Enviromental Hearing Board

Adjudications and Opinions

1997

Volume II

COMMONWEALTH OF PENNSYLVANIA

George J. Miller, Chairman

MEMBERS

OF THE

ENVIRONMENTAL HEARING BOARD

1997

Chairman	GEORGE J. MILLER
Member	ROBERT D. MYERS
Member	THOMAS W. RENWAND
Member	MICHELLE A. COLEMAN
Secretary	WILLIAM T. PHILLIPY IV

City by Volume and Page of the
Environmental Hearing Board Reporter

Thus: 1997 EHB 1

ISBN No. 0-8182-0230-0

FOREWORD

This volume contains all of the adjudications and opinions issued by the Environmental Hearing Board during the calendar year 1997.

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

ADJUDICATIONS

OPINIONS

1997 DECISIONS

UNITED STATES CONSTITUTION

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

ROBERT G. KOCHEMS and GEORGANN RYAN-KOCHEMS, et al.	:	
v.	:	**EHB Docket No. 96-187-C**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and RODNEY McCLELLAND Permittee	:	**Issued: April 18, 1997**

OPINION AND ORDER ON MOTION FOR DISCOVERY SANCTIONS

By Michelle A. Coleman, Member

Synopsis

A motion for discovery sanctions is granted. Precluding an appellant from introducing evidence concerning matters within the scope of a permittee's discovery requests is appropriate where the appellant failed to respond to any of permittee's discovery requests, failed to offer any explanation for its failure to respond, and failed to respond to the permittee's motion for sanctions.

OPINION

This matter was initiated with the September 9, 1996, filing of a notice of appeal by Robert Kochems, Georgann Ryan-Kochems, and nine other individuals (collectively, Appellants), residing in or near Mercer, PA. The appeal challenges the Department of Environmental Protection's (Department) July 18, 1996, issuance of a water obstruction and encroachment permit to Rodney McClelland (Permittee), authorizing him to construct and maintain a hotel within the regulated

floodway of a tributary to Schollard Run in Springfield Township, Mercer County. The notice of appeal averred that, by issuing the permit, the Department violated 25 Pa. Code § 105.20, relied on incomplete or inaccurate information in the permit application, and otherwise abused its discretion and acted contrary to law.

On January 15, 1997, Permittee filed a motion for discovery sanctions. In the motion, Permittee avers that he served his first set of interrogatories and a request for production of documents upon Appellants no later than December 3, 1996[1] (motion for discovery sanctions, para. 2); and, that Appellants never responded to his discovery requests (motion for discovery sanctions, para. 3). Arguing that his ability to defend his appeal had been prejudiced by Appellants' failure to respond, Permittee requested in his motion that the Board preclude Appellants from introducing evidence at hearing regarding the matters on which he sought discovery.

Appellants failed to file a response to Permittee's motion for discovery sanctions. Since Appellants did not respond to the motion, and Permittee properly pleaded that they failed to respond to his discovery requests, Appellants are deemed to have failed to respond to the discovery requests pursuant to section 1021.70(f) of the Board's rules of practice and procedure, 25 Pa. Code § 1021.70(f).[2]

---

[1] Permittee first served his discovery requests on November 14, 1996. Subsequently however, Permittee discovered that four Appellants were inadvertently omitted from the initial mailing. The discovery requests were served on those individuals on December 3, 1996. (Motion for sanctions, para. 2.)

[2] Section 1021.70(f) of the Board's rules provides:

> Except in the case of motions for summary judgment or partial summary judgment . . . the Board will deem a party's failure to respond to a motion to be an admission of all properly-pleaded facts contained in the motion.

Appellants' failure to respond to the discovery requests warrants precluding them from introducing evidence on matters covered in those requests. Section 1021.111(a) of the Board's rules, 25 Pa. Code § 1021.111(a), provides that discovery in procedings before the Board shall be governed by the Pennsylvania Rules of Civil Procedure. Under the rules of civil procedure, parties must respond to interrogatories and requests for production of documents within 30 days. *See* Pa.R.C.P. 4006 (interrogatories) and 4009 (requests for production of documents). Appellants failed, however, to file response or objections to either of Permittee's discovery requests. Ordinarily, the Board is reluctant to impose discovery sanctions unless a party defies an order compelling discovery. *See, e.g., Griffin v. Tedesco*, 513 A.2d 1020, 1024 (Pa. Super. 1986); *DER v. Chapin & Chapin*, 1992 EHB 751; *Eastern Consolidation & Distribution Services v. DEP*, EHB Docket No. 94-200-C (Opinion issued October 10, 1996). However, we have also held that discovery sanctions can be appropriate even absent an order to compel; the sanction need only be reasonable given the severity of the violation. *Weist v. Atlantic Richfield Company*, 543 A.2d 142 (Pa.Super. 1988); *DER v. Chapin & Chapin*, 1992 EHB 751.

The sanctions Permittee requests are reasonable given the violations here. This is not a situation where a party is appearing without an attorney or where they attempted to comply with at least part of a discovery request. Appellants are represented by counsel, but they refused to respond in any way to either of Permittee's discovery requests--before or after the 30-day period for responses expired. Nor did Appellants attempt to respond to Permittee's motion for sanctions.

The Board has the power, pursuant to Pa.R.C.P. 4019, to preclude Appellants from introducing evidence on the matters on which Permittee sought discovery. Subsection (a)(1) of Rule 4019 authorizes the Board to issue "appropriate orders" where a party fails to serve answers or

objections to written interrogatories or requests for documents. *See* Pa.R.C.P. 4019(a)(1)(i) and (a)(1)(vii). Subsection (c)(2) of the Rule, meanwhile, provides that those orders may include orders "refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing in evidence designated documents, things, or testimony. . . ."

Given the fact that the discovery period closed on January 17, 1997, that Appellants refused to respond to any part of Permittee's discovery requests, and that they never even attempted to explain their failure to respond to those requests, it is appropriate to preclude Appellants from introducing evidence on matters on which Permittee sought discovery. Their failure to respond to the discovery requests not only threatens to needlessly delay the proceedings but also to confound Permittee's attempts to secure information necessary to mount a successful defense of his permit.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ROBERT G. KOCHEMS and GEORGANN RYANN-KOCHEMS, et al.	:	
	:	
v.	:	**EHB Docket No. 96-187-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and RODNEY McCLELLAND Permittee	:	

ORDER

AND NOW, this 18th day of April, 1997, it is ordered that Permittee's motion for discovery sanctions is granted and Appellants are precluded from introducing any evidence at hearing regarding matters on which Permittee sought discovery.

ENVIRONMENTAL HEARING BOARD

Michelle A. Coleman

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: April 18, 1997

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

For the Commonwealth, DEP:
Mary Susan Davies, Esq.
Northwest Region

For Appellant:
Robert G. Kochems, Esq.
NELSON RYAN & KOCHEMS
Mercer, PA

For Permittee:
Kenneth K.Kilbert, Esq.
Jennifer A. Smokelin, Esq.
BABST, CALLAND, CLEMENTS
AND ZOMNIR
Pittsburgh, PA

bl

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

ROBERT G. KOCHEMS and GEORGANN RYAN-KOCHEMS, et al.	:	
v.	:	**EHB Docket No. 96-187-C**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: April 22, 1997**

OPINION AND ORDER ON MOTION FOR SUMMARY JUDGMENT

By Michelle A. Coleman, Member

Synopsis

The Board will grant a permittee's motion for summary judgment against an appellant where the appellant failed to respond to the motion for summary judgment and has a history of failing to respond which seems to betray a lack of interest in prosecuting the appeal.

OPINION

This matter was initiated with the September 9, 1996, filing of a notice of appeal by Robert Kochems, Georgann Ryan-Kochems, and nine other individuals (collectively, Appellants), residing in or near Mercer, PA. The appeal challenges the Department of Environmental Protection's (Department) July 18, 1996, issuance of a water obstruction and encroachment permit to Rodney McClelland (Permittee), authorizing him to construct and maintain a hotel within the regulated floodway of a tributary to Schollard Run in Springfield Township, Mercer County. The notice of

appeal averred that, by issuing the permit, the Department violated 25 Pa. Code § 105.20, relied on incomplete or inaccurate information in the permit application, and otherwise abused its discretion and acted contrary to law.

On February 3, 1997, Permittee filed a motion for summary judgment and a supporting memorandum of law. There, he asserts that he is entitled to judgment as a matter of law because Appellants lack standing and because the objections they raise in their notice of appeal either have no bearing on the Department's decision or are controverted by the facts of record. Accordingly, he requests that we dismiss the appeal. Appellants failed to file any response to Permittee's motion.

When ruling on motions for summary judgment, the Board looks to Rules 1035.1 to 1035.5 of the Pennsylvania Rules of Civil Procedure. *See, e.g., Tranguch v. DEP*, EHB Docket No 95-255-C (Opinion issued February 25, 1997). Subsection (a) of Pa.R.C.P. 1035.3 provides that, in response to a motion for summary judgment, "[t]he adverse party may not rest upon the mere allegations or denials of the pleadings but must file a response within 30 days after service of the motion. . . ." Subsection (d) of the same rule provides, "Summary judgment may be entered against a party who does not respond." The explanatory comment accompanying Rule 1035.3 states, "The rule permits entry of judgment for failure to respond to the motion but does not require it."

Granting Permittee's motion for summary judgment based on Appellants' failure to respond is entirely appropriate here. Appellants' failure to respond to the motion for summary judgment is just the latest instance betraying their seeming lack of interest in seriously prosecuting their appeal.

The Board recently imposed sanctions on Appellants for failing to comply with Permittee's discovery requests. The Permittee had served interrogatories and a request for production of documents upon Appellants. However, Appellants failed to respond to any part of the discovery

request, failed to offer any explanation of its failure to respond, and failed to respond to Permittee's motion for sanctions based on their refusal to comply with his discovery requests. We granted Permittee's motion for sanctions and precluded Appellants from introducing evidence on the matters within the scope of the discovery Permittee had requested. *See Kochems v. DEP*, EHB Docket No. 96-187-C (Opinion issued April 18, 1997).

Now Appellants have failed to file a response to Permittee's motion for summary judgment. As we noted in our opinion and order on the motion for discovery sanctions, Appellants are represented by counsel. They should have been aware that, by failing to respond to the motion for summary judgment, they risked having judgment entered against them pursuant to Pa.R.C.P. 1035.3. Nevertheless, they opted not to respond. We will not devote the Board's limited resources to defending the allegations raised in Appellants' notice of appeal where Appellants have been unwilling to do so themselves and where they have a history of failing to respond which suggests they do not have a serious interest in prosecuting their appeal. *See, e.g., Martin v. DEP*, EHB Docket No. 95-190-C (Opinion issued February 14, 1997) (denying an appellant's request to withdraw with prejudice and dismissing his appeal for failure to prosecute).

Since we are granting Permittee's motion, and Permittee moved for summary judgment with respect to all issues raised in the notice of appeal, we will dismiss Appellants' appeal.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ROBERT G. KOCHEMS and GEORGANN RYANN-KOCHEMS, et al.	:	
v.	:	**EHB Docket No. 96-187-C**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: April 22, 1997**

ORDER

AND NOW, this 22nd day of April, 1997, it is ordered that Permittee's motion for summary judgment is granted and Appellants' appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

Michelle A. Coleman

MICHELLE A. COLEMAN
Administrative Law Judge
Member

Board Member Thomas W. Renwand did not participate in this decision.

DATED: April 22, 1997

c: **DEP Bureau of Litigation**
Attention: Brenda Houck, Library
For the Commonwealth, DEP:
Mary Susan Davies, Esq.
Northwest Region
For Appellant:
Robert G. Kochems, Esq.
NELSON RYAN & KOCHEMS
Mercer, PA
For Permittee:
Kenneth K. Kilbert, Esq.
Jennifer A. Smokelin, Esq.
BABST CALLAND CLEMENTS AND ZOMNIR
Pittsburgh, PA

jb/nb

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

AGMAR SEWER COMPANY, INC. and FRED W. SHEAMAN, trading as AGMAR ESTATES	:	
v.	:	**EHB Docket No. 96-206-C**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued:** April 30, 1997

OPINION AND ORDER ON MOTION FOR JUDGMENT ON THE PLEADINGS

By Michelle A. Coleman, Administrative Law Judge

Synopsis:

A motion for judgment on the pleadings filed by the Department of Environmental Protection (Department) is granted. Judgment on the pleadings is granted to the Department with respect to objections raised in an appeal which do not state with specificity the factual or legal basis for the objections. A judgment on the pleadings also is granted to the Department with respect to Appellants' objection that they are financially unable to comply with the order, since the Department is under no obligation to consider the economic effect of its order on the party to whom the order is issued.

OPINION

On October 10, 1996, Agmar Sewer Company, Inc. and Fred W. Sheaman, trading as Agmar Estates (Appellants), filed an appeal from the Department's September 9, 1996 order issued

pursuant to Sections 5 and 610 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), Section 20 of the Dam Safety and Encroachments Act, Act of November 26, 1978, P.L. 1375, *as amended*, 32 P.S. §§ 693.1 - 693.27 (DSEA), and Section 1917-A of the Administrative Code of 1929. The order directs Appellants to, among other things, cease and prevent the discharge of untreated sewage from Agmar's sewage treatment plant, repair a culvert, and restore two-hundred linear feet of stream channel.

On February 3, 1997, the Department filed a motion for a judgment on the pleadings. The Department contends that it is entitled to judgment on the pleadings because Appellants' notice of appeal does not identify specific objections or raise valid objections and defenses to the Department's order. Appellants did not file a response.

A motion for judgment on the pleadings is in the nature of a demurrer and is used to determine whether a cause of action, as pleaded, exists at law. *Bensalem Twsp. School District v. Commonwealth*, 544 A.2d 1318, 1321 (Pa. 1988); *see also, Kerr v. Borough of Union City*, 614 A.2d 338 (Pa.Cmwlth. 1992), *appeal denied*, 627 A.2d 181 (Pa. 1993). A motion for judgment on the pleadings, like a motion for summary judgment, may be granted when no material facts are in dispute and a hearing is pointless because the law is clear on the issue. *Winton Consolidated Companies v. DER, et al.*, 1990 EHB 860.

In ruling on this motion, the Board must consider as pleadings the appeal, the motion for judgment on the pleadings, and Appellants' answer to the motion. Board Rule 1021.70(e), 25 Pa. Code § 1021.70(e), requires an appellant to respond to a motion for judgment on the pleadings with an answer that sets forth "all factual disputes and the reason the opposing party objects to the motion." If there are no disputed issues of material fact or the reasons the party objects to the

motion are legally insufficient, the motion can be granted. This is a change from prior practice and is the result of the adoption of new rules on September 5, 1995 prior to which only the notice of appeal could be considered as a pleading.

Initially, we will consider whether there are any material factual disputes. Based on the information provided in this case, there are no material factual disputes. Appellants have failed to respond to the motion. Board Rule 1021.70(f), 25 Pa. Code § 1021.70(f), provides that "for purposes of the relief sought by a motion, the Board will deem a party's failure to respond to a motion to be an admission of all properly pleaded facts contained in the motion." Consequently, all of the facts in the Department's motion are deemed admitted.

Therefore, the undisputed facts of this case are as follows. On September 9, 1996, the Department issued an order pursuant to Sections 5 and 610 of the Clean Streams Law, Section 20 of the DSEA and Section 1917-A of the Administrative Code, directing Appellants to, among other things, cease and prevent the discharge of untreated sewage from Agmar's sewage treatment plant, repair a culvert, and restore two hundred linear feet of stream channel. On October 10, 1996, Appellants filed a notice of appeal requesting review of the September 9, 1996 order. Appellants stated the following objections in their notice of appeal:

> 1. The order dated September 9, 1996 issued by the Commonwealth of Pennsylvania to Appellants is arbitrary, capricious and not supported by substantial evidence.
>
> 2. The order dated September 9, 1996 issued by the Commonwealth of Pennsylvania is in violation of the constitutional rights of the Appellants.
>
> 3. Appellants are financially unable to comply with the mandates of said order.

Appellants did not reserve the right to amend their appeal after discovery. Appellants did not serve any requests for discovery on the Department and the discovery period ended on January 13, 1997. Appellants also neither filed amendment to their appeal as of right nor sought leave to amend their appeal.

On February 3, 1997, the Department filed its motion for judgment on the pleadings. In the motion the Department alleges that Paragraphs 1 and 2 of the notice of appeal do not set forth specific objections to the Department's actions and do not identify objections with reasonable specificity to provide the Department with notice of the issues being raised in the appeal. Paragraph 3 of the notice of appeal does not identify a valid objection to the Department order, and the Department is under no obligation to consider economic impact upon the recipient of an order and financial inability to comply is not a valid defense to an order.

Having determined that there are no disputes of material facts and having set forth the facts in this matter, we will now decide whether the Department is entitled to judgment as a matter of law.

Paragraphs 1 and 2 - Lack of Specific Objections

The Department contends that the Appellants' notice of appeal does not conform to Board Rule 1021.51(e) which requires that objections be set forth with reasonable specificity. Specifically, the Department argues that Paragraphs 1 and 2 of the notice of appeal fail to identify objections with reasonable specificity so as to notify the Department of the issues being raised in the appeal because the paragraphs do not identify any facts or circumstances upon which the objections are based, any statutory or regulatory basis for objecting to the order, or any constitutional rights which allegedly are violated by the order. The Department also alleges that Appellants have not taken any steps to cure their defective notice of appeal because they did not avail themselves of the right to amend their

appeal and did not serve any requests for discovery during the discovery period which has since ended.

Board Rule 1021.51(e), 25 Pa. Code § 1021.51(e), states:

> The appeal shall set forth in separate numbered paragraphs the specific objections to the action of the Department. The objections may be factual or legal. An objection not raised by the appeal or an amendment thereto under Section 1021.53 (relating to amendments to appeal; nunc pro tunc appeals) shall be deemed waived, provided that upon good cause shown, the Board may agree to hear the objection. For the purpose of this subsection, good cause shall include the necessity for determining through discovery the basis of the action from which the appeal is taken.

Paragraphs 1 and 2 of Appellants' appeal state the following objections:

> 1. The order dated September 9, 1996 issued by the Commonwealth of Pennsylvania to Appellants is arbitrary, capricious and not supported by substantial evidence.
>
> 2. The order dated September 9, 1996 issued by the Commonwealth of Pennsylvania is in violation of the constitutional rights of the Appellants.

We agree with the Department. Appellants' objections fail to raise the issues with specificity. The objections are too broad to provide adequate notice to the Department of the factual and legal basis of the action being appealed. Therefore, the Department's motion is granted on this issue.

Financial inability

The Department contends that Paragraph 3 of the appeal, which states "Appellants are financially unable to comply with the mandates of said order," is not a valid objection or defense to the order. The Department argues that an appeal from the issuance of an order serves only to evaluate the validity and content of the order, that the recipient's economic conditions are not a factor in the Department's statutorily governed decision to issue an order and that financial inability

is not a defense to an order in an appeal before the Board.

We again agree with the Department and grant its motion on this issue. The Pennsylvania Supreme Court and the Board have held that the Department is not obligated to consider economic conditions in issuing an order. In *Ramey Borough v. Commonwealth, Department of Environmental Resources*, 351 A.2d 613 (Pa. 1975) the Board upheld a Department order directing a borough to construct and operate a waste-water treatment facility. The Commonwealth Court affirmed the Board's decision on appeal. On subsequent appeal to the Pennsylvania Supreme Court, that court held that the Clean Streams Law does not limit the orders which may be issued by the Department to orders to municipalities which can afford to take the corrective measures necessary. The Supreme Court stated that a municipality's economic condition is not a major factor in the Department's statutorily governed decision to issue an order under the Cleans Streams Law. *Id.* at 615. The ability to comply with an order, for technological or economic reasons, may be relevant in a proceeding to enforce an order. *Id.* at 615. The Court went on to say that the appeal from the issuance of the order serves only to determine the validity and content of the order. *Id.* at 615. (emphasis added)

The Board has utilized this same reasoning in a case in which the Board granted the Department's motion for judgment on the pleadings involving an appeal from an order for the cleanup of waste disposal pits. *Altoona City Authority v. DER*, 1991 EHB 1381. The Board, citing *Ramey*, granted the motion stating that the portion of Altoona City Authority's appeal alleging that the Department abused its discretion by failing to consider the economic impact of its order must be dismissed because the Department was under no obligation to consider the economic impact of the order. *Id.* at 1390.

In the instant appeal Appellants also raise the issue of their financial inability to comply with

the order issued. As noted above, the Department is not required to consider the economic impact of an order when it issues that order. While financial inability to comply with an order may be relevant in an appeal from the enforcement of an order, Appellants here are not challenging enforcement of an order but rather the issuance of an order. Their financial inability to comply is not a valid objection at this stage of the proceedings. Therefore, judgment on the pleadings is warranted with respect to this issue and is granted to the Department.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

AGMAR SEWER COMPANY, INC. and FRED W. SHEAMAN, trading as AGMAR ESTATES	:	
v.	:	**EHB Docket No. 96-206-C**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 30th day of April, 1997, the Department's motion for judgment on the pleadings is granted and the appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

EHB Docket No. 96-206-C

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: April 30, 1997

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

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

For Appellant:
Michael Beltrami, Esq.
Hazleton, PA

kh/bl

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

GARY L. REINERT, SR.,	:	
	:	
v.	:	**EHB Docket No. 97-012-MR**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: May 5, 1997**

OPINION AND ORDER
on
MOTION FOR LEAVE TO FILE AN AMENDED APPEAL

By Robert D. Myers, Administrative Law Judge

Synopsis:

Where a fire destroys a waste tire disposal facility after an appeal has been filed from the forfeiture of a bond applicable to the facility, the Appellant will be allowed to amend his appeal, pursuant to 25 Pa. Code § 1021.53(b), to plead the facts of the fire and to raise the issue of impossibility of compliance and frustration of purpose.

OPINION

This appeal, as originally filed on January 13, 1997, sought Board review of a Declaration of Forfeiture of Surety Bond No. 111 3319 2200 in the amount of $150,000, issued by the Department of Environmental Protection (DEP) on December 12, 1996. After a major fire occurred at the site covered by the Surety Bond, DEP demanded immediate payment despite the pendency of this appeal. Appellant sought a supersedeas and a hearing was held on March 25, 1997. An Opinion

and Order on Petition for Supersedeas, issued April 17, 1997, denied the petition.[1]

While the supersedeas was being debated, Appellant on April 4, 1997 filed a Motion for Leave to File an Amended Appeal. The Motion seeks to file an amended appeal "to include the issues of impossibility or impracticability of performance or compliance and frustration of purpose," all as a result of the fire. DEP has not responded to the Motion.

Amendments to appeals is a subject addressed in our Rules of Practice and Procedure at 25 Pa. Code § 1021.53. Appeals may be amended "as of right" within 20 days after the filing. § 1021.53(a). Thereafter, allowing amendments is discretionary with the Board. § 1021.53(b). Appellant does not invoke § 1021.53(a) since his Motion was filed more than 20 days after filing of the appeal. He does invoke § 1021.53(b), however, and we will consider the Motion in the context of that provision.

An appellant in § 1021.53(b) must satisfy one of the following conditions:

> (1) It is based upon specific facts, identified in the motion, that were discovered during discovery of hostile witnesses or Departmental employes.
> (2) It is based upon facts, identified in the motion, that were discovered during preparation of appellant's case, that the appellant, exercising due diligence, could not have previously discovered.
> (3) It includes alternate or supplemental legal issues, identified in the motion, the addition of which will cause no prejudice to any other party or intervenor.

Appellant claims to come within the scope of paragraph (2) and, in the alternative, paragraph (3). Certainly, the fire that occurred about six weeks after the appeal was filed could not have been addressed in the Notice of Appeal. Paragraph (2), therefore, is satisfied. We also conclude that the

---

[1] For a more complete statement of the facts and history of this situation, refer to the Supersedeas Opinion of April 17, 1997.

requested amendment falls within the scope of paragraph (3) by raising legal issues (impossibility of performance, frustration of purpose) that could not have been raised before the fire. We, of course, express no opinion on the viability of this issue. We simply conclude that it is properly raised at this stage of the proceedings. Nor do we see any prejudice to DEP. The facts of the fire are well known to DEP and served as the basis for DEP's decision to collect the bond while this appeal was pending.

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

GARY L. REINERT, SR.,	:	
	:	
v.	:	**EHB Docket No. 97-012-MR**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

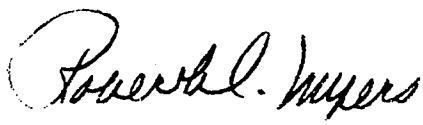
ORDER

AND NOW, this 5th day of May, 1997, it is ordered as follows:

1. Appellant's Motion for Leave to File an Amended Appeal is granted and the amendment set forth in paragraph 3 of the Motion is accepted.

2. Pre-hearing Order No. 1, dated January 17, 1997, is revised to extend discovery to June 2, 1997 and to extend the filing of dispositive motions to July 2, 1997.

ENVIRONMENTAL HEARING BOARD



ROBERT D. MYERS
Administrative Law Judge
Member

DATED: May 5, 1997

See next page for a service list.

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

For the Commonwealth, DEP:
George Jugovic, Esquire
Southwest Region

For Appellant:
Alan S. Miller, Esquire
PICADIO McCALL KANE & NORTON
Forty-Sixth Floor
600 Grant Street
Pittsburgh, PA 15219-2702

bap

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

ALICE WATER PROTECTION ASSOCIATION	:	
v.	:	**EHB Docket No. 96-019-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and AMERIKOHL MINING INC., Permittee	:	**Issued: May 7, 1997**

OPINION AND ORDER ON MOTION TO DISMISS APPEAL AS MOOT

By: Thomas W. Renwand, Administrative Law Judge

Synopsis

An appeal of a coal mining permit will be dismissed as moot where the permittee has removed all of the coal from the site.

OPINION

Presently before the Board is the Motion to Dismiss Appeal as Moot ("Motion") filed by the Department of Environmental Protection ("Department"). Amerikohl Mining, Inc. ("Amerikohl") joins in the Motion. The Appellant, Alice Water Protection Association ("Alice Water"), did not file a response to the Department's Motion. Therefore, the facts set forth in the Motion are deemed admitted pursuant to Section 1021.70(f) of the Board's Rules of Practice and Procedure. 25 Pa. Code §1021.70(f). *Westmark Diversified, Inc. v. Department of Environmental Protection,* EHB Docket Nos. 96-089-C and 96-095-C at page 3 (Opinion issued March 18, 1997).

In January 1996, Alice Water filed a notice of appeal challenging the Department's issuance of a surface coal mining permit to Amerikohl. The permit authorized Amerikohl to conduct surface mining at a mine site known as the "Aultman Strip" in Mount Pleasant Township, Westmoreland County. Since filing its appeal Alice Water has neither sought a supersedeas nor requested this Board to schedule a merits hearing on the issues raised in the appeal.

According to the Department's Motion, Amerikohl completed coal mining at the Aultman Strip in August 1996. Amerikohl is currently reclaiming the site pursuant to the permit. None of the issues raised in the notice of appeal by Alice Water concern the reclamation of the site.

This Board has consistently held that a matter before the Board becomes moot when an event occurs that deprives the Board of the ability to provide effective relief. *Morcrette v. Department of Environmental Protection,* 1996 EHB 459, 462*; Pennsylvania Electric Company v. Department of Environmental Resources,* 1994 EHB 810. In this appeal, the complete removal of coal from the permitted site is such an event. Even if we were to find that the Department abused its discretion in issuing the mining permit, Amerikohl has already gained the benefit of the permit. Its obligation would be the same as it is now--to reclaim the site. Accordingly, we will issue an order dismissing the appeal as moot.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

ALICE WATER PROTECTION ASSOCIATION	:	
	:	
v.	:	**EHB Docket No. 96-019-R**
	:	
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION and AMERIKOHL MINING INC., Permittee	:	

ORDER

AND NOW, this 7th day of May, 1997, the appeal of Alice Water Protection Association is **dismissed as moot.**

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: May 7, 1997

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

For the Commonwealth, DEP:
Steven F. Lachman, Esq.
Western Region

For Appellant:
Patricia A. Paul, *pro se*
Adeline Leichliter, *pro se*
Mount Pleasant, PA

For Permittee:
Stanley R. Geary, Esq.
BUCHANAN INGERSOLL, P.C.
Pittsburgh, PA

med

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

KANE GAS LIGHT and HEATING COMPANY: and WETMORE GAS PRODUCING COMPANY	:	
v.	:	**EHB Docket No. 96-088-R (Consolidated with 96-143-R and 96-178-R)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: May 7, 1997**

OPINION AND ORDER ON DEPARTMENT'S MOTION FOR SUMMARY JUDGMENT

By Thomas W. Renwand, Administrative Law Judge

Synopsis

Where the same two corporations remain as the owners and operators of abandoned wells the Department did not abuse its discretion in denying applications for orphan well status. The fact that the shareholders of the corporation may have changed since the wells were last operated is irrelevant.

OPINION

Presently before the Board is the Department of Environmental Protection's ("Department") Motion for Summary Judgment. The Appellants are two corporations, Kane Gas Light and Heating Company ("Kane") and Wetmore Gas Producing Company ("Wetmore"). These two corporations are owned by the same principals. In 1994, Kane and Wetmore asked the Department to declare approximately 138 wells as orphan wells. These wells were owned and/or operated by Kane and

Wetmore. In 1996 the Department denied the applications to declare the wells orphan wells and further ordered Kane to plug its wells and seven of the Wetmore wells for which Kane was listed as the operator. Various appeals followed which have been consolidated.

This controversy revolves around whether the wells should be designated as orphan wells even though the corporate owners have not changed. Kane and Wetmore argue that the principals and shareholders of the two companies changed completely since the wells were last operated. They also argue that since the current principals and shareholders received no economic benefit from the earlier operation of the wells they should not be responsible for the substantial costs of plugging them. Furthermore, Kane argues the Department is estopped from denying its applications because between the time they were filed in 1994 and the time the Department denied the applications, Kane sold its distribution system assets and relinquished its status as a public utility. Thus, Kane argues it cannot recoup the costs of plugging its wells from its former customers.

The Board may grant summary judgment when the record shows that the material facts are undisputed so as to entitle the moving party to judgment as a matter of law. *Bethenergy Mines, Inc. v. Department of Environmental Protection,* EHB Docket No. 90-050-MR (Opinion issued March 17, 1997). Summary judgment may be entered only in cases "where the right is clear and free from doubt." *Hayward v. Medical Center of Beaver County,* 608 A.2d 1040, 1042 (Pa. 1992). In addition, the Board must examine the record in the light most favorable to the nonmoving party. *Marks v. Tasman,* 589 A.2d 205 (Pa. 1991); *Northeastern Equity Associates, Inc. v. Department of Environmental Protection,* 1996 EHB 331, 334. "A fact is material if it directly affects the disposition of a case." *Fulmer v. White Oak Borough,* 606 A.2d 589, 590 (Pa. Cmwlth. 1992).

The General Assembly by enacting the Oil and Gas Act, Act of December 19, 1984, P.L. 1140, as amended, 58 P.S. §§ 601.101-601.605 ("Oil and Gas Act"), established a comprehensive framework for the regulation of oil and gas activities in Pennsylvania. Section 601.103 is the definitional section of the legislation. It defines an "orphan well" as follows:

> Any well abandoned prior to the effective date of this act that has not been affected or operated by the present owner or operator and from which the present owner, operator or lessee has received no economic benefit, except only as a landowner or recipient of a royalty interest from the well.

Kane was incorporated in 1885. Wetmore was incorporated in 1961. Neither corporation has been dissolved. Both Kane and Wetmore are the owners and operators of their respective wells. Although we certainly empathize with the current shareholders of Kane and Wetmore, the fact remains that under Pennsylvania law these wells in question are not orphan wells because their owners have not changed. Kane and Wetmore have owned these wells at all times material to these appeals. It is simply of no consequence that the companies' shareholders may have changed.

Kane was ordered to plug its wells (and seven owned by Wetmore that it operates) because they have not been operated for at least one year. An abandoned well is defined under the Act as a well that has not been in operation within the preceding twelve months. Kane does not dispute that its wells have not been in operation for at least twelve months.[1] Section 601.210 requires that "upon abandoning any well, the owner or operator thereof shall plug the well in a manner prescribed by regulation of the Department...."

---

[1] In fact, in Kane and Wetmore's unverified response to the Department's Motion for Summary Judgment, they contend that the wells ordered to be plugged were abandoned between 1941 and 1974. See Appellant's Response to Appellee's Motion for Summary Judgment, paragraph 34.

Like the appellant in *Kenco Oil & Gas, Inc. v. Department of Environmental Protection*, 1996 EHB 325, Kane provides this Board with absolutely no authority to excuse its failure to act. The Department was entirely justified, and indeed legally mandated, to order Kane to plug its wells. Moreover, by not plugging its wells in contravention of Section 601.210, Kane violated Sections 601.502[2] and 601.509[3] which, as a matter of law, constitutes a public nuisance and unlawful conduct.

Finally, Kane and Wetmore argue that the Department should be equitably estopped from denying orphan well status to their wells because it took the Department nearly two years to deny their applications. Equitable estoppel is a doctrine of fundamental fairness designed to preclude a

---

[2] § 601.502. **Public nuisances**

A violation of section 206, 207, 208, 209 or 210, or a rule, regulation, order or term or condition of any permit relating thereto, shall constitute a public nuisance.

[3] § 601.509. **Unlawful conduct**

It shall be unlawful for any person to:

(1) Drill, alter, operate or utilize an oil or gas well without a permit or registration from the department as required by this act or in violation of the rules or regulations adopted under this act, or orders of the department, or in violation of any term or condition of any permit issued by the department.

(2) Conduct any activities related to drilling for, or production of, oil and gas, contrary to the rules or regulations adopted under this act, or orders of the department, or any term or any condition of any permit, or in any manner as to create a public nuisance or to adversely affect the public health, safety, welfare or the environment.

(3) Refuse, obstruct, delay or threaten any agent or employee of the department in the course of lawful performance of any duty under this act, including, but not limited to, entry and inspection.

(4) Attempt to obtain a permit or identify a well as an orphan well by misrepresentation or failure to disclose all relevant facts.

(5) Cause the abandonment of a well by removal of casing or equipment necessary for production without plugging the well in a manner prescribed pursuant to section 210. The owner or operator of a well may only temporarily remove casing or equipment necessary for production if it is part of the normal course of production activities.

party of "depriving another of the fruits of a reasonable expectation when the party inducing the expectation knew, or should have known, that the other would rely." *Department of Commerce v. Casey*, 624 A.2d 247 (Pa. Cmwlth. 1993). As we held in *Ambler Borough Water Department v. Department of Environmental Resources*, 1995 EHB 11, the doctrine may be applied against a governmental agency. However, the Department must "have intentionally or negligently misrepresented some material fact and induced a party to act to his or her detriment, knowing or having reason to know that the other party will justifiably rely on the misrepresentation." 1995 EHB at 26.

Mudd v. Nosker Lumber, Inc., 662 A.2d 660 (Pa. Super. 1996) is not on point. In *Mudd*, the defendant requested a continuance on the eve of trial ostensibly so a settlement could be negotiated with the plaintiff. The court granted the continuance and one month later the defendant filed a motion for a *non pros* because of two years of docket inactivity. The trial court granted the motion. The Superior Court reversed finding that the continuance was at defendant's request. The court went on to hold that the defendant had acted in bad faith and had deliberately misled the plaintiff.

Looking at the facts in the light most favorable to Kane and Wetmore, there is simply no evidence of any misrepresentation of a material fact by the Department or any inducement by the Department to Kane and Wetmore upon which they relied to their detriment. At the time Kane sold its gas distribution assets, it knew its applications for orphan well status had not been approved by the Department. By going ahead with the sale, Kane assumed the risk that the Department would do what it eventually did--deny the applications. There is nothing in the Department's actions that provides a basis to apply the doctrine of equitable estoppel.

Accordingly, the Department is entitled to Summary Judgment and the dismissal of the appeal.

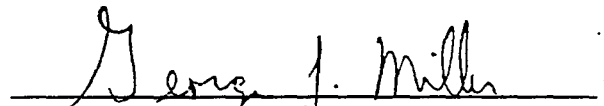
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

KANE GAS LIGHT and HEATING COMPANY: and WETMORE GAS PRODUCING COMPANY	:	
v.	:	**EBB Docket No. 96-088-R (Consolidated with 96-143-R and 96-178-R)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 7th day of May, 1997, the Department's Motion for Summary Judgment is **granted**. The appeals of Kane Gas Light and Heating Company and Wetmore Gas Producing Company are **dismissed**.

ENVIRONMENTAL HEARING BOARD



GEORGE J. MILLER
Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATE: May 7, 1997

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

For the Commonwealth, DEP:
Stephanie K. Gallogly, Esq.
Northwest Region

For Appellant:
John A. Bowler, Esq.
Erie, PA

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

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, Plaintiff	:	
v.	:	**EHB Docket No. 92-429-CP-MG**
CROWN RECYCLING AND RECOVERY, INC., JOSEPHINE BAUSCH CARDINALE, Executrix for the Estate of Phillip Cardinale, NANCY CARDINALE, Executrix for the Estate of Anthony Cardinale, UNIVERSAL MANUFACTURING CORP., MAGNETEK, INC., SCHILBERG INTEGRATED METALS, CORP. and WIRE RECYCLING, INC., Defendants	:	**Issued: May 13, 1997**

OPINION AND ORDER ON MOTION TO PRECLUDE PROPOSED EXPERT WITNESS TESTIMONY

By George J. Miller, Administrative Law Judge

Synopsis:

The Board grants the motion of the Department to preclude witnesses said to be involved in the drafting of the scrap metal exemption contained in the Hazardous Sites Cleanup Act as evidence of the intent of the Legislature in adopting this provision even though no contemporaneous legislative history is available. The Board will reserve its ruling as to whether or not expert testimony may be presented as to the prevailing standards for conducting environmental investigations and/or audits at recycling facilities during the time period of December, 1981 to May, 1986, but sustains the Department's objection as to this expert's testimony with respect to the

Department's investigation of the site's compliance with applicable laws and regulations for the time period prior to May, 1986.

OPINION

Background:

The Board has scheduled a hearing with respect to the liability of Defendant Schilberg Integrated Metal Corporation ("SIMCO") under the Hazardous Sites Cleanup Act, Act of October 18, 1988, P.L. 756, 35 P.S. § 6020.101 *et seq.*, limited to the question of whether or not SIMCO is exempt from liability by virtue of the scrap metal exemption contained in section 701(b)(5) of that Act, 35 P.S. § 620.701(b)(5). The Board has issued a summary judgment with respect to this defendant's liability as a person which arranged for the treatment of hazardous material at the site. The Board, however, denied the Department's motion for summary judgment with respect to whether or not this defendant is exempt from liability by virtue of the scrap metal exemption. As indicated in that decision, this defendant sent scrap, insulated copper wire to the site where the insulation was removed from the copper wire by means of incineration and the copper wire reclaimed. . The scrap metal exemption provides as follows:

> (5) A person who generates scrap materials that are transferred to a facility owned or operated by another person for the purpose of reclamation or reuse of the metallic content thereof through melting, smelting or refining shall not be considered to have arranged for the disposal, treatment or transport for disposal or treatment at that facility of a hazardous substance present in the scrap materials, provided that the generator demonstrates that all of the following are true:
>
> (i) The scrap materials consisted of:
>
> (A) obsolete metallic items, such as automobiles or appliances;

(B) new solid metallic by-products, such as trimmings, turnings, cuttings or punchings;

(C) prepared grades of scrap metal produced in accordance with recognized industry specifications by processing obsolete items or metallic by-products through shredding, cutting, compressing or other mechanical means; or through shredding, cutting, compressing or other mechanical means; or

(D) intact, nonleaking spent lead-acid storage batteries.

(ii) The generator did not introduce the hazardous substance into the scrap materials.

(iii) The generator handled and transported the scrap materials in accordance with all applicable laws and regulations.

(iv) The generator transferred the scrap materials for valuable consideration.

(v) If the generator selected the facility, the generator reasonably believed that the facility was then in substantial compliance with all applicable laws and regulations pertaining to receipt, management and reclamation or reuse of the scrap materials.

SIMCO proposes to have Keith Forrester of Forrester Environmental Services, Inc. testify on (a) "the prevailing standards for conducting environmental investigations and/or audits at recycling facilities during the time period of December, 1981 to May, 1986, generally, and (b) the PADER's investigation of the Site's compliance with applicable laws and regulations for the time period prior to May, 1986." The Department contends that this testimony is irrelevant because Bernard Schilberg, president of the defendant, admits that he never visited the Crown industry site at all or had anyone on behalf of SIMCO ever visit the Crown site. The conceivably relevant issue to which this testimony might be directed under the scrap metal exemption is the last subparagraph of the exemption which provides that if the generator selected the facility, the generator must have

a reasonable belief that the facility was then in compliance with all applicable laws and regulations pertaining to receipt, management, reclamation or reuse of the scrap materials.

The Board will reserve its decision on the admissibility of this testimony until the time of hearing because it is not clear that SIMCO takes the position that it selected the facility for the treatment of its scrap wire. In addition, all of the evidence that might be presented with respect to what SIMCO may have reasonably believed with respect to the Cardinale's facility in Pennsylvania is not yet before the Board. Secondly, it may well be that the prevailing standards in effect in 1986 with respect to due diligence as to treatment facilities may be considered as a part of the total legislative intent when HSCA was adopted in 1988. Accordingly, the Department's motion *in limine* with respect to the Forrester testimony will be denied at this time without prejudice to renewal of the motion at the time Mr. Forrester's testimony is offered.

The Department's motion is granted, however, with respect to the status of the Department's investigation of the site's compliance with environmental regulations prior to May, 1986. Defendant does not contend that it investigated the Department's records to ensure itself that the facility was in compliance, so that whatever the records contained has no relevance to the question of whether or not the defendants might be exempted from liability by the scrap metal exemption.

SIMCO proposes to offer the testimony of J. Thomas Wolf of the Institute of Scrap Recycling Industries on the federal regulation of scrap metal such as SIMCO's insulated copper wire under the Resource Conservation and Recovery Act, 42 U.S.C.A. § 6901, *et seq.* (RCRA). SIMCO contends that this testimony is relevant because HSCA should be interpreted in a way that is analogous to the federal Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C.A. § 9601, *et seq.* (CERCLA) or at least the Board has so ruled with respect to the issue

of joint and several liability. SIMCO argues that EPA's rule adopted under RCRA in 1997 should be utilized in interpreting Pennsylvania's scrap metal exemption under HSCA, which was adopted in 1988, because copper wire is a "hazardous substance" under CERCLA only because it has been a "hazardous waste" under RCRA.

The fact is that even if RCRA has exempted this wire from RCRA's complex rules for the handling and disposal of "hazardous wastes", copper remains a "hazardous substance" under CERCLA because it is listed as a substance designated as a hazardous substance under § 307(a) of the Clean Water Act, 33 U.S.C.A. § 1317(a). See 40 CFR § 302.4 and CERCLA definition of a "hazardous substance" at 42 U.S.C.A. § 9601(14). Further CERCLA does not contain a scrap metal exemption, and the liability provisions of CERCLA and HSCA serve different purposes than do the waste handling provisions of RCRA and of Pennsylvania's Solid Waste Management Act, Act of July 7, 1980, P.L. 380, as amended, 35 P.S. § 6018.101, *et seq.*

While the Board believes that this testimony could be only marginally relevant in view of the fact that only HSCA, and not CERCLA, contains a scrap metal exemption, it is at least possible that the considerations which led EPA to adopt its rules under RCRA with respect to scrap metal as expressed in the statement of basis and purpose of the rulemaking may provide some illumination as to how the scrap metal exemption under HSCA should be interpreted. Accordingly, the Board will reserve ruling on the admissibility of this testimony until it is offered at the hearing on the merits.

Finally, SIMCO's pre-hearing memorandum states that it intends to call Richard J. Allen, Legislative Director, Pennsylvania Institute of Scrap Recycling Industries, to testify on the intent and purpose of the HSCA scrap metal exemption and his opinion as to whether or not such an

exemption applies to SIMCO. The pre-hearing memorandum states that Mr. Allen assisted in the drafting of the scrap metal exemption and discussed the intent and purpose of the exemption with State Legislators and with the Department prior to the adoption of this provision.[1] The pre-hearing memorandum acknowledges that no legislative history appears to exist that would otherwise explain the intent and purpose of this exemption.

Under Pennsylvania law, the question of legislative intent is an issue for decision by the Board and is not a subject of expert testimony. Even members of the Legislature may not be called upon to testify with respect to the intent and purpose of the duly enacted statute. *Nichols v. City of Corry,* 417 A.2d 836 (Pa. Cmwlth. 1980); *City of Philadelphia v. Depuy*, 244 A.2d 741 (Pa. 1968). Statements of legislators made during the enactment process are not dispositive of legislative intent, but they may be properly considered as part of the contemporaneous legislative history. *Commonwealth v. Wilson*, 602 A.2d 1290, 1294, fn. 5 (Pa. 1992).

The Pennsylvania rule limiting evidence of legislative intent to statements or writings made contemporaneously with the enactment of the legislation appears to be the majority rule of courts in the United States with the exception of California. See *Covalt v. Cary Canada, Inc.*, 28 ERC 1882 (7th Cir. 1988). As pointed out in the *Covalt* case, subsequent writings may be nothing but wishful thinking and those generated and used in the course of litigation may be designed to mislead or to put an advocate's slant on things. 28 ERC at p. 1886.

---

[1] SIMCO also indicates that it might call Duane Siler as a witness on the same issue of legislative intent. Attorney Siler is said to have been employed by the Institute for Scrap Recycling Industries at the time the scrap metal exemption was being drafted and also assisted with the drafting of that exemption. SIMCO also believes that Mr. Siler participated in discussions with state legislators and other Department officials regarding the intent of the exemption.

SIMCO argues that these authorities need not be followed in an administrative hearing before the Board. However, where the evidence relates to a critical part of a party's case, the Board is bound to apply the same rules of evidence that would be applied in the courts of Pennsylvania. *Franklin Plastics Corp. v. DER*, 657 A.2d 100, 103 (Pa. Cmwlth. 1995); *DER v. Franklin Plastics*, 1996 EHB 645, 655. Few things are more critical to the interpretation to be given to scrap metal exemption than the intent of the legislature which, in this case, must be determined on the basis of the language contained in the Act and evidence which is admissible to aid in the interpretation of that language.

Accordingly, we enter the following order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION,	:	
Plaintiff	:	
v.	:	**EHB Docket No. 92-429-CP-MG**
CROWN RECYCLING AND RECOVERY, INC., JOSEPHINE BAUSCH CARDINALE, Executrix for the Estate of Phillip Cardinale, NANCY CARDINALE, Executrix for the Estate of Anthony Cardinale, UNIVERSAL MANUFACTURING CORP., MAGNETEK, INC., SCHILBERG INTEGRATED METALS, CORP. and WIRE RECYCLING, INC.,	:	
Defendants	:	

ORDER

AND NOW, this 13th day of May, 1997, the Board reserves its decision on the Department's motion *in limine* with respect to the testimony of Keith Forrester relating to prevailing standards of due diligence in Pennsylvania prior to May, 1986 and of Thomas Wolf. The Board **GRANTS** the Department's motion with respect to the proposed testimony relating to the Department's investigation of the site prior to May, 1986 and the proposed testimony of Richard J. Allen and, if offered, the testimony of Duane Siler relating to legislative intent.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

DATED: May 13, 1997

See next page for service list.

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

For the Commonwealth, DEP:
Dennis Abraham, Esquire
Southeast Region

For Appellant:
John R. Bashaw, Esquire
BRENNER SALTZMAN WALLMAN & GOLDMAN
New Haven, CT

rk

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

POND RECLAMATION COMPANY	:	
	:	
v.	:	**EHB Docket No. 96-147-R**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION and CONSOLIDATION	:	
COAL COMPANY, Permittee	:	**Issued: May 15, 1997**

OPINION AND ORDER ON MOTIONS FOR SUMMARY JUDGMENT AND PARTIAL SUMMARY JUDGMENT

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

The Department's Motion for Summary Judgment and the Permittee's Motion for Partial Summary Judgment are granted where the Appellant has failed to demonstrate that any material facts are in dispute.

Although the Board and the Department may evaluate contracts for the purpose of determining whether a permit applicant has complied with the regulations and statutes, neither may resolve any contractual disputes.

Article I, Section 27 of the Pennsylvania Constitution is intended to protect public resources from unnecessary or unreasonable environmental incursion. Where the Appellant's objection concerns the competing interests of two private property owners, it has failed to state a claim for

relief under Article I, Section 27.

OPINION

Consolidation Coal Company ("Consol") owns and operates the Robena Coal Refuse Disposal Area in Greene County, Pennsylvania pursuant to Coal Refuse Disposal Permit No. 30733707. Pursuant to an application filed by Consol, the Department of Environmental Protection ("Department") amended the permit on June 5, 1996 to allow Consol to construct two new sediment ponds and to raise the height of an existing slurry pond. (Attachment to Notice of Appeal) The slurry pond, which is owned by Consol, is known as "Pond No. 4." (Pitman Affidavit, paragraph 4)

On July 5, 1996, Pond Reclamation Company ("Pond Reclamation") appealed the permit amendment. In its notice of appeal, Pond Reclamation asserts that it is the owner of certain coal fines contained in Pond No. 4 pursuant to a June 17, 1983 agreement with United States Steel Corporation and its subsidiary, U.S. Steel Mining Company (collectively referred to herein as "U.S. Steel"), the prior owners of Pond No. 4. It further asserts that Consol's construction of a new pond at the site of Pond No. 4 will interfere with Pond Reclamation's access to the coal fines and eventually lead to their destruction. The notice of appeal contains eleven objections identified as Objections A through K.

On October 16, 1996, Consol filed with the Board a Motion for Partial Summary Judgment seeking summary judgment on the following issues: 1) Whether the Board has jurisdiction to adjudicate Pond Reclamation's rights under the agreement with U.S. Steel, and 2) Whether Pond Reclamation has standing to raise an issue under Article 1, Section 27 of the Pennsylvania

Constitution. Pond Reclamation filed a Response to the Motion on November 25, 1996, and Consol filed a Reply on December 10, 1996.

On November 25, 1996, the Department filed a Motion for Summary Judgment seeking dismissal of the appeal. Pond Reclamation filed a Response to the Department's Motion on December 24, 1996. Consol joined in the Department's Motion on December 10, 1996. The Department and Consol filed supplemental briefs on April 25, 1997 and April 28, 1997, respectively.

We will address each of the arguments raised by the Department and Consol in support of their motions.

Notice

Pond Reclamation raises the following objections in paragraphs A, F, and G of the notice of appeal:

> A. The Department failed to give notice of the proposed Application to the Appellant since the Application was filed June 5, 1996 and approved the same day.
>
> F. The Department acted arbitrarily and capriciously in granting the Application with no meaningful input from the Appellant owner of the fines.
>
> G. The Department acted arbitrarily and capriciously in granting the Application the day it was submitted.

In support of its Motion for Summary Judgment, the Department submitted the affidavit of Gary Camus, a Mining Engineer at the Department's McMurray District Mining Office. Mr. Camus was responsible for the technical review of Consol's application for permit amendment. (Camus Affidavit, paragraphs 1 and 3) According to Mr. Camus, Consol's application was received by the

Department on June 6, 1995, nearly one year before it was approved. (Camus Affidavit, paragraph 5) Notice of the Department's receipt of the application was published in the Pennsylvania Bulletin. (Camus Affidavit, paragraph 6) In addition, Consol published notice of its filing of the application in the Greene County edition of the *Observer - Reporter* on the following dates: July 3, 10, 17, and 24, 1996. (Camus Affidavit, paragraph 9 and Attachment B) The Department received no objections to the application. (Camus Affidavit, paragraph 8)

In its Response to the Department's Motion, Pond Reclamation does not deny the Department's assertion that the application for permit amendment was received by the Department on June 6, 1995 and that notice of the filing of the application was published in the Pennsylvania Bulletin and the *Observer - Reporter.* Nor does Pond Reclamation's Response address the objections raised in paragraphs A, F, and G of the notice of appeal.

Pursuant to Pa. R.C.P. 1035.3 (a), a party against whom a motion for summary judgment has been filed may not rest upon the mere allegations of its pleading but must file a response which identifies "one or more issues of fact arising from evidence in the record controverting the evidence cited in support of the motion or from a challenge to the credibility of one or more witnesses testifying in support of the motion." Here, Pond Reclamation has not controverted the evidence cited in support of the Department's Motion. There appears to be no dispute that the Department received Consol's application nearly one year prior to its approval, that the filing of the application was published in both the Pennsylvania Bulletin and the Greene County *Observer - Reporter*, and that Pond Reclamation filed no comments with the Department on the application. Because no question of material fact exists with regard to these issues, we find that Consol and the Department are entitled to summary judgment on the issues raised in paragraphs A, F, and G of the notice of

appeal.

Effect on Pond Reclamation's Coal Fines

Pond Reclamation raises the following objections in paragraphs B through E of the notice of appeal:

> B. The Department failed to consider the adverse effect of the proposed Application on Appellant's property.
>
> C. The Department failed to consider other alternative methods to dispose of coal refuse which would not cause destruction of fines owned by Appellant.
>
> D. The Department approved the Application which will cause the loss of a valuable resource by allowing refuse to be deposited on and mixed with the existing fines owned by Appellant.
>
> E. The Department failed to consider the fact that the nature and quality of the coal refuse to be deposited in the pond will be substantially unlike the existing fines.

Both Consol and the Department argue that the Board lacks the jurisdiction to adjudicate any private contractual rights Pond Reclamation may have with Consol or the previous owner, U.S. Steel. The Department further argues that there is nothing in Section 86.37 of the mining regulations which provides the Department with a basis for denying a permit application based on an alleged violation of a private obligation between the applicant and a third party.

In its Response, Pond Reclamation points to the regulations governing coal refuse disposal at 25 Pa. Code Chapter 90, which state that an application for coal refuse disposal must contain maps and plans showing (1) the boundaries of lands and names of present owners of record of those lands

included in or contiguous to the permit area and (2) the boundaries of land within the proposed permit area which the applicant has the legal right to enter and begin coal refuse disposal activities. 25 Pa. Code § 90.21(a)(1) and (2). Pond Reclamation asserts that, through its appeal, it is seeking review of whether the Department properly determined that Consol had a legal right to the permit revision in light of the 1983 agreement.

Pond Reclamation argues that Sections 90.21(a)(1) and (2) of the regulations require the Department to consider Pond Reclamation's contractual rights to the coal fines in Pond No. 4 before the Department may issue a permit revision to Consol which would allow expansion of Pond No. 4. However, while 25 Pa. Code § 90.21(a)(1) and (2) require the applicant to identify owners of real property in or contiguous to the permit, including surface and subsurface rights, and areas which the applicant has a legal right to enter, these sections do not require the applicant to identify the owners of personal property on the permit area. Both in its original application and in its current application to obtain the permit revision, Consol identified itself as the surface owner, coal seam owner, and operator of the facility, including Pond No. 4, in compliance with 25 Pa. Code § 90.21(a)(1) and (2). (Department Supplemental Brief, Camus Verification, paragraph 18)

Other sections of the regulations not cited by Pond Reclamation do require information about other features existing on the area covered by the coal refuse disposal permit application. Of particular note is Section 90.21(a)(20), which requires the applicant to identify the location of storage and disposal areas of spoil, coal refuse, underground development waste and noncoal and to state whether the applicant owns the item so identified. In a reclamation plan narrative included as part of its revision application, Consol identified the 1983 agreement between U.S. Steel and Pond Reclamation and acknowledged Pond Reclamation's right to remove coal fines from Pond No. 4 for

an extended period of time. (Department Supplemental Brief, Camus Verification, paragraph 4d and Appendix A) Thus, Consol complied with Section 90.21(a)(20). Additionally, the narrative noted that under the agreement Pond Reclamation was obligated to obtain any and all necessary permits for the coal fine removal.

In its Response, Pond Reclamation asserts that the Department has an obligation to take cognizance of contracts entered into by parties and the Board has jurisdiction to determine whether the Department properly considered the parties' contractual rights. It is well-established that both the Board and the Department may evaluate property related issues and contracts for the purpose of determining compliance with the regulations and statutes, although neither may make determinations of title. *Empire Coal Mining and Development, Inc. v. Department of Environmental Resources*, 678 A.2d 1218, 1223 (Pa. Cmwlth. 1996); *Middleport Materials, Inc. v. DEP*, EHB Docket No. 96-004-MR (Opinion issued January 22, 1997), *slip op.* at 8-9; *Body v. DER*, 1992 EHB 758, 760-61. Furthermore, while the Board may consider contractual matters in determining whether there has been compliance with the statutes and regulations, we may not adjudicate or enforce the contract rights of private parties vis-a-vis each other. *McKees Rocks Forging, Inc. v. DER*, 1991 EHB 405, 409-10. The Board's jurisdiction does not extend to resolving disputes between private parties, but only to actions involving the Department. *Id.; Crawford v. DER*, 1994 EHB 912, 916-17. Thus, although the Board may take cognizance of the 1983 agreement between Pond Reclamation and U.S. Steel, we may not resolve any disputes as to Pond Reclamation's rights under that agreement. Nor is the Department empowered to resolve any such disputes.[1]

---

[1] In a Motion for Emergency Relief filed on May 2, 1997, Pond Reclamation cites the Board's decision in *Lucchino v. DER*, 1994 EHB 380, as holding that the Department has a duty

In the present case, the Department received an application from Consol to expand its slurry pond. Consol notified the Department that the pond contained coal fines which were owned by Pond Reclamation and which Pond Reclamation had a right to remove pursuant to a 1983 agreement with U.S. Steel, the previous owner of the site. Even considering Pond Reclamation's agreement with U.S. Steel, there was no basis for a denial of the permit revision. Based on the information contained in the parties' motions and responses, Consol met the regulatory requirements for issuance of the permit revision.

Although Pond Reclamation asserts that it is not asking the Board to adjudicate its rights under a contract, that is, in effect, what it is seeking. Pond Reclamation's objection centers on its agreement with U.S. Steel, and is dependent on what rights it may have under that agreement. It is not within the Board's jurisdiction to determine whether this agreement also binds Consol or whether Consol's action in expanding Pond No. 4 is a violation of the agreement. Rather, this dispute between Pond Reclamation and Consol is a matter which must be resolved before the court of common pleas.

---

to look beyond the permit application documents when confronted with a property dispute. The issue in *Lucchino* concerned the validity of landowner consent forms which authorized the Department and permit applicant to enter onto the appellant's property in connection with the mining permit. The landowner consent forms in question had been executed by the appellant in connection with an earlier permit. Rather than obtain new landowner consent forms when it applied for a subsequent permit, the mining company simply referenced the consent forms signed in connection with the earlier permit. The Board held, "If, during the course of a permit review, the Department is informed that a dispute exists as to the validity of a landowner consent form or the underlying agreement between the applicant and the landowner which grants the applicant access to the property, the Department may not issue the permit, or may not issue it without condition, unless and until the dispute is resolved..." *Id.* at 399. The present case may be distinguished since Consol is the owner of Pond No. 4 and the property on which Pond No. 4 is located, and Pond Reclamation has not alleged that Consol does not have a legal right to conduct coal refuse disposal activities at the location in question.

Because the Board does not have jurisdiction to adjudicate Pond Reclamation's rights under the 1983 agreement, we find that the Department and Consol are entitled to summary judgment on the issues raised in paragraphs B, C, D, and E of the notice of appeal.

Article 1, Section 27

In paragraph H of the notice of appeal, Pond Reclamation raises the following objection:

> H. The Department's action violates rights of the people of the Commonwealth in allowing waste of valuable coal resources.

In its Motion for Partial Summary Judgment, Consol asserts that this objection is tantamount to asserting that the Department violated Article 1, Section 27 of the Pennsylvania Constitution by issuing the permit revision.

Article 1, Section 27 of the Pennsylvania Constitution provides as follows:

> The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

It is Consol's contention that Pond Reclamation lacks standing to raise this issue because Article 1, Section 27 does not require the Department to balance the interests of one private property owner against those of another. The Department joins in Consol's argument that Pond Reclamation lacks standing to raise this issue. (Department's Brief in Support of Motion for Summary Judgment, footnote 2)

Article 1, Section 27 of the Constitution was considered at length by the Commonwealth

Court in *Payne v. Kassab*, 312 A.2d 86 (Pa. Cmwlth. 1973). There, the Court stated that "Section 27 was intended to allow the normal development of property in the Commonwealth, while at the same time constitutionally affixing a public trust concept to the management of *public natural resources* of Pennsylvania." *Id.* at 94. The Court recognized that Article 1, Section 27 required a balancing of environmental and social concerns, and established the following threefold test:

> (1) Was there compliance with all applicable statutes and regulations relevant to the protection of the Commonwealth's public natural resources?
>
> (2) Does the record demonstrate a reasonable effort to reduce the environmental incursion to a minimum?
>
> (3) Does the environmental harm which will result from the challenged decision or action so clearly outweigh the benefits to be derived therefrom that to proceed further would be an abuse of discretion?

Id.

Based on the analysis of the Commonwealth Court in *Payne v. Kassab*, it is clear that Article I, Section 27 is intended to protect public resources from unnecessary or unreasonable environmental incursion. This issue is not present in the case before us. As Consol correctly notes in its Reply, had the Department issued a permit which authorized Consol to develop a previously untouched area for coal refuse disposal, such an action might give rise to a claim for relief under Article 1, Section 27. Here, however, where the dispute centers around the competing interests of two private property owners, we find that Pond Reclamation has failed to state a claim for relief under Article 1, Section 27 of the Pennsylvania Constitution.

In its Response, Pond Reclamation also relies on Pennsylvania's Environmental Master Plan, found at 25 Pa. Code § 9.1 *et seq.* The Master Plan sets forth the Commonwealth's environmental

policy with respect to natural resources, including coal resources. In particular, Pond Reclamation points to Section 9.141 (a), which states that "areas with coal reserves are of Statewide importance," and Section 9.193 (b), which reads, "It shall be the environmental policy of the Commonwealth to encourage open space land uses in carbonate areas to prevent the loss of resources and other environmental values by uncontrolled growth and development." As with Article 1, Section 27 of the Constitution, the provisions of the Environmental Master Plan relied upon by Pond Reclamation deal with the use of *public resources* and thus are not applicable in this case.

