of compliance with the order. At this point we cannot conclude that the order fails to meet constitutional standards.
>
> If, in an appropriate proceeding to enforce such an order, a municipality properly establishes that all alternatives have been exhausted and compliance with the order is impossible, a court would not impose sanctions for failure to do that which cannot be done. This is not such a case.

351 A.2d at 615-616. *See also Kidder Township v. Department of Environmental Protection*, 399 A.2d 799, 801-802 (Pa. Cmwlth. 1979) (financial inability to comply with order to build sewer system "may prove to be a defense in a citation for contempt for failing to obey one or more of DER's orders, but it is no defense on the merits of the order"); *Heidelberg Heights Sewerage Company v. DEP*, 1998 EHB 538, 542-543 (Department not obligated to consider economic impact on the order recipient in issuing an order; financial inability to comply not a valid objection in EHB appeal); *Wasson v. DEP*, 1998 EHB 1148, 1158 (same; cites numerous cases); *Agmar Sewer Company v. DEP*, 1997 EHB 433, 438 (same); *Altoona City Authority v. DER*, 1991 EHB 1381 (same).

Thus, while the Board inquiry focuses upon the content of the order, the court in an enforcement, and perhaps more accurately, a contempt proceeding is not so much concerned with the content of the order as with a party's legal obligation to comply with an order. A court will not impose sanctions – quite possibly including jail time – if the party can prove that it would be impossible for it to comply. Although one might argue that it would be more efficient to address all of these questions in one proceeding, *see Ramey Borough (C. J. Nix, dissenting)*, that is not how it is done in Pennsylvania.

The Supreme Court's concern with the speculative nature of costs as one reason for not examining financial feasibility is implicated here. Although Whitemarsh fears that it will cost a great deal of money to interconnect, here, as in *Ramey Borough*, at this state of the proceedings, financing and construction cost projections are poorly defined estimates which may or may not prove to be accurate in attempting to achieve interconnection. *Ramey Borough*, 351 A.2d at 616. Departmental orders should not be overturned on the basis of such supposition and speculation. *Id.*

This speculation was demonstrated when Whitemarsh pointed out several times during the proceedings that Upper Dublin Township, the operator of the plant that is the most likely candidate for receiving the flow currently going to the Whitemarsh Plant, is discussing the possibility of selling its facility to another party. By the time that all of the preliminaries are taken care of here, the new owner might be in possession. Therefore, the Upper Dublin fees that Whitemarsh has decried may no longer be in place. Whether any of this is likely to occur is completely beside the point. But it does show that one of Whitemarsh's own suppositions could possibly change the cost of complying with the order, which demonstrates the speculative, premature nature of the entire financial feasibility discussion.

As noted above, the best possible spin that we can put on Whitemarsh's financial argument is that the allegedly extreme cost of connecting to the Upper Dublin system means that it is not "available" as that term was used in the Permit. To use exaggeration to make the point, if it cost one million dollars per EDU to connect to the Upper Dublin system, alternate sewerage could not fairly be characterized as "available." In other words, the system is not available in the generic sense, so

Whitemarsh's (and its users') unique financial condition is irrelevant. If it would be infeasible for anybody to comply, the finding of "availability" is invalid. Because the availability of alternatives was a basis for the order, as the argument goes, the order is an abuse of discretion.

Although the interpretation of "availability" is extremely close to the question of whether compliance with an order is feasible, we do see a subtle but important difference between the two questions. The order is based on the permit, which in turn requires the Plant to cease discharging if alternative facilities become "available." The Department's case turns on this determination. This Board must, therefore, determine whether the Department's finding of availability is correct. Feasibility is legitimately an aspect of availability.

This Board has previously held that availability in the context in which it is being used here relates to the capacity of alternate facilities. *Martin, supra, 1996 EHB 1076; Pennsbury Village, supra,* 1976 EHB 369. Of course, a facility with capacity that is 100 miles away probably could not be considered available. It is not difficult to imagine other facts that would preclude a plant from being available, even if it has capacity, such as truly impassible terrain features or the like. In order to be consistent with *Ramey Borough*, in making this determination, we view the question of availability using an objective standard without regard to Whitemarsh's (or its users') particular financial circumstances.

While there are reasonable limits to the concept of "availability," we are not called upon to define them here. The record in this case does not suggest in any way that the Department erred in concluding that alternate facilities were "available." To the contrary, a sewer line is located on the

very street where the Plant and three of its users are located. There is even the possibility of a gravity feed. If a municipal sewer line on the very street where the interim plant is located flowing to a plant with unused capacity is not "available," it is hard to imagine what would be. The Department did not arbitrarily, capriciously, or otherwise act in violation of the law in finding availability here, and its determination is supported by the evidence. In the highly unlikely event that future efforts demonstrate true infeasibility, Whitemarsh (or its users) will have a defense if the Department brings an enforcement action.

Whitemarsh refers us to *East Pennsboro Township Authority v. Department of Environmental Resources*, 334 A.2d 798 (Pa. Cmwlth. 1975). While it is true that the Department has a statutory duty to consider the impact of its actions upon the community and the public at large, 35 P.S. § 691.5(a), that obligation does not necessarily require consideration of the economic impact of a Departmental action on the individual who is the object of that action. *Mathies Coal Company v. DER,* 559 A.2d 506, 511-12 (Pa. 1989); *Altoona City Authority v. DER,* 1991 EHB 1381, 1389-90. Whitemarsh has not asserted any failing on the part of the Department to consider an economic impact beyond that to be suffered by itself and its users. Nor do we independently detect any such failing.

Yet another difficulty with Whitemarsh's economic feasibility argument is that, even if we assume (as we have) that the order essentially requires *somebody* to interconnect to municipal facilities, we have not been shown that *Whitemarsh* will suffer any of the expenses associated with interconnecting to a municipal system. Whitemarsh is a corporation whose only function is to

operate the Plant. Whitemarsh does not produce any flow of its own; it receives and treats the flow of its four users. None of those users intervened in this case despite their obvious stake in the outcome. Barring any contractual obligations to the contrary, of which there is no evidence, Whitemarsh's obligation is logically limited to compliance with the order as written, which only requires Whitemarsh to cease discharging. Thus, Whitemarsh is really only exposed to the very limited costs associated with ceasing the discharge. The costs of finding alternative treatment for their sewage would seem to be the responsibility of the users if they wish to stay in business. We need not decide how these costs will be allocated because we have rejected the economic feasibility defense and the challenge to the "availability" determination; that is, the economic defenses are rejected regardless of who ultimately must pay for an interconnection. We nevertheless mention it as an example of how Whitemarsh failed to prove that **it** will suffer any untoward economic harm as a result of the Department's actions.

Whitemarsh and its users have had more than 30 years to prepare for an interconnection. Whitemarsh's initial permit made it clear that the Plant was to be an interim system that would need to be dismantled once municipal sewage became available. A reasonably prudent operator would have planned accordingly. Among other things, it would have reserved funds. It would have charged appropriate rates so that it could reserve funds. Alternatively, its users could have and should have done the same. They have benefited from years of borrowed time. The Department's exercise of its discretion should not be limited by these parties' lack of preparedness.

A major theme of Whitemarsh's case has been that it would make more economic sense to

rehabilitate the Plant than to shut it down. This argument and the evidence presented to support it are irrelevant on several levels. First, the argument is contrary to Permit Condition C.2, which specified that the Plant was to be an interim facility. The argument goes more to whether the Plant should have been created as a contingent, as opposed to permanent, facility in the first place. If the argument could be made at all, it would have needed to be made in an appeal from the original permit issuance.

In any event, comparing the relative costs of rehabilitation and interconnection sheds no light on the central question in the case of whether interconnection is available. Availability is not a relative concept. Interconnection is available or it is not. Interconnection is no less available simply because it would be less expensive to rehabilitate the interim plant. If it would cost ten times as much to interconnect as to rehabilitate, that would not provide particularly probative information on the availability question.

Whitemarsh cites *North Cambria Fuel Company v. Department of Environmental Resources*, 621 A.2d 1155 (Pa. Cmwlth. 1993), for the proposition that the exercise of the police powers is "restricted by the parameters of reason." 621 A.2d at 1161. It argues that requiring intermunicipal connection is an unreasonable exercise of the police powers when it would be much less expensive to rehabilitate the Plant. Again, however, this argument needed to be made when permit condition C.2 was drafted and issued, not now. Further, for the reasons discussed throughout this adjudication, there is no question that the Department's exercise of its powers in this matter was in the public interest, reasonably necessary, and not unduly oppressive.

At least in the first instance, this should not be viewed simply as a case where there is a problem discharge and something needs to be done about it. In such a case, it might be appropriate for the parties to weigh all of the various options for correcting the discharge that might be available. This case is more about eliminating satellite sewer plants when central municipal facilities become available. Considering other options or even no action at all is not relevant when the issue is defined properly and once availability of the municipal system has been established, given the terms of Whitemarsh's permit.

In *Interstate Traveller's Services v. DER*, 1981 EHB 187, discussed earlier, we ruled that the Department has the discretion to phase out individual isolated sewer plants when centrally located municipal facilities come on line. We continue to see the merit in the Department's policy of discouraging the proliferation and continuation of small, localized, privately held plants when centrally located municipal facilities become available. This case serves as an example of the drain on the Department's resources that small plants are want to cause. Proper operation of such plants, over the long haul, is rarely a priority for the developers who build them. While such plants may be necessary in relatively remote or rural areas with a pocket of dense activity, the Department policy of reluctant toleration is justified.

Thus, the Department's decision to issue the Order and deny the permit renewal would have been appropriate even if the Plant had been in a good condition and operating in accordance with its expired permit. The decisions happen to be further justified by Whitemarsh's failure to properly operate and maintain the Plant.

There is no need to repeat our findings of fact here. Suffice it to say that Whitemarsh has established an unmistakable pattern and practice of compliance problems that clearly demonstrates that it is unwilling and unable to comply with the law. (F.F. 68-121.) It has violated its permit conditions almost continuously, with the exception of the two months after the hearing was scheduled in this appeal. It has allowed the discharge of raw sewage into the stream on many occasions. It has failed to report its discharges and failed to notify the Department of its many violations. This pattern of illegal activity has continued virtually unabated since at least 1996 (when current management took over).

Whitemarsh devotes a great deal of effort in its post-hearing brief to blaming its contract certified operators, WasteOps, for failing to comply with the law. This effort to deflect the blame was misplaced. First, many of Whitemarsh's violations occurred after WasteOps no longer worked at the Plant. Second, while WasteOps may not have been the ideal operator, it did bring problems to Whitemarsh's attention, usually to no avail. Finally, Whitemarsh as the permittee and owner of the Plant bore final responsibility for ensuring compliance with the Permit and the law. Similarly, Whitemarsh's argument that it should be excused because the Department should have been more vigilant in discovering the violations and reporting them to Whitemarsh borders on the absurd. Whitemarsh has no one to blame here but itself.

Aside from its actual violations, Whitemarsh has allowed its system to gradually fall apart. Rather than have backups and contingencies in place, in the best of times Whitemarsh runs its facility with the barest of essentials. The evidence exhibited many examples of how the Plant is

being run with substandard, dilapidated equipment. Although the concrete floors and walls might last indefinitely, much of the guts of the Plant – the actual equipment that treats sewage – is past the point of no return. Extensive, dramatic, and expensive rehabilitation would be required. Whitemarsh has never seriously disputed that point.

We were particularly persuaded by the testimony of Michael DiSantis, who we view as a highly qualified, very credible witness. Although Mr. DiSantis's company currently runs the Plant for Whitemarsh, DiSantis gave a clear, honest appraisal of the situation. DiSantis described the long history of violations at the Plant, which included a mysterious mixed liquor sludge problem suggestive of sludge discharges to the stream over an extended period of time. His pleas to Whitemarsh to correct the problem fell upon deaf ears. He described a Plant with many deficiencies that would take hundreds of thousands of dollars to correct. Whitemarsh made no attempt to attack DiSantis's testimony or credibility at the hearing. Although DiSantis had an economic incentive to paint a rosy picture of the Plant, his description was anything but favorable. In fact, it was alarming. DiSantis's testimony along with the mountain of other evidence regarding the condition of the Plant leaves absolutely no doubt that it cannot be permitted to continue to operate.

If the availability of alternative systems was not an issue in this case, and if Whitemarsh had shown that it was willing and able to comply with the law in all respects other than plant maintenance, we might speculate that it would have been reasonable to allow repermitting with extensive rehabilitation. But the evidence leaves no room for debating the conclusion that Whitemarsh and its management simply do not care about this system. David Miller, Whitemarsh's

general manger, and through another corporation its sole shareholder, is completely occupied with the operation of the Cherry Tree Hotel, one of the Plant's users. The Plant has been an annoyance and a bother since Miller's first involvement. He never even looked at the Plant before agreeing to buy it as a condition to purchasing the Hotel. This case presents a textbook example of a neglected private treatment plant in the middle of a developed area that has long outlived its justification for existence.

Neither Whitemarsh nor Miller have deliberately set out to violate the law. Rather, their relationship to the Plant can be characterized as one of callous indifference and intentional neglect. When its certified operators have identified serious problems, Whitemarsh and Miller have put them off. As described in the findings of fact, Miller has not attempted to run Whitemarsh as a legitimate separate corporation. Whitemarsh avoids paying its vendors, to the point that no one will work for the company without being paid in advance. There is no evidence that either Whitemarsh or its current management have ever or will ever take their duty to comply with the environmental laws seriously. The overwhelming majority of the evidence is very much to the contrary. This system cannot be allowed to remain open as a sewage treatment facility. Whitemarsh's misconduct in general and the poor condition of the Plant in particular lend abundant support to the Department's decision to issue the Order under appeal.

Still further, in assessing whether Whitemarsh is willing or able to comply with the law in the future, the Department properly considered the financial and institutional condition of the operation. As outlined in the findings of fact, in Miller's words, "Whitemarsh has no money." (F.F. 119.) It

does not have a bank account. Even more of concern is the fact that there is no system in place to make Whitemarsh a financially viable operation. The users either do not pay at all or pay rates that do not cover the cost of operating the system, let alone rehabilitate it. This situation has continued for years. Even in the face of a Department order to shut down the system, admittedly the subject of litigation but still a threatening contingency that any reasonable business would have planned to address, there was no evidence that Whitemarsh has done anything to get its financial house in order. An operation such as Whitemarsh with a near total absence of any financial and institutional controls will inevitably have operational problems as well. One need look no further than the incident a few months before the hearing when Whitemarsh's electricity supplier shut off power for nonpayment resulting in the discharge of raw sewage. Whitemarsh has a long history of not paying its vendors, which inevitably leads to operational difficulties. (F.F. 113, 114, 115.)

All of these difficulties are exascerbated still further by the fact that the Plant is located in a flood-prone area, and it has in fact been flooded repeatedly. The Plant is not designed to withstand these floods. The floods have wrought havoc on an already overly stressed system operated by indifferent management. While we do not cite the flood-prone location of the Plant as an independent basis to support the Department's actions, we mention it because it makes it that much riskier to allow the Plant to continue in operation with marginal management and institutional controls.

The condition of the Plant and Whitemarsh's demonstrated unwillingness and proven inability to comply with the law not only bolster the Department's decision to order the Plant to cease

discharging, they compel the conclusion that Whitemarsh must cease discharging in relatively short order. The private treatment plant in *Interstate Traveller's Services* was operating without serious violations, so this Board allowed it 24 months to phase out operations and connect to the newly constructed municipal sewage plant across the street. Here, the Whitemarsh Plant cannot be allowed to periodically discharge raw sewage for another 24 months. If we believed that interconnection could be achieved in 90 days, we would require it. We have extended that period only because of our grave doubt that interconnection can be achieved so quickly.

For all of these reasons, we conclude that the Department did not err in issuing the Order (except for the compliance deadline) and denying the permit renewal. The record also supports the other bases cited by the Department for issuance of the Order. By the time the Department issued the Order, Whitemarsh had been operating without a permit for approximately eight months. (F.F. 9, 11.) Whitemarsh repeatedly discharged inadequately treated sewage (F.F. 69, 71, 92, 93, 94), failed to monitor its discharge and report problems as required by its permit (F.F. 72, 99, 100, 101), and failed to employ certified operators at all times (F.F. 80). For all of these reasons, as well as the reasons discussed above, we conclude that Whitemarsh has violated and will almost certainly continue to violate the law and its permit and has caused and will almost certainly continue to cause actual and threatened pollution of the waters of the Commonwealth, thereby justifying issuance of the Order.

Similarly, there is no question that the Department acted properly in denying the permit renewal. In fact, it necessarily follows. The Department obviously could not have left the Order in

place and renewed the Permit. By standing pat on the Order, the Department had to deny the permit renewal. We find that the additional bases for the permit renewal denial cited by the Department (F.F. 24) are also supportive of the Department's action. We have already addressed Whitemarsh's compliance history, inadequate management, and demonstrated inability to comply with the law.