Therefore, Consol and the Department are granted summary judgment with respect to paragraph H of the notice of appeal.

Construction of New Pond

Pond Reclamation raises the following issues in Objections I and J of the notice of appeal:

> I. The Department failed to consider that Consolidation Coal Company intends to construct an entirely new pond and granting the application is an abuse of discretion.
>
> J. The Department's action in opposing [sic] construction of an entirely new pond is not supported by the requirements of applicable law or regulation.

In its Motion, the Department asserts that Pond Reclamation's notice of appeal "falsely states that Consol intended to construct a new pond" and that objections I and J "are based on the premise that the Department, by granting Consol's application for permit revision, has approved the construction of an entirely new pond." (Department's Motion, page 4) In moving for summary judgment on this issue, the Department relies on paragraph 10 of Gary Camus' affidavit, which states as follows:

> The activity proposed by Consol and approved by the Department as part of the June 5, 1996 revision involves the expansion of an existing slurry pond by increasing the top height or elevation of the existing slurry pond embankment to increase the disposal area. It does not involve construction of a new pond.

In its Response, Pond Reclamation disputes the Department's characterization of the work as the enlargement of an existing pond rather than construction of a new pond. It cites a report by Almes and Associates, Inc., Consulting Engineers dated May 18, 1994 as evidence that the existing Pond No. 4 was filled to its engineering capacity. An excerpt of the report is attached to the Response as Exhibit C. Page 2 of the report states, "The fine coal refuse disposal capacity at Pond No. 4 is essentially depleted."

Even if we accept the excerpt of the Almes report as evidence of the condition of Pond No. 4 in May 1994, it does not establish, as Pond Reclamation asserts, that an entirely new pond is to be built, as opposed to an enlargement of the existing pond. Moreover, according to the affidavit of Gary Camus, the individual in the Department responsible for the technical review of Consol's application for permit revision, the application sought only to increase the height of the embankment of Pond No. 4, not to construct an entirely new pond. (Department's Supplemental Brief, Camus Verification, paragraph 8)

Because Pond Reclamation has not demonstrated that there are material questions of fact in dispute with regard to the issue raised in paragraphs I and J of the notice of appeal, the Department and Consol are granted summary judgment on this issue.

Compliance History

Finally, Objection K of the notice of appeal states as follows:

> K. The Department erred in granting the requested Application when the Applicant is subject to consent orders for violations of applicable Law and regulations, which may effect [sic] the proposed project.

Section 86.37 of the coal mining regulations sets forth the criteria which the Department must consider in its evaluation of an application for a permit or permit revision. The applicant must submit, *inter alia*, proof that any violation has been corrected or is in the process of being corrected. 25 Pa. Code § 86.37(a)(8) and (11). In addition, the Department must determine that there are no past or continuing violations which show a lack of ability or intention to comply with the environmental laws and regulations. *Id.* at § 86.37(a)(10).

According to the affidavit of Gary Camus, Consol had no outstanding compliance orders or violations at the time the permit revision was issued. (Camus Affidavit, paragraph 28) Nor had it violated any laws or regulations that showed that it lacked the ability or intention to comply with the laws applicable to its operations or the permit revision. (Camus Affidavit, paragraph 27) In response to interrogatories propounded to Pond Reclamation by the Department asking for the factual basis for the contention made in paragraph K of the notice of appeal, Pond Reclamation responded, "The referenced allegation may be withdrawn at a later time in the proceeding." (Exhibit 2 to Department's Motion)

In its Response to the Department's Motion, Pond Reclamation again states only that it reserves the right to withdraw paragraph K of the notice of appeal at a later date. Pond Reclamation's Response fails to produce any evidence controverting what is stated in Mr. Camus' affidavit regarding Consol's compliance history. In accordance with Pa. R.C.P. 1035.3(a)(1), we, therefore, grant summary judgment to the Department and Consol with regard to the issue raised in

paragraph K of the notice of appeal.

In conclusion, we enter the following Order:[2]

[2] In light of our ruling on the motions for summary judgment and partial summary judgment, the issues raised by Pond Reclamation in its Motion for Emergency Relief are moot.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

POND RECLAMATION COMPANY	:	
	:	
v.	:	**EHB Docket No. 96-147-R**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and CONSOLIDATION COAL COMPANY	:	

ORDER

AND NOW, this 15th day of May, 1997, the Department's Motion for Summary Judgment and Consol's Motion for Partial Summary Judgment are **granted** and the appeal of Pond Reclamation is **dismissed.**

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: May 15, 1997

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

For the Commonwealth, DEP:
Zelda Curtiss, Esq.
Southwest Region

For Appellant:
Michael D. DeMarco, Esq.
Pittsburgh, PA

David C. Hook, Esq.
Waynesburg, PA

For Permittee:
Thomas C. Reed, Esq.
Pittsburgh, PA

Robert M. Vukas, Esq.
Consolidation Coal Company

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

HEMLOCK MUNICIPAL SEWER COOPERATIVE	:	
v.	:	**EHB Docket No. 96-157-C**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: May 22, 1997**

OPINION AND ORDER ON MOTION FOR SUMMARY JUDGMENT

By Michelle A. Coleman, Administrative Law Judge

Synopsis:

The Board grants a motion for summary judgment filed by the Department of Environmental Protection (Department) requesting the dismissal of the appeal by a cooperative of developers of a denial of financial assistance under the Contribution by Commonwealth to Cost of Abating Pollution Act, the Act of August 20, 1953, P.L. 1217, *as amended*, 35 P.S. § 701 - 703 (Act 339). No material issues of fact are in dispute because appellants admitted to all material facts by failing to file a response to a Request for Admissions and Interrogatories. The Department is entitled to judgment as a matter of law because under Act 339 and its accompanying regulations contribution toward the expenses of sewage treatment plants are available only for sewage treatment plants acquired and constructed by municipalities, municipal authorities and school districts, and a cooperative is not a municipality, a municipal authority or a public school district.

OPINION

This matter was initiated with the August 9, 1996 filing of a notice of appeal by Hemlock Municipal Sewer Cooperative. The notice of appeal challenges the Department's July 12, 1996 letter in which a determination of ineligibility is rendered on Appellant's 1995 application for reimbursement of construction costs under the Contribution by Commonwealth to Cost of Abating Pollution Act, the Act of August 20, 1953, P.L. 1217, *as amended*, 35 P.S. § 701 - 703 (Act 339). The costs were accrued during construction of a sewage facility in Hemlock Township, Columbia County. The Department's letter asserts that Appellant is ineligible because payments under Act 339 can be made only to municipalities, public school districts and municipal authorities.

On January 30, 1997, the Department filed a motion for summary judgment and a supporting memorandum. Appellant filed its answer to the motion and a memorandum in opposition on February 28, 1997.

The Department contends that it is entitled to summary judgment because there are no material issues of fact and it also is entitled to judgment as a matter of law. The Department alleges that the material facts articulated in the Department's First Request for Admissions and Interrogatories, served on Appellant on December 11, 1996, are deemed admitted by Appellant's failure to answer the request as of January 30, 1997. The Department contends that it is entitled to judgment as a matter of law under Section 103.25 of the regulations. Section 103.25 states that only municipalities, municipal authorities and public school districts are eligible for Act 339 subsidy assistance and Appellant is not one of these eligible entities.

Appellant disagrees. Appellant states in its Answer to Motion for Summary Judgment that it is an agent of Hemlock Township, and therefore, contends that there is an issue of material fact

regarding the existence of an agency relationship between Appellant and Hemlock Township (Township). Appellant asserts that it is an agent of the Township for several reasons explained in the supporting memorandum of law. Those reasons, among others, include: the Township manifested an intent for Appellant to act on its behalf regarding the construction and operation of the sewage collection and treatment facility; it retained de facto control of the construction and operation of the sewage treatment system; it guaranteed the obligations of Appellant by ordinance and agreement; it may assume total ownership and control of all of Appellant's assets; it required all residents of the Township to connect to the Appellant's system; and it is a member of the Appellant collective with the option to utilize 180 EDU's (Equivalent Dwelling Units). Appellant further asserts that the Department is not entitled to judgment as a matter of law because the agency relationship between Appellant and the Township qualifies Appellant for the assistance.

The Board may grant summary judgment where the pleadings, depositions, answers to interrogatories, and admissions on file -- together with 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. 1035.1-1035.5; *Tranguch v. DEP*, EHB Docket No. 95-255-C (Opinion issued February 25, 1997). All doubts as to the existence of material facts are resolved against the moving party. *Ducjai v. Dennis*, 656 A.2d 102 (Pa. 1995).

Initially, we will address whether any material facts are in dispute. The Department in its Motion contends that no material facts are in dispute because all are deemed admitted by Appellant's failure to answer a request for admissions and interrogatories. Appellant in its Answer contends that a material issue of fact exists regarding the agency relationship it has with the Township.

We agree with the Department. In Appellant's Answer, filed on February 28, 1997, it

admitted to the following facts:

> - On December 11, 1996, Hemlock was served with the Department's First Request for Admissions and Interrogatories in the above-captioned matter. (¶ 7)
>
> - Responses to the Department's First Request for Admissions and Interrogatories were due on or before January 11, 1997, pursuant to Pa. R.C.P. 4014. (¶ 8)
>
> - Hemlock has failed to answer the Department's discovery requests. (¶ 9)
>
> - A party is deemed to have admitted facts set forth in a request for admissions by failing to file timely responses. (¶ 10)
>
> - Hemlock has not filed timely responses to the Department's Request for Admissions and Interrogatories. (¶ 11)

Since Appellant in its Answer admits that the facts as stated in the Department's motion are not disputed, we must address the issue of agency raised by Appellant in its Answer and supporting memorandum. Appellant contends that there is a material issue of fact in dispute because the Department did not raise the issue of agency in its motion. However, Appellant did not incorporate by reference any documents supporting this agency contention in its Answer. Rather all the documents Appellant offers are attached to the memorandum. Therefore, we can not consider Appellant's contention. The Board has long held that motions for summary judgment must set forth, with adequate particularity, the reasons for summary judgment and that representations in legal memoranda alone are insufficient. *See County of Schuylkill, et al. v. DER, et al*, 1990 EHB 1370. To the extent, therefore, that the memorandum supporting a motion for summary judgment is inconsistent with the motion itself, the motion controls. The same rationale applies to the answer and the memorandum in opposition. *Barkman v. DER*, 1993 EHB 738. As we noted in *Township*

of Florence v. DEP, et al, 1996 EHB 1399, our consideration is governed by the content of the motion and the exhibits attached to it. The briefs are only to provide a more detailed discussion of the bases of the motion, and not to add new arguments or new facts. *Barkman v. DER*, 1993 EHB 738. Accordingly, the exhibits attached to a brief are not part of our consideration. Exhibits attached to legal memorandum cannot properly form the basis for granting a motion for summary judgment or for denying that motion when the answer raises issues not supported in any form.

Also in its response, Appellant admits that it did not file responses to the Department's Request for Admissions and Interrogatories. However, it offers a further answer that the status of Hemlock Municipal Sewer Cooperative as an agent of Hemlock Township was not addressed in the Request for Admissions. Thus, Appellant contends that a material issue of fact still exists. Consequently, Appellant believes we should deny the motion.

We disagree. Whether or not the Request for Admissions addressed the status of Appellant as an agent of the Township is irrelevant to whether the admissions are deemed admitted. Pa. R.C.P. 4014(b) provides in relevant part:

> ... The matter is admitted unless, within thirty days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission an answer verified by the party or an objection, signed by the party or by his attorney....

This Board has long held that failure to respond to a request for admissions results in the admissions being deemed admitted. *Kerry Coal Co. v. DER*, 1991 EHB 73; *C&K Coal Co. v. DER*, 1991 EHB 1484; *Heasley, et al. v. DER, et al.*, 1991 EHB 473. By failing to file a timely response, the admissions as stated by the Department are deemed admitted. Thus, the following facts are deemed admitted:

- The Department is the agency with the duty and authority to administer and enforce the Pennsylvania Sewage Facilities Act, Act of January 24, 1966, P.L. (1965) 1535, *as amended*, 35 P.S. § 750.1 *et seq*. ("Pennsylvania Sewage Facilities Act"); The Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. § 691.1 *et seq*. ("Cleans Streams Law"); Section 1917-A of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, *as amended*, 71 P.S. § 510-17 ("Administrative Code"); the Contribution by Commonwealth to Costs Abating Pollution Act ("Act of 339"), Act of August 20, 1953, P.L. 1217, No. 339, *as amended*, 35 P.S. § 701 *et seq*.; and the rules and regulations promulgated thereunder.

- Pursuant to Act 339, the Department provides an annual operating subsidy to municipalities, municipal authorities and school districts in an amount equal to two percent (2%) of the cost incurred in the acquisition and construction of public sewage treatment works.

-Hemlock Municipal Sewer Cooperative (Herein after "the Cooperative") is a cooperative corporation, incorporated pursuant to the Nonprofit Corporation Law of 1988.

- A group of developers formed the Cooperative for the purpose of constructing and operating a public sewage treatment plant in Hemlock Township.

- The Cooperative is not an applicant municipality, as defined in 25 Pa. Code § 103.21.

- The Cooperative is not a municipality.

- The Cooperative is not a public school district.

- The Cooperative is not a municipal authority.

- The Cooperative expended funds for the acquisition and construction of sewage treatment works to serve Hemlock Township.

- The Cooperative is responsible for the operation and maintenance of the sewage treatment works in Hemlock Township.

- For the year 1995, the Cooperative filed an application for Act 339 subsidy for the operation of its sewage treatment works.

Material facts are not in dispute by virtue of these admissions being deemed admitted. Next, we will consider whether the Department is entitled to judgment as a matter of law.

The Department contends that it is entitled to judgment as a matter of law, under Act 339 and Section 103.25 of the regulations thereunder, because Appellant is not a municipality, a municipal authority, or public school district.

Appellant contends that it qualifies for the subsidy under Act 339 as an agent of a municipality. Appellant asserts that it is clear that since the Legislature's intent in Act 339 was to provide assistance to municipalities like the Township, the Township is entitled to assistance under the regulations, and it should not be penalized for utilizing a creative solution, i.e. Appellant's agency, to solve a problem.

We agree with the Department. Under Act 339 and its regulations payment may be made to a limited class. Section 103.25 specifically states, "Payments are to be made only to municipalities, public school districts, and municipality authorities." 25 Pa. Code § 103.25. As noted above, Appellant admitted that it is not a municipality, public school district or a municipal authority by failing to file a timely response to the Department's Request for Admissions and Interrogatories. Furthermore, Appellant admitted in its Answer that it is not an applicant municipality as defined in Section 103.21. Under Section 103.21, "Applicant Municipality" is defined as, "A county, city, town, borough, township, school district, institution or an authority created by any one of the foregoing. ..." 25 Pa. Code § 103.21. Appellant admitted in its Answer that it was not any of the

entities listed or defined at 25 Pa. Code §§ 103.25 or 103.21.[1]

There is precedent that the Board has determined that sewage treatment facilities constructed or acquired by a municipality authority through agreements between private enterprises and local municipalities are eligible for funding under Act 339. (*See Downingtown Area Regional Authority v. DER*, 1994 EHB 440; *Westfield Borough Authority v. Commonwealth of Pennsylvania, Department of Environmental Resources*, 1989 EHB 407). However, there must be some documentation on file through pleadings, depositions, answers to interrogatories, admissions - with affidavits, if any - which present material facts pursuant to Pa. R.C.P. 1035.1-1035.5 in order for the Board to reach this conclusion. Since there is nothing on which to base a conclusion that Appellant is an agent or Applicant Municipality, our finding must be that Appellant does not qualify for reimbursement under Act 339.

Even if we were to consider the materials attached to Appellant's brief, it is clear that the Cooperative is a non-profit entity separate from Hemlock Township. Appellant was charged with the construction of the treatment system and is charged with its operation. It owns the treatment system. Hemlock Township is charged by the Authority for its use of the Authority's treatment system. While Hemlock Township appears to have guaranteed a portion of the financing of the construction of the system, it neither constructed nor has acquired the sewage treatment plant as Act 339 requires as a basis for reimbursement. While it may, as Appellant asserts, assume total ownership and control of the Authority's assets, it has not done so yet, so that neither Appellant nor

---

[1] Although the Department's motion in paragraph 11 contains items a-k as a list of material facts, Appellant's Answer is limited to the statement of "admitted in part; denied in part," and does not delineate among the 11 individual issues.

the township is entitled to contribution under Act 339 for the cost of construction or acquisition of the sewage treatment system. Thus, the Department is clearly entitled to judgment as a matter of law. For the foregoing reasons, we grant the Department's motion for summary judgment. Accordingly, we enter the following order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

HEMLOCK MUNICIPAL SEWER COOPERATIVE	:	
	:	
v.	:	**EHB Docket No. 96-157-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 22nd day of May, 1997, the Department's motion for summary judgment is granted and the appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

GEORGE J. MILLER
Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member

EHB Docket No. 96-157-C

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: May 22, 1997

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

For the Commonwealth, DEP:
Dawn M. Herb, Esq.
Northcentral Region

For Appellant:
Alvin J. Luschas, Esq.
DERR, PERSEL, LUSCHAS & NORTON
Bloomsburg, PA

kh/bl

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

DARLENE K. THOMAS, et al.	:	
	:	
v.	:	**EHB Docket No. 95-206-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and LAMAR TOWNSHIP BOARD OF SUPERVISORS	:	**Issued:** May 29, 1997

OPINION AND ORDER ON MOTION FOR JOINDER

By Michelle A. Coleman, Administrative Law Judge

Synopsis:

A motion for joinder is denied. The Board lacks the power to order involuntary joinder. Furthermore, a joint municipal authority cannot be made a party appellee under section 1021.51(g) of the Board's rules, 25 Pa. Code § 1021.51(g), simply by serving it with a copy of the notice of appeal where the authority was not the recipient of the permit, license, approval, or certification at issue in the appeal.

OPINION

This matter was initiated with the September 25, 1995, filing of a notice of appeal by Darlene Thomas, L. Carl Rumbalski, Truman and Miriam Neff, and Lewis Barner (collectively, Appellants). The appeal challenges an August 29, 1995, letter sent from the Department of Environmental Protection (Department) to the Lamar Township Board of Supervisors (Lamar Township) informing

it of the Department's conditional approval of two related requests to revise official sewage facilities plans under Act 537: one filed by Lamar Township and one filed by Porter and Walker Townships. The revised sewage facilities plans provide for the construction of a 400,000 gallon-per-day sewage treatment facility that will serve portions of Lamar, Porter and Walker Townships. The townships formed a joint municipal authority, the East Nittany Valley Joint Municipal Authority, (ENVJMA) to implement the revised plans.

The Board has issued one previous opinion in this appeal. On January May 9, 1996, we granted in part and denied in part a motion to compel filed by Appellants.

On February 5, 1997, Appellants filed a status report with the Board that, among other things, requested that ENVJMA be made a party to the proceedings. To the extent that the status report requested that relief, we treated it as a motion for joinder, sending a motion letter to the Department and Lamar Township, and copying ENVJMA, and we directed them to file any objections to the motion before February 25, 1997. Lamar Township did not respond to the motion. The Department filed a response on February 25, stating that it did not object to Appellants' request. ENVJMA filed a response on February 26, 1997 objecting to Appellants' request.

Subsequently, on March 27, 1997, Appellants' filed a "supplement" to their motion for joinder, asking the Board, when it rules on the motion, to consider a March 3, 1997, letter from Gary Metzger, a water quality specialist supervisor with the Department, to Kevin Karstetter, secretary of the Lamar Township Municipal Authority.[1] Neither the Department, Lamar Township, nor

---

[1] At the same time Appellants filed the supplement to their motion for joinder, they also filed a separate notice of appeal to the Metzger letter. In the cover letter accompanying the supplement and notice of appeal, Appellants explained that they enclosed the notice of appeal in the event the (continued...)

ENVJMA filed a response to Appellants' "supplement."

We will not consider ENVJMA's response for purposes of ruling on Appellants' motion. Since responses to the motion were due on February 25, 1997, and ENVJMA failed to file its response until afterwards, its response was untimely.[2]

Appellants cite no legal authority for the proposition that the Board has the power to join any party involuntarily, much less the power to join ENVJMA under the circumstances here. Instead, Appellants argue that the Board should join ENVJMA because they intended to make ENVJMA a party when they filed their notice of appeal; they expressed that intention to the Board Secretary; they served ENVJMA with a copy of their notice of appeal and all other documents in the appeal; and, language in a January 6, 1997, status report filed by the Department shows that ENVJMA is involved in the appeal. In its response stating that it did not object to Appellants' request for joinder, the Department wrote that, while the Board has held that it does not have the power to join parties, section 1021.51(g) of our rules of practice and procedure, 25 Pa. Code § 1021.51(g), provides that service of Appellants' notice of appeal on ENVJMA subjects the authority to the jurisdiction of the Board as a party appellee.

---

[1](...continued)
Board concludes ENVJMA cannot be joined to their appeal at 95-206-C. Since the Board's rules do not provide for "holding" the filing of a notice of appeal pending the outcome of other matters, we docketed Appellants' notice of appeal to the Metzger letter at a separate docket number: EHB Docket No. 97-075-C.

[2] The fact that we will not consider the response, however, does not mean that we will assume ENVJMA wants to join this appeal. If ENVJMA wants to participate in the proceedings, it may file a petition to intervene. Since the instant motion is brought *by Appellants* seeking to join ENVJMA, we must assume ENVJMA does not want to participate absent some indication to the contrary. Appellants, as the moving parties, bear the burden of demonstrating that they are entitled to the relief requested. *Green Thornbury Committee v. DER*, 1995 EHB 294.

The Board last addressed the issue of involuntarily joining parties in *Lower Paxton Authority v. DEP*, 1995 EHB 131. There, after noting that the Environmental Hearing Board Act, Act of July 10, 1988, P.L. 530, 35 P.S. § 7511 *et seq.*; the Administrative Law and Procedure Act, Act of April 28, 1978, P.L. 202, *as amended*, 2 Pa.C.S.A. § 101 *et seq.*; Board's rules of practice and procedure, 25 Pa. Code Chapter 1021; and the General Rules of Administrative Procedure, 1 Pa. Code part II; all fail to provide for the involuntary joinder of parties, we held that the Board lacks the power to join involuntary parties. This result is consistent with the Commonwealth Court's earlier decision in *Ferri Contracting Company, Inc. v. DER,* 506 A.2d 981 (Pa. Cmwlth. 1986), holding that the Board does not have the power to order compulsory joinder. In *Ferri*, the Court also expressly rejected the proposition that the joinder provisions in the Rules of Civil Procedure, Pa. R.C.P. 2226 to 2250, apply to proceedings before the Board. 506 A.2d 984.

It is a cardinal principle of administrative law that agencies have only those powers expressly conferred, or necessarily implied, by statute. *See, e.g., DER v. Butler County Mushroom Farm*, 454 A.2d 1 (Pa. 1982), and *Costanza v. DER*, 606 A.2d 645 (Pa. Cmwlth. 1992). Since Appellants do not point to any statutory basis for their contention that the Board has the power to order involuntary joinder, we see no reason to reexamine the prior case law holding that we lack that power.

Nor are we persuaded by the Department's argument that service of Appellants' notice of appeal on ENVJMA makes it a party to the proceedings under section 1021.51(g) of our rules. Section 1051 of the Board's rules sets forth the form, content, and service requirements for notices of appeal. Subsection (g) of 1051 provides, in pertinent part, "The service upon the recipient of a permit, license, approval, or certification as required by this section, shall subject the recipient to the jurisdiction of the Board as a party appellee." Even assuming Appellants otherwise complied with

the service requirements under section 1051, service of the notice of appeal on ENVJMA would not subject that entity to the jurisdiction of the Board. Subsection (g), by its terms, applies only to "the *recipient* of a permit, license, approval, or certification. . . ." (Emphasis added.) ENVJMA was not the recipient of either of the approvals mentioned in the letter that Appellants challenge in their appeal. Consequently, section 1051(g) cannot have made ENVJMA a party appellee.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DARLENE K. THOMAS, et al.	:	
	:	
v.	:	**EHB Docket No. 95-206-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and LAMAR TOWNSHIP BOARD OF SUPERVISORS	:	

ORDER

AND NOW, this 29th day of May, 1997, it is ordered that Appellants' motion to join ENVJMA is denied.

ENVIRONMENTAL HEARING BOARD

Michelle A. Coleman

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: May 29, 1997

c: **DEP Litigation Library**
Attention: Brenda Houck
For the Commonwealth, DEP:
Geoffrey J. Ayers, Esq.
Northcentral Region
For Appellants:
Darlene K. Thomas
718 E Street, NE
Washington, D.C. 20002
For Lamar Township:
Richard L. Campbell, Esq.
State College, PA
Courtesy copy:
Donald L. Faulkner, Esq.
SNOWISS STEINBERG & FAULKNER
Lock Haven, PA

jb/bl

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

BERWICK AREA JOINT SEWER AUTHORITY	:	
v.	:	**EHB Docket No. 95-165-C**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and NESCOPECK BOROUGH	:	**Issued:** June 3, 1997

OPINION AND ORDER ON MOTION IN LIMINE TO STRIKE A STIPULATION

By Michelle A. Coleman, Administrative Law Judge

Synopsis:

Appellee's motion in limine to strike a stipulation is denied where the stipulation is clear and unambiguous on its face. The Board will not consider the intent of the parties regarding the stipulation when the stipulation is clear and unambiguous.

OPINION

Presently before the Board is Nescopeck Borough's (Nescopeck) motion in limine to strike a stipulation entered into by Nescopeck and Berwick Area Joint Sewer Authority (Berwick) regarding a third party's determination of costs for a new sewage treatment plant. This matter was initiated with the July 5, 1995 appeal by Berwick of the Department of Environmental Protection's (Department) approval of the Nescopeck Official Sewage Facilities Plan Update which calls for the construction of a new sewage treatment plant to serve Nescopeck. Berwick contends, among other

things, that an alternative which would call for the connection of Nescopeck to the Berwick sewage treatment system is more appropriate and less expensive than the alternative adopted in the Nescopeck Plan Update. After the Department's approval of the Plan, there remained differences between cost estimates prepared by Nescopeck's consultant, Quad Three Group, Inc., and Berwick's consultant, Reilly Associates, relating to the Nescopeck Alternative and the Berwick Alternative. On August 30, 1995, a meeting was held at the office of the Department and was attended by representatives of the Department, the Pennsylvania Infrastructure Investment Authority (PENNVEST), Nescopeck and Berwick. The representative of PENNVEST suggested that it hire a third party engineering consultant to resolve the differences between the cost estimates prepared by Quad Three Group and Reilly Associates to the extent that any still existed after the meeting. The Department representative proposed that Nescopeck and Berwick agree in advance to accept the third party engineering consultant's cost estimates as final and binding for purposes of Departmental action and the instant appeal. Berwick verbally agreed. Nescopeck's representative, however, stated that he would have to check with the Borough Council and get back to the Department. By letter dated September 5, 1995, Nescopeck agreed to the proposal. Under the terms of the proposal, Nescopeck and Berwick agreed to submit their package of materials, including cost estimates and all supporting materials to each other, the Department and PENNVEST by no later than September 20, 1995, and further agreed that neither party would attempt to introduce or rely upon any other materials or estimates before the Board. Nescopeck and Berwick signed a stipulation, drafted by the Department, on September 28, 1995 and October 4, 1995, respectively, which set forth the terms stated in the meeting.

The parties stipulated to the following:

1. For the purposes of the EHB's consideration of the issue of sewage treatment cost alternatives (i.e., the estimated total costs, including capital and operations, maintenance and replacement costs) for the Nescopeck and Berwick Authority alternatives, Nescopeck and Berwick Authority hereby agree to accept as valid, and hereby stipulate not to contest, the conclusions of the PENNVEST engineer referred to above; which conclusions and supporting data and materials may be entered into evidence at the hearing of this Appeal, or in support of any prehearing motions, pursuant to the rules of evidentiary procedure utilized by the EHB.

2. Notwithstanding the foregoing, Nescopeck and Berwick Authority agree and stipulate that the issue of "cost" is not the sole issue to be taken into account in the review of Nescopeck's or DEP's decision regarding the adoption of Nescopeck's revision to its Sewage Facility Plan.

PENNVEST retained Smith Environmental Engineers to perform the third party present worth cost analysis. In performing its present worth cost analysis Smith Environmental added items to its cost estimates for the Nescopeck Alternative which neither Berwick and its consultant nor Nescopeck and its consultant had included in their own cost estimates. The items added by Smith Environmental resulted in an additional base cost of $170,000.00 to the cost estimate for the Nescopeck Alternative. Contingency items figured into the inclusion of the three items by Smith Environmental added $229,500.00 to the cost estimate for the Nescopeck Alternative.

Nescopeck contends that the Board should strike the stipulation because it is unclear regarding the intent of the parties. Nescopeck alleges that it is clear that the intent of the parties to the stipulation was that the third party engineering consultant hired by PENNVEST was to review the cost estimates and supporting material submitted by the parties in order to resolve any differences regarding the cost estimates, as evidenced by the correspondence between the parties; that Smith Engineering went beyond the scope of the stipulation when it performed an EDU (Equivalent Dwelling Unit) cost analysis and when it added cost estimates that the other consultants had deemed

not necessary; that the Smith Environmental report did not take into consideration problems experienced by Berwick, such as manhole discharges of raw sewage onto the surface of the ground and the location where Nescopeck would tie into the Berwick system; and the Smith Environmental cost estimate did not take into account any changes necessary to accommodate the Nescopeck sewage. Nescopeck argues that the courts have stated that they will adopt the most reasonable and probable interpretation of the stipulation, bearing in mind the objects the parties intended to accomplish through the stipulation, *Cobbs v. Allied Chemical Corp.*, 661 A.2d 1375 (Pa. Super. 1995), citing *Tyler v. King*, 496 A.2d 16 (Pa. Super. 1985); that in ascertaining the parties' intention the court may take into consideration the surrounding circumstances, the situation of the parties, the objects they apparently have in view, and the nature of the subject-matter of the agreement, *International Organization Master, Mates and Pilots of America, Local No. 2 v. International Organization Master, Mates and Pilots of America*, 439 A.2d 621 (Pa. 1981) (quoting *Foulke v. Miller*, 112 A.2d 124 (Pa. 1955)); and that when a stipulation is not clear and unambiguous, the court may examine evidence regarding the intent of the parties which is not within the four corners of the stipulation, *Cobbs v. Allied Chemical Corp.*, 661 A.2d 1375 (Pa. Super. 1995), citing *Tyler v. King*, 496 A.2d 16 (Pa. Super. 1985).

On February 6, 1997, Berwick filed its response. Berwick contends the motion should be denied because Nescopeck disingenuously confuses the objective of the third party cost analysis. Berwick alleges that the Smith report is consistent with the stipulation and consistent with the terms of the discussion among the parties at the August 30, 1995 meeting. Berwick alleges that the only thing which is inconsistent with the stipulation is the pending motion which ignores its letter and spirit.

On February 18, 1997 the Department filed its response. The Department contends that the motion should be granted because under the present circumstances the Board should consider all relevant evidence where as here the agreement might serve to impede the fact finding abilities and discretion and where the parties cannot themselves agree upon the intended meaning or scope of the stipulation; that the stipulation is not sufficiently clear and unambiguous; that other factors present suggest that the parties were under a mutual mistake of fact, or a unilateral material mistake of fact; and that new evidence obtained during discovery, that the Berwick sewage treatment plant is not currently physically capable to accept sewage from Nescopeck without significant repairs or capital expenditures, would prevent the Department from approving any conveyance of sewage to Berwick until these problems are rectified.

It is well established that parties, by stipulations, may bind themselves on all matters except those affecting jurisdiction and prerogatives of the court. *Shapely v. Commonwealth*, 615 A.2d 827 (Pa. Cmwlth. 1992) When interpreting a stipulation, courts employ the rules for construction of contracts, with the primary focus placed on ascertaining and giving effect to the intention of the parties. *Tyler v. King*, 496 A.2d 16, 21 (Pa. Super. 1985) Where a stipulation is clear and unambiguous on its face, the court is prohibited from examining evidence to the intent of the parties which is not within the four corners of the stipulation. *Cobbs v. Allied Chemical Corp.*, 661 A.2d 1375, n. 5 (Pa. Super. 1995).

We deny Nescopeck's motion because the stipulation is clear and unambiguous. The stipulation clearly states that Nescopeck and Berwick agreed not to contest and to accept as valid the conclusions of the third-party consulting engineer selected by PENNVEST, (1) for the purposes of the Board's consideration on the issue of sewage treatment cost alternatives; (2) that the conclusions

and supporting data and materials may be entered into evidence at a hearing of the appeal or in support of any prehearing motions; and, (3) that the issue of "cost" is not the sole issue to be taken into account in the review of Nescopeck's or the Department's decision regarding the adoption of Nescopeck's revision to its sewage plan. This stipulation is clear and unambiguous on its face. Consequently, we cannot look farther to find the intent of the parties.

Since we have denied the motion we see no need to hold a hearing on the issue of striking the stipulation as requested by Nescopeck. Because this matter is already scheduled for hearing any additional issues the parties wish to raise may be done so at that time.

Accordingly, we enter the following order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

BERWICK AREA JOINT SEWER AUTHORITY	:	
v.	:	**EHB Docket No. 95-165-C**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and NESCOPECK BOROUGH	:	

ORDER

AND NOW, this 3rd day of June, 1997, we deny Nescopeck Borough's motion in limine to strike a stipulation and its request for a hearing on the matter.

ENVIRONMENTAL HEARING BOARD

Michelle A. Coleman

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: June 3, 1997

c: **DEP Bureau of Litigation**
Attention: Brenda Houck, Library
For the Commonwealth, DEP:
John H. Herman, Esq.
Northeast Region
For Berwick Area Joint Sewer Authority:
Thomas E. Leipold, Esq.
JAMES & MIHALIK
Bloomsburg, PA
For Nescopeck Borough:
Robert E. Gawlas, Esq.
Donald H. Brobst, Esq.
ROSENN, JENKINS & GREENWALD
Wilkes-Barre, PA

kh/bl

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

M.G.S. GENERAL CONTRACTING, INC.	:	
	:	
v.	:	**EHB Docket No. 97-030-MR**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: June 5, 1997**

OPINION AND ORDER ON MOTION TO DISMISS

By Robert D. Myers, Administrative Law Judge

Synopsis:

A Motion to Dismiss an appeal as untimely is granted where the Appellant filed a Notice of Appeal with the Board six days after the deadline for filing a timely appeal.

OPINION

In a Notice of Appeal received by the Board on January 27, 1997, M.G.S. General Contracting, Inc. (Appellant) stated that it was challenging a Civil PenaltyAssessment imposed by the Department of Environmental Protection (DEP) pursuant to section 605 of the Solid Waste Management Act, Act of July 7, 1980, P.L. 380, *as amended*, 35 P.S. § 6018.605.

On January 29, 1997, the Board issued an order directing Appellant to file with the Board evidence that Appellant had notified DEP's Office of Chief Counsel regarding the appeal. When Appellant failed to comply with the order, the Board issued a Rule to Show Cause why the appeal

should not be dismissed pursuant to 25 Pa. Code § 1021.52(c) for failure to perfect the appeal.[1] On March 6, 1997, Appellant filed with the Board a letter with attachments which indicated that Appellant had notified DEP's Office of Chief Counsel regarding the appeal.

Once Appellant had perfected the appeal, DEP filed a Motion to Dismiss the appeal as untimely. DEP alleged in its motion that Appellant received written notice of the Civil Penalty Assessment on December 19, 1996. (Motion to Dismiss, paras. 10, 11, 15, and exh. H.) Appellant did not file a response to the motion. The Board will deem Appellant's failure to respond to be an admission of all properly-pleaded facts contained in the motion. 25 Pa. Code § 1021.70(f). Thus, Appellant admits that it received written notice of the Civil Penalty Assessment on December 19, 1996.

The Board's jurisdiction will not attach to an appeal from an action of DEP unless the appeal is filed with the Board within 30 days after the appellant has received written notice of the action. 25 Pa. Code § 1021.52(a). Where the last day of the 30-day period falls on a Saturday, Sunday, or legal holiday, the period shall run until the end of the next day which is neither a Saturday, Sunday, nor legal holiday. 1 Pa. Code § 31.12. In this case, the last day of the 30-day appeal period fell on Saturday, January 18, 1997. The next day which was neither a Saturday, Sunday, nor legal holiday was January 21, 1997. Thus, Appellant had until January 21, 1997 to file its Notice of Appeal with the Board. However, the Board did not receive Appellant's Notice of Appeal until January 27, 1997.[2] Therefore, the appeal is untimely.

---

[1] The rule was returnable on or before March 6, 1997.

[2] Appeals required to be filed with the Board shall be received by the Board within the time limits for the filing; the date of receipt by the Board and not the date of deposit in the mails is determinative. 25 Pa. Code § 1021.11(a).

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

M.G.S. GENERAL CONTRACTING, INC.	:	
	:	
v.	:	**EHB Docket No. 97-030-MR**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 5th day of June, 1997, it is ordered that the Motion to Dismiss filed by Commonwealth of Pennsylvania, Department of Environmental Protection, is granted.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: June 5, 1997

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

For the Commonwealth, DEP:
Kenneth T. Bowman, Esquire
Office of Chief Counsel
400 Waterfront Drive
Pittsburgh, PA 15222

For Appellant:
Anthony W. Hinkle, Esquire
CIPRIANI & WERNER
2500 Two PNC Plaza
Pittsburgh, PA 15222

RI/bl

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

DAVID C. ABOD and DORA E. ABOD	:	
	:	
v.	:	**EHB Docket No. 97-104-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: June 6, 1997**

OPINION AND ORDER ON MOTION TO AMEND NOTICE OF APPEAL

By Michelle A. Coleman, Administrative Law Judge

Synopsis:

A "notice of motion to amend," in which appellants request a supersedeas, a temporary supersedeas, and leave to amend their notice of appeal, is denied. The Board will not grant a request for supersedeas that cites no legal authority, and includes neither affidavits nor an explanation of why affidavits were not submitted. The Board will not grant a request for temporary supersedeas that is not accompanied by a petition for supersedeas that comports with section 1021.77 of the Board's rules, 25 Pa. Code § 1021.77. The Board will not grant a request for leave to amend a notice of appeal where the appellants fail to indicate how they will amend their notice of appeal but simply indicate that they intend to do so in the future.

OPINION

This matter was initiated with the May 15, 1997, filing of a notice of appeal by David and Dora Abod (Appellants) to an April 15, 1997, order issued by the Department of Environmental

Protection (Department) pursuant to the Storage Tank and Spill Prevention Act, Act of July 6, 1989, P.L. 169, *as amended*, 35 P.S. §§ 6021.101-6021.2104 (Storage Tank Act). The order averred that Appellants failed to register or properly close underground storage tanks on their property as required under the Storage Tank Act. Among other things, the order directed Appellants to close the tanks by Friday, May 30, 1997.

Appellants filed a "notice of motion to amend" on May 30, 1997--the day by which the order required that they have the tanks closed. In that filing, Appellants state that they have additional information they want to add to their notice of appeal and that some information they have previously filed was submitted improperly. Accordingly, they request leave to amend their notice of appeal. In addition, pointing to section 1021.53 of the Board's rules, Appellants request 30 additional days to comply with the Department's order. According to Appellants, the additional time is necessary because they already have contracted to have the tanks removed from their property, the tanks are exempt from the provisions of the Storage Tank Act, complying with the Department's order would be much more expensive than removing them as Appellants already have arranged, and the additional expense would inflict irreparable harm upon them. Appellants also aver that the additional time is necessary because they are trying to secure legal representation.

Appellants filed another copy of their "notice of motion to amend" on June 3, 1997. Unlike their previous submission, this copy of their "notice of motion to amend" was accompanied by proof of service and a cover letter expressly requesting a temporary supersedeas and a supersedeas.

Because Appellants are appearing *pro se* and are requesting a delay in the enforcement of a Department order that required compliance by last Friday, we are taking the extraordinary step of

ruling on their motion without waiting for a response from the Department.[1] It is clear here that Appellants cannot prevail on their motion, and we want them to understand that filing the motion does not excuse them from complying with the Department's order. Were Appellants to mistakenly believe that they need not comply with the order while their motion is pending, they might subject themselves to further liability.

We cannot grant Appellant's request for leave to amend their notice of appeal. Under section 1021.53(a) of the Board's rules of practice and procedure, 25 Pa. Code § 1021.53(a), an appellant may amend his notice of appeal as of right within 20 days of filing it. Since the Appellants filed their motion within 20 days of filing their notice of appeal, they did not have to seek the Board's permission to file an amended notice of appeal; they could have just filed it as a matter of right. Where Appellants run into trouble is that they neither filed an amended notice of appeal nor requested leave to amend their notice of appeal in a particular way. Although Appellants state that they request leave to amend their notice of appeal because their notice of appeal included documents that it should not have, Appellants never identified or described those documents. Similarly, while Appellants insist that they want to include certain "additional information" in their notice of appeal, they never identify what this additional information is. Thus, although Appellants request leave to amend their notice of appeal, their filing is not a present attempt to amend the notice of appeal; it is simply a notice that they intend to amend the notice of appeal at some point in the future. If Appellants desire to amend their notice of appeal, they must either file an amended notice of appeal

---

[1] Although the Department has not filed a response to Appellants' motion, it did copy the Board on a letter it sent to Appellants regarding their motion. In that letter, received by the Board on June 4, 1997, the Department said that it would oppose Appellants' requests and warned that Appellants were still obligated to comply with the Department's order.

within the 20-day time frame provided for amending as of right or they must request leave to amend. We cannot grant them leave to amend simply on the basis that they say they plan to amend their notice of appeal in the future.

Appellants' request for a 30-day supersedeas and a temporary supersedeas is also problematic. Section 1021.77(a) of the Board's rules, 25 Pa. Code § 1021.77(a), provides that petitions for supersedeas must include affidavits supporting the facts averred, or must explain why affidavits were not included. Yet Appellants failed to include affidavits or explain why they are missing.[2] Similarly, section 1021.77(b) of the Board's rules, 25 Pa. Code § 1021.77(b), provides that petitions for supersedeas must identify the legal authority supporting supersedeas. Appellants failed to do that as well. Therefore, they failed to prove that they are entitled to a supersedeas. Under section 1021.77(c) of our rules, 25 Pa. Code § 1021.77(c), either of the defects in Appellants' request for supersedeas is sufficient for the Board to deny the request *sua sponte*.

Appellants also failed to show that they were entitled to a temporary supersedeas. Section 1021.79(b) of the Board's rules, 25 Pa. Code § 1021.79(b), provides that a petition for temporary supersedeas must be accompanied by a petition for supersedeas which meets the requirements at section 1021.77 of the rules. Even assuming an appellant could satisfy this requirement by filing one document requesting both a supersedeas and a temporary supersedeas, Appellants could not prevail here because--as noted above--their request for supersedeas fails to comport with section 1021.77.

In light of the above, Appellants' "notice of motion for leave to amend" is denied.

---

[2] Appellants simply stated in their June 3, 1997, cover letter that they were including a copy of their notice of appeal and a copy of their "notice of amendment" "in lieu of affidavits." This is entirely inadequate as an explanation under section 1021.77(a). Appellants had to do more than simply state that they were not submitting affidavits; they had to explain why they could not submit them.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

DAVID C. ABOD and DORA E. ABOD	:	
	:	
v.	:	**EHB Docket No. 97-104-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

And now, this 6th day of June, 1997, it is ordered that Appellants' "notice of motion to amend" is denied.

ENVIRONMENTAL HEARING BOARD

Michelle A. Coleman

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: June 6, 1997

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

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

For Appellant:
David C. Abod
Dora E. Abod
Harveys Lake, PA

jb/bl

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

E. MARVIN HERR, E.M. HERR FARMS	:	
	:	
v.	:	**EHB Docket No. 94-098-MR**
	:	**(Consolidated with 94-099-MR)**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION and PEQUEA TOWNSHIP,	:	
Intervenor	:	**Issued: June 16, 1997**

OPINION AND ORDER ON MOTION FOR SUMMARY JUDGMENT

By Robert D. Myers, Administrative Law Judge

Synopsis:

On a remand from Commonwealth Court reversing the Board's prior disposition of these appeals, the Board takes a broad view of the circumstances affecting the Landowner to determine whether his vested rights have been impaired by actions of DEP and the Township. The Board rules (a) that the Landowner's vested right to proceed with the development of an industrial park applied also to the public improvements (public sewers) and method of sewage disposal shown on his plans, (b) that this vested right in sewage matters could be limited only if it posed a threat to public health, safety or welfare, (c) that the Landowner's proposed use of public sewers did not pose such a threat, (d) that DEP was justified in withdrawing an order to the Township requiring the approval of the Landowner's planning module after a later Act 537 Plan was deemed to be approved, (e) but that DEP was not justified in denying the Landowner's private request because the Act 537 Plan then in effect was not adequate for the Landowner's needs, and (f) as a result, DEP should have issued

another order to the Township.

Summary judgment is granted to the Landowner and DEP is ordered to issue an approval letter.

OPINION

E. Marvin Herr, E. M. Herr Farms (Landowner), continues to pursue his efforts to place an industrial park (Millwood Industrial Park) on a 45-acre portion of his land in Pequea Township, Lancaster County (Township). When he filed a preliminary subdivision plan with Lancaster County Planning Commission (LCPC)[1] on December 5, 1989, the 45 acres (Site) was zoned industrial under the MPC and was designated as land to be served by public sewers in the Township's 1971 Act 537 Plan.[2] After several revisions, the preliminary subdivision plan was approved by the LCPC on October 10, 1990.

About six months earlier, on April 24, 1990, the Township had adopted a comprehensive land use plan under Article III of the Pennsylvania Municipalities Plannning Code (MPC), 53 P. S. §§ 10301-10306, seeking to preserve prime agricultural lands and to maintain a rural atmosphere. The plan recommended that the Site remain agricultural in use, but did not have the binding effect of a zoning ordinance. 53 P. S. § 10303(c); *Patterson v. DEP,* 1996 EHB 550, *aff'd sub nom, County of Adams v. Department of Environmental Protection,* 687A.2d 1222 (Pa. Cmwlth. 1997).

---

[1] LCPC served as the planning agency for the Township pursuant to Article II of the Pennsylvania Municipalities Planning Code (MPC), Act of July 31, 1968, P.L. 805, *as reenacted,* Act of December 21, 1988, P.L. 1329, *as amended,* 53 P. S. §§ 10201-10211.

[2] The 1971 Act 537 Plan was a county-wide plan developed pursuant to the Pennsylvania Sewage Facilities Act (commonly referred to as Act 537), Act of January 24, 1966, P.L. (1965) 1535, *as amended,* 35 P. S. §§ 750.1-750.20a, and adopted by the Township on January 4, 1971.

The zoning of the Site was changed from industrial to agricultural on August 22, 1990.

When the LCPC gave its preliminary subdivision plan approval seven weeks later, it was obviously relying on the provisions of section 508(4) of the MPC, 53 P. S. § 10508(4), which give duly filed and approved plans immunity from changes in the zoning, subdivision, or other governing ordinance or plan.

On June 3, 1992 the Township adopted a new Act 537 Plan, which repealed all prior Act 537 Plans. Under this 1992 Plan, the Site was removed from the area to be served by public sewers. The Township submitted the 1992 Plan to DEP for its review and approval under Act 537 on June 22, 1992. About a month later, on July 30, 1992, the Landowner filed with the Township an Act 537 planning module for the sewering of the proposed industrial park. 25 Pa. Code §§ 71.51-71.57. The Township rejected the planning module on September 2, 1992.

The Landowner then turned to DEP, filing a private request under Section 5(b) of Act 537, 35 P. S. § 750.5(b), on October 20, 1992. This private request sought to have DEP order the Township to adopt his planning module as part of its Act 537 Plan.[3] While DEP was considering this private request, it was also reviewing the Township's 1992 Plan. On October 21, 1992, the Township received a letter from DEP that it needed an additional sixty days to complete its review. On November 16, 1992, DEP returned the 1992 Plan because of numerous deficiencies. The Township attempted to address these deficiencies during the months that followed.

---

[3] Section 5(b) of Act 537 authorized DEP to grant a private request if it is determined that the Act 537 Plan is inadequate to meet the applicant's sewage disposal needs. The 1994 amendments to Section 5 do not apply here because they had not yet been enacted at the time DEP granted the private request. *See* Act of December 14, 1994, P.L. 1250. DEP's regulations at 25 Pa. Code § 71.14(a) provided that private requests could be made either on the basis that the Act 537 Plan was not being implemented or was inadequate to meet the applicant's needs.

On September 27, 1993, LCPC gave conditional final approval to the Landowner's subdivision plan for the industrial park. LCPC acted in the belief that the Landowner had a vested right to proceed with the development despite the change in zoning. Final approval was made conditional, however, because the LCPC believed that it lacked authority to address issues relating to the Township's Act 537 Plan. The Township took no appeal from LCPC's grant of final approval.

On November 10, 1993 the Landowner delivered to DEP documents representing his final submission in support of his private request. On February 8, 1994, DEP granted the private request and issued an Order to the Township directing it to approve the Landowner's planning module as part of its Act 537 Plan. Both the Township and the Landowner took timely appeals from this Order, seeking Board review of its issuance (on the Township's part) and of its lack of a specific date (on the Landowner's part).[4]

The Township also sought a supersedeas. After a hearing, the presiding Administrative Law Judge issued an Opinion and Order Sur Petition for Supersedeas on March 25, 1994. *Pequea Township v. DER*, 1994 EHB 415. Determining that DEP had not timely informed the Township of the need for more review time, the presiding judge held that the Township's 1992 Plan was deemed approved on October 20, 1992. Since the 1992 Plan did not provide for public sewers on the Site, the presiding judge reasoned, DEP could not issue the private request Order more than fifteen months later because it conflicted with the approved 1992 Plan.[5]

---

[4] The appeals were filed at EHB Docket Nos. 94-044-E and 94-054-E. The Landowner was allowed to intervene in the Township's Appeal. The two appeals were consolidated on April 13, 1994 at EHB Docket No. 94-044-E.

[5] The initial filing of the Landowner's private request on October 20, 1992 turns out to be the very date that the 1992 Plan was deemed approved.

Following consideration of the supersedeas decision, DEP and the Township entered into an undated Stipulation providing for the withdrawal of the February 8, 1994 Order and the dismissal of the Township's Appeal (EHB Docket No. 94-044-E) as moot.[6] Each party agreed, *inter alia,* to bear its own legal expenses. Pursuant to this Stipulation, DEP on April 4, 1994, withdrew the Order to the Township and denied the Landowner's private request. The Landowner appealed both of these actions on May 4, 1994, the appeals presently before us (EHB Docket Nos. 94-098-E and 94-099-E).

Meanwhile, in the appeals consolidated at EHB Docket No. 94-044-E, the presiding judge issued to the Landowner on April 5, 1994 a Rule to Show Cause why the appeals should not be dismissed as moot. The Landowner responded to the Rule on April 25, 1994. The Township countered the arguments in the Landowner's Response on May 6, 1994.

In an Opinion and Order Sur Mootness issued May 27, 1994, a unanimous Board dismissed the appeals as moot concluding, *inter alia,* (a) that the withdrawal of the February 8, 1994 Order made the appeals moot, (b) that the Landowner's due process rights were protected in the appeals filed at EHB Docket Nos. 94-098-E and 94-099-E, and (c) that the Board has no power to address violations of the MPC. *Pequea Township v. DER*, 1994 EHB 755. The Landowner appealed this decision to Commonwealth Court which, in an order issued on October 20, 1994, granted the Township's Motion to Dismiss and dismissed the appeal. *Herr v. Department of Environmental Resources,* No. 1599 C.D. 1994, (Pa.Cmwlth. filed October 20, 1994). Commonwealth Court issued only an order and did not explain the basis for its action. The Motion to Dismiss was based on mootness. Presumably, the Court agreed that the matter was moot. The Landowner did not request

---

[6] The presiding judge, in a conference call on March 31, 1994, agreed that withdrawing the February 8, 1994 Order would moot the appeal.

the Supreme Court to review the decision.

Meanwhile, in the appeals at EHB Docket Nos. 94-098-E and 94-099-E, the Township had been allowed to intervene, and the two appeals had been consolidated at EHB Docket No. 94-098-E on July 8, 1994. On September 19, 1994 the parties submitted a Stipulation with exhibits to the Board and requested the Board to make a final adjudication on the basis of the Stipulation. In the unanimous Adjudication issued on March 7, 1995, the Board dismissed both appeals, holding, *inter alia,* (a) that DEP's withdrawal of the February 8, 1994 Order was a matter of prosecutorial discretion which the Board cannot review in EHB Docket No. 94-098-E, (b) that the Landowner is not harmed by this ruling because he can raise the same issues in the appeal at EHB Docket No. 94-099-E, (c) that section 508(4)(i), granting vested rights to developers, did not apply to Act 537 Plans, and (d) as a result, the Landowner has not carried his burden of proof in the appeal at EHB Docket No. 94-099-E. *Herr v. DER,* 1995 EHB 311.

The Adjudication was appealed by the Landowner to Commonwealth Court, which issued an unreported Memorandum Opinion on May 31, 1996. The Court reversed the Board and remanded the case for further proceedings, ruling, *inter alia*, (a) that the Board erred in concluding that it lacked jurisdiction to review DEP's withdrawal of the February 8, 1994 Order in EHB Docket No. 94-098-E, (b) that DEP's actions of entering into the Stipulation with the Township and withdrawing the February 8, 1994 Order have escaped any review, (c) that the Board erred in viewing the withdrawal in isolation, and (d) that when an agency's decision or refusal to act impacts personal or property rights etc. or leaves the complainant with no other forum in which to assert his rights, the agency's action is appealable. *Herr v. DER,* No. 862 C.D. 1995 (Pa. Cmwlth. filed May 31, 1996.)

After remand, the parties disagreed on how the appeal should proceed. Administrative Law Judge Robert D. Myers, a Member of the Board, to whom the case had been assigned after Judge Richard S. Ehmann left the Board, issued an Order on September 25, 1996. Acknowledging some uncertainty on the issues remanded, he announced that the issue to be litigated was DEP's actions of entering into the Stipulation with the Township and withdrawing the February 8, 1994 Order. Judge Myers allowed discovery on these issues and set a date of December 2, 1996 for filing of dispositive motions on these issues (later extended to February 10, 1997).

The Landowner filed a Motion for Summary Judgment along with exhibits, an affidavit and a legal memorandum on February 10, 1997. DEP and the Township both answered the Motion on March 14, 1997, also filing exhibits and legal memoranda. The Landowner filed a Reply Brief on March 26, 1997. It is this Motion that is before us for disposition.

We may grant summary judgment as a matter of law (a) when the record shows that the material facts are undisputed, or (b) when the record contains insufficient evidence of facts to make out a *prima facie* cause of action or defense. Pa. R.C.P. Nos. 1035.1 - 1035.5. We must view the Motion in the light most favorable to the non-moving party. *Penoyer v. DER,* 1987 EHB 131.

The Landowner contends that he is entitled to summary judgment because (a) the Stipulation was fatally flawed, (b) the Stipulation failed to include an indispensable party, (c) absolute conformity between a section 5(b) private request and an Act 537 Plan is not required, (d) DEP's actions of entering into the Stipulation and withdrawing the February 8, 1994 Order were not supported by the Supersedeas Opinion, (e) DEP's conduct was manifestly unreasonable, and (f) the Landowner's private request is acceptable under section 5(b) of Act 537 with respect to both the

1971 Act 537 Plan and the 1992 Act 537 Plan.[7]

The heart of the controversy, in our judgment, is embodied in arguments (c) and (f). DEP's entry into the Stipulation and withdrawal of the February 8, 1994 Order was based upon its conclusions (a) that a section 5(b) private request cannot be granted when it conflicts with the approved Act 537 Plan, (b) that the Landowner's section 5(b) private request does conflict with the 1992 Act 537 Plan and (c) the Landowner's section 5(b) private request could not have been legally granted. If these conclusions are faulty, DEP's actions may amount to an abuse of discretion.

The ruling that the 1992 Act 537 Plan was deemed approved and, therefore, was in existence when DEP issued the February 8, 1994 Order is final. *Herr v. Department of Environmental Resources,* No. 862 C.D. 1995 (Pa. Cmwlth. filed May 31, 1996), slip op. at 10-11. As a result, the public sewers the Landowner was proposing for the Site conflict with the provisions of the 1992 Act 537 Plan. Since DEP's outstanding Order of February 8, 1994 was based on the earlier Act 537 Plan, which provided for public sewers on the Site, it was technically no longer appropriate and needed to be reconsidered.

Faced with these circumstances and the legal principles stated by this Board in the Supersedeas Opinion, we cannot say that DEP abused its discretion in withdrawing the February 8, 1994 Order. If that was not an abuse of discretion, neither was the Stipulation that provided for the withdrawal.

We could end this opinion at this point and deny the Landowner's Motion for Summary Judgment, but twice in recent years we have been instructed by Commonwealth Court to take a more

---

[7] DEP and the Township argue that many of these issues are forclosed for one reason or another.

expansive, inclusive view of Act 537 appeals when the landowner claims that a course of conduct has invaded his rights so extensively that it becomes appealable to this Board. In *Middle Creek Bible Conference, Inc. v. Department of Environmental Resources,* 645 A. 2d 295, 300 (Pa. Cmwlth. 1994), Commonwealth Court held that the letter that was the subject of the appeal

> should not be viewed as an isolated, passive expression of acceptance of the Township's 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's letter constitutes an appealable action.

Middle Creek was relied on by Commonwealth Court in its unreported Memorandum Opinion in the present case, reversing the Board on this very point and remanding the case for further proceedings. The Court stated that the Board's opinion in EHB Docket No. 94-098-E

> ignores the factual and procedural circumstances of this voluminous ongoing litigation between [the Landowner], [DEP] and the Township.

Herr v. Department of Environmental Resources, No. 862 C.D. 1995 (Pa.Cmwlth. filed May 31, 1996), slip op. at 21.

In obedience to these instructions, we will refrain from viewing the Stipulation and Order withdrawal in isolation but will proceed to consider whether the Landowner's property rights have been improperly affected by the course of conduct engaged in by DEP and the Township.[8]

There is no dispute over the fact that the Landowner received approval of his preliminary subdivision plan from LCPC on October 10, 1990. This plan called for the development of an industrial park served by public sewers of the Suburban Lancaster Sewer Authority (SLSA) which

---

[8] We never reached this point in *Middle Creek;* the parties negotiated a settlement while the remand was pending.

adjoined the Site. At the time of preliminary plan filing, the proposed development was in conformity with both zoning and Act 537 regulations.

Under the provisions of Section 508 (4) of the MPC, this approved subdivision became immune from certain governmental actions.

> [N]o change . . . of the zoning, subdivision or other governing ordinance or plan shall affect the decision on such application adversely to the applicant and the applicant shall be entitled to a decision in accordance with the provisions of *the governing ordinances or plans as they stood at the time the application was duly filed.* In addition, when a preliminary application has been duly approved, the applicant shall be entitled to *final approval in accordance with the terms of the approved preliminary application as hereinafter provided.*

Section 508(4) of the MPC (emphasis added).[9]

The Landowner apparently filed his final subdivision plan with LCPC in 1991, still proposing an industrial park served by public sewers of SLSA. A December 3, 1991 letter to LCPC from the Township zoning officer discusses the final plan, advising that the plan "generally conforms with the [Township] zoning regulations" and that the preliminary plan was submitted when the Site was zoned for industrial use - a use since changed to agriculture. The final subdivision plan was approved by LCPC on September 27, 1993 with more than forty conditions. One of them, Condition A.6, required the Landowner to

> provide notification from [DEP] that either approval of the Sewer Facility Plan Revision (Plan Revision Module for Land Development) or Supplement has been granted or that such approval is not required. . . .

---

[9] The immunity expires after five years unless the applicant takes certain action. Section 508(4) of the MPC.

Final approval came less than three years after preliminary approval, satisfying the five-year time allowance in section 508(4) of the MPC. Moreover, the final approval accorded with the terms of the preliminary approval with respect to land use and method of sewage disposal. Condition A.6 merely required the Landowner to obtain DEP approval of a planning module if such approval is needed.

Since the Landowner was legally entitled to final approval on the basis of preliminary approval, the question arises whether this right extended to the method of sewering the Site. In our Adjudication of these appeals on March 7, 1995, we held that recognizing vested rights in sewage disposal methods and facilities conflicts with the spirit of Act 537 which envisions plans that are evolving rather than static. *Herr v. DER*, 1995 EHB 311, 328. That ruling failed to consider certain appellate court decisions such as *Raum v. Board of Supervisors*, 370 A.2d 777 (Pa. Cmwlth.1977)[10]

Raum dealt, *inter alia,* with cartway widths of streets shown on the preliminary plan but later changed by the municipality. Conclusion of Law 10 reads as follows:

> When a "plat", as defined by the [MPC] has been approved, the land development improvements shown thereon are approved, and the applicant is entitled to proceed in accordance with the approved plans.

Raum, 370 A.2d at 797-798[11]

The Landowner's plans here show public improvements in the form of new streets, public

---

[10] Some of the other decisions analyzing a landowner's vested rights are *Board of Commissioners v. Toll Brothers, Inc.*, 607 A.2d 824 (Pa. Cmwlth. 1992); *Vogel v. Hopewell Township Board of Supervisors*, 365 A.2d 706 (Pa. Cmwlth 1976); *Ridgeview Associates v. Board of Supervisors,* 333 A.2d 249 (Pa.Cmwlth. 1975).

[11] Sewers were also shown on the plan as an improvement.

water lines and public sewer lines. General Note 2, on the first page of the final plan, states that all lots, except 11 A, will be served with public sewers and public water. Approval of these plans, according to *Raum*, constituted approval of these aspects, entitling the Landowner to proceed. That means that vested rights in Act 537 matters can be obtained by approvals under the MPC.

Some of our prior decisions have recognized this conclusion.[12] In *Borough of Sayre v. DER* 1979 EHB 25, the developer had obtained deemed approval of his proposed development, confirmed by court decision, but was unable to get the municipality to revise its Act 537 Plan to accommodate the project. DER issued an order to approve the planning module as a revision to the Act 537 Plan. The municipality appealed. In affirming DER's order, the Board ruled that, while zoning and land use matters are purely local, once a developer obtains vested rights under the MPC, he is entitled to have his planning module approved.[13]

In *Oley Township v. DEP* , 1996 EHB 1359, a developer who had obtained deemed approval of his proposed development, confirmed by court decision as in *Borough of Sayre,* was denied approval of his planning module for new land development. DEP reviewed his private request and issued an order to the municipality. The municipality appealed. In affirming DEP's action, the Board held, *inter alia,* that once land use has been settled and the developer is allowed to proceed

---

[12] Our opinions on Act 537/MPC issues are not always consistent with each other. These cases are governed largely by their particular facts and by the particular sites involved, and are based on statutory and regulatory authority existing at the time of decision.

[13] It is interesting to note that the Act 537 Plan provided for the developer's land to be served by public sewers. The developer proposed the use of on-site disposal systems because the municipality was not in a position to provide sewer service. The Board relied, *inter alia,* on *Department of Environmental Resources v. Trautner,* 338 A.2d 718 (Pa. Cmwlth. 1975).

with his proposed development, DEP is entitled to rely on that for Act 537 matters.[14]

We reached a similar conclusion in *Hilltown Township v. DEP*, 1996 EHB 1499. The developer there had approval of a preliminary subdivision plan, mandated by court decision, subject to gaining DEP approval for public sewers to serve the site. The relevant Act 537 Plan called for on-site disposal systems which, however, were unsuitable for the development. DEP granted the developer's private request and ordered the municipality to revise the Act 537 Plan because of its inadequacy to meet the developer's needs. The municipality appealed. This board affirmed DEP's action, determining that the developer had land use approval and that DEP was authorized to issue the order since the Act 537 Plan was inadequate to meet the developer's needs.

On the basis of these decisions, we now reject the Board's prior holdings in these appeals that landowners cannot obtain vested rights in Act 537 matters.

How can the Landowner's, or any developer's, vested rights be reconciled with the evolving nature of Act 537 plans which we believe is desirable and in the public interest? A review of our prior decisions in this field shows that we often considered whether there was any evidence that the method of sewage disposal involved would be detrimental to public health, safety and welfare.[15] That was similar to considerations made by Commonwealth Court in *Department of Environmental Resources v. Flynn,* 344 A.2d 720 (Pa. Cmwlth. 1975). There, a landowner had built a house to be

---

[14] In the *Oley Township* case, we distinguished the Board's decisions regarding the Landowner's Site, citing factual distinctions justifying a different result. Since Commonwealth Court reversed and remanded the present cases, there is little need to distinguish those earlier decisions.

[15] This was an important consideration in *Borough of Sayre*; *Kise v. DER,* 1992 EHB 1580; *Oley Township*; and *South Huntingdon Township Board of Supervisors v. DER,* 1990 EHB 197. It also was considered in *Benco, Inc. v. DER,* 1994 EHB 168, 201.

served by an on-site disposal system, relying on a permit that, unknown to him, had been erroneously issued. DER revoked the permit and the landowner appealed. This Board held that the permit could not be revoked on the basis of estoppel unless actual harm to waters of the Commonwealth is shown. Commonwealth Court affirmed, holding that Flynn's good faith reliance on the permit coupled with the lack of any evidence to show that "the public health, safety or welfare would be adversely affected by the use of the permit" entitled Flynn to retain it. *Flynn,* 344 A.2d at 725.

Although the erroneously issued permit in the *Flynn* case differs from an approved subdivision plan, both cases deal with vested rights in the method of sewage disposal. We believe, therefore, that its reasoning is applicable here. We hold that the Landowner has a vested right to proceed with the use of public sewers on the Site unless it can be shown that such use will adversely affect the public health, safety or welfare.

Because of the nature of this showing, we ordinarily would remand the matter to DEP for its consideration. We decline to do that here for two reasons: (1) the Landowner's constitutional right to prompt action and (2) the peculiar facts of this case. The latter reason is based on the fact that the Landowner proposes the use of public sewers on the Site, sewers and treatment facilities in which he has reserved capacity.

Public sewers generally are thought to be the best solution to sewage disposal problems and have been mandated by DEP on numerous occasions. *See* 25 Pa. Code §§ 71.62(b)(1), 72.2(c) and 72.25(f)(2). Regional sewage facilities covering an entire drainage basin or watershed likewise have been encouraged by DEP. *See* 25 Pa. Code §§ 91.15 and 91.31. The disposal of industrial waste, which could be generated by an industrial park along with toxic and hazardous wastes, is best

thought to be handled by POTWs[16] with their pretreatment programs. *See* 25 Pa. Code, Chapter 94.

Neither DEP nor the Township has claimed that the use of public sewers on the Site will adversely affect the public health, safety or welfare. In fact, DEP issued the February 8, 1994 Order calling for Township approval of the use of public sewers. This Order was issued only after careful consideration of its effect on the environment. If the use of public sewers posed a danger to the public health, safety or welfare, DEP would not have required them. The fact that this Order was based on a superseded Act 537 Plan does not vitiate DEP's determination that public sewers would not cause harm.

The Township's main reason for resisting the Landowner's Act 537 Plan revision was to preserve "prime agricultural land." This is a laudable effort, especially in a county known for its agriculture. But in *Kise v. DER,* 1992 EHB 1580, we held that DEP's consideration of that policy relates solely to the particular method of sewage disposal proposed by the developer. As we observed in that case, the installation of on-site disposal facilities with their related piping (properly-buried sewer lines in the present case) can have little adverse impact on using the land for agriculture.

Besides, we held in cases such as *Oley Township,* that preserving prime agricultural land is primarily the responsibility of municipalities under their zoning powers. Here, the Township did revise the zoning of the Site, changing the use from industrial to agriculture. But, under the provisions of Section 508(4) of the MPC, the Landowner was not affected by the change and had a vested right to proceed with the development. The Township did not challenge this vested right

---

[16] POTWs are "publicly owned treatment works" as defined at 25 Pa. Code § 94.1.

by appealing the LCPC's approval of the final plan, as provided by Article IX and Article X-A of the MPC, 53 P. S. §§ 10901- 10916.2 and §§ 11001-A-11006-A, and the matter is now final and unassailable.[17] Having failed to overcome the Landowner's vested rights to develop the Site under the MPC, the Township cannot re-litigate the issue under the guise of Act 537. *South Huntingdon Township,* 1990 EHB 197; *Oley Township.*

It is clear, therefore, that the 1992 Act 537 Plan is inadequate to meet the Landowner's sewage disposal needs under his approved final subdivision plan. While DEP was fully justified in withdrawing the February 8, 1994 Order, it should not have denied the Landowner's private request. Instead, it should have issued another order to the Township, a right reserved by DEP in the Stipulation, to approve the Landowner's planning module as a revision to the 1992 Act 537 Plan. The lack of conformity between the two, contrary to our prior decisions in these cases, does not bar such an order.

Section 5 (b) of Act 537, as noted earlier, provides for the making of private requests when the Act 537 Plan is "inadequate" to meet the applicant's needs. DEP's regulations at 25 Pa. Code § 71.14 expand on this concept by adding to it circumstances where the Act 537 Plan is not being implemented. The Landowner's private request here was treated initially by DEP as one based on the Township's refusal to implement the 1971 Act 537 Plan which called for public sewers. When this Board ruled that the 1992 Act 537 Plan, calling for on-site disposal systems, was the governing document, the Landowner's private request changed from "failure to implement" to "inadequate."

While "failure to implement" may require some conformity to the Act 537 Plan - *the private*

---

[17] The absence of a court order approving the land use, as was present in several of our earlier cases, is of no consequence when the land use has become final by other means.

request does not seek to change the Plan but, instead, seeks to have it implemented. - the concept of "inadequacy", by its very nature, will not conform - *the private request seeks to change the Plan.* We noted this in a similar vein involving conformity between a private request and a comprehensive program of water quality management in the watershed as a whole as set forth in Chapter 91 of the regulations. Section 91.31(b) requires conformity of the project with the Act 537 Plan. We ruled that the conformity requirement was "nonsensical" when applied to a private request seeking a change in the Act 537 Plan on the ground of inadequacy. *Andrews v. DER,* 1993 EHB 548, 561.

Viewing the circumstances as a whole, as we are instructed to do by the remand, we hold that DEP abused its discretion (a) by denying the Landowner's private request and (b) by failing to issue another order to the Township.[18] Considering the matter in the light most favorable to DEP and the Township, we hold that there are no disputed material facts concerning these DEP actions, and that the Landowner is entitled to judgment as a matter of law.

Our next task is crafting a remedy. Ordinarily, we would remand to DEP for action conforming to our opinion. We decline to do that here because of the history of this litigation. We are loathe to put the Landowner back into the multi-agency quagmire that has held up the pursuit of his vested rights for nearly five years already. For that reason, and because we are convinced that serving the Site with public sewers poses no threat to the public health, safety or welfare, we will order DEP to issue a letter to the Landowner approving his planning module as a revision to the

[18] This should not be viewed as being overly critical. We recognize our influence on DEP's actions because of our prior decisions.

Township's Act 537 Plan.[19]

[19] We realize that our disposition of these appeals is equitable in nature. We have acted in equity because, we believe, the remand opinions of Commonwealth Court in this case and in *Middle Creek* required it. Like other courts acting in equity, we have not been bound by some of the technical rules of procedure and principles of law. *See* Pa. R.C.P. Nos. 1501-1550; *Custis v. Serrill*, 154 A. 487 (Pa. 1931).

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

E. MARVIN HERR, E.M. HERR FARMS	:	
	:	
v.	:	**EHB Docket No. 94-098-MR**
	:	**(Consolidated with 94-099-MR)**
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION and PEQUEA TOWNSHIP,	:	
Intervenor	:	

ORDER

AND NOW, this 16th day of June, 1997, it is ordered as follows:

1. The Landowner's Motion for Summary Judgment is Granted.

2. On or before **July 7, 1997**, DEP shall issue a letter to the Landowner approving his planning module as a revision to the Township's 1992 Act 537 Plan.

ENVIRONMENTAL HEARING BOARD

George J. Miller

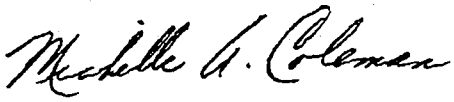
GEORGE J. MILLER
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

EHB Docket No. 94-098-MR
(Consolidated with 94-099-MR)

THOMAS W. RENWAND
Administrative Law Judge
Member



MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: June 16, 1997

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

For the Commonwealth, DEP:
Mary Martha Truschel, Esquire
Southcentral Region

For Appellant:
John J. Gallagher, Esquire
Carl R. Shultz, Esquire
LeBOEUF, LAMB, GREENE & MacRAE
Harrisburg, PA

For Intervenor:
Eugene E. Dice, Esquire
Harrisburg, PA

bap

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

SVONAVEC, INC.	:	
	:	
v.	:	**EHB Docket No. 97-033-MR**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: June 16, 1997**

OPINION AND ORDER ON MOTION TO DISMISS

By Robert D. Myers, Member

Synopsis:

A Motion to Dismiss an appeal for lack of jurisdiction is granted where the Department of Environmental Protection's (DEP) letter to the Appellant is not a final decision on the Appellant's permit renewal application but, rather, is merely an explanation of DEP's position on the bonding requirements for the Appellant's site.

OPINION

Svonavec, Inc. operates a coal preparation plant in Black Township, Somerset County (the Site) under the authority of Coal Mining Activities Permit (CMAP) No. 56841612. In July 1996, Svonavec submitted an application to DEP for renewal of the permit. In August 1996, DEP sent a letter to Svonavec requesting that Svonavec submit, *inter alia*, an updated bond calculation for the

Site.[1] In response to DEP's letter, Svonavec provided additional information.

In a September 23, 1996 letter, DEP informed Svonavec that DEP had reviewed the additional information and had determined that it was inadequate. As a result, DEP had scheduled a pre-denial conference to discuss the deficiencies in Svonavec's permit renewal application. (DEP's Motion to Dismiss, exh. B.) At the October 3, 1996 pre-denial conference, DEP identified the information which DEP needed from Svonavec to complete its review of the application. Some time later, Svonavec supplemented its application with more information. (DEP's Motion to Dismiss, paras. 13-14.)

---

[1] DEP's August 26, 1996 letter stated in pertinent part as follows:

> 1. Submit an updated bond calculation for the site. The structure demolition calculations must list each structure as shown on the updated bond map and include the construction materials, the dimensions, the volume and the demolition cost. Please find enclosed the structure demolition schedule (Module 23). In addition, the reclamation bond is to be revised to provide $3,000 per acre of permit area.
>
> The Department may approve alternative structure demolition amounts which are based on valid contractor's cost estimates. Each request must include two estimates from independent contractors for completing all demolition work. Each estimate must include a description of each structure to be demolished, the time and labor associated with the work, and the time and cost of equipment needed to do the work. Estimates may not include adjustments for the value of salvaged equipment. Each estimate must be certified as representing a reasonable account of the work to be done and the costs necessary to complete the job by a qualified registered professional engineer. The Division of Permits will take the average of the two estimates to obtain a final figure, unless there is a large amount of disparity between the estimates, in which case the Division will use the estimate closest to others in Division files. The Division will add 15% on to the final estimate to account for administrative costs which would be incurred on a bond forfeiture reclamation project.

(DEP's Motion to Dismiss, exh. A.)

In November 1996, DEP sent another letter to Svonavec informing Svonavec that DEP had reviewed Svonavec's correspondence with DEP concerning the bonding calculations for the Site. DEP noted that the Site was originally permitted under bonding guidelines dated February 25, 1986; however, these guidelines had been revised on July 1, 1993. DEP attached a copy of the current guidelines and pointed out that bond for a structure is required unless the structure is in its state of post-mining land use.[2] DEP further indicated that, because Svonavec's preparation plant, refuse bin, and thickener are not in their state of post-mining land use, Svonavec must include those structures in its bond calculations. DEP concluded its letter by stating that failure to submit a revised bond calculation within 15 days of the November 25, 1996 letter "will result in the denial of the renewal application and subsequent order for reclamation." (DEP's Motion to Dismiss, exh. C.)

On January 7, 1997, Svonavec telephoned DEP and indicated that it did not fully understand the current guidelines; thus, Svonavec requested further information about them. In response to Svonavec's request, DEP sent a letter, the body of which is set forth here in its entirety:

> Pursuant to our phone conversation on January 7, 199[7], I shall attempt to explain [DEP's] position on the bonding requirements for the above referenced site. In my November 25, 1996 letter, I requested a revised bond calculation and submission schedule for the preparation plant, refuse bin and thickener. This request was based on the requirements of the Bonding Guidelines dated July 1, 1993.
>
> Subsequently, I received both a telephone call and letter from Patrick Svonavec indicating that he did not fully understand the guidelines and requested further information. I have consulted with our Central Office staff as well as our legal staff on this matter. The following explanation accurately describes [DEP's] position on this site. In Section 4, special considerations and exceptions to base rates, letter C; it states that "structures with valid post-mining land uses need not be assessed for demolition". We feel that under these guidelines, the proposed post-

---

[2] DEP stated that bond was not required for Svonavec's bath house and shop because these structures were already in their state of post-mining land use. (DEP's Motion to Dismiss, exh. C.)

mining uses for the prep plant, refuse bin and clarifier are considered "unreasonable" and speculative at best. These facilities are suited to few other uses other than coal processing and should be removed at the end of mining unless the post-mining landowner actually converts them to some beneficial use. Therefore, [DEP] is requiring demolition bonds for these structures.

I have offered to explain these facts at a meeting; however, you requested our policy in writing. If you wish to meet to further confer on this matter, I would be happy to do so. I believe this clearly explains the position of my office on this case; therefore, I will reestablish the 15 day deadline for the submission of a bond calculation and submission schedule by this letter.

Should you have any questions, please contact me at the above number.

(DEP's Motion to Dismiss, exh. D.)

On January 28, 1997, Svonavec filed a Notice of Appeal with the Board challenging DEP's January 7, 1997 request for demolition bond calculations which include Svonavec's preparation plant, refuse bin and thickener. The Board issued a pre-hearing order setting deadlines for discovery and the filing of dispositive motions.

On April 9, 1997, DEP filed its Motion to Dismiss contending that the January 7, 1997 letter does not constitute an appealable action or an adjudication. On May 6, 1997, Svonavec filed a response to the motion.[3] On May 27, 1997, DEP filed a reply to Svonavec's response. We now address whether DEP's January 7, 1997 letter to Svonavec constitutes an appealable action.

Section 4(a) of the Environmental Hearing Board Act, Act of July 13, 1988, P.L. 530, 35 P.S.

---

[3] On May 19, 1997, DEP filed a Motion to Strike Svonavec's Response as untimely. However, in the Response, Svonavec does not deny the well-pleaded facts which are necessary to dispose of the Motion to Dismiss. Thus, because the grant or denial of DEP's Motion to Strike would have no effect on the outcome here, we decline to address it. Nevertheless, we note that DEP's allegation that the January 7, 1997 letter was merely advisory is a question of law based on the actual language of the letter. It is not a well-pleaded fact that will be deemed admitted absent a denial. *See* 25 Pa. Code § 1021.70(f).

§ 7514(a), limits the Board's jurisdiction to the review of "orders, permits, licenses or decisions" of DEP. The Board's Rules of Practice and Procedure (Rules) refer to these collectively as DEP "actions." The Rules define the term "action" as:

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

25 Pa. Code § 1021.2(a). In *Phoenix Resources, Inc. v. DER*, 1991 EHB 1681, 1684 (emphasis added), the Board commented on this definition as follows:

> [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.[4]

Indeed, the permit application process is such that the applicant's concerns may be resolved as a result of the interplay between DEP and the applicant, or the applicant may have new concerns by

---

[4] In *Gardner v. Department of Environmental Resources*, 658 A.2d 440, 444 (Pa. Cmwlth. 1995) (citations omitted), the Commonwealth Court used similar language in discussing the principle of ripeness.

> The purpose of the ripeness requirement . . . is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.

the time DEP reaches a final decision on the application. *New Hanover Corporation v. DER*, 1989 EHB 1075. Until DEP's final decision is embodied in the grant or denial of the permit application, we will not intrude upon the process. *Id.*; *see also Epstein v. DER*, 1994 EHB 1471; *Environmental Neighbors United Front v. DER*, 1992 EHB 1247, *aff'd*, 632 A.2d 1097 (Pa. Cmwlth. 1993); and *Plymouth Township v. DER*, 1990 EHB 974.

Here, DEP's January 7, 1997 letter is merely a response to Svonavec's request for an explanation of DEP's current bonding guidelines, nothing more.[5] In its November 1996 letter, DEP informed Svonavec that the bath house and shop may be excluded from the bond calculations, but that the preparation plant, refuse bin, and thickener would have to be included therein. When Svonavec requested a written explanation, DEP sent the January 7, 1997 letter. The letter offers an explanation of DEP's "decision" and invites further discussion on the matter if the explanation does not suffice. Such a letter typifies the interplay that occurs between DEP and an applicant during the permit process; it explains DEP's provisional and interlocutory "decision" on the bond calculations which Svonavec must submit in order for DEP to complete its review of the application. This "decision" may eventually affect Svonavec's obligations under the permit; however, until DEP renders a final decision on Svonavec's application, the "decision" has no concrete effect.[6]

---

[5] Indeed, the letter explicitly states that its intention is to provide such an explanation in response to Svonavec's request. The Board has stated that, in order to determine whether a DEP communication is an appealable action, we examine the language of the letter itself. *M.W. Farmer Co. v. DER*, 1995 EHB 29. In addition, the Board has held that letters which are advisory in nature are not appealable. *Id.; Eagle Enterprises, Inc. v. DEP*, 1996 EHB 1048.

[6] If Svonavec disagrees with DEP's "decision," Svonavec has two options. Svonavec may refuse to provide the revised bonding calculations and insist that DEP take final action on the application as submitted, or Svonavec may provide the revised bonding calculations to DEP and file an appeal after DEP has taken final action on the permit application.

Because DEP's January 7, 1997 letter does not constitute DEP's final action on Svonavec's permit renewal application, we grant DEP's Motion to Dismiss Svonavec's appeal for lack of jurisdiction.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

SVONAVEC, INC.	:	
	:	
v.	:	**EHB Docket No. 97-033-MR**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 16th day of June, 1997, it is ordered that the Motion to Dismiss filed by the Commonwealth of Pennsylvania, Department of Environmental Protection is granted.

ENVIRONMENTAL HEARING BOARD

GEORGE J. MILLER
Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: June 16, 1997

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

For the Commonwealth, DEP:
Steven Lachman, Esquire
Barbara J. Grabowski, Esquire
Office of Chief Counsel
400 Waterfront Drive
Pittsburgh, PA 15222-4745

For Appellant:
Patrick P. Svonavec, Esquire
BARBERA, CLAPPER, BEENER, RULLO & MELVIN
146 West Main Street
P. O. Box 775
Somerset, PA 15501-0775

bap

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

LCA LEASING, INC.	:	
	:	
v.	:	**Docket No. 95-203-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued:** June 17, 1997

ADJUDICATION

By George J. Miller, Administrative Law Judge

Synopsis:

The Department did not abuse its discretion in cancelling a solid waste permit for an inactive solid waste transfer station and returning its application for renewal of that permit when that applicant offered to surrender its permitted capacity to an affiliated company proposing to engage in the remediation of contaminated soil at substantially the same location. The Department issued the permit to the affiliated company relying on the reduced traffic that might result from the surrender of the transfer station permit. Further, the applicant for the inactive transfer station did not clearly advise the Department personnel charged with the responsibility for issuance of the soil remediation permit that the transfer station's offer to surrender its permitted capacity had been changed in any way.

BACKGROUND

This appeal arises from the Department of Environmental Protection's (Department) return

of LCA Leasing, Inc.'s (LCA) application for renewal of a Solid Waste Permit issued to it authorizing the operation of a municipal waste transfer recycling facility known as the Chester Solid Waste Transfer Station and Recycling Facility located at Front and Thurlow Streets in Chester, Pennsylvania. LCA had filed a permit renewal application for the operation of this facility as a result of a change in the Department's regulations with respect to waste transfer facilities.

The hearing on the merits was held for three days on February 18-20, 1997. Following the hearing, the parties filed extensive requests for findings of fact and conclusions of law and supporting legal briefs. The record consists of the pleadings, a joint stipulation of facts, a transcript totaling 637 pages and 72 exhibits. After a full and complete review of the record and briefs we make the following:

FINDINGS OF FACT[1]

1. The Department is the agency of the Commonwealth with the authority to administer and enforce the Solid Waste Management Act, Act of July 7, 1980, P.L. 380, *as amended*, 35 P.S. §§ 6018.101-.1003. (Solid Waste Management Act), and the rules and regulations adopted thereunder. (J.S. 1)

2. LCA is a Pennsylvania corporation with a business address of 625 Liberty Avenue, CNG Tower, Suite 3100, Pittsburgh, PA 15222-3124. (J.S. 2)

3. On December 8, 1987, the Department issued Solid Waste Permit No. 101469 to LCA authorizing the operation of a municipal waste transfer and recycling facility known as the Chester Solid Waste Transfer Station and Recycling Facility. (J.S. 3)

---

[1] The parties' joint stipulation is hereinafter cited as "J.S. ___"; the notes of testimony as "N.T. ___"; LCA's exhibits as "A Ex. ___"; the Department's exhibits a "C Ex. ___."

4. LCA, a municipal waste transfer facility, was one of four waste facilities developed by Chester Solid Waste Associates, a limited partnership, to occupy a 52 acre site at Front and Thurlow Streets in the city of Chester. (N.T. 250; J.S. 8)

5. In approximately 1985, Chester Solid Waste Associates developed the Delaware County Resource Recovery Facility, a trash to steam plant, on a portion of the site which it leased and ultimately sold to Westinghouse Corporation. (N.T. 253-54)

6. This site is divided into two dominant parts. On a 23.2 acre portion of the site sits the Westinghouse Incinerator. On the remaining portion of the site are Thermal Pure Systems, Inc., SRS, the LCA transfer station and assorted non-waste related properties. (J.S. 8; N.T. 10, 125, 152)

7. The corporate structure of Chester Solid Waste Associates is interrelated with that of LCA and another entity known as Soil Remediation Systems, Inc. (SRS) in that many of the same individuals serve as officers and directors in the various corporations. (J.S. 9)

8. Donald Rea serves as a corporate officer of Chester Solid Waste Associates, LCA and SRS. Rea is also the president of National Waste Industries, the owner of SRS. Edward Bistany serves as corporate officer of both LCA and Chester Solid Waste Associates. (J.S. 10-11)

9. LCA and SRS utilized the services of the same consulting firm to prepare and submit their respective permit applications, namely, American Resource Consultants, Inc. (ARC). (N.T. 311-12)

10. In 1986, Chester Solid Waste Associates formed LCA to be a corporate entity for leasing the property and to apply for a permit for a transfer facility to be located on the remainder of the property. (N.T. 257)

11. The LCA facility was originally permitted in December, 1987 to accept 1,600 tons

per day (tpd) of municipal solid waste. (J.S. 4)

12. This figure also took into consideration traffic impacts. This limitation was developed as a result of discussions with the city of Chester and an analysis of the traffic impact of the LCA facility by the Pennsylvania Department of Transportation (DOT). (N.T. 132-33, 262-63; A Ex. 3; C Ex. 3-6).

13. Sometime after the permit application for LCA was filed with the Department, Chester Solid Waste Associates began work on a proposal to site an infectious waste facility on the property to be operated by a corporation named Thermal Pure. Negotiations were conducted with the city of Chester with respect to a host community agreement in 1988-89. (N.T. 10, 130-31).

14. To facilitate the permitting of Thermal Pure, there was an agreement between LCA and Thermal Pure to transfer 403 tpd of LCA's permitted capacity to Thermal Pure. (N.T. 13-18, 136, 261; A Ex. 4).

15. In 1993 the Department issued a permit to Thermal Pure to operate a 403 tpd medical waste processing facility. (J.S. 12)

16. Revised regulations governing the construction and operation of municipal waste facilities took effect on April 9, 1988, which provided that existing permits without a permit term expired on April 9, 1993, and required permittees to apply for permit renewal. On or about August 30, 1991, in compliance with the Department's municipal waste management regulations, LCA submitted to the Department a permit renewal application to conduct municipal waste transfer activities at the LCA facility. (J.S. 5).

17. The Department provided LCA with both administrative completeness and technical review letters on its permit renewal application. (J.S. 7; C Exs. 10, 15).

18. LCA has not operated the transfer station since February 1992. (Motion for Summary Judgment ¶ 15)[2]

19. At its highest level of operation, LCA operated at an 800 to 900 tpd level of waste acceptance. (N.T. 160-61)

20. Despite the fact that LCA had ceased operating at the site, the public continued to express concerns about truck traffic and the resultant nuisances at the Chester Solid Waste site throughout the SRS permitting process. (N.T. 457-59)

21. While the LCA permit renewal application was pending, Chester Solid Waste Associates created SRS and submitted to the Department an application for a facility to remediate soil contaminated with virgin petroleum with a heat treatment process and submitted the application to the Department in October, 1992. (N.T. 18-19, 353-54)

22. SRS originally proposed a 600 tpd thermal facility and hoped to add a second thermal unit which would increase its capacity to a total of 1,200 tpd. (N.T. 19-20)

23. In 1993, SRS decided to substitute one large heat unit and submitted a revised application for a single thermal unit operating at 1,200 tpd. (N.T. 23-24)

24. As it did in the case of Thermal Pure, LCA indicated its intention to surrender tonnage to accommodate the SRS facility. (N.T. 18-23)

25. On November 4, 1992, in connection with the SRS application, ARC, a consultant serving both LCA and SRS, reported to the DOT that there will be no increase in traffic because of the SRS permit application because the permit application was for 600 tpd and when that application

---

[2] The allegations of undisputed fact from the Appellant's motion for summary judgment were entered into the record of this case as uncontested facts. (N.T. 7)

is approved, LCA will reduce its permitted capacity by 600 tpd. They additionally advised the DOT that when the second 600 ton unit is added, LCA will surrender the remaining 600 tpd. (A Ex. 5; C Ex. 15)

26. Accordingly, on December 14, 1992, DOT advised DEP that it approved of the SRS application from a traffic point of view based on the commitment from LCA to cede its capacity to SRS. (C Ex. 17)

27. Larry Lunsk, a facilities manager in the Department's waste management program, supervised the technical staff on permit applications, including the LCA application. (N.T. 347-48)

28. Tom Pullar and Edward Prout of ARC told Larry Lunsk to suspend review of LCA's permit because they were primarily concerned with the SRS application. (N.T. 359-60)

29. Edward Prout is President of ARC and was the project director for both the LCA and SRS projects. (N.T. 310; 312; 359-60)

30. It was Lunsk's understanding that when the SRS permit was issued, LCA would "go away." (N.T. 358-59)

31. The repermitting application was not withdrawn, however, because the principals did not want to give up the LCA facility until they were sure that SRS would receive a permit. (N.T.431)

32. On March 4, 1993, in response to a Department inquiry, ARC advised the Department that LCA intended to relinquish part of its permitted capacity to SRS so that the combined facilities on the Chester Waste Associates property would not exceed 1,600 tpd previously approved by the Department and DOT. (A Ex. 7)

33. On April 1, 1993, the Department wrote to LCA requesting that it withdraw its repermitting application on the basis that the capacity of Thermal Pure and SRS would consume all

of LCA's permitted capacity. (A Ex. 8)

34. LCA did not withdraw its repermitting application. On April 5, 1993, LCA's consultants advised the Department that LCA intended to retain any residual capacity remaining from its permit. (A Ex. 9)

35. At the same time that the Department was considering SRS' solid waste permit application, it was also considering SRS' application for an air quality permit for the facility.

36. At some point in the permitting process, SRS reduced its proposed processing capacity to 900 tpd to address the Department's concerns regarding air emissions by limiting its operation to only two shifts per day. (N.T. 50; 72-73; 362)

37. In a technical review letter dated April 29, 1994, the Department informed SRS that, despite the steps taken to date, the Department had determined that its proposal had the potential to cause environmental harm and that it should, therefore, provide a written explanation of how it planned to mitigate potential harm caused by the proposed facility. The mitigation was to include an analysis of "the potential impacts from fugitive emissions, noise and vibrations from the proposed truck traffic and equipment." The letter also requested that SRS submit an up-to-date traffic study. (C Ex. 27 at 1-2)

38. In response to the Department's April 29, 1994 technical review letter, SRS submitted a traffic impact study. The study found that "[i]n addition to the traffic generated by the proposed project [SRS], the traffic to be generated by three other facilities on Harwick Street has to be accounted for [Westinghouse, Thermal Pure and LCA]. The study then went on to consider the impacts of these facilities. (C Ex. 29 at § 5.4, p. 24)

39. Mr. Clement, the ARC employee who prepared the SRS application, testified that

even though SRS had reduced its proposed processing capacity to 900 tpd, SRS still hoped that it could obtain a permit which would allow them to accept 1,200 tpd. (N.T. 50-51)

40. Mr. McClellan, an SRS consultant, testified that as of August 29, 1994, SRS was proposing to "accept for processing" 900 tpd. (N.T. 233)

41. Mr. Clement testified that he thought it was clear that LCA intended to retain any residual capacity. (N.T. 95)

42. Before July 6, 1995, there was no letter written to the Department explaining that LCA intended to retain a 300 tpd residual capacity or that any residual capacity would be available to it after the SRS permit was issued. (N.T. 104, 300)

43. On August 16, 1994, the Department sent SRS a technical comment letter which addressed certain deficiencies in the SRS solid waste and air quality permit applications including the effect of increased fugitive emissions, noise and vibration resulting from truck traffic related to the project. The letter invited SRS to a meeting to discuss these deficiencies on August 29-30, 1994. (Ex. A 14)

44. On August 29, 1994, representatives from SRS, LCA and their consultants met with representatives from the Department to discuss the technical issues related to the SRS permits as set forth in the August 16 letter. (N.T. 186;363)

45. In the Department's view, potential environmental harm from traffic, specifically vehicle emission, noise and vibrations, were critical issues to be addressed. (N.T. 479-80)

46. These issues were discussed at the meeting. (E.g., N.T. 187-89)

47. Donald Rea testified that he was anxious to get the SRS project completed and was frustrated that the approval process was taking so long. (N.T. 271;279-81)

48. Mr. Rea testified that he proposed surrendering the entire LCA permit in exchange for a decision on the SRS permit within 30 days. (N.T. 271; 278-80)

49. Edward Prout and Stuart Clement of ARC, and Mark McClellan, President of Evergreen Environmental, another consulting firm retained by SRS, all testified that they recalled Mr. Rea making this proposal. (N.T. 324-25; 195; 43-44)

50. Mr. Prout testified that the deal was to give up 1,200 tpd of LCA capacity for a 900 tpd SRS permit. (N.T. 337-38)

51. None testified that they recalled anyone from the Department committing to a 30 day decision on the permit in exchange for the surrender of the LCA permit. (See N.T. 324)

52. Ronald Furlan, the Department's Program Manager for Waste Management Programs testified that it was his recollection that LCA proposed surrendering all of the LCA truck traffic to offset the impacts from SRS. He responded that the proposal should be put in writing. (N.T. 525-26; C Ex. 33)

53. Mr. Lunsk did not have any specific recollection of any discussions regarding surrendering the LCA permit during the August 29, 1994 meeting. (N.T. 363)

54. Mr. Lunsk did recall that Mr. Rue, Regional Director of the Department's Southeast Regional Office, indicated that the Department would be in touch with SRS within 30 days of receiving its response to the technical comment document. (N.T. 386)

55. Messrs. Rea and Prout testified that Mr. Rue made a commitment to issue the permit within 30 days of receipt of a response to the Department's comment letter. (N.T. 280-81; 324-25)

56. But other Department personnel at the meeting recalled no such commitment. (N.T. 471;557-60)

57. There was no testimony that LCA or its representatives ever discussed with the Department after August 29, 1994, what would happen to any residual capacity of the LCA facility if SRS was permitted for less than 1,200 tpd and there was no letter from anyone after that meeting that spoke of a residual capacity until July 6, 1995, well after the SRS permit had been issued.

58. After the meeting, on September 6, 1994, SRS wrote to the Department to confirm what was needed to be submitted in order to address the August 16 comment letter. The letter reiterates SRS' understanding of the 30 day commitment of the Department, i.e. that the Department would render a decision on the permit within 30 days of receipt of the response letter. (A Ex. 15)

59. This letter also did not mention the LCA permit or an offer to surrender the LCA permit in exchange for a 30 day decision. (A Ex. 15; N.T. 86,89)

60. The Department responded by letter dated September 22, 1994. The Department believed that certain items in SRS' September 6 letter were inaccurate or needed clarification. It did not address the issue of the 30 day response. (A Ex. 17)

61. On September 30, 1994, SRS prepared a letter formally responding to the Department's August 16 technical comment letter. (A Ex. 18)

62. In the part addressing potential harm, the letter stated, "[a]s has been the case all along, once a permit is issued to SRS, the permit for LCA Transfer Station (1200 TPD) will be surrendered to prevent a net increase in the impact of the facilities at this site upon the surrounding community." (A Ex. 18)

63. The letter also stated that "[t]he calculations included in Attachment K, demonstrate that the truck traffic associated with LCA will mean a net decrease in vehicle stack emissions for the traffic utilizing the access road." Attachment K, entitled "Vehicle Emissions (Permitted vs.

Proposed)", listed under the subheading "Existing Permitted Daily Traffic", data associated with LCA, Thermal Pure, and Westinghouse. Under the heading "Proposed Daily Capacity" LCA was not listed. (A Ex. 18)

64. Attachment K was never modified. (N.T. 80)

65. There was no statement in the September 30 letter that if SRS was only permitted for 900 tpd, there would be a residual 300 tpd left over for LCA. (N.T. 95;104;300)

66. The letter also reiterated the understanding that the Department would render a decision on the permit within 30 days. (A Ex. 18)

67. The letter does not make the surrender of the LCA permit contingent upon a 30 day decision.

68. In November 1994 the Department prepared a draft denial letter which was inadvertently mailed to SRS. (N.T. 388-91; A Ex. 19)

69. SRS was told to ignore the letter. (N.T. 492-93)

70. Gregg Robertson became a Deputy Secretary for the Department in March of 1987. He became Acting Secretary of the Department in November 1994 until leaving the Department n January 1995. His responsibilities included management of all regulatory programs as they were implemented in the field. (N.T. 487, 508-509)

71. He met with Messrs. Rea and McClellan to discuss the SRS permit in November 1994. (N.T. 491-92)

72. After these meetings no decision on the SRS permit was made. (N.T. 280-90)

73. Mr. Rea testified that he viewed these events as the Department's reneging on its commitment to make a prompt decision on the SRS permit and so shortly after the meetings he

advised Mr. Robertson that "all bets were off" and all offers were "off the table." (N.T. 288-90)

74. Mr. Robertson testified that although he had some conversations with Mr. Rea concerning the length of time it was taking to issue the SRS permit, he was not aware of any deal to surrender the LCA permit in exchange for a 30 day decision and he was not told by Mr. Rea or anyone else that the offer was withdrawn. (N.T. 491-92, 493)

75. Mr. Rea never attempted to communicate that the deal was off to the individuals responsible for the issuance of the SRS permit in the Department's regional office. (N.T. 305-306)

76. The Board finds the testimony of Mr. Robertson to be more credible and convincing than Mr. Rea on this issue.

77. By late winter 1995, the SRS permit had still not been issued, and Mr. Rea did not have much hope that it would be issued. (N.T. 291)

78. He testified that since LCA had found a potential operator for the facility, he decided to reactivate the LCA facility. (N.T. 56, 58, 291)

79. Accordingly, Mr. Prout wrote to the Department on February 22, 1995 and March 28, 1995, advising them of the intended reactivation. (A Ex. 21; A Ex. 22)

80. Mr. Lunsk and the Department reasonably believed that the letters were written to keep pressure on the Department to issue SRS application as no one had discussed the LCA renewal application for a couple of years and LCA did not change its previous request that the LCA permit not be processed pending the Department's action on the SRS application. (N.T. 377)

81. SRS received a draft copy of the proposed solid waste permit for SRS in mid-June 1995 so that the company would have an opportunity to challenge any conditions in advance of issuance and to ensure that both SRS and the Department were agreeing to the terms to avoid any

potential appeals of the permit. That draft provided a 900 tpd limit on the acceptance of waste. (N.T. 207)

82. On June 28, 1995, the Department issued a permit to SRS. The permit provided a 900 tpd limit on acceptance of waste, but did not contain a condition that LCA surrender its permit. (J.S. 19; C Ex. 45; N.T. 60-61)

83. The Department would not normally impose such a condition in a permit. (N.T. 392, 541)

84. The Department stated its understanding the LCA permit would be surrendered in the comment response document issued with the SRS permit. (C Ex. 48 at Comments 4, 14)

85. Mr. Clement was aware that the Department issued such a document routinely. (N.T. 103)

86. After its issuance, ARC went through the permit with its client, condition by condition. (N.T. 60)

87. In the permit the Department incorporated the September 30 letter which contained the offer to surrender the LCA permit, and it thereby became part of the permit. (C Ex. 45; N.T. 540-41)

88. SRS did not appeal its permit because the principals were satisfied with the conditions in the permit and were not concerned about the fact that they were limited to accepting 900 tpd of waste instead of 1,200 tpd. (N.T. 333)

89. The permit included the public response document wherein the Department stated that the LCA permit would be surrendered when the SRS permit was issued. (C Ex. 48)

90. Mr. Prout saw that document in July, 1995. (N.T. 334-35)

91. By letter dated July 6, 1995, LCA stated its intention to retain any residual capacity and proposed a permit condition which would allow the capacities of the various facilities to "float" based on the actual operations at the facilities. (A Ex. 27)

92. By letter dated August 18, 1995, the Department rejected the "float concept", revoked the LCA permit and returned the repermitting application. (A Ex. 1)

93. The Department's action was based on LCA's commitment to surrender its remaining capacity if a permit was issued to SRS. (N.T. 459-61; 467-71)

94. The Department had issued the permit to SRS based on this commitment because this commitment alleviated the impact of increased truck traffic on the neighboring community. (A Ex. 1)

DISCUSSION

In an appeal of an action of the Department our role is to determine whether or not the Department abused its discretion or committed an error of law. Our review is *de novo*, therefore the Board is not limited to considering the evidence the Department actually had before it at the time it acted but considers evidence presented before the Board. *Warren Sand and Gravel Co., Inc. v. Department of Environmental Resources*, 341 A.2d 556 (Pa. Cmwlth. 1975). Where the Department acts pursuant to mandatory authority of a statute or regulation the only question for the Board is whether to uphold or vacate the Department's action. On the other hand, where the Department exercises its discretionary authority the Board may substitute its discretion for the Department's. *Id.* However, we are not required to do so. *Western Hickory Coal Company v. Department of Environmental Resources*, 485 A.2d 877 (Pa. Cmwlth. 1984).

The Board will find that the Department has abused its discretion where the action is not

based on facts or evidence or is an arbitrary exercise of its duties or functions. *Al Hamilton Contracting Co. v. DER*, 1995 EHB 855. However,

> [a] mere 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 unreasonably 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.

The Appellant first argues that the burden of proof in this matter rests with the Department. The Department in contrast, contends that the burden rests entirely with the Appellant.[3] We disagree with both parties.

The burden of proof in proceedings before the Board is governed by 25 Pa. Code § 1021.101. Situations where the Department bears the burden of proof are enumerated in subsection (b), which include, among others, when the Department has revoked a permit for cause. 25 Pa. Code § 1021.101(b)(2). However the party appealing an action bears the burden where, among other things, the Department refuses to grant or reissue a permit. 25 Pa. Code § 1021.101(c)(1). Both of these sections apply in this case.

The August 18, 1995 letter which provides the basis for this appeal does two things: it returned the LCA repermitting application and revoked the underlying permit. The return of the application was essentially a refusal to reissue a permit. Therefore the Appellant bears the burden

---

[3] The Department cites *Board of Supervisors of Middle Paxton Township v. DER*, 1995 EHB 160, in support of its argument. Not only was the burden of proof not at issue in this appeal from the Department's disapproval of a sewage plan, but it has been reversed by the Commonwealth Court. *Board of Supervisors of Middle Paxton Township v. Department of Environmental Resources*, 669 A.2d 418 (Pa. Cmwlth. 1995).

of proving that the Department abused its discretion in so doing. We believe that the revocation of the underlying permit falls under the purview of Rule 1021.101(b), even though the revocation of the permit was based on LCA's agreement to surrender the permit. The Department bears the burden of proving the affirmative that its action was proper. With this in mind, we first turn our consideration to the return of the repermitting application.

The Appellant argues that the basis for the return of the repermitting application was the Department's rejection of the floating capacity proposal in the July 6, 1995 letter. This assertion is not borne out by the text of the August 18, 1995 letter. The Department's letter does reject the float proposal but goes on to note that LCA offered to relinquish its permit when SRS was permitted and cites the September 30, 1994 letter from ARC to the Department. (A Ex. 18) It is clear from Mr. Kennedy's testimony that the Department returned the LCA repermitting application based on the September 30 letter and its understanding that LCA would relinquish its permit when SRS was permitted. (N.T. 460-61)

The Appellant also argues that the Department erred in returning the repermitting application because it was "unreasonable to conclude that LCA intended to give up the LCA permit even where the SRS permit would ultimately be denied on appeal." By returning the repermitting application after the appeal period for SRS had expired, Appellant charges that the Department exercised "poor judgment" under the circumstances.

While the Department obviously had several courses of action to choose from rather than returning the application when it did, we can not say as a matter of law that it abused its discretion. The public comment document which it issued clearly stated that LCA had agreed to surrender its permitted capacity. Mr. Prout saw that document in July. The Department has no duty to protect the

interests of a permittee in ensuring that a solid waste venture is a viable, profit-making business and the issuance of any permit may be appealed. Significantly, the offer made by LCA to surrender its permitted capacity was not contingent on there being no appeal from the issuance of the permit to SRS. There is certainly no evidence that the Department had any improper motive in returning the permit application when it did. While it might have required LCA to formally surrender its permit prior to the issuance of the SRS permit, its failure to do so does not rise to an abuse of discretion.

The Appellant next contends that the return of the application was in error because it did not conform to the Department's model permit process. The Appellant admits that there is no evidence that the model permit process was binding upon the Department, but argues instead that the return of the application "is not what common sense would require." (Appellants Brief at 12)

We find that LCA waived the procedural steps in the model process when it began to use the LCA permit as a bargaining chip for the SRS permit.[4] LCA told the Department to suspend review of the permit. It is clear from the evidence that the Department thought that LCA intended to relinquish its entire permit if the SRS permit was granted. Considering all the evidence we find that this belief on the part of the Department was not unreasonable. Under these circumstances, the

---

[4] As we stated in our summary judgement opinion in this case, "if the commitment contained in the September 30, 1994 letter was not conditioned on a commitment that the Department make a permit decision in 30 days, Appellant's letter must be viewed as a waiver of these procedural steps." *LCA Leasing, Inc. v. DEP*, 1996 EHB 1053, 1058. While Mr. Rea testified that his offer was contingent on a 30 permit decision, there is nothing in the correspondence between the Department and LCA between the August 29th meeting and the September 30 letter which makes the surrender of the LCA permit contingent upon a 30 day decision. No one from the Department recalled that the offer to relinquish the LCA permit was contingent on a 30 day decision. At no time did Mr. Rea or any of his consultants notify the Department personnel to whom the offer had been made that the offer was withdrawn. Considering all the evidence, we find that the Department reasonably believed that LCA had agreed to surrender its permit if the SRS permit was issued even at the 900 tpd level.

return of the application was the natural result of LCA's agreement and can not rise to the level of an abuse of discretion. In sum, we find that the Department did not abuse its discretion in returning LCA's permit application.

We next turn to the revocation of the LCA permit. The Appellant contends that it did not intend to relinquish the entire LCA permit but wished to retain any residual tonnage not used in the SRS permit. The theme of this argument seems to be that the Department "should have" known that LCA intended to retain this capacity in spite of its offer to surrender its permitted capacity if the SRS permit was issued, and, LCA "assumed" that there was an "understanding." Regardness of which party has the burden of proof, we find that the responsibility of ensuring that there are no misunderstandings in the permitting process must fall squarely on the shoulders of the permit applicant.

It is very clear from the evidence in this case that until the August 29th meeting, there was some confusion and misunderstanding with respect to the fate of LCA's permitted capacity if the SRS permit was issued. In addition, the recollection of the witnesses concerning the content of the August 29th meeting varies from person to person. However, there is no evidence that anyone ever discussed what would happen if SRS was permitted for less than 1,200 tpd, either orally or in writing between the August meeting and the issuance of the SRS permit. Yet the consultants were certainly aware that the proposed tonnage for SRS would probably be reduced to 900 tpd to address air quality issues. This should have put the Appellant on notice that the issue of residual tonnage should be discussed with the Department, optimally in writing, and before the SRS permit was issued. While LCA did notify the Department that it intended to reactivate the LCA facility at a level of 1,000 tpd by letter dated February 24, 1995, and that it intended to initiate operation during July, 1995, the

Department reasonably believed that this was only being used as a pressure point for the issuance of the SRS permit. Nothing was said in those letters indicating that LCA was withdrawing its prior offer and no request was made for the Department to process LCA's renewal application.

The September 30 letter following the August 29th meeting in which ARC formally responds to the Department's outstanding concerns about the SRS application, the issue of potential harm caused by increased truck traffic is addressed by the statement "[a]s has been the case all along, once a permit is issued to SRS, the permit for LCA Transfer Station (1,200 TPD) will be surrendered to prevent a net increase in the impact of the facilities at this site upon the surrounding community." There is nothing in this letter which limits the surrender of the LCA permit to a ton-for-ton exchange between LCA and SRS. There is nothing in the letter which makes the surrender of the LCA permit contingent upon a thirty day decision by the Department. There is nothing in the letter which makes the surrender of the LCA permit contingent upon the SRS permit not being successfully appealed by third parties. There is no credible evidence that the Appellant was unwilling to surrender the LCA permit at any point after the September 30 letter. Accordingly, it was reasonable for the Department to rely on the representations in this letter in issuing the SRS permit and in revoking the LCA permit. It is not the Department's role to read between the lines of correspondence received from permit applicants and guess what the applicant must have meant or contact permit applicants to make certain that they meant what they said. It is the Appellant's burden to assure that the Department understands the material submitted with a permit application as well as the terms of any offer made with respect to the surrender of a permit. LCA and its affiliates must suffer the consequences for their failure to make their intent clear to the Department personnel charged with the authority to issue or withdraw permits.

In sum, we conclude that the Department did not abuse its discretion in either returning the repermitting application or revoking the LCA permit.

CONCLUSIONS OF LAW

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

2. Pursuant to 25 Pa. Code § 1021.101(c) the Appellant bears the burden of proof to show that the Department abused its discretion when it returned LCA's renewal application.

3. Pursuant to 25 Pa. Code § 1021.101(b) the Department bears the burden of proving that it did not abuse its discretion in revoking the LCA permit.

4. At all relevant times following the August 29th meeting, the Department reasonably believed that LCA was willing to surrender its permitted capacity if the SRS permit was issued even at 900 tpd.

5. The Department did not abuse its discretion in returning LCA's permit renewal application.

6. The Department did not abuse its discretion in revoking LCA's permit.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

LCA LEASING, INC.	:	
	:	
v.	:	**Docket No. 95-203-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 17th day of June, 1997, the appeal of LCA Leasing, Inc. in the above-captioned matter is hereby DISMISSED.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

Administrative Law Judge Michelle A. Coleman is recused and did not participate in this decision.

DATED: June 17, 1997

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

For the Commonwealth, DEP:
Mark L. Freed, Esquire
Southeast Region

For Appellant:
William H. Eastburn, III, Esquire
EASTBURN & GRAY
Doylestown, PA

ml/bl

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

AMERICAN AUTO WASH, INC.	:	
	:	
v.	:	**Docket No. 96-122-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: June 17, 1997**

OPINION ON MOTION IN LIMINE OF THE DEPARTMENT OF ENVIRONMENTAL PROTECTION

By George J. Miller, Chairman

Synopsis:

Evidence relating to the Department's action in not seeking penalties, or assessing more lenient penalties, against gasoline station owners other than Appellant who also failed to install required State II vapor control and collection systems by the required deadline will not be admitted at the hearing on the merits because these matters were not properly raised in the notice of appeal and because these matters are irrelevant to the question of whether the Department abused its discretion in assessing a penalty against Appellant. Evidence that the Appellant believed that the Department would not impose penalties for delayed compliance will be admitted on the issue of whether the Appellant's violations were wilful.

BACKGROUND

On May 2, 1996, the Department of Environmental Protection issued an Assessment of Civil Penalty against the Appellant in the amount of $78,309 for its failure to install Stage II vapor

collection and control systems by the required deadline at its three gasoline service stations located in Norristown, Montgomery County and in Parkside and Upper Darby, Delaware County. The installation of these controls was required by November 15, 1993 by 25 Pa. Code § 129.82 and section 6.7 of the Air Pollution Control Act, Act of January 8, 1960, P.L. (1959) 2119, as amended, 35 P. S. §.4001 et seq, 35 P.S. § 4006.7. The penalty assessment states that the Appellant did not meet these requirements until August 22, 1994 at the Norristown station and until July 15, 1994 at the Upper Darby and Parkside stations.

The Appellant filed a timely appeal on May 30, 1996 challenging the appropriateness of the amount of the penalty stating that Appellant had diligently ordered the required equipment but was unable to install this equipment by the required date for reasons beyond its control. The notice of appeal states that Appellant could not obtain timely delivery and installation of the equipment because (1) there was a tremendous backlog of orders for the equipment as a result of delay in the certification of the equipment by the California Air Resource Board, ("CARB"), (2) major oil companies were given favored treatment by both manufacturers and installers of the equipment, and (3) the equipment could not be installed promptly after receipt due to unfavorable weather conditions and the backlog which those weather conditions caused the installer of the equipment. The notice of appeal finally says that Appellant reasonably believed that it would not be penalized as a result of statements made by representatives of the Department and members of the industry that "timely non-compliance was acceptable to DEP due to the delay in the CARB certification of the Stage Vacuum-Assist equipment." The notice of appeal did not reserve the right to amend the appeal as discovery progressed.

The hearing on the merits is scheduled to commence on June 30, 1997. The Department has

filed a motion to strike six claims in the Appellant's first pre-hearing memorandum[1] so as to narrow the issues at the hearing on the ground that those claims were not raised in the notice of appeal and are therefore beyond the Board's jurisdiction.

DISCUSSION

Under decided case law, the Board ordinarily has no jurisdiction to consider any objection not raised in the notice of appeal in the absence of at least a general allegation or a statement in the notice of appeal reserving the right to amend. *Newtown Land Limited Partnership v. Department of Environmental Resources*, 660 A.2d 150 (Pa. Cmwlth. 1995); *Pennsylvania Game Commission v. Department of Environmental Protection,* 509 A.2d 877 (1996), *aff'd*, 555 A.2d 812 (1989). While the Board has amended its rules of procedure to permit amendments to appeals under specified circumstances, that rule requires a timely motion to amend and applies only to appeals filed after the September 2, 1996 effective date of this rule.

The Department's motion to strike paragraph 7 of the Appellant's pre-hearing memorandum will be denied because it set forth facts which the Department is required to consider in assessing a penalty in determining whether or not the Appellant's failure to meet the required deadline was "wilful" or merely negligent. Paragraph 7 of Appellant's pre-hearing memorandum states as follows:

> Reinhard Bets, President of American Auto Wash, learned from another independent retailer, Robert Bulson ("Bulson") that the Department would use discretion in enforcing penalties and that Bulson had been forgiven penalties: and Reinhard Bets believed that he would be treated similarly.

---

[1] The Appellant has since filed two amendments to its pre-hearing memorandum.

Section 9.1 of the APCA, 35 P. S. § 4009.1 sets forth the factors to be considered by the Department in determining the amount of the penalty for violation of the APCA as follows:

> In determining the amount of the penalty, the department shall consider the wilfulness of the violation; damage to air, soil, water or other natural resources of the Commonwealth or their uses; financial benefit to the person in consequence of the violation; deterrence of future violations; cost to the department, the size of the source or facility; the compliance history of the source; the severity and duration of the violation; degree of cooperation in resolving the violation; the speed with which compliance is ultimately achieved; whether the violation was voluntarily reported; other factors unique to the owners or operator of the source or facility; and other relevant factors.

While the absence of wilful intent was not specifically raised in the notice of appeal, the notice of appeal as a whole contends that the violations were not wilful in the sense that violations were caused by conditions beyond Appellant's control. In addition, objection (6) in the notice of appeal claims that Appellant acted with a reasonable belief that timely non-compliance was acceptable to DEP due to delay in the CARB certification of the Stage II equipment. Since the appropriate application of the penalty factors is in issue in a penalty assessment, the Board believes that evidence supporting the claim of paragraph 7 of the Appellant's pre-hearing memorandum is admissible on the issue of whether its violations were wilful.

The Department's motion will be granted, however, with respect to paragraphs 27, 28, 29, 30 and 31. Paragraphs 27, 29, 30 and 31 of Appellant's pre-hearing memorandum state that the Department either forgave penalties to other violators of the APCA for failure to install the Stage II equipment on time or gave other violators significantly reduced penalties. The notice of appeal contains no allegation that the Department's actions were discriminatory to the extent that the Appellant was deprived of due process or equal protection of the law, and nothing in Section 9.1 of

the APCA suggests that the penalties assessed against other violators is a relevant matter which the Department is to consider in determining the amount of the penalty. We have held in the past that what the Department did with other similar violators under another set of facts is irrelevant. *Goetz v. DEP,* 1993 EHB 1401, 1431; *Sechan Limestone v. DER*, 1986 EHB 134, 167. We will adhere to that precedent in this case and rule that evidence in support of paragraphs 27, 28, 29, 30 and 31 will not be admitted into evidence.

Paragraph 28 of Appellant's pre-hearing memorandum also states "The Department's enforcement discretion was influenced by political intervention." Appellant argues that Bulson, another gasoline station owner, was given favorable treatment because of the influence of a member of the Pennsylvania Senate, and that Mobil had used political lobbying to obtain a delay of the deadline for installation.

Nothing in the notice of appeal suggests that this was a ground for appeal, and good cause does not exist for permitting this claim to be considered. We hold that these are irrelevant matters in an appeal from the assessment of a penalty for the Appellant's violation of the law. As indicated above, the Department's assessment of penalties to others under different factual situations is not a matter which the Department need consider absent a claim that the Department violated Appellant's right to due process and equal protection of the law. No such claim was made in the Notice of Appeal or in Appellant's response to the Department's motion. The decision as to penalties is a matter within the Department's prosecutorial discretion, and its treatment of other violators is a matter over which the Board has little or no jurisdiction. *Goetz v. DEP*, 1993 EHB 1401, 1431. In addition, so long as the Department's action is in accordance with law, its motives for taking the action are irrelevant. *Tinicum Township v. DEP*, 1996 EHB 816, 828.

Appellant argues that the Board should consider these matters because its rules permit it to consider an objection not raised in the notice of appeal "upon good cause shown." 25 Pa. Code § 1021.51(e). While the Board's rules do provide for it to consider additional grounds, that showing of good cause must ordinarily be based on a reservation of rights set forth in the notice of appeal to advance additional grounds. Even if the Appellant's notice of appeal had reserved such a right, we hold that there is no good cause for pursuing the Department's treatment of other violators or the Appellant's claim that more lenient treatment of others was the result of political influence. As in most other matters of life, the Appellant must stand on the merits of its claim that its violations should be excused because they were beyond Appellant's control or that the Department abused its discretion in determining the amount of the penalty by application of the factors which the APCA directs the Department to consider.

Accordingly, we enter the following order:

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

AMERICAN AUTO WASH, INC.	:	
	:	
v.	:	**Docket No. 96-122-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 17th day of June, 1997, upon consideration of the Commonwealth of Pennsylvania, Department of Environmental Protection's Motion in Limine to preclude the admission of evidence in support of six paragraphs of Appellant's pre-hearing memorandum, and Appellant's response thereto, it is hereby ORDERED and DECREED that the presentation of any testimony or evidence in this matter on the following objections is precluded:

1. There are several other independent stations for whom the Department forgave penalties and there is sufficient justification for the Department to forgive penalties for American Auto Wash, Appellant's Pre-hearing Memorandum, paragraph 27;

2. The Department's enforcement discretion was influenced by political intervention, Appellant's Pre-Hearing Memorandum, paragraph 28;

3. The Department utilized its enforcement discretion and reduced civil penalties assessed against Mobil Oil Company ("Mobil") at 45 locations to approximately $2,000 per station, Appellant's Pre-Hearing Memorandum, paragraph 29;

4. While American Auto Wash avers that the penalties assessed against it should be forgiven entirely, if it is decided that penalties should be enforced they should be reduced at least to an amount commensurate with what Mobil paid i.e. approximately $3,200 per station, Appellant's Pre-Hearing Memorandum, paragraph 30; and

5. Sun Oil Company ("Sunoco") was assessed penalties at 12 gas stations which were significantly reduced by the Department which provides additional precedence for the Department to forgive or in the alternative to significantly reduce the penalties enforced against American Auto Wash, Appellant's Pre-Hearing Memorandum, paragraph 31.

And it is FURTHER ORDERED that the Department's motion with respect to paragraph 7 of Appellant's pre-hearing memorandum is denied.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

DATED: June 17, 1997

c: **DEP Litigation Library:**
Attention: Brenda Houck

For the Commonwealth, DEP:
Peter J. Yoon, Esquire
Office of Chief Counsel
Lee Park, 555 North Lane
Suite 6015
Conshohocken, Pa 19428

For the Appellant:
Lisa B. Wershaw, Esquire
ZARWIN, BAUM, DEVITO, KAPLAN & O'DONNELL, P.C.
Suite 700
Four Penn Center Plaza
1616 John F. Kennedy Boulevard
Philadelphia, Pa 19103-2588

bap

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

STANLEY GRAZIS	:	
	:	
v.	:	**EHB Docket No. 97-047-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued:** June 17, 1997

OPINION AND ORDER ON MOTION TO DISMISS

By Michelle A. Coleman, Administrative Law Judge

Synopsis

A motion to dismiss is granted. A letter to an appellant from a Department attorney is not an appealable action where it simply advises the appellant of the Department's interpretation of the law. Furthermore, even assuming the letter were an appealable action, the appeal would be moot by virtue of a subsequent letter from the Department withdrawing the first letter.

OPINION

This matter was initiated with the February 20, 1997, filing of a notice of appeal by Stanley Grazis (Grazis) who operates wells on state lands in Abbot and Eulalia Townships, Potter County. Grazis appeals a February 4, 1997, letter sent to him by Stephanie Gallogly, an Assistant Counsel in the Department's Meadville Office of Chief Counsel. Gallogly sent her letter in response to a February 3, 1997, letter by Grazis to Steven Beckman, Northwest Regional Director for the Department. In his letter to Beckman, Grazis stated that he was unable to comply with plans he had

previously submitted for returning nine wells to active status or having them plugged.[1] In her response to Grazis' letter, Gallogly informed him that the wells did not have inactive status, and, therefore, are deemed abandoned and must be plugged. She explained that it was Grazis' obligation to plug the wells and that, if he could not comply, he had to send the Department detailed reasons explaining why, including any relevant financial information. Gallogly asked Grazis to respond by February 20, 1997. There is no indication, however, that Grazis ever responded.

The Department filed a motion to dismiss and a supporting memorandum of law on May 5, 1997. Grazis failed to file a response. Therefore, under section 1021.70(f) of the Board's rules of practice and procedure, 25 Pa. Code § 1021.70(f), all properly pleaded facts in the Department's motion are deemed admitted. *Alice Water Protection Association v. DEP*, EHB Docket No. 96-019-R (Opinion issued May 7, 1997).