In addition, our conclusion that the Plant's discharge must be terminated with all deliberate speed is bolstered by, but not dependent upon, the fact that the Plant is in a "built up" area. The Department cites to 25 Pa. Code § 91.32 as additional support for the permit denial, which reads as follows:

> (a) The Department will look with disfavor upon applications for sewerage permits for private sewerage projects to be located within the built-up parts of cities, boroughs and first and second class townships.
>
> (b) Generally, issuance of the sewerage permits will be limited to proper private sewerage projects located in the rural parts of first and second class townships, and for which areas there appears to be no present necessity for public sewerage.

It does not appear that this regulation directly applies to permit renewals because it speaks of projects "to be" located in built-up areas. In addition, Whitemarsh Township happens to be a home-rule-charter municipality. (T. 480.) Nevertheless, the regulation is one example of the Department's policy of limiting private sewerage projects to rural areas where there is no present need for public sewerage. The area of the Whitemarsh Plant and at least three of its users cannot be characterized as in any way rural. The area is a busy commercial district that is in fact served by public sewerage. The nature of the area provides support for the Department's decision to terminate the Plant's discharge by denying its permit renewal.

Whitemarsh seems to argue that the Department's actions have improperly resulted in a de facto taking of its and the Plant's users' property rights without appropriate compensation. All that the Department has done here, however, is order a plant that was permitted as an interim plant from its inception to cease discharging. Neither Whitemarsh nor the users ever had a right to have this plant operated on a permanent basis. In any event, a permittee has no property interest in permits issued by the Department that is capable of being taken in the constitutional sense because permits merely convey privileges. *Tri- State Transfer Co.* v. *Department of Environmental Protection*, 722 A.2d 1129, 1133 (Pa. Cmwlth. 1999).

Whitemarsh argues that the Department failed to follow federal procedural regulations when it declined to renew Whitemarsh's permit. To the extent that the issue is within our jurisdiction due to Whitemarsh's failure to include it in its notice of appeal, *see Commonwealth of Pa., Pa. Game Commission v. Commonwealth of Pa., Department of Environmental Resources,* 509 A. 2d 877, 885 (Pa. Cmwlth. 1986), the procedural requirements that the Department was required to follow are set forth in Title 25 of the Pennsylvania Code, not Title 40 of the Federal Code of Regulations. There is no evidence that the Department failed to follow the applicable procedural regulations.

B. The Complaint For Civil Penalties

The final aspect of this consolidated matter is the Department's complaint for civil penalties against both Whitemarsh and Miller. The Board, not the Department, assesses civil penalties under the Clean Streams Law. *Westinghouse Electric Corporation v. DEP* (*Westinghouse II*), EHB Docket NO. 88-319-CP-MG, Slip Op. at 12, *aff'd*, Cmwlth. Ct. Docket No. 1069 C.D. 1999 (February 10,

2000); *Westinghouse Electric Corporation v. DEP* (*Westinghouse I*), 1996 EHB 1144, 1284 n. 49, *remanded on other grounds*, 705 A.2d 1349 (Pa. Cmwlth. 1998). The Department starts the process by filing a complaint for civil penalties, as it did here. 25 Pa. Code § 1021.56. Although the Department can and does make a recommendation regarding the amount of the penalty, that recommendation is purely advisory. *Westinghouse I*, 1996 EHB at 1258; *E.M.S. Resource Group, Inc. v. DER*, 1995 EHB 834, 840. The Board must exercise its independent judgment, which may result in the assessment of a penalty that is higher or lower than the Department's recommendation. Along the same lines, although the Department is free to use various internal policies, procedures, and formulae in formulating its recommendation, this Board does not necessarily rely on those devices. For these reasons, the "reasonable fit" standard of reviewing a predetermined assessment does not apply in our Clean Streams Law cases. (It does, of course, apply to the Commonwealth Court's subsequent review of our decision.)

Section 605(a) of the Clean Streams Law, 35 P.S. § 691.605(a), provides that "a penalty may be assessed whether or not the violation was willful," that the penalty "shall not exceed ten thousand dollars ($10,000) per day for each violation," and that, when determining the amount of the penalty, the Board "shall consider the willfulness of the violation, damage or injury to the waters of the Commonwealth or their uses, cost of restoration, and other relevant factors." The deterrent effect of the penalty is one of the "other relevant factors" the Board may consider under Section 605. *Westinghouse II*, slip op. at 12.

1. Whitemarsh

a. Count I

Count I seeks penalties for the failure to have an operational blower from "approximately" June 15, 1996 through September 24, 1996. The Defendants do not dispute the fact that the blower was not operational during the summer of 1996. The precise date when the blower went down is not clear, but the record indicates that it was sometime during the week of June 15. (F.F. 68.) In order to err on the side of caution, we will add an entire week to June 15 and assume for purposes of the complaint that the blower stopped working on June 22.

Concerning the end of the period, there was testimony that the repaired blower was available as of September 18, but the Department asked that it not be installed for fear of releasing a pollutional discharge. (T. 508.) Accordingly, we will not assess penalties for failing to operate the blower after September 17.

Failing to operate the blower, which was undisputedly necessary to effect proper treatment, constituted a violation of the law. The regulations promulgated under the authority of the Clean Streams Law require that "the permittee shall maintain in good working order and operate as efficiently as possible facilities or systems of control installed by the permittee to achieve compliance with the terms and conditions of the permit." 25 Pa. Code § 92.51(4). They also require that, as a minimum level of treatment, sewage treatment facilities must provide secondary treatment. 25 Pa. Code § 95.2. Part B, paragraph G, of the Permit requires that "the Permittee shall

at all times maintain in good working order and properly operate all facilities and systems (and related appurtenances) for collection and treatment which are installed or used by the permittee for water pollution control and abatement to achieve compliance with the terms and conditions of the permit." (F.F. 21.) Whitemarsh as the actual actor and the permittee clearly violated the law and is liable for civil penalties.

The Department has suggested a penalty of $2,000 per day for this violation. One problem that we see with that recommendation is that it penalizes Whitemarsh the same for its violation on June 22 as September 17. If nothing else, the record indicates that it took a while for the absence of a functional blower to have an effect on the discharge. More importantly, while various factors including the confusion attendant upon the change of ownership of business might explain the June period, there is no excuse for having allowed the situation to continue into September.

There was no evidence that the discharge resulting from the ineffective treatment had any quantifiable harm to the receiving stream, any organisms living in the streams, or any of the stream's uses. The stream is not classified as a high-quality stream. The Department did not present any evidence regarding the actual quality of the stream. There was no evidence that any downstream users were affected. The pollutants involved were conventional pollutants that, relatively speaking, are not particularly hazardous. There have been no identified, quantified costs of restoring the stream. During several days during September, the entire Plant was out of service, which further reduced the significance of not having a blower during that period. The new management of Whitemarsh was in the process of inheriting a dilapidated Plant that had been in receivership for

some time. (On the other hand, Miller conducted virtually no due diligence regarding the Plant, which reasonably should have given him advance notice of the condition of the Plant.) We have insufficient evidence to gauge the Department's costs. We also do not have enough evidence to calculate accurately the savings that Whitemarsh enjoyed by not repairing the blower in a timely manner.

With regard to the willfulness factor, we have defined the various levels of culpability in the context of a civil penalty assessment as follows:

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

F.R. & S., Inc. v. DEP, EHB Docket No. 97-247-MG, Slip op. at 29 (Adjudication issued May 19, 1999); *Phillips v. DER*, 1994 EHB 1266, *affd*, 2651 C.D. 1994 (Pa. Cmwlth., June 16, 1995) (quoting *Southwest Equipment Rental, Inc. v. DER*, 1986 EHB 465, 475).

We have no hesitation in concluding that Whitemarsh knew about the problem. (F.F. 72.) A corporation is deemed to know all material facts which its officers or agents acquire within the scope of their employment and authority. *Westinghouse I*, 1996 EHB at 1274, *citing Southwest Equipment Rental, Inc. v. DER,* 1986 EHB 465, 475. While Whitemarsh (through Miller) argued with the certified operators about who would pay for the repairs and when, the Plant "went septic"

and discharged inadequately treated sewage for weeks on end. Miller was not receptive to the repeated pleas of the certified operators. The duration of the neglect was unacceptable. Although we do not believe that Whitemarsh set out to deliberately violate the law, we are satisfied that its conduct was reckless.

With regard to the deterrence factor, because this adjudication allows the discharge to continue for another six months, Whitemarsh must be deterred from such future misconduct and neglect. It is also appropriate for the regulated community at large to understand that the callous disregard exhibited by Whitemarsh here should not be tolerated. With these factors in mind, we assess a penalty of $500 per day in June (8 days), $1,000 per day in July, $2,000 per day in August, and $4,000 per day in September (17 days), for a total penalty for Whitemarsh for Count I of $165,000. Although substantial, this amount is only a small fraction of the statutory maximum.

b. Count II

Count II is based upon discharges during the summer months of 1996 that exceeded the permit effluent limits. Such exceedances occurred (F.F. 94), and constituted a violation of the law, 35 P.S. §§ 691.201, 691.202, 691.401, 691.402, 691.611; 25 Pa. Code § 92.3.

The very same factors and considerations that applied to the Department's request for penalties under Count I apply to the effluent violations during that unfortunate summer of 1996. In addition to those circumstances, we are influenced by the fact that the exceedances resulted in violations of the monthly average limits (as opposed to isolated or daily occurences). Indeed, all of

the relevant facts suggest that the illegal discharge was nearly continuous. Furthermore, Whitemarsh violated multiple monthly limits for multiple parameters (June-suspended solids, BOD5; July – fecal coliform, suspended solids, dissolved oxygen, ammonia (nitrogen), and BOD5; August-fecal coliform, suspended solids, dissolved oxygen, ammonia (nitrogen), and BOD5). Some of the exceedences were severe, particularly in July and August, when the exceedences were as much as six times the permit limit. Again, we believe that the duration and increasing severity of the violation must be factored in. These exceedances were the direct, inevitable result of the Whitemarsh's indifference to the consequences of its actions.

Whitemarsh argues that it should not be penalized for the broken blower **and** for the noncompliant discharge that was a direct result of the lack of a blower. Although there is no question that the two acts constitute separate violations and can be penalized separately, there is some merit to Whitemarsh's point that we should not totally ignore the close relationship of the two violations in setting the **amount** of the penalty for each.

Although the Department calculated a daily penalty to come up with a recommendation, we believe that it is more appropriate to assess a monthly penalty in light of the violation of monthly limits. We are not required to assess penalties on a daily basis. *See, e.g., F.R .& S., Inc. v. DEP*, EHB Docket NO. 97-247-MG (Adjudication issued May 19, 1999); *DER v. Canada-PA, LTD*, 1989 EHB 319, 325-29; *DER v. Landis*, 1994 EHB 1781, 1786-87. Based upon all of these factors, including the fact that we have also assessed a penalty for failing to maintain an operational blower, we assess a penalty against Whitemarsh of $10,000 for June, $20,000 for July, and $40,000 for

August, for a total of $70,000. We believe that anything less will not have the desired deterrent effect as the parties move forward following the issuance of this adjudication.

c. Count III

The Department seeks penalties for Whitemarsh's failure to notify the Department of the problems at the Plant which were resulting in permit exceedances. We stressed the importance of notification in *Westinghouse II.* Although that case involved releases to the groundwater of hazardous substances, the same concepts with very little modification apply to releases to a stream from a permitted facility:

> The Department cannot possibly inspect every facility every day to determine whether hazardous substances may have been released and, if so, whether the release might threaten waters of the Commonwealth. Similarly, the Department cannot possibly maintain remediation staff and equipment capable of responding at a moment's notice to every facility that could potentially have a release that could threaten those waters. If the owners of the facilities fail to notify the Department of releases and fail to take immediate action to protect the waters of the Commonwealth and those who use them, the waters may become contaminated and – as happened here – those using the waters may discover only afterwards that they have been using contaminated water. While the Department ordinarily has a variety of enforcement tools at its disposal, it has little means of protecting other water users if it is unaware that a release of a hazardous substance has occurred. Furthermore, it is frequently impossible to restore an affected aquifer completely once it has been contaminated. And even where possible, restoration can take years.

Westinghouse II, slip op. at 20-21.

It is true that this case does not involve hazardous substances, identifiable harm to downstream users, and some of the other factors that gave rise to a multimillion dollar penalty in

Westinghouse II. However, the point here is that the notice requirement is just as much a keystone of the NPDES program as it is important to the site remediation programs. The Department cannot inspect every permitted facility every day. Limited resources necessitate reliance on self-reporting so that the Department can act in a timely manner. Furthermore, people naturally abhor incriminating themselves. The requirement of giving notice in and of itself adds a strong incentive to fix the problem that is the subject of the notice.

On the other hand, we do not have the impression that Whitemarsh was deliberately attempting to hide anything from the Department, or that it intentionally decided to withhold notice. This case does not smack of a "cover-up," but rather, the same indifference that characterized Whitemarsh's other violations. Whether notification would have made any difference is to some extent a matter of speculation here. It is difficult to point to specific harm or cost savings that resulted from the failure to notify in and of itself. Taking all of these considerations into account, we assess a civil penalty against Whitemarsh of $5,000, which is materially consistent with the Department's recommendation.

d. Count IV

The Department seeks penalties for discharging without a permit since August 13, 1996 in Count IV of the Complaint. The Department has recommended a penalty for each of the 342 days between August 13, 1996 and the date on which Whitemarsh submitted a complete application to renew its permit, July 22, 1997. Whitemarsh has stipulated that its permit expired on August 12, 1996, and it has not disputed that it has been discharging ever since. There is no question that the

violation has been established.

Discharging on a daily basis for months on end without the legal authority to do so is a serious violation. Allowing such conduct without sanction is unfair to the vast majority of the regulated community who bear the rather significant burden and expense of obtaining permits and complying with them. Requiring parties to maintain permits is even more a cornerstone of the Department's regulatory efforts than the notice requirement discussed above.

Certain other circumstances here, however, militate in Whitemarsh's favor. During a significant period of time, the parties were involved in apparently good faith negotiations. Whitemarsh did make some effort to submit a new application. We do not see the callous disregard that we found for other violations for this violation. The Department even accepted a renewal application and eventually ruled it administratively complete. The Department has never evidenced particular alarm with the lack of a permit or acted particularly aggressively to terminate the discharge as a result of the lack of a permit. The lack of a permit in and of itself has not caused any harm to the environment or necessitated costs of restoration.

Although the penalty should begin running on August 13, 1996, it is not as clear when it should stop. Whitemarsh argues that, if any penalty is appropriate, it should have stopped running on February 11, 1997, the date it first submitted a renewal application. On the other hand, the Department points to July 22, the date when Whitemarsh "submitted a complete permit application," as the best end date.

Rather than attempt to compute a daily figure and multiply it by a somewhat arbitrary number of days, we have the option of assessing one penalty based upon the totality of the circumstance. While the Clean Streams Law provides for a maximum daily penalty, as previously noted, there is nothing in the law that requires us to assess a penalty on a daily basis.

Here, considering all of the factors discussed above, and being particularly swayed by the ongoing, good faith dialogue regarding the permit renewal in the early days that took place between the parties, we assess a total penalty of $10,000 against Whitemarsh under Count IV.

e. Counts V and VI

The Department seeks a penalty of $783 for a raw sewage discharge. A Department inspection on April 11, 1997 revealed that the Plant had recently discharged raw sewage and that solids had bypassed the Plant from the Whitemarsh manhole, and that this discharge had entered Sandy Run Creek. (T.616-617, 621-622; C. Ex. 22, 25.) Count VI seeks a civil penalty of $517 for the Defendants' failure to notify the Department of the discharge. Although it is likely that a discharge occurred and that it originated from the Plant, we do not have enough record evidence upon which to confidently assess separate penalties for this incident. In other words, we have little or no evidence to go on regarding willfulness, harm to the environment, savings to the operator, the Department's total costs, etc. Further, we do not think an additional penalty of a few hundred dollars would have any noticeable marginal deterrent impact given the remainder of this adjudication. For these reasons, we assess no penalties under Counts V and VI.

2. Miller

The Department's complaint is also brought against David Miller on all counts. The Department seeks to have Miller held individually liable as both a direct participant in the violations and as the alter ego of Whitemarsh.

a. Alter Ego Theory

The law regarding piercing the corporate veil is summarized in *Longenecker v. Commonwealth*, 596 A.2d 1261 (Pa. Cmwlth. 1991), *pet. for allowance of appeal denied*, 613 A.2d 561 (Pa. 1992):

> The accepted rule in Pennsylvania is that a corporation shall be regarded as an independent entity even if its stock is owned entirely by one person. *College Watercolor Group, Inc. v. William H. Newbauer, Inc.*, 468 Pa. 103, 360 A.2d 200 (1976). Under Pennsylvania law there is a strong presumption against piercing the corporate veil. *Wedner Unemployment Compensation Case*, 449 Pa. 460, 296 A.2d 792 (1972). There are, however, circumstances which will permit a court to disregard the corporate entity and hold individuals associated with a corporation personally liable for a wrong. Factors which may justify piercing the corporate veil include undercapitalization, failure to adhere to corporate formalities, substantial intermingling of corporate and personal affairs, and use of the corporate form to perpetrate a fraud. *Kaites v. Department of Environmental Resources*, 108 Pa. Commonwealth Ct. 267, 529 A.2d 1148 (1987).