In its motion and memorandum, the Department argues that the Board does not have jurisdiction over the appeal because our jurisdiction is limited to Department actions and adjudications, and Gallogly's letter is neither. The Department also argues that, even if the letter is a Department action or adjudication, we do not have jurisdiction because, on February 27, 1997, Gallogly sent another letter to Grazis explaining that her previous letter was not meant to affect Grazis' obligations under Pennsylvania law and that, to the extent the previous letter might have affected those obligations, it was withdrawn.

We agree with both of the Department's arguments. Under section 4(a) of the Environmental Hearing Board Act, Act of January 13, 1988, P.L. 530, *as amended*, 35 P.S. §§ 7511-7514 at § 7514,

---

[1] The relevant wells are 1 and 2 on tract 364, and wells 1, 2, 3, 4, 6, 10, and 11 on tract 365. Both tracts of land are owned by the Commonwealth of Pennsylvania.

the Board has jurisdiction to review orders, permits, licenses or decisions of the Department. A letter from the Department is an appealable action if it orders specific action. *See, e.g., Medusa Aggregates v. DER*, 1995 EHB 414. But, if the letter merely advises the recipient of the Department's interpretation of the law, it is not appealable. *Sandy Creek Forest, Inc. v. Department of Environmental Resources*, 505 A.2d 1091 (Pa. Cmwlth. 1986); *Eagle Enterprises v. DEP*, 1996 EHB 1048. The letter that Grazis appeals is advisory rather than imperative. In it, Gallogly merely explains the Department's position with respect to the wells; she does not direct Grazis to do anything that he would not be required to do otherwise.

Furthermore, even assuming the letter were an appealable action when Grazis appealed it to us, we would not have jurisdiction over the appeal now by virtue of Gallogly's second letter to Grazis. Since that letter expressly withdrew any aspect of the first letter that was an appealable action, the Board can no longer grant Grazis effective relief and his appeal of the first letter is moot.

Furthermore, even assuming the letter were an appealable action when Grazis appealed it, Grazis' appeal would be moot now by virtue of the Gallogly's second letter to him. A matter before the Board becomes moot when an event occurs which deprives the Board of the ability to provide effective relief or deprives the appellant of a stake in the outcome. *In re Gross*, 476 Pa. 203, 382 A.2d 1000 (1980); *New Hanover Corporation v. DER*, 1991 EHB 1127. Since Gallogly's second letter expressly withdraws any aspect of the first letter that was an appealable action, the Board can no longer grant Grazis effective relief.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

STANLEY GRAZIS	:	
	:	
v.	:	**EHB Docket No. 97-047-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 17th day of June, 1997, it is ordered that the Department's motion to dismiss is granted and Grazis' appeal is dismissed.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

EHB Docket No. 97-047-C

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: June 17, 1997

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

For Grazis:
Stanley L. Grazis, Esq.
6006 South Holly Street, #188
Englewood, CO 80101

For the Commonwealth, DEP:
Stephanie Gallogly, Esq.
Northwestern Region

jb/bl

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

READING ANTHRACITE COMPANY	:	
	:	
v.	:	**EHB Docket No. 95-196-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, PORTER ASSOCIATES, INC., Permittee, and KOCHER COAL COMPANY, INC., Intervenor	:	**Issued: June 18, 1997**

OPINION AND ORDER ON MOTION TO DISMISS AND A MOTION FOR SUMMARY JUDGMENT OR IN THE ALTERNATIVE, TO LIMIT ISSUES

By Michelle A. Coleman, Administrative Law Judge

Synopsis:

A motion to dismiss and a motion for summary judgment are denied when the moving party in each instance fails to prove it is entitled to judgment as a matter of law. The Board will consider a motion labeled "motion to dismiss" as a motion for summary judgment when the evidence presented by the moving party to support the motion indicates that the motion actually is one for summary judgment. The Board will deny a motion for summary judgment when the moving party fails to sustain its burden of proof by improperly attaching its exhibits to a memorandum of law instead of to its motion and did not incorporate them by reference. A motion for summary judgment on the grounds of administrative finality is denied when the allegations in the appeal raise issues that arose between the time the original permit was issued and the renewal of the permit. Summary

judgment on grounds of administrative finality also is denied when the moving party fails to show that the Appellants received actual or constructive notice of modification of the permit.

OPINION

This matter was initiated with the September 11, 1995 filing of a notice of appeal by Reading Anthracite Company (Reading) to the July 20, 1995 renewal of an anthracite surface mining permit, SMP No. 54890105R, by the Department of Environmental Protection (Department). The renewal permit authorized Porter Associates, Inc. (Porter) to operate an anthracite surface mine and to dispose of coal refuse and fly ash/bottom ash on a 115 acre site, known as Porter Stripping, in Porter Township, Schuylkill County, Pennsylvania.

Currently before the Board are the August 8, 1996 motion to dismiss for lack of jurisdiction of Kocher Coal Company (Kocher)[1] and Porter's August 8, 1996 motion for summary judgment, or in the alternative, a motion to limit issues. By a letter dated August 12, 1996 the Department joined in both motions.

BACKGROUND

Reading and Kocher entered into an Agreement of Sale dated May 1, 1967 for the sale of certain property in Porter Township, Schuylkill County, Pennsylvania, including the Porter Strip Property referenced in the above permit. On or about February 28, 1969 the Department issued Kocher a Mine Drainage Permit for the Porter Strip. Subsequent to this permit Kocher submitted a surface mine permit application, SMP No. 54703014, for the Porter Strip. Around July 31, 1986, the Department denied SMP Application No. 54703014 because Kocher refused to accept

[1] On April 4, 1996 the Board granted Kocher Coal Company, Inc.'s petition to intervene.

responsibility for discharge emanating from the mine site and failed to submit information required to complete the permit review. After numerous orders and appeals to the Board based on those orders, the parties entered into a Consent Order and Agreement dated January 19, 1990.

In October 1989, Kocher filed an application for a surface mining permit for an anthracite surface mine operation located in Porter Township, Schuylkill County. Notice of the application was published in *The Pottsville Republican* of Pottsville, PA, a newspaper of general circulation, on October 10, October 26, November 2, and November 9, 1989 under Kocher's name. On June 25, 1990 the Department issued SMP No. 54890105 to Kocher. Subsequent to the permit issuance, notice of the commencement, operation and restoration of the Porter Strip was published in the July 21, 1990 *Pennsylvania Bulletin*, Volume 20, No. 29 under Kocher Coal Company[2]. There is no record that any other notice was filed or that Reading filed an appeal with respect to the above referenced application and permit.

On or about September 25, 1990 Kocher filed an application to revise SMP No. 54890105 to include surface mining, refuse disposal, other coal support facilities and fly ash/ bottom ash disposal at the Porter Stripping operation. Notice of the modification was published in *The Citizen Standard* of Valley View, Schuylkill County, a newspaper of general circulation, on September 26, October 3, October 10, and October 17, 1990 under the name of Kocher Coal Company. On January 23, 1991 the Department issued a modified surface mine permit, SMP No. 54890105(C) to Kocher. Reading did not file an appeal regarding the modification to the permit.

---

[2] The notice stated that the application was received October 20, 1989 and that the permit was issued on June 25, 1990.

In the Spring of 1991, Porter applied for the transfer of SMP No. 54890105(C3)[3] from Kocher. Notice of the transfer application appeared in *The Citizen Standard* on May 15, May 22, May 29 and June 5, 1991 from Kocher Coal Company to Porter Associates, Inc. On October 3, 1991, the Department issued the permit transfer, SMP No. 54890105C3T, to Porter Associates, Inc. Notice of the permit transfer was published in the *Pennsylvania Bulletin*, Volume 21, No. 43 on October 28, 1991 under the name of Porter Associates, Inc. but no mention was made of Kocher Coal Company. Reading did not file an appeal from the transfer.

During the latter half of 1994, Porter filed an application seeking renewal of SMP No. 54890105(C3) set to expire on June 25, 1995. Notice of the renewal application was published in *The Citizen Standard* of Valley View, Pennsylvania on February 15, February 22 and March 1, 1995 under the name of Porter Associates, Inc.. The Department issued the renewal on July 20, 1995. The notice of the renewal was published in the August 12, 1995 *Pennsylvania Bulletin*, Volume 25, No. 32 under the name of Porter Associates, Inc..

On September 11, 1995 Reading filed its appeal based on the issuance of the renewal permit. On January 10, 1996 Porter filed a motion to compel discovery and requested an extension for the filing of dispositive motions. The Board granted the motion and request in its June 18, 1996 order. By that order the deadline for filing dispositive motions was August 8, 1996.

---

[3] The permit was subsequently corrected on two occasions. The first time was on March 27, 1991 when an additional fly ash/bottom ash disposal source was approved (SMP. No. 54890105(C2)). The permit was corrected again on July 16, 1991 to approve another fly ash/bottom ash disposal source (SMP No. 54890105(C3)).

On August 8, 1996 Kocher filed a motion to dismiss for lack of jurisdiction.[4] On the same day Porter filed its Motion for Summary Judgment, and in the alternative, a Motion to Limit Issues. By a letter dated August 12, 1996, the Department joined in both motions.

On December 30, 1996 Reading filed its response to both motions.

Currently before the Board are two motions. We will consider both in this opinion.

DISCUSSION

Reading alleges that the issuance of the renewal permit was an abuse of discretion by the Department because the renewal application failed to comply with permit renewal regulations. Specifically, Reading alleges:

> - applicant failed to include either the written contractual consent of Reading Anthracite Company, the current surface owner, to conduct mining operations on the subject property or provide copies of documents expressly granting Kocher or Porter the right to extract coal or deposit coal refuse in the renewal application despite the legal obligation to correct or update such information;
>
> - as owner of the property on which the ash disposal activities would occur, Reading's consent was required before a permit could be approved by the Department pursuant to 25 Pa. Code § 86.37(a)(1);
>
> - the permit renewal application failed to list Reading as a "legal or equitable" owner of the coal to be mined and as a "legal or equitable owner" of the surface area within the proposed permit areas as required by 25 Pa. Code § 86.62(a)(1)(ii);
>
> - the permit application failed to comply with 25 Pa. Code § 86.55(d) (which incorporates 25 Pa. Code § 86.62) because Reading is a "person" owning or controlling the subject property and is in a

[4] Although Kocher has labeled its motion a motion to dismiss, we will consider it as a motion for summary judgment because the evidence Kocher presented in support of its motion is of such a nature that the motion would be more properly labeled a motion for summary judgment.

> position either, directly or indirectly, to determine the manner in which the proposed coal mining or ash disposal activities will be conducted as a surface estate owner.

Kocher and Porter contend that there are no material facts in dispute and that they are entitled to judgment as a matter of law. Kocher and Porter argue that the appeal should be dismissed on the grounds of administrative finality because the allegations concerning ownership raised in the notice of appeal could have and should have been raised when the Department issued the original permit especially since Reading had notice of the original action. The Department did not file a supporting memorandum.

We will not consider Reading's response for the purpose of ruling on Kocher's and Porter's motions. Under Board Rule 1021.73(d), 25 Pa. Code § 1021.73(d), a response to a dispositive motion shall be filed within 25 days of the date of service of the motion. Since Kocher and Porter served copies of their motions on Reading's counsel on August 7, 1996,[5] Reading had until August 31, 1996 to file its response.[6] Reading, however, did not file a response until December 30, 1996, almost four months after it was due. Consequently, its response is untimely. We consider an untimely response as a failure to respond.

When ruling on a motion for summary judgment, the Board is authorized to render summary judgment if the pleadings, depositions, answers to interrogatories, and the admissions on file,

---

[5] Although Kocher's certificate of service for its motion was attached to the motion, it was unsigned. The Board will give Kocher the benefit of the doubt and assume that the motion was served on August 7, 1996 as claimed by the certificate of service.

[6] August 31, 1996 was a Saturday. Under Board policy when a filing date occurs on a weekend or holiday the party has until the next working day to file its document(s). Thus, Appellant had until Tuesday, September 3, 1996 to file its response

together with affidavits, if any, show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Bethenergy Mines, Inc. v. DEP*, EHB Docket No. 90-050-MR (Opinion issued March 17, 1997). Summary judgment may be entered only in cases "where the right is clear and free from doubt." *Hayward v. Medical Center of Beaver County*, 608 A.2d 1040, 1042 (Pa. 1992). The Board must read the motion for summary judgment in the light most favorable to the non-moving party. *Hilltown Twp. v. DEP, et al*, 1996 EHB 1499. So the moving party in the matter bears the burden of proving that there no material facts in dispute and that they are entitled to judgment as a matter of law.

Kocher's Motion

Kocher's motion must be denied because it is not entitled to judgment as a matter of law. A moving party bears the burden of proving that it is entitled to the relief requested. *Bethenergy Mines, Inc. v. DEP*, EHB Docket No. 90-050-MR (Opinion issued March 17, 1997); *Weiss, et al. v. DEP, et al*, 1996 EHB 246. That party has a duty to present its best case, and the Board will not do so by default. *Green Thornbury Committee, et al. v. DER, et al*, 1995 EHB 636, 667. In the instant case, Kocher improperly has attached its exhibits to its Memorandum of Law instead of attaching them to the motion and has not incorporated the exhibits by reference in the motion. The Board has held that it will not consider exhibits attached to a memorandum of law. *See, County of Schuylkill v. DER*, 1990 EHB 1370. Our consideration is governed by the content of the motion and the exhibits attached to it. *Township of Florence v. DEP*, 1996 EHB 1399. Briefs in support of a motion are to provide only a more detailed discussion of the basis of the motion, and not to add new arguments or new facts. *Barkman v. DER*, 1993 EHB 738. Exhibits attached to legal memorandum cannot properly form the basis for granting a motion for summary judgment or for denying that

motion when the answer raises issues not supported in any form. *Hemlock Municipal Sewer Cooperative v. DEP*, EHB Docket No. 96-157-C (Opinion issued May 22, 1997). Without the exhibits to support the arguments Kocher has failed to sustain its burden of proof. Consequently, we must deny its motion on the issues raised in the notice of appeal.

Porter's Motion for Summary Judgment

Porter also has not sustained its burden of proving that it is entitled to judgment as a matter of law. Under the doctrine of administrative finality, the primary issue raised by Porter, "one who fails to exhibit his statutory remedies may not thereafter raise an issue which could have and should have been raised in the proceeding afforded by his statutory remedy." *DER v. Wheeling-Pittsburgh Steel Corp.*, 348 A.2d 765 (Pa. Cmwlth. 1975), *aff'd* 375 A.2d 320 (Pa. 1977), *cert. denied*, 434 U.S. 969 (1977). The Board has held that where a party aggrieved by an administrative action of the Department fails to appeal that action, neither the content nor the validity of the Department's action or the regulations underlying it, may be attacked in a subsequent administrative or judicial proceeding. *People United to Save Homes and Pennsylvania American Water Co. v. DEP, et al*, 1996 EHB 1428; *Kennemetal, Inc. v. DER*, 1990 EHB 1453. Therefore, we must decide whether Reading has failed to appeal a Department action within the time constraints of administrative finality.

The doctrine of administrative finality has been applied in the case of a permit renewal and permit reissuance to bar a third party from raising objections to issues which appeared in the original permit where the third party failed to file an appeal from the original permit issuance. *See, New Castle Twp. Board of Supervisors v. DER*, 1994 EHB 1336; *Borough of Ridgeway v. DER*, 1994 EHB 1090. 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. *Borough of Ridgeway v. DER*, 1994 EHB 1090, 1102.

We must reject Porter's argument of the applicability of the doctrine of administrative finality. Three of the four allegations raised in the notice of appeal raise issues related to whether the Department abused its discretion by issuing a renewal permit based on the supporting documentation submitted with the renewal application. In these allegations, Reading is challenging only those issues which relate to the permit renewal - failure by Porter to provide correct or updated information for the renewal application, and failure of the application to comply with Sections 86.55(d) and 86.62(a)(1)(ii) by listing Reading as the legal or equitable owner of both the coal to be mined and of the surface area within the permitted area. Since these issues arose between the time the permit was issued and the permit was renewed, Reading could not have raised them prior to this appeal. Thus, the doctrine of administrative finality is inapplicable regarding these allegations. Consequently, Porter has failed to sustain its burden that it is entitled to judgment as a matter of law on those issues.

Reading's other allegation raises the issue that the Department abused its discretion by approving the permit when Porter had failed to obtain Reading's consent. Reading alleges that as owner of the property on which ash disposal activities would occur its consent was required before the Department could approve the permit. The request for fly ash/bottom ash disposal was originally raised in an application submitted in 1990. Although at first glance it appears that the doctrine of administrative finality applies here because this issue could have been raised in a prior appeal, we must also reject the argument for this allegation on the basis that Reading did not have adequate notice to raise this issue earlier. According to the evidence offered by Porter notice of the

modification only was published in a newspaper of general circulation, *The Citizen Standard* of Valley View, Schuylkill County. Porter, however, has not offered evidence that Reading received that notice or had access to that notice since it is not in the circulation area of that newspaper. Thus, Porter has not proven that Reading received the requisite notice to start the tolling of the 30 day appeal period. In fact, under Board Rule 1021.52, 25 Pa. Code § 1021.52, an appellant has 30 days from receipt of the written notice of the action or within 30 days after notice of the action has been published in the *Pennsylvania Bulletin* (emphasis added). Here Porter has failed to prove that Reading received adequate notice of the modification by either of these methods so that it could have appealed the issue prior to its present appeal. The Board will not grant the motion for summary judgment when Porter's right to summary judgment is not clear and free from doubt. For the foregoing reasons we deny Porter's motion for summary judgment.

Accordingly, we enter the following order.

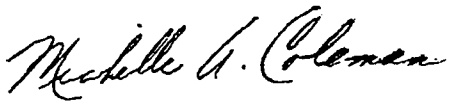
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

READING ANTHRACITE COMPANY	:	
	:	
v.	:	**EHB Docket No. 95-196-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, PORTER ASSOCIATES, INC., Permittee and KOCHER COAL COMPANY, INC., Intervenor	:	

ORDER

AND NOW this 18th day of June, 1997, we deny Kocher Coal Company's and Porter Associates, Inc.'s motions for summary judgment.

ENVIRONMENTAL HEARING BOARD



MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: June 18, 1997

See following page for service list.

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

For the Commonwealth, DEP:
Marc A. Ross, Esq.
Southcentral Region

For Appellant:
Martin J. Cerullo, Esq.
Matthew E. Turowski, Esq.
CERULLO, DATTE & WALLBILLICH
Pottsville, PA

For Permittee:
Ronald V. Santora, Esq.
HOURIGAN, KLUGER, SPOHRER & QUINN
Wilkes-Barre, PA

For Intervenor:
Charles E. Gutshall, Esq.
Roslyn M. Pitts, Esq.
RHOADS & SINON
Harrisburg, PA

bl

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

E. MARVIN HERR, E.M. HERR FARMS	:	
	:	
v.	:	**EHB Docket No. 94-098-MR**
	:	**(Consolidated with 94-099-MR)**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and PEQUEA TOWNSHIP, Intervenor	:	**Issued: July 14, 1997**

OPINION AND ORDER ON MOTION FOR CLARIFICATION AND APPLICATION FOR STAY

By Robert D. Myers, Member

Synopsis:

A Motion for Clarification and Application for Stay are denied where the Motion and Application seek a different remedy from the one crafted by the Board and where the Board has determined that its remedy was well chosen.

OPINION

The history of this proceeding is fully documented in our Opinion and Order on Motion for Summary Judgment issued on June 16, 1997 at EHB Docket No. 94-098-MR (Consolidated with 94-099-MR). In that decision, we ordered as follows:

1. The Landowner's [Appellant] Motion for Summary Judgment is granted.

2. On or before July 7, 1997, DEP shall issue a letter to the Landowner approving his planning module as a revision to the Township's 1992 Act 537 Plan.

On July 7, 1997, the date for compliance with paragraph 2 of our Order, the Department of Environmental Protection (DEP) filed a Motion for Clarification and Application for Stay taking issue with the remedy crafted by this Board in the June 16, 1997 Opinion and Order. On July 9, 1997, the Landowner filed a Motion to Deny the Stay Without a Hearing and requested sanctions. After carefully considering the Motion and Application and the Landowner's responses, we are convinced that our remedy was well chosen. What DEP seeks is a remand by this Board back to DEP, requiring the Landowner to start the process all over again with his private request measured by the requirements of Act 537 and its regulations, as amended in 1994.

This request by DEP illustrates the very outcome we tried to avoid in our June 16, 1997 Opinion and Order. After stating that we normally would remand the appeals to DEP for action conforming to our Opinion and Order, we stated:

> We are loathe to put the Landowner back into the multi-agency quagmire that has held up the pursuit of his vested rights for nearly five years already.

Herr v. DEP, EHB Docket No. 94-098-MR (Opinion issued June 16, 1997), slip op. at 17 (hereinafter *Herr*). In an effort to short-circuit the process, being satisfied that the Landowner's planning module posed no threat to the public health, safety or welfare, we ordered DEP to approve the module as a revision to the Township's 1992 Act 537 Plan.

DEP supports its Motion and Application with arguments illustrating a narrow focus fixed primarily on the technical niceties of bureaucratic administration. The first of these claims is that, technically, there is no planning module currently pending before DEP and, as a result, there is nothing for DEP to approve. This is absurd. DEP's February 8, 1994 Order to the Township that generated all of this litigation directed the Township to approve the Landowner's planning module

as part of its Act 537 Plan. Appeals from this Order were litigated at EHB Docket Nos. 94-044-E and 94-054-E. All parties and the Board were fully aware of the Landowner's planning module and its terms.

The same is true in the present appeals filed, in part, from DEP's rejection of that planning module. The documents making up the module are part of the record and an important matter for the Board's consideration. For DEP to claim that this planning module, technically, is no longer "pending" before it is also disingenuous. It reflects the hypertechnical mindset we were loathe to force the Landowner to deal with again.

The next argument is scarcely any more meritorious. It contends that this Board must apply the law in place at the time the Board makes its decision. As a result, we must apply the provisions of Section 5(b) of Act 537, and the underlying regulations, in their current form - with the 1994 amendments included. In our June 16, 1997 Opinion and Order, we noted that DEP's issuance of the February 8, 1994 Order to the Township preceded the adoption of the 1994 amendments and, therefore, those amendments were not applicable. *Herr*, slip op. at 3, n. 3. DEP's Memorandum of Law, filed on March 14, 1997, acknowledged this to be true. What is true with respect to DEP's February 8, 1994 Order is also true with respect to its April 4, 1994 withdrawal of the Order. Both actions occurred before the statute and regulations were amended.

DEP cites *Doraville Enterprises v. DER*, 1980 EHB 489, for this proposition, but that case is inapposite. In *Doraville*, DEP denied the appellant's 1973 mine drainage permit application because it did not comply with the requirements of regulations which were promulgated in 1979. On appeal, the appellant argued that DEP should have applied the regulations which were in effect in 1973. The Board held that, in reviewing a permit application, *DEP* is bound to apply the

regulations in effect at the time it makes *its* decision.[1] *See Borough of Glendon v. Department of Environmental Resources*, 603 A.2d 226 (Pa. Cmwlth. 1992); *R & P Services, Inc. v. Department of Environmental Resources*, 541 A.2d 432 (Pa. Cmwlth. 1988); *Franconia Township v. DER*, 1991 EHB 1290; *New Hanover Township v. DER*, 1991 EHB 1234.

Here, however, the law is clear that, in reviewing the propriety of a DEP action, the Board must examine DEP's action in the context of the regulations which were applicable at the time of DEP's action. *Harmar v DER*, 1993 EHB 1856; *Fiore v. DER*, 1986 EHB 744; *see also Mock v. Department of Environmental Resources*, 623 A.2d 940 (Pa. Cmwlth. 1993). That is precisely what the Board did in concluding that the 1994 Amendments, which took effect on December 14, 1995, did not apply to DEP's April 4, 1994 denial of Herr's private request.

DEP's position on this point offends our sense of justice and fairness because it says, in effect: "We abused our discretion when we denied your private request and withdrew the Order to the Township in April 1994, a conclusion you litigated successfully over a more than three year period. Now, despite all of that, you must start all over again and, by the way, there are new statutes and regulations you must comply with. Sorry."[2]

The final argument used to support DEP's Motion and Application adds one additional factor to DEP's proposed scenario. The Landowner would also be required to show that the on-site

---

[1] Although the Board cited *Department of Environmental Resources v. Harmar Coal Co.*, 452 Pa. 77, 306 A.2d 308 (1973), for the proposition that an appellate court must apply the law in effect at the time it renders its opinion, the Board then stated that, because review before the Board is *de novo*, arguments based upon an appellate court analogy must fail.

[2] It cannot be forgotten that all of this litigation occurred because DEP did not act timely on the Township's 1992 Act 537 Plan, bringing about approval by default. The Landowner had no power to prevent this from happening and bears no share of the blame for it.

disposal systems mandated by the Township's 1992 Act 537 Plan are not adequate for the development. This too flies in the face of our attempts to avoid further abuse of the administrative process. We held in our June 16, 1997 Opinion and Order that: (1) the Landowner had a vested right to use public sewers, despite the provisions of the 1992 Act 537 Plan, if they posed no threat to the public health, safety and welfare; and (2) based upon the evidence and our understanding of sewage disposal matters, the use of public sewers will pose no such threat.

On what basis can it be argued that the Landowner, with DEP and the Township arrayed against him, should deal with the adequacy of a method of sewage disposal he does not have to use? Once again, DEP's intention to bog this matter down in a "multi-agency quagmire" shines through. We will not give it the chance to do that - denying its Motion and Application for Stay. We find no merit in either document.

The Landowner claims in his response that DEP's Motion for Clarification is really a Motion for Reconsideration because it seeks substantive changes in our June 16, 1997 Opinion and Order. The Landowner also contends that DEP's Application for Stay fails to comply with our Rules of Procedure at 25 Pa. Code §§ 1021.77 and 1021.78. While both of these arguments may have some merit, we have chosen to dispose of the Motion and Application on their substantive merits rather than on procedural grounds.

The Landowner's request for sanctions and legal costs associated with DEP's Motion and Application is taken under advisement in order to give the other parties opportunity to respond.

COMMONWEALTH OF PENNSYLVANIA

ENVIRONMENTAL HEARING BOARD

E. MARVIN HERR, E.M. HERR FARMS	:	
	:	
v.	:	**EHB Docket No. 94-098-MR**
	:	**(Consolidated with 94-099-MR)**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION and PEQUEA TOWNSHIP,	:	
Intervenor	:	**Issued: July 14, 1997**

ORDER

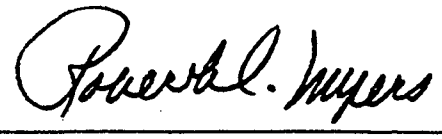
AND NOW, this 14th day of July, 1997, it is ordered that the Department of Environmental Protection's Motion for Clarification and Application for Stay is denied.

ENVIRONMENTAL HEARING BOARD

George J. Miller

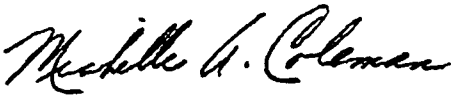
GEORGE J. MILLER
Administrative Law Judge
Chairman

EHB Docket No. 94-098-MR
(Consolidated with 94-099-MR)



ROBERT D. MYERS
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member



MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: July 14, 1997

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

For the Commonwealth, DEP:
Mary Martha Truschel, Esquire
Southcentral Region

For Appellant:
John J. Gallagher, Esquire
Carl R. Shultz, Esquire
LeBOEUF, LAMB, GREENE & MacRAE
Harrisburg, PA 17108-2105

For Intervenor:
Eugene E. Dice, Esquire
William W. Thompson, Esquire
1721 North Front Street
Suite 101
Harrisburg, PA 17102

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

CAERNARVON TOWNSHIP SUPERVISORS	:	
	:	
v.	:	**EHB Docket No. 96-180-MR**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION and CHESTER COUNTY	:	**Issued: July 21, 1997**
SOLID WASTE AUTHORITY, Permittee	:	

OPINION AND ORDER ON MOTION IN LIMINE TO PRECLUDE AN EXPERT WITNESS

By Robert D. Myers, Member

Synopsis:

A Motion in Limine to Preclude an Expert Witness is denied where the moving party did not seek an order from the Board to compel discovery with respect to the expert witness, the answering party did not act in bad faith or misrepresent the existence of the expert witness, and the moving party did not show prejudice as a result of the answering party's dilatory response.

OPINION

Caernarvon Township Board of Supervisors (Appellant) challenges the issuance to Chester County Solid Waste Authority (Permittee) of a modification of a solid waste disposal and/or processing permit (Permit No. 100944) by the Department of Environmental Protection (DEP). Permittee filed a Motion in Limine on April 14, 1997 to preclude the testimony of Appellant's expert witness in the matter. In its Motion, Permittee alleges that: (1) on January 9, 1997, Permittee served interrogatories on Appellant requesting the identity of any expert witness retained to testify in this

matter and the substance of the testimony, (Permittee's Motion at para. 6); (2) on January 31, 1997, Permittee deposed Terry Styer on the technical objections to the permit; however, Ms. Styer testified that Appellant had not yet retained an expert to testify, and she could not address the technical objections, (Permittee's Motion at paras. 7-8); (3) on February 27, 1997, the Board issued an order requiring that discovery be completed by March 31, 1997, (Permittee's Motion at para. 9); (4) counsel for Permittee notified the parties that he would be out of the country from March 21 through March 31, 1997; (Permittee's Motion at para. 10); (5) on March 17, 1997, Permittee received Appellant's answers to the interrogatories, (Permittee's Motion at para. 11); (6) Appellant identified David Child as the expert who would testify in the matter but indicated that, because the investigation was ongoing, Appellant would supply the substance of the testimony later, (Permittee's Motion at para. 12); (7) on March 18, 1997, Permittee served a Notice of Deposition of Mr. Child for March 31, 1997, (Permittee's Motion at para. 13); (8) on March 19, 1997, the parties agreed to hold the deposition on April 8, 1997 because of the vacation of Permittee's counsel, (Permittee's Motion at para. 14); (9) subsequently, Appellant refused to allow a deposition and, instead, agreed to furnish an expert report by April 14, 1997, (Permittee's Motion at paras. 15-16); (10) as of April 14, 1997, Permittee had not received the expert report, (Permittee's Motion at para. 17). Based on these averments, Permittee asks the Board to impose a sanction and preclude expert witness testimony by Appellant in this matter.

In response, Appellant asserts that it identified Mr. Child as a possible expert as early as January 31, 1997 at the deposition of Ms. Styer. (Appellant's Response at para. 12; Permittee's Motion, Exh. C at 93-94.) Appellant further states that Permittee did not object when, in a letter to Permittee dated February 26, 1997, Appellant requested until March 6, 1997 to answer the

interrogatories. Appellant eventually served the answers on March 13, 1997 and, therein, identified Mr. Child as Appellant's expert. Appellant also indicated that it would supplement the answers with respect to the substance of Mr. Child's testimony. (Appellant's Response at para. 11 and Exh. A.) Appellant also indicates that, although Appellant initially agreed to a deposition of Mr. Child on a date that would suit the vacation schedule of counsel for Permittee, Appellant had not yet received the Notice of Deposition and did not waive the right to object to the deposition upon receipt of the Notice. (Appellant's Response at para. 12.) Finally, Appellant states that, after complying with the legal constraints of the Sunshine Act[1] and allowing for a proper expert review of Permittee's permit application, Appellant provided an expert report to Permittee on April 21, 1997. (Appellant's Response at paras. 19, 21.)

In *Green Construction Company v. Department of Transportation*, 643 A.2d 1129, 1139 (Pa. Cmwlth. 1994) (citations omitted), the Commonwealth Court stated:

> The imposition of sanctions such as excluding the use of expert witness testimony for failure to comply with a rule of discovery is largely within the discretion of the [Board]. . . . The preclusion of expert testimony is a drastic sanction which should not be applied unless the facts of a case make it absolutely necessary to do so. . . . The [Board] must balance the facts and circumstances of each case to determine the prejudice to each party. . . . In practice, sanctions for noncompliance with discovery requests are generally not imposed until there has been a refusal to comply with a [Board] order compelling compliance.
>
> Assuming that a party has not acted in bad faith and has not misrepresented the existence of an expert expected to be called at trial, no sanction should be imposed unless the complaining party shows that it has been prejudiced from properly preparing its case for trial as a result of a dilatory disclosure. . . . Where there is ambiguity, [the rules] must be construed to secure a just determination of the action: this will more likely be achieved by receiving relevant evidence than by excluding it.

---

[1] Act of July 3, 1986, P.L. 388, 65 P. S. §§ 271-286.

Applying these principles here, we first note that, despite the fact that Appellant's answers to the interrogatories were untimely, Permittee did not seek, and the Board did not issue, an order compelling Appellant to answer Permittee's interrogatories. As indicated above, sanctions are generally *not* imposed in such a case.

Second, Appellant has not acted in bad faith or misrepresented the existence of Mr. Child as an expert in this case. Appellant identified Mr. Child as its expert in the answers to the interrogatories and indicated an intent to provide the substance of the testimony in supplementary answers. This is entirely permissible under Pa. R.C.P. Nos. 4003.5(a)(1) and 4007.4(1). A few days later, Appellant demonstrated good faith by agreeing to the deposition of Mr. Child at a time that fit the vacation plans of Permittee's counsel. Appellant's later opposition to the deposition does not amount to bad faith because: (1) Appellant had not received the Notice of Deposition and, thus, did not have time to properly consider it before agreeing to it, (*see* Permittee's Motion, Exh. H); and (2) "[s]upplemental oral questioning of an expert may be permitted only upon cause shown, and upon payment of such fees and expenses as the [Board] may fix." Pa. R.C.P. No. 4003.5, cmt 4. Thus, Appellant was not under any obligation to subject its expert to an oral deposition. Moreover, the fact that Appellant submitted an expert report one week later than promised does not constitute bad faith in light of Appellant's need to allow sufficient time for its expert to review Permittee's permit application.

Finally, Permittee has not shown that it has been prejudiced from properly preparing its case for trial as a result of Appellant's dilatory response. Indeed, at this time, no hearing has been scheduled in this case, and Permittee has had Appellant's expert report since April 21, 1997. While Permittee claims prejudice *per se* because the deadlines for discovery and dispositive motions have

expired, Permittee has not sought an extension of time from the Board. *See Royster v. McGowen Ford, Inc.*, 439 A.2d 799 (Pa. Super. 1982) (holding that the ability of the party to cure the prejudice is a factor in determining whether to preclude expert testimony). Permittee also claims prejudice because Permittee has already constructed a portion of the landfill expansion area and has commenced using it. However, this has nothing to do with the purpose of the rules governing the discovery of expert testimony, which is to prevent a party from introducing a surprise expert witness at trial. *See* 9 Goodrich Amram 2d § 4003.5:1.

Based on the facts and circumstances here, we deny Permittee's Motion.

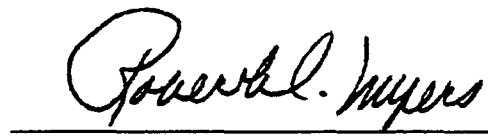
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CAERNARVON TOWNSHIP SUPERVISORS	:	
	:	
v.	:	**EHB Docket No. 96-180-MR**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and CHESTER COUNTY SOLID WASTE AUTHORITY, Permittee	:	

ORDER

AND NOW, this 21st day of July, 1997, it is ordered that Permittee's Motion in Limine to Preclude an Expert Witness is denied.

ENVIRONMENTAL HEARING BOARD



ROBERT D. MYERS
Administrative Law Judge
Member

DATED: July 21, 1997

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

For the Commonwealth, DEP:
Ember S. Jandebeur, Esquire
Southcentral Region

For Appellant:
George T. Cook, Esquire
BLAKINGER, BYLER & THOMAS, P.C.
Lancaster, PA

For the Permittee:
Vincent M. Pompo, Esquire
LAMB, WINDLE & McERLANE, P.C.
West Chester, PA

bap

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

T.W. PHILLIPS OIL AND GAS COMPANY	:	
	:	
v.	:	**EHB Docket No. 97-103-MR**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and MARK M. STEPHENSON, Permittee	:	**Issued: July 21, 1997**

OPINION AND ORDER ON MOTION FOR PROTECTIVE ORDER

By Robert D. Myers, Member

Synopsis:

A Motion for Protective Order is granted in part and denied in part where the information sought through interrogatories does not impose an unreasonable burden on the other party; is relevant, or may be relevant, to the subject matter of the appeal; and includes some information that is confidential proprietary information.

OPINION

T.W. Phillips Oil and Gas Company (T.W. Phillips) has appealed from the April 25, 1997 issuance by the Department of Environmental Protection (DEP) of Well Permit No. 37-063-31768 to Mark M. Stephenson (Permittee) for a site in West Mahoning Township, Indiana County. In its Notice of Appeal, T.W. Phillips raised the following issues: (1) Whether DEP erred in failing to notify T.W. Phillips regarding the reopening of a "conference" under 58 P.S. § 601.501(a); (2)

whether there is a workable **coal** seam below the proposed gas well site; (3) whether DEP's permit violates **coal** casing and cementing requirements; (4) whether DEP's permit violates 25 Pa. Code § 78.81(d)(2) because there is no mutual agreement between Permittee and T.W. Phillips as to drilling a gas well in a **storage protective area**; and (5) whether DEP's permit violates 25 Pa. Code § 78.81(d)(2) because it allows drilling which would not protect the **gas storage reservoir**.

Permittee served T.W. Phillips with interrogatories which request, *inter alia*, information about: (1) the geological formations which comprise T.W. Phillips' gas storage reservoir (Interrogatories 7 & 8); (2) any well within 5,000 feet of the proposed gas well, including the geological formations from which the wells produce natural gas (Interrogatories 10 & 24); and (3) drilling records of the six wells mentioned in paragraph 3.25 of the Notice of Appeal which show the presence of a workable coal seam in the vicinity of the proposed well (Interrogatory 31).

T.W. Phillips requests that the Board issue a Protective Order prohibiting disclosure of: (1) documents providing detailed geologic information regarding wells owned or operated by T.W. Phillips; (2) documents which disclose historical or current natural gas production rates from wells owned or operated by T.W. Phillips; and (3) documents related to the oil or natural gas wells owned or operated by entities other than T.W. Phillips. (*See* attached Protective Order to T.W. Phillips' Motion for Protective Order.)

Relevancy

T.W. Phillips argues that information about the gas storage reservoir formations is not relevant to whether a workable coal seam underlies the proposed well. That may be true; however, T.W. Phillips also claims on appeal that it operates a gas storage reservoir near the proposed well site, and that 25 Pa. Code § 78.81(d)(2) requires a mutual agreement as to drilling methods between

the well operator and the gas storage operator so as to protect the gas storage reservoir. With respect to these issues, T.W. Phillips must demonstrate that it operates a gas storage reservoir, thereby requiring the mutual agreement under the regulations, and that the permit allows drilling that would harm the gas storage reservoir. The Board believes that the geological formations of the gas storage reservoir are relevant to these issues.[1]

T.W. Phillips also contends that information about natural gas production from the formations which comprise the storage reservoir is irrelevant to these proceedings. (*See* Interrogatory 7.) Permittee maintains that the information is relevant and necessary to show that T.W. Phillips does not operate a "storage reservoir" under section 401 of the Oil and Gas Act. We are not in a position at this early stage of the appeal to determine the relevancy of this data. Since we are instructed to apply the rules in favor of more discovery, *Save Our Lehigh Valley Environment v. DER*, 1988 EHB 147, and since information is relevant if it may lead to other evidence, Pa. R.C.P. No. 4003.1(b), we will deny the motion with respect to this evidence.

T.W. Phillips next argues that information about wells owned and operated by other entities is irrelevant. Permittee maintains that the information is relevant because it may reveal that T.W. Phillips has not objected to other wells which produce gas from the same formations in which T.W. Phillips claims to be storing gas. If such information exists, argues Permittee, it could be used to challenge the credibility of T.W. Phillips' witnesses. We conclude that the information is relevant

---

[1] A party may obtain discovery regarding any matter, not privileged, which is **relevant** to the subject matter of the action, whether it relates to the claim or the defense of a party. Pa. R.C.P. No. 4003.1(a). It is not ground for objection that the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. Pa. R.C.P. No. 4003.1(b).

for Permittee's purposes.

Confidentiality

T.W. Phillips also argues that information about the geological formations of the storage reservoir and the wells owned or operated by T.W. Phillips is confidential information. In support of this contention, T.W. Phillips has submitted the affidavit of Keith Swanton, Vice President of Operations and Engineering. According to Swanton's affidavit, details about geological formations and the production rates of particular wells are confidential proprietary information in the industry.[2] T.W. Phillips keeps such information in secure areas, and the data is only available to authorized employees; consultants who must see the data have to execute a confidentiality agreement. Swanton also asserts that disclosure of the information would adversely affect T.W. Phillips' competitive position in the industry. Swanton explains that, whereas T.W. Phillips has expended considerable resources to obtain the information, others would not have to do so. (*See* T.W. Phillips' Motion at para. 5.)

Permittee denies that the information sought is confidential in the industry. (Response to Motion at para. 5(b).) However, he admits that T.W. Phillips conducts its business in secret and does *not* disclose information that other gas producers might disclose. (Response to Motion at para. 5(g).)

---

[2] A trade secret can consist of any compilation of information which is used in a business and which gives that business an opportunity to obtain an advantage over competitors, who do not know or use it. A trade secret requires that its owner maintain a substantial amount of secrecy. Matters of public knowledge cannot be considered trade secrets. 6 Standard Pennsylvania Practice § 34:65.

In determining whether commercial information is not discoverable, the Board must consider: (1) whether the material requested involves proprietary information; (2) whether the two parties are competitors; (3) whether the party objecting to discovery would suffer serious injury to its business by the disclosure of the material; and (4) the extent to which the information is known by employees and others involved in the business. 6 Standard Pennsylvania Practice § 34:67.

Permittee also admits that T.W. Phillips has expended its resources to obtain the information sought; however, Permittee contends that, because he is a smaller gas producer than T.W. Phillips, his access to T.W. Phillips' data will not significantly increase competition for T.W. Phillips. (Response to Motion at para. 5(c) and 5(d).)

Based on Swanton's affidavit and Permittee's response, we conclude that the requested information is proprietary. However, we note that T.W. Phillips does not object to providing geological information related to the location of the coal formations near the proposed well site. (T.W. Phillips' Reply Brief at 5, n. 4.) Thus, T.W. Phillips shall provide such information to Permittee. To the extent that any other documents which may be relevant to these proceedings contain information about the geological formations of the storage reservoir and wells of T.W. Phillips, or the production rates of the wells, they shall be the subject of a proposed Confidentiality Order submitted to the Board by T.W. Phillips. To the extent that any of these documents or other information are filed by T.W. Phillips with state or federal regulatory agencies without a confidentiality claim, they shall not be included in the proposed Confidentiality Order.

Unreasonable Burden

T.W. Phillips also argues that the request for information about non-T.W. Phillips wells within 5,000 feet of the proposed well places an unreasonable burden on T.W. Phillips. However, because Permittee has amended his request to include only those wells known to T.W. Phillips, the burden is not unreasonable. Moreover, Permittee has stated that he will accept an affidavit where T.W. Phillips does not possess information about non-T.W. Phillips and non-PC Exploration wells. Because T.W. Phillips does not have access to information about wells owned and operated by PC Exploration and other entities, discovery shall be limited to wells known to T.W. Phillips. Where

T.W. Phillips does not possess complete information about a particular well known to exist within 5,000 feet of the proposed well, T.W. Phillips should submit an affidavit to that effect.[3]

[3] Permittee has filed a Motion to Strike the Reply Brief of T.W. Phillips. T.W. Phillips has filed a Motion for Leave to File a Reply Brief. Because of our disposition of T.W. Phillips' Motion for Protective Order, we will not address these motions. We have examined the contents of the Reply Brief and conclude that nothing in it would change our disposition of the Motion for Protective Order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

T.W. PHILLIPS OIL AND GAS COMPANY	:	
	:	
v.	:	**EHB Docket No. 97-103-MR**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and MARK M. STEPHENSON, Permittee	:	

ORDER

AND NOW, this 21st day of July, 1997, it is ordered that Appellant's Motion for Protective Order is granted in part and denied in part as set forth in the attached opinion. It is further ordered that:

1. On or before August 11, 1997, Appellant shall submit to the Board a proposed Confidentiality Order pertaining to the geological formations of Appellant's storage reservoir and wells and the production rates of the wells.

2. On or before August 11, 1997, except for the information and documents covered in paragraph 1 above, Appellant shall provide Permittee with answers to Interrogatories 7, 8, 10, 24, and 31.

ENVIRONMENTAL HEARING BOARD

ROBERT D. MYERS
Administrative Law Judge
Member

DATED: July 21, 1997

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

For the Commonwealth, DEP:
Gail A. Myers, Esquire
Southwestern Region

For Appellant:
R. Timothy Weston, Esquire
KIRKPATRICK & LOCKHART LLP
Payne-Shoemaker Building
240 North Third Street
Harrisburg, PA 17101-1507

For Permittee:
Richard S. Ehmann, Esquire
7031 Penn Avenue
Pittsburgh, PA 15208-2407

bap

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

FLORENCE TOWNSHIP	:	
	:	
v.	:	**EHB Docket No. 95-107-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION and WASTE	:	
MANAGEMENT OF PENNSYLVANIA, INC.	:	**Issued:** July 22, 1997

ADJUDICATION

By George J. Miller, Administrative Law Judge

Synopsis:

The Department was not barred from issuing a solid waste permit for the expansion of an existing landfill by Act 101 or by the Department's regulations thereunder where the expansion of the facility was both provided for and "expressly provided for" by the relevant Municipal Waste Management Plans of the Pennsylvania counties involved.

BACKGROUND

This appeal arises from the Department of Environmental Protection's (Department) issuance of a solid waste permit under the Solid Waste Management Act, Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §§ 6018.101-.103 (SWMA), and the rules and regulations thereunder, to Waste Management of Pennsylvania, Inc. (WMPI) for the construction and operation of the Southern Expansion to its existing Tullytown Landfill located in Falls Township, Bucks County.

Florence Township (Appellant) is a municipal corporation of the State of New Jersey located directly across the Delaware River from the proposed Southern Expansion. It contends that the permit for the Southern Expansion was improperly issued because the Department, among other things, did not comply with the requirements of the Municipal Waste Planning Protection, Recycling and Waste Reduction Act, Act of July 28, 1988, P.L. 556, No. 101, 53 P.S. § 4000.101, *et seq.* (Act 101). The principal claim in the appeal is that the Southern Expansion was not provided for by the Bucks County Municipal Waste Management Plan (Bucks County Plan) and, as a result, the permit could not be issued because the permit application did not show that alternate requirements of Act 101 with respect to alternate facilities could be met.

Prior to the time of the hearing on the merits, the Board denied WMPI's motion to dismiss with respect to WMPI's claim that the Appellant lacks standing to appeal because there were disputes of material fact on this issue. *Township of Florence v. DEP,* 1996 EHB 282.[1]

The hearing on the merits was held for two days on April 2 and 3, 1997. Following the hearing, the parties filed extensive requests for findings of fact and conclusions of law and supporting legal briefs. The record consists of the pleadings, a joint stipulation of facts, a transcript totalling 298 pages and 30 exhibits. After a full and complete review of the record and briefs, we make the following:

FINDINGS OF FACT

1. The Department is the agency of the Commonwealth with the authority to administer

---

[1]The Board later denied WMPI's Motion for Summary Judgment with respect to Appellant's claim that the Southern Expansion is not provided for by the Bucks County Plan. 1996 EHB 1379

and enforce the Solid Waste Management Act, Act of July 7, 1980, P.L. 380, *as amended*, 35 P.S. §§ 6018.101-.1003 (SWMA), and the rules and regulations thereunder.

2. On May 23, 1995, the Department issued to WMPI a solid waste disposal permit for the Southern Expansion of WMPI's Tullytown Resource Recovery Landfill Facility (Tullytown Landfill) to be located in Tullytown Borough and Falls Township, Bucks County based upon WMPI's application which was received by the Department on August 12, 1992.

3. The permit is for a ten year term to May 23, 2005 and permits the disposal of no more than 10,000 tons of waste on any single operating day (tpd) and no more than 8,333 tons on an average daily volume basis over the standard calendar year quarter. Waste may be accepted from Bucks and Philadelphia counties in accordance with their approved plans and from Morris and Mercer counties in New Jersey pursuant to contracts specified in the permit. (Permittee-6)

4. Appellant is a municipal corporation of the State of New Jersey and is located directly across the Delaware River from the proposed expansion of the Tullytown Landfill. It contends that the permit for the landfill expansion was improperly issued because the Department, among other things, did not comply with the requirements of Act 101 and the Department's regulations thereunder.

5. The principal basis for this appeal is that the Southern Expansion was not provided for by the Bucks County Plan and, as a result, the permit could not be issued because the permit application did not show that the alternate requirements of Act 101, and the Department's regulations thereunder, could be met.

Background of the Bucks County Plan

6. The original permit for the operation of the Tullytown Landfill was issued by the

Department to WMPI in February, 1988 before the adoption of Act 101. The permitted area for the landfill and its support facilities are located in both Tullytown Borough and Falls Township. (N.T. 274; Board Exhibit-1, ¶ 2)

7. Thereafter, Bucks County and WMPI entered into an agreement dated December 5, 1988, effective retroactively to July 1, 1988 (the December 1988 Agreement), under which Bucks County agreed, among other things, to identify and designate WMPI's state permitted landfill sites within Tullytown Borough and Falls Township and reasonable expansions thereof as landfills for use or disposal of municipal waste generated within the boundaries of the County as part of any officially adopted County Municipal Waste Management Plan in accordance with Act 101. (Permittee-4 at ¶ 2; Board Exhibit 1 at ¶ 9)

8. Paragraph 3 of the December 1988 Agreement also provided that in each year of the agreement WMPI would provide the County with municipal waste disposal capacity at its state permitted landfills within Tullytown Borough and Falls Township and reasonable expansions thereof, and the County agreed not to interpose any objection to WMPI's accepting out-of-county waste for disposal at these landfills or any reasonable expansion thereof. (Permittee-4, ¶ 3; Board Exhibit-1 at ¶ 10)

9. In January, 1990, Bucks County submitted to the Department the Bucks County Plan pursuant to the requirements of Act 101. The plan as then submitted included Volumes I, II and III (Permittee-2)

10. In March 1990, the Department determined that the proposed County plan was not complete. The Department told Bucks County that the plan was not complete because the plan failed to select and designate facilities for the disposal of Bucks County municipal solid waste during

the ten-year planning period and failed to explain the basis for its selection and designation. In addition, the Department told the County that the plan must include an estimate of the processing or disposal capacity for the next ten years and the amount of the capacity to be used at each facility. (Permittee-5 and -6; App-1 (c), p. 3, Figure 19)

11. By letter dated January 9, 1991, Bucks County submitted a revised Municipal Waste Management Plan dated December, 1989 which consisted of Volumes I, II and III and an Addendum to Volume II--Technical Supplement (the Addendum) dated December, 1990.

12. The Addendum was prepared and submitted to the Department in response to the Department's statement of reasons why the plan, as submitted in January, 1990, was incomplete. (Letter from Moore to Kearns contained in the Addendum, Permittee-2). The Addendum contained, among other things, Table 23 entitled "Designated Facilities for Bucks County Municipal Waste 1990 through 2000" which designates facilities by facility/owner, location, operational status, available capacity, expansion capacity, remaining life and capacity to be used by Bucks County. (The Addendum, pp. 22-23, Permittee-2)

13. The Addendum designated the Tullytown Landfill as an operating facility with an available capacity of the 10,000 tpd then permitted by the DEP, a remaining life of 3.7 to 5.2 years and a capacity to be used by Bucks County ranging from 586 tpd in 1990 decreasing over time to 30 tpd in the year 2000. The Addendum also listed its expansion capacity as "0".

14. On March 28, 1991, the Department issued a Conditional Plan Approval for the revised Bucks County Plan. The Department's approval was conditioned, among other things, on the "exclusive use of the resource recovery and/or disposal facilities listed in Table 23 of the plan

for municipal waste generated in the County during the ten-year planning period, except as the plan may be modified pursuant to section 501 of Act 101." (Board Exhibit-1, §§ 4-8; Permittee-1; N.T. 242-246)

15. The Department interprets Act 101 and its regulations as authority for the Department to grant conditional approval of a county's municipal waste management plan, and the conditions provide a controlling interpretation of the plan unless an appeal is filed. (N.T. 92-94, 243-246)

16. No appeal was filed from the Department's conditional approval of the Bucks County Plan.

The Department's Interpretation of the Bucks County Plan

17. Bucks County submitted the December 1988 Agreement to the Department as an implementing document of the approved Bucks County Plan. (N.T. 192, 250-251; Permittee-2, Volume III, Appendix B)

18. Bucks County identified this agreement in its plan as the main implementing document which will ensure sufficient available capacity to properly dispose of potentially all municipal waste that is expected to be generated within Bucks County for the next ten years. While this agreement was to expire in 1998, Bucks County said it intended to amend the agreement so that it would at least be extended to December 31, 1999. (Permittee-2, Volume II at page 68)

19. The Department treated this agreement as the principal implementing document because it allowed Bucks County to implement its municipal waste management plan by ensuring adequate disposal capacity over the entire ten-year planning period of the Bucks County Plan. (N.T. 154-155, 193-194, 251-252)

20. The Department had some difficulty in determining that the Bucks County Plan provided for the Southern Expansion of the Tullytown Landfill because of some ambiguities in Table 23, the absence of a commitment in the December 1988 Agreement to provide a specific amount of waste to the Tullytown Landfill, a provision in Volume I of the plan indicating that any expansion had to be approved by the County as an amendment to the plan and the fact that the Department's Regional Waste Management Manager, Ronald Furlan, was not aware of the conditions on the Department's approval of the Bucks County Plan and of Table 23 until December, 1994 or early 1995. (N.T. 184-187, 201-202, 210-212)

21. One ambiguity in Table 23 was that it described the remaining life of the Tullytown Landfill as between 3.7 to 5.2 years, but also called for the delivery of waste to the landfill out to the year 2000, well beyond Table 23's description of the remaining life.

22. Mr. Furlan and the Department properly resolved this ambiguity by concluding that the precise description of the amount of Bucks County waste to be deposited at the Tullytown Landfill to the year 2000 controlled and that an expansion of the Tullytown Landfill was therefore planned for by Bucks County. (N.T. 187-188, 246-247)

23. Mr. Furlan and the Department interpreted the "0" in the column of Table 23 labelled "Expansion Capacity (additional tpd)," as applying to no expansion of the daily acceptance rate -- not as relating to any expansion of the boundaries of the Tullytown Landfill. (N.T. 185-187; 261-262)

24. The solid waste permit for the Southern Expansion did not increase the dailyacceptance rate in tons per day (tpd) beyond the 10,000 tpd set forth in the solid waste permit

for the Tullytown Landfill or the 10,000 tpd described in Table 23 for this facility. (N.T. 185-186; Permittee-16)

25. Mr. Furlan and the Department interpreted the figures listed in Table 23 as the capacity to be used by Bucks County ranging from 586 tpd in 1990 and decreasing over time to 30 tpd in the year 2000 to be limited to expected Bucks County waste recognizing that the Tullytown Landfill and the Southern Expansion would also receive non-Bucks County waste. (N.T. 188-195)

26. Information which supported this conclusion and considered by Mr. Furlan and the Department was the following:

1. The December 1988 Agreement specifically provided that Bucks County would not impose any objection to the acceptance of out-of-county waste at the landfill or any reasonable expansion thereof;
2. The reference on page 52 of the Addendum that Bucks County was to receive $0.36 per ton for all non-Bucks County waste disposed at the Tullytown Landfill, and reasonable expansions;
3. The reference on page 51 of the Addendum that the Tullytown Landfill was then receiving approximately 5,800 tpd of municipal solid waste, of which only 576 tpd was generated in Bucks County; and
4. Bucks County does not have the authority to limit a private disposal facility to Bucks County waste.

(N.T. 109-110, 187, 191-192, 195; Permittee-2, The Addendum at pp. 51, 52)

27. While Volume I of the Bucks County Plan at page 15 provided that proposed expansions of the facilities listed in that portion of the original plan would require a plan revision

under section 501(d) of Act 101, Mr. Furlan and the Department interpreted this provision as not applying to the Southern Expansion because its expansion capacity was later designated in Table 23 to satisfy Bucks County's planning needs out to the year 2000 which is beyond the anticipated useful life of the Tullytown Landfill as originally permitted. (N.T. 201-202)

28. The resolution of the ambiguities in the Bucks County Plan listed above were a reasonable interpretation of the Bucks County Plan which supports Mr. Furlan's and the Department's conclusion that the Southern Expansion was provided for in the Bucks County Plan.

The Department's Interpretation of its Regulations

29. Mr. Furlan and the Department also concluded that the Southern Expansion was "expressly provided for" in the Bucks County Plan as required by the Department's regulations. (N.T.107-108, 114-115)

30. The Department's interpretation of its regulations is that a facility or facility expansion is "expressly provided for" within the meaning of the Department's regulations when it is designated in a county municipal waste management plan to receive a specified volume of waste. (N.T. 66, 76)

31. Under this interpretation, if the approved county plan itself shows a specified volume of waste, it is not necessary that any implementing document also show a specific amount of waste for the facility or the expansion in order to be "expressly provided for" in the county plan. (N.T. 108-109, 114-115, 129-131)

32. The Bucks County Plan in Table 23 designated a specific amount of its waste to go to the Tullytown Landfill from 1990 to 2000 so that the Southern Expansion was "expressly provided for" in the Bucks County Plan.

33. At the time the Department issued the solid waste permit for the Southern Expansion, it determined that there was not an existing solid waste facility located within Morris or Mercer Counties (N.T. 206, 255), and the application demonstrates that the approved municipal waste plan for Philadelphia County provided for the disposition of waste at the Tullytown Landfill. (Permittee-10, p. D-1 (29))

Standing

34. Appellant failed to present testimony or documentary exhibits at the hearing on the merits to demonstrate that it has a substantial, direct, and immediate interest in the Department's issuance of the permit to WMPI.

DISCUSSION

The Appellant is the party protesting the issuance of the permit and therefore bears the burden of proof that the Department's action in issuing the permit was an abuse of discretion or was the result of an error of law. 25 Pa Code § 1021.101(c)(2). Our review is *de novo* so that the Board is not limited to considering the evidence the Department had before it at the time it issued the permit, but the Board considers evidence presented before the Board. *Warren Sand and Gravel Co., Inc. v. Department of Environmental Resources*, 341 A.2d 556 (Pa. Cmwlth. 1975).

An essential element of the Appellant's proof is that it has standing in the sense that it has been aggrieved by the issuance of the permit because it has a substantial, direct and immediate interest in the Department's issuance of the permit to WMPI. *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 346 A.2d 269, 280 (Pa. 1975); *Florence Township v. DEP*, 1996 EHB 282, 289-290.

Unfortunately, the Appellant presented no testimony with respect to its standing to bring this appeal at the hearing on the merits. Appellant's request for findings of fact requests that the Board find that Appellant is exposed to diminished air quality due to dust and odors from the operation of the Southern Expansion of the Tullytown Landfill referring to Form D which was part of the application. WMPI responds that the only portion of Form D that was introduced into evidence was Permittee-10 and that it does not contain the version of the Form D referred to by Appellant. While our previous opinion at 1996 EHB 282 indicated that there was a dispute of material fact as to whether or not Appellant has standing to bring this appeal, Appellant failed to prove at the hearing that it was in fact directly affected by the issuance of the permit. While we suspect that Appellant may have been able to prove that it had standing if it had offered evidence on that point, it failed to do so. We cannot find that Appellant has standing to bring this appeal as a result.

We could dismiss the appeal on this procedural ground alone. However, because of the public interest in the Department's issuance of the permit for the Southern Expansion, we have decided to issue this opinion on the merits of the Appellant's claims.

Appellant contends that the Department committed errors of law in issuing the permit despite limitations on the Department's authority imposed by Act 101 and the Department's regulations thereunder. Section 507(a) of Act 101 provides in relevant part as follows:

> (a) **Limitation on permit issuance.** After the date of submission to the department of all executed ordinances, contracts or other requirements under section 513, the department shall not issue any permit, or any permit that results in additional capacity, for a municipal waste landfill or resource recovery facility under the Solid Waste Management Act, in the county unless the applicant demonstrates to the department's satisfaction that the proposed facility:
>
> (1) is provided for in the plan for the county; or

(2) meets all of the following requirements:

> (i) The proposed facility will not interfere with implementation of the approved plan.
>
> (ii) The proposed facility will not interfere with municipal waste collection, storage, transportation, processing or disposal in the host county.
>
> (iii) The proposed location of the facility is at least as suitable as alternative locations giving consideration to environmental and economic factors.

As set forth above, section 507 places no limitation on the Department's issuance of a solid waste management permit if the facility is "expressly provided for" in the county's municipal waste management plan. If it is not so provided for in the plan for the county, then it must meet alternative requirements, including proof that the proposed location of the facility is at least as suitable as "alternative locations giving consideration to environmental and economic factors."

The Department's regulations at 25 Pa. § Code 271.201(b) appear to add additional requirements that the facility be "expressly provided for" in the host county plan and, among other things, there is no "site" in a county where the waste was generated which is more suitable for a municipal waste facility or a resource recovery facility than the proposed location of the facility. It specifically provides as follows:

> (b) In addition to the provisions of subsection (a), a permit application for a municipal waste landfill or resource recovery facility will not be approved unless the applicant affirmatively demonstrates to the Department's satisfaction that the following conditions are met:
>
> > (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, if the facility would receive waste that is included in the approved plan for the host county.

(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, municipality or State plan approved under applicable law.

(ii) The proposed facility will not interfere with municipal waste collection, storage, transportation, processing or disposal in the host county.

(iii) No site in a county where the waste was generated is more suitable for a municipal waste disposal facility or resource recovery facility than the proposed location of the facility.