596 A.2d at 1262. *See also Lumax Industries v. Aultman*, 669 A.2d 893, 895 (Pa. 1995); *Commonwealth v. Vienna Health Products*, 726 A.2d 432, 434-35 (Pa. Cmwlth. 1999); *Knoll v. Butler*, 675 A.2d 1309, 1314 (Pa. Cmwlth. 1996); *Department of Environmental Resources v.*

Peggs Run Coal Co., 423 A.2d 765 (Pa. Cmwlth. 1980).

The Department has not satisfied its burden of proving that David Miller may be held liable for civil penalties by virtue of the alter ego theory. If we assume for purposes of argument that Whitemarsh is a sham corporation such that its veil may be pierced, then who can be held liable here? Miller is neither a shareholder nor an officer of Whitemarsh. Even if Miller were an officer, we are not sure that the Board may piece the corporate veil to assign liability to an **officer**. *Vienna Health Products*, *supra*, speaks of the liability of shareholders. *Longenecker* refers to "individuals associated with a corporation," but our research has not disclosed a Pennsylvania case that has actually applied the alter ego theory to an individual who was an officer but not a shareholder. The piercing the corporate veil doctrine has traditionally been applied to shareholders. *See generally,* Stephen B. Presser, PIERCING THE CORPORATE VEIL (1999).

With regard to shareholder liability, Keystone owns all of the shares of Whitemarsh. If we pierce Whitemarsh's veil, we get to Keystone, not Miller. Although Miller is the shareholder of Keystone, there is not nearly enough evidence of record to conclude that **Keystone** is a sham corporation that must be disregarded. In light of the direction expressed in such cases as *Lumax* that there is a strong presumption against ignoring the corporate form in Pennsylvania, we are not willing to disregard or bypass Keystone in order to find Keystone's shareholder, Miller, liable. "Control group" and "common enterprise" theories simply do not apply in this jurisdiction, at least in this context. Here, the Department has failed to overcome the strong presumption that Keystone's corporate form must be honored by demonstrating (or even arguing for the matter) for example, that

Keystone (as opposed to Whitemarsh) is undercapitalized at the relevant times, i.e. June 15, 1996 through July 22, 1997, that it failed to adhere to corporate formalities, that it intermingled its affairs with Miller's, or that it was designed to perpetrate a fraud. It is worth noting that Keystone was not even named in the complaint.

b. "Participation Theory"

The "participation theory" simply recognizes the fundamental point that an individual with authority to direct the affairs of a corporation can be held liable for a violation if he was personally involved in it. This principle was enunciated in *Kaites, supra*:

> As a general rule, corporate officers are individually liable for their own tortious actions. *Wicks v. Milzoco Builders, Inc.*, 503 Pa. 614, 470 A.2d 86 (1983); *Donsco* [, *Inc. v. Casper Corp.*, 587 F.2d 602 (3d Cir. 1978)]. In Pennsylvania, the participation theory imposes liability "on the individual as an actor rather than as an owner. Such liability is not predicated on a finding that the corporation is a sham and a mere alter ego of the individual corporate officer. Instead, liability attaches where the record establishes the individual's participation in the tortious activity." *Wicks*, 503 Pa. at 621, 470 A.2d at 90. Thus, in order for liability to attach the officer must actually participate in wrongful acts. *Amabile v. Auto Kleen Car Wash*, 249 Pa. Superior Ct. 240, 376 A.2d 247 (1977). He may be held liable for misfeasance but not for *simple* nonfeasance.

529 A.2d at 1151 (some citations omitted). Unfortunately, the court did not go on to define what it meant by "*simple* nonfeasance (emphasis original)." The court did explain that the officer in question could not be held liable simply because (1) he was an officer and (2) it could be inferred that he was responsible for statutory infractions. 529 A.2d at 1148. The court went on to state that

an officer could be held liable if it was shown that he contributed, by personal actions of intentional neglect or misconduct, to the violation. 529 A.2d at 1152. It appears, then, that actual affirmative acts are not necessary to find liability. It is enough that there is "intentional neglect," which must be what the court meant when it said that there must be more than "*simple* nonfeasance."

A key to the application of the theory seems to be whether the individual knew about the violations but intentionally neglected to do anything about them. *Wicks,* 470 A.2d at 90; *Kaites*, 529 A.2d at 1152. Pennsylvania's participation theory may be viewed in a way as a reaction to the United States Supreme Court's decision in *United States v. Park*, 421 U.S. 658 (1975), that a corporate officer without knowledge could nevertheless be held liable due solely to his officer status.

In *Wicks,* the trial court granted preliminary objections dismissing corporate officers from a case because they could not be held individually liable for drainage problems resulting from property development. The Superior Court affirmed but the Supreme Court reversed. The Supreme Court's reasoning is worth quoting because of its direct applicability here:

> Liability under this theory [participation theory] attaches only where the corporate officer is an actor who participates in the wrongful acts. Therefore, corporate officers may be held liable for misfeasance. (citations omitted.) Nevertheless, corporate officers and directors may not be held liable for mere nonfeasance. (Citations omitted). *See also Cohen v. Maus*, 297 Pa. 454, 457, 147 A. 103, 104 (1929) (directors of a corporation cannot be held individually liable for a conversion by the corporation and its general manager about which they knew nothing simply because they might have discovered the conversion by examining the corporate records). Thus, the mere averment that a corporate officer should have known the consequences of the liability-creating corporate act is subject to a motion to strike for impertinence and proof of that averment alone is insufficient to impose liability. However, the pertinent averments in

> these complaints can be read as setting forth, generally, that the individual appellees actually knew that the location of the proposed Monroe Acres Development created, at least, an unreasonable risk of the drainage problems which occurred and that, having the power to do so, they deliberately ordered the work to proceed.

470 A.2d at 90. Thus, knowledge seems to be the linchpin. An allegation that an officer "should have known" will not suffice, but an allegation that the officer "actually knew" of the conduct can be adequate to support individual liability.

Wicks also stands for the proposition that the individual at issue must have had authority to direct corporate action. Although most of the cases addressing this theory have concerned corporate officers, there is no reason that an individual must be an officer so long as he has managerial authority regarding the conduct in question. The participation theory is designed to preclude individuals who have acted illegally from hiding behind a corporate mantle. Whether the individual is a director, officer, or manager is not particularly relevant so long as he had the requisite authority to act. *Herzog v. Department of Environmental Resources*, 645 A2d 1381, 1392-93 (Pa. Cmwlth. 1994) (individual liable under the participation theory for violations of the Solid Waste Management Act and the Clean Streams Law based on knowledge of and involvement in dumping unacceptable fill); *Loeffler v. McShane*, 539 A.2d 876, 878 (Pa. Super. 1988) (under Pennsylvania Law, the general rule is that the owners *and managers* of corporations may be held financially accountable for their wrongful, injury-producing conduct); *Shonbergher v Oswell*, 539 A.2d 112, 114 (Pa. Super. 1987) (under "participation theory," an *agent* or officer of a corporation may be held individually liable for participation in tortious acts). *Cf., Barkman v DER*, 1993 EHB 738, 746-748 (employee and joint owner at property not liable for violations Act because she was not involved in the

management of operations or the handling of any materials at the facility); *Blosenski v DER*, 1992 EHB 1716, 1728-29 (co-owner and the secretary/bookkeeper of a business is not personally liable for an assessment of civil penalties based on a lack of knowledge and participation in the violations).

Not only must the individual have authority; he must also have a duty that he has violated. If he has no duty, there has been no "neglect."

Turning to the matter at hand and Count I of the Complaint, we must determine (1) if and when Miller knew about the broken blower and the consequences thereof (2) if Miller intentionally neglected the situation, and (3) if and when Miller had the requisite authority to act and (4) if and when he had a duty to act.

The record clearly shows that Miller knew about the broken blower as of July 25, 1996. On that day, all parties agreed that Miller met with WasteOps at the Plant. WasteOps advised Miller that it needed money, first to pay down its own past-due bills, and second, to get the broken blower repaired. (T. 1518.) The WasteOps representatives also informed Miller of the seriousness of not having a blower. (T. 367, 435.) Miller asserts that he knew about the blower problem but did not understand that it was serious at the time. He admits that he directed WasteOps to get the blower fixed. (T.1518.) In his own words, he said: "Get it done. I'll give you the money." (T.1518.) Again in Miller's own words:

> [WasteOps] then said they wanted the money in advance. I said I don't pay for anything in advance; I'll happily pay COD.
>
> Q. I can't hear you. You'll have to speak up.
>
> A. I'm sorry. I said, "I'll happily pay COD, but I'm not

> going to pay in advance." They said there was a history with WDC. I said, "This isn't WDC; this is me. You asked me for money, and I immediately wrote you a check. Get the thing fixed, and I'll pay for it."

(T. 1518.)

The check that Miller wrote was for $5,000 to pay down WasteOps outstanding bills. The check was drawn on Miller's personal funds. (C. Ex. 13.) The testimony of WasteOps is materially consistent. (T. 367-370, 435.) The reason that the parties were arguing about payment terms was that vendors would refuse to do work for Whitemarsh without payment in advance due to its poor payment history. (C.Ex.15, 16.) Miller was fully aware of this problem. (T.89, 1518.) Miller did not deny his responsibility for the problem as a basis for refusing payment. He also did not cite his lack of legal responsibility for his unwillingness to pay for the repair in advance. We interpret his and WasteOps's testimony to be that Miller simply balked at the idea of having to pay for something in advance.

Miller asserts that he paid the $5,000 and authorized the repair of the blower merely as an interested bystander. He denies that he believed that he had any legal obligation to maintain the Plant at the time. If this is true, then why did Miller order the blower to be repaired? Miller's assertion that he did not understand the seriousness of the situation is not credible. If he did not think the situation was serious, he would not have ordered that the blower be repaired given his claimed perception that he was a mere bystander. Not only do we reject Miller's claim of ignorance, we find the testimony of two separate WasteOps witnesses that they explained the seriousness of the matter to Miller to be credible. We conclude that Miller knew of the blower problem and the

serious consequences of that problem as of July 25, 1996.

The next question is whether Miller intentionally neglected the situation. We conclude that he did. There is abundant testimony that Miller actively avoided dealing with the problem by, e.g., quibbling about payment arrangements as the Plant's effluent continued to deteriorate.

The last two questions are whether (and when) Miller had the (1) duty and (2) authority to act. These two questions are integrally related in this case and the facts that relate to them have been the subject of vigorous debate. The Department argues that Keystone acquired the stock of Whitemarsh and Miller became the General Manager of Whitemarsh on April 19, 1996. The Department, however, has not carried its burden of proof on that point. The only record evidence that it cites in support of its argument is an amendment to an agreement of sale which provides for a closing date of April 19, 1996, and some court documents that referred to the agreed-upon closing date. (*See, e.g.* DEP Post-Hearing Brief, proposed F.F. 209.) But the fact that an agreement provides that the closing date will be a certain day does not necessarily mean that the closing in fact occurred on that day. In fact, it is common knowledge that closing dates set forth in transactional documents are frequently missed. We have no documentary evidence (e.g. a share certificate) of when closing actually took place.

Whitemarsh and Miller have argued that closing did not occur until "the end of August." (See, e.g., Whitemarsh/Miller Post-Hearing Brief proposed F.F. 243-245.) They produced testimony to support that assertion. (T.1583.) We will interpret the "end of August" to mean that the closing occurred at least as of September 1, 1996.

Thus, Miller had no official capacity vis-à-vis Whitemarsh as of July 25, 1996. Although he certainly acted as if he had authority by, e.g., paying WasteOps $5,000 and directing that the blower be fixed, in point of fact he probably did not. Even if we assume he had some sort of authority, there is not enough record evidence to conclude that his role imposed upon him any duty to act which he breached.

The record does support the conclusion, however, that Miller became General Manager of Whitemarsh after the closing, i.e. as of September 1, 1996. (T. 1495.) As General Manager, Miller was stipulated to have the **authority** and **responsibility** for operation of the Plant, and there was no one higher in the chain of command than Miller. (F.F. 123.) As of that date, Miller had preexisting knowledge of the preexisting blower problem, and yet he intentionally continued to fail to do anything about it. He permitted the Plant to continue operating without a major component. We hold that Miller is personally responsible for operating the Plant without the blower for 17 days, from September 1 through September 17, 1996.

With regard to the amount of the penalty, the factors that we discussed above concerning Whitemarsh's penalty apply here as well. With regard to specific deterrence, regardless of what situation obtained in 1996, Miller as of the hearing was (and we presume remains) clearly responsible for ensuring that Whitemarsh complies with the law. A penalty against Miller is appropriate to ensure that he avoids future instances of willful neglect over the 180 days that this adjudication authorizes the Plant to discharge. Under the circumstances of this case, a penalty to be paid out of Miller's personal funds does not need to be as high to have the desired deterrent effect. We also repeat that Miller's legal responsibility started later than Whitemarsh's. Taking all of these

factors into account, we assess a penalty of $1,000 per day in September (17 days) for a total penalty against Miller of $17,000.

Miller is not liable under Count II because of our holding that his responsibility did not begin until September 1996. The record does not support a finding that Miller intentionally neglected to notify the Department of the blower incident, so we find that he has no liability under Count III. Finally, applying the Clean Streams Law factors such as willfulness, harm, costs of restoration, and deterrence, even if we assume for purposes of argument that Miller has personal liability, we conclude that no penalties are warranted against Miller personally under Counts IV through VI.

IV. CONCLUSIONS OF LAW

1. The Environmental Hearing Board (the "Board") has jurisdiction over this matter pursuant to Section 605 of the Clean Streams Law, 35 P.S. § 691.605, and Section 4 of the Environmental Hearing Board Act, 35 P.S. § 7514.

2. The Department is the agency with the duty and authority to administer and enforce the Clean Streams Law, Section 1917-A of the Administrative Code, the Sewage Facilities Act, the regulations promulgated under those statutes, and the NPDES permitting program.

3. The Clean Streams Law grants the Department the power to issue such orders as may be necessary to implement the provisions of the statute and the rules, regulations, orders, and permits issued thereunder. 35 P.S. § 691.5(b)(7). Such orders may include orders to cease discharges if the operation involved is causing or creating a danger of pollution or is in violation of the law. 35 P.S.

§ 691.610. Under these provisions, the Department has the authority to order an operator to submit a plan to terminate a discharge. *Hooper v. DEP*, 1996 EHB 1318, 1329.

4. The Clean Streams Law prohibits the discharge of sewage into waters of the Commonwealth except as authorized in a discharge permit issued thereunder. 35 P.S.§§ 201 and 202. Any discharge without or contrary to such a permit constitutes a nuisance. 35 P.S. § 202. Whitemarsh's violations of its Permit conditions constitute violations of the Clean Streams Law and a nuisance.

5. Whitemarsh is precluded by the doctrine of administrative finality from challenging the terms of its original permit and the amendment thereof. *Tinicum Township v. DER*, 1996 EHB 816.

6. The Board has the authority to review the Department's determination that the conditions of Whitemarsh's permit prerequisite to a closure order have been met.

7. The Department correctly found that the terms of Condition C.2 of Whitemarsh's permit prerequisite to a closure obligation have been met. In particular, alternate sewerage facilities are "available."

8. The Department has the discretion under appropriate circumstances, present here, to order independent sewer plants to cease discharging when regional facilities become available. *Interstate Travellers' Services v. DER*, 1981 EHB 187.

9. The Department bears the burden of proving, 25 Pa. Code § 1021.101(b)(4), by a

preponderance of the evidence, *C&K Coal Co. v. DER*, 1992 EHB 1261, 1289, that the issuance of April 4, 1997 Order was neither so arbitrary and capricious as to constitute an abuse of discretion nor otherwise contrary to law, *Concerned Residents of the Yough, Inc. v. DER*, 1995 EHB 41, 77.

10. The Department satisfied its burden of proof except with regard to the compliance deadline.

11. The Department abused its discretion by ordering that the Plant cease discharging in 90 days, instead of 180 days.

12. Hauling sewage for off-site treatment is a reasonable measure if municipal connection has not been realized in 180 days.

13. The Board does not consider whether it is infeasible for Whitemarsh to comply with the Order. *Ramey Borough v Department of Environmental Resources*, 351 A.2d 613 (Pa. 1976). This Board may consider objective feasibility in determining whether alternate facilities are "available" under Whitemarsh's permit.

14. The Department's exercise of its police powers has not exceeded the parameters of reason.

15. Whitemarsh has demonstrated an unwillingness and inability to comply with the law.

16. Whitemarsh's Plant continues to create a danger of pollution of the waters of the Commonwealth.

17. Whitemarsh bears the burden of proving that the Department erred in denying the permit renewal. 25 Pa. Code § 1021.101(c)(1).

18. Whitemarsh failed to satisfy its burden of proving that the permit renewal was denied in error.

19. The Department has the burden of proof regarding the allegations set forth in the complaint for civil penalties. 25 Pa. Code § 1021.101(b)(1).

20. The Department satisfied its burden of proof against Whitemarsh for Counts I, II, III, and IV of the complaint for civil penalties. The Department failed to satisfy its burden of proof against Whitemarsh on Counts V and VI.