25 Pa. Code § 271.201(a)(6) also imposes an additional relevant requirement. It provides as follows:

(6) If an application for a permit for a municipal waste landfill or a resource recovery facility includes approval for the disposal or processing of municipal waste generated in county, municipality or state that has an approved municipal waste management plan under applicable law, the facility is expressly provided for in the approved plan, and the approved plan designates the proposed facility to receive that waste volume under §§ 272.227, 272.231 and 272.245 (relating to selection and justification of municipal waste management program; implementing documents; and submission of implementing documents).

We deal first with the Appellant's statutory argument because of our belief that statutes take precedence over regulations[2] even though the Appellant's brief places primary emphasis on its argument based on the Department's regulations. In our view of the evidence, WMPI demonstrated

[2] As the Commonwealth Court recently observed, where there is a conflict between a statute and a regulation purporting to implement the provision of that statute, the regulation must give way. *Commonwealth v. Colonial Nisan, Inc.*, 691 A.2d 1005 (Pa. Cmwlth. 1997).

to the Department's satisfaction that the Southern Expansion is provided for in the Bucks County Plan as required by section 507(a)(1) of Act 101. Having met that requirement of section 507(a)(1), WMPI was not under an obligation to demonstrate to the Department's satisfaction that the proposed facility would meet all of the requirements of section 507(a)(2), including the requirement that the proposed "location" of the facility is at least as suitable as "alternative locations" giving consideration to environmental and economic factors. Those requirements need be met only if it were found that the proposed facility is not provided for in the Bucks County Plan. Accordingly, they need not be met by WMPI under the statute.

The Department's approval of the Bucks County Plan in March, 1991 was conditioned, among other things, on the exclusive use of the facilities listed in Table 23 of the plan. No appeal was taken from that determination. Table 23 specifically provided for Bucks County waste to go to the Tullytown Landfill to the year 2000 which is well after the remaining life of the original facility. Accordingly, as set forth in the foregoing Findings of Fact, the Department's conclusion that the Southern Expansion was provided for in the Bucks County Plan was a reasonable determination by the Department. To be sure, that determination involved resolving ambiguities in the plan in favor of WMPI, but the Department's resolution of those ambiguities is reasonable and did not amount to an abuse of discretion.

We turn next to Appellant's argument based on the Department's regulations. As we noted above, these regulations appear to provide restrictions on the Department's power to issue a permit under SWMA which are not found in the text of Act 101. In any event, we think that the evidence submitted by WMPI demonstrates that the requirements of 25 Pa.Code § 271.201(b)(1) were met by the Department. Keith C. Kearns, the Department's Chief of the Division of Waste

Minimization and Planning, testified that the determination of whether a facility is expressly provided for in a plan can be determined from either the implementing documents or from the plan showing a specified volume of waste. (N.T. 64-66) Table 23 shows that the Tullytown Landfill was to be used until the year 2000 for specified volumes of waste. Accordingly, he determined that the Southern Expansion was expressly provided for in the plan. (N.T. 109-110, 114-115)

The facility would also receive waste that is not provided for in Table 23 of the Bucks County Plan because Table 23 describes only Bucks County waste. However, it is clear that the Department properly determined that the alternate requirements of 25 Pa. Code § 271.201(b)(2) with respect to such waste were met. The proposed facility would not interfere with the implementation of the plans of Bucks or of Philadelphia counties because the Philadelphia county plan provided for disposal of waste at the Tullytown Landfill (Permittee-10, p. D-1 (29)) and those counties in New Jersey have no facilities at which the waste could be put. (N.T. 206, 255) It is clear that the proposed facility would not interfere with municipal waste collection, storage, transportation, processing or disposal in the host county because the plan itself states that the December 1988 Agreement was the principal implementing document because it gave Bucks County adequate disposal capacity over the entire 10 year period. (N.T. 154-155, 193-194, 251-252)

Finally, the requirement that no "site" in a county where the waste was generated is more suitable for a municipal waste disposal facility or resource recovery facility than the proposed location of the facility did not bar the issuance of the permit. In the case of Philadelphia, its approved plan expressly provided for disposal of the same specified volumes of waste at Tullytown as were provided for in the Bucks County Plan. (Permittee-10, p. D-1 (29)) As to the New Jersey counties, the term "site" is defined in the regulations as an area where municipal waste processing

or disposal facilities are operated. 25 Pa. Code 271.1 The testimony was that at the time the Department issued the solid waste permit for the Southern Expansion it determined that there was not an existing solid waste facility located in Morris or Mercer counties to which this waste could be sent. (N.T. 206, 255) The existing Mercer County Plan provided for disposal at Tullytown (Permittee-10, p. 185) and New Jersey's Solid Waste Management State Plan referenced no waste disposal facilities in either Morris or Mercer County. (Permittee-10, Letter to Furlan from WMPI, pp. 4-5) The Appellant produced no testimony to contradict this finding.

Appellant's brief argues that the regulation requires an environmental siting analysis to demonstrate the site's suitability in comparison to alternative "locations." That requirement, however, is not included in the Department's regulations with respect to a facility which is expressly provided for in the Bucks County Plan. It is contained only in section 507(a)(2) of Act 101 and would be a requirement only in the event the facility were not provided for by the Bucks County Plan. As we have held above, it is clear that this requirement is not applicable because the Southern Expansion is provided for in the Bucks County Plan within the meaning of section 507(a)(1) of Act 101.

Turning to 25 Pa. Code § 271.201(a)(6), the argument is that the Southern Expansion was not expressly provided for in the proposed plans of Philadelphia, Morris and Mercer counties. While the Appellant cites this provision in its brief, it does not press the argument that the applicant failed to show that the Southern Expansion was expressly provided for in the plans of these other counties. The Appellant presented no evidence on this issue and the evidence referred to above demonstrates to the contrary. Accordingly, we reject the contention that the Department's action was improper by reason of not meeting any requirement of 25 Pa. Code § 271.201(a)(6) of the regulations.

It would be difficult for the Department to deny a permit to this expansion of the existing landfill in any event. The December 1988 Agreement under which WMPI agreed to take all of Bucks County's waste was an agreement that pre-dated the January, 1990 submission by Bucks County to the Department of its Municipal Solid Waste Plan. That agreement contained Bucks County's agreement not to oppose the expansion of the Tullytown Landfill and, section 502(c) of Act 101 specifies that the county plan "shall not substantially impair the use of their remaining permitted capacity or of capacity which could be made available through the reasonable expansion of such facilities." Nothing in the Appellant's evidence suggests that the Southern Expansion is not a reasonable expansion within the definition contained in Act 101, 53 P.S. § 4000.103. Accordingly, we conclude that Appellant failed to demonstrate that the Department acted in violation of its own regulations.

Accordingly, we make the following:

CONCLUSIONS OF LAW

1. The Department's determinations are entitled to substantial deference and will not be disturbed unless they are shown to be an abuse of discretion, to be arbitrary or capricious or clearly erroneous.

2. Appellant bears the burden of proof to present evidence with respect to each issue that remained for the hearing.

3. The Board conducts a *de novo* hearing and makes its determination based on the evidence properly admitted at the hearing.

4. The Department is authorized to conditionally approve a county's Municipal Waste Management Plan under Act 101. 53 P.S. § 4000.505(a); 25 Pa. Code § 272.244(a)

5. Absent a timely appeal, the County must implement the plan that was submitted to the Department in accordance with the provisions of the plan and the conditions contained in the conditional approval. 25 Pa. Code § 272.244(a)

6. Appellant cannot now contest the Department's Conditional Plan Approval by reason of its failure to take an appeal within 30 days after that approval was made. *Tinicum Township v. DEP*, 1996 EHB 816, 824-826.

7. The Southern Expansion was "provided for" in the approved Bucks County Plan within the meaning of section 507(a)(1) of Act 101.

8. Because the Southern Expansion was so provided for in the Bucks County Plan, it was not required to meet the alternative requirements set forth in section 507(a)(2) of Act 101.

9. The Southern Expansion was "expressly provided for" in the approved Bucks County Plan within the meaning of the Department's regulations.

10. The Department properly determined that the facility would meet the requirements of 25 Pa. Code § 271.201(b) with respect to out-of-county waste because, among other things, the Department properly determined that the use of the Tullytown Landfill by Philadelphia was provided for in Philadelphia's approved plan and there was no "site" in Mercer or Morris counties that was more suitable for a municipal waste disposal facility or resource conservation facility than the proposed location of the Southern Expansion.

11. The Department properly determined that the Southern Expansion met the requirements of 25 Pa. Code § 271.201(a)(6) because the evidence shows that the approved plan for Philadelphia County expressly designated the proposed facility to receive the waste from Philadelphia County.

12. The December 1988 Agreement continued to be valid after the adoption of Act 101 under section 506 of Act 101 because it was entered into before the adoption of the approved Bucks County Plan.

13. The Board is unable to determine whether Appellant has standing to bring this appeal because of its failure to offer evidence at the hearing on the merits to demonstrate that it has a substantial, direct and immediate interest in the issuance of the permit to WMPI.

Accordingly, we enter the following order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

FLORENCE TOWNSHIP	:	
	:	
v.	:	**EHB Docket No. 95-107-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and WASTE MANAGEMENT OF PENNSYLVANIA, INC.	:	

ORDER

AND NOW, this 22nd day of July, 1997, IT IS HEREBY ORDERED that the appeal of Florence Township is DISMISSED.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: July 22, 1997

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

For the Commonwealth, DEP:
Douglas White, Esquire
Southeast Region

For Appellant:
Wendy Carr, Esquire
Philadelphia, PA
and
Thomas J. Germine, Esquire
Whippany, NJ

For Permittee:
Neil Witkes, Esquire
MANKO GOLD & KATCHER
Bala Cynwyd, PA

rk

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

MAY ENERGY, INC.	:	
	:	
v.	:	**EHB Docket No. 97-085-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued:** July 24, 1997

OPINION AND ORDER ON PETITION FOR SUPERSEDEAS

By Michelle A. Coleman, Administrative Law Judge

Synopsis:

A petition for supersedeas is denied where the petition cites no legal authority, includes no affidavits supporting the facts averred, and fails to explain the absence of affidavits.

OPINION

This matter was initiated with the April 14, 1997, filing of a notice of appeal by May Energy, Inc. (May) to a March 13, 1997, order issued by the Department of Environmental Protection (Department) pursuant to the Oil and Gas Act, Act of December 19, 1984, P.L. 1140, *as amended*, 58 P.S.§§ 601.101-601.605 (Oil and Gas Act). The order directed Amber Energy (Amber) to register, bond, and plug 12 wells it allegedly owns in Warren and Venango counties.[1]

[1] May asserts that it has an interest in the wells in question because it holds a blanket bond covering them, and because it is a creditor of--and minority shareholder in--Amber. Amber filed a separate appeal of the Department's order, docketed at EHB Docket No 97-086-C.

On July 7, 1997, May filed a petition for supersedeas.[2] In the petition, May avers that: (1) plugging the wells would be expensive; (2) "the parties"[3] are developing a plan that would allow the wells to be upgraded and kept operating; (3) it has submitted a plan to Amber's court-appointed receiver to take over operation of the wells; (4) it can prove that the wells were inoperative for reasons beyond its control and that its plan for taking over the operation of the wells is reasonable; and, (5) no threat of pollution or injury to the public will result from granting a supersedeas.

We will not grant May's petition for supersedeas. Section 1021.77(a) of the Board's rules, 25 Pa. Code § 1021.77(a), provides that petitions for supersedeas must include affidavits supporting the facts averred, or must explain why affidavits were not included. Yet May failed to include affidavits or explain why they are missing. Similarly, section 1021.77(b) of the Board's rules, 25 Pa. Code § 1021.77(b), provides that petitions for supersedeas must identify the legal authority supporting supersedeas. May, however, failed to do so. Instead, it simply averred that it would likely prevail on the merits "for the reasons submitted [in its] notice of appeal." (Petition for supersedeas, para. 2(d).) Under section 1021.77(c) of our rules, 25 Pa. Code § 1021.77(c), either of the defects in May's petition is sufficient for the Board to deny the petition *sua sponte*.

---

[2] Although May is not a party to the action and has not even filed a petition to intervene, May filed an identical copy of the petition for supersedeas in Amber's appeal of the Department's order at EHB Docket No 97-086-C.

[3] Judging from the context of the use of the phrase "the parties" in the notice of appeal, May seems to regard itself as one of "the parties"--despite the fact that it is not actually a party to the instant appeal.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MAY ENERGY, INC.	:	
	:	
v.	:	**EHB Docket No. 97-085-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 24th day of July, 1997, it is ordered that May's petition for supersedeas is denied.

ENVIRONMENTAL HEARING BOARD

Michelle A. Coleman

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: July 24, 1997

c: **DEP Bureau of Litigation**
Attention: Brenda Houck, Library
For the Commonwealth, DEP:
Stephanie K. Gallogly, Esq.
Northwest Region
For May Energy, Inc.:
William G. Martin, Esq.
Franklin, PA

For Amber Energy, Inc.
Rolf Louis Patberg, Esq.
LUDWIG & PATBERG
Pittsburgh, PA

bl

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

AMBER ENERGY, INC.	:	
	:	
v.	:	**EHB Docket No. 97-086-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued:** July 24, 1997

OPINION AND ORDER ON PETITION FOR SUPERSEDEAS

By Michelle A. Coleman, Administrative Law Judge

Synopsis:

A petition for supersedeas is denied where the petition cites no legal authority, includes no affidavits supporting the facts averred, and fails to explain the absence of affidavits.

OPINION

This matter was initiated with the April 14, 1997, filing of a notice of appeal by Amber Energy (Amber) to a March 13, 1997, order issued by the Department of Environmental Protection (Department) pursuant to the Oil and Gas Act, Act of December 19, 1984, P.L. 1140, *as amended*, 58 P.S.§§ 601.101-601.605 (Oil and Gas Act). The order directed Amber to register, bond, and plug 12 wells it allegedly owns in Warren and Venango counties.

On July 7, 1997, May Energy, Inc., (May) filed a petition for supersedeas.[1] In the petition,

[1] May is not a party in this appeal, nor has it filed a petition to intervene. It did, however, file a separate appeal to the same order Amber appeals here. In its own appeal, docketed at EHB

May avers that: (1) plugging the wells would be expensive; (2) "the parties"[2] are developing a plan that would allow the wells to be upgraded and kept operating; (3) it has submitted a plan to Amber's court-appointed receiver to take over operation of the wells; (4) it can prove that the wells were inoperative for reasons beyond its control and that its plan for taking over the operation of the wells is reasonable; and, (5) no threat of pollution or injury to the public will result from granting a supersedeas.

We will not grant May's petition for supersedeas. Section 1021.77(a) of the Board's rules, 25 Pa. Code § 1021.77(a), provides that petitions for supersedeas must include affidavits supporting the facts averred, or must explain why affidavits were not included. Yet May failed to include affidavits or explain why they are missing. Similarly, section 1021.77(b) of the Board's rules, 25 Pa. Code § 1021.77(b), provides that petitions for supersedeas must identify the legal authority supporting supersedeas. May, however, failed to do so. Instead, it simply averred that it would likely prevail on the merits "for the reasons submitted [in its] notice of appeal." (Petition for supersedeas, para. 2(d).) Under section 1021.77(c) of our rules, 25 Pa. Code § 1021.77(c), either of the defects in May's petition is sufficient for the Board to deny the petition *sua sponte.*

Docket No. 97-085-C, May asserts that it has an interest in the wells because it holds a blanket bond covering the wells in question, and because it is a creditor of--and minority shareholder in--Amber. May filed an identical copy of the instant petition for supersedeas in its own appeal at EHB Docket No. 97-085-C.

[2] Judging from the context of the use of the phrase "the parties" in the notice of appeal, May seems to regard itself as one of "the parties"--despite the fact that it is not actually a party to the instant appeal.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

AMBER ENERGY, INC.	:	
	:	
v.	:	**EHB Docket No. 97-086-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 24th day of July, 1997, it is ordered that May's petition for supersedeas is denied.

ENVIRONMENTAL HEARING BOARD

Michelle A. Coleman

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: July 24, 1997

c: **DEP Bureau of Litigation**
Attention: Brenda Houck, Library
For the Commonwealth, DEP:
Stephanie K. Gallogly, Esq.
Northwest Region
For Amber Energy, Inc.:
Rolf Louis Patberg, Esq.
LUDWIG & PATBERG
Pittsburgh, PA
For May Energy, Inc.:
William G. Martin, Esq.
Franklin, PA

bl

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

M. DIANE SMITH
SECRETARY TO THE BOA

PEOPLE UNITED TO SAVE HOMES and PENNSYLVANIA AMERICAN WATER COMPANY	:	
v.	:	**EHB Docket No. 95-232-R (Consolidated with 95-233-R 96-223-R and 96-226-R)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and EIGHTY-FOUR MINING COMPANY, Permittee and INTERNATIONAL UNION UNITED MINE WORKERS OF AMERICA AND DISTRICT 2 UNITED MINE WORKERS OF AMERICA, Intervenors	:	**Issued:** July 30, 1997

OPINION AND ORDER ON MOTION FOR RECUSAL

By: The Board

Synopsis

A Motion for Recusal filed by People United to Save Homes is denied where the Motion fails to provide any basis requiring recusal of the presiding judge. Representation of a non-party affiliate of the permittee by the judge's spouse's firm is not a disqualifying "financial interest" under Canon 3(C) of the Code of Judicial Conduct. Nor has the Motion demonstrated any bias of the presiding judge in this matter.

OPINION

Presently before the Board is a Motion for Recusal ("the Motion") filed by People United to Save Homes ("PUSH"). After careful review of PUSH's Motion, supporting memorandum of law, and exhibits, as well as the record in this case and Board opinions cited by PUSH, it is

clear that PUSH has not produced a scintilla of evidence in support of its Motion, alleging conflict of interest, bias, or unfairness. Nor does the case law on which PUSH relies support its Motion. Because PUSH's Motion lacks both a factual and legal foundation, it must be denied.

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

PUSH first contends that there is a conflict of interest pursuant to Canon 3 of the Code of Judicial Conduct because Judge Renwand's wife, Attorney Sandra Mackey Renwand ("Attorney Renwand"), is a lawyer at a law firm, Babst, Calland, Clements & Zomnir, P.C. ("BCCZ"), that represents a company, Leatherwood, Inc. ("Leatherwood"), which is not a party to this litigation. Leatherwood is a subsidiary of another company, Rochester and Pittsburgh Coal Company ("Rochester and Pittsburgh"), which also is not a party to this litigation. Eighty-Four Mining Company ("Eighty-Four"), the permittee in this matter, is a subsidiary of Rochester and Pittsburgh. Eighty-Four is represented by the firm of Reed, Smith, Shaw & McClay in this appeal.

Canon 3(C) of the Code of Judicial Conduct, the guide, provides in relevant part as follows:

> (1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where...
>
> > (c) he knows that he, individually or as a fiduciary, or his spouse or a minor child residing in his household, has a substantial financial interest in the subject matter in controversy or in a party to the proceeding, or any interest that could be substantially affected by the outcome of the proceeding...
>
> (3) For the purpose of this section...
>
> > (b) "financial interest" means ownership of a legal or equitable interest if substantial, or a relationship as director, advisor or other active participant in the affairs of a party.

What is the "substantial financial interest in the subject matter in controversy or in a party to [this] proceeding?" Neither Leatherwood nor Rochester and Pittsburgh are parties to this litigation. Nor has PUSH alleged that Attorney Renwand or BCCZ has any financial interest in Eighty-Four. The financial interest in question must be "substantial" to warrant recusal under Canon 3(C). There is simply no basis for finding that Attorney Renwand or BCCZ has any financial interest in a party to this proceeding, much less a "substantial financial interest."

Leatherwood, the company which is represented by BCCZ, is involved in another appeal which is pending before the Board. Judge Renwand recused himself from that appeal at the time BCCZ was retained to represent Leatherwood and has not participated in any of that proceeding.[1]

---

[1]When a judge of the Environmental Hearing Board is recused from a case, that judge has absolutely no contact with the case. Briefs, transcripts, and opinions regarding the case are not circulated to the recused judge. Nor does the judge take part in any discussions concerning the case with the other judges of the Board. Judge Renwand's recusal has been set forth in every Board decision issued in that case. This crucial fact of his recusal was omitted in PUSH's Motion.

Moreover, although BCCZ represents Leatherwood in that proceeding, Attorney Renwand does not represent Leatherwood and has no "substantial financial interest" in that proceeding.

PUSH acknowledges that Attorney Renwand has not represented Leatherwood, but since BCCZ receives fees from their clients, including Leatherwood, PUSH argues that she derives a benefit therefrom. BCCZ's representation of Leatherwood should not be considered since, as noted above, Judge Renwand has recused himself from that case. However, even setting aside for the moment this important distinction, this does not create a substantial financial interest in this case since BCCZ does not represent Eighty-Four. PUSH cites no case law to support its untenable interpretation of Canon 3. Nor does PUSH address the requirement of "any other interest that could be substantially affected by the outcome of the proceeding." In short, PUSH cites no case law to support recusal.

Two recent decisions support the conclusion that recusal is precluded under the facts of this case. *Welch v. Board of Directors of Wildwood Golf Club*, 918 F.Supp. 134 (W.D.Pa. 1996), involved a suit against a country club. United States District Judge Donald Lee of the Western District of Pennsylvania granted summary judgment in favor of Wildwood. The plaintiffs later alleged that Judge Lee failed to disclose a conflict of interest because his sons were attorneys at the Pittsburgh law firm of Dickie, McCamey & Chilcote, P.C. ("DM&C"), which regularly represented Wildwood, including giving legal advice "in the early stages of the complaint." Wildwood was represented by another firm during the litigation. The plaintiffs argued that Judge Lee's alleged interest in protecting the employment of his sons at DM&C and the sharing of income received from providing legal services to the defendants had affected his impartiality. The

court found that no reasonable person could harbor doubts concerning Judge Lee's impartiality based on the following:

(1) DM&C did not represent any of the parties in the litigation before Judge Lee;

(2) the judge's sons at DM&C never represented Wildwood in any other litigation; and

(3) the law firm's receipt of fees from Wildwood did not mean that the sons had a substantial financial interest in any party or the subject matter in controversy; nor did the sons have an interest in the case that could be substantially affected by the outcome of the proceeding. The court concluded, therefore, that Judge Lee need not recuse himself in the *Welch* case.

The nexus here is much more remote than in the *Welch* case. BCCZ does not represent Eighty-Four. The receipt of legal fees BCCZ might collect from a separate company does not trigger Canon 3.

Similarly, in *Randt v. Abex Corporation*, 671 A.2d 228 (Pa. Super. 1996), the Pennsylvania Superior Court affirmed the trial judge's refusal to recuse himself even though the trial judge's son worked as a paralegal for a law firm representing one of the defendants in the case. The court noted that such a relationship did not require recusal and that there was no indication that the son's continued employment was in any way related to his judge-father's rulings in the case. The Superior Court accepted the trial judge's reasoning that "he was able to dispose of the matter fairly and without prejudice." *Id.* at 235.

In addition, under long established Pennsylvania law dealing with corporations, applying PUSH's contentions, there is absolutely no conflict of interest, duty to disclose, or requirement that Judge Renwand recuse himself. PUSH's Motion acknowledges that Eighty-Four, Rochester and Pittsburgh, and Leatherwood are three separate companies. PUSH does not assert that Eighty-

Four's corporate structure should be disregarded. Consequently, we are obligated under Pennsylvania law to recognize Eighty-Four as a corporation separate from both Leatherwood and Rochester and Pittsburgh. Because Eighty-Four and Leatherwood are two separate corporations, represented by two separate law firms, Judge Renwand has no reason to recuse himself nor does he have anything to disclose. In fact, Judge Renwand had no knowledge that Leatherwood was a subsidiary of Rochester and Pittsburgh. Now that PUSH, through its current counsel, has made this information available in this case, we still are obligated to recognize Eighty-Four as a separate corporation. See *Kiehl v. Action Mfg.*, 535 A.2d 571 (Pa. 1987); *Fitzgerald v. Hilton Hotels Corporation*, 183 F.Supp. 342 (E.D.Pa. 1960).

In *Shared Communications Services v. Bell Atlantic Properties,Inc.*, 692 A.2d 570 (Pa. Super. 1997), the Pennsylvania Superior Court rejected the argument that a parent corporation and its wholly owned subsidiary should be treated as one entity. The court stressed that a parent and subsidiary "are recognized as separate and distinct legal entities" even if they might share common goals. *Id.* at 573. In *Kiehl, supra*, the Pennsylvania Supreme Court similarly ruled that a subsidiary corporation is still a separate corporation that can not be considered the same corporation as the parent even if a parent controls the subsidiary to such an extent that the latter is reduced to a mere division of the parent. 535 A.2d at 574.

The case of *McSparran v. Bethlehem Minerals Co.*, 210 F.Supp. 21 (E.D.Pa. 1962), is illustrative. The plaintiff contended that two subsidiaries should be treated as one entity since both were subsidiaries of the same parent. The court expressly rejected this argument where, as here, the moving party failed to show a lack of corporate separateness of the company in the lawsuit.

The court held that, under Pennsylvania law, the separate corporate identities of the two subsidiaries must be respected.

In this case, PUSH does not allege that Eighty-Four is not a separate company from Rochester and Pittsburgh or Leatherwood. In fact, PUSH has never urged that the separate corporate identities should be disregarded. Therefore, there is no reason for Judge Renwand to disqualify himself in this case because BCCZ represents a company that is not a party to this case. In sum, PUSH has not adduced any facts or cited any law that raises a question that Judge Rewand's impartiality could reasonably be questioned pursuant to Canon 3 of the Code of Judicial Conduct. Consequently, he is obligated to preside. *Welch, supra.*

Second, PUSH's Motion requests that Judge Renwand recuse himself because he has allegedly shown a bias in favor of coal companies and against citizen's groups.[2] The record refutes this allegation. The action being appealed in this case is the Department's approval of a revision to Eighty-Four's Mining Activity Permit. This approval generated five separate appeals in the months of October and November 1995. These appeals were filed by Columbia Gas of Pennsylvania, Inc., PUSH, Pennsylvania American Water Company, South Strabane Township and Eighty-Four.[3] Over strenuous objections of Eighty-Four and the Department Judge Renwand granted a motion joined in by PUSH to consolidate the appeals in one action.

---

[2]PUSH has failed to cite any of the Board's many opinions where recusal motions were denied. For example, see *Luzerne Coal Corporation v. Department of Environmental Resources,* 1990 EHB 140. The Board's decision denying the Motion to Recuse was based, in part, on the theory that "an unfavorable procedural ruling, absent other circumstances, does not constitute grounds for recusal." *Id.* at 145.

[3]The United Mine Workers intervened in the case following issuance of our opinions on dispositive motions.

The case proceeded through discovery. The Board ruled on dispositive motions filed by the various parties. The opinions issued in November and December 1996 on these motions were unanimous Board opinions (authored by Judge Renwand and joined in by the Board). These opinions were appealed, unsuccessfully, by Eighty-Four and the Department. The coal company also unsuccessfully attempted to invoke the jurisdiction of the Court of Common Pleas of Washington County to reverse the Board opinions. Even though these opinions were not in favor of Eighty-Four, PUSH cites to these unanimous Board rulings as evidence that Judge Renwand is biased against PUSH.

While the first appeals of Eighty-Four and the Department were pending in the Commonwealth Court the action was stayed by operation of the Pennsylvania Rules of Appellate Procedure.[4] Once the appeals were quashed and the case was remanded to the Board, Pennsylvania American Water Company filed a motion to withdraw its remaining issues. Eighty-Four filed another appeal following the Board's issuance of orders on the water company's motions. The case was again stayed pursuant to the Pennsylvania Rules of Appellate Procedure pending the disposition of the appeal in the Commonwealth Court.

---

[4]The applicable rule reads as follows:

> **Pa. R.A.P. 1701 Effect of Appeal Generally**
>
> (a) General Rule. Except as otherwise prescribed by these rules, after an appeal is taken or review of a quasijudicial order is sought, the trial court or other government unit *may no longer proceed further in the matter.* [Emphasis added]

PUSH argues that our following the mandates of the Pennsylvania Rules of Appellate Procedure by staying the hearing in this action while the parties were in Commonwealth Court arguing Eighty-Four's most recent appeal harmed PUSH or showed bias against it. The last appeal to the Commonwealth Court, at most, caused the hearing to be postponed by approximately one month. This Motion and the change of counsel by PUSH have caused a greater delay than the appeal. Moreover, if the Commonwealth Court would have heard the appeal and the parties were already proceeding to trial before the Board such action might have resulted in the loss to the parties of thousands of dollars in legal fees, expert witness fees, and other trial expenses. That is why we were patient and followed the Pennsylvania Rules of Appellate Procedure.

PUSH alleges that the prehearing rulings showed a bias against PUSH. However, the record does not support this contention. In our opinion and order regarding PUSH's Motion for Summary Judgment we considered PUSH's Motion on the merits even though we found it procedurally defective and could have denied it on that ground alone. The Board found that PUSH's three page Motion for Summary Judgment did not meet the degree of specificity required by 25 Pa. Code Section 1021.70(d). It contained general, conclusory statements without specific grounds in support thereof. Also, the motion failed to contain a single reference to the attached exhibits. In addition, a number of arguments in the supporting memorandum of law were never raised in the motion itself. The Board overlooked PUSH's procedural defects "in the interest of insuring a speedy and efficient resolution of this matter." 1996 EHB 1472 (citing Pa. R. Civ. P. 126). In the Board's carefully considered opinion issued on December 2, 1996, we addressed every argument raised by PUSH in its motion, and determined that material questions of fact remained which PUSH could raise at the trial of the case.

On November 27, 1996, we ruled on Eighty-Four's Motion for Partial Summary Judgement against PUSH. Of the more than 200 objections raised by PUSH in its notice of appeal, the Board dismissed only fifteen of them.

PUSH complains regarding our opinion in which we partially granted Pennsylvania American Water Company's motion for partial summary judgment. (This opinion was also issued on November 27, 1996.) In this opinion, the Board prohibited Eighty-Four from mining under Pennsylvania American Water Company's 30-inch water line until "it has submitted a revised subsidence control plan and received approval thereof from the Department of Environmental Protection consistent with the requirements set forth in this Opinion or until Pennsylvania American Water Company has provided Eighty-Four Mining Company with permission to mine under its water line." 1996 EHB at 1425.

PUSH is critical of language in the Board opinion that is derived directly from the act in question. "It is also the policy of this act to assure that the coal supply essential to the Nation's and the Commonwealth's energy requirements, and their economic and social well-being, is provided and to strike a balance between protection of the environment and agricultural productivity and the Nation's and the Commonwealth's need for coal as an essential source of energy."[5] See 52 P.S. §1396.1 This language from a section of the Act emphasizes the intent of the legislature that coal mining proceed in an environmentally sound way. In making our ruling we indicated that in doing so we were protecting the lives and property of thousands of people. This opinion and order of the Board certainly can not support a contention of bias against PUSH.

---

[5]PUSH may not like this language. However, it is in a section of the Act entitled "Purpose of Act." This Board is not free to ignore this language.

A further review of the voluminous record in this case reveals a number of other orders issued in PUSH's favor.

(1) **5-6-96** - Ordered the Department of Environmental Protection to file more specific responses to PUSH's interrogatories following oral argument on PUSH's Motion to Compel.

(2) **8-6-96** - Denied Eighty-Four's Motion to Strike Amendment to PUSH's Memorandum of Law in support of its Motion for Summary Judgment.

(3) **10-24-96** - Denied Eighty-Four's and the Department's Motion to Strike Expert Report of Jeffrey Maze (PUSH's Second Amended Pre-Hearing Memorandum docketed 4-22-97, lists Mr. Maze as a possible witness.)

(4) **12-2-96** - Denied Eighty-Four's Motion to Strike Portions of PUSH's Pre-Hearing Memorandum.

(5) **12-23-96** - Denied Eighty-Four's Motion for Reconsideration of Board's Opinion on Eighty-Four's Motion for Partial Summary Judgment against PUSH.

(6) **1-24-97** - Denied Eighty-Four's and the Department's Motions to Allow Appeal to Commonwealth Court.

(7) **5-8-97** - Denied PUSH's former counsel's Motion to Withdraw as PUSH's counsel until PUSH was able to retain new counsel. Granted PUSH's Motion for Continuance of the hearing until new

counsel could be retained.

Consequently, a review of the decisions in this case could not lead any reasonable person to conclude that Judge Renwand was in any way biased against PUSH.

PUSH next argues that a review of Board cases shows that Judge Renwand has never ruled in favor of a citizen's group or a municipality. PUSH's argument is fatally flawed. First, we reject the proposition that a statistical analysis of what a judge has done in the past in other cases is sufficient to show bias against PUSH or any of the other parties in this case. Second, PUSH is simply wrong. Judge Renwand has ruled in favor of municipalities and citizen's groups. See *City of Harrisburg v. Department of Environmental Protection*, 1996 EHB 709 (100 page opinion granting City's appeal from action of Department); *Indian Lake Borough v. Department of Environmental Protection*, 1996 EHB 1030 (Denied Department's Motion to Dismiss Without a Hearing Indian Lake Borough's Petition for Supersedeas. Counsel for PUSH was also counsel for Indian Lake Borough).

PUSH fails to include in its list of decisions, an adjudication issued after an eleven day trial before Judge Renwand in *Rand, Am., Inc. v. Department of Environmental Protection and Mountain Watershed Association, Inc.*, EHB Docket No. 95-161-R (Adjudication issued April 1, 1997). In this case, the Board ruled in favor of the Department and Mountain Watershed Association in upholding the Department's denial of Rand Am's application for an underground coal mining permit. We held that the coal company failed to demonstrate that the operation of the mine would not result in pollution to the waters of the Commonwealth. Since Mountain Watershed Association was represented throughout the case by PUSH's counsel's law firm we can

only assume that the omission of this case was deliberate since it refutes his argument that Judge Renwand is biased in favor of coal companies and against citizen's groups.[6]

Second, the list of cases cited by PUSH is incomplete, inaccurate and, therefore, misleading. It fails to discuss any of the decisions. It also fails to note that the few final decisions were decisions of the entire Board. More importantly, except for the PUSH decisions, none of the other cases on PUSH's list have been appealed by the losing party, let alone reversed. The law was so clear in some of these cases that the appellant did not even file an opposing brief to the Department's or permittee's dispositive motions.

The list is also misleading in other respects. Some of the cases listed by PUSH involved very minor motions that had or will have no bearing on the outcome of the cases. Also, many of the cases cited by PUSH have not yet been resolved. In addition, in some of the cases PUSH lists in its Motion, the Board rejected most of the permittee's or Department's arguments. Yet, PUSH lists the cases as indicia of bias. This is true of the *Chestnut Ridge* case, referenced by PUSH in its Motion. *Chestnut Ridge Conservancy v. Department of Environmental Protection and Tasman Resources, Inc.*, EHB Docket No. 96-022-R *et al.* PUSH points to the fact that the permittee in that case is represented by BCCZ, without further explanation. PUSH failed to disclose that as soon as BCCZ entered its appearance in the case, Judge Renwand moved to recuse

---

[6]We have discussed only the Board decisions authored by Judge Renwand. PUSH should also have considered the Board decisions in which Judge Renwand joined which were authored by other judges in which the Board also ruled in favor of third party appellants. For example, *see Herr v. Department of Environmental Protection and Pequea Township,* EHB Docket No. 94-098-MR (Opinion issued June 16, 1997); *Fontaine v. Department of Environmental Protection and Waste Management Disposal Services of Pa.*, 1996 EHB 1333; and *Oley Township v. Department of Environmental Protection*, 1996 EHB 1098.

himself from any further involvement in the case. The parties, however, specifically requested that he hear the case. All parties entered into a joint stipulation waiving any potential conflict of interest.

PUSH states also that in the *Chestnut Ridge* case the permittee's Motion for Partial Summary Judgment was granted. PUSH fails to state that only one minor issue was granted in favor of the permittee and the motion was denied in all other respects. Following the ruling on the motion, the parties proceeded to trial, which recently took place over 30 trial days.

A final decision in the case has not yet been issued as the parties have not completed their post-hearing submissions. However, none of the parties, including two citizen's groups, ever alleged any bias.

Finally, PUSH complains that the Board has not prohibited mining from continuing while the case was on appeal to the Commonwealth Court. PUSH's counsel is well aware that the mere filing of an appeal with the Environmental Hearing Board will not stop the mining. At anytime since November 1995, counsel for PUSH could have filed a Petition for Supersedeas. 25 Pa. Code §§1021.76 to 1021.79. If PUSH had filed a Petition for Supersedeas and it was able to prove the allegations in its Petition at a hearing, we are empowered, *inter alia*, to order a halt to the mining. PUSH never filed such a petition. It was certainly under no duty to file such a petition. However, the point is that PUSH had other options; the Board is not to blame for PUSH's strategy.

In sum, a review of the entire record in this case as well as applicable Board and individual decisions fails to show bias, either in favor of the coal company or against PUSH. Consequently, recusal is not appropriate.

PUSH expresses concern that it may suffer some retribution from Judge Renwand or the Board because of the filing of this Motion to Recuse. PUSH has nothing to fear from Judge Renwand or this Board from this motion. All parties in this case will continue to be treated fairly and with the utmost courtesy.

Each case before the Board is important, including this case which has been especially hard fought by the parties. A review of the record, as a whole, attests that the parties perceive that their vital interests are at stake. PUSH feels that their homes are directly threatened. Eighty-Four feels that its right to mine coal is under siege. The Department feels that its management and regulation of its underground mining program is being jeopardized. The United Mine Workers feel their jobs are threatened.

The media scrutiny and interest adds to the pressures on the parties and their attorneys. In such an atmosphere emotions can and sometimes do run high. The temptation is always there in such a situation to ascribe bias to someone who is looking at the issues not blinded by the smoke and fire of advocacy or the moral certainty that he is right.

The Board will always be guided by the law and evidence in deciding the issues remaining in this case. To prevent any further delay, the trial will be scheduled, by separate order, to begin in Pittsburgh on August 18, 1997.

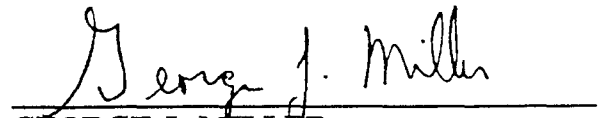
COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

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

ORDER

AND NOW, this 30th day of July, 1997, the Motion for Recusal filed by People United to Save Homes is **denied.**

ENVIRONMENTAL HEARING BOARD



GEORGE J. MILLER
Administrative Law Judge
Chairman

ROBERT D. MYERS
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: July 30, 1997

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

For the Commonwealth, DEP:
Steven F. Lachman, Esq.
Patience Robinson Nelson, Esq.
Diana Stares, Esq.
Western Region

For PUSH:
Robert P. Ging, Jr., Esq.
Confluence, PA

For UMWA:
Michael J. Healey, Esq.
Claudia Davidson, Esq.
HEALEY DAVIDSON & HORNAK, P.C.
Pittsburgh, PA

For PA American Water:
Jan L. Fox, Esq.
Julie A. Coletti, Esq.
LeBEOUF LAMB GREENE & MacRAE, L.L.P.
Pittsburgh, PA
Michael D. Klein, Esq.
LeBEOUF LAMB GREENE& MacRAE, L.L.P.
Harrisburg, PA

For Eighty-Four Mining:
Thomas C. Reed, Esq.
Henry Ingram, Esq.
REED SMITH SHAW & McCLAY
Pittsburgh, PA

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

OLEY TOWNSHIP	:	
	:	
v.	:	**EHB Docket No. 96-198-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and STAUFFER REIFSNEIDER, Intervenor	:	**Issued:** July 30, 1997

ADJUDICATION

By George J. Miller, Administrative Law Judge

Synopsis:

The Board denies a township's appeal from an order of the Department requiring the township to revise its official sewage plan to include a proposed subdivision. The Board finds that the Department did not err in ordering the revision by relying on a court order which deemed the subdivision approved under the Municipalities Planning Code where the sewage planning module was otherwise consistent with the township's official plan. We also find that the township did not sustain its burden of proving that the proposed subdivision will cause a violation of the safe drinking water standard for nitrate-nitrogen. Finally, the Department's order does not violate the Department's regulations under the Sewage Facilities Act.

BACKGROUND

Before the Board is the appeal of Oley Township which seeks review of an order of the Department of Environmental Protection which directed the Township to revise its official sewage plan to incorporate a planning module for a residential subdivision to be developed by an individual landowner, Stauffer Reifsneider.

On October 8, 1996, the Township filed a petition for supersedeas seeking a stay of the Department's order during the pendency of its appeal. The Board held a hearing on the Township's petition on October 22, 1996. In an opinion and order dated November 6, 1996, the Board denied the Township's petition for supersedeas on the grounds that the Township had failed to establish that it was likely to succeed on the merits of the appeal. *Oley Township v. DEP*, 1996 EHB 1359.

The Board held a hearing on the merits of the appeal on March 27, 1997. The parties stipulated to the inclusion of the record from the supersedeas hearing. After consideration of the briefs, transcripts and exhibits in this matter the Board makes the following:

FINDINGS OF FACT[1]

1. Oley Township (Appellant) is a township of the second class situated in Berks County, Pennsylvania.

2. The Department of Environmental Protection is the agency with the duty and authority to administer and enforce the Pennsylvania Sewage Facilities Act, Act of January 24, 1966, P.L. (1965) 1535, *as amended*, 35 P.S. §750.1 - 750.20a. (Sewage Facilities Act); the Clean Streams

---

[1] The Appellant's exhibits admitted into evidence are referred to as "Ex. A- ___"; the Department's exhibits as "Ex. C- ___"; Intervenor's exhibits as "Ex. I-___". References to the October 22, 1996 supersedeas transcript is referenced as "S.N.T." References to the transcript of the hearing on the merits on March 27, 1997, are noted as "N.T."

Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P.S. §§ 691.1- .1001; the Pennsylvania Safe Drinking Water Act, Act of May 1, 1984, P.L. 206, *as amended*, 35 P.S. §§721.1- .17 (Safe Drinking Water Act); and Section 1917-A of the Administrative Code of 1929, Act of April 9, 1929, P.L. 177, *as amended*, 71 P.S. § 510-17, and the rules and regulations promulgated thereunder.

3. Stauffer B. Reifsneider (Intervenor) is an individual residing at R.D. 4, Box 4051, Fleetwood, Pennsylvania.

4. The subdivision proposed by Intervenor is a 13-lot subdivision on a 24.57 acre tract of land on the west side of Covered Bridge Road (SR1030) and Oak Lane (T-462) in Oley Township. (S.N.T. 181; Ex. A-17, App. 5)

5. The lots range in size from 1.54 acres to 2.06 acres and will utilize on-lot septic systems for sewage disposal. (Ex. A-17, App. 1)

6. The Intervenor farmed the site of the proposed subdivision for eight years; the farming is currently being done under lease by a tenant farmer. (S.N.T. 181;189)

7. On April 17, 1992, the Intervenor submitted a plan for subdivision of the tract to Oley Township as required by the Municipalities Planning Code and the Township's 1986 land development ordinance. (Ex. A-11)

8. After submission of the subdivision plan, the Township adopted Ordinance 240, an amendment to its zoning ordinance which prohibits development of the Reifsneider tract for residential purposes except under very stringent limitations. (Ex. A-11 at 2)

9. On April 23, 1993, by order of the Court of Common Pleas of Berks County, the Township was ordered to approve the subdivision plan because it had failed to act on Intervenor's

request for approval of the subdivision plan within the 90 day review period mandated by Section 508(3) of the Municipalities Planning Code, 53 P.S. § 10508(3). (Ex. A-11)

10. This order was affirmed by the Commonwealth Court and petition for allowance of appeal was denied by the Pennsylvania Supreme Court. (Ex. A-17, App. 6 and App. 7)

11. Having exhausted all appeals, the Township signed the Reifsneider subdivision plan and it was recorded in Plan Book Volume 209, Page 21 on June 6, 1995. (Ex. A-17 at 4)

12. On October 25, 1995, Oley Township revised its Official Sewage Plan; the revision was approved by the Department. (Ex. A-16)

13. The 1995 revision primarily dealt with the sewage disposal needs of Pleasantville, Water Street, and Essig Subdivision areas of Oley, proposing extension of sewer lines to those areas. (Ex. A-1)

14. The revision noted that township zoning law imposed density requirements on agricultural lands and only allows for two dwelling units on tracts of property between 7 and 30 acres. (Ex. A-1 at 1-4)

15. Oley Township currently has no plans to run public sewer lines to the area of the township where the Reifsneider Subdivision is located. (Ex. A-1 at 1-5)

16. On or about January 15, 1996, the Intervenor submitted a Planning Module for New Land Development to Oley Township for its review and approval in accordance with Section 5 (a.1) of the Sewage Facilities Act, 35 P.S. § 750.(a.1). (S.N.T. 21; Ex. A-17, App. 1)

17. The Planning Module proposed on-lot sewage disposal and individual water supply wells and was accompanied by a preliminary hydrogeologic evaluation, as required by 25 Pa. Code § 71.62(c). (Ex. A-17, Apps. 1, 2)

18. The Township refused to approve the Planning Module as a revision to its Official Plan, asserting that

a. the proposed subdivision proposed residential development in an area of prime farmland which was inconsistent with the Oley Township and Berks County Comprehensive Plans;

b. the proposed subdivision was inconsistent with the Township's Official Plan which only allowed limited residential development in areas zoned for agricultural preservation in accordance with the municipality's zoning ordinance;

c. the proposed subdivision would be inconsistent with the Commonwealth's policies regarding the protection of prime agricultural lands articulated at 4 Pa. Code Ch. 7, Subchapter W;

d. the proposed subdivision would aggravate already elevated levels of nitrate-nitrogen in the area.

(S.N.T. 21-29; Ex. A-17, App. 3)

19. The Intervenor, pursuant to Section 5(b) of the Sewage Facilities Act, 35 P.S. § 750.5(b), submitted a private request to the Department to order the Township to revise its Official Plan to provide for the sewage disposal needs of the Reifsneider Subdivision. (S.N.T. 183; Ex. A-17)

20. Timothy Wagner is a Compliance Specialist for the Department's Southcentral Region Water Management Program. He is a certified sewage enforcement officer and a former water quality specialist. He has seven years of experience in reviewing on-lot sewage disposal system applications, planning modules for new land development and township official sewage plans. (S.N.T. 124-26)

21. Mr. Wagner is responsible for soliciting comments, distributing the private request to the proper technical personnel, and otherwise coordinating the review of the private request. (S.N.T. 129)

22. Upon receipt of a private request for an official plan revision, the Department solicits comments from the affected municipality, its planning agency, and the county planning agency which have 45 days to review the request and submit comments. (S.N.T. 128-29)

23. Oley Township and the Berks County Planning Commission reiterated and elaborated on the comments they articulated when the Planning Module was originally presented to them for review. (Exs. A-19, A-20)

24. At the request of Mr. Wagner, Mark Sigouin, the Water Management Program Hydrogeologist, reviewed the private request, particularly the preliminary hydrogeological report prepared on behalf of Intervenor by Carlyle Gray Associates, and a hydrogeological report prepared on behalf of Oley Township by Tethys Consultants, Inc. (N.T. 9-10)

25. Based on the comments of the technical specialists, Mr. Wagner developed a recommendation to Leon Oberdick, the Water Management Program Manager, who, in turn, made the ultimate decision to issue an order to Oley Township on September 18, 1996, to revise its Official Sewage Plan to meet the sewage disposal needs of the Reifsneider Subdivision. (S.N.T. 129-30)

26. The Oley Township official Sewage Plan designates on-site sewage disposal as the method of sewage disposal for the area of the township where the Reifsneider tract is located. (S.N.T. 38-53; Ex. A-1)

27. The Planning Module for the subdivision indicates that on-lot sewage disposal will be utilized in the development. (S.N.T. 39; Ex. A-17, App. 1)

28. Because the Reifsneider Subdivision was a recorded existing subdivision by virtue of the order of the Berks County Court of Common Pleas, the Department determined that it could not impose the density requirement noted in the Official Plan. (S.N.T. 133-35)

29. Although the Department relies on county and municipal planning agencies to determine whether a planning module is consistent with comprehensive plans, Mr. Wagner testified that municipal and county comprehensive plans are strictly advisory. They must be implemented through zoning and subdivision and land development ordinances. (S.N.T. 135-36; 146)

30. The Department determined that the planning module for the Reifsneider Subdivision is consistent with the Oley Township Official Plan because the proposed method of sewage disposal is the designated means of sewage disposal for this portion of Oley Township. (S.N.T. 132)

31. At the time of its review of the Reifsneider private request, the Department did not have a prime agricultural land policy. (S.N.T. 138)

32. The Department's position is that the protection of prime agricultural land is achieved through local land use decision. (S.N.T. 138-39)

33. An applicant is required to submit a preliminary hydrogeologic evaluation when:

a. a large volume on-lot sewage disposal system is proposed; or

b. there are 50 or more dwelling units proposed on lots which are one acre or less in size; or

c. the Department has documented that a water supply has nitrate-nitrogen levels in it of greater than 5 mg/l; or

d. when a combination of on-lot sewage disposal and the geology of the tract lend themselves to ground water contamination.

(S.N.T. 151)

34. A preliminary hydrogeologic study was required for the Reifsneider subdivision because it is underlain by carbonate geology. (N.T. 10; Ex. A-17, App.2)

35. The purpose of the preliminary hydrogeologic study is to identify the average impact of on-lot sewage disposal on nitrate-nitrogen concentrations in the groundwater beneath a proposed land development. (S.N.T. 150; N.T. 8, 51-52)

36. The Department's policy is to not approve subdivisions utilizing on-lot disposal if the average nitrate-nitrogen level beneath the subdivision will, as a result of the subdivision, rise above 10 milligrams per liter (mg/l). (S.N.T. 152; N.T. 11)

37. The 10 mg/l standard is a drinking water standard for nitrate-nitrogen. (S.N.T. 154)

38. The Department reviews the impact of a proposed subdivision on the land upon which it will be located. (S.N.T. 170)

39. If the lots on a subdivision are large enough so that the dilution of waste water would result in an on-site groundwater concentration of nitrate-nitrogen below 10 mg/l, the use of on-lot sewage disposal would meet the drinking water standard. (N.T. 48)

40. A mass balance equation is the traditional method for determining the post-subdivision impact of the subdivision on the groundwater at the site. (S.N.T. 154)

41. The mass balance is calculated based on one lot and then is "calculated backwards," using the safe drinking water standard to determine what the minimum lot size must be which will not cause an exceedance of that standard. (S.N.T. 81)

42. Two wells, evenly spaced, were drilled on the Reifsneider tract and two sets of samples were taken roughly a year apart. (N.T. 13)

43. The two Reifsneider wells were located so they could serve as water supply wells for the lots as well as provide representative water quality samples. (Ex. A-17, App. 8 at 2)

44. The Reifsneider wells were cased into competent bedrock and the annular well space was pressure grouted to prevent surface infiltration. When the wells were sampled they were purged for two hours at a rate of three gallons per minute with a pump setting of 90 feet. (Ex. A-17, App. 8 at 2-3)

45. Using the mass balance equation and the data from these two wells, the Carlyle Gray report concluded that with a minimum lot size of 1.37 acres the average concentration of nitrate-nitrogen in the groundwater beneath the subdivision would not exceed the drinking water standard. (S.N.T. 166-67; Ex. A-17, App. 2 at 1-2)

46. The smallest lot size for the proposed Reifsneider subdivision is 1.54 acres. (S.N.T. 168; Ex. A-17, App. 1)

47. A mass balance equation commonly uses four factors to determine the minimum lot size that will result in a nitrate-nitrogen below 10 mg/l in groundwater leaving the site: average daily sewage flow, average nitrate-nitrogen concentration of the waste water, groundwater recharge rate and background on-site water quality. (N.T. 11-12)

48. Several hydrogeologic reports were admitted into evidence: The Carlyle-Gray report, included in Intervenors private request and relied upon by the Department; a review of hydrogeologic aspects of the subdivision prepared by Mark Sigouin of the Department; the Tethys report, prepared on behalf of Oley Township by Dr. James Richenderfer and the Triegel report and

supplement prepared on behalf of Oley Township by Dr. Elly Triegel. (Exs. A-17, App. 2; C-6; A-14; A-24, A-25).

49. The following witnesses testified as hydrogeologic experts:

a. Mark Sigouin is a hydrogeologist for the Department's Southcentral Region Water Management Program. He has held this position for ten years and has reviewed 500 subdivision planning modules similar to that proposed by the Intervenor. (S.N.T. 147, 151; N.T. 9)

b. Dr. James Richenderfer is a consultant for Tethys Consultants, Inc. He has been a hydrogeologist for 16-18 years and has conducted research addressing the migration of waste water through soils and into groundwater. As a consultant he has conducted hydrogeologic studies similar to that at issue in this matter for 8-10 years. (S.N.T. 64-65)

c. Dr. Elly Triegel is president of Triegel and Associates Inc. She is an environmental consultant with twenty two years experience in geochemistry, geology and soil science. She has had experience with the movement of various contaminants, including nitrates, through groundwater since 1977. She has completed several hydrogeologic reports, but could not specify an exact number. (N.T. 60,100, 102)

50. The Carlyle Gray report used an average daily sewage flow rate of 262.5 gallons per day (gpd). (N.T. 12)

51. This figure is derived from the commonly accepted theory that each person creates an average of 75 gpd of sewage, and each single family residence averages 3.5 persons per household, which equals 262. 5 gpd of sewage flow from each single family residence. (N.T. 16)

52. The Tethys report also used this figure. Dr. Richenderfer testified that it is a reasonable figure that has been used in the ten years that he has been doing these types of studies. (S.N.T. 78-79; 86)

53. The measure of average daily sewage flow is not different for different methods of sewage disposal. (N.T. 53)

54. Dr. Triegel used an average daily sewage flow of 400 gpd. She used this rate because 25 Pa. Code § 73.16 requires that absorption areas for single family dwellings be designed to handle 400 gpd of sewage flow. (N.T. 88-89)

55. Mr. Sigouin testified that the requirement in Section 73.16 is a design safety feature. (N.T. 16)

56. The Carlyle Gray mass balance equation used 45 mg/l for the concentration of nitrate-nitrogen in waste water from each on-lot system. (N.T. 17)

57. Dr. Richenderfer and Mr. Sigouin agree that this is the proper figure to use. (S.N.T. 79; N.T. 17)

58. Groundwater recharge is the amount of water entering the saturated groundwater system coupled with the flowing away of that new ground water; it measures the amount of water entering the groundwater system. (Ex. C-6 at 2)

59. The higher the groundwater recharge rate, the more dilution of sewage discharges from on-lot disposal systems and the smaller the lot size required to not exceed the limit for nitrate-

nitrogen. Conversely, the smaller the groundwater recharge rate, the less dilution of sewage discharges from on-lot disposal systems and the larger the lot size needed to not exceed the limit for nitrate-nitrogen. (N.T. 23)

60. The hydraulic properties of carbonate bedrock should be the same regardless of the watershed in which they are located. (N.T. 21)

61. The Reifsneider property is underlain entirely by the Richland formation, a carbonate rock formation. (N.T. 37-38; Ex. C-6)

62. The groundwater recharge rate used in the Carlyle Gray report was 1,220 gallons per day per acre or 780,000 gpd/mi^2. (N.T. 13, 23)

63. This rate was determined by analyzing a Water Resources Bulletin for the Schuylkill River Basin at Pottstown, Pennsylvania, which is the nearest stream gauging station to the site. (Ex. A-17, App. 2 at 4)

64. Mr. Sigouin compared this rate to the groundwater recharge rates for carbonate bedrocks in the Executive Summary of the Basinwide Study of the Delaware which was generated by a computer model. The Delaware Basin rate was 900,000 gpd/mi^2. (N.T. 24)

65. The groundwater recharge rate used in the Carlyle Gray report is more conservative when compared to the groundwater recharge rates for carbonate rocks in the Delaware Basin. (N.T. 24; Ex. C-6)

66. Mr. Sigouin also generated his own groundwater recharge rate using data related to the Limekiln Creek watershed from a water resources report prepared for Oley Township by Paulachok and Wood of the United States Geologic Survey (Paulachok & Wood Study). (Ex. C-6)

67. The purpose of the Paulachok & Wood Study was to calculate a water budget to determine a safe yield for the aquifers in Oley Township. (N.T. 30)

68. Mr. Sigouin opined that

a. Although the Reifsneider subdivision is located in the Manatawny Creek watershed, the data related to the Limekiln Creek watershed gave a more accurate picture of the site. (N.T. 37-39)

b. Watershed boundaries are delineated by topographic features; they have nothing to do with the type of bedrock underlying the watershed. (N.T. 31)

c. The Reifsneider subdivision is roughly less than one mile to the east of the Limekiln Creek watershed and is underlain entirely by carbonate bedrock. (N.T. 21;37; Ex. C-6)

d. The hydrogeologic characteristics of the watershed continue beyond the edges of the watershed wherever carbonate bedrock occurs. (N.T. 37; Ex. C-6 at 3)

69. Mr. Sigouin used data from the Limekiln Creek watershed because it is 93% underlain by carbonate bedrock and typifies the hydraulic properties of carbonate bedrock formations in Oley Township. (N.T. 22; Ex. C-6)

70. The groundwater recharge rate derived by Mr. Sigouin is 804,521 gpd/mi^2. (N.T. 35)

71. This figure is the sum of groundwater discharge and groundwater underflow data from the Paulachok & Wood Study. (N.T. 35)

72. If this rate is applied in the mass balance equation, it results in a lower average concentration of nitrate-nitrogen beneath the Reifsneider site, and therefore a slightly smaller minimum lot size. (N.T. 35, 43; Ex. C-6)

73. Mr. Sigouin accepted the groundwater recharge rate in the Carlyle Gray report because it was more conservative than the rate he derived using the Paulachok & Wood Study. (N.T. 36)

74. Dr. Richenderfer did not criticize the groundwater recharge rate used by the Carlyle Gray report. (Ex. A-14)

75. Dr. Triegel determined a groundwater recharge rate for the Reifsneider property of 470,000 gpd/mi^2. She derived this rate from the data of the Manatawny Creek watershed in the Paulachok & Wood Study. (N.T. 92; Ex. A-24 at 7)

76. This figure utilized data only from the groundwater discharge portion of the groundwater recharge and excluded groundwater underflow. (N.T. 36)

77. The purpose of a water resources report such as the Paulachok & Wood study is to determine the safe yield of an aquifer, that is, how much water can be safely withdrawn without causing any adverse effect. (N.T. 20, 30)

78. The safe yield rate and groundwater recharge rate are not the same for carbonate rock. (N.T. 22-23)

79. Dr. Triegel assumed that safe yield was equivalent to groundwater recharge at the Reifsneider site. (N.T. 36; Exs. A-24, A-25)

80. The Manatawny Creek watershed is underlain by only 44% carbonate bedrock. (N.T. 107)

81. The Reifsneider property is underlain by 100% carbonate bedrock. (N.T. 37)

82. The Board finds that the groundwater recharge rate used in the Carlyle Gray study is more representative of conditions of the proposed subdivision than the groundwater recharge rate used by Dr. Triegel.

83. Background water quality at the site in question is the most important data for determining the effect of a subdivision on that site. (S.N.T. 163)

84. The Carlyle Gray report calculated the background nitrate-nitrogen concentration on the Reifsneider tract to be 3.43 parts per million. This number was based on data derived from two rounds of samples from the two monitoring wells drilled on the tract. (N.T. 12; Ex. A-17, App. 2)

a. The two wells were evenly spaced across the Reifsneider property. (N.T. 13)

b. Each well was sampled twice, approximately one year apart. (N.T. 13)[2]

85. Mr. Sigouin testified that

a. the background water quality factor is best derived by sampling the groundwater beneath the actual site because it is then unnecessary to estimate quality or interpolate data; (N.T. 13; S.N.T. 164)

b. one on-site well is often adequate to get an accurate picture of on-site water quality; (N.T. 13)

c. two data points for each of the Reifsneider wells were sufficient to establish background nitrate-nitrogen levels because the wells were evenly spaced and the sampling data was consistent. (N.T. 14; S.N.T. 164)

---

[2] It was reported at the Supersedeas hearing that the average of the two on site wells is 3.43 mg/l. That is the average from the first round of sampling in March 1995. The wells were sampled again in March 1996, and the average of all four samples is approximately 3.37 mg/l. (Ex. A-24, Table 1)

86. Mr. Sigouin also testified that:

a. Off-site wells serve only as an estimate of on-site water quality. (N.T. 14)

b. Using all wells within a quarter mile of the site is scientifically unsound because mere averaging within artificial bounds can alter the average water quality level either up or down. (Ex. C-6 at 5)

c. The accuracy of off-site data to estimate on-site water quality depends on the variability of the data, the proximity of the wells to the site, and any activities which may be taking place near the off-site wells which may affect the sample results. (N.T. 14)

d. The samples from wells outside of the Reifsneider subdivision provided in the Tethys review of the preliminary hydrogeological report were helpful to the extent that they confirmed the necessity for performing a preliminary hydrogeological evaluation. (N.T. 15)

e. But, because their locations in proximity to the Reifsneider site were not indicated and the results were highly variable they were not helpful in estimating the background water quality on the Reifsneider Subdivision. (N.T. 15)

f. Further, the areawide use of nitrate-nitrogen data should be discounted because the area wells appear to be locally affected by activity on each property. (Ex. C-6 at 5)

87. Elevated nitrate-nitrogen levels in wells can be caused by agricultural fertilizer, lawn fertilizer, and/or malfunctioning septic systems. (N.T. 117)

88. After reviewing the Tethys data Mr. Sigouin concluded that the off-site wells sampled around the Reifsneider site do not accurately portray on-site water quality. (N.T. 15; 41)

a. Several of the off-site wells were 800 feet or more from the border of the Reifsneider property. (N.T. 11)

b. The 1994 water samples cited in the Tethys report were not taken from all the homes adjacent to the Reifsneider Subdivision. (Ex. A-14)

c. Dr. Richenderfer did not exclude any well samples for calculations of the background water quality. (Ex. A-14)

89. Dr. Triegel determined background water quality using off-site well data. She did not attempt to sample the on-site Reifsneider wells. (N.T. 118)

90. The off-site samples taken by Dr. Triegel have nitrate-nitrogen concentrations ranging from 0.0 mg/l to 12.00 mg/l. (Ex. A-25, Table 1)

91. She sampled residential wells within a quarter mile radius of the proposed subdivision.

92. These wells were in the same watershed as the Reifsneider property, in close proximity and in the down-gradient position from the proposed subdivision. (N.T. 73-74)

93. However, Dr. Triegel selectively eliminated sampling results from wells from her calculations where she had reason for doing so. (N.T. 112-15; Exs. A-24, A-25)

94. Well No. 14, known as the Alderfer well, tested at a nitrate-nitrogen level of 5.7 mg/l, which is lower than the average of all wells sampled and included in Dr. Triegel's analysis. (Ex. A-25, Table 1)

a. This well is located across a stream from the Reifsneider site. (N.T. 113; Ex. A-24 at 5)

b. Dr. Triegel excluded the sample results from the Alderfer well from her analysis based on the well's location across a stream from the Reifsneider site. (N.T. 113)

c. This well was excluded after it was sampled. (N.T. 113)

95. Dr. Triegel excluded the results for Well No. 3, the Richards Well, because it may have been affected by animal wastes. (N.T. 114)

96. However, Well Nos. 2 and 11 were included in her analysis; these wells are very close to the Richards Well. (N.T. 114; Ex. A-25, Table 1)

97. Dr. Triegel did not include crossgradient wells; only downgradient wells. (N.T. 85)

98. Dr. Triegel took well samples in December 1996 and January 1997. The December samples have a lower nitrate-nitrogen average concentration than the January samples. (N.T. 120)

99. Dr. Triegel excluded the lower December samples in reaching her final post-development concentrations. (N.T. 120; Ex. A-25, Table 1)

100. Dr. Triegel opined that in order to properly evaluate well samples, it is necessary to know how deep the wells are and how much surface casing each well has. (N.T. 75-76)

101. However, she did no independent evaluation of the wells that she sampled, relying instead on interviews of the well owners. (N.T. 80)

102. Of the five wells which Dr. Triegel testified would be contaminated above the drinking water standard, three are between 87 and 260 feet deep. One is 24 feet deep and the depth of the fifth is unknown. (Exs. A-24, Table 1; A-25)

103. Of the four downgradient wells which Dr. Triegel contends will not be contaminated, one is 100 feet deep, one is 23 feet deep, and two are of unknown depths. (Exs A-24, Table 1; A-25)

104. Dr. Triegel testified that generally wells are cased to prevent contamination from septic fields. (N.T. 79)

105. The on-site wells were pumped at 90 feet deep. (Ex. A-17, App. 8)

106. Dr. Triegel's background concentration does not calculate the background water quality of nitrates on the proposed subdivision, but over a larger area. (N.T. 126)

107. The direction of groundwater flow is generally east to southeast. (Exs. A-17, App. 2; A-24)

108. The Department does not require that dispersion plumes and mixing zones be calculated for each on-lot disposal system within a subdivision because the scientific literature establishes that such plumes are not readily traceable as a result of general degradation of the groundwater resulting from the churning or mixing action of wells in the subdivision. (S.N.T. 156-160)

109. The calculation of dispersion plumes is only required for large volume systems where more than 400 gpd of sewage is being disposed into the septic system. (S.N.T. 161)

110. The mass balance equation shows the dispersion plume in narrative form. (S.N.T. 173-74)

111. Dr. Triegel did not perform any dispersion plume calculations or estimate the length of the dispersion plume. (Ex. A-24 at 6)

112. She concluded generally that wells in the area were likely to be affected by the subdivision because of the property of carbonate bedrocks of rapid groundwater movement. (Ex. A-24 at 6)

113. Carlyle Gray Associates found no evidence of closed depressions or sinkholes when it conducted a survey of the proposed subdivision. (Ex. A-17, App.2 at 3)

114. Dr. Triegel testified that based on her review of publications, there were closed depressions on the proposed subdivision which she believed was an easy way for water to reach the water table from the surface. (N.T. 105)

115. The testimony of Mark Sigouin more properly takes into account the appropriate factors for determining whether the proposed subdivision will cause an exceedance of the nitrate-nitrogen standard than the testimony of Dr. Elly Triegel.

116. Nitrate-nitrogen concentration in groundwater in agricultural areas is higher because of the agricultural application of nitrogen fertilizers (S.N.T. 99)

117. Mr. Reifsneider rotates corn and soybean crops on the site of the proposed subdivision. (N.T. 132)

118. Mr. Reifsneider applies chemical nitrogen fertilizer to his fields in April and only when corn is being grown. (N.T. 132)

119. When samples were taken on the proposed subdivision in 1994, chemical nitrogen fertilizer had not been applied for nearly two years because soybeans had been grown. (N.T. 132-33)

120. Mr. Reifsneider is familiar with the animal waste management practices on the agricultural properties adjacent to his proposed subdivision. (S.N.T. 203)

121. In the late fall, manure is dumped on the Hager property adjacent to the Vardjan property; the manure sits in piles until the weather allows it to be spread in the spring. (S.N.T. 204)

a. The Hager cornfields are within feet of the rear of the Vardjan residence. (S.N.T. 203; Ex. I-11)

b. The Vardjan samples exceed the 10 mg/l nitrate-nitrogen standard (Ex. A-14)

122. There are wet spots on the Fritz property throughout the year. (S.N.T. 196-98; Exs. I-2, I-3, I-6, I-7)

123. The Fritz water samples exceeded the 10 mg/l nitrate-nitrogen standard. (Ex. A-14)

124. David Kessler, a supervisor for Oley Township, testified that the Township has no ordinance requiring the maintenance of on-lot sewage systems. (S.N.T. 43)

125. John Weber, the Township engineer, testified that possible sources of nitrate-nitrogen contamination in the area of the Reifsneider subdivision could include fertilizer usage and septic system infiltration into the groundwater. (S.N.T. 57)

126. The Township has done nothing to regulate the nitrate levels on the properties surrounding the proposed subdivision. (S.N.T. 60)

DISCUSSION

In an appeal of an action of the Department our role is to determine whether or not the Department abused its discretion or committed an error of law. Our review is *de novo*, therefore the Board is not limited to considering the evidence the Department actually had before it at the time it acted but considers evidence presented before the Board. *Warren Sand and Gravel Co., Inc. v. Department of Environmental Resources*, 341 A.2d 556 (Pa. Cmwlth. 1975). Where the Department acts pursuant to mandatory authority of a statute or regulation the only question for the Board is

whether to uphold or vacate the Department's action. On the other hand, where the Department exercises its discretionary authority the Board may substitute its discretion for the Department's. *Id.* However, we are not required to do so. *Western Hickory Coal Company v. Department of Environmental Resources*, 485 A.2d 877 (Pa. Cmwlth. 1984).

The Board will find that the Department has abused its discretion where the action is not based on facts or evidence or is an arbitrary exercise of its duties or functions. *Al Hamilton Contracting Co. v. DER*, 1995 EHB 855. However,

> [a] mere 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.

The Township argues that the burden of proof in this matter rests with the Department.[3] We disagree. An appeal from a departmental order to a municipality to revise its official sewage plan is essentially an approval of a request by the Intervenor. Accordingly the Township's appeal is analogous to a third party appeal and 25 Pa. Code § 1021.101(c)(2), placing the burden of proof with the Township applies. *See South Huntingdon Township Board of Supervisors v. DER*, 1990 EHB 197; *Eagles View Lake v. DER*, 1978 EHB 44.

---

[3] The Township points out that the Department's pre-hearing memorandum stated that it carried the burden of proof. Since this statement was incorporated by reference into the Intervenor's answering memorandum, the Township contends that the parties have stipulated to this allocation of the burden. However, as the Intervenor properly contends, this is merely a misstatement of the law.

Consistency with the Township's Official Plan and the Commonwealth's Agricultural Policy

The Township argues that the proposed development is inconsistent with its Official Sewage Plan. Specifically, the Township contends that the subdivision contravenes the density requirement which is noted in the Official Plan. This density requirement only allows for two dwelling units on tracts of property between seven and thirty acres which are located in the agricultural area of the Township.

We considered this issue in some detail in our supersedeas opinion and have not been presented with any new facts which would change our disposition. We held that the density requirement was in the nature of a land use matter which the Department has no authority to regulate under the Sewage Facilities Act. Further, Department did not err in relying upon a court order which deemed the subdivision approved under the Municipalities Planning Code. Such a determination can not be collaterally attacked via a challenge under the Sewage Facilities Act. The only issues reviewable by the Board are those related to the method of sewage disposal.

The Township relies on our decision in *Herr v. DER*, 1995 EHB 311. As we stated in our supersedeas opinion, that decision was reversed and remanded to the Board by the Commonwealth Court. The Board has recently revisited its 1995 decision in *Herr v. DEP*, EHB Docket No. 94-098-MR (Opinion issued June 16, 1997). There we concluded that the Department had abused its discretion in denying a private request for a sewage plan revision where the developer had acquired a vested right to proceed with the development pursuant to the Municipalities Planning Code. Similarly, in the matter at hand, the Intervenor has acquired a final resolution of the land use issues involved in the proposed subdivision by operation of law. We therefore adopt the reasoning of our supersedeas opinion on this issue and find that the Department did not abuse its discretion in

concluding that the Planning Module was consistent with the Township Official Sewage Plan. *Oley Township v. DEP*, 1996 EHB 1359.

The Township also argues that the Department abused its discretion by approving the private request without adequately reviewing the plan's consistency with the Commonwealth's prime agricultural lands policy as found in Title IV of the Pennsylvania Code, Chapter 7, Subchapter W. We held in our supersedeas opinion that the Township had "failed to demonstrate how the Reifsneider subdivision is inconsistent with the policy to preserve prime agricultural land for agricultural purposes simply because the proposed development is located in an area of prime agricultural lands."

At the hearing on the merits the Township did not introduce any new evidence on this point. However, we agree with the Township's contention that the Department admitted that it did not perform any meaningful review of the subdivision's consistency with the prime agricultural land policy. Although it is an abuse of discretion for the Department to fail to review an application as required by statutes and regulations, we need not reject that application where such a failure is environmentally inconsequential. *Oley Township v. DEP*, 1996 EHB 1098; *Kwalwasser v. DER*, 1986 EHB 24. Here, there is no evidence in the record that even if the Department had considered agricultural policy it would have found the proposed subdivision to be inconsistent. As we noted recently in *Herr v. DER*, EHB Docket No. 94-098-MR (consolidated)(Opinion filed June 16, 1997), the Department's "consideration of [prime agricultural land] policy relates solely to the particular method of sewage disposal proposed by the developer. . . . [T]he installation of on-site sewage disposal facilities with their related piping . . . can have little adverse impact on using the land for agriculture." Slip op. at 15. The use of the property for residential rather than agricultural purposes

is an issue of local land use which is outside the purview of the Department's review under the Sewage Facilities Act.

Nitrate-Nitrogen Contamination

Finally the Township contends that the proposed subdivision will cause exceedances of the nitrate-nitrogen standard for drinking water in downgradient residential wells. Specifically, the Township argues, the Department abused its discretion in relying on the data contained in the preliminary hydrogeological report included in the Planning Module.

The purpose of the preliminary hydrogeological report is to evaluate the "technical and institutional feasibility" of using on-lot sewage as the method of sewage disposal for a proposed subdivision. 25 Pa. Code § 71.62(c); *see also Kise v. DER*, 1992 EHB 1580. In this case the impact of the subdivision upon the groundwater of the site was a concern. Currently, the Department endorses a procedure whereby this impact is calculated by the "mass balance equation." The equation calculates the minimum lot size which will dilute nitrates generated by the method of sewage disposal sufficiently to ensure that the drinking water standard will not be exceeded at the site.

The Township charges that the Department abused its discretion in relying upon the Intervenor's preliminary hydrogeological report because it used incorrect inputs for its mass balance equation. Specifically, (1) it underestimated the projected flow of wastewater from an on-lot sewage treatment system; (2) it overestimated the groundwater recharge rate; and (3) it improperly determined the background concentration of nitrate-nitrogen.

Average Daily Sewage Flow

In calculating the minimum lot size for the Reifsneider Subdivision, the Carlyle Gray report uses the figure of 262.5 gallons per day (gpd) as the flow rate of sewage that would be generated

by an on-lot sewage system. This figure was derived by the assumption that a person creates an average of 75 gpd of sewage and each single family residence has an average of 3.5 people per household. Dr. Richenderfer, testifying on behalf of the Township at the supersedeas hearing, noted that this is a reasonable figure and he has used this figure in preliminary hydrogeological reports for the last ten years. Mr. Sigouin also testified that the measure of average daily sewage flow is not different for different methods of sewage disposal. We find this figure to be reasonable and hold that the Department did not abuse its discretion in accepting it in the mass balance equation in the Carlyle Gray report.

The Township argues that Dr. Triegel's figure of 400 gpd is more reasonable. She used this figure because Section 73.16 of the regulations provides that an absorption area for a subsurface sewage treatment system must be designed based on a minimum flow of 400 gpd. 25 Pa. Code § 73.16(b). This regulation is one of several governing design requirements, site locations and absorption areas. The design requirement of 400 gpd is a safety feature to ensure that a sewage system can accommodate heavy usage if necessary. It is not an average daily sewage flow rate and is not meant to be used as such. Therefore, it was not erroneous to use the rate of 262.5 gpd for the average daily sewage flow in calculating the minimum lot size.

Groundwater Recharge

The Township also argues that the Carlyle Gray Report utilized an incorrect figure for the groundwater recharge rate of the area. We disagree.

The figure for groundwater recharge in the Carlyle Gray report was derived from the Water Resources Bulletin for the Schuylkill River Basin at Pottstown, Pennsylvania. Using this data, the rate derived was 780,000 gpd/mi^2. Mr. Sigouin testified that he compared this rate with rates derived

from two other sources: recharge rates from a study of the Delaware River Basin and his own calculated rate. The Delaware Basin rate was 900,000 gpd/mi^2. Using data from the Paulachok & Wood Study, a study of the watersheds in Oley Township, his own calculated rate was 804,521 gpd/mi^2. Using either of these groundwater recharge rates in the mass balance equation would result in smaller minimum lot sizes than that calculated by Carlyle Gray. Since the Carlyle Gray number was the most conservative and would result in larger lots, Mr. Sigouin accepted it.

Dr. Triegel derived a significantly smaller groundwater recharge rate of 470,000 gpd/mi^2. She, like Mr. Sigouin, derived her figure using data from the Paulachok & Wood Study. She criticized the Sigouin figure because it was derived from data related to the Limekiln Creek watershed. Dr. Triegel's figures were from the Manatawny Creek watershed, the watershed in which the proposed subdivision is actually located.

Mr. Sigouin testified that Dr. Triegel's analysis was flawed in several respects. First, data derived from the Limekiln Creek watershed more accurately characterizes the subdivision because it is made up of rock more similar to that which underlies the proposed subdivision than the Manatawny Creek watershed. Mr. Sigouin noted that the boundary of the Limekiln Creek watershed is close to the proposed subdivision and that watershed boundaries are topographic and have nothing to do with the hydraulic properties of the bedrock beneath the watershed. Second, her calculation of the groundwater recharge assumed that the safe yield figures for the proposed subdivision were the same as the groundwater recharge rates. Although these figures can be the same in certain types of rocks, in carbonate bedrock, which underlies the proposed subdivision, safe yield and groundwater recharge are not the same. Finally, Dr. Triegel's figure only utilized the groundwater

discharge portion of the groundwater recharge and excluded groundwater underflow which exists in the aquifer.

Dr. Triegel's analysis was less convincing than the analysis of the Department. Her figure was significantly different from any of the figures calculated by the Department and by Carlyle Gray. Dr. Richenderfer did not criticize the figure used by Carlyle Gray. We find that the Department acted reasonably in accepting the groundwater recharge figure in the Carlyle Gray report.

Background Nitrate-Nitrogen Concentration

Much of the controversy surrounding the mass balance equation of the Carlyle Gray Report involves the figure used for the background concentration for the site. The background concentration used by Carlyle Gray and accepted by the Department was derived from data adduced from samples taken by two wells located on the site of the proposed subdivision. Both Dr. Richenderfer and Dr. Triegel testified that a more accurate background concentration should be derived by using water samples from surrounding wells. When sample results from other wells in the area are used a much higher background concentration is derived.

We find that the Department did not abuse its discretion in relying on the background concentration figure which used only the sample results from the site itself. Mr. Sigouin testified that on-site data is more accurate than averaging samples from other wells. First, the sample data from the wells surrounding the site was highly variable and appeared to be affected by activities of the property owners.[4] Second, off-site data only provides an estimate of the water quality on-site. Third, averaging off-site wells is scientifically unsound because the background figure can be

---

[4] *See* Finding of Fact Nos. 86-90 and 121-123.

skewed by either including or excluding samples from surrounding wells. At most, the off-site data supported the necessity for performing a preliminary hydrogeological analysis of the proposed subdivision.

Both Dr. Triegel and Dr. Richenderfer advocated the use of off-site well samples in deriving the background concentration for the proposed subdivision. However, no testimony was presented which provided a scientific basis for including these well samples other than their mere proximity to the proposed subdivision. The purpose of the preliminary hydrogeologic report is to determine characteristics of the site itself. Dr. Triegel even admitted that her background water quality figure was not an estimate of water quality of the site, but of the region as a whole. She chose her sampling radius based on the regulation which requires a developer to perform a preliminary report where the Department has documented that water supplies within a quarter mile of the site exceed five parts per million of nitrate-nitrogen. 25 Pa. Code § 71.62(c)(2)(iii). She offered no hydrogeologic basis for choosing how many wells to sample and how close or how far away from the property they should be.

The Township argues that our decision in *Musser v. DER*, 1992 EHB 1534, mandates analysis of water samples in surrounding wells. We do not find this decision to require such a result. In that case the Department denied a planning module for a proposed subdivision with a on-lot sewage disposal. There was no hydrogeologic data from the confines of the proposed subdivision itself in the *Musser* case, but there was a significant amount of data from surrounding wells in other nearby subdivisions some of which were upgradient from the site and would have an effect on the site's water quality. In contrast, in this case there is actual, on-site data which we believe provides adequate information concerning the water quality of the Reifsneider Subdivision. *See Kise v. DER*,

1992 EHB 1580 (holding that on-site well samples were adequate for determining background nitrate-nitrogen concentration).[5]

We find that the on-site data provided a reasonable basis for determining the water quality of the site itself. Therefore, the Department did not abuse its discretion by accepting the background concentration figure in the Carlyle Gray report.

Contamination

The Township argues that Dr. Triegel's testimony supports its contention that the Reifsneider Subdivision will cause contamination of the downgradient wells. We do not find this to be so. First, as we explained above, the inputs used by Dr. Triegel for the groundwater recharge, average daily sewage flow and background water quality were flawed.

Second, there was no testimony from Dr. Triegel concerning a hydrogeological connection between the proposed subdivision and the wells which she sampled. She evidently selected these wells as those likely to be affected by the proposed subdivision simply because they were downgradient and based upon her misapprehension that Department regulations required sampling of all wells within a quarter mile radius of the subdivision. She performed no independent geologic analysis of either the watershed or the site itself. She admitted in her testimony that she relied on the representations of wells owners concerning the depth and construction of their wells. She herself testified that well construction information is critical to a proper evaluation, but she performed no

---

[5] Decisions with respect to on-lot sewage disposal systems are necessarily site specific and have less precedential value as a result. The hydrogeologic data relied on by the Department will vary from case to case as circumstances warrant. So long as this data is reasonably chosen, based on the scientific evidence available, it will not be disapproved simply because it differs from that used in another case.

independent analysis of the construction of the sampled wells. Therefore, there is no reliable information upon which to base an opinion that the sampled wells and the wells on the subdivision are hydrogeologically connected.

Third, Dr. Triegel did not provide any specific information concerning size of the area which allegedly would be affected by the proposed subdivision. Moreover, she simply assumed that there would be little attenuation of nitrates because the geologic literature notes karst features in the area. However, in their survey of the site, Carlyle Gray Associates specifically noted that there was no evidence of closed depressions, a sign of karst topography. As stated previously, Dr. Triegel performed no independent geologic evaluation of the proposed subdivision.

The Township has suggested in its brief that the on-site wells, which were pumped at 90 feet, were somehow inadequate to accurately gauge the background water quality because Dr. Triegel testified that nitrates often travel at shallower depths, suggesting that there may be some contamination of shallower wells. However, most of the wells which were sampled by Dr. Triegel are of depths similar to the on-site wells. She also testified that wells are generally protected from contamination from a property's own septic system which may cause contamination at shallower depths. No other evidence was presented which would prove that the on-site wells were pumped at an incorrect level or that nitrates emanating from the proposed subdivision would cause contamination at a shallow depth by itself.

In sum, Dr. Triegel's testimony does not convince us that the downgradient wells will be contaminated as a direct result of the method of sewage disposal proposed for the Reifsneider subdivision. The Township has not sustained its burden of proving that the proposed subdivision will cause contamination of the downgradient wells.

Conformance with Section 71.62(c)(3)

Finally, the Township argues that the Department abused its discretion by relying upon the Carlyle Gray report because it did not conform to 25 Pa. Code § 71.62(c)(3). This regulation provides that:

> A preliminary hydrogeologic evaluation shall include as a minimum, in map and narrative report form:
>
> (i) The topographic location of the proposed systems in relation to groundwater or surface water flow, or both.
> (ii) Estimated wastewater dispersion plume.
> (iii) Identification and location of existing and potential groundwater uses in the estimated area of impacted groundwater.

25 Pa. Code § 71.62 (c)(3). Specifically the Township argues that the Carlyle Gray report had no map of a dispersion plume and did not adequately identify groundwater uses in the area of impacted groundwater.

First, we do not find that the lack of a mapped dispersion plume constitutes an abuse of discretion. It does not appear that the Department interprets this regulation to require maps for every system. Mr. Sigouin testified that the Department does not require dispersion plumes to be drawn for every system because it would not be useful to accurately estimate contamination attributable to the subdivision as a whole. Rather, the Department will accept dispersion plume information in narrative form for systems which generate less than 400 gpd of sewage.

In this case, the mass balance equation makes unnecessary a depiction of a dispersion plume for the proposed subdivision. The equation demonstrates that because the lots proposed for the subdivision are large enough to dilute nitrates in the groundwater, any groundwater which leaves the

site will not exceed the drinking water standard and can not, by itself, cause an exceedance in the drinking water of other downgradient wells.

We do not find this interpretation of the regulation to be manifestly unreasonable. 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); *Green Thornbury Committee v. DER*, 1995 EHB 636. Certain features of a preliminary hydrogeologic evaluation lend themselves more readily to mapping and others more readily to narrative description. It is not clearly contrary to the language of the regulation to only require information which can be usefully mapped to be illustrated in that manner. In any event, a remand to the Department to reconsider the application in light of a mapped dispersion plum would serve no useful purpose. *See* S.N.T. 156-61. Whether the dispersion plume was mapped or not, the mass balance equation clearly shows that the nitrate-nitrogen standard would not be exceeded.

In addition, the evidence presented to the Board with respect to other wells in the area does not persuade us that the proposed subdivision alone will cause an exceedance of the nitrate standard in those wells. As seen in Findings of Fact Nos. 120-23, other causes, such as fertilization practices and faulty sewage systems appear to be the major contributors to any possible contamination in those wells. The Intervenor should not be held responsible for those other causes.

Finally, we agree with the Township that the Carlyle Gray report did not specifically identify groundwater uses in the area of impacted groundwater. However, this information was readily available to the Department from other sources. Mr. Sigouin testified that he assumed that the groundwater use would be for on-site wells since the proposal was for a residential subdivision. This

assumption is supported by information in the planning module which identifies groundwater uses in the proposed subdivision as on-site wells. (Ex. A-17, App. 1 at 2). Other wells in the area were provided in a map contained in the Tethys report which Mr. Sigouin testified was available to him for his consideration. Therefore, even though the report did not contain this information, the information was otherwise available to the Department when it considered the Carlyle Gray report. The error is harmless.

CONCLUSIONS OF LAW

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

2. The Township bears the burden of proving by a preponderance of the evidence that the Department abused its discretion in ordering it to revise its Official Sewage Plan to incorporate the Reifsneider Planning Module.

3. The Department is bound by a court of common pleas conclusive determination regarding municipal zoning and land development ordinances.

4. The proposed Reifsneider subdivision is consistent with Oley Township's Official Sewage Plan which designates on-lot disposal for the area of the township where the proposed subdivision is located.

5. The proposed subdivision is not inconsistent with the Commonwealth's Agricultural Land Preservation Policy.

6. The Department's acceptance of on-site well data to determine the background concentration of nitrate-nitrogen in the groundwater beneath the proposed subdivision is not an abuse of discretion.

7. The proposed subdivision will not elevate the nitrate-nitrogen concentration in the groundwater of the site above the 10 mg/l drinking water standard.

8. Oley Township did not sustain its burden of proving through a preponderance of the evidence that the Department's issuance of the Order was an abuse of discretion.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

OLEY TOWNSHIP	:	
	:	
v.	:	**EHB Docket No. 96-198-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and STAUFFER REIFSNEIDER, Intervenor	:	

ORDER

AND NOW, this 30th day of July, 1997, the appeal of Oley Township in the above-captioned matter is hereby DISMISSED.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: July 30, 1997

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

For the Commonwealth, DEP:
Paul J. Bruder, Jr., Esq.
Southcentral Region

For Appellant:
Eugene E. Dice, Esq.
Harrisburg, PA

For Intervenor:
Maxine M. Woelfling, Esq.
MORGAN, LEWIS & BOCKIUS
Harrisburg, PA

ml/bl

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

GOODMAN GROUP, LTD.	:	
	:	
v.	:	**EHB Docket No. 97-149-MR**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: August 8, 1997**

OPINION AND ORDER DENYING MOTION FOR SUPERSEDEAS

By Robert D. Myers, Member

Synopsis:

A Motion for Supersedeas is denied without a hearing where the Motion for Supersedeas lacks any affidavits or an explanation for their absence.

OPINION

On July 17, 1997, Goodman Group, Ltd. (Appellant) filed a Notice of Appeal challenging a June 18, 1997 Order of the Department of Environmental Protection (DEP) requiring Appellant to remove waste tires from a property located at Heller and Walnut Bank Farms Roads in Richland Township, Bucks County, Pennsylvania. Along with the filing of its appeal, Appellant filed a Motion for Supersedeas/Stay of Department's Order (Motion for Supersedeas).

In its Motion for Supersedeas, Appellant avers: (1) the Commonwealth Court has already ruled that Appellant is not responsible for removal of the tires, (Motion for Supersedeas at para. 4);

(2) the deadlines established by DEP for removal of the tires are unreasonable, (Motion for Supersedeas at para. 5); and (3) Appellant has removed as many tires as it reasonably could in order to comply with DEP regulations, (Motion for Supersedeas at paras. 6-7). On July 21, 1997, the Board scheduled a hearing on the Motion for Supersedeas for Wednesday, August 6, 1997.

Three days later, on July 24, 1997, DEP filed a Motion to Deny or Strike Motion for Supersedeas (Motion to Deny). DEP alleges therein that Appellant's Motion for Supersedeas: (1) fails to cite legal authority which serves as the basis for the grant of a supersedeas, (Motion to Deny, para. 2); (2) fails to contain affidavits or an explanation why no supporting affidavits are submitted, (Motion to Deny, para. 3); (3) fails to include a copy of an Agreement of Sale which Appellant relies heavily upon in its Notice of Appeal, (Motion to Deny at para. 5); and (4) fails to state grounds sufficient for granting a supersedeas, (Motion to Deny at para. 6).

Under our rules of procedure at 25 Pa. Code § 1021.77(c), we may deny a request for a supersedeas, without a hearing, either upon the basis of a motion filed before the hearing or *sua sponte* if the request is deficient in any one of the following areas: (1) lack of particularity in the facts pleaded, (2) lack of particularity in the legal authority cited as the basis for the request, (3) failure to support the request by affidavits or to adequately explain why supporting affidavits are not submitted, and (4) failure to state grounds sufficient for the grant of a supersedeas.

DEP's Motion to Deny contends that the request is defective under (2), (3) and (4) and, in addition, fails to include a copy of an agreement of sale on the terms of which Appellant relies in its challenge to DEP's Order. After receipt of DEP's Motion, we waited for Appellant to respond, even though we have the power to act *sua sponte*, on our own volition, whether or not a motion has been filed, in summarily denying a request for supersedeas. On Wednesday, July 30, 1997, nearly a week

later, we received a letter from Appellant by facsimile transmission, defending its request and promising a response to DEP's Motion to Deny by Friday, August 1, 1997.

When no response was received by the afternoon of that date, we issued an Order, with an Opinion to follow, denying the request for a supersedeas without a hearing for failure to comply with our rules of procedure. We acted when we did in order to spare the parties the time and effort of preparing needlessly for a hearing scheduled for the following Wednesday, August 6, 1997.

Appellant filed its Response with us by facsimile transmission after the close of business on Tuesday, August 5, 1997. It is hand-dated "7/5/97" but obviously should be "8/5/97," clearly establishing that it was not in position to be filed with us on Friday, August 1, 1997, as promised in the July 30, 1997 letter. Attached to the Response is an affidavit of David A. Goodman, dated and sworn to on Thursday, July 31, 1997, and a copy of the agreement of sale referred to in its prior filings.

The affidavit covers all factual averments made by Appellant in its Notice of Appeal, Motion for Supersedeas, and "Response to [DEP's] Motion to Deny Supersedeas." Even though the affidavit apparently was ready to be filed by Friday, August 1, 1997, it had to wait for the Response to be completed and that did not occur until Tuesday, August 5, 1997.

In its cover letter accompanying the Response, Appellant asserts that it would have filed the Response within the time allowed by the rules if we had not entered our Order denying the request for a supersedeas without a hearing. Appellant does not cite the rule it relies upon but 15 days is allowed for most types of motions. 25 Pa. Code §§ 1021.70-1021.74.[1] That time period would not

[1] The exception is dispositive motions which, by definition, seek to make a final resolution of the issues in appeals without a hearing. 25 Pa. Code §§ 1021.2(a) and 1021.73. Since DEP's

have expired until Friday, August 8, 1997, two days after the scheduled hearing. Appellant obviously could not expect to wait until after the hearing to respond to a Motion to Deny that seeks to avoid the hearing.

Besides, as already noted, we can act *sua sponte*, without the necessity of a motion and without the necessity of waiting for a response to a motion. Here, we waited 15 days after the Motion for Supersedeas was filed and eight days after DEP's Motion to Deny was filed. We could have acted sooner but refrained from doing so when Appellant promised its Response by Friday, August 1, 1997. The Order was issued only when that promise was not kept.

Finally, Appellant offers no explanation why David A. Goodman's affidavit, or that of some other appropriate person, could not have been prepared and filed sooner. A supersedeas request to this Board is placed on a fast track because it seeks an extraordinary result - the suspension of a DEP action. The hearing is to be held as soon as possible after the request is filed, within two weeks if feasible.[2] 25 Pa. Code § 1021.76(c). Hearings are limited, generally confined to one day, and decisions are issued promptly thereafter. Appellants are expected to file an adequate request complying with our rules in the first instance. If they fail to do so, they must be prepared to correct the deficiencies within a matter of days because the request is proceeding rapidly to hearing, and this Board and other parties must be assured that the request is not frivolous or dilatory in nature. There is no justification for Appellant's belief that it could let a week go by after being apprised by DEP

Motion deals only with Appellant's request for a supersedeas and does not seek a final resolution of the issues in the appeal, it is not a dispositive motion.

[2] The hearing on Appellant's request was scheduled for August 6, 1997, 20 days after the filing.

of the deficiencies in its request without correcting them or offering some reasonable explanation for the delay.

Turning now to the contents of Appellant's Motion for Supersedeas, we are satisfied that the allegations of fact are stated with reasonable particularity but there are no affidavits included and no explanation for that absence, as required by 25 Pa. Code § 1021.77(a)(1) and (2). In its July 30, 1997 letter, referred to above, and in its Response, Appellant maintains that affidavits are not necessary because the facts alleged in the Motion for Supersedeas are matters of record since they are also contained in the Notice of Appeal.

Notices of Appeal are not considered to be pleadings and are not required to be verified as civil pleadings are by Pa. R.C.P. No. 1024. 25 Pa. Code § 1021.51. Appellant's Notice of Appeal in this case is not verified; but, even if it were, the allegations of fact would still be only allegations, not uncontroverted facts of record. Appellant's argument that the signature of its attorney to the Notice of Appeal and the Motion for Supersedeas amounts to a verification is rejected. The signing of a pleading, required by Pa. R.C.P. No. 1023, simply means that the attorney has read it, believes there is good ground to support it to the best of his knowledge, information and belief, and has not been filed for purposes of delay. This signing does not take the place of the verification required by the very next rule, Pa. R.C.P. No. 1024.

Our supersedeas rules of procedure at 25 Pa. Code § 1021.77(a)(1) specifically require affidavits to be prepared in accordance with Pa. R.C.P. Nos. 76 (definitions) and 1035(d)[3](motion for summary judgment). To satisfy the definition of "affidavit" in Pa. R.C.P. No. 76, the statement

---

[3] Pa. R.C.P. No. 1035(d) is now covered by Pa. R.C.P. No. 1035.4. The language regarding affidavits is unchanged.

must be in writing, signed by the person making it, and either sworn to before an authorized officer or contain a statement that it is made subject to the penalties of 18 Pa. C.S. § 4904 relating to unsworn falsification to authorities.[4] To satisfy the requirements of Pa. R.C.P. No. 1034.4, the affidavit must be made on personal knowledge, contain facts admissible in evidence, and show affirmatively that the signer is competent to testify to the facts. No document meeting these criteria was filed with us before we issued our Order on August 1, 1997.

The affidavit requirements are not unique to Board practice; they parallel the requisites for summary judgment, a common aspect of civil practice for Pennsylvania attorneys. That is why the summary judgment rules are specifically mentioned in our rule at 25 Pa. Code § 1021.77(a)(1). This Board has regularly, either *sua sponte* or on motion, denied requests for supersedeas without a hearing when the affidavit requirement has not been met. *See, e.g., E.P. Bender Coal Company v. DER*, 1990 EHB 1624; *Care and Moosic Lakes Homeowners Assn. v. DER*, 1995 EHB 725; *Abod v. DEP*, EHB Docket No. 97-104-C (Opinion issued June 6, 1997); *May Energy, Inc. v. DEP*, EHB Docket No. 97-085-C (Opinion issued July 24, 1997); *Amber Energy, Inc. v. DEP*, EHB Docket No. 97-086-C (Opinion issued July 24, 1997). We also have enforced the requirement in our summary judgment proceedings. *Pickelner v. DER*, 1995 EHB 359 (holding that a simple verification is not enough).

Since Appellant failed to support its Motion for Supersedeas by any affidavit, the Motion was defective at the outset and remained uncorrected by the time of our Order on August 1, 1997. The Order, therefore, was a proper Board action under 25 Pa. Code § 1021.77(c) and is attached to this

---

[4] Verifications are also subject to these requirements. Pa. R.C.P. No. 76 (definitions).

Opinion. Our disposal of the Motion for Supersedeas on this ground makes it unnecessary to decide whether the Motion for Supersedeas otherwise complies with our rules.

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

GOODMAN GROUP, LTD.	:	
	:	
v.	:	**EHB Docket No. 97-149-MR**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 1st day of August, 1997, it is ordered that the Appellant's Motion for Supersedeas/Stay is dismissed without a hearing for failure to comply with Board rules of procedure governing supersedeas. The hearing on the Motion for Supersedeas/Stay scheduled for August 6, 1997 is **cancelled**. An opinion will follow.

ENVIRONMENTAL HEARING BOARD

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

DATED: August 1, 1997

c: **For the Commonwealth, DEP:**
Kenneth A. Gelburd, Esquire
Southeastern Region
For Appellant:
Michael M. Goss, Esquire
Eric R. Green, Esquire
WEINSTEIN, GOSS, SCHLEIFER,
EISENBERG & WINKLER ASSOCIATES, P.C.
Philadelphia, PA 19103-6719
For Court Reporter:
Capital City Reporting Services, Inc.

bl

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

CAERNARVON TOWNSHIP SUPERVISORS	:	
	:	
v.	:	**EHB Docket No. 96-180-MR**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION and CHESTER COUNTY	:	**Issued: August 12, 1997**
SOLID WASTE AUTHORITY, Permittee	:	

OPINION AND ORDER ON MOTION FOR SUMMARY JUDGMENT

By Robert D. Myers, Member

Synopsis:

Because Appellant's proposed expert testimony creates a genuine issue of material fact as to whether the permit modification authorizes a landfill overfill that is excessive in height, scientifically unjustifiable, and threatening to the public health, safety, and welfare, and as to whether the modification allows expansion of the landfill in a manner that is detrimental to the public health, safety, and welfare, summary judgment is denied with respect to issues 8(e) and 8(j). Because DEP's guidance memo of December 11, 1995, which calls for simultaneous issuance of waste and air permits, is merely a statement of policy with no legal effect, summary judgment is granted with respect to issue 8(g). Because DEP is not required to condition a waste permit on providing a right to indemnification and because Appellant failed to challenge the adequacy of Permittee's closure and postclosure cost plan in the Notice of Appeal, summary judgment is granted

with respect to issue 8(h). Because Appellant admits that, one day after receiving a Notice of Violation, Permittee redirected any harmful discharge directly into a leachate effluent storage tank, which remedy was acceptable to DEP, this violation does not bar the issuance of the waste permit, and summary is granted as to issue 8(n). Because Appellant stipulates to the dismissal of issue 8(d), that matter is dismissed. Thus, Permittee's Motion for Summary Judgment is granted in part and denied in part.

OPINION

Caernarvon Township Board of Supervisors (Appellant) challenges the modification of a solid waste disposal and/or processing permit (Permit No. 100944) issued to Chester County Solid Waste Authority (Permittee) by the Department of Environmental Protection (DEP) on August 1, 1996 for the Lanchester Sanitary Landfill facility (Landfill). The modification authorized the construction and operation of an expansion known as the Municipal Site Landfill Overfill (Overfill) located in both Caernarvon Township, Lancaster County, and Honeybrook Township, Chester County, pursuant to the Solid Waste Management Act (SWMA), Act of July 7, 1980, P.L. 380, *as amended*, 35 P. S. §§ 6018.101-6018.1003.

On November 8, 1996, Permittee filed a Motion to Dismiss or, in the alternative, a Motion to Limit Issues. In that motion, Permittee contended that the 14 objections raised by Appellant in its appeal were deficient as a matter of law and should be dismissed or, at least, limited. In a February 25, 1997 Opinion and Order, the Board dismissed the issues raised in paragraphs 8(a), (b), (c), (f), (i), (k), (l) and (m) of the appeal. However, the Board did not dismiss the issues raised in paragraphs 8(d), (g), (h), (j) and (n) of the appeal. The Board also ruled that, with respect to paragraph 8(e), the "visual impact" of the Overfill would not be an issue.

On April 14, 1997, Permittee filed a Motion in Limine to preclude the testimony of Appellant's expert witness, David Child. Permittee sought this sanction because of Appellant's dilatory response to Permittee's request for information about Appellant's technical objections to the permit modification. On July 21, 1997, after consideration of the matter, the Board issued an Opinion and Order denying the motion.

On April 16, 1997, Permittee filed the present Motion for Summary Judgment (Motion) along with a Memorandum of Law in support of the Motion. Appellant filed a response and a Memorandum of Law in opposition to the Motion on May 9, 1997. On May 28, 1997, Permittee filed an Unopposed Motion for an Extension of Time to file a reply brief, which the Board granted. On June 5, 1997, pursuant to the parties' request, the Board stayed the proceedings until July 1, 1997 for the pursuit of settlement of the appeal. On July 2, 1997, again at the parties' request, the Board stayed the proceedings until July 11, 1997 for resolution of one remaining issue of the appeal. On July 11, 1997, when the parties failed to settle all issues, Permittee filed a reply brief.

In the Motion, Permittee asserts that, with respect to paragraphs 8(d), (e), (g), (h), (j) and (n) of the appeal, there is no genuine issue of material fact, and, therefore, Permittee is entitled to judgment as a matter of law.[1] We shall now address each issue in turn.

Issue 8(d): Final Closure Date

In paragraph 8(d) of the Notice of Appeal, Appellant avers that DEP committed an error of law and abused its discretion in issuing the permit modification because DEP did not condition the

[1] A party may move for summary judgment in whole or in part as a matter of law whenever there is no genuine issue of material fact as to a necessary element of the cause of action or defense. Pa. R.C.P. No. 1035.2.

modification upon the proposed final closure date for the Landfill. Permittee counters that the regulations do not require such a condition. (Permittee's Motion at para. 12.) In response, Appellant stipulates to the dismissal of this issue. (Appellant's Reply at paras. 11-14.) Thus, the issue is dismissed.

Issue 8(e): Overfill Height

In paragraph 8(e) of the Notice of Appeal, Appellant claims that the "permit modification authorizes an 'overfill' that is, for technical reasons, excessive in height, not justifiable on a scientific basis, and which constitutes an unjustifiable threat to the public health, safety and welfare." Permittee seeks summary judgment on this issue because it requires expert testimony which Appellant cannot produce. (Permittee's Motion at para. 42.) In response, Appellant asserts that Mr. Child's expert report, served on April 21, 1997, addresses this issue. (Appellant's Reply at para. 37.) Permittee, however, maintains that Mr. Child is not qualified to give an opinion on a landfill project that involves an overfill design, that Mr. Child's opinion lacks any factual foundation, and that Mr. Child's opinion is not offered with reasonable certainty.[2] (Permittee's Reply Brief at 17-19.)

In *Miller v. Brass Rail Tavern, Inc.*, 664 A.2d 525, 528 (Pa. 1995) (citations omitted), the Supreme Court of Pennsylvania stated:

> It is well established in this Commonwealth that the standard for qualification of an expert witness is a liberal one. The test to be applied is whether the witness has **any** reasonable pretension to specialized knowledge on the subject under investigation. If he does, he may testify and the weight to be given to such testimony is for the trier of fact to determine. . . . It is not a necessary prerequisite that the expert be possessed

---

[2] Although Mr. Child does not use the words "with reasonable certainty" in his report, experts are not required to use "magic words" when expressing their opinions. We simply look at the substance of their testimony. *Welsh v. Bulger*, ___ A.2d ___ (No. 28 W.D. Appeal Docket 1996, Pa, filed July 23, 1997); *City of Harrisburg v. DER*, 1996 EHB 709.

> of all the knowledge in a given field . . . , only that he possess more knowledge than is otherwise within the ordinary range of training, knowledge, intelligence, or experience. . . . [T]he qualification of an expert witness rests within the sound discretion of the [Board].

Here, Permittee concedes that, according to Mr. Child's curriculum vitae, Mr. Child has some landfill experience and has reviewed at least one landfill design in his capacity as a professional engineer. (Permittee's Reply Brief at 17; *see also* Appellant's Reply at Exh. E.) Thus, Mr. Child has some reasonable pretension to specialized knowledge on landfill design. If it is true that Mr. Child lacks experience in dealing with landfill designs that involve an overfill, the Board, in the exercise of its discretion, may choose to qualify Mr. Child as an expert witness and weigh his testimony accordingly. At this point in the proceedings, the Board is not prepared to conclude as a matter of law that Mr. Child is unqualified to testify as an expert.

Permittee next contends that, even if Mr. Child is qualified as an expert in this case, Permittee is entitled to summary judgment because Mr. Child's opinions lack a factual foundation; therefore, as a matter of law, they are not competent. (Permittee's Reply Brief at 19-21.)

Mr. Child's expert report is based on his review of the permit application, the design drawings, and the project manual. The substance of the report can be summarized as follows. In evaluating the overfill design for safety, DEP failed to consider that: (1) the movement of heavy construction equipment over the site, with the varying soil densities and compaction rates, creates the potential for shear; (2) biological decomposition in the landfill below the overfill could cause subsidence, which can damage the integrity of the liner and provide a pathway for the uncontrolled escape of leachate; and (3) instability between the High Density Polyethylene (HDPE) cap below and the HDPE liner above, combined with the 3:1 slope, the possibility of infiltrating rainwater, and

lower density soil compaction caused by soil vibration, could cause the overfill to slide. (Appellant's Response, exh. 11.)

In attacking the competency of these opinions, Permittee points out that Mr. Child never reviewed the Comment and Response Document which DEP issued on July 31, 1996 after a public hearing on the overfill. (Permittee's Reply at 20.) That document reveals that DEP *did* consider questions raised about the stability and safety of the overfill and its liner system, including the stability of the slope, the possibility of shear, the potential for soil and waste settlement, and the effect of siesmic activity on the overfill. (Permittee's Reply, Appendix at 5-6, 16-19.) DEP concluded that the overfill's stability and safety was within an acceptable range for standard engineering practice. (Permittee's Reply, Appendix at 6.)

Although DEP may have considered some of the matters raised in Mr. Child's expert report, Permittee does not indicate whether DEP fully considered the effect of heavy construction equipment, possible subsidence from biological decomposition, or rainwater on the safety of the overfill. Because a genuine issue of material fact still remains with respect to the safety of the overfill design, summary judgment is denied with respect to issue 8(e).

Issue 8(g): Air Quality

In paragraph 8(g) of the Notice of Appeal, Appellant challenges the permit modification's air quality monitoring provision, maintaining that the phrase "Air Quality Plan Approval" does not state with reasonable specificity what Permittee must do to satisfy air quality requirements. However, in our February 25, 1997 Opinion and Order on the Motion to Dismiss, we stated that a dispute over DEP's permit coordination policy is the only remaining aspect of this issue to be litigated. *Caernarvon Township Supervisors v. DEP*, EHB Docket No. 96-180-MR (Opinion issued

February 25, 1997), slip op. at 13. Thus, we shall limit our discussion to DEP's alleged violation of the permit coordination policy.

Appellant asserts that, in issuing the permit modification, DEP violated a policy, set forth in a December 11, 1995 guidance memo, which requires DEP to issue solid waste and air quality permits simultaneously. Permittee avers that the guidance memo establishes nothing more than a goal for DEP. (Permittee's Motion at para. 21.) Appellant responds that the policy should be enforced in this case. (Appellant's Reply at para. 21.) Permittee replies that the policy lacks the force of law and, thus, is not binding on DEP employees. (Permittee's Reply at 7.)

A document, except a regulation, promulgated by an agency which sets forth procedural obligations is merely a "statement of policy." *See* Section 102(13) of the Commonwealth Documents Law, Act of July 31, 1968, P.L. 769, *as amended*, 45 P. S. § 1102(13). As such, it does not establish a binding norm; it only announces an agency's tentative intentions for the future. *Hillcrest Home, Inc. v. Department of Public Welfare*, 553 A.2d 1037 (Pa. Cmwlth. 1989) (citing *Pennsylvania Human Relations Commission v. Norristown Area School District*, 374 A.2d 671 (Pa. 1977). Thus, DEP's guidance memo has no legal effect. In fact, there is case law which establishes that DEP is *not* required to consider solid waste and air quality permits at the same time. *Jefferson County Commissioners v. DEP*, 1996 EHB 997. Therefore, Permittee is entitled to summary judgment on this issue.

Issue 8(h): Indemnification

In paragraph 8(h) of the Notice of Appeal, Appellant asserts that DEP failed to condition the permit modification on Permittee's indemnification of Appellant for harms arising from landfill operations. In our Opinion and Order on Permittee's Motion to Dismiss, we stated:

> Appellant seeks to hold open "its rights to later seek to raise issues related to indemnification and financial assurances as per 25 Pa. Code § [1021.53(b)]" after discovery. Despite our inclination to dismiss Paragraph 8(h), we will hold off until discovery is completed. Permittee may renew its motion at that time, if it thinks it appropriate to do so.

In the instant Motion, Permittee seeks summary judgment on paragraph 8(h) because there is no requirement to condition a permit modification on a Permittee's indemnification of the township where the landfill is located. (Permittee's Motion at para. 24.) Appellant admits that Permittee is correct in this regard. (Appellant's Reply at para. 24; Appellant's Memorandum of Law at 19-20.)

However, Appellant then maintains that Permittee failed to comply with 25 Pa. Code § 277.192(b)(6), which requires that a permit applicant describe an adequate means by which the applicant will make funds available for postclosure operations. (Appellant's Reply at para. 24; Appellant's Memorandum of Law at 19-20.) Appellant suggests that Permittee's plan will not provide sufficient funds for postclosure operations. Permittee, however, points out that Appellant has just raised this issue for the first time; thus, the issue has been waived, and Permittee is entitled to summary judgment. (Permittee's Reply Brief at 11-12.)

We agree with Permittee. Because Appellant never questioned Permittee's postclosure cost plan until Appellant responded to Permittee's Motion, the issue is waived.[3] Summary judgment is granted with respect to issue 8(h).

Issue 8(j): Public Health, Safety and Welfare

In paragraph 8(j) of the Notice of Appeal, Appellant contends that the permit modification

---

[3] We note that numerous statutory and regulatory provisions exist to ensure funding for postclosure expenses. *See, e.g.,* Section 505 of the Solid Waste Management Act (SWMA), 35 P. S. § 6018.505; Section 1108 of the Municipal Waste Planning, Recycling and Waste Reduction Act (Act 101), 53 P. S. § 4000.1108; 25 Pa. Code § 271.331; and 25 Pa. Code § 272.101.

allows expansion of the landfill in a manner that is detrimental to the public health, safety, and welfare. Permittee maintains that this issue requires expert testimony, which Appellant is unable to present. (Permittee's Motion at paras. 36-39.) Appellant responds that the issue is addressed in Mr. Child's expert report. (Appellant's Response at paras. 36-39.) Permittee, however, maintains that Mr. Child is not qualified to give an opinion on a landfill project that involves an overfill design, that Mr. Child's opinion is not offered with reasonable certainty, and that Mr. Child's opinion lacks any factual foundation. (Permittee's Reply Brief at 17-19.) For the reasons set forth above with respect to issue 8(e), we deny summary judgment on this matter.

Issue 8(n): Unresolved Notice of Violation

In paragraph 8(n) of the Restated Notice of Appeal, Appellant asserts that DEP improperly issued the permit modification when a Notice of Violation was unresolved for a point source discharge which continued to harm the environment. Permittee points out in its Motion that, on July 10, 1996, one day after receiving the Notice of Violation, Permittee redirected the discharge directly into a leachate effluent storage tank. (Permittee's Motion at para. 29; Exh. B, para. 21, exh. 12.) Appellant admits that Permittee did so but claims that, despite the redirection, the pollution continued. (Appellant's Response at paras. 29-30.) Permittee replies that, even though the actual source of the discharge was unknown on July 10, 1996, DEP was satisfied that the problem was corrected. (Permittee's Reply at 13.)

Section 503(d) of SWMA, 35 P. S. § 6018.503(d), provides in pertinent part:

> (d) Any person . . . [who] has engaged in unlawful conduct as defined in this act . . . shall be denied any permit or license required by this act unless the permit or license application demonstrated to the satisfaction of the Department that the unlawful conduct has been corrected.

In *Concerned Residents of Yough, Inc. v. Department of Environmental Resources*, 639 A.2d 1265, 1271 (Pa. Cmwlth. 1994), the Commonwealth Court stated that, by utilizing the phrase "to the satisfaction of the Department," the General Assembly chose to grant DEP "great discretion."

In Appellant's Memorandum of Law, Appellant recognizes a two-part analysis under section 503(d) of SWMA: (1) whether the applicant engaged in unlawful conduct; and, if so, (2) whether the applicant demonstrated to the satisfaction of DEP that the conduct had been corrected. (Appellant's Memorandum of Law at 24.) Examining the current record, Appellant then states that the first question "can only be resolved by concluding that a violation existed from July 8 - July 10." (Appellant's Memorandum of Law at 25.) We note that Appellant's conclusion is contrary to its own position on this issue, which is that the pollution continued after Permittee redirected the discharge. Because Appellant now concedes that the violation did not continue after July 10, 1996, DEP is entitled to summary judgment on this issue. Indeed, if there was no violation after July 10, 1996, it would not have been necessary for Permittee to satisfy DEP by August 1, 1996 that the problem had been corrected.[4]

[4] It does not matter that, after July 10, 1996, DEP insisted that Permittee locate the ultimate source of the discharge and correct it. As noted by the Commonwealth Court in *Concerned Residents of Yough, Inc.*, 639 A.2d at 1271: "Lamentably, the pollution cannot be corrected quickly and completely by simply turning a faucet; there is no simple solution." Likewise, here, although the redirection of the discharge was an interim solution to the problem, the complete solution required additional research and corrective measures.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

CAERNARVON TOWNSHIP SUPERVISORS	:	
	:	
v.	:	**EHB Docket No. 96-180-MR**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and CHESTER COUNTY SOLID WASTE AUTHORITY, Permittee	:	

ORDER

AND NOW, this 12th day of August, 1997, it is ordered that Permittee's Motion for Summary Judgment is granted with respect to issues 8(g), 8(h), and 8(n), and denied with respect to issues 8(e) and 8(j). It is further ordered that issue 8(d) is dismissed.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: August 12, 1997

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

For the Commonwealth, DEP:
Ember S. Jandebeur, Esquire
Southcentral Region

For Appellant:
George T. Cook, Esquire
BLAKINGER, BYLER & THOMAS
Lancaster, PA

For Permittee:
Vincent M. Pompo, Esquire
LAMB, WINDLE & McERLANE
West Chester, PA

bi/bap

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

WILLIAM S. RITCHEY and S & R TIRE RECYCLING	:	
v.	:	**EHB Docket No. 96-242-C**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued:** August 12, 1997

OPINION AND ORDER ON PETITION FOR SUPERSEDEAS

By Michelle A. Coleman, Administrative Law Judge

Synopsis:

A petition for supersedeas requesting removal from Commonwealth Court of a Department of Environmental Protection's petition for enforcement is denied. The Board cannot wrest jurisdiction of a petition for enforcement from the Commonwealth Court.

OPINION

Presently before the Board is William S. Ritchey Sr.'s (Ritchey) and S & R Tire Recycling, Inc.'s (Appellants) June 24, 1997 Petition for Supersedeas.[1] William S. Ritchey is owner and operator of S & R Tire Recycling, Inc. The supersedeas stems from the Department of Environmental Protection's (Department) petition for enforcement of a consent order and agreement (CO&A) because of Appellants' noncompliance with provisions of, among other statutes, the Solid

[1] The petition is labeled for filing with Commonwealth Court but Appellants filed it with the Board.

Waste Management Act, Act of July 7, 1980, P.L. 380, *as amended*, 35 P.S. §§ 6018.101 - 6018.1003 and other statutes. The petition to enforce was filed with Commonwealth Court and concerned a waste tire storage and processing facility located in Tyrone, Blair County, Pennsylvania.

BACKGROUND

Between June 1991 and December 1992 the Department conducted five inspections of the facility. As a result of these inspections the Department determined, among other things, that the tires were being stored at the facility in a manner which was inconsistent with the Department's Interim Policy (Policy) for the storage of waste tires. After the initial inspection in June 1991, the Department issued Ritchey a letter informing him that the storage of waste tires should be in accordance with the Department's policy and that he must submit a Comprehensive Plan for Operation as well as a Preparedness, Prevention and Continency Plan.[2] After subsequent inspections on August 6, 1991 and March 23, 1992, the Department issued notices of violations citing Appellants for storage/processing/disposal of waste tires without a permit and for failure to operate the facility in accordance with the Department's Policy on the storage of waste tires. In July and December 1992, after completing two additional inspections, the Department determined that Ritchey was still not in compliance with the Policy. In January 1993, the Department issued an administrative order directing Ritchey to cease accepting any more tires and to provide the Department with a plan for the proper removal of the tires already at the facility. Ritchey submitted a plan in May 1993, and submitted a revised plan in June 1994. The revised plan was the subject

---

[2] After reviewing the plans Ritchey submitted in accordance with the Department's instructions, the Department advised him that he could operate the facility so long as the operation met the Department's policy.

of a July 15, 1994 meeting with the Department and the subject of a September 8, 1994 CO&A. The September CO&A was revised on March 9, 1995. These revisions included extending the date for removal of all stockpiled tires[3] and setting the daily amount of civil penalty at $750.00 per violation per day for each violation of the order. In October 1996 the Department filed a petition for enforcement of the consent orders with the Commonwealth Court.

On November 19, 1996 Appellants filed an appeal with the Board challenging the CO&A signed September 8, 1994, the March 9, 1995 revised CO&A, and the October 1996 Petition to Enforce. On December 9, 1996 Appellants amended their appeal.

On June 24, 1997 Appellants filed a Petition for Supersedeas with the Board. The petition alleges: 1) that the Board has jurisdiction to determine the issues raised in their appeal regarding the Department's jurisdiction and authority to act on the enforcement of the order; 2) that a determination in Appellants' favor on the appeals would render any action taken by Commonwealth Court to enforce the petition void or moot; 3) that granting the supersedeas would give Appellants the opportunity to exhaust administrative remedies not otherwise available if Commonwealth Court proceeds to enforce the enforcement petition; 4) that the issue of taking, as raised in the Amended Notice of Appeal, is within the exclusive jurisdiction of the Board; 5) that issues that are within the expertise of the administrative agency are matters to which any court should defer judgment under the doctrine of primary jurisdiction; 6) that they have strong constitutional and factual grounds to prevail on the merits; 7) that the Department is estopped from proceeding on the issues raised under the doctrine of *res judicata*; 8) that they are in compliance with all aspects of the Petition to Enforce;

---

[3] The removal date was extended from March 1, 1995 to September 1, 1995.

and 9) that any matters which are determined to be validly enforceable and with which they are not in compliance are diminimus.

The Department has not filed a response. In order to expedite the proceedings we see no need to wait for the Department's response to render our decision on the issue of jurisdiction.

DISCUSSION

Pursuant to Board Rule 1021.77, the Board may deny a petition for supersedeas without a hearing for failure to state grounds sufficient for granting a supersedeas. 25 Pa. Code 1021.77(a)(4). In their petition, Appellants/Petitioners are seeking to have the Board wrest jurisdiction of the Department's petition for enforcement of the CO&A from Commonwealth Court. It is clear Appellants/Petitioners are making an inappropriate request of the Board.

Under Section 104(10) of the Solid Waste Management Act the Department has the power to institute an action in a court of competent jurisdiction against any person or municipality to compel compliance with the provisions of any order of the Department. 35 P.S. § 6018.104(10). Commonwealth Court qualifies as a court of competent jurisdiction under Section 761(a) of the Judicial Code which states, " ... Commonwealth Court has original jurisdiction of all civil actions or proceedings: ... (2) By the Commonwealth government, including any officer thereof, ... except eminent domain proceedings ..." 42 Pa. C.S.A. § 761(a). The Department, a government agency, decided to pursue enforcement of the CO&As under the Commonwealth Court's original jurisdiction provision. Although the Solid Waste Management Act contains a provision setting forth the powers and duties of the Board which includes jurisdiction over any order such as that in this appeal (35 P.S. § 6018.108), the Department opted not to utilize the Board's services on this matter. Whether or not we agree with the Department's decision is not important. What is important is that

the Department has filed its petition of enforcement with a court that has jurisdiction to hear the matter in accordance with the law. Clearly, Commonwealth Court satisfies this criteria. For the foregoing reason we will not wrest the matter from the court. Accordingly, we enter the following order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

WILLIAM S. RITCHEY, SR. and	:	
S & R TIRE RECYCLING, INC.	:	
v.	:	**EHB Docket No. 96-242-C**
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
DEPARTMENT OF ENVIRONMENTAL	:	
PROTECTION	:	

ORDER

AND NOW this 12th day of August, 1997 William S. Ritchey's and S & R Tire Recycling's petition for supersedeas is denied.

ENVIRONMENTAL HEARING BOARD

Michelle A. Coleman

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: August 12, 1997

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

For the Commonwealth, DEP:
Ember S. Jandebeur, Esquire
Southcentral Region

For Appellant:
Bruce R. Johnstone, Esquire
Hollidaysburg, PA

kh/bl

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

M. DIANE SMITH
SECRETARY TO THE BOARD

MAY ENERGY, INC.	:	
	:	
v.	:	**EHB Docket No. 97-085-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued:** August 18, 1997

OPINION AND ORDER ON MOTION FOR JUDGMENT ON THE PLEADINGS

By Michelle A. Coleman, Administrative Law Judge

Synopsis:

A motion for judgment on the pleadings concerning a Department of Environmental Protection (Department) order is granted where material issues of fact are not in dispute and there are no causes of action concerning the issues stated in the appeal.

OPINION

This matter arose from a compliance order issued by the Department on March 13, 1997 to May Energy, Inc. (May) concerning oil and gas wells located on leases in Warren and Venango Counties, Pennsylvania. The order alleges violations of the Oil and Gas Act, Act of December 19, 1984, P.L. 1140, *as amended*, 58 P.S. §§ 601.101 - 601.605, specifically, that May failed to plug abandoned wells. On April 14, 1997, May and Kevin D. Hudock, principal shareholder of May,

(collectively, Appellants) filed an appeal on behalf of May and of Amber Energy, Inc..[1] Presently before the Board is the Department's motion for judgment on the pleadings.

BACKGROUND

The Department's order which is the basis for this appeal concerns oil wells located primarily on leases in Southwest Township, Warren County and Cornplanter Township, Venango County. On or about June, 1989, Appellants assigned their interest in said wells to Amber and became a creditor and minority shareholder of Amber. The wells have been the subject of significant litigation beginning on or about May 24, 1991 when Appellants sued Richard I. Fry and David J. Rybak, individually, and d/b/a Amber Energy, Inc. and as Marwell, Inc. in the Court of Common Pleas of Venango County.[2] The subject of the litigation was Amber's failure to bond the wells even though Appellants are holders of a blanket bond covering the wells in question. Appellants requested an injunction by Venango County Court of Common Pleas to enjoin Richard I. Fry and David J. Rybak, individually, and d/b/a Amber Energy, Inc. and Marwell, Inc. from interfering with Appellants in the operation of the oil and gas leases. As part of Venango County Court of Common Pleas' decision it appointed Michael D. Snyder, Esquire, as a receiver to act on behalf of Amber to dissolve that entity, to close its operations, to pay any pertinent claims and to disburse any assets. On appeal the

---

[1] Amber owns 280 oil and gas wells located on leases in Warren and Venango Counties. A second order was issued to Amber for failing to register and to bond wells and failing to plug abandoned wells. On or about June, 1989 Appellants assigned their interest in the wells to Amber and became creditor and minority shareholder in Amber. It appears that this is the basis for Appellants' attempt to include Amber in the appeal. However, neither the status of creditor nor as minority shareholder gives Appellants the legal authority to appeal on behalf of Amber.