21. The failure to have an operating blower and maintain secondary treatment constitutes a violation of Sections 201 and 202 of the Clean Streams Law, 35 P.S. §§ 691.201 and 691.202, 25 Pa. Code §§ 92.2, 92.3, and 92.51(4), Part B, paragraph G, of the Permit, unlawful conduct under Section 611 of the Clean Streams Law, 35 P.S. § 691.611, and a nuisance under Section 202 of the Clean Streams Law, 35 P.S. § 691.202.

22. The Defendants discharged effluent from the Plant during June, July, and August, 1996, which exceeded the effluent limits set forth in the NPDES permit.

23. The discharges constitute violations of the NPDES permit; violations of Sections 201 and 202 of the Clean Streams Law, 35 P.S. §§ 691.201 and 691.202; violations of 25 Pa. Code § 92.3; unlawful conduct under Sections 401 and 611 of the Clean Streams Law, 35 P.S. §§ 691.402

and 691.611; and a nuisance under Sections 202 and 401 of the Clean Streams Law, 35 P.S. §§ 691.202 and 691.401.

24. The Defendants' failure to notify the Department of its failure to have an operating blower and of the resulting effects constitutes a violation of Sections 201 and 202 of the Clean Streams Law, 35 P.S. §§ 691.201 and 691.202; a violation of 25 Pa. Code §§ 101.2; a violation of Part A, paragraph II.D.1 (a), of the NPDES Permit; unlawful conduct under Section 611 of the Clean Streams Law 35 P.S. § 691.611; and a nuisance under Section 202 of the Clean Streams Law, 35 P.S. § 691.202.

25. Whitemarsh's continued discharge without a permit from August 13, 1996 through at least the time of the hearing constitutes continuing violations of Sections 201 and 202 of the Clean Streams Law, 35 P.S. §§ 691.201 and 691.202, and of the Department's regulations promulgated thereunder at 25 Pa. Code § 92.3.

26. Whitemarsh and Miller have acted recklessly and with callous indifference and intentional neglect.

27. This Board sets the amount of civil penalties under the Clean Streams Law. *Westinghouse Electric Corporation v. DEP (Westinghouse II),* EHB Docket No. 88-319-CP-MG, Slip. Op. at 12, *aff'd*, Cmwlth. Ct. Docket No. 1069 C.D. 1999 (February 10, 2000).

28. The Department's recommendation is purely advisory. *Westinghouse Electric Corporation v. DEP*, 1996 EHB at 1258.

29. David Miller is personally liable for violations of the NPDES permit and the Clean Streams Law for operating the Plant from September 1 to September 17, 1996 without a functioning blower.

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

WHITEMARSH DISPOSAL CORPORATION, INC. & DAVID S. MILLER	:	
v.	:	**EHB Docket No. 97-099-L**
	:	**(Consolidated with 98-169-L &**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**& 98-078-CP-L)**

ORDER

AND NOW, this 20th day of March, 2000, it is hereby ordered as follows:

1. The appeal docketed at 97-099-L from the Department's Order is DISMISSED in all respects except that Whitemarsh shall cease discharging within 180 (instead of 90) days of the date of this Order, so long as it proceeds with its plans to terminate the discharge with all deliberate speed.

2. The appeal docketed at 98-169-L from the denial of the Permit renewal is DISMISSED.

3. Within 30 days:

   a. Whitemarsh shall pay the Department a civil penalty of $ 250,000; and

   b. Miller shall pay the Department a civil penalty of $17,000.

EHB Docket No. 97-099-L
(Consolidated with 98-169-L & 98-078-CP-L)

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MICHAEL L. KRANCER
Administrative Law Judge
Member

DATED: March 20, 2000

EHB Docket No. 97-099-L
(Consolidated with 98-169-L & 98-078-CP-L)

c: **DEP Bureau of Litigation**
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SECRETARY TO THE BOA

EXETER TOWNSHIP, BERKS COUNTY, AUTHORITY	:	**EHB Docket No. 98-154-C**
and	:	
PETERS TOWNSHIP SANITARY AUTHORITY	:	
v.	:	**EHB Docket No. 98-189-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: March 23, 2000**

OPINION AND ORDER ON MOTION FOR SUMMARY JUDGMENT

By Thomas W. Renwand, Administrative Law Judge
Michelle A. Coleman, Administrative Law Judge

Synopsis:

Actual interest costs are a component of the costs included in calculating subsidies pursuant to Act 339. Neither Act 339 nor its regulations set forth a deadline after which a municipality may not request an eligible subsidy and neither requires a municipality to include all eligible expenses in an application for the year in which they occur. Act 339 and the regulations allow eligible costs to carry over and accumulate from year to year. The doctrine of administrative finality does not prevent applicants from claiming these costs if they had not requested them previously.

OPINION

These two appeals involve identical issues regarding the calculation of subsidies pursuant to the Contribution by Commonwealth to Cost of Abating Pollution Act (Act 339). Once again, we must examine the issue of interest costs under Act 339. In these appeals, the Appellants, Exeter Township, Berks County, Authority (Exeter Township) and Peters Township Sanitary Authority (Peters Township), are seeking interest costs which were not included in applications they filed in earlier years. The Department has filed a Motion to Dismiss both appeals, while Peters Township has filed a Motion for Summary Judgment. Following the filing of the Motions and Briefs, oral argument was held before Administrative Law Judges Coleman and Renwand. The Board later ordered the parties to brief the issue of whether the decision in *City of Philadelphia v. DEP*, 1996 EHB 47, *aff'd*, 692 A.2d 598 (Pa. Cmwlth. 1997) applies retroactively to claims seeking the difference between the 1.5% interest component previously allowed by the Department and the actual interest rate incurred where no appeal was taken from the Department's action and the Department's action took place after the issuance of the Board's decision in the *City of Philadelphia.*

Act 339

Pursuant to Section 1 of Act 339, 35 P.S. § 701, and 25 Pa. Code § 103.24a, the Department provides an annual subsidy in an amount equal to 2% of the costs incurred for the "acquisition and construction" of publicly-owned sewage treatment plants. Act 339 itself does not include any provision for the allowance of interest as an eligible cost. The regulations do refer generally to the eligibility of "interest during construction" but do not specify a rate to be applied. *See* 25 Pa. Code

§§ 103.32 and 103.36. Historically, the Department allowed an interest rate of 1.5% to be included in the components of eligible costs used to calculate the 2% subsidy. Many times, as can be imagined, the interest rate actually incurred is in excess of 1.5%.

Our Previous Decisions

1. *Department of Environmental Protection v. City of Philadelphia*

The City of Philadelphia challenged the Department's exclusion of actual interest from the costs considered to derive the 2% subsidy. The Board, in a decision issued February 13, 1996, sustained this part of Philadelphia's appeal. *City of Philadelphia v. DEP,* 1996 EHB 47. On April 7, 1997, the Commonwealth Court affirmed the Board's decision regarding the eligibility of interest. *Department of Environmental Protection v. City of Philadelphia,* 692 A.2d 598, 605 (Pa. Cmwlth. 1997).

2. *University Area Joint Authority v. Department of Environmental Protection*

The next case concerning interest costs before the Board was filed by University Area Joint Authority (the Authority). On May 5, 1998, the Board granted summary judgment in favor of the Authority. The Authority appealed the Department's action regarding its subsidy because it did not include its actual interest component. The Authority filed its subsidy request prior to the issuance of the Board's decision in the *City of Philadelphia.* It did so by completing the Department's Act 339 application form which limited its interest component to 1.5%. While its application was pending the Board issued its decision in *City of Philadelphia.* More than two months after our decision, the Department rendered its decision on the Authority's 1994 application. The Department calculated

the interest rate at 1.5%. Evidently now aware of the Board's decision allowing actual interest rather than just 1.5% interest to be included in the calculation of eligible costs, the Authority filed a timely appeal with the Board. The Authority argued that it was entitled to include its actual interest rate in its eligible costs even though it had not claimed such amount in its application.

The Department first argued that the Authority could not benefit from the *City of Philadelphia* decision because the Authority failed to claim the actual interest costs in its application. The Authority countered that pursuant to the Department's form, which all applicants were required to complete pursuant to 25 Pa. Code § 103.23(b), it could not claim its actual interest costs because the form limited the interest allowance to 1.5% interest. The Board held that given the contents of the application form and the Department's long-standing policy, the Authority had no reason to claim its actual interest costs when it filed its application in January 1995. A reason to do so did not arise until February 13, 1996 when the Board issued its decision in the *City of Philadelphia.*

The Department further argued that after the Board's decision in the *City of Philadelphia*, but before the Department issued its decision on the Authority's 1994 application, the Authority should have amended its application to claim its actual interest costs. Since it did not do so, the Department contended that it could not claim these interest costs for the first time in an appeal to the Environmental Hearing Board. The Board rejected this argument. We held that there was only a relatively short 69 day period between the issuance of the Board's decision invalidating a historic Department policy and the Department's decision. Moreover, the Department conducted a vigorous if ultimately unsuccessful appeal to reverse the Board in Commonwealth Court. The Board

concluded that the Authority preserved its rights by taking a timely appeal of the Department's decision and that it was "entitled to have its 1994 Act 339 subsidy recalculated." 1998 EHB at 402.

The Current Controversy

Exeter Township and Peters Township filed their applications for the years in question on the Department's forms. These forms, just like the form in *University Area Joint Authority*, only allowed them to claim interest costs in the amount of 1.5% even though they both incurred interest costs in excess of this amount. The Department made final decisions on their applications that did not include the increased interest amounts, first, after the Board's decision in *City of Philadelphia* and, then, even after the Commonwealth Court's affirmance of this Board's decision. However, neither Exeter Township nor Peters Township (unlike the appellant in *University Area Joint Authority*) appealed these Department decisions. Instead, both applied in later applications for the difference between the 1.5% interest rate credited to eligible expenses earlier by the Department and the actual interest rate incurred in these earlier years. In other words, Peters Township and Exeter Township have added the interest amounts from previous years which were never before requested because of the Department's practice of only allowing 1.5% interest to be included in eligible costs.

The Department argues that these claims for additional interest costs are barred by the doctrine of administrative finality. *Department of Environmental Resources v. Wheeling-Pittsburgh Steel Corp.*, 375 A.2d 320 (Pa. 1977), *cert. denied*, 434 U.S. 969 (1977); *Department of Environmental Resources v. Derry Township*, 351 A.2d 606, 609-610 (Pa. 1976); *Ingram Coal Co. v. DER*, 1988 EHB 800, 803; *Reading Anthracite Company v. DEP*, 1998 EHB 728; and *Emporium*

Water Company v. DEP, 1997 EHB 395. The Appellants contend the doctrine is inapplicable because they only claimed 1.5% interest previously. Therefore they claim that since they never requested these amounts, the Department never ruled on the eligibility of the actual interest costs. We agree with the municipalities.

Under the doctrine of administrative finality, both the factual and legal bases of a final action of the Department are unassailable by a party that has failed to take a timely appeal from that action. In *City of Philadelphia* we indicated that Philadelphia waived its rights for previous applications which were not timely appealed. 1996 EHB at 85. The Commonwealth Court affirmed the Board by stating that "[Philadelphia] recognized that it has waived its right to challenge the 1.5% rate for [unappealed decisions]." *Department of Environmental Protection v. City of Philadelphia*, 692 A.2d 598, 604. However, a close reading of these decisions reveals that this conclusion is mere *dicta* and was conceded by Philadelphia. We conducted neither an analysis of Act 339 or its regulations nor did we review the arguments now raised by Peters and Exeter.

The crucial consideration for coverage under Act 339 and its regulations is that the subsidies applied for constitute costs of acquisition and construction of the eligible sewage treatment project approved by the Department and conducted pursuant to a Pennsylvania Water Quality Management Part II Permit. *See City of Philadelphia*, 672 A.2d 598, 601; 25 Pa. Code § 103.24a. The Department does not dispute that the municipalities' claimed subsidies, but for the timing issue, would qualify as eligible costs. Nor can the Department point to language in Act 339 or its regulations which impose any time frame by which a claim for eligible subsidies becomes stale.

Indeed, when the relevant section of the Act, Section 701, became effective in 1954, it allowed claims to be made for eligible expenses back to the effective date of the Clean Streams Law, June 22, 1937. 35 P.S. § 701.

The Board's recent decision in *University Area Joint Authority* does not mandate a different result. In that case, the Authority did not apply for actual interest in its 1994 application *but did file an appeal* to the Board of the Department's decision to use the 1.5% interest factor to calculate eligible interest costs on the 1994 application.[1] The Board held that since the Authority had filed a timely appeal it was entitled to have its 1994 subsidy recalculated on the basis of its actual interest costs.

Unlike the *University Area Joint Authority*, Peters Township and Exeter Township failed to file appeals of the Department's earlier subsidy decisions. The Department argues that the Appellants' claims are now barred by the doctrine of administrative finality because they did not appeal the Department's earlier decisions on Act 339 subsidies.

However, as correctly pointed out on page 5 of the supplemental brief submitted by Peters Township and Exeter Township, the existence of an appeal in this context is a distinction without any legal relevance. The regulatory scheme of Act 339 permits a party to forgo inclusion of costs in

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[1] The timing of the Department's action in *University Area Joint Authority* is almost the same as the Department's action in ruling on Exeter Township's 1994 application. The Department rendered its decision in *University Area Joint Authority* on April 22, 1996 while it rendered its decision on Exeter Township's application on March 27, 1996. The Authority filed an appeal within 30 days of the Department's decision. Exeter Township did not appeal. Both Department actions took place after the Board's decision of February 13, 1996 in *City of Philadelphia v. DEP*, 1996 EHB 47.

a specific year and allows the applicant to submit the costs in another year. Therefore, the General Assembly has refused to impose traditional rules of waiver and preservation of claims in this context. See 25 Pa. Code §§ 103.21-103.37. Indeed, the Department's regulation at 25 Pa. Code § 103.28 only prohibits an appeal from an attempt to include items, previously declared ineligible, in a later application if no appeal was taken from the original denial. That specific provision, itself an expression of the principle of administrative finality, would not bar the present appeal. Therefore, it would be completely inconsistent to apply the doctrine of administrative finality to eligible interest costs never before claimed by these municipalities.

Peters Township and Exeter Township correctly point out that the regulations offer no distinction between types of recoverage subsidies, such as between electrical contracts and interest. See 25 Pa. Code §§ 103.35, 103.36. Therefore, it makes no legal sense to bar a municipality's claims for eligible interest costs because it was not requested earlier and at the same time allow the submission of other eligible costs, such as plumbing costs.

It was our intent as set forth in *City of Philadelphia* to correct the Department's incorrect interpretation of Act 339 and its regulations that denied applicants from receiving the full interest subsidy to which they are entitled under the Act. Moreover, since neither the Act nor the regulations impose any time limits for claiming eligible costs, municipalities are free to first make these claims at a later time. As Section 103.25(b) provides, the Act 339 Program must be liberally applied and the instant appeal plainly warrants liberal application. 25 Pa. Code § 103.25(b).

In conclusion, our holding certainly allows Peters Township and Exeter Township to take full advantage of our earlier decisions mandating the inclusion of actual interest costs in the compilation of eligible costs to calculate the 2% subsidy under Act 339. We therefore will issue an Order denying the Department's Motions to Dismiss. The Department is free to raise additional issues identified in the Exeter Township Appeal which now may be ripe for decision. We will grant Peters Township's Motion for Summary Judgment.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

EXETER TOWNSHIP, BERKS COUNTY, AUTHORITY	:	**EHB Docket No. 98-154-C**
and	:	
PETERS TOWNSHIP SANITARY AUTHORITY	:	
v.	:	**EHB Docket No. 98-189-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 23rd day of March, 2000, Appellant Peters Township Sanitary Authority's Motion for Summary Judgment is **granted**. The Department's Motions to Dismiss filed in the above appeals are **denied**.

EHB Docket Nos. 98-154-C
and 98-189-R

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MICHAEL L. KRANCER
Administrative Law Judge
Member

DATED: March 23, 2000

EHB Docket No. 98-154-C
and 98-189-R

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

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COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

EXETER TOWNSHIP, BERKS COUNTY AUTHORITY	:	**EHB Docket No. 98-154-C**
and	:	
PETERS TOWNSHIP SANITARY AUTHORITY	:	
v.	:	**EHB Docket No. 98-189-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

CONCURRING OPINION OF ADMINISTRATIVE LAW JUDGE CHAIRMAN GEORGE J. MILLER

While I fully agree with the opinion in this case, I want to express my view that our holding in this case does not open the Department to stale claims for reimbursement of interest expense since 1937 for two reasons. First, I believe that the general law of statutes of limitations is applicable to these reimbursement claims. The Board need not decide here whether or not such a claim will be governed by the four year statute applicable to express or implied contracts (42 Pa. C.S.A. § 5525 (3) or (4)) or the residual six year statute of limitations applicable to all claims for which no other limitation is provided (42 Pa. C.S.A. § 5527) since this question has not been briefed by the parties. It is sufficient to say that under either of these limitations the Board's 1996 decision in the *City of Philadelphia* case will not result in a large number of viable claims for reimbursement

of interest expense not previously claimed by a municipality.

Secondly, the Environmental Stewardship and Watershed Protection Act, Act of December 15, 1999, P.L. 528 (Act 1999-68) has effectively repealed the provision of Act 339 for any qualified applicant not presently receiving payments under that Act except for projects which commenced construction before the December 31, 1999 effective date of Act 1999-68.