[2] Appellants state in their notice of appeal that the Department was aware of the litigation and at least one Department officer participated as a witness in the litigation.

Superior Court of Pennsylvania affirmed on or about October 12, 1996.[3] Appellants presented a proposal to the receiver to operate the wells in question and to bring them into back into compliance with the appropriate oil and gas laws and the supporting regulations. Throughout the litigation May did not have the authority to act as operator of these wells. The litigation continues to the present.

As part of its March 13, 1997 order the Department stated several findings of its investigations including the following:

> - May has engaged in various oil and gas exploration activities in Venango and Warren Counties since the 1980's;
>
> - May is the "operator," as defined in Section 103 of the Act, of 268 oil and gas wells located on leases in Warren and Venango Counties;
>
> - May has a blanket bond with the Department for the 268 wells;
>
> - the wells do not have the equipment necessary for production and/or have not produced [oil or gas]for twelve or more months;
>
> - the wells, therefore, are "abandoned wells" as the term is defined in Section 103 of the Act; and
>
> - the failure to plug abandoned wells violates Section 210 of the Act and constitutes unlawful conduct and a public nuisance pursuant to Sections 509 and 502 of the Act.

Based on these findings the Department ordered May to submit a written plan and schedule for plugging the abandoned wells. On April 14, 1997, Appellants filed their appeal. On May 12, 1997, the Department filed its motion for judgment on the pleadings. Appellants filed their response on June 16, 1997.

---

[3] Since Appellants did not specifically state what was the lower court's decision, we assume based on this statement that the court ruled in Appellant's favor and granted the injunction.

DISCUSSION

Appellants contend that the Department erred and abused its discretion in issuing the order for the violations concerning the oil and gas wells. Appellants assert that they were not given any prior notice of the Department's intent to issue such an order, that they were not given an opportunity to request a conference to discuss this matter and to review pertinent information, and that they had presented a proposal to the court appointed receiver to operate the wells in question and to bring them back into compliance.

The Department alleges that there are no material facts in dispute and that it is entitled to judgment as a matter of law. The Department contends that Appellants do not dispute that they are the owner and/or operator of the wells, that Appellants abandoned the wells because they had not produced for almost six (6) years and because Appellants had not applied for inactive status. Furthermore, the Department contends that it is not obligated to notify well owners and/or operators of pending orders, that Appellants knew of the availability of inactive status and by doing nothing they abandoned the wells. Consequently, the orders were justified.

We will not consider Appellants' response for the purpose of ruling on the Department's motion. Under Board Rule 1021.73(d), 25 Pa. Code § 1021.73(d), a response to a dispositive motion shall be filed within 25 days of the date of service of the motion. Since the Department served a copy of its motion on Appellants' counsel on May 9, 1997, Appellants had until June 2, 1997 to file its response. Appellants, however, did not file their response until June 16, 1997, two weeks after it was due. Consequently, the response is untimely. We consider an untimely response as a failure to respond.

A motion for judgment on the pleadings is in the nature of a demurrer and is used to

determine whether a cause of action, as pleaded, exists at law. *Bensalem Twsp. School Dist. v. Commonwealth of Pennsylvania, et al*, 544 A.2d 1318, 1321 (Pa. 1988); *see also, Kerr v. Borough of Union City*, 614 A.2d 338 (Pa. Cmwlth. 1992), *alloc. denied*, 627 A.2d 181 (Pa. 1993). The Board will enter judgment on the pleadings only if there are no material facts in dispute and a hearing is pointless because the law on the issue is clear. *Florence Twsp., et al v. DEP, et al.*, 1996 EHB 282; *Joseph F. Cappelli & Sons, Inc. v. DER*, 1994 EHB 1835; *See also, Kerr v. Borough of Union City*, 614 A.2d 338, 339 (Pa. Cmwlth. 1992) *alloc. denied,* 627 A.2d 181 (Pa.1993)

In resolving such a motion, the Board must accept as true all of the well-pleaded facts contained in the notice of appeal, and may not consider any facts not contained in the notice of appeal. *Bensalem Twsp. School Dist. v. Commonwealth of Pennsylvania, et al*, 544 A.2d 1318, 1321 (Pa. 1988); *Joseph F. Cappelli & Sons, Inc. v. DER*, 1994 EHB 1835. Although a notice of appeal is technically not a "pleading" under Pennsylvania Rule of Civil Procedure 1019(a), the Board treats it as such for purposes of a motion for judgment on the pleadings. *Huntington Valley Hunt v. DER*, 1993 EHB 1533, 1538, note 4.

Since Appellants' response was untimely and not considered herein, there are no material facts in dispute. The undisputed facts are as set forth earlier in the Background portion of this opinion and will not be repeated here. Having set forth the undisputed facts we will now consider whether a cause of action exists.

Notice

We must reject Appellants' contention of the inadequacy of prior notice. Appellants allege they should have been notified prior to the issuance of the order. The Department argues that it is not required to notify a party prior to issuing an order. We agree with the Department. Neither the

Act nor the accompanying regulations require the Department to give notice prior to the issuance of an order. Thus, the Department did not abuse its discretion by issuing the order without prior notice.

Conference

We also must reject Appellants' allegation that it was not given an opportunity to request a conference to discuss the matter. The Department does not address this issue in its motion or the accompanying supporting memorandum.

Under Section 501(a) of the Act,

> The department of (sic) any person having a direct interest in the subject matter of this act may, at any time, request that a conference be held for the purpose of discussing and endeavoring to resolve by mutual agreement any matter arising under the provisions of this act, ...

58 P.S. § 601.501(a). In this case, neither the Department nor Appellants requested such a conference even though both were aware of the situation and the ongoing litigation. Although Appellants imply that the Department should have requested the conference since it was aware of the Court of Common Pleas litigation because an employee testified at that hearing, we disagree. Appellants as the operators of the wells had ample opportunity to request a conference since not only did they know that they were not operating the wells but, also because they initiated the litigation which precipitated the wells' inactivity. Appellants as operators of the wells had a vested direct interest in working with the Department to maintain compliance with the law. Consequently, we believe that a cause of action on this matter does not exist.

Abandoned wells

Appellants were ordered to plug their wells because the wells have not been operated for at

least six (6) years. An abandoned well is defined under the Act as a well that has not been in operation for at least twelve months. Appellants do not dispute that their wells have not been in operation for at least twelve months. Their notice of appeal states that the wells have not been operated since 1991. Section 601.210 requires that "upon abandoning any well, the owner or operator thereof shall plug the well in a manner prescribed by regulation of the Department ...."

This Board has held that the Department is entirely justified, and legally mandated, in ordering a well operator to plug wells if a well operator fails to provide the Board with evidence to excuse its failure to act. *See, Kane Gas Light and Heating Company, et al v. DEP,* EHB Docket No. 96-088-R (Consolidated with 96-143-R and 96-178-R) (Opinion issued May 7, 1997); *Kenco Oil & Gas, Inc. v. DEP*, 1996 EHB 325. In this case Appellants have failed to produce adequate evidence to justify their failure to plug the wells. Moreover, by not plugging its wells in contravention of Section 601.210 Appellants violated Sections 601.502[4] and 601.509[5], which as a matter of law, constitutes a public nuisance and unlawful conduct. Unplugged abandoned wells pose a threat to the environment since there is the potential for contamination of soil, water, and vegetation. As the agency charged with protecting the environment, the Department is responsible for enforcing the provisions of the various oil and gas related statutes and did not abuse its discretion by doing so in this instance.

If Appellants did not or could not plug the wells they could have applied for inactive status

---

[4] "A violation of section 206, 207, 208, 209 or 210, or a rule, regulation, order or term or condition of any permit relating thereto, shall constitute a public nuisance."

[5] "It shall be unlawful for any person to: ... (2) Conduct any activities related to drilling for, or production of, oil and gas, contrary to the rules or regulations adopted under this act, or orders of the department, or any term ...."

as provided under the Act. According to the provisions set forth in the Act and its accompanying regulations operators/owners of wells must initiate the request for inactive status. The statute provides "Upon application, the department shall grant inactive status for a period of five years for any permitted or registered well ..." (emphasis added) 58 P.S. § 601.204(a). It is clear under the law that Appellants were obligated to initiate that request. Therefore, the Department's issuance of the order was appropriate since Appellants failed to apply for inactive status or to plug the wells. No cause of action exists at law for any of the objections raised in the notice of appeal.

For the foregoing reasons, we grant the Department's motion for judgment on the pleadings and dismiss the appeal. Accordingly, we enter the following order:

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

MAY ENERGY, INC.	:	
	:	
v.	:	**EHB Docket No. 97-085-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 18th day of August, 1997, the Department of Environmental Protection's motion for judgment on the pleadings is granted and the appeal of May Energy, Inc. is dismissed.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: August 18, 1997

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

For the Commonwealth, DEP:
Stephanie K. Gallogly, Esquire
Northwest Region

For Appellant:
William G. Martin, Esquire
Franklin, PA

kh/bl

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

M. DIANE SMITH
SECRETARY TO THE BOARD

EAGLE ENVIRONMENTAL, L.P.	:	
	:	
v.	:	
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, PENNSYLVANIA FISH AND BOAT COMMISSION, JEFFERSON COUNTY COMMISSIONERS, JEFFERSON COUNTY SOLID WASTE AUTHORITY and CLEARFIELD-JEFFERSON COUNTIES REGIONAL AIRPORT AUTHORITY, Intervenors	:	**EHB Docket No. 96-215-MG** **Issued:** August 20, 1997

OPINION AND ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT

By George J. Miller, Administrative Law Judge

Synopsis:

Cross motions for summary judgment are denied. A permittee is not entitled to summary judgment on the basis that the revocation of its encroachment permit resulted from the application of regulations it claims to be invalid because they contained an impermissible delegation of authority to the Fish and Boat Commission (Commission) to determine what is a "wild trout stream" or were not promulgated in accordance with the formal requirements for regulations. The permittee failed to show that there was an invalid delegation of authority to the Commission or that the revocation otherwise resulted from the application of invalid regulations. Furthermore, even if the permittee had shown that the Department of Environmental Protection (Department) abused its discretion by

revoking the permit without reviewing the Commission's determination that the streams are wild trout streams or whether the Commission applied invalid regulations, the permittee would not be entitled to summary judgment because the Board can substitute its discretion for the Department and resolve the question of whether the streams are wild trout streams based on the evidence before it.

A citizens group is not entitled to summary judgment on the basis that an adverse party has failed to produce evidence essential to its cause of action where the adverse party does not bear the burden of proof.

OPINION

This appeal concerns a September 25, 1996, order issued by the Department to Eagle Environmental, L.P. (Eagle). The order affected four permits (collectively, permits) issued to Eagle in connection with the construction and operation of Happy Landing Landfill, a municipal waste landfill in Washington Township, Jefferson County. The Department revoked in part and suspended in part an encroachment permit, and suspended a solid waste permit, a National Pollution Discharge Elimination System (NPDES) permit, and an air quality permit.

In its order, the Department explained that it modified the encroachment permit because:

> (1) the permit authorizes Eagle to fill certain wetlands which lie within the floodplain of three streams--Irish Run, and two unnamed tributaries identified as UNTO1 and UNTO2--near the proposed landfill (Order, ¶¶ D and E);
>
> (2) the streams are "wild trout streams" under section 105.1 of the Department's dam safety regulations, 25 Pa. Code § 105.1 (Order, ¶ D);
>
> (3) wetlands within the floodplains of wild trout streams are "exceptional value wetlands" under section 105.17(1)(iii) of the Department's dam safety regulations, 25 Pa. Code § 105.17(1)(iii) (Order, ¶¶ E and F); and,
>
> (4) municipal waste landfills may not be operated within 300 feet of exceptional

value wetlands pursuant to section 273.202(a)(2) of the Department's municipal waste landfill regulations, 25 Pa. Code § 273.202(a)(2) (Order, ¶ F).

The order also explained that the Department suspended the other permits because of their relationship to the encroachment permit. The Department suspended Eagle's solid waste permit because the modified encroachment permit precluded Eagle from constructing and operating the landfill in the location authorized by the solid waste permit. (Notice of appeal, ¶ I) The Department suspended the NPDES and air quality permits, meanwhile, because those permits had been issued for Eagle's proposed landfill and--given the suspension of the solid waste permit--the landfill's future was questionable. (Order, ¶ E.)

Eagle filed a notice of appeal on October 18, 1996. The notice averred, among other things, that the Commission erred by classifying Irish Run, UNTO1, and UNTO2 as "wild trout streams" and that the Department erred by relying on the Commission's classification of those streams because the classification was not published in accordance with the Commonwealth Documents Law, Act of July 31, 1968, P.L. 769, *as amended,* 45 P.S. §§ 1102-1208 (Commonwealth Documents Law).

Subsequently, additional parties intervened in the proceedings. The Board granted two requests to intervene: one filed by the Commission, and a second filed Jefferson County, Jefferson County Solid Waste Authority, and Clearfield-Jefferson Counties Regional Airport Authority (collectively, Jefferson).

The Board has issued one previous decision in this appeal: an opinion and order granting in part and denying in part a Commission motion to dismiss or, in the alternative, to strike certain objections from the notice of appeal. *See Eagle Environmental, L.P., v. DEP,* EHB Docket No. 96-

215-MG (Opinion and order issued March 12, 1997). We struck some of the objections but declined to strike others or dismiss the appeal.

Currently before the Board are cross motions for summary judgment filed by Eagle and Jefferson. Eagle filed its motion and a supporting memorandum on May 1, 1997. The Commission filed a response and memorandum in opposition on May 27, 1997. Jefferson filed its response on May 30, 1997, and its memorandum in opposition on June 2, 1997. The Department filed its response on July 15, 1997.[1] And Eagle filed a memorandum in reply on August 8, 1997.

Jefferson combined its cross motion for summary judgment with its response to Eagle's motion and combined its supporting memorandum with its memorandum opposing Eagle's motion.[2] Eagle filed a response and memorandum in opposition on June 24, 1997, but neither the Department nor the Commission filed responses. Jefferson did not file a reply.

In its motion, Eagle argues that it is entitled to summary judgment because:

---

[1] The Department did not file a memorandum of law as such. Instead, at the end of its response to Eagle's motion for summary judgment, the Department simply appended a list of "additional reasons" for denying Eagle's motion--much as a defendant might set forth "new matter" in response to a complaint. The list consisted of legal reasons to deny Eagle's motion, and, since the reasons did not correspond to the paragraphs in Eagle's motion, the Department simply assigned each a separate letter. The Department stated that it included the list pursuant to section 1021.70(e) of the Board's Rules of Practice and Procedure, 25 Pa. Code § 1021.70(e).

Section 1021.70(e) provides, "A response to a motion shall set forth in correspondingly-numbered paragraphs all factual disputes and the reason the opposing party objects to the motion." Nothing in section 1021.70(e) provides for a list of legal arguments akin to those in the "additional reasons" portion of the Department's response. The place for the legal arguments the Department attempts to raise there is a memorandum of law. While we will consider the arguments the Department raises in its "additional reasons" this time, we encourage the Department to submit conventional memoranda of law in the future.

[2] Jefferson filed a supplement to its motion for summary judgment on July 3, 1997, but withdrew it shortly thereafter, on July 11, 1997.

(1) the Department relied on a Commission determination that Irish Run, UNTO1, and UNTO2 are "wild trout streams," but, when the Commission made that determination, it relied on regulations not promulgated in accordance with the Commonwealth Documents Law; the Newspaper Advertising Act, Act of July 9, 1976, P.L. 887, *as amended,* 45 Pa.C.S.A. §§ 101-907 (Newspaper Advertising Act); the Commonwealth Attorneys Act, Act of October 15, 1980, P.L. 950, *as amended,* 71 P.S. §§ 732-01-732-402 (Commonwealth Attorneys Act); and the Sunshine Act, Act of July 3, 1986, P.L. 388, *as amended,* 65 P.S. §§ 271-286 (Sunshine Act);[3] and

(2) the classification of Irish Run, UNTO1, and UNTO2 as "wild trout streams" involved an impermissible delegation of authority to the Commission.

Jefferson, meanwhile, insists that it is entitled to summary judgment because Eagle's answers to interrogatories requesting the factual and legal bases of each claim in the notice of appeal show that

---

[3] Specifically, Eagle contends that the Commission:

(a) failed to give public notice of its intent to adopt and amend its regulations, as required by section 201 of the Commonwealth Documents Law, 45 P.S. § 1201;

(b) failed to deposit the regulations with the Legislative Reference Bureau for publication, as required by sections 702, 722, and 724 of the Newspaper Advertising Act, 45 Pa.C.S.A. §§ 702, 722, and 724;

(c) failed to adopt the regulations at a public meeting as required by the Sunshine Act;

(d) failed to obtain legal approval for the regulations from the Department of Justice and Attorney General, as required by section 205 of the Commonwealth Documents Law, 45 P.S. § 1205, and section 204(b) of the Commonwealth Attorneys Act, 71 P.S. § 732-204(b);

(e) failed to accept and consider public comments, as required by section 202 of the Commonwealth Documents Law, 45 P.S. § 1202; and,

(f) failed to have an agency head or designated representative certify the regulations, as required by section 722(a) of the Newspaper Advertising Act, 45 Pa.C.S.A. § 722(a).

Eagle has no basis for those claims.

After a thorough review of the arguments raised in the motions and memoranda filed by all parties, we find that neither Eagle nor Jefferson is entitled to summary judgment at this time. We shall address the motions separately below. Before we do so, however, some context is necessary.

Much of the confusion here results from the definition of "wild trout stream" at section 105.1 of the Department's dam safety regulations, 25 Pa. Code § 105.1: "[a] stream classified as supporting naturally reproducing trout populations by the Fish Commission." The Department issued the revocation order after the Commission determined that Irish Run, UNTO1, and UNTO2 are wild trout streams. When the Commission determines that a particular stream is a wild trout stream, it adds the stream to the "wild trout stream list" (list)--a list the Commission maintains of all wild trout streams in the Commonwealth. (Eagle's motion, at ¶ 22; and ¶ 22 of the responses.)

I. Eagle's Motion for Summary Judgment

Eagle argues that it is entitled to summary judgment because both the list and standard the Commission used to classify the streams (standard) are regulations, yet neither was promulgated in accordance with the formal requirements for regulations under the Commonwealth Documents Law, the Newspaper Advertising Act, the Commonwealth Attorneys Act, and the Sunshine Act. Eagle also argues that the classification of the streams as wild trout streams involved an impermissible delegation of authority to the Commission. According to Eagle, the Commission's classification of the streams constituted either rulemaking or an exercise of executive authority, but, under the Dam Safety and Encroachments Act and Clean Streams Law, only the Environmental Quality Board (EQB) can promulgate regulations and only the Department can exercise executive authority.

The other parties disagree. With respect to Eagle's argument concerning whether the standard and list met the formal requirements for regulations, the Commission argues that the standard and list are not regulations, and that, even if they were, the failure to comply with the formal requirements for promulgating regulations would not render them legal nullities. The Commission also argues that, even if the standard and list were invalid, the Department would not have abused its discretion by classifying the streams as wild trout streams. As for Eagle's contention that the classification of the streams involved an invalid delegation of authority, the Commission argues that the classification of wild trout streams falls within its statutory powers and duties; that it resembles other Department regulations which refer to Commission determinations; and that whether the streams are wild trout streams turns on unresolved issues of material fact.

The Department, for its part, contends that whether Commission promulgated the standard and list is immaterial because neither the standard nor list are regulations. With respect to Eagle's argument concerning the delegation to the Commission, the Department argues that it deferred completely to the Commission's classification of the streams and, therefore, Eagle had to raise any *challenges to the Commission's classification* by filing an appeal with the Commission. Although the Department concedes that the Board is the proper forum to determine *whether it abused its discretion* by relying on the Commission's classification, the Department maintains that the issue is not suited for summary judgment. In addition, the Department argues that it would not have abused its discretion, even if an impermissible delegation of authority to the Commission were involved, because the streams at issue support naturally-reproducing trout populations.

Jefferson does not respond to the specific arguments Eagle raises in support of its motion. Instead, Jefferson simply argues that it is entitled to summary judgment for the reasons set forth in

its own motion for summary judgment.

We will not grant Eagle's motion because: (1) Eagle failed to show that the classification of the streams involved an invalid delegation to the Commission; (2) Eagle failed to show that the standard or list are regulations; and, (3) even if Eagle had shown that there were an invalid delegation to the Commission, or that the standard or list were invalid regulations, Eagle would not be entitled to summary judgment.

A. Eagle failed to show that the classification of the streams involved an invalid delegation to the Commission.

The fact that the Department considered input from the Commission does not necessarily mean that the Department allowed the Commission to exercise impermissible executive authority. The regulations of both federal and state agencies frequently refer to determinations made by sister agencies.[4] Indeed, section 9 of the Dam Safety and Encroachments Act *requires* that the Department ensure that Dam Safety and Encroachments Act permits and their conditions comply with laws

---

[4] *See, e.g.*, EPA's interim regulations on the discharge of dredged or fill material into navigable waters, at 40 CFR § 230.30(a). Section 230.30(a) refers to lists of threatened and endangered species maintained by the Department of the Interior and Department of Commerce. In addition to referring to wetlands within the floodplain of wild trout streams, section 105.17(1) of the Department's dam safety regulations, 25 Pa. Code § 105.17(1), also refers to other lists generated by sister agencies during the course of defining what constitutes an "exceptional value wetland." Section 105.17(1), for instance, provides that "exceptional value wetlands" include, among other things: (1) wetlands which serve as a habitat for fauna listed as "endangered" or "threatened" by the Commission, Game Commission, U.S. Department of the Interior (Interior), and U.S. Department of Commerce; (2) wetlands which lie within the floodplain of rivers listed by Interior under the Wild and Scenic Rivers Act of 1968, 16 U.S.C.A. §§ 1271-1287; (3) wetlands in areas designated Federal wilderness areas by Interior pursuant to the Wilderness Act, 16 U.S.C.A. §§ 1131-1136, or the Federal Eastern Wilderness Act of 1975, 16 U.S.C.A. §§ 1132; and (4) wetlands in areas designated National natural landmarks by Interior under the Historic Sites Act of 1935, 16 U.S.C.A. §§ 461-467.

administered by the Commission. Furthermore, we have previously held that, under section 9, the Department may consult with the Commission as part of the permit review process. *Hatchard v. DER*, 1991 EHB 1691; *affirmed,* 612 A.2d 621 (Pa. Cmwlth. 1992); *petition for allowance of appeal denied*, 533 Pa. 647, 622 A.2d 1378 (1993).

Nor does the definition of "wild trout stream" at 25 Pa. Code § 105.1 unlawfully delegate regulatory authority to the Commission, as Eagle contends. Eagle assumes that, under that definition, the Commission has the sole and final authority to determine what is a wild trout steam. We believe this to be an erroneous interpretation of this portion of the regulations.

Under the principles of statutory construction, courts have a duty to declare statutes valid where they can reasonably do so. *Triumph Hosiery Mills, Inc. v. Commonwealth,* 364 A.2d 919 (Pa. 1976), *appeal dismissed* 429 U.S. 1083 (1977). Since the same principles apply to the construction of regulations as to statutes, *Fraternal Order of Police Lodge No. 5 v. City of Philadelphia*, 590 A.2d 384 (Pa. Cmwlth. 1991), we have a duty to construe the definition of "wild trout stream" as valid if we can reasonably do so. We believe that a valid construction of that definition exists here.

The overall legislative design of environmental regulation in Pennsylvania is for the Environmental Quality Board (EQB) to promulgate regulations for the guidance of the Department in administering the various environmental statutes enacted by the General Assembly. The Department's exercise of discretion in administering those statutes is controlled by both the standards set forth in the regulations by the EQB and this Board's determination of whether the Department has properly applied the standard set forth by the EQB. While the Board normally limits its review to whether or not the Department has abused its discretion, where the Department's action is discretionary, this Board may substitute its own discretion for that of the Department based on the

evidence presented at the hearing before it. *Warren Sand and Gravel Co., Inc. v. Commonwealth of Pennsylvania, DER*, 341 A.2d 556 (Pa. Cmwlth. 1975); *City of Harrisburg v. DEP,* 1996 EHB 1518. The Department exercises its discretionary authority when it revokes a permit. *See, e.g., LCA Leasing, Inc. v. DEP,* EHB Docket No. 95-203-MG (Opinion issued June 17, 1997); and *Ganzer Sand & Gravel v. DER*, 1993 EHB 1142, 1169-1171.

Given this overall regulatory structure, together with the definition of "wild trout stream" at 25 Pa. Code § 105.1, we believe the Department cannot blindly defer to the Commission's classification of streams as wild trout streams. Instead, the Department has a duty to ascertain that the Commission's determination is correct. Such a determination may require the Department to evaluate whether the standard the Commission applies accurately indicates whether a stream supports naturally reproducing trout populations. It may also require the Department to assure itself that the Commission has considered all available evidence relevant to its determination. It is the duty of this Board to determine whether the Department properly exercised its discretionary powers based on the evidence before it. If the Board so chooses, it may determine based on the evidence before it whether the Department's action was proper.

B. Eagle failed to show that the standard or list are regulations.

Eagle also contends at great length that the standard and list are invalid because they are regulations but were not promulgated in accordance with the requirements for regulations in the Commonwealth Documents Law, the Newspaper Advertising Act, the Commonwealth Attorneys Act, and the Sunshine Act. While this argument has great superficial appeal, it turns on Eagle's interpretation of 25 Pa. Code §105.1 as granting the Commission sole and final regulatory authority

as to whether or not a stream meets the criterion of a stream supporting naturally reproducing trout populations. Because we believe that this is an improper interpretation of the EQB's regulation, we conclude that the standard and list are not regulations but only criteria for a determination which finally may be made only by the Department or this Board.

C. Even if Eagle had shown that there were an invalid delegation to the Commission, or that the standard or list were invalid regulations, Eagle would not be entitled to summary judgment.

Even assuming the definition of "wild trout stream" at 25 Pa. Code § 105.1 involves an impermissible delegation of authority to the Commission rendering the regulation invalid, that would not necessarily mean that the Department erred by issuing the revocation order. An invalid regulation is a legal nullity. *Newport Homes, Inc. v. Kassab*, 332 A.2d 568, 575 (Pa. Cmwlth. 1975). Therefore, if the definition of "wild trout stream" at 25 Pa. Code § 105.1 were invalid, we would be left with no regulatory definition for the phrase "wild trout stream" in 25 Pa. Code § 105.17(1)(iii) to determine whether the wetlands are exceptional value wetlands other than the EQB standard of a stream supporting naturally reproducing trout populations. In addition, we could construe "wild trout stream" in accord with the plain and ordinary meanings of the words. *Centolanza v. Lehigh Valley Dairies, Inc.*, 658 A.2d 336 (Pa. 1995). Whether the Department abused its discretion by issuing the revocation order would turn on whether the streams are "wild trout streams" within that definition, whether wetlands within the floodplain of the streams lay within 300 feet of the proposed location of Eagle's landfill, and whether the Department properly exercised its discretion with respect to any input from the Commission. Even assuming the Department did abuse its discretion--as it would have if it relied on an invalid regulation--we could still sustain the revocation order if we

determine that the streams involved are wild trout streams under either the standard of section 105.1 as streams supporting naturally reproducing trout populations or the plain and ordinary meaning of the words. We noted earlier in this opinion that the Board can substitute its discretion for the Department's where the Department abuses its discretion. If--based on the evidence adduced at hearing--it appears that the streams are "wild trout streams" within the plain and ordinary meaning of that phrase, then whether the Department relied on the Commission's determination under 25 Pa. Code § 105.1 when issuing the revocation order is immaterial.

Similar reasoning applies to Eagle's contention that the Commission failed to promulgate the standard and list in accordance with the formal requirements for regulations. Even if the Department abused its discretion by relying on the standard or list, and the standard or list is an invalid regulation, the Board can substitute its discretion for that of the Department. Therefore, if the Department can prove at hearing that the streams are in fact wild trout streams, then whether the Department and Commission relied on an invalid regulation when classifying them as wild trout streams is immaterial.

Although Eagle argues that the phrase "wild trout stream" in Chapter 105 of the regulations would be unconstitutionally vague absent the definition at 25 Pa. Code § 105.1, we disagree. "To satisfy constitutional requirements, laws must 'give the person of ordinary intelligence a reasonable opportunity to know what is prohibited,' and, in order to prevent the evil of arbitrary enforcement, laws must 'provide explicit standards for those who apply them.'" *Pennsylvania Bar Association v. Commonwealth*, 607 A.2d 850, 858 (Pa.Cmwlth 1992) (quoting *Grayned v. City of Rockford,* 408 U.S. 104, 108-109 (1972)). While courts will sometimes strike regulations on the basis of vague

language, they do so only where the language is considerably more amorphous than that used here.[5]

Consider the cases Eagle cites in support of its position. In *Commonwealth v. Stein,* 546 A.2d 36 (Pa. 1988) *cert. denied sub nom. Pennsylvania v. Stein,* the Supreme Court held that Medicaid fraud regulations referring to an "office visit," "brief examination," and "evaluation and/or treatment" were too vague to put a defendant podiatrist on notice that a face-to-face encounter with his patients was required. In *Salada v. Commonwealth*, 627 A.2d 261 (Pa.Cmwlth 1993), the Commonwealth Court struck down county health department regulations prohibiting the use of a private system if a public sewer were "reasonably accessible." The Court explained that the regulation was impermissibly vague because, property owners had no way to determine whether a public sewer were "reasonably accessible." In *Banco v. State Board of Private Licensed Schools*, 631 A.2d 1076 (Pa.Cmwlth 1993), the Court struck down a portion of the Private Licensed Schools Act, Act of December 15, 1986, P.L. 1585, *as amended*, 24 P.S. § 6501-6518, exempting "other service occupations" from licensing requirements under the act as impermissibly vague. The Court explained that, without proper regulations identifying which occupations were exempted, a defendant bartender could not determine whether he had to secure a license.

The phrase "wild trout stream"--as commonly understood, or defined as a stream which supports a naturally reproducing trout population--is not nearly so plastic. While it could

---

[5] The courts have taken a similar approach with regard to cases involving alleged unconstitutional delegations of power from the General Assembly to other branches of state government. As with the rule that regulations must be specific, the courts have explained that the prohibition against delegating legislative power "seeks to protect against the arbitrary exercise of unnecessary and uncontrolled discretionary power." *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 346 A.2d 269, 291 (Pa. 1975). Nevertheless, the courts have sustained such delegations in many instances where the guidance in the statute was no more precise than that involved here. *See id,* at 292.

conceivably be interpreted in more than one way, we believe that the guidance it provides is sufficient to minimize the danger of arbitrary enforcement and put the public on notice. In this respect, the phrase "wild trout stream" bears more of a resemblance to the provision of the Act of June 13, 1961, P.L. 282, *as amended*, 53 P.S. §§ 8001-8004 (Historic Preservation Act), challenged as vague in *Park Home v. City of Williamsport*, 680 A.2d 835 (Pa. 1996), than to the language found vague in the cases Eagle cites. In *Park Home*, a building owner challenged section 4 of the Historic Preservation Act, 53 P.S. § 8004. Section 4 provides that, before local governing bodies grant a permit to demolish a historic structure, they must evaluate the effect the loss of the structure would have upon "the general historic and architectural nature of the district" considering "the general design, arrangement, texture, material and color of the . . . structure and the relation of such factors to similar features of . . . structures in the district." Although building owners would not necessarily be able to tell from the language in section 4 whether they could demolish a particular structure, the Commonwealth Court upheld the provision nevertheless, explaining that section 4 "provide[d] sufficient notice to property owners as to what will guide a governing body's decision-making process." 680 A.2d at 838-840.

II. <u>Jefferson's Motion for Summary Judgment</u>

Jefferson argues that it is entitled to summary judgment on the basis of Eagle's answers to its interrogatories. The relevant interrogatories requested that Eagle provide the factual and legal bases for each of the objections raised in its notice of appeal. According to Jefferson, Eagle's answers show that no legal or factual basis existed for the objections in its notice of appeal. Eagle opposes Jefferson's motion, arguing that it has adequately supported its objections and that, even

if it had not, summary judgment would be inappropriate because the Department bears the burden of proof and the parties are still engaged in discovery.[6]

Even assuming Eagle failed to support the objections in its notice of appeal, as Jefferson contends, Jefferson would not be entitled to summary judgment here. Rule 1035.2(2) of the Pa.R.C.P. governs motions for summary judgment based on facts insufficient to make a prima facie case. It provides that parties may move for summary judgment, "if, after the completion of discovery relevant to the motion . . . an adverse party *who will bear the burden of proof* at trial has failed to produce evidence essential to the cause of action or defense. . . ." (Emphasis added) Section 1021.101(b)(2) of the Board's Rules of Practice and Procedure provides that the Department bears the burden of proof in appeals of permit revocations. Since the Department bears the burden of proof here, Jefferson cannot invoke Rule 1035.2(2) against Eagle. Accordingly, we deny Jefferson's motion.

III. Conclusion

These considerations lead us to conclude that neither Jefferson nor Eagle are entitled to summary judgment and that a hearing is required to resolve issues of material fact. If the Department interpreted the EQB's regulation to mean that it could not question the Commission's determination, then it is clear that the Department's action was erroneous. The evidence of record, however, is that the Department assured itself that the Commission considered all material facts in reaching its determination that Irish Run and its two tributaries are wild trout streams. The record

---

[6] The discovery period closed on August 1, 1997, after Eagle filed its response and memorandum in opposition.

is not conclusive as to whether or not this determination by the Department included a consideration of whether the criteria applied by the Commission was reasonable for the conclusion that it reached. The evidence may be that the Department in fact concluded that the Commission correctly classified the stream as supporting naturally reproducing trout populations even though the evidence of record is clear that the Department did not make an independent determination that the streams supported naturally reproducing trout populations.

If the evidence shows that the Department failed to determine whether the Commission correctly determined that these streams were wild trout streams, the question then will be whether we should remand the matter to the Department for further consideration or whether we should hold a hearing on the merits and determine based on the evidence whether or not the Department's conclusion that the wetlands involved are exceptional value wetlands because they are located in or along the floodplain of the reach of a wild trout stream within the meaning of 25 Pa. Code §105.17. Because we believe that a remand would only result in another appeal in which the Board would be called upon to consider the same evidence, the Board's hearing on the merits is to include taking evidence as to whether or not the wetlands involved are of exceptional value for this reason.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

EAGLE ENVIRONMENTAL, L.P.	:	
	:	
v.	:	**EHB Docket No. 96-215-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION, PENNSYLVANIA FISH AND BOAT COMMISSION, JEFFERSON COUNTY COMMISSIONERS, JEFFERSON COUNTY SOLID WASTE AUTHORITY and CLEARFIELD-JEFFERSON COUNTIES REGIONAL AIRPORT AUTHORITY, Intervenors	:	

ORDER

AND NOW, this 20th day of August, 1997, Eagle and Jefferson's cross motions for summary judgment are denied.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

DATED: August 20, 1997

See following page for service list

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

For the Commonwealth, DEP:
Michael Buchwach, Esq.
Southwest Region

For Eagle:
David R. Overstreet, Esq.
KIRKPATRICK & LOCKHART
Harrisburg, PA

For Intervenors:
Pennsylvania Fish and Boat Commission
Dennis T. Guise, Esq.
Laurie Shepler, Esq.
Harrisburg, PA

Jefferson County Commissioners
Jefferson County Solid Waste Authority
Clearfield-Jefferson Counties Regional Airport Authority
Robert P. Ging, Jr., Esq.
Confluence, PA

jb/bl

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

M. DIANE SMITH
SECRETARY TO THE BOARD

RALPH GAMBLER	:	
	:	
v.	:	**EHB Docket No. 97-051-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued:** August 22, 1997

OPINION AND ORDER ON MOTION FOR SUMMARY JUDGMENT

By Michelle A. Coleman, Administrative Law Judge

Synopsis:

The Board will deny a motion for summary judgment when the moving party fails to sustain its burden of proof by failing to attach its exhibits to its motion and did not incorporate them by reference.

OPINION

This matter was initiated with Ralph Gambler's (Appellant) filing a notice of appeal on February 24, 1997 challenging the Department of Environmental Protection's issuance of an order stating that Appellant violated provisions of the Dam Safety and Encroachment Act, Act of November 26, 1997 , P.L. 1375, *as amended*, 32 P.S. §§ 693.1-693.27, and requiring Appellant to implement a reclamation plan for a segment of Lick Run Creek, Lawrence Township, Clearfield County, Pennsylvania. Currently before the Board is the Department's July 7, 1997 motion for summary judgment.

BACKGROUND

Appellant is an individual who resides at 314 Franklin Street, Albartis, Pennsylvania. On July 27, 1996 Appellant submitted a "Notification to Use BDWW-GP-3 Bank Rehabilitation, Bank Protection Gravel Bar Removal" (GP-3 Notification) to the Clearfield County Conservation District, which has been delegated the authority to administer the Department's Dam Safety and Waterway Management program. In his GP-3 Notification Appellant stated that he intended to restore a small portion of the Lick Run streambank by removing gravel deposition and/or to remove gravel bar material. The delineated segment proposed to be affected by these activities has been designated a high quality, cold water fishery. On July 31, 1996 the Clearfield County Conservation District acknowledged receipt of the GP-3 Notification and that notification effectively granted Appellant General Permit No. 031796502 pending acknowledgment from the United States Army Corps of Engineers. The Corps' acknowledgment was required before Appellant could legally remove the material. Appellant removed the gravel and performed additional activity at the site prior to receiving this acknowledgment.

On August 16, 1996, the Department inspected the site and found Appellant had relocated or re-channeled approximately 325 feet of Lick Run Creek and had placed the excavated material in the floodway without a permit. The Department found Appellant to be in violation of provisions in his General Permit, the Dam Safety Act and its accompanying regulations. The Department ordered Appellant to either complete the Department's restoration plan or to file and complete a plan designed by Appellant.[1] Appellant filed his February 24, 1997 appeal based on this order. On

---

[1] The Appellant designed plan had to be submitted to and approved by the Department prior to implementation.

March 5, 1997, Appellant filed a copy of the Department order pusuant to a February 26, 1997 Board order. On July 7, 1997 the Department filed its motion for summary judgment and an accompanying memorandum. On July 15, 1997 Appellant filed his response.[2] On July 31, 1997 the Department filed its reply brief.

DISCUSSION

Appellant alleges that there are no violations of the General Permit, and if there is a technical violation of the permit there was no damage to the stream or the stream bed and that there were no violations of the Dam Safety Act or its accompanying regulations.

The Department contends that it is entitled to a motion for summary judgment on all the issues because there are no material facts in dispute and that it is entitled to judgment as a matter of law. The Department alleges that it is entitled to judgment as a matter of law because, among other reasons, Appellant has failed to sustain his burden as the non-moving party to disclose evidence that forms the basis for resisting the motion for summary judgment by providing the Board with any documentary evidence which either supports his objections or refutes the evidence offered by the Department with his response.

When ruling on a motion for summary judgment, the Board is authorized to render summary judgment if the pleadings, depositions, answers to interrogatories, and the admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Reading Anthracite Company v. DEP, et al*, EHB

---

[2] Appellant did not file the accompanying memorandum until August 15, 1997. We will not consider the memorandum for the purpose of ruling on the Department's motion because Appellant's supporting memorandum arrived one month after his repsonse.

Docket No. 95-196-C (Opinion issued June 18, 1997) Summary judgment may be entered only in cases "where the right is clear and free from doubt." *Hayward v. Medical Center of Beaver County*, 608 A.2d 1040, 1042 (Pa. 1992). The Board must read the motion for summary judgment in the light most favorable to the non-moving party. *Reading Anthracite Company v. DEP, et al*, EHB Docket No. 95-196-C (Opinion issued June 18, 1997) So the moving party in the matter bears the burden of proving that there are no material facts in dispute and that they are entitled to judgment as a matter of law.

The Department's motion must be denied because it is not entitled to judgment as a matter of law. A moving party bears the burden of proving that it is entitled to the relief requested. *Reading Anthracite Company v. DEP, et al,* EHB Docket No. 95-196-C (Opinion issued June 18, 1997); *Bethenergy Mines, Inc. v. DEP*, EHB Docket No. 90-050-MR (Opinion issued March 17, 1997) That party has a duty to present its best case, and the Board will not do so by default. *Green Thornbury Committee, et al v. DER, et al*, 1995 EHB 636, 667. In the instant case, the Department has failed to attach the exhibits to the motion and has not incorporated the exhibits by reference in the motion. Our consideration is governed by the content of the motion and the exhibits attached to it. *Township of Florence v. DEP*, 1996 EHB 1399. Exhibits which are not attached to or incorporated by reference in the motion cannot properly form the basis for granting a motion for summary judgment or for denying that motion when the answer raises issues not supported in any form. *Hemlock Municipal Sewer Cooperative v. DEP*, EHB Docket No. 96-157-C (Opinion issued May 22, 1997) Without the exhibits to support the arguments the Department has failed to sustain its burden of proof. Consequently, we must deny its motion on the issues raised in the notice of appeal.

Accordingly, we enter the following order.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

RALPH GAMBLER	:	
	:	
v.	:	**EHB Docket No. 97-051-C**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW this 22nd day of August, 1997 the Department of Environmental Protection's motion for summary judgment is denied.

ENVIRONMENTAL HEARING BOARD

Michelle A. Coleman

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: August 22, 1997

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

For the Commonwealth, DEP:
Geoffrey J. Ayers, Esquire
Northcentral Region

For Appellant:
Dennis J. Yonkin, Esquire
GREEVY & YONKIN
Williamsport, PA

kh/bl

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

M. DIANE SMITH
SECRETARY TO THE BOAR

GLACIAL SAND & GRAVEL COMPANY	:	
	:	
v.	:	**EHB Docket No. 97-023-MR**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued:** August 25, 1997

OPINION AND ORDER ON MOTION FOR PARTIAL SUMMARY JUDGMENT

By Robert D. Myers, Member

Synopsis:

DEP's Motion for Partial Summary Judgment is granted on the basis of administrative finality where the Appellant challenges a permit condition which was part of the original permit, which has been in continuous effect, and which the Appellant never challenged before this proceeding.

OPINION

On January 27, 1992, the Department of Environmental Protection (DEP) issued Water Obstruction and Encroachment Permit No. E03-322 to the Appellant for commercial sand and gravel dredging along the Allegheny River. The 1992 permit incorporated by reference a sand and gravel agreement between Appellant and DEP, Sand and Gravel Agreement No. M-280154-08, which provided in pertinent part:

> 2.25 Prior to dredging Licensee shall at the request of the Department, undertake or cause to be undertaken by a reputable environmental consultant, at Licensee's expense, a survey to determine if mussels are present in the area it proposes to dredge. The data collected shall be provided to [the] Department, Pennsylvania Fish Commission, U.S. Army Corps of Engineers and the U.S. Department of the Interior, Fish and Wildlife Service for review and comment before dredging is initiated. If significant mussel resources exist in the proposed dredging area, dredging shall be prohibited.

(DEP's Motion, paras. 1, 2, 5; Appendix B.) The Appellant never appealed the issuance of the 1992 permit; nor did the Appellant appeal the agreement, incorporated therein, which prohibits dredging wherever mussel surveys reveal the presence of mussels. (DEP's Motion, para. 6; Appendix C.)

On December 22, 1995, DEP notified the Appellant by letter that DEP would extend the expiration date of the 1992 permit to August 30, 1996. In the same letter, DEP reminded the Appellant that all of the permit's conditions remain in effect. DEP also requested that the Appellant submit mussel surveys for areas to be dredged in 1996-1997. (DEP's Motion, para. 11; Appendix E.) The Appellant never appealed the extension of the 1992 permit which preserved the mussel survey condition. (DEP's Motion, para. 12; Appendix C.)

On January 1, 1996, DEP entered into a new sand and gravel agreement with the Appellant, Sand and Gravel Agreement No. M-280169-08, which provided in pertinent part:

> 2.26 Prior to dredging Licensee shall undertake or cause to be undertaken by a reputable environmental consultant, at Licensee's expense, a survey to determine if mussels are present in the area it proposes to dredge. The data collected shall be provided to [the] Department, Pennsylvania Fish and Boat Commission, U.S. Army Corps of Engineers and the U.S. Department of the Interior, Fish and Wildlife Service for review and comment before dredging is initiated. If significant mussel resources exist in the proposed dredging area, dredging shall be prohibited.

(DEP's Motion, paras. 7, 9; Appendix D.) The Appellant never appealed the new agreement with its requirement for mussel surveys. (DEP's Motion, para. 10; Appendix C.)

On January 8, 1997, DEP reissued the permit. This time, the Appellant filed the instant appeal with the Board objecting, *inter alia*, to the imposition of "new restrictions and requirements." (DEP's Motion, paras. 13, 15.) The 1997 permit contains the following new Special Conditions:

> A. Although Page 1 of this permit depicts areas approved for dredging in past permits, based on the mussel survey information submitted to date, you are only authorized to conduct commercial sand and gravel dredging between the river miles listed below. . . .
>
> C. When the updated NEPA documentation that will be prepared relative to commercial sand and gravel dredging on the Allegheny and Ohio Rivers is finalized, this permit may be re-opened and modified to reflect the study results.
>
> . . . .
>
> E. Prior to dredging in locations other than those specified in Special Condition A above, the permittee shall conduct mussel surveys in accordance with Department approved procedures, and submit six copies of the results to the Department for review and authorization of dredging activities for specific river miles. Work in these additional areas can only begin after authorization from the Department. This authorization will be in the form of a permit amendment.

(DEP's Motion, paras. 16-19.)

On January 24, 1997, the Board issued Pre-Hearing Order No. 1, scheduling the completion of discovery and the filing of dispositive motions. On April 28, 1997, pursuant to a Joint Motion to Extend Discovery, the Board issued an order extending discovery to June 30, 1997. On May 27, 1997, DEP filed a Motion for Partial Summary Judgment Based on Administrative Finality (Motion) with supporting documents. DEP asserts in its Motion that it is entitled to judgment as a matter of law in this appeal to the extent that the Appellant is challenging the mussel survey requirement as a "new restriction and requirement." The Appellant filed no response to the Motion.

Summary judgment may be entered in whole or in part as a matter of law whenever there is no genuine issue of any material fact. Pa. R.C.P. No. 1035.2. In this case, the Appellant has not

contested the facts as set forth in DEP's Motion. Thus, we shall proceed to address whether, as a matter of law, DEP is entitled to partial summary judgment based on the doctrine of administrative finality.

The doctrine of administrative finality focuses on the failure of a party aggrieved by an administrative action to pursue a statutory appeal remedy. *Kent Coal Mining Co. v. Department of Environmental Resources*, 550 A.2d 279 (Pa. Cmwlth. 1988). In *Department of Environmental Resources v. Wheeling-Pittsburgh Steel Corp.*, 348 A.2d 765, 767 (Pa. Cmwlth. 1975), *aff'd*, 375 A.2d 320 (Pa. 1977), *cert. denied*, 434 U.S. 969 (1977), the Commonwealth Court explained the doctrine as follows:

> We agree that an aggrieved party has no duty to appeal but disagree that upon failure to do so, the party so aggrieved preserves to some indefinite future time in some indefinite future proceedings the right to contest an unappealed order. To conclude otherwise, would postpone indefinitely the vitality of administrative orders and frustrate the orderly operation of administrative law.

With respect to the issuance of permits, the Board has held that, where a permit condition has been in continuous effect, and the permittee did not appeal the condition when the permit was originally issued, the permit condition cannot be challenged in later permit modifications. *Empire Sanitary Landfill, Inc. v. DEP*, 1996 EHB 345.

Here, the original 1992 permit, through the sand and gravel agreement, provided for mussel surveys which could possibly restrict the Appellant's dredging activities along the Allegheny River. In December 1995, when DEP extended the expiration date of this permit, DEP explicitly stated to the Appellant that all prior conditions were still in effect. The mussel survey condition set forth in the sand and gravel agreement was obviously still in effect because, at the same time, DEP requested that the Appellant submit mussel survey data for 1996-1997. The Appellant, instead of questioning

DEP's request for mussel survey information, apparently submitted the mussel survey results which ultimately served as the basis for the dredging restrictions in the 1997 permit. *See* Special Condition A. In January 1996, DEP and the Appellant entered into a new sand and gravel agreement which contained a provision for mussel surveys, and, once again, the Appellant did not take issue with the requirement. Because the mussel survey requirement was continuously in effect and the Appellant failed to challenge it, the doctrine of administrative finality bars the Appellant from doing so here.

Accordingly, we grant DEP's Motion.[1]

[1] Our action here does not end the proceeding. DEP's Motion and our granting of it forecloses only the issues specifically mentioned.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

GLACIAL SAND AND GRAVEL COMPANY	:	
	:	
v.	:	**EHB Docket No. 97-023-MR**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 25th day of August, 1997, the Department of Environmental Protection's Motion for Partial Summary Judgment Based on Administrative Finality is granted.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: August 25, 1997

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

For the Commonwealth, DEP:
Charney Regenstein, Esq.
Southwestern Region

For Appellant:
Henry Ingram, Esq.
REED SMITH SHAW & McCLAY
Pittsburgh, PA

ri/bl

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

M. DIANE SMITH
SECRETARY TO THE BOARD

TOWNSHIP OF FLORENCE	:	
	:	
v.	:	**EHB Docket No. 96-045-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and WASTE MANAGEMENT OF PENNSYLVANIA, INC., Permittee	:	**Issued:** August 26, 1997

ADJUDICATION

By George J. Miller, Administrative Law Judge

Synopsis:

The Board dismisses an appeal of an air quality plan approval for the expansion of a municipal solid waste landfill where the appellant has failed to present any evidence that it had a direct, immediate and substantial interest in the outcome of the appeal. The appellant further failed to proffer sufficient evidence to prove that the Department abused its discretion in concluding that the requirement of new source review did not apply to the proposed expansion because the potential emissions of volatile organic compounds from the expansion when aggregated with net increases in the potential to emit of the original landfill do not exceed the 25 ton per year threshold.

BACKGROUND

This appeal arises from the Department of Environmental Protection's issuance of an air quality plan approval to Waste Management of Pennsylvania, Inc. (WMPI) under the Air Pollution Control Act (APCA), Act of January 8, 1960, P.L. (1959) 2119, *as amended,* 35 P.S. §§ 4001-4106.

This plan approval authorized the construction of regulated air emission sources associated with the proposed expansion to the southern boundaries of the Tullytown Resource Recovery Facility landfill located in Tullytown Borough and Falls Township, Bucks County, Pennsylvania.[1]

Florence Township (Appellant) is a municipal corporation of the State of New Jersey located directly across the Delaware River from the proposed landfill expansion. In its notice of appeal the Appellant contended that the plan approval contravenes several sections of the Air Pollution Control Act and the federal Clean Air Act, 42 U.S.C. §§ 7401-7671q. All but two objections raised in the notice of appeal were dismissed by the Board in *Township of Florence v. DEP*, 1996 EHB 871. The remaining objections were that the plan approval failed to comply with state and federal new source review requirements.[2]

A hearing on the merits was held for two days on April 9 and 10, 1997, before Administrative Law Judge George J. Miller. Following the hearing, the parties filed extensive requests for findings of fact and conclusions of law and supporting legal memoranda. The record consists of the pleadings, a joint stipulation of facts, a transcript and 31 exhibits. After a full and complete review of the record and briefs, we make the following:

---

[1] The Appellant also appealed the issuance of the solid waste permit issued for the proposed expansion. *See Florence Township v. DEP*, EHB Docket No. 95-107-MG (Adjudication issued July 22, 1997).

[2] The Board later denied WMPI's motion for summary judgment with respect to the Appellant's claim that the Department failed to properly apply the statutes and regulations related to new source review. *Township of Florence v. DEP*, 1996 EHB 1399.

FINDINGS OF FACT

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

2. On September 7, 1989, the Department issued to WMPI a permit pursuant to the Solid Waste Management Act, Act of July 7, 1980, P.L. 380, *as amended*, 35 P.S. §§ 6018.101-.1003, authorizing the construction of a solid waste landfill in Tullytown, Pennsylvania known as the Tullytown Resource Recovery Landfill Facility (hereafter "Original Landfill"). (J.S. 1)[3]

3. On May 23, 1995, the Department issued WMPI a solid waste permit authorizing construction and operation of an expansion to the southern boundaries of the Original Landfill, known as the Southern Expansion. (J.S. 6)

4. On May 8, 1995, WMPI submitted to the Department an application for an air quality plan approval for the installation of four landfill gas turbines at the Southern Expansion. (J.S. 8; Ex. P-7)

5. The Original Landfill and the Southern Expansion are located in Bucks County, an area classified under the Clean Air Act as a severe nonattainment area for the National Ambient Air Quality Standard for ozone. (J.S. 13)

6. The Department issued air quality plan approval no. 09-322-055 to WMPI authorizing the construction and temporary operation of air emission sources associated with the Southern

---

[3] The parties' stipulation of facts was admitted into evidence as Board Exhibit 1. It is hereinafter referred to as "J.S.__." WMPI's exhibits are referred to as "Ex. P-__"; the Appellant's exhibits as "Ex. A-__."

Expansion on February 1, 1996. (J.S. 11)

7. The Department analyzed WMPI's application for the air plan approval for the Southern Expansion and determined that the sources associated with the expansion were not subject to the new source review provisions under Subchapter E of Chapter 127 of the Department's regulations. (J.S. 15)

Emissions of the Original Landfill

8. Thomas J. McGinley is the Chief of Engineering Services in the air quality program in the Department's Southeast Region. He has held this position for ten years. His duties include the issuance of planning approvals and operating permits, as well as performing new source review. (N.T. 11-12)

9. Sachin Shankar is employed by the Department as an Air Pollution Engineer. He reports to Mr. McGinley. He made the determination on behalf of the Department that new source review was not required for the Southern Expansion. (N.T. 110, 112)

10. Mr. McGinley evaluated whether or not there had been increases in the potential to emit of the Original Landfill during the consecutive five year period of 1992-1996, inclusive. (N.T. 45)

11. In the absence of emissions limitations imposed by an air quality plan approval, the Department determines the potential to emit of a landfill based upon the overall waste disposal capacity allowed in its solid waste facility permit. (N.T. 53-54)

12. The potential to emit of a landfill is calculated from the permitted waste disposal capacity of a landfill and the control systems, such as gas collection and destruction (N.T. 16-17; N.T. 269-71)

13. The potential to emit for a landfill would increase only if there was an increase in the capacity of the landfill to take refuse and as long as emissions controls remained in effect. (N.T. 53-54; 282-83)

14. A landfill has fluctuations in actual emissions. Although actual emissions vary, these variations will not change a source's potential to emit. (N.T. 56-57; 270-71)

15. Further, actual emissions are almost always less than potential emissions because the potential to emit takes into account the maximum amount that a source can emit over the course of its lifetime. (N.T. 385)

16. From 1988 to 1995, the Department did not issue any modification to the Original Landfill's solid waste permit authorizing an increase in disposal capacity at the Original Landfill. (N.T. 45; 63-64)

17. In the course of determining whether the potential to emit of the Original Landfill increased for VOCs during the contemporaneous five years leading up to February 1, 1996, the Department did not consider the total potential to emit of the Original Landfill to be relevant; only increases in the potential to emit were relevant, as provided in the regulations. (N.T. 42-43)

18. The Department determined that there was no increase in the potential to emit VOCs at the Original Landfill during the relevant period of 1992 to 1996, inclusive, because there had been no changes in the permitted capacity of the Original Landfill. (N.T. 43, 45, 62-64, 112, 227, 28, 37)

19. The Original Landfill has an air quality operating permit for a landfill gas collection system and associated flare which was issued on May 19, 1993. The system is required to achieve a collection efficiency of at least 80% and a destruction efficiency for non-methane organic

compounds of at least 98%. (J.S. 3; J.S. 4; Exs. P-3; P-4)

20. Although the installation of the flare system at the Original Landfill decreased emissions of VOCs, the Department did not consider these decreases in its determination that the Original Landfill had no increase in its potential to emit VOCs. (N.T. 43-44)

Potential to Emit of the Southern Expansion

21. WMPI's plan approval application for the Southern Expansion included, among other things, a description of the proposed total acreage and volume of the landfill expansion area, identification of the maximum average daily refuse disposal rate and total landfill capacity, and incorporation of an allowable six-day-per-week operating schedule, all consistent with the solid waste permit issued by the Department for the Southern Expansion. (Ex. P-7 at App. 1)

22. The Department's determination of the Southern Expansion's potential to emit for VOCs was based on:

a. a final municipal waste capacity of 11, 760, 000 tons;

b. a VOC concentration of 900 parts per million by volume (ppmv) as hexane in landfill gas;

c. a gas collection efficiency of 92%; and

d. landfill gas-fueled turbines which included a gas destruction efficiency of 98% of the VOCs in the collected gas.

(J.S. 3; J.S. 10; N.T. 226-27)

23. The plan application also demonstrated that the maximum quantity of VOC emissions that could result from air emission sources associated with the Southern Expansion would be less than 25 tons per year (tpy), including both point source and fugitive emissions. (Exs. P-7, P-8)

24. Michael Nieman is employed by Rust Environment & Infrastructure Inc. as a Project Scientist/Landfill Gas Assessment Coordinator. He has significant experience in landfill gas system designs for municipal solid waste landfills. Mr. Nieman acted as a consultant to WMPI in preparing the air quality plan approval application for the Southern Expansion. (N.T. 380; Ex. P-13)

25. The 900 ppmv concentration of VOCs in the landfill gas which was a factor from which WMPI determined the potential to emit of the Southern Expansion, was based on analyses of gas samples collected by the WMPI's consultant at the Original Landfill. (J.S. 9; Ex. P-7 at Tab 6)

26. At the time the Department determined the potential to emit of the Southern Expansion, it was accepted practice in the discipline of landfill gas assessment to utilize the EPA Model for estimation of a landfill's generation rate for VOCs, although at the time the May 1991 New Source Performance Standards containing the EPA Model had not yet been promulgated in final form. (N.T. 455)

27. The EPA promulgated the New Source Performance Standard on March 12, 1996, after the Department's issuance of a plan approval for the Southern Expansion. (Ex. P-12)

28. The EPA Model as finally promulgated did not change from the formula which appeared in the May 1991 draft New Source Performance Standards, nor did the definitions of the variables to be used in the Model and units in which those variables were to be expressed. (N.T. 455)

29. However, the May 1991 draft of the EPA Model did not include a recommended factor for converting landfill gas concentrations measured as parts per million carbon to parts per million hexane. (Proposed 40 C.F.R. § 60.753(a) at 56 Fed. Reg. 24468, 24503-04 (May 30, 1991))

30. The final EPA Model requires the use of a conversion factor of 6.0. (40 C.F.R. §

60.753(a)(3); 61 Fed. Reg. 9905 (March 12, 1996))

31. Mr. Nieman used a conversion factor of 7.18 to calculate the conversion of carbon to hexane necessary to determine the emission levels of VOCs for the Southern Expansion. This factor is the ratio of the molecular weight of hexane to the molecular weight of carbon. (N.T. 478)

32. Mr. Nieman testified that using the EPA conversion factor of 6.0 would not necessarily result in a VOC concentration of greater than 900 ppmv. (N.T. 485)

33. He explained that to simply increase the calculated concentration of VOCs by the ratio of the conversion factors incorrectly ignores the complexities of the chemical relationships of the various parameters that should be excluded from the determination of VOC concentration. (N.T. 477-79)

34. Mr. Nieman testified that the information incorporated into the VOC emission determinations for the Southern Expansion constitutes the best available data for calculated projected VOC emission levels for the Southern Expansion. (N.T. 501)

35. In calculating the collection efficiency for the Southern Expansion, WMPI utilized established scientific principles and generally accepted methods employed in the field of landfill gas collection and air pollution control. (N.T. 218; 434; 440-41)

36. WMPI's calculation of collection efficiency considered only the landfill gas that would be collected from the area of the landfill within the active zone of influence of vertical landfill gas collection wells, since the landfill area subject to active gas control can be directly determined by application of Darcy's Law. (N.T. 396; 437-38; *see also* N.T. 391-95)

37. Mr. Nieman's data inputs for computing the efficiency of the gas collection systems were a combination of site specific information from the Original Landfill and historical data

developed from many landfills. (N.T. 493-96; 498)

38. WMPI's determination of the collection efficiency of 92% included within the plan approval application underestimates the collection efficiency of the landfill gas collection system to be installed at the Southern Expansion, in that it does not take into account collection efficiency enhancements that will result from:

a. passive influence in landfill gas migration toward gas collection wells as a result of diffusion; and

b. the impediment to fugitive landfill gas emission of intermediate and final cover systems.