ENVIRONMENTAL HEARING BOARD

GEORGE J. MILLER
Administrative Law Judge
Chairman

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SECRETARY TO THE BOA

HENRY McCOOL	:	
	:	
v.	:	**EHB Docket No. 98-214-K**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and SONIE'S MINE INCORPORATED, Permittee	:	**Issued: March 23, 2000**

OPINION AND ORDER REGARDING EXTENSION OF TRIAL DEADLINES

Pending before us is a motion filed on March 17, 2000 by brand new counsel for Appellee, Sonie's Mine Incorporated for an extension of time from recently established pre-trial filing deadlines and of the scheduled trial. Filed on the same date was one of Sonie's Mine's two new counsel's entry of appearance announcing officially the fact that Sonie's Mine was now proceeding with new counsel. A second new counsel filed an entry of appearance on March 23, 2000. At this point in time, it appears that Sonie's Mine is represented by two different counsel from two different law firms. In any event, the basis of the Motion is that both new counsel are on vacation at different times in March and, in general, an extension of all deadlines is necessary for "new counsel to be effective". An across the board 30 day extension of all deadlines is requested.

The Department, by letter dated March 20, states that it joins in the Motion. DEP states that it has been having trouble communicating and coordinating with counsel for permittee in

recent weeks. DEP points out that its policy regarding third-party appeals is to allow the permittee to take the "laboring oar" in defending the case and that it takes a more active role only in those cases where the appeal addresses issues of programmatic level which this one does not. DEP desires to coordinate its efforts in the defense of the appeal with the course that the permittee intends to pursue and it, therefore, joins in the Motion. Appellee, Henry McCool, through his counsel, strongly objects to any extension of any pre-trial deadline or the trial date for the reasons set forth in the Answer to Motion For Extension of Time filed on March 21, 2000. Basically, McCool states enough is enough. McCool points out that the case has been pending for a year and a half, there has already been plenty of time for Sonie's Mine to prepare the case, he has already produced his expert's report in compliance with the established scheduling order, obtaining new counsel should not preclude existing deadlines from being complied with and he is not available on the proposed alternative dates for trial because he is "attached to Court" for criminal trial duty at that time.

Normally, a request for an extension of a mere 30 days would not present great difficulty. However, in this case it does because of the history of the case and the Appellant, McCool, so strongly objects to the request. The history of this case was outlined in our Order dated January 27, 2000. It was noted in that order that Mr. McCool's Notice of Appeal had been filed on October 30, 1998. The January 27, 2000 Order ordered a conference call for February 3, 2000 the purpose of which was "to discuss the progression of this case, including but not limited to, possibly the setting of a definite trial schedule for trial to be held no later than July, 2000."

Based on the history outlined in the January 27, 2000 Order and the conference call on February 3, 2000 with all counsel, albeit now former counsel for Sonie's Mine, an order dated February 7, 2000 was issued in which a pre-trial submission schedule was set and trial scheduled

for June 13 through June 16. The schedule set forth in the Order of February 7, 2000 was arduously discussed during the conference call and the Order of February 7th was a product thereof.

Under the Order of February 7, 2000, McCool was to submit its expert report by March 13, 2000. McCool had its expert report done by the date it was required to do so by our February 7, 2000 scheduling order. We do note that a supplement to the McCool expert report bears the date March 14, 2000 which is one day past the March 13, 2000 expert report deadline applicable to McCool. We do not view that, however, as being relevant for this discussion. Thus, we view appellant McCool as already having acted in reliance and compliance with the February 7, 2000 scheduling order even before this request for an extension of time by Appellee Sonie's Mine was made. Indeed, that fact is at least part of the basis for McCool's strong opposition to the pending motion.

We are sensitive to the request of new counsel for Sonie's Mine for more time since it has just now taken over the case. However, we are also sensitive to the points made by counsel for Mr. McCool in the Answer. There has been plenty of time for the parties to do the things necessary to prepare for litigation. Among those things are to have counsel and experts doing the things they need to do before trial to get the case ready. At this point there has been plenty of time already passed for those things as the appeal was filed on October 30, 1998. Being that it is only March 23, 2000 today, there is plenty of time left before the scheduled trial date of June 13th.

A party is free, of course, to decide to change counsel. To do so, however, does not automatically negate pre-trial and trial deadlines.

Based on the competing interests and positions as expressed in the Motion and the Answer thereto and on our review of the history of this matter, we will allow new counsel additional time to have Sonie's Mine's expert report filed. At the same time, by the way, DEP's expert report date will be extended since that date had originally been set to be coincident to the deadline for Sonie's Mine filing its expert report. Also, because of the extension of the date for filing Sonie's Mine's and DEP's expert reports we are extending the dates for the other pre-trial filings. However, we think that the trial dates should be maintained. As we have noted, this case has been on the docket for a long time. Appellant is entitled to his day in court and he is entitled to have the previously designated day in court maintained. There is no prejudice to Sonie's Mine from doing so. There is almost three months between March 17, 2000, when new counsel entered their appearance, and the June 13th trial date. We think that is enough time to allow for new counsel to learn the case and to litigate it. As we have eluded to before, the freedom to choose new counsel in the middle of a case, or towards the end as the case might be, does not come without some burdens and responsibilities.

Accordingly, we enter the following Order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

HENRY McCOOL	:	
	:	
v.	:	**EHB Docket No. 98-214-K**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and SONIE'S MINE INCORPORATED, Permittee	:	

AMENDED SCHEDULING ORDER

AND NOW, this 23rd day of March, 2000, upon consideration of the Motion For Extension of Time filed on March 17, 2000 by new counsel for Sonie's Mine Incorporated, DEP's response letter dated March 20, 2000 and the Answer To Motion For Extension of Time filed by counsel for Appellant on March 21, 2000, which opposes the request for extension of deadlines , IT IS HEREBY ORDERED that:

1. Appellee Sonie's Mine Incorporated and the Department shall file their respective expert reports with the Board and serve the other parties therewith by **Monday, April 24, 2000;**

2. Dispositive Motions shall be filed by no later than **Monday, May 8, 2000,** response briefs shall be filed by **Monday, May 15, 2000** and reply briefs by **Friday, May 19, 2000.** Any party filing such a motion, response or reply thereto shall serve all other counsel by telecopy. If the Motion, response or reply contains copious exhibits which cannot easily be telecopied then the Motion, response or reply and accompanying memorandum of law shall be served by telecopy with the hard copy with all exhibits by overnight delivery;

3. Appellant's Pre-Hearing Memorandum shall be filed by **Monday, June 2, 2000.**

4. Responsive Pre-Hearing Memoranda of DEP and Sonie's Mine Incorporated shall be filed by **Monday, June 12, 2000.**

5. The dates already reserved for trial, namely, **Tuesday, June 13th through Friday, June 16, 2000**, remain as set forth in the scheduling order dated February 7, 2000.

ENVIRONMENTAL HEARING BOARD

MICHAEL L. KRANCER
Administrative Law Judge
Member

DATED: March 23, 2000

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WILLIAM T. PHILLIPY IV
SECRETARY TO THE BOAI

JEFFERSON COUNTY COMMISSIONERS, et al.	:	
v.	:	**EHB Docket No. 95-097-C (Consolidated with 95-102-C)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued:** March 24, 2000

OPINION AND ORDER ON PETITION FOR SUPERSEDEAS

By Michelle A. Coleman, Administrative Law Judge

Synopsis:

A petition for supersedeas in an appeal challenging the Department's issuance of a solid waste permit is denied. Petitioners will not suffer irreparable harm from the issuance of the permit where (1) the Department has issued an order suspending the permit; (2) the Board has temporarily superseded that order, but will be holding a supersedeas hearing on the order within days; and (3) petitioners failed to demonstrate that they would suffer an irreparable injury if permittee was allowed to operate under the terms of the permit for the few days before the supersedeas hearing on the order suspending the permit is held.

OPINION

This matter was initiated with the June 8, 1995, filing of a notice of appeal by Jefferson County, the Jefferson County Solid Waste Authority, and the Clearfield-Jefferson Counties Regional Airport Authority (collectively, Jefferson). They appealed a permit authorizing the

construction and operation of a solid waste landfill that the Department of Environmental Resources (Department) issued to Leatherwood, Inc. (Permittee) on May 12, 1995. The landfill would be located in Pinecreek Township, Jefferson County, in the vicinity of the Dubois-Jefferson County Airport (airport). Pinecreek Township filed a separate appeal to the permit on June 12, 1995. The Board consolidated the appeals filed by Jefferson and Pinecreek Township (collectively, Appellants) at this docket number.

On October 21, 1996, the Department issued an order suspending the permit and two related NPDES permits because the permits were inconsistent with section 1220 of the Federal Aviation Reauthorization Act of 1996, 49 U.S.C. § 44178(d). Permittee filed a notice of appeal on November 20, 1996, asserting that the Department had acted arbitrarily and capriciously by issuing the order, and otherwise acted contrary to law. The Board docketed this appeal separately, at EHB Docket No. 96-249-C.

Both appeals were proceeding before the Board in a normal manner—with some side litigation concerning the constitutionality of the Federal Reauthorization Act of 1996—until March 17, 1999. On that date, the parties became aware that Congress passed the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (Aviation Act). Section 503(b) of the Aviation Act would amend 42 U.S.C. § 44718(d) to read:

> (d) LIMITATION ON CONSTRUCTION OF LANDFILLS.—
>
> (1) IN GENERAL.—No person shall construct or establish a municipal solid waste landfill ... within 6 miles of a public airport that has received grants under chapter 471 and is primarily served by general aviation aircraft and regularly scheduled flights of aircraft designed for 60 passengers or less unless the State aviation agency of the State in which the airport is located requests that the Administrator of the Federal Aviation Administration exempt the landfill from the application of this subsection and the Administrator determines that such exemption would have no adverse impact on aviation safety.
>
> (2) LIMITATION ON APPLICABILITY.—Paragraph (1) shall not apply ... to the construction, establishment, expansion, or modification

> of, or to any other activity undertaken with respect to, a municipal solid waste landfill if the construction or establishment of the landfill was commenced on or before the date of the enactment of this subsection.

On that same day, March 17, 2000, Permittee filed a petition for temporary supersedeas and a petition for supersedeas in its appeal of the Department's order suspending its permit, at EHB Docket No. 96-249-C. In its petitions, Permittee stated that, while it felt it had commenced "construction" of the landfill by virtue of certain preliminary activities it conducted at the site prior to the Department's order suspending the permit, it feared that it might be precluded from finishing the landfill if those activities were not deemed to be "construction" within the meaning of section 503(b) of the Aviation Act. If the activities it conducted at the site to date do not qualify as "construction," Permittee would have to conduct some activity at the site that meets that definition before section 503(b) was signed in to law or Permittee would be banned from constructing the landfill by section 503(b)—even if Permittee would otherwise ultimately have prevailed in its litigation concerning the issuance of the permit and the orders suspending the permit.

The Board granted Permittee's petition for temporary supersedeas and superseded the Department's October 21, 1996, order pending the March 21, 2000, supersedeas hearing in that matter. In the interim, however, the Department issued a second order suspending Permittee's permit. This order—issued March 20, 2000—expressly superseded the Department's October 21, 1996, suspension order. Simultaneously, the Department filed a motion to dismiss Permittee's appeal of the Department's October 21, 1996, order as moot. Permittee filed a notice of appeal to the March 20, 2000, order on the same day, together with a petition for temporary supersedeas and a petition for supersedeas.

On March 21, 2000, the Board conducted a hearing. Turning first to the appeal at EHB

Docket No. 96-249-C, the Board vacated the temporary supersedeas it granted to Permittee concerning the Department's October 21, 1996, order and denied Permittee's petition for supersedeas. The Board explained that the petitions relating to the Department's October 21, 1996, order were moot in light of the March 20, 2000, order superseding the earlier permit. The Board turned next to Permittee's petition for temporary supersedeas in EHB Docket No. 2000-066-C. The Board granted the petition—superseding the March 20, 2000, order suspending the permits—pending the supersedeas hearing, scheduled for March 27-28, 2000. Then the Board proceeded to Appellants' petition for supersedeas in their appeal of the permit, at EHB Docket No. 95-097-C.

Appellants argue that the Board should supersede the issuance of the permit because proceeding with the construction of the landfill would imperil planned improvements to the airport and would violate state and local laws because Permittee presently lacks certain state and local permits, bonding, and other requirements necessary for construction of the landfill. In support of their position, Appellants called two witnesses: David Black, Chairman of the Jefferson County Board of Commissioners; and Roger Nasuti, president of an engineering consulting firm retained by Appellant Pinecreek Township.

Black testified that construction of the landfill would endanger major improvements that the Commissioners planned for the airport, as well as jeopardizing related projects. He explained that the Commissioners planned to extend the runway in the direction of the proposed landfill so that larger planes could use the airport, and so that smaller planes could carry sufficient fuel to allow them to use the airport without having to refuel at the closest major airport. (According to Black, physical obstacles on the ground prevented the airport from simply extending the far end of the runway.) The Federal Aviation Administration (FAA) would provide up to a million

dollars per year for the project, provided local government paid for a share of the airport improvements. However, Black stated that the Commissioners would not agree to provide any funds for the improvements if Permittee can construct and operate the landfill, since the landfill would present a significant bird-strike hazard for planes using the longer runway. Without local funding, the FAA would not contribute funding, and the runway would not be lengthened.

Black also testified about two projects related to the airport improvements. One was an interchange that would be eligible for state matching funds. The other was an air commerce park that was designated a Keystone Opportunity Zone in October of 1999. According to Black, both projects would be imperiled if the airport did not extend the runway. Black also testified that Appellants had more at stake in the supersedeas decision than Permittee because Appellants stood to lose millions of dollars in funding and tax benefits while the assessed value of the landfill site was only $8,250.

Nasuti also testified about the airport, explaining that in airport improvements like lengthening the runway, where local matching funds are required, the FAA typically contributes 90% of the funding. In addition, he testified that his engineering firm recommends to Pinecreek Township the action it should take on various permit applications. He said that his firm advised Pinecreek Township that storm water management plans submitted by Permittee in December of 1999 did not meet the appropriate requirements. He also testified that Leatherwood had submitted an application for a building permit, but that he did not know whether any action had been taken on that application.

Permittee did not offer any evidence at the supersedeas hearing. However, Permittee did argue that Appellants would not be irreparably harmed without the supersedeas; that any effects on the Keystone Economic Zone are immaterial because the zone was not designated an

economic zone until after the permit was issued; and that the fact that it might have to satisfy additional requirements before it could construct or operate the landfill is immaterial because it does not propose to flout those requirements.

Although the Department actively participated in the proceedings, it did not stake out a position either for or against this particular petition for supersedeas. Nor did it introduce any evidence.

After a careful review of the evidence and the parties' arguments, we conclude that a supersedeas would be inappropriate here. Section 4(d) of the Environmental Hearing Board Act, Act of January 13, 1988, P.L. 530, *as amended*, 35 P.S. §§ 7511-7514, (Environmental Hearing Board Act), 35 P.S. § 7514(d), provides, in pertinent part:

> (1) .... The board, in granting or denying a supersedeas, shall be guided by relevant judicial precedent and the board's own precedent. Among the factors to be considered are:
>
> (i) Irreparable harm to the petitioner.
>
> (ii) The likelihood of the petitioner prevailing on the merits.
>
> (iii) The likelihood of injury to the public or other parties, such as the permittee in a third party appeal.
>
> (2) A supersedeas shall not be issued in cases where pollution or injury to the public health, safety or welfare exists or is threatened during the period when the supersedeas would be in effect.[1[1]]

The purpose of a supersedeas is to preserve the lawful *status quo* while the appeal is proceeding to final disposition. See, e.g., *Solomon v. DEP*, 1996 EHB 989, 992.

At the supersedeas hearing, the parties did not address the question of Appellants' likelihood of prevailing on the merits. Therefore, in making our decision on Appellants' petition for supersedeas, we shall confine our attention to whether Appellants will suffer irreparable harm and the likelihood of injury to the public or other parties, such as Permittee.

[1[1]] Section 1021.78(a)-(b) of the Board's rules, 25 Pa. Code § 1021.78(a)-(b), has

Appellants failed to establish that they would suffer irreparable harm if we deny their petition for supersedeas. The evidence Appellants elicited went to the question of whether they would suffer irreparable harm *if Permittee constructed the landfill.* However, the relevant question for purposes of determining whether Appellants are entitled to a supersedeas is whether they would suffer irreparable harm *if Permittee were allowed to use the permit pending a final disposition of their appeal.* The difference is significant because this appeal has been pending for almost five years, and it would appear that a final disposition is a relatively short time away.[2[2]] Therefore, at an absolute minimum, Appellants had to demonstrate that they would be irreparably harmed if the permit was not superseded over this short period of time.

The most important obstacle to Appellants showing that they would be irreparably harmed pending a final disposition of their appeal is the Department's March 20, 2000, order suspending the permit. As noted above, the Board has temporarily superseded that order. However, the supersedeas hearing is scheduled for the next business days that the Board is open—next Monday and Tuesday—and a determination on that petition for supersedeas will follow shortly thereafter. Although we are denying Appellant's petition to supersede the issuance of the permit, that does not necessarily mean that Permittee has the authority to operate under the terms of the permit until the final disposition of this appeal. Permittee could have the authority to operate under the terms of the permit for only a matter of days if, after the supersedeas hearing on the Department's order suspending the permit, we conclude that Permittee has not shown that it is entitled to a supersedeas of the order. If, however, we grant Permittee's petition for supersedeas of the order, then Permittee would be entitled to act in

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virtually identical provisions.

[2[2]] The hearing on the merits is currently scheduled for July of this year. Presumably, therefore, the Board will issue an adjudication on the merits shortly thereafter.

accordance with the permit—provided it complied with any other applicable statutes and regulations—until the final disposition of its appeal of the permit.[3][3]

Therefore, the central question in this particular supersedeas is: Have Appellants demonstrated that they will suffer an irreparable injury if the Board allows Permittee to operate in accordance with the terms of its permit between now and when the Board issues its decision on Permittee's petition for supersedeas of the Department's order suspending the permit.[4][4] We conclude that they have not.

None of Appellants' evidence of possible injury resulting from the landfill went to harm that might result within this limited time frame. Even assuming that it was otherwise relevant, the evidence concerning the funding of the proposed airport improvements, the air commerce park, and the interchange did not indicate that any crucial decisions had to be made in the next several days, or even weeks. Nor did Appellants introduce any evidence that showed that any action Permittee might be authorized to take under the terms of its permit within that time frame might result in a permanent obstacle to any of Appellant's projects.[5][5]

Appellants did argue that, by granting Permittee's petition for temporary supersedeas of the order suspending the permit, the Board granted Permittee the authority to construct the landfill—despite Permittee's failure to comply with several other state and local requirements

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[3][3] Assuming, that is, that the Department did not issue another order suspending the permit, or take any other action regarding the permit.

[4][4] Since Appellants are parties to Permittee's appeal of the order suspending the permit, they can address any harm that may result between the supersedeas hearing and the final disposition of the appeals related to this permit at the supersedeas hearing in that proceeding. Significantly, there, since Permittee is the party petitioning for supersedeas, Permittee will bear the burden of establishing that it is entitled to operate under the terms of the permit. In the instant proceeding, by contrast, Appellants bore the burden of proving that they were entitled to the relief they requested.

[5][5] One possible exception is Appellants' argument concerning the effect of Permittee's proceeding with construction on the applicability of the Aviation Act. We address this argument

necessary before Permittee could lawfully proceed with construction. According to Appellants, since these other state and local requirements are codified in laws designed to protect the public health and welfare, authorizing Permittee to begin construction of the landfill despite these requirements amounts to an irreparable injury *per se,* or at least a *per se* injury to the public.

We disagree. By granting Permittee's petition for temporary supersedeas of the Department's order suspending the permit, the Board simply removed *the order suspending the permit* as an impediment to Permittee constructing the landfill. We did not excuse Permittee from complying with any other state or local requirements that may be necessary before it could lawfully proceed with construction of the landfill. Therefore, even assuming that authorizing a violation of the state and local requirements would constitute an injury *per se,* we have authorized no such injury here.

Finally, we want to address the issue that has imparted such a sense of urgency to the appeals related to the landfill: the grandfather clause in the Aviation Act for landfills where construction begins before the Act is signed into law. It is undeniable and indeed understandable that the Aviation Act is driving the frenzied pace of litigation in the appeals related to this permit. There is a realization among all of the parties involved that the ultimate disposition of the appeals might turn on precisely when the legislation is signed. One of the arguments that Appellants seemed to be making in support of their petition is that the Board should supersede Permittee's permit because, otherwise, Permittee might be able to invoke the grandfather clause and construct and operate the landfill, which would work an irreparable injury on Appellants.

To the extent that Appellants are making this argument, we reject it. The purpose of a supersedeas is to prevent an irreparable injury *pending the final disposition of the action before*

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in more detail later in this opinion.

the Board. Department actions can have drastic consequences for many persons. To show that they were entitled to a supersedeas, Appellants did not merely have to show that they would suffer an irreparable injury if the landfill were constructed; they had to show that they would likely suffer an irreparable injury before the Board could rule on the Permittee's petition for supersedeas of the Department's order suspending the permit. As noted previously, they failed to do so. The fact that a supersedeas might thwart the landfill from meeting the grandfather clause, and that the landfill may have drastic consequences for Appellants, does not necessarily show that Appellants would suffer an irreparable injury before the Board could rule on the Permittee's petition for supersedeas of the Department's order.

Permittee dutifully applied for its permit to construct and operate the landfill, and the Department issued the permit. While we are mindful of the Aviation Act and the potential harm to Appellants, we must also accord a great deal of weight to Permittee's interest in having a full and fair opportunity to litigate its claims under Pennsylvania law. Here it appears that the harm that might result to Appellants from denying the supersedeas is speculative and nebulous, while granting the supersedeas might deprive Permittee of any opportunity to litigate its case on the merits.

Accordingly, the petition for supersedeas is denied.

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

JEFFERSON COUNTY COMMISSIONERS, et al.	:	
	:	
v.	:	**EHB Docket No. 95-097-C**
	:	**(Consolidated with 95-102-C)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued:** March 24, 2000

O R D E R

AND NOW, this 24th of March, 2000, it is ordered that Appellants' petition for supersedeas is denied.

ENVIRONMENTAL HEARING BOARD

Michelle A. Coleman

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: March 24, 2000

See following page for service list.

c: **DEP Bureau of Litigation**
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WILLIAM T. PHILLIPY I
SECRETARY TO THE BOA

RICHARD and CATHY MADDOCK	:	
	:	
v.	:	**EHB Docket No. 99-224-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and CONSOL COAL COMPANY, Permittee	:	**Issued: March 24, 2000**

OPINION AND ORDER ON MOTION TO DISMISS

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

Synopsis:

The Department's motion to dismiss an appeal is denied where, interpreting the record in the light most favorable to the nonmoving parties, it appears that some legitimate objections have been made to what is indisputably a final Departmental action.

OPINION

Richard and Cathy Maddock (the "Maddocks") filed their notice of appeal on November 4, 1999. The appeal relates to a mine in Plum Borough, Allegheny County, that was formerly operated by Consol Coal Company ("Consol"). The Department of Environmental Protection (the "Department") has moved to dismiss the appeal, and Consol has filed a brief in support of that motion.

Among other things, the Maddocks identified "the enclosed letters" as the actions of the Department for which review is sought in their notice of appeal. The "enclosed letters" included

an October 6, 1999 permit revision approval letter. The October 6 letter is undeniably a final, appealable Departmental action. To the extent the Maddocks' arguments and objections can be interpreted as a challenge to the approval letter, the Board has jurisdiction to review them. The arguments may or may not have merit, but that is a matter for another day.

The Maddocks are proceeding without counsel, and their filings to date suggest that their decision to proceed in that manner may very well ultimately be their undoing. We are very sympathetic to the Department's frustration in defining precisely what the Maddocks' arguments are. Nevertheless, in the context of the motion to dismiss, we are bound to assess the notice of appeal in the light most favorable to the Maddocks, and we can only dismiss their appeal if there are no factual disputes and the law is so clear that the Department is clearly entitled to judgment as a matter of law. *See Smedley v. DEP*, 1998 EHB 1281, 1282.

With that most liberal of standards in mind, it appears that the Maddocks have challenged the after-the-fact nature of the permit revision approval, notice issues, and whether approval should have been granted given the permittee's allegedly illegal conduct. These are all questions within our purview. Some of the documents cited by the Department as beyond our consideration may in fact be offered as evidence in support of these arguments as opposed to cited by the Maddocks as independent appealable actions in and of themselves. Again, making this distinction is impossible at this juncture.

In the section of the notice-of-appeal form that asks the party to identify related appeals now before the Board, the Maddocks wrote: "The Maddocks object to releasing of the bond at [the subject mine]." Thus, the Maddocks do not cite the bond release, which we are advised has yet to occur, as the appealable action in **this** appeal.

Accordingly, we issue the following Order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

RICHARD and CATHY MADDOCK	:	
	:	
v.	:	**EHB Docket No. 99-224-L**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and CONSOL COAL COMPANY, Permittee	:	

ORDER

AND NOW, this 24th day of March, 2000, the Department's motion to dismiss is DENIED.

ENVIRONMENTAL HEARING BOARD

BERNARD A. LABUSKES, JR.
Administrative Law Judge
Member

DATED: **March 24, 2000**

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WILLIAM T. PHILLIF
SECRETARY TO THE E

FELIX DAM PRESERVATION ASSOCIATION, et al.	:	
v.	:	EHB Docket No. 2000-009-K
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	Issued: April 10, 2000

OPINION AND ORDER ON MOTION TO DISMISS

By Michael L. Krancer, Administrative Law Judge

Synopsis:

DEP's Motion to Dismiss is granted in part and denied in part. DEP made a decision to remove a dam owned by it and entered into a "Notice of Award" upon bids for its removal. Appellants, persons who own property or businesses on the dam pool and allegedly rely on it for recreational, aesthetic and business purposes, characterize this as a contract. In addition, DEP had issued a temporary "Emergency Permit" under the dam safety regulations authorizing the removal of the Dam which had expired by the time that the Motion to Dismiss was pending. The jurisdiction of the Board does not attach to the decision of DEP to remove the Dam from DEP's execution of the "Notice of Award" even as characterized as a "contract" since the regulatory scheme governing dam safety and dam removal requires that an Emergency Permit, a full permit or a permit wavier be secured from DEP before removal of the Dam can be effectuated. Thus,

execution by DEP of a "Notice of Award", even if viewed as a contract, is not a final action which affects the rights and liabilities of the Appellants. The DEP's Motion to Dismiss is denied in part as the issuance of an Emergency Permit would be appealable and the effect, if any, of the expiration of the Emergency Permit on the appeal was not propounded by DEP in its Motion to Dismiss as a basis for dismissal and the parties have not fully briefed that issue.

OPINION

I. Factual and Procedural Background.

A. The Facts and Procedural Posture of the Litigation.

We are called upon to decide, via DEP's Motion to Dismiss, whether we have jurisdiction over this appeal, *i.e.*, whether DEP's action is an appealable action. This appeal traces its genesis to the storm damage visited by Hurricane Floyd in September, 1999. The appeal was commenced by a Notice of Appeal filed on January 20, 2000 and supplemented by an Amended Notice of Appeal filed on February 8, 2000.[1] The appeal involves what is alleged to be DEP's decision to dismantle and remove the Felix Dam which had been damaged by flood waters on the Schuylkill River. The Dam is located on the Schuylkill River and it is owned by DEP's Bureau of Abandoned Mine Reclamation.

Appellants are a series of associations, corporations and 10 individuals. The association and corporate Appellants are: (1) Felix Dam Preservation Association ("FDPA"), a not-for-profit association of 300 members whose objectives are, among other things, to promote and preserve Felix Dam as a recreational area; (2) Reading Boat Works, Inc. ("RBWI"), a for-profit corporation located on the banks of Felix Dam Pool engaged in the sale and repair of recreational

[1] We will cite the Notice of Appeal as "NOA ¶__" and the Amended Notice of Appeal as "ANOA ¶__".

boats and aquatic equipment; (3) Ontelaunee Orchards, Inc., a for-profit corporation that owns and operates a fruit orchard located on the banks of Felix Pool which has relied upon and used Felix Dam Pool for irrigation of its fruit crop; (4) Reading Water Skiers, Inc. ("RWSI"), a not-for-profit association of approximately 125 members with headquarters on the banks of the Felix Dam Pool and is a water ski club engaged in the promotion and sponsorship of water skiing activities on the Felix Dam Pool; and (5) Berks Boating Club ("BBC"), a not-for-profit association of 36 member families having its headquarters on the Felix Dam Pool and is a boating club engaged in the promotion of recreational boating on the Felix Dam Pool. ANOA ¶¶ 3-7. In addition, there are 10 individual Appellants each of whom own a home on the shores of the Felix Dam Pool. ANOA ¶¶ 8-16.

According to the ANOA the Felix Dam is owned by DEP's Bureau of Abandoned Mine Reclamation. ANOA ¶ 18. The Dam was originally built in 1855 and was restored as part of a joint state-federal project to restore the Schuylkill River referred to as the Schuylkill River Project ("Project") which commenced in 1949. ANOA ¶ 22. The Schuylkill River Project involved the construction by the Army Corps of Engineers of a series of siltation basins along the River and the removal of more than 30,000,000 tons of coal culm deposits along the River bed which had accumulated from the River's headwaters in Schuylkill County to the Fairmount Dam in Philadelphia. ANOA ¶ 23. A significant purpose of the Project was to create and enhance recreational opportunities for boating, swimming and fishing. ANOA ¶ 24.

The Felix Dam allowed the formation of the Felix Dam Pool and recreation area. ANOA ¶¶ 19-20. After its restoration as part of the Project, the Dam was acquired by the

Commonwealth and, on several occasions, the Commonwealth maintained the Dam and the Felix Dam Pool by dredging the pool and performing maintenance on the Dam. ANOA ¶¶ 27-30. In 1991 the Dam Pool experienced low water conditions and the Department backfilled a refrigerator-sized hole in the Dam with 20 tons of stone but did not effectuate actual physical repair to the Dam. ANOA ¶ 30. Then, in 1993, it is alleged that the Department agreed to repair the damage to the Dam by Labor Day, 1993 and to generate a report discussing the long-term options for the Dam which the Department stated included either major repairs or construction of a new Felix Dam. ANOA ¶ 31. Despite approval in the Commonwealth's capital budget of 1994 of an expenditure to repair the Dam and a Legislatively approved appropriation in 1996 to build a new Dam, the Dam did not undergo major repairs and no new Felix Dam was constructed. ANOA ¶¶ 32-33.

In 1996, the Department posted signs to warn that the Dam could break without warning. ANOA ¶ 35. It was noted that a possible break would not pose an immediate threat to residents or property beyond the banks of the River. ANOA ¶ 35. The FDPA, in 1998, made application to DEP for a stream encroachment permit that would allow construction of a temporary earthen structure across the portion of the Schuylkill Canal that is perpendicular to the Felix Dam so as to allow access to the Dam to investigate and plan the necessary repairs. ANOA ¶ 36. DEP approved that permit application on September 9, 1999.

Then, Hurricane Floyd hit the eastern United States on September 17, 1999 with devastating effects. The Schuylkill River flooded and Felix Dam was severely damaged. ANOA ¶ 38. Even so, on September 27, 1999, DEP had drafted a cost estimate and design drawing for

the rebuilding of the Dam and a meeting was held on October 15, 1999 to discuss the procurement of funds necessary to rebuild the Dam. ANOA ¶¶ 40-41.

Then, it is alleged that sometime between the October 15th meeting and December 28, 1999, the Department made an internal, unilateral, and arbitrary decision to abandon Felix Dam. ANOA ¶ 42. On December 17, 1999, DEP made its first public statement of its intention to abandon the Dam by publishing a Request for Proposals for removal of the Dam. ANOA ¶ 43. The "Facsimile Bid Form" indicates that it is relative to the "Felix Dam Removal Project". ANOA Ex. "A". The attached "General Instructions For Bidders, Department of Environmental Protection Bureau of Waterways Engineering" and Technical Specifications contain a detailed description of the process DEP expects to be followed by the Contractor in executing the removal of the Dam. NOA Exhibit "A". Also, the ANOA states that, on information and belief, the Bureau of Abandoned Mines Reclamation obtained an emergency permit from the Bureau of Waterways Engineering (the "Emergency Permit") to remove the Dam. ANOA ¶ 44. Also, it is alleged that, "[u]pon information and belief, the Department awarded a contract on December 28, 1999 to No. One Contracting Corp. for removal of the Felix Dam, thus manifesting the heretofore unannounced decision to abandon Felix Dam". ANOA ¶ 2. Furthermore, it is alleged that the Department's Bureau of Waterways Engineering entered into a contract with No. One to dismantle, not repair, the Felix Dam. ANOA ¶ 21.

The allegations that the decision has affected personal or property rights, privileges, immunities, duties, liabilities or obligations of the individual Appellants are legion. Appellant FDPA's members will permanently lose the use of the Felix Dam Pool recreational facility.

ANOA ¶ 3. Appellant RBWI, which is engaged in the sale and repair of aquatic recreational accoutrements, will lose 10% of its revenue base. ANOA ¶ 4. Appellant, Ontelaunee, which owns and operates a fruit orchard, will lose access to irrigation water upon which it relies for its business and will, thus, lose not only some fruit but also between $200,000 and $500,000 in revenue annually. ANOA ¶ 5. Members of Appellant RWSI, a water ski club, will lose members and revenue and had planned to host the year 2000 Pennsylvania State Championships this summer. ANOA ¶ 6. The members of Appellant BBC, a boating club, will lose a substantial number of its members and associated revenue upon which BBC relies for its existence. ANOA ¶ 7. The individual Appellants, Dyke Becker, Carey Becker, Wayne Morris, Richard and Carol Smith, Edward Kemmerer, Lloyd Johnson, Frank Barbon, Patricia Bowels, and Glen Wenrich all have homes located on the Felix Dam Pool. ANOA ¶¶ 8-16. All of the individual Appellants will allegedly suffer significant diminution in the value of their properties by the failure to fix the Dam. ANOA ¶¶ 8-16.

By letter telecopied to the Board on February 8, 2000, Appellants provided copies of the December 28, 1999 DEP Bureau of Waterways Engineering "Notice of Award" to No. 1 Contracting Corporation for the project designated as "Removal of Felix Dam".[2] The letter is dated December 28, 1999 and it is from Michael D. Conway, Director, DEP Bureau of Waterways Engineering to Mr. Al Roman, President, No. 1 Contracting Corporation. The "Re" header of the letter reads in relevant part, "Removal of Felix Dam". The letter states as follows:

[2] This document refers to the contractor as "No. 1" as opposed to "Number One". We are not sure which is correct.

> Bids for the referenced project were received on December 27, 1999. We are pleased to inform you that your bid has been found acceptable and you are hereby authorized to proceed based on your bid in the amount of $392,000.00. Enclosed is a copy of your submitted bid form showing the unit prices for each work item.
>
> In accordance with the "General Instructions for Bidders" issued for this project, you are to submit the required insurance certificates to the Department of Environmental Protection (DEP) prior to starting work. Materials to be incorporated into the project (seeding, mulch, etc.) shall be reviewed and approved prior to use at the site.
>
> Please contact Chip Schaffer, Project Engineer, Bureau of Waterways Engineering, P.O. Box 8460, Harrisburg, Pennsylvania 17105-8460, telephone number 717-783-7950, concerning a pre-job conference, prior to moving any equipment to the site. On-site work shall be started within 10 calendar days, and the work shall be completed within 60 calendar days.
>
> After work has been satisfactorily completed, in the opinion of DEP, submit a Letterhead invoice to the Department for payment. Please acknowledge receipt of this letter by signing and dating the enclosed copy and returning it to the above address.

At the bottom left hand corner of the letter is the designation in all capital letters, "NOTICE OF AWARD" and a handwritten date thereunder states, "12/28/99."

Also provided with the letter telecopied to the Board by Appellants on February 8, 2000 is a copy of the "Emergency Permit" for "work involv[ing] the removal of the Felix Dam". The Emergency Permit is dated December 22, 1999 and is issued by DEP's Bureau of Dams, Waterways and Wetlands with the permittee being DEP's Bureau of Abandoned Mine Reclamation. There is a form statement on the Emergency Permit which reads, "[t]his permit will expire in 30 days unless written permission extending that time is issued by the Department".

DEP filed its Motion to Dismiss on March 9, 2000. The Motion is accompanied by the affidavits of Scott Johnson of DEP's Bureau of Abandoned Mine Protection and Michael Conway, the Chief of DEP's Bureau of Waterways Engineering and by Exhibits "A" through

"E". DEP also filed a brief in support of its Motion.

The essence of DEP's Motion is that the Board has no jurisdiction because there is no final appealable DEP action. DEP alleges that Felix Dam was acquired by the Commonwealth in 1947 as part of the Schuylkill River Project which is described as aimed at cleaning the River of accumulated wastes from mining, industrial processes and municipal sanitation and to prevent further accumulation of such waste. Motion ¶¶ 5-6. Now, however, such pollution is controlled by the enforcement of laws enacted since the Project and, in fact, since the mid-1990s, DEP has been working hard to eliminate old, unnecessary dam structures. Motion ¶ 6. DEP has performed sporadic maintenance on it over the years. Motion ¶ 8.

Hurricane Floyd washed out an approximately 80 foot wide section of the Dam on September 17, 1999 and there has been no Felix Dam Pool since then. Motion ¶ 9. DEP alleges that the remnants of the Dam present a dangerous condition and an "attractive nuisance". Motion ¶¶ 9-10.

The Department's Motion states that the Department made an internal decision to remove the remaining structure of the Dam. Motion ¶¶ 11-18. Sometime between the end of September and October 15, 1999 DEP "determined that the remaining structure was a serious public hazard, presenting potential Commonwealth liability in the damaged and exposed condition and that the Department would not repair the Dam." Motion ¶ 11. On October 15, 1999 DEP representatives met with various other public officials and agencies such as the Army Corps of Engineers and the Fish and Boat Commission and a representative of Appellant FDPA at which the DEP representatives stated that DEP intended to remove the remnants of the Dam and DEP would not take the lead in having a new Dam built. Motion ¶ 13. Pursuant to DEP's internal decision, DEP issued a Press Release on December 17, 1999 to inform potential contractors of an opportunity to

submit bids for the removal project. Motion ¶ 14. DEP held a pre-bid meeting at the site of the Dam at which members of FDPA were present. Motion ¶ 14. The project covered by DEP's request for bids involved dredging the upstream area and removal of the remnants of Felix Dam. Motion ¶ 16, NOA Exhibit "A".

On December 21, 1999 because of the public hazard posed by the breached Dam, and pursuant to 25 Pa. Code § 105.64, the Bureau of Waterways Engineering issued the Emergency Permit to the Bureau of Mines for the removal of the Dam. Motion ¶ 15, Exhibit "C".[3] Under the terms of the Emergency Permit it expired on January 21, 2000 and was not renewed. Motion, Exhibit "C".[4]

Number One Contracting, Inc. submitted the low bid and that bid was accepted by DEP by letter dated December 28, 1999. Motion ¶ 16, Exhibit "D".[5] DEP alleges that "no contract between the Department and Number One Contracting has been signed". Motion ¶ 16. Number One was not able to perform the work provided for in its bid and the Emergency Permit because DEP was not able to obtain, on an expedited basis, a needed federal Section 10 permit under 33 U.S.C. § 403 ("Section 10 Permit") from the United States Army Corps of Engineers. Motion ¶ 17. As of the date of the Motion, Number One has not commenced any removal work. Motion ¶

[3] Exhibit "C" to DEP's Motion is the Emergency Permit together with its transmittal memorandum from Mr. Conway of the Bureau of Waterways Engineering to Mr. Giovannitti of the Bureau of Mine Reclamation.

[4] As already noted, the Emergency Permit is dated December 22, 1999 and on its face states that it will expire in 30 days in the absence of written permission extending that time. Thus, the permit expired on January 21, 2000 as stated in DEP's Motion.

[5] Exhibit "D" to DEP's Motion is the December 28, 1999 "Notice of Award" letter dated December 28, 1999 which was referred to earlier which had been forwarded to the Board by the February 8, 2000 telecopy letter from counsel for Appellants.

18.

DEP states that it is no longer pursuing the Emergency Permit route to execute its decision to remove the Dam. Instead, DEP's Bureau of Abandoned Mine Reclamation has applied to DEP's Bureau of Waterways Engineering for the issuance of a "restoration waiver" under 25 Pa. Code § 105.12(16) of DEP's Dam Safety Regulations to proceed with the removal of the Dam. Motion ¶ 26-28. A "restoration waiver" waives the requirement that the removal of a Dam be done pursuant to the permit process of 25 Pa. Code Chapter 25. Motion ¶ 27. The "restoration waiver" process involves the performance of an Environmental Assessment, notice to the public, public participation, and approval by the Bureau of Waterways Engineering of a work plan for removal of the Dam. DEP's Motion notes that if the Bureau of Waterways Engineering does issue the restoration wavier then that action would be a final decision which is appealable to the Board. Motion ¶ 28.

DEP also notes that, under the current plan for removing the Dam, a federal Section 10 Permit is needed. Motion ¶ 29-31. DEP has applied to the Army Corps of Engineers for that permit but no decision has yet been made.

B. **The Relevant Regulations Governing Dam Safety and Removal of Dams.**

The inquiry whether we have jurisdiction as the matter now stands is somewhat dependent upon and must be determined in the context of the regulatory backdrop relating to dam safety and especially dam removal. The regulations governing dam safety are found at Chapter 105 of 25 Pa. Code. A dam owner is subject to regulatory requirements in order to remove a Dam. 25 Pa. Code § 105.11 provides that, "a person may not construct, operate,

maintain, modify, enlarge or abandon a dam, water obstruction or encroachment without first obtaining a written permit from the Department". 25 Pa. Code § 105.11. The rules regarding the permitting process, including what must be contained in a permit application and DEP's review of permit applications, are set forth in 25 Pa. Code §§ 105.13 – 105.14. The regulations also provide for an "emergency permit" which allows the removal of a dam on an emergency basis with a quite truncated permitting process. 25 Pa. Code § 105.64. An emergency permit is available if DEP finds that "immediate remedial action is necessary to alleviate an imminent threat to life, property or the environment." 25 Pa. Code § 105.64. Pursuant to 25 Pa. Code § 105.64, an emergency permit has a life of only 30 days unless it is renewed. 25 Pa. Code § 105.64. In this case, as noted in the factual discussion, DEP had obtained an Emergency Permit under 25 Pa. Code § 105.64 but that permit expired by its terms and pursuant to the regulation on January 21, 2000.

A "permit waiver" is also available under certain circumstances. 25 Pa. Code § 105.12. Under a permit waiver, a dam owner may secure permission from DEP to remove the dam without the full blown permitting process outlined in 25 Pa. Code §§ 105.13 – 14. In this case, DEP has applied for a "permit waiver" under 25 Pa. Code § 105.12(a)(16) which applies to "restoration activities undertaken and conducted pursuant to a restoration plan which has been approved, in writing, by the Department." 25 Pa. Code § 105.12(a)(16). It is under this provision that DEP's Bureau of Abandoned Mine Reclamation, as the owner of the Dam, had applied to DEP's Bureau of Waterways Engineering for a "permit waiver". As the regulation specifies, and as DEP has alleged, it has submitted a work plan which must be approved. The

Bureau of Abandoned Mine Reclamation's permit wavier application was still pending as of the date of DEP's Motion to Dismiss.[6] DEP also notes that in order for it to proceed to actually remove the Dam a federal Section 10 Permit from the Army Corps of Engineers is required.

II. The Parties' Arguments.

In brief, DEP argues that the "internal decision" to abandon and remove Felix Dam is not a final appealable decision to which our jurisdiction attaches because there is no final appealable action. Appellants argue to the contrary. The essence of Appellants' point is that, in this case, the Department's decision was manifested by the Emergency Permit and the "contract" with No. 1 Contracting and, at the time the appeal was filed, those were the only state actions that DEP anticipated taking to effect its abandonment decision. The DEP decision to remove the Dam coupled with the manifestation or executive actions appurtenant thereto, *i.e.*, issuance of the Emergency Permit and entry into the contract with Number One Contracting, directly and adversely impact all the Appellants. Accordingly, the decision is an appealable action.

III. Legal Analysis.

A. The Standard of Review of a Motion To Dismiss.

"The Board evaluates Motions to Dismiss in the light most favorable to the non-moving party." *Borough of Chambersburg v. DEP*, EHB Docket No. 99-092-MG slip op. at 5 (opinion issued December 3, 1999) (citing *Tinicum Township v. DEP*, 1996 EHB 816, 821; *Solar Fuel*

[6] Apparently, an environmental assessment is not required to proceed with dam removal under an Emergency Permit but an environmental assessment is required to be done and approved by DEP before a dam may be removed under either a regular permit or a permit waiver. 25 Pa. Code § 105.15. We are informed by the status reports of the parties that the Bureau of Abandoned Mine Reclamation is performing an environmental assessment.

Co., Inc. v. DER, 1994 EHB 737, 741). "Moreover, the Board will grant a Motion to Dismiss only when there are no material factual disputes and the moving party is entitled to judgment as a matter of law." *Borough of Chambersburg*, EHB Docket No. 99-092-MG slip op. at 5 (citing *Wheeling and Lake Erie Railway v. DEP*, EHB Docket No. 97-252-R slip op. at 3 (opinion issued May 26, 1999).[7]

B. **The Basic Statutory and Regulatory Framework Relating to Appealability.**

The Department's Brief accurately identifies the relevant statutory and regulatory provisions which govern our review of 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,

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[7] As noted DEP has submitted affidavits and exhibits with its Motion to Dismiss. The Notice of Appeal and Amended Notice of Appeal also contain numerous exhibits. The Board has noted that, "as a matter of practice, the Board has authorized motions to dismiss as a 'dispositive motion' and has permitted the motion to be determined on facts outside of those stated in the appeal when the Board's jurisdiction...is in issue." *Florence Township and Mobley, et al. v. DEP*, 1996 EHB 282, 302. Here, of course, our jurisdiction is in issue.

determination, or ruling by the Department affecting personal or property rights, privileges, immunities, duties, liabilities or obligations of a person including but not limited to a permit, a license, approval or certification".

As this Board has said before in analyzing the appealability of DEP actions, we must examine the substance of the DEP's action. *See e.g., Bituminous Processing Co., Inc. v DEP*, Docket No. 99-172-L slip op. at 2 (opinion issued, January 18, 2000)(in determining whether a letter stating DEP's notice of intent to forfeit a bond constitutes an appealable action, the Board will consider the substance of the letter itself)(*citing Central Blair County Sanitary Authority v. DEP*, 1998 EHB 643, 646-47). 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.

C. **Appellants' Cases**.

Appellants' reliance on the four cases cited in their brief is misplaced. These four cases are, *Middle Creek Bible Conference, Inc. v. DER*, 645 A.2d 295 (Pa. Cmwlth. 1994); *Highridge Water Authority v. DEP*, EHB Docket No. 98-191-R (opinion issued January 5, 1999); *Medusa Aggregates Company v. DER*, 1995 EHB 414; and *National Forge Company v. DER*, 1993 EHB 1639. While these cases involve non-traditional bases for jurisdiction, as this case would, we have reviewed these cases and we believe that none of them are particularly applicable to the situation here.

Middle Creek involved a letter from DER which returned to two Township Boards of Supervisors their Sewage Facilities Plan revisions for which the Townships had revoked their

approvals. *Middle Creek, supra* at 296-299. The project involved had been delayed for six years prompting the Commonwealth Court to state that: "[w]e find it unconscionable that a six year delay occurred, after which Middle Creek was no closer to building its project than it was when the entire process began". *Id.* at 300. The Court said that, under the circumstances,

> this letter should not be viewed as an isolated, passive expression of acceptance of the Townships' actions. It is the culmination of a series of acts by DER that caused Middle Creek to become entangled in a web of approvals, disapprovals, rescissions and policy changes. Viewed accordingly, DER's letter constitutes an appealable action.

Id. The Appellants quote this language in their brief but do not explain how it or the *Middle Creek* case applies to this case. It is not clear how it does.

The *Highridge Water Authority* case does not seem to apply either. There, the Board held that letters to two water authorities stating that they need not have an allocation permit modification was needed for their plan for one to sell water to the other was appealable. *Highridge Water Authority*, slip op. at 2-3. The Board concluded that letters stating that no allocation permit modification was a discreet action, *i.e.*, the approval of the plan to sell and purchase water without requiring a permit modification, which had a direct impact on Highridge's own allocation permit because it was still subject to a permit condition regardless of DEP's decision to sanction the transaction at issue without a modification. *Id.* at 4.

Medusa is likewise not supportive of Appellants' position in this case. In that case, DEP, by letter, notified a mine operator that mining was no longer authorized on a part of the property which theretofore had been the subject of an authorization to mine. *Medusa, supra*, at 415-17. That decision, even though manifested by letter instead of a cease and desist order, was a

direction to stop mining. *Id.* at 419. Thus, the letter was a discreet action which had a clear adverse impact on the appellant.

Finally, the *National Forge* case is not supportive of Appellants' position. In that case the subject was a letter from DER telling the appellant that a waste pile was subject to regulation as a residual waste impoundment. *National Forge*, 1993 EHB at 1064. DER had previously stated this orally to National Forge. *Id.* at 1642. DER, however, memorialized this decision in a letter to National Forge. *Id.* at 1639-1641. The Board held this letter was appealable because it was a final decision and the letter triggered various regulatory requirements as its direct consequence in that the law requires each operator of a residual waste impoundment to submit detailed information to DER. *Id.* at 1642-1643. This case does not appear to fit in the *National Forge* mold.

D. **DEP's Essential Cases.**

DEP points us to, among others, the cases where a DEP decision has yet to be made and which hold that we do not have jurisdiction to issue declaratory judgments. Obviously, DEP, the owner of the Dam, and Appellants, who have historically enjoyed and relied upon its attributes for recreational, aesthetic and/or occupational purposes, have an extreme difference of opinion about the Felix Dam and what should be done with it. DEP correctly points out that our jurisdiction does not attach before a DEP decision is made. DEP cites *JEK Construction Company, Inc. v. DER*, 1990 EHB 535 in that regard. In that case, *JEK* purported to appeal certain oral and written expressions of the opinions of DEP personnel about a proposed solid waste project before *JEK* had submitted the application. *Id.* at 536-38. The Board held that there

was no jurisdiction over the matter at that point. DEP is quite correct that the *JEK* Board held that DEP's denial or issuance of the permit would be the final action which would be appealable and before that, no jurisdiction attached. *Id.* at 544-45. The *JEK* Board noted that even if the permit application had been submitted and pending the result would be the same. *Id.* at 545. That latter point, which was *dicta* in the *JEK* case, was reiterated as the holding of our very recent decision in *United Refining Company v. DEP*, Docket No. 99-187-L slip op. at 2-3 (opinion issued February 15, 2000), where the Board declined to review an interim determination of DEP made during the pendency of its review of United Refining's application for an air pollution plan approval. Thus, along these lines and as DEP points out in its brief, we do not have jurisdiction to render declaratory judgments or advisory opinions. *Empire Sanitary Landfill, Inc. v. DER*, 684 A.2d 1047, 1054-55 (Pa. 1996); *Costanza v. DER*, 606 A.2d 645, 647-48 (Pa. Cmwlth. 1992); *DEP v. Landmark International, Ltd.*, 570 A.2d 140, 142-43 (Pa. Cmwlth. 1990); *Nashotka v. DER*, 1991 EHB 1900, 1901-02; *Westinghouse Electric Corp. v. DER*, 1990 EHB 515, 517-18.

We agree that there is no jurisdiction before DEP makes a decision on what to do with the Dam, but, in this case, DEP made a decision and DEP has no hesitation so admitting. Thus, this line of cases and this line of argument, like the cases cited by Appellants discussed above, are informative but not dispositive here.

E. **DEP's Decision to Abandon the Felix Dam.**

Even so, we recognize that our jurisdiction does not attach to the metaphysical status of DEP's "decision". A decision which is not manifested in any way or not carried out in any way

is not appealable. *DER v. New Enterprise Stone & Lime Co.*, 359 A.2d 845, 847 (Pa. Cmwlth. 1975). As the Board very recently said in *Protect Environment and Children Everywhere ("PEACE") v. DEP*, Docket No. 99-170-L slip op. at 3 (opinion issued January 4, 2000), a case involving whether DEP's publication of a Request For Proposals for a reclamation project was an appealable action:

> An internal decision to pursue a particular course of action is not enough. Thus, for example, it is the issuance of a compliance order, not a decision to issue a compliance order, that is appealable. Perhaps more closely analogous to the situation here, a Department letter stating that it is considering the possibility of taking enforcement action is not in and of itself appealable. *See E.P. Bender Coal Company v. DER*, 1991 EHB 790, 798-99; *Percival v. DER*, 1990 EHB 1077, 1107-08 (Department letters discussing, among other things, the possibility of future enforcement are not appealable actions); *see also Lower Providence Township Municipal Authority v. DEP*, 1996 EHB 1139, 1140-41 and *M. W. Farmer Co. v. DER*, 1995 EHB 29, 30, (stating that a notice of violation containing a list of violations, the mention of the possibility of future enforcement actions or the procedure necessary to achieve compliance is not an appealable action).

PEACE, slip op. at 3. We will have more to say about the *PEACE* case later.

DEP's bare decision to remove the Dam affects no rights of the Appellants in a manner cognizable for jurisdiction of the Board. No matter how disturbing or distressing the decision of DEP may be to the Appellants, the decision in and of itself has no impact on their rights and liabilities.[8]

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[8] Before we depart from this area we note that we have considered DEP's argument that, if the decision is appealable, that the appeal was untimely because DEP alleges that its decision was announced publicly at the meeting of October 15, 1999 at which, allegedly, representatives of Appellants were present. Appellants' Notice of Appeal was not filed until January 18, 2000 making it untimely as to the decision of DEP to remove the Dam. Appellants vigorously disagree with DEP's recitation of the events regarding the meeting and what transpired at the meeting. They say that DEP did not manifest a decision to abandon the Dam at that time but that many alternatives were discussed. Appellants allege that it was later that DEP decided to remove the dam. In light of our discussion about the decision as such not being appealable, this aspect of the Motion to Dismiss and the Appellants' counterpoints need not be discussed.

Appellants, however, argue that the decision together with the executive action of the "contract" and the issuance of the Emergency Permit constitute a DEP action which affects the rights of Appellants which is appealable. We must then examine whether the "contract", or the issuance of the Emergency Permit, or both taken together, move this into appealable territory.

F. **DEP's Decision Plus the "Contract".**

Appellants argue that the "contract" entered into by DEP with Number One Contracting brings this case into the appealable realm. Appellants have alleged that there is a contract to remove the Dam. The Department denies that there is an executed contract with Number One. DEP states in Paragraph 16 of its Motion that, "Number One Contracting, Inc. submitted the low bid in response to the Department's press release. Number One Contracting's bid was accepted by the Department by letter dated December 28, 1999" and DEP attached as Exhibit "D" to its Motion a copy of the "Notice of Award" to No. 1 Contracting Corporation for "Removal of Felix Dam". For purposes of the Motion to Dismiss we will view the allegations in the light most favorable to Appellants. Thus, we will credit their allegation that there is a "contract".

We do note that a "contract" or a "Notice of Award" of contract is not specifically mentioned in the EHB Act, Agency Law or our Rules in the list of types of manifestations of decisions that are appealable. However, our review of the statutory language does not lead us to the conclusion that omission of these specific references mean that these items could never be the basis for our jurisdiction. The examples of the types of manifestations of decisions provided in the EHB Act, the Agency Law and our Rules is meant to be exemplary and not exclusive such

that if the exact mechanism at issue is not on the list the appeal must be dismissed. Our Rules are very clear on this point by the use of the "including but not limited to" language in the list of appealable actions. The Rule provides that 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. 25 Pa. Code § 1021.2. (emphasis added). Thus, the list is not exclusive but exemplary and absence from the list is not an absolute bar to appealability. We have had no problem coming to the same conclusion before. In *Belitskus v. DEP and Williamette Industries, Inc.*, 1997 EHB 939, appellants appealed from DEP's approval of the discharge by Williamette of stormwater into a nearby creek as being covered by a general permit. Williamette argued that the DEP action was not appealable because 25 Pa. Code § 1021.2(a) did not include an approval of coverage in its definition of the term "action". *Belitskus, supra* at 944. The Board rejected Williamette's argument with dispatch by stating that, "the regulation clearly states that the definition of 'action' is not limited to the enumerated examples." *Id.* at 945-46. Also, as we have noted before, we must consider the substance of the DEP action in the context of determining whether an appealable action has transpired. *Bituminous Processing, Co., Inc. v. DEP*, slip op. at 1.

The Department relies, at least in part, on the Board's recent *PEACE* case. In *PEACE*, the Board held that a published notice in the *Pennsylvania Bulletin* of a request for proposals ("RFPs") for the design and construction of an acid mine drainage mitigation project was not an appealable action to which the Board's jurisdiction attached. *PEACE, slip op.* at 4-5. The

Board, thus, granted DEP's motion to dismiss the appeal. *Id.* The Board in *PEACE* stated that:

> This Board only has jurisdiction to review final actions of the Department. 35 P. S. §7514(a); 25 Pa. Code § 1021.2. To be appealable, an action must affect personal or property rights, privileges, immunities, duties, liabilities, or obligations of a person. 25 Pa. Code § 1021.2; *DER v. New Enterprise Stone and Lime Co.*, 359 A.2d 845, 847 (Pa. Cmwlth. 1976). An RFP is not such an action. It is not an offer; it is a request for offers. By its own terms, it does not commit the Department to do anything...For example, the Department can reject all bids and decide to pursue an entirely different course of action. *See Conduit and Foundation Corporation v. City of Philadelphia*, 401 A.2d 376 (Pa. Cmwlth. 1979 (public officials may reject all bids). It is merely an announcement of the *possible* beginning of a process. As such, an RFP in and of itself does not affect anybody's legal rights and liabilities. See *Jenkins v. County of Schuylkill*, 658 A.2d 380, 383 (Pa. Super. 1995), *petition for allowance of appeal denied*, 666 A.2d 1056 (Pa. 1995)(unilateral termination of negotiations following a request for proposals does not create a cause of action for breach of contract); *Facchiano v. Pa. Turnpike Commission*, 621 A.2d 1058, 1059 (Pa. Cmwlth. 1993)(disappointed bidders have no expectation of receiving award and no legally cognizable injury). In short, it is not a final action that triggers the Board's jurisdiction.

PEACE, *slip op.* at. 2. Moreover, the Board stated that, "[h]ere the Department has done nothing more than announce that it will consider proposals. That simply is not enough to constitute an appealable action". *Id.* at 3. Thus, the decision there and its follow-up action was not appealable as it was not final in any sense and, thus, did not affect any rights of Appellants.

In this sense we see something much different here than we saw in *PEACE*. The *PEACE* provisos such as, "it is not an offer; it is a request for offers"; "by its own terms, it does not commit the Department to do anything"; "the Department can reject all bids and decide to pursue an entirely different course of action" and; "the Department has done nothing more than announce that it will consider proposals" are not applicable here. In this case, there is an allegation, which we must take as true for the present purposes, that there is a contract to remove

Felix Dam.[9]

Thus, our decision in *PEACE* is not dispositive of the Appellants' argument that the "contract" in this case could conceivably be an appealable action. In that regard, we are not convinced that a contract is per se not appealable.

A significant Board case in this regard is *McFadden v. DER*, 1974 EHB 25. In that case, DER had terminated a contract with McFadden for its operation of a horse riding stable in a state park and McFadden sought to appeal DER's termination action to the Board. *Id.* at 25-26. The Board held that it was not a proper tribunal to determine a breach of contract action but, in dismissing the appeal, noted as follows:

> This appeal would have to be comprehended under subsection (a), as an appeal from a decision of the department, if we have jurisdiction at all. A review of §§ 1901-A through 1020-A of the Administrative Code of 1929, supra, however, convinces us that the legislature intended that the type of decision that was intended to be appealable to this board was limited to decisions relating to environmental management and regulation.
>
> We are not ready to say that this board has no jurisdiction over any matter relating to any contract entered into by the department. A number of "decisions" the department might make relating to its environmental management and regulation functions might become final actions, ripe for appeal, only as contracts were entered into to carry them out. Such contracts, or conditions or terms thereof, might well be appealable actions".

Id. at 26.

This issue was touched upon again by the Board in *New Enterprise Stone & Lime Company, Inc. v. DER*, 1975 EHB 167, *aff'd,* 359 A.2d 845 (Pa. Cmwlth. 1976). In that case,

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[9] It is certainly possible that, later, DEP could present evidence which demonstrates that the relationship between it and Number One Contracting is of the nature to which the rationale of the *PEACE* case applies. However, if we ever get to that point it would have to be upon presentation of evidence and the analysis undertaken here is in the context of a Motion to Dismiss.

New Enterprise filed a "petition to review and modification" with the Board to review and modify the terms of an "agreement" between *New Enterprise* and DER. *Id.* at 167. The agreement related to *New Enterprise's* obligation under a DER order to install certain air pollution control equipment by a certain date and provided for the imposition of penalties upon *New Enterprise* for its failure to have the equipment installed by the designated date. *Id.* New Enterprise's request to DEP for a revision to the contract had been denied. *Id.* DER argued, successfully, that the Board did not have jurisdiction to resolve what amounted to a contract dispute between the parties. However, before it reached that point, the Board acknowledged the *McFadden* case and quoted the same language just set forth in this opinion from McFadden and, then, went on to observe that:

> Whether or not there will ever be a "decision" of the Department that presents itself in reviewable form in a contract, it seems clear that the Board's jurisdiction is for the most part limited to review of unilateral actions of the Department,--particularly, orders, permits, licenses or decisions as stated in § 1901-21A, *supra.*

Id. at 169.

Finally, there is the Commonwealth Court case of *Warren Sand & Gravel Co., Inc. v. DER*, 341 A.2d 556 (Pa. Cmwlth. 1975). This case is, of course, best known for the principle of law that where the Department, when acting under its discretionary authority, is found to have abused its discretion, then the Board, based on the record before it, may substitute its discretion for DEP's. *Id.* at 565-66. The primary issue in this case was the terms of DEP's granting of various gravel companies' applications for permits to remove sand and gravel from the bed of the Allegheny River. *Id.* at 558. In the milieu of the appeal, though, Commonwealth Court also

specifically addressed what was apparently a side issue raised by DER of "whether the Board can review DER's actions in granting leases or bills of sale for such sand and gravel". *Id.* at 565. The Commonwealth Court said as follows in connection with this question:

> We resolve this issue by reference to section 1921-A(c) of the Administrative Code of 1929 (added by Act No. 275), 71 P.S. § 510-21(c) (Supp. 1974-1975) which provides that:
>
> > "(c) Anything in law to the contrary notwithstanding, any action of the Department of Environmental Resources may be taken initially without regard to the Administrative Agency Law, but no such action of the department adversely affecting any person shall be final as to such person until such person has had the opportunity to appeal such action to the Environmental Hearing Board; provided, however, that any such action shall be final as to any person who has not perfected his appeal in the manner hereinafter specified."
>
> This particular section permits DER to hold an initial fact-finding hearing without permitting cross-examination, but after such fact-finding hearing, any action taken by DER is reviewable by the Environmental Hearing Board under subsection (c) quoted above. In other words, the Legislature wisely provided that DER shall not have unrestrained or arbitrary power to enter into agreements or issue permits, but rather has provided that such actions are reviewable by the Board under the Administrative Agency Law.

Id. at 565 (emphasis added). The Commonwealth Court thus appeared to recognize that an appealable action could take the form of an appeal from the issuance of permits or from DEP's entering into agreements.

However, given the facts of this case and the regulatory structure presented, we do not believe that this is a situation where DEP's entering into a contract is appealable. The governing regulations provide that the Dam owner, in this case DEP's Bureau of Mines Reclamation, cannot remove Felix Dam until the Bureau obtains regulatory approval in the form of an Emergency Permit under 25 Pa. Code § 105.64, a regular permit under 25 Pa. Code §§ 105.13-

105.14 (with an environmental assessment under 25 Pa. Code § 105.15), or permission to proceed under a "permit waiver" under 25 Pa. Code § 105.12(a)(16) (with a work plan approved by DEP pursuant to 25 Pa. Code § 105.12(a)(16) and an environmental assessment under 25 Pa. Code § 105.15). The work cannot legally commence before the issuance of one of those clearances notwithstanding the provisions of any contract. That is the case whether the Dam owner is a private party or, as in this case, DEP itself. The securing of a contractor, even under contract, cannot be considered as anything more than preparatory and not appealable. The action would be appealable through the issuance of an Emergency Permit, a regular permit or a permit waiver.[10] DEP's entry into a contract for removal of the Dam, in and of itself, in this regulatory context, is not the type of action which affects their rights or liabilities. To the extent that Appellants' contention of appealability is based on the "contract" that contention is without merit and the appeal must be dismissed to the extent that the appeal rests on the "contract".[11]

G. **DEP's Decision Plus the Temporary Permit.**

The issuance of an Emergency Permit under 25 Pa. Code § 105.64 would be appealable. However, both parties are in agreement that, as of the date of the Motion, the Emergency Permit had expired, DEP is not seeking to renew it, and DEP is not going to seek any Section 105.64 Emergency Permit to effectuate its decision to remove the Dam. There is no question that the Emergency Permit had expired by the time DEP filed its Motion to Dismiss. Both parties'

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[10] Any such appeal could also, of course, be accompanied by a Petition For Supersedeas.

[11] DEP also notes that the work cannot proceed without a federal Section 10 Permit either and that the federal Section 10 Permit decision is appealable to the United States District Court. We agree with Appellants' argument that those matters do not have a bearing on the question whether the DEP action is appealable under our statutes and case-law.

papers so state, the face of the Emergency Permit so states, and the regulations so provide. Moreover, Appellants admit in their ANOA that, on information and belief, not only has the Emergency Permit expired but also that DEP does not intend to renew the Emergency Permit. ANOA ¶ 45. DEP states that it does not intend to pursue an Emergency Permit to effectuate its intent to remove the Dam. Motion ¶¶ 15, 26-28.

This raises the question, then, whether an appeal based on the now expired Emergency Permit, may be moot. DEP did not move to dismiss the appeal on the grounds of mootness and its initial brief did not argue this topic. Appellants did not brief this issue either, presumably because DEP's Motion to Dismiss did not assert mootness as a ground for dismissal nor did its brief argue that point. DEP states in its reply brief, however, that it is axiomatic that an expired permit, such as the Emergency Permit here, cannot form the basis of the Board's jurisdiction and that, even so, the appeal would now be moot. DEP acknowledges that Appellants may have a counter-argument that the situation is capable of repetition but DEP's reply brief argues that this theory would not be applicable to the situation here.

As already noted, this theory for dismissal of the appeal was not a basis for DEP's Motion and the issue has not been fully briefed. Thus, we will not address that issue herein and the Motion to Dismiss will not be granted to the extent that the Appeal is based on the Emergency Permit.[12]

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[12] We have also considered whether the "contract" together with the issuance of the Emergency Permit taken together provide a synergistic effect which renders this matter appealable. We have concluded, primarily on the basis of our discussion of the non-appealability of the DEP decision as manifested by the contract, that no such synergy is present. In short, one cannot make silk from a sow's ear.

Accordingly, we enter the following Order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

FELIX DAM PRESERVATION ASSOCIATION, et al.	:	
	:	
v.	:	**EHB Docket No. 2000-009-K**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 10th day of April, 2000, DEP's Motion to Dismiss is **granted** to the extent that the basis for the appeal purports to be the Notice of Award/contract between DEP and Number One Contracting, Inc. and denied to the extent that the Appeal is based on the Emergency Permit.

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 10, 2000

c: **DEP Bureau of Litigation**
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