(N.T. 222-24; 435-37; 440)

39. With the inclusion of these features, the best scientific information indicates that the collection efficiency for the landfill gas collection system at the Southern Expansion will exceed 92%. Mr. Nieman testified that he was not aware of any better scientific information upon which the collection efficiency of a gas management system could be determined. (N.T. 441)

40. The Department determined, based upon the best available information, that the collection efficiency for the Southern Expansion will equal or exceed 92%. (N.T. 218)

41. All factors necessary for a determination of the collection efficiency achieved by the landfill gas control system can be measured or calculated. (N.T. 452)

42. The plan approval for the Southern Expansion includes numerous conditions designed to limit VOC emissions from the Southern Expansion. (J.S. 12; Ex. P-12; N.T. 69-77)

43. The conditions included with the plan approval require that VOC emissions for the Southern Expansion remain below 25 tpy throughout the life of the Southern Expansion. (Ex. P-12;

N.T. 74)

44. The conditions included in the plan approval require WMPI to routinely monitor specified conditions at the Southern Expansion and project future emissions to ensure that VOC emissions remain below 25 tpy. (Ex. P-12; N.T. 75-77)

45. The Department determined that WMPI's compliance with a landfill gas collection efficiency of 92% required under the plan approval could be evaluated and enforced based on the conditions in the permit. (N.T. 232)

46. The permit condition requiring that emissions of VOCs be less than 25 tpy is practically enforced by a number of techniques. One is testing of control devices and knowing the discharge concentration and gas flow rates from the units, as well as the calculated emission potential and collection efficiency. (N.T. 89)

47. The collection efficiency can be demonstrated based upon the measurement of indirect parameters and calculations consistent with best engineering judgment. (N.T. 232; 303)

48. As a matter of regulatory implementation, the Department frequently authorizes sources to demonstrate compliance with applicable emission limitations through indirect measures, including measurement of surrogate parameters and calculations based on site specific emission factors. (N.T. 285-87)

49. Mr. Shankar testified that the conditions included in the plan approval will be effective in ensuring that VOC emissions from the Southern Expansion remain below 25 tpy. (N.T. 229)

50. Specifically the collection efficiency of 92% for the Southern Expansion would be enforced by having the facility put in the collection wells that they had designated in their

application in providing the gas flow capacity to remove that amount of gas. (N.T. 88)

51. The conditions included in the plan approval are both federally enforceable and practically enforceable. (N.T. 229)

52. The Department considers all information set forth in a plan approval application as being enforceable against the applicant even if there is no specific permit condition relating to that information. Incorrect or false information in a permit application would be grounds for the Department to revisit the permitting decision. (N.T. 302-304)

53. There is no evidence that WMPI designed the Southern Expansion to circumvent new source review requirements.

Standing

54. The Appellant presented no evidence at the hearing which established that it has a substantial, direct and immediate interest in with respect to any matter set forth in its notice of appeal.

DISCUSSION

The Appellant is the party protesting the issuance of the permit and therefore bears the burden of proof that the Department's action in issuing the permit was an abuse of discretion or was the result of an error of law. 25 Pa Code § 1021.101(c)(2). Our review is *de novo* so that the Board is not limited to considering the evidence the Department had before it at the time it issued the permit, but may consider evidence presented before the Board. *Warren Sand and Gravel Co., Inc. v. Department of Environmental Resources*, 341 A.2d 556 (Pa. Cmwlth. 1975).

An essential element of the Appellant's proof is that it has standing in the sense that it has been aggrieved by the issuance of the plan approval because it has a substantial, direct and

immediate interest in the Department's issuance of the approval to WMPI. *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 346 A.2d 269, 280 (Pa. 1975); *Florence Township v. DEP*, 1996 EHB 282, 289-290.

The Appellant presented no testimony or other evidence which would establish its substantial, direct and immediate interest in the issuance of the air plan approval to WMPI. Although the Appellant protests that we should find that WMPI waived objections to its standing to appeal in this matter because the issue was not specifically raised earlier in this litigation, the Appellant had ample opportunity to provide the Board with such evidence. WMPI very clearly raised the issue in its prehearing brief which is sufficient to preserve the objection to the Appellant's appeal and provide an opportunity for the Appellant to present evidence. *See Oley Township v. DEP*, 1996 EHB 1098, 1126-27. Moreover, the standing issue was raised in both a motion to dismiss and at the hearing on merits of the appeal of the solid waste permit for the Southern Expansion. *Florence Township v. DEP*, EHB Docket No. 95-107-MG (Adjudication issued July 22, 1997). Accordingly, there is no "injustice" done to Appellant by dismissing its appeal on this basis.

However, the Appellant has raised issues of considerable public interest in the course of its appeal of the air quality plan approval. Therefore, although we are dismissing the Appellant's appeal for lack of standing, we will nevertheless address the merits of the Appellant's claims.

The Appellant contends that the Department abused its discretion in issuing the air quality plan approval to WMPI because it violates the new source review provisions of the Department's regulations.[4]

---

[4] In its notice of appeal the Appellant also objected to the air plan approval because it violated federal new source review provisions. However, in its post-hearing brief the Appellant does

The purpose of the new source review provisions of the Clean Air Act is an effort to control the emission of additional pollutants in areas where National Ambient Air Quality Standards have not been achieved for criteria pollutants such as volatile organic compounds (VOCs). States located in nonattainment areas are required by federal law to implement permitting programs which provide for the construction and operation of new or modified major stationary sources in accordance with the provision of Section 173 of the Clean Air Act, 42 U.S.C. § 7503. Section 172(c)(5) of the Clean Air Act, 42 U.S.C. § 7502(c)(5). These new source review provisions have been implemented by the Department in Chapter 127 of the Pennsylvania Code, 25 Pa. Code §§ 127.201-.217, which generally provides that a proposed source that has the "potential to emit" VOCs in excess of the established threshold of 25 tons per year must comply with new source review requirements.

New source review pursuant to the Department's regulations is triggered by Section 127.203(c)(1). It provides that:

> The applicability of requirements in § 127.211 [pertaining to new source review] apply except as provided by this subsection. A modification to an existing facility with the potential to emit 25 tons per year or more which results in an increase in the potential to emit VOC . . . may not be considered a de minimis increase. The requirements of this subchapter apply, if the increase in potential to emit, when aggregated with the other net emission increases in potential to emit occurring over a consecutive 5-calendar-year period exceeds 25 tons per year . . . .

25 Pa. Code § 127.203(c)(1). Under this section the Department determines whether a source described in a plan approval application is exempted from new source review. In this case the Department determined that the Southern Expansion was exempt from new source review because there was no increase in the potential to emit of the Original Landfill over the consecutive five year

---

not raise any issues relating to specific violations of federal law and has therefore waived this objection.

period, and the potential to emit of the Southern Expansion was less than 25 tpy.

The Appellant first argues that the Department erred in concluding that the Southern Expansion was exempted from new source review because (1) the Department never determined the total potential to emit of the Original Landfill; and (2) the Original Landfill experienced emissions increases during the five year period leading up to February, 1996. These emissions increases, Appellant contends, when aggregated with the potential to emit of the Southern Expansion exceed the 25 tpy threshold. We find that the Appellant did not sustain its burden of proving that the Department was required by law to determine the total potential to emit of the Original Landfill or that the Original Landfill sustained increases in its relevant emissions.

Section 127.203 focuses on the "potential to emit" of air sources rather than actual emissions. New source review only applies "if the increase in *potential to emit* [resulting from a modification], when aggregated with the other *net emission increases in potential to emit* occurring over a consecutive 5-calendar-year period exceeds 25 tons per year . . . ." 25 Pa. Code § 127.203(c)(1)(*emphasis added*). The potential to emit for a landfill is determined from the permitted waste disposal capacity of a landfill and the control systems, such as gas collection and destruction. Increases in the overall capacity of a landfill to accept waste would result in an increase in a landfill's potential to emit, absent corresponding changes in emission controls. The Department determined that there had been no increase in the potential to emit of the Original Landfill because there had been no modifications to the solid waste permit which increased the capacity of the landfill to accept waste, nor had there been any discontinuation of a control device which would result in an increase in the potential to emit VOCs. Accordingly, the Department concluded that the potential to emit of the Original Landfill had not increased during the five year period.

The Appellant argues that the Department failed to determine the original potential to emit of the existing landfill. However, the original potential to emit is not relevant under 25 Pa. Code § 217.203. The regulation only requires that net *increases* in the potential to emit must be aggregated with the potential to emit of the modification for the purposes of new source review.[5] 25 Pa. Code § 217.203(c)(1). Therefore the Department was only required to consider increases in the potential to emit of the Original Landfill, not its total potential to emit.

The Appellant also contends that the Original Landfill sustained increases in actual emissions of VOCs. This, too, is not relevant under the terms of the regulation. Further, as experts for both WMPI and the Department testified, actual emissions are almost always less than potential emissions, because the potential to emit takes into account the maximum amount that a source can emit over the course of its lifetime and the facility's potential to emit is at its highest at or shortly after closure of the landfill. (N.T. 385)

In sum, the Appellant failed to present any evidence which proved that the potential to emit of a landfill is not accurately determined from the waste disposal capacity of the landfill. Nor did the Appellant present evidence that the overall capacity of the Original Landfill had changed. Accordingly we conclude that the Department did not abuse its discretion by concluding that the potential to emit VOCs of the Original Landfill did not increase from 1991-96, inclusive.

The Appellant next argues that the potential to emit for the Southern Expansion exceeds 25

---

[5] Decreases in potential to emit of the original source are also relevant and under certain circumstances may be subtracted from increases in the potential to emit. WMPI presented evidence that a flare had been installed at the Original Landfill which resulted in a decrease in the potential to emit VOCs. Mr. McGinley testified that since the Original Landfill had no increase in its potential to emit, that the Department did not consider the decreases in the potential to emit which resulted from the landfill gas collection system and flare.

tpy because (1) WMPI improperly calculated the concentration of VOCs in the landfill gases which resulted in an underestimation of the generation of VOCs for the Southern Expansion, and (2) WMPI failed to adequately demonstrate that the emissions controls for the Southern Expansion are demonstrably effective.

The Appellant first charges that the Department erred in concluding that the Southern Expansion has a potential to emit less than 25 tpy of VOCs because the calculation which determined the concentration of VOCs in the landfill gases was incorrect. The evidence adduced at hearing does not support this conclusion.

The concentration of VOCs in landfill gas for the Southern Expansion was calculated by Mr. Nieman using raw data from samples of gases from the Original Landfill which were measured in parts per million by volume (ppmv) as carbon. This data had to be converted into ppmv of hexane in order to use it as an input variable in the model used to calculate a source's potential to emit. The model used for this calculation was an EPA Model found in the proposed New Source Performance Standards Regulations of May, 1991. Mr. Nieman testified that he used a conversion factor of 7.18 to express the carbon data as hexane. This factor was derived from the respective molecular weights of carbon and hexane.

The Appellant argues that this calculation was in error because the EPA Model as finally promulgated in March, 1996 recommended a conversion factor of 6.0. We find that the use of the 7.18 conversion factor was not erroneous for several reasons. First, the conversion factor of 6.0 was not found in the regulations available to the Department until after the air plan approval was issued in February, 1996. It can not be an abuse of discretion to not rely upon data that could not have possibly been available to the Department in making its determination. *Cf. North Pocono Taxpayer*

Ass'n v. DEP, 1994 EHB 449 (events which occurred during the pendency of the appeal of a permit do not demonstrate that the Department abused its discretion in issuing the permit). Second, Mr. Nieman provided a rational scientific basis for using his conversion factor which was not refuted by any evidence proffered by the Appellant, nor did the Appellant present any evidence for the superiority of the 6.0 conversion factor as a scientific matter. Finally, Mr. Nieman testified that even if he had used the conversion factor of 6.0, it does not necessarily follow that he would calculate a different VOC concentration for the Southern Expansion because there are many other variables which are taken into account in the calculation. We therefore conclude that the Department did not err in relying upon a VOC concentration of 900 ppmv in concluding that the Southern Expansion had the potential to emit less than 25 tpy.

The Appellant next argues that the Department erred in concluding that new source review did not apply to the Southern Expansion because WMPI failed to show that the emissions controls for the Southern Expansion are enforceable and will effectively limit emission of VOCs below the 25 tpy threshold.

We have guidance for the legal consideration of emissions controls in evaluating a source's potential to emit from the federal court decision of *Ogden Projects, Inc. v. New Morgan Landfill*, 911 F. Supp. 863 (E.D. Pa. 1996). The court applied a two prong test for determining whether it is proper to include a gas management system's impact on a source's potential to emit:

> [T]he controls must go beyond being merely effective, but must be more akin to "unquestionably" and "demonstrably" effective. In addition these controls must stem from state or local government regulations, and not from "operational restrictions that an owner might voluntarily adopt."

Ogden Projects, 911 F. Supp. at 876 (citation omitted) (quoting *National Mining Association v.*

EPA, 59 F.3d 1351, 1362, 1364 (D.C. Cir. 1995)). The court went on to conclude that in that case, information available at the time of construction of the landfill demonstrated that the controls proposed for emissions of VOCs were demonstrably effective. The court also concluded that the controls stemmed from state regulation because the data in the permit application was incorporated into the permit and was a requirement of state law which the landfill operator was not free to disregard.

We find that the Appellant failed to prove that the gas management system for the Southern Expansion is not both demonstrably effective and enforceable under state law. The Appellant contends that the condition of the air plan approval that VOC emissions remain below 25 tpy is insufficient to limit the potential to emit of the Southern Expansion. We would agree if, in fact, this condition were the only element of the permit which operates to limit emissions from the proposed expansion. However, there are many permit restrictions which operate to require WMPI to maintain VOC emissions below the 25 tpy threshold. First, not only are the explicit conditions of the plan approval itself enforceable by the Department, but information provided in the plan application is also enforceable. Mr. Slade, Chief of the Division of Permits for Air Quality, testified that if any of the information provided in the plan application was false or incorrect, the Department has the authority to revisit the permitting decision.

Second, there are numerous conditions in the permit which require monitoring of emissions from the landfill expansion as well as the efficiency of the gas management system. The Appellant argues that these provisions of the permit which require WMPI to regularly monitor and recalculate the parameters which were used to determine the potential to emit of the Southern Expansion evidence a failure of the Department to determine the effectiveness of the gas management system

prior to the construction of the Southern Expansion. We fail to see how this is so. There is ample evidence in this record that the Department considered the effectiveness of the emission control equipment for the Southern Expansion and that the effectiveness was judged based on accepted scientific and engineering methods. Even had the Appellant presented evidence that other methods existed for evaluating the gas management system, it would have to prove that the alternative method was so superior, and that the method used by the Department was so inadequate, that the Department's reliance upon the calculations in the plan approval application rose to the level of an abuse of discretion. There is nothing on this record from which such a conclusion could be drawn.

The Appellant next contends that WMPI's claim that the gas collection efficiency of 92% is not correct because (1) the volume of gas generated by the Southern Expansion cannot be measured and (2) Mr. Nieman used inaccurate inputs in calculating this efficiency.

First, Mr. Slade testified that the Department does not always require direct site specific data for measuring emissions from an air emission source. The equipment and technology used to acquire accurate direct measurement is so expensive that it is only required for the largest emitting sources. For smaller sources, evaluation of factors from which emissions can be calculated are acceptable. For instance, in the case of a landfill, waste intake is one factor from which the level of emissions can be accurately estimated. Therefore, even though the volume of gas generated by the Southern Expansion need not be directly measured, there are factors which can be measured from which this volume can be calculated.

As for the Appellant's second argument, that the inputs used for calculating the collection efficiency were flawed, the Appellant has not presented evidence from which such a conclusion may be drawn. Mr. Nieman testified that the data for determining the collection efficiency was derived

from a combination of site specific information from the Original Landfill, and historical information derived from the data of many landfills. He explained that the values for some of the inputs had large ranges because there had been great improvements made in the landfill management techniques over the years. The Appellant neither presented proof concerning what inputs should have been used nor specified why Mr. Nieman incorrectly characterized expected conditions at the Southern Expansion. Therefore we conclude that the Department did not err in accepting the 92% collection efficiency of the gas management system for the Southern Expansion in concluding that the potential to emit of the Expansion was less than 25 tpy.

The Appellant finally contends that the Department should have aggregated the potential to emit of the Original Landfill with the potential to emit of the Southern Expansion rather than considering only increases in the Original Landfill's potential to emit, in order to evaluate whether or not new source review should be required. The Appellant relies on testimony of John Slade where he acknowledged that there was no explicit mechanism in the regulations which would preclude indefinite expansion of a landfill without emissions offsets.

At the hearing on the matter John Slade, who has authority to speak for the Department regarding air quality permitting and the regulations, testified as follows:

> Q When we go to 203(c), do I read 203(c) as saying that six years after this expansion facility is operating, that Tullytown Expansion Two could be in effect, could be permitted so long as Tullytown Two's potential to emit was 25 pons per year or less, is that your interpretation of this Regulation? . . . . [I]t seems to me that if the only rule is potential to emit under 203(c), why then there can be an infinite number of new Tullytown Expansions so long as each one is under 25 tons per year.
>
> A You're saying as long as they do it in stages five years apart?
>
> Q Yes. . . . What in your view would be the trigger in the case of the development of Tullytown Two or Three . . . the next possible expansion?

> A You are right, if someone keeps their increase below the major trigger and that de minimis aggregation, if they keep it in a five-year increment so that that smaller increase would not be aggregated, then you can continue to have these incremental increases. . . .

(N.T. 311-13). Mr. Slade then went on to explain that although there is no regulatory provision which would limit indefinite expansion, the Department would use its judgment to avoid such an outcome. (N.T. 316-17)

Based upon this testimony and our own reading of Section 203(c) of the regulations, it is true that there is no specific regulatory provision which would preclude indefinite modifications of air sources, so long as increases in potential to emit are limited to 25 tpy and spaced by at least five years. However, this result appears to be sanctioned by Section 182(c)(6) of the Clean Air Act, 42 U.S.C. § 7511a(c)(6). Further, the Appellant has presented no evidence that WMPI is in any way deliberately evading new source review with the addition of the Southern Expansion to the Original Landfill. Nor has the Appellant directed our attention to any statutory language which would require the Department to aggregate the total potential to emit of the Original Landfill instead of increases in potential to emit of the Original Landfill. Accordingly, we conclude that the Department did not abuse its discretion in concluding that the Southern Expansion was not subject to new source review.

CONCLUSIONS OF LAW

1. The Appellant bears the burden of proof to present evidence with respect to each issue that remained for the hearing.

2. The Board conducts a *de novo* hearing and makes its determinations based on the evidence properly admitted at the hearing.

3. The Appellant failed to adduce any evidence which demonstrated that it had a direct,

substantial and immediate interest in the outcome of the issues raised in its notice of appeal.

4. The potential to emit VOCs of the Original Landfill did not increase from 1992-96, inclusive.

5. The potential to emit of the Southern Expansion is less than 25 tpy.

6. The Department did not abuse its discretion in concluding that the requirements of new source review did not apply to the Southern Expansion and in issuing the plan approval.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

TOWNSHIP OF FLORENCE	:	
	:	
v.	:	**EHB Docket No. 96-045-MG**
	:	
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION and WASTE MANAGEMENT OF PENNSYLVANIA, INC., Permittee	:	

ORDER

AND NOW, this 26th day of August, 1997, it is hereby ordered that the appeal of Florence Township in the above-captioned matter is DISMISSED.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: August 26, 1997

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

For the Commonwealth, DEP:
Douglas G. White, Esquire
Southeast Region

For Appellant:
Wendy Carr, Esquire
Philadelphia, PA
and
Thomas J. Germine, Esquire
Whippany, NJ

For Permittee:
Bart E. Cassidy, Esquire
Neil Witkes, Esquire
MANKO, GOLD & KATCHER
Bala Cynwyd, PA

ml/bl

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

M. DIANE SMITH
SECRETARY TO THE BOARD

LUCKY STRIKE CORPORATION, et al.	:	
v.	:	**EHB Docket No. 92-003-MR, (Consolidated with 92-004-MR, 92-005-MR, 92-006-MR, 92-008-MR, 92-011-MR, 92-012-MR, 92-013-MR, 92-015-MR, 92-016-MR)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
	:	**Issued: September 2, 1997**

OPINION AND ORDER SUR MOTION FOR SUMMARY JUDGMENT AND MOTION FOR LEAVE TO AMEND APPEALS

by Robert D. Myers, Member

Synopsis:

Summary judgment is granted in a bond forfeiture case based on administrative finality where the Appellants failed to appeal compliance orders and civil penalty assessments which served as the basis for the bond forfeitures. The automatic stay provision of the Bankruptcy Code at 11 U.S.C. §§ 362(a)(1), which stays certain proceedings against the debtor, does not prevent DEP from forfeiting the bonds because bond forfeiture falls under the exception in 11 U.S.C. § 362(b)(4) for governmental action to enforce police or regulatory power. The automatic stay provision at 11 U.S.C. § 362(a)(3), which stays an act to obtain "property of the estate," does not prevent DEP from forfeiting the bonds because the surety bonds and collateral bonds here are not "property of the estate." Where a plan of reorganization confirmed by a bankruptcy court is conditioned upon DEP's

acceptance of a contractor to perform mine reclamation and of a surety to post bonds for the reclamation, and where DEP has not yet indicated its acceptance of the contractor and the surety, the plan does not constitute DEP's consent and approval under 52 P. S. § 1396.4(h), or written authorization under the bond provisions, for the surety to reclaim the mine sites in lieu of bond forfeiture. Finally, a motion for leave to amend appeals is denied under 25 Pa. Code § 1021.53(c) where the motion was filed after the Board set the case for hearing.

OPINION

I. Procedural History

On January 8, 1992, Lucky Strike Coal Company (Lucky Strike) and Beltrami Enterprises, Inc. (Beltrami) filed appeals with the Board challenging the Department of Environmental Protection's (DEP) forfeiture of bonds on December 6, 1991 with respect to five Luzerne County mine sites: (1) Beltrami's Eckley North Basin Mine Site in Foster Township (92-004-MR); (2) Beltrami's Eckley South Basin Mine Site in Foster Township (92-005-MR); (3) Lucky Strike's Wanamie Mine Site in Newport Township (92-003-MR); (4) Beltrami's Honeybrook/Beaverbrook (a.k.a. Audenreid) Mine Site in Hazle Township (92-0008-MR); and (5) Lucky Strike's Huber Bank Mine Site in Hanover Township (92-006-MR). On January 9, 1992, Lackawanna Casualty Company (Lackawanna), surety for both Lucky Strike and Beltrami, filed appeals from the bond forfeitures at docket numbers 92-016-MR, 92-011-MR, 92-013-MR, 92-015-MR, and 92-012-MR. The appeals were consolidated on March 25, 1992.[1]

Two types of bonds are involved in the forfeiture action here. *See* 25 Pa. Code § 86.156(a)

[1] Appeals filed by Pagnotti Enterprises, Inc. (PEI) were consolidated with those of Lucky Strike, Beltrami, and Lackawanna; however, PEI subsequently withdrew its appeals.

(relating to acceptable types of bonds). Some of the bonds are surety bonds which name either Lucky Strike or Beltrami as the principal and Lackawanna as the surety company. *See* Notices of Appeal at Docket Nos. 92-003-MR, 92-004-MR, 92-005-MR, 92-006-MR and 92-008-MR. These bonds provide, *inter alia*, that: (1) the principal shall comply with the requirements of relevant statutes and regulations; and, (2) in the event of default and forfeiture, the Commonwealth may confess judgment against the principal and/or the surety for the amount of money due under the bond. (DEP's Motion, Appendix 28; *see* 25 Pa. Code § 86.157(6).)

The other bonds are collateral bonds pledging certificates of deposit issued by the Meridian Bank and Hazleton National Bank as collateral. *See* DEP's Forfeiture Letters of December 6, 1991; Notices of Appeal at Docket Nos. 92-004-MR & 92-008-MR; *see also* 25 Pa. Code § 86.158(c). Although the parties have not provided the actual collateral bond instrument to the Board, DEP regulations at 25 Pa. Code § 86.158(c)(1) require that the "certificates of deposit be assigned to [DEP], in writing, and the assignment recorded upon the books of the bank issuing the certificate." State law also requires that DEP obtain possession of the certificates and place them with the State Treasurer for custody and safekeeping. 52 P. S. § 1396.4(d); 25 Pa. Code § 86.158(a).

Prior to DEP's forfeiture of the bonds and the filing of these appeals, Lucky Strike and Beltrami each had filed a Chapter 11 Petition for Bankruptcy in the Bankruptcy Court for the Middle District of Pennsylvania (Bankruptcy Court). At the request of the parties, the Board issued various orders to continue the proceedings so that the parties could pursue settlement of the appeals in conjunction with the bankruptcy proceedings. The proceedings were thus continued from April 21, 1992 until May 1997. During that time, the parties filed status reports which indicate, *inter alia*, that: (1) on August 20, 1993, the Bankruptcy Court appointed Charles E. Gutshall, Esquire as

Trustee for Lucky Strike and Beltrami (Trustee), with power to negotiate with DEP concerning the mine sites; and, (2) on March 11, 1997, the Bankruptcy Court confirmed the First Amended Plan of Reorganization of Trustee and Pagnotti Enterprises, Inc., As Modified (Plan).

On May 12, 1997, DEP informed the Board by letter that settlement discussions had broken down. In the same letter, DEP indicated that, although the Bankruptcy Court had confirmed the Plan, the Plan had not been executed and its execution was not foreseeable in the future. As a result, DEP requested a case management order. On May 30, 1997, the Board issued an order scheduling hearings in the case. On June 11, 1997, Lackawanna filed a motion to amend that order to allow a period for discovery prior to the hearings. Lackawanna later filed a supplemental motion and a letter in support of the motion. DEP filed responses, and, on June 19, 1997, the Board issued an order rescheduling the hearings.

On June 27, 1997, DEP filed the instant Motion for Summary Judgment (Motion) based on the doctrine of administrative finality, along with a Memorandum of Law and supporting documents. On July 11, 1997, at the parties' request, the Board continued proceedings until August 25, 1997, except with respect to DEP's Motion. Lackawanna filed a response to DEP's Motion on July 22, 1997, along with a brief and supporting materials. On the same date, Lackawanna filed a Motion for Leave to Amend Appeals, with a supporting brief. On July 30, 1997, DEP filed its reply to Lackawanna's response to the Motion.

II. Motion for Summary Judgment

According to the Motion, DEP forfeited the bonds on December 6, 1991 because Lucky Strike and Beltrami had violated various provisions of the Surface Mining Conservation and Reclamation Act (Surface Mining Act), Act of May 31, 1945, P.L. 1198, *as amended*, 52 P. S. §§

1396.1-1396.19a, the Clean Streams Law, Act of June 22, 1937, P.L. 1987, *as amended*, 35 P. S. §§ 691.1-691.1001, the Solid Waste Management Act, Act of July 7, 1980, P.L. 380, *as amended*, 35 P. S. §§ 6018.101-6018.1003, and the rules and regulations promulgated thereunder. The Motion sets forth the following history of DEP's enforcement actions against Lucky Strike and Beltrami.

A. Eckley North Basin Mine Site

DEP issued Compliance Orders to Beltrami for the Eckley North Basin Mine Site on December 17, 1990 (No. 90-5-179-S), January 22, 1991 (No. 91-5-014-S), May 16, 1991 (No. 91-5-091-S), August 21, 1991 (No. 91-5-156-S), September 20, 1991 (No. 91-5-188-S), November 18, 1991 (No. 91-5-221-S), and December 18, 1991 (No. 91-5-244-S). DEP also assessed a civil penalty on March 20, 1991 ($8,222). Beltrami did not appeal the orders or the assessment. DEP assessed additional civil penalties on January 23, 1992 ($2,150), February 26, 1992 ($24,000), and March 25, 1992 ($22,500). Beltrami appealed these assessments but later withdrew each appeal. (DEP's Motion at paras. 4-62.) DEP issued the compliance orders and assessed the civil penalties, *inter alia*, because Beltrami: (1) failed to maintain backfilling equipment needed to complete reclamation of the site; (2) failed to complete reclamation of the site; (3) failed to seal exploration drill holes; (4) improperly disposed of non-coal wastes on the site; (5) failed to submit water monitoring reports; and (6) failed to comply with DEP orders. (DEP's Motion at paras. 5, 10, 15, 19, 24, 29, & 34.)

B. Eckley South Basin Mine Site

DEP issued Compliance Orders to Beltrami for the Eckley South Basin Mine Site on November 20, 1990 (No. 90-5-170-S), December 17, 1990 (No. 90-5-178-S), November 18, 1991 (No. 91-5-222-S), and December 9, 1991 (No. 91-5-237-S). DEP assessed civil penalties on January 30, 1991 ($4,235) and March 20, 1991 ($22,500). Beltrami failed to appeal the orders or the

assessments. (DEP's Motion at paras. 63-96.) DEP issued these orders and assessed the penalties, *inter alia*, because Beltrami: (1) failed to maintain backfilling equipment needed to complete reclamation of the site; (2) failed to complete reclamation of the site; (3) failed to mark the perimeter of the permit area; and (4) failed to submit water monitoring reports. (DEP's Motion at paras. 64, 69, 74, 78, & 82.)

C. Wanamie Mine Site

DEP issued Compliance Orders to Lucky Strike for the Wanamie Mine Site on January 2, 1991 (No. 91-5-003-S), January 29, 1991 (No. 91-5-024-S), September 9, 1991 (No. 91-5-169-S), and September 16, 1991 (No. 91-5-184-S). Lucky Strike failed to appeal the orders. (DEP's Motion at paras. 97-122.) DEP issued the orders, *inter alia*, because Lucky Strike: (1) removed backfilling equipment needed to complete restoration; and (2) failed to comply with DEP orders. (DEP's Motion at paras. 98, 103, 108, & 113.)

D. Honeybrook/Beaverbrook (a.k.a. Audenreid) Mine Site

DEP issued Compliance Orders to Beltrami for the Honeybrook/Beaverbrook (a.k.a. Audenreid) Mine Site on October 23, 1990 (No. 90-5-151-S), November 8, 1990 (No. 90-5-151-S(A)), November 20, 1990 (No. 90-5-169-S), and November 26, 1991 (No. 91-5-228-S). By letter dated January 17, 1991, DEP notified Beltrami of its intent to suspend Beltrami's surface mining permit and to forfeit the bonds posted on the mine site. DEP assessed a civil penalty on January 30, 1991 ($1,000.) Beltrami did not appeal the orders, the letter, or the assessment. DEP also assessed civil penalties on December 20, 1991 ($22,500) and February 26, 1992 ($230). Beltrami appealed these assessments; however, the Board dismissed Beltrami's appeal of the December 20, 1991 assessment, and Beltrami withdrew the other appeal. (DEP's Motion at paras. 123-163.) DEP

issued the orders, sent the letter, and assessed the penalties, *inter alia*, because Beltrami: (1) removed backfilling equipment needed to complete reclamation of the site; (2) ceased mining operations for more than 30 days without approval; (3) failed to complete reclamation; and (4) failed to comply with DEP orders. (DEP's Motion at paras. 124, 130, 135, 139, & 144.)

E. Huber Bank Mine Site

DEP issued Compliance Orders to Lucky Strike for the Huber Bank Mine Site on October 28, 1990 (No. 90-5-155-S), September 9, 1991 (No. 91-5-170-S), and September 16, 1991 (No. 91-5-183-S). DEP assessed a civil penalty on January 30, 1991 ($200). Lucky Strike did not appeal the orders or the assessment. (DEP's Motion at paras. 164-187.) DEP issued these orders and assessed the penalty, *inter alia*, because Lucky Strike: (1) failed to mark the perimeter of the site; (2) failed to backfill and reclaim the site; and (3) failed to comply with DEP's orders. (DEP's Motion at paras. 165, 170, 175, & 180.)

III. Legal Issues

Lucky Strike and Beltrami have not filed responses to DEP's Motion. Lackawanna has filed a response and has admitted therein that: (1) DEP issued compliance orders and assessed civil penalties for each of the mine sites prior to the bond forfeiture action;[2] and (2) Lucky Strike and Beltrami failed to appeal the orders and assessments. Although there is no genuine issue of material fact, Lackawanna argues that DEP is not entitled to judgment as a matter of law because the automatic stay provision of federal bankruptcy law at 11 U.S.C. § 362 precludes DEP's forfeiture

[2] In its response, Lackawanna asserts that it lacks sufficient knowledge and information to form a belief as to whether Beltrami appealed civil penalties assessed *after* DEP's bond forfeiture action. (Lackawanna's Response at paras. 49-50, 54-55, 58-59, 154-155, and 159-160.)

action. DEP counters that the automatic stay provision does not apply here because of the exception set forth in 11 U.S.C. § 362(b).

A. Automatic Stay

As a preliminary matter, we note that DEP regulations provide for bond forfeiture whenever "the permittee has . . . filed a petition in bankruptcy." 25 Pa. Code § 86.181(a)(6). In the bond forfeiture case of *Martin v. Department of Environmental Resources*, 570 A.2d 122, 125 (Pa. Cmwlth. 1990) (emphasis in original), the Commonwealth Court recognized the legal efficacy of this regulation, stating: "[I]nsolvency is not a defense to a forfeiture action but in fact can be a *reason* for forfeiture under 25 Pa. Code § 86.181(a)(6)." Thus, clearly, under state law, bond forfeiture is *not* automatically stayed by the filing of a bankruptcy petition; quite the contrary, bond forfeiture can *result from* the filing of a bankruptcy petition. Nevertheless, because there is an issue of federal supremacy here, *i.e.*, whether the automatic stay provisions of federal bankruptcy law pre-empt state laws governing bond forfeiture, we shall address Lackawanna's argument.

The United States Court of Appeals for the Third Circuit has commented as follows on the pre-emptive force of federal bankruptcy law:

> While Congress, under its Bankruptcy power, certainly has the constitutional prerogative to pre-empt the States, even in their exercise of police power, the usual rule is that congressional intent to pre-empt will not be inferred lightly. Pre-emption must either be explicit, or compelled due to an unavoidable conflict between the state law and the federal law. . . . Consideration of whether a state provision violates the supremacy clause starts with the basic assumption that Congress did not intend to displace state law.
>
> Proper respect, therefore, for the independent sovereignty of the several States requires that federal supremacy be invoked only where it is clear that Congress so intended. Statutes should therefore be construed to avoid pre-emption, absent an unmistakable indication to the contrary. Where the traditional police power of the State is to "be deemed withdrawn by Congress in bankruptcy legislation, evidence

of that withdrawal in fit language should be found within the act."

Penn Terra Limited v. Department of Environmental Resources, 733 F.2d 267, 272-73 (3d Cir. 1984).

With these principles in mind, we shall examine the language of the automatic stay provisions to determine whether Congress has explicitly pre-empted state laws that provide for bond forfeiture as a means to protect the environment. Section 362 of the Bankruptcy Code provides in pertinent part as follows:

> **(a)** Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title operates as a stay, applicable to all entities, of --
>
> (1) the commencement or continuation . . . of a . . . proceeding against the debtor that was or could have been commenced before the commencement of the case under this title . . . .
>
> (3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate. . . .
>
> **(b)** The filing of a petition under section 301, 302, or 303 of this title does not operate as a stay . . . .
>
> (4) under subsection (a)(1) of this section, of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power.

11 U.S.C. § 362.

1. "Police or Regulatory Power"

Lackawanna rests its automatic stay argument on the extensive scope of subsection 362(a)(1), as enunciated in *Borman v. Raymark Industries, Inc.*, 946 F.2d 1031 (3d Cir. 1991). Under *Borman*, the automatic stay of subsection 362(a)(1) extends to all proceedings "related to" a bankruptcy case. The *Borman* court explained that a proceeding is "related to" a bankruptcy case if the outcome could

conceivably alter the debtor's rights, liabilities, options, or freedom of action and could impact the handling and administration of the estate in any way. Here, Lackawanna could argue that, because the Trustee is empowered to negotiate with DEP concerning the mine sites, DEP's bond forfeiture action could impact the handling and administration of the estate. Thus, subsection 362(a)(1) should stay the bond forfeiture.

However, the *Borman* case did not involve an action by a governmental entity to enforce its police or regulatory power; accordingly, the Third Circuit never had to address the exception to subsection 362(a)(1) set forth in subsection 362(b)(4). The Third Circuit specifically addressed subsection 362(b)(4) in *Penn Terra*, 733 F.2d at 722-23, stating as follows:

> Given the general rule that pre-emption is not favored, and the fact that, in restoring power to the States, Congress intentionally used such a broad term as "police and regulatory powers," we find that the exception to the automatic stay provision contained in [subsection 362(b)(4)] should itself be construed broadly, and no unnatural efforts be made to limit its scope.

Moreover, the legislative history for subsection 362(b)(4) indicates that, with this exception, Congress intended to allow states to take action against an entity to protect the environment even though that entity is in the midst of bankruptcy proceedings. *See Department of Environmental Resources v. Peggs Run Coal Company*, 423 A.2d 765 (Pa. Cmwlth. 1980); *Penn Terra.* Thus, in *Southwest Pennsylvania Natural Resources, Inc. v. DER*, 1982 EHB 48, the Board held that bond forfeiture under the Surface Mining Act is proper while the appellant is in bankruptcy court; the Board based this result on its determination that bond forfeiture is an action by the state to enforce its police or regulatory power with respect to the environment. Because bond forfeiture falls under the subsection 362(b)(4) exception, subsection 362(a)(1) does *not* prevent DEP from forfeiting the bonds.

2. "Property of the Estate"

Although Lackawanna quotes subsection 362(a)(3) in its Memorandum of Law, and other subsections which stay actions against the debtor or the property of the debtor,[3] Lackawanna does not make an argument based on these provisions. We shall nevertheless discuss whether DEP's bond forfeiture action should be stayed because it constitutes an act to obtain possession of "property of the estate."[4] For the following reasons, we conclude that the bonds at issue here are not "property of the estate."

A surety bond is: "An indemnity agreement in a sum certain payable to [DEP] executed by a permittee which is supported by the guarantee of payment on the bond by a corporation licensed to do business as a surety in this Commonwealth." 25 Pa. Code § 86.142. Thus, with respect to a surety bond, the *surety*, a third party, agrees to pay the bond amount to DEP when the permittee is unable to fulfill its obligations to DEP. Indeed, the surety bonds here provide that Lackawanna is jointly and severally liable with Lucky Strike and Beltrami for payment of the amount due under the bond. Thus, DEP is entitled to payment of the full amount of the bond from Lackawanna alone; DEP does not have to seek payment of any amount from Lucky Strike or Beltrami.

It is apparent that, in this case, DEP is seeking payment on the surety bonds only from

---

[3] Lackawanna cites subsections 362(a)(5) and 362(a)(6) in its Memorandum of Law but provides no legal argument based on those provisions. Those subsections stay various acts against the property of the debtor, or against the debtor. Because we conclude in our discussion of subsection 362(a)(3) that the bonds here are not "property of the estate" and that the bond forfeiture is not an act against the debtor or the debtor's property, we will not discuss these subsections any further.

[4] The Bankruptcy Code defines "property of the estate" as "all legal or equitable interests of the debtor in property." 11 U.S.C. § 541(a)(1).

Lackawanna, not from Lucky Strike or Beltrami. In their Notices of Appeal, Lucky Strike and Beltrami do not even contest DEP's forfeiture of the surety bonds; they only challenge DEP's forfeiture of the collateral bonds. Thus, Lackawanna stands alone in its opposition to forfeiture of the surety bonds. Because DEP is acting against the surety, *not* the debtor, and is seeking the property of the surety, *not* the property of the debtor or the property of the estate, DEP's forfeiture of the surety bonds is not stayed by subsection 362(a)(3). *See In re: Purifiner Distribution Corp.*, 188 Bankr. 1007, 1011 (Bankr. M.D. Florida, 1995) ("An act to enforce the liability of the surety is an act to obtain property of the surety from the surety, not property of the estate from the estate. Such an act is not stayed by [subsection] 362(a)(3).").

Turning to the collateral bonds, we note that a collateral bond is: "An indemnity agreement in a sum certain payable to [DEP] executed by the permittee and which is supported by the deposit with [DEP] of . . . negotiable certificates of deposit." 25 Pa. Code § 86.142. Where certificates of deposit are pledged to support a collateral bond, DEP requires that the certificates be assigned to DEP in writing, and that the assignment be recorded in the books of the bank issuing the certificates. 25 Pa. Code § 86.158(c)(1). DEP then takes possession of the certificates and places them with the State Treasurer for custody and safekeeping. 52 P. S. § 1396.4(d); 25 Pa. Code § 86.158(a). Upon forfeiture, the *banks*, as third parties, have an independent obligation to pay the amount of the certificates to DEP. *See Duplitronics, Inc. v. Concept Design Electronics*, 183 Bankr. 1010 (Bankr. N.D. Illinois 1995). If the banks refuse to pay, DEP is authorized to take appropriate steps to collect the certificate proceeds from the banks. 25 Pa. Code § 86.182(d).

Because Lucky Strike and Beltrami assigned the certificates of deposit to DEP, because DEP actually took possession of the certificates, because the *banks* have an obligation to pay DEP that

is separate from the bankruptcy proceedings of Lucky Strike and Beltrami, and because DEP's remedy upon the banks' failure to pay is to take action to collect from the *banks*, we fail to see how the collateral bonds can be considered property of the debtor or property of the estate. Therefore, we do not believe that subsection 362(a)(3) stays DEP's forfeiture of the collateral bonds.

In sum, the Board concludes that the bonds at issue here are not property of the bankrupt estate. The surety and the banks are third parties who are obligated to pay the amount of the bond to DEP upon forfeiture. The surety pays DEP from its own property; the banks pay DEP from the proceeds of certificates assigned to DEP and in DEP's possession. Neither of these transactions involves property of the estate. Therefore, the automatic stay provision in subsection 362(a)(3) cannot prevent DEP from forfeiting the bonds.

3. Bond Forfeitures Not Totally Immune from Stay

In *Penn Terra*, 733 F.2d at 273, the Third Circuit points out that, where the automatic stay does not apply, the Bankruptcy Court "has ample other powers to stay actions not covered by the automatic stay." The Bankruptcy Court has all the traditional powers of a court of equity and may issue an injunction if the Trustee demonstrates that a particular case threatens the bankrupt estate. *Id.* Here, the Board has heard nothing from the Bankruptcy Court or from the Trustee.

4. Discharge of Debts

Although we accept DEP's argument that the automatic stay does not apply here, we shall address an alternative argument raised by DEP. DEP maintains that, even if the automatic stay is applicable, it is no longer in effect. DEP contends that, because a stay only continues until a discharge of debts is granted, 11 U.S.C. § 362(c)(2), and because the confirmation of a plan of reorganization constitutes a discharge of debts, 11 U.S.C. § 1141(d)(1)(A), the stay has ended.

However, in making this argument, DEP has not properly considered the provisions of the Plan itself. Article 9.2 of the Plan states that "an order confirming this Plan shall constitute a discharge, *as of the Effective Date* (emphasis added)." Article 1.29 of the Plan indicates that the Effective Date is the date upon which all conditions precedent have been satisfied or waived. Article 6 of the Plan sets forth several conditions precedent to the Effective Date which have not yet occurred and have not been waived. (Affidavit of Roth, exh. D, paras. 9.2, 1.29, & 6.) Therefore, the confirmation of the Plan is not yet a discharge of debts. This means that, if the automatic stay provisions applied here, they would still have effect.

B. Plan of Reorganization

Lackawanna next contends that DEP is not entitled to judgment as a matter of law because: (1) the Plan confirmed by the Bankruptcy Court constitutes DEP's consent and approval under 52 P. S. § 1396.4(h) for Lackawanna to reclaim the mine sites instead of paying the bond amount;[5] and (2) the confirmed Plan constitutes DEP's written authorization, under the bond provisions, for Lackawanna to cover the reclamation obligations of Lucky Strike and Beltrami.[6]

In support of its position, Lackawanna alleges that the Plan: (1) provides for the Trustee to

---

[5] 52 P. S. § 1396.4(h) provides: "A corporate surety issuing surety bonds which are forfeited by the department shall have the option of reclaiming the forfeited site, in lieu of paying the bond amount to the department, upon the consent and approval of the department."

[6] Each of the forfeited bonds contains the following clause:

> The surety hereby waives any right to cover or perform the obligations of the principal upon the principal's default, provided however, that the Department may authorize, in writing, the surety to cover such defaulted obligations if the Department determines that it is in their interest to do so.

(DEP's Motion, Appendix 28; *see also* Lackawanna's brief at 11.)

reclaim the mine sites, (Lackawanna's Response at para. 202); (2) provides for Lackawanna and its affiliates to contribute an amount in excess of the amount of the bonds toward reclamation, (Lackawanna's Response at para. 203); (3) provides for the release of the bonds by DEP as a condition precedent to the Effective Date of the Plan, (Lackawanna's Response at paras. 204-205); and (4) was negotiated and accepted by DEP, (Lackawanna's Response at para. 206).

DEP, in its reply, does not deny these factual allegations. However, DEP points out that, before the Plan becomes effective: (1) the Trustee must secure a contractor to perform the reclamation; (2) the contractor must post bonds for the reclamation work; and (3) the Trustee must enter into an asset purchase agreement with Pagnotti Enterprises, Inc. (PEI) whereby PEI will buy certain estate assets for $5.2 million. DEP notes that these conditions precedent to the Plan have not been satisfied. DEP then argues that it is unreasonable to allow the indefinite status of the unexecuted and unfunded Plan to prevent DEP from pursuing an alternative remedy to accomplish reclamation of the mine sites. (DEP's Reply at 5-6.)

We have reviewed the Plan and make the following observations with respect to the conditions precedent. First, as a condition precedent to the Effective Date of the Plan, the Trustee must secure a contractor to perform the reclamation work, and the contractor must be acceptable to DEP. Second, the contractor must post performance and/or reclamation bonds from a surety, and the surety must be acceptable to DEP. Third, upon approval of the contractor and surety, DEP will release the bonds. Fourth, if each of these conditions precedent to the occurrence of the Effective Date is not satisfied or waived, the Plan is null and void. (Affidavit of Roth, exh. D at paras. 6.1.2 & 6.2.)

It is evident from the Plan that DEP has *not* given its full consent and approval, or written

authorization, for Lackawanna, through the Trustee, to reclaim the mine sites in lieu of payment of the bond amount. In fact, because DEP must still consent to and approve of the contractor and surety, DEP has control over whether the Plan will eventually become effective or whether the Plan will become null and void. Because DEP has not given *every* consent and approval necessary to authorize mine reclamation and because the Plan is null and void absent *every* DEP approval, the Plan does *not* constitute DEP consent and approval, or written authorization, for Lackawanna to reclaim the mine sites instead of paying the amount of the bonds.

C. Administrative Finality

Having disposed of Lackawanna's arguments, we turn to DEP's contention that DEP is entitled to summary judgment based on the doctrine of administrative finality. The doctrine of administrative finality focuses on the failure of a party aggrieved by an administrative action to pursue a statutory appeal remedy. *Kent Coal Mining Co. v. Department of Environmental Resources*, 550 A.2d 279 (Pa. Cmwlth. 1988). In *Department of Environmental Resources v. Wheeling-Pittsburgh Steel Corp.*, 348 A.2d 765, 767 (Pa. Cmwlth. 1975), *aff'd*, 375 A.2d 320 (Pa. 1977), *cert. denied*, 434 U.S. 969 (1977), the Commonwealth Court explained the doctrine as follows:

> We agree that an aggrieved party has no duty to appeal but disagree that upon failure to do so, the party so aggrieved preserves to some indefinite future time in some indefinite future proceedings the right to contest an unappealed order. To conclude otherwise, would postpone indefinitely the vitality of administrative orders and frustrate the orderly operation of administrative law.

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). Because of that, DEP is not only justified, but has a mandatory duty to forfeit the bonds. *Snyder v. Department of Environmental Resources*, 588 A.2d 1001 (Pa. Cmwlth. 1991). Therefore, DEP is entitled to judgment as a matter of law.

IV. Motion for Leave to Amend Appeals

Finally, when filing its response to DEP's Motion on July 22, 1997, Lackawanna also filed a Motion for Leave to Amend Appeals. Lackawanna asserts therein that the Bankruptcy Court's confirmation of the Plan constitutes a ground for appeal which has only recently arisen. Thus, Lackawanna seeks to amend its appeals to aver that, because the Plan provides for mine reclamation, because the Plan provides for Lackawanna and its affiliates to contribute in excess of the bond amounts toward reclamation, because the Plan provides for DEP to release the bonds, and because DEP participated in the negotiations for the Plan, the Plan constitutes DEP's consent and approval, and written authorization, for Lackawanna to reclaim the mine sites in lieu of paying the bond amounts.

An appellant may not request leave to amend a notice of appeal after the case has been assigned for hearing. 25 Pa. Code § 1021.53(c). Here, on July 11, 1997, the Board issued an order scheduling hearings on this case for October 1, 2, and 3, 1997. Because Lackawanna did not move for leave to amend its appeal until July 22, 1997, Lackawanna's motion is denied. Nevertheless, we note that, in addressing DEP's Motion above, the Board considered Lackawanna's argument and found it lacking in merit.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

LUCKY STRIKE CORPORATION, et al.	:	
	:	
v.	:	**EHB Docket No. 92-003-MR, (Consolidated with 92-004-MR, 92-005-MR, 92-006-MR, 92-008-MR, 92-011-MR, 92-012-MR, 92-013-MR, 92-015-MR, 92-016-MR)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 2nd day of September, 1997, it is ordered that the Department's Motion for Summary Judgment is granted, and all appeals in the above matter are dismissed. It is further ordered that the Motion for Leave to Amend Appeals filed by Appellant Lackawanna Casualty Company is denied.[1]

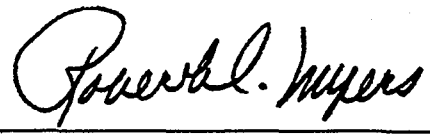
ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

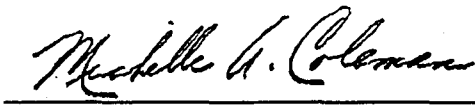
[1] Obviously, the hearings scheduled for **October 1, 2, 3, 1997** are **cancelled.**

EHB Docket No. 92-003-MR,
(Consolidated with 92-004-MR,
92-005-MR, 92-006-MR, 92-008-MR,
92-011-MR, 92-012-MR, 92-013-MR,
92-015-MR, 92-016)



ROBERT D. MYERS
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member



MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: September 2, 1997

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

For the Commonwealth, DEP:
Mary Martha Truschel, Esquire
Marc A. Ross, Esquire
Southcentral Region
and

John H. Herman, Esquire
Northeast Region

For Lackawanna Casualty Co:
John G. Shelly, Jr., Esquire
Robert N. Gawlas, Jr., Esquire
ROSENN, JENKINS & GREENWALD
Wilkes-Barre, PA

For Lucky Strike Coal Corp. and
Beltrami Enterprises, Inc:
Arthur L. Piccone, Esquire
Ronald V. Santora, Esquire
HOURIGAN KLUGER SPOHRER & QUINN
Wilkes-Barre, PA
and
Charles E. Gutshall, Esquire
Donna M. J. Clark, Esquire
RHOADS & SINON
Harrisburg, PA

For Beltrami Brothers Real Estate:
Lawrence M. Klemow, Esquire
GLASSBERG AND KLEMOW
Hazleton, PA

bap

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

M. DIANE SMITH
SECRETARY TO THE BOARD

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION,	:	
Plaintiff	:	
v.	:	**EHB Docket No. 92-429-CP-MG**
CROWN RECYCLING AND RECOVERY, INC., JOSEPHINE BAUSCH CARDINALE, Executrix for the Estate of Phillip Cardinale, NANCY CARDINALE, Executrix for the Estate of Anthony Cardinale, UNIVERSAL MANUFACTURING CORP., MAGNETEK, INC., SCHILBERG INTEGRATED METALS, CORP. and WIRE RECYCLING, INC.,	:	**Issued:** September 9, 1997
Defendants	:	

ADJUDICATION

By George J. Miller, Administrative Law Judge

Synopsis:

A metal merchant, who arranged for the treatment of insulated copper wire by incineration at an off-site facility, does not fall within the scrap metal exception to liability, at section 701(b)(5) of the Hazardous Sites Cleanup Act, Act of October 18, 1988, P.L. 756, *as amended*, 35 P.S. §§ 6020.101-6020.1305 (the Hazardous Sites Cleanup Act). Subsection (b)(5)(i) of the exception provides that it applies only to persons generating four specific categories of scrap materials, and the insulated wire at issue does not fall within any of those categories. Furthermore, the metal merchant did not transfer the insulated wire for valuable consideration, as required by subsection (b)(5)(iv) of the exception, where it simply paid the off-site facility a fee to treat the wire by incinerating the

insulating material rather than selling the insulated wire to the facility.

INTRODUCTION

This adjudication concerns a complaint filed by the Department of Environmental Protection (Department) on September 8, 1992, requesting reimbursement for costs incurred in an interim response action taken with respect to a Crown Recycling and Recovery, Inc. (Crown) site in Lackawaxen Township, Pike County. The Department amended the complaint twice, but in its final form the complaint avers that defendants Crown; Schilberg Integrated Metals Corporation (SIMCO)[1]; Magnetek, Inc. (Magnetek); Universal Manufacturing Corporation;[2] Wire Recycling, Inc. (Wire Recycling); Nancy Cardinale; and Josephine Bausch Cardinale; are jointly and severally liable for the interim response costs pursuant to sections 501(a), 505(b), 507(a), 701(a), and 702 of the Hazardous Sites Cleanup Act, 35 P.S. §§ 6020.501(a), 6020.505(b), 6020.507(a), 6020.701(a), and 6020.702.

The Board has issued three previous decisions in this appeal. On November 3, 1993, we issued an opinion and order which granted in part and denied in part defendants' preliminary objections and denied a Department motion to limit the scope of the Board's review to the administrative record required under the Hazardous Sites Cleanup Act. The Board remanded the appeal to the Department, directing it to reopen the administrative record. *See Crown Recycling v.*

---

[1] In the 1980's (the precise year is not clear from the evidence adduced at hearing), SIMCO changed its name from Schilberg Iron and Metals to its current name of Schilberg Integrated Metals. (N.T. 47-48) Since the name change is immaterial for purposes of these proceedings, we will refer to the corporation as "SIMCO" both before and after the name change.

[2] The Department has since reached a settlement with Magnetek and Universal Manufacturing Corporation.

DER, 1993 EHB 1571. We issued a second opinion and order on February 20, 1997. That decision granted the Department's motion for summary judgment as to liability against the individual defendants, held SIMCO and Wire Recycling to be liable under HSCA as generators of hazardous waste, and denied motions for summary judgment filed by SIMCO and Wire Recycling. *See Crown Recycling v. DEP,* EHB Docket No. 92-429-CP-MG (Opinion issued February 20, 1997). We issued the third opinion and order on May 13, 1997. That decision granted in part and reserved our decision in part on a Department motion *in limine*. *See Crown Recycling v. DEP*, EHB Docket No. 92-429-CP-MG (Opinion issued May 13, 1997).

On March 21, 1997, in response to motions filed by SIMCO and Wire Recycling, we ordered the bifurcation of the hearing on the merits into separate liability and damage phases. The order stated that we would resolve three issues in this, the liability phase of the hearing: (1) whether SIMCO falls within the scrap metal exception at section 701(b) of the Hazardous Sites Cleanup Act; (2) whether the Board has personal jurisdiction over Wire Recycling; and, (3) whether Wire Recycling is a responsible person under section 701(a) of the Hazardous Sites Cleanup Act. Subsequently, however, the Department and Wire Recycling informed the Board that they had reached an agreement in principle regarding Wire Recycling's liability. Accordingly, the Board issued an order on April 9, 1997, limiting the liability phase of the hearing to the issue of whether SIMCO falls within the scrap metal exception at section 701(b)(5) of the Hazardous Sites Cleanup Act, 35 P.S. § 6020.701(b)(5).

Administrative Law Judge George J. Miller presided over the liability phase of the hearing, which took place on May 20, 1997. SIMCO filed its post-hearing memorandum on June 16, 1997, and the Department filed its post-hearing memorandum on July 1, 1997. SIMCO filed a reply

memorandum on July 28, 1997.

In its post-hearing memoranda, SIMCO argues that it cannot be held liable under section 701(a) of the Hazardous Sites Cleanup Act because the Department averred in its complaint that SIMCO was liable as a "generator"--not an owner--of a hazardous substance. SIMCO contends that it did not generate the hazardous substances at issue here.[3] SIMCO also argues that, even if it were a generator of a hazardous substance, it would still not be liable under section 701(a) because it meets all of the criteria in the scrap metal exception at section 701(b)(5).

The Department did not respond to SIMCO's argument with regard to section 701(a). Instead, it confined its attention to the applicability of the scrap metal exception, arguing that SIMCO did not fall within the exception because: (1) SIMCO did not "generate" the scrap materials at issue; (2) SIMCO did not transfer them for smelting, melting or refining; (3) the materials do not fall within any of the permissible categories identified under subsection (i) of the exception, 35 P.S. § 6020.701(b)(5)(i); and, (4) although SIMCO selected the processing facility, SIMCO did not

---

[3] SIMCO's argument that it is not liable under section 701(a) because it is not a "generator" of a hazardous substance is foreclosed by the Board's entry of summary judgment against it under section 701(a) as one who arranged for the treatment of a hazardous substance. Moreover, if we were to accept SIMCO's assertion that it did not generate the scrap insulated wire, then the scrap metal exception could not apply to SIMCO because, by its terms, the exception applies only to a person who generates scrap materials.

Even assuming SIMCO could argue that it was not a "generator" of a hazardous substance, its position would be problematic. SIMCO suggests that we construe "generator" to apply only to manufacturers. However, were we to construe "generator" that narrowly, we would effectively eviscerate the scrap metal exception. Many of those engaged in the scrap metal industry are not the manufacturers of the products they handle. Furthermore, subsection (i)(A) of the exception, 35 P.S. § 6020.701(b)(5), expressly provides that automobiles and appliances are permissible "scrap materials" under the exception. Both products--like many types of scrap materials--typically pass through the hands of consumers between the time they are manufactured and scrapped. Given these factors, we cannot agree that the Legislature intended to use "generator" in the narrow sense SIMCO suggests.

reasonably believe the facility was in substantial compliance with all relevant laws and regulations, as required by subsection (v) of the exception, 35 P.S. § 6020.701(b)(5)(v).

The record for purposes of this phase of the hearing consists of the pleadings, a transcript of 204 pages, and 6 exhibits. After a full and complete review of the record, we make the following findings of fact.

FINDINGS OF FACT

1. The Department is an administrative department of the Commonwealth of Pennsylvania and the agency authorized to administer and enforce the Hazardous Sites Cleanup Act and the regulations thereunder.

2. SIMCO is a Connecticut corporation and a metal merchant engaged in the purchase and sale of non-ferrous metals. (N.T. 9, 12, 17)

3. In the 1980's , SIMCO changed its name from Schilberg Iron and Metals to its current name of Schilberg Integrated Metals. (N.T. 47-48)

4. SIMCO specializes in copper wire, which it obtains from wire manufacturers. (N.T. 14, 32)

5. Wire manufacturers gave SIMCO the wire because it did not meet their customers' specifications. (N.T. 33)

6. Bernard Schilberg (Schilberg) testified that wire failed to meet the manufacturer's specifications because the wire consisted of "short ends", wire with insufficient plastic on it, wire with the wrong copper gauge, or wire with the wrong print. (N.T. 33)

7. Schilberg is the executive vice president of SIMCO. (N.T. 9)

8. The insulated copper wire sent to SIMCO consisted of 50-55 % copper and had a steel

member to make it rigid. (N.T. 32)

9. The insulation on the wire is plastic. (N.T. 13-14, 33, 184, 189)

10. The wire arrives at SIMCO's facility in bales or Gaylord boxes, the standard means of packaging wire in the industry. (N.T. 34)

11. Gaylord boxes are large cardboard boxes on skids. (N.T. 33)

12. SIMCO sorts the incoming wire according to whether it is insulated bare copper or insulated tin copper. (N.T. 31, 34)

13. Apart from the sorting, SIMCO does not process the insulated wire itself. (N.T. 34-35)

14. Although SIMCO sometimes sells the wire with the insulation intact, on other occasions it has the insulation removed. (N.T. 36, 65-66)

15. Between December 3, 1981, and May 30, 1986, SIMCO had an agreement with Philip and Anthony Cardinale (Cardinales) that SIMCO would send them insulated wire, and Cardinales would remove the insulation, return the stripped wire to SIMCO, and send the remains of the insulation to Franklin Smelting in Philadelphia. (N.T. 16, 17, 22, 31, 36, 37, 43, 133-135)

16. Cardinales removed the insulation by placing the wire--along with wood and fuel oil--in a crude concrete bunker at the Crown site, then igniting it. (N.T. 133-135)

17. The combustion of the insulated wire reduced the insulation to ash, but the copper remained wire. (N.T. 37, 45-46, 64)

18. Rather than selling the insulated wire to Cardinales and buying the stripped wire back afterwards, SIMCO simply retained ownership of the wire and paid Cardinales a fee to remove the insulation. (N.T. 65-66)

19. After Cardinales burned the insulation off the wire, the ash from the insulation was taken to Franklin Smelting, which paid SIMCO for the ash and extracted any copper remaining in the ash. (N.T. 37, 39)

20. Cardinales returned the stripped wire to SIMCO loose on a trailer. (N.T. 31)

21. After it received the stripped wire from Cardinales, SIMCO would place the wire in a baler or high-pressure compactor before selling it to its customers. (N.T. 32)

DISCUSSION

Under section 701(a)(2) of the Hazardous Sites Cleanup Act, 35 P.S. § 6020.701(a)(2), persons are generally liable for a release of a hazardous substance if they generate, own, or possess the substance and arrange for either its treatment or transport for treatment. Section 701(b) of the act, 35 P.S. § 6020.701(b), however, carves out a number of exceptions to this general rule. Among them is the so-called "scrap metal exception," at section 701(b)(5) of the act, 35 P.S. § 6020.701(b)(5), which applies, in limited circumstances, to generators whose scrap materials are transferred offsite for reclamation or reuse of their metallic content. The issue here is whether SIMCO falls within the scrap metal exception.

The exception provides:

> (b)(5) A person who generates scrap materials that are transferred to a facility owned or operated by another person for the purpose of reclamation or reuse of the metallic content thereof through melting, smelting or refining shall not be considered to have arranged for the . . . treatment or transport for . . . treatment at that facility . . ., provided that the generator demonstrates that all of the following are true:
>
> (i) The scrap materials consisted of:

(A) obsolete metallic items, such as automobiles or appliances;

(B) new solid metallic by-products, such as trimmings, turnings, cuttings or punchings;

(C) prepared grades of scrap metal produced in accordance with recognized industry specifications by processing obsolete items or metallic by-products through shredding, cutting, compressing or other mechanical means; or

(D) intact, nonleaking spent lead-acid storage batteries.

(ii) The generator did not introduce the hazardous substance into the scrap materials.

(iii) The generator handled and transported the scrap materials in accordance with all applicable laws and regulations.

(iv) The generator transferred the scrap materials for valuable consideration.

(v) If the generator selected the facility, the generator reasonably believed that the facility was then in substantial compliance with all applicable laws and regulations pertaining to receipt, management and reclamation or reuse of the scrap materials.

SIMCO bears the burden of proving that it falls within the exception because the exception requires that the "generator demonstrates that all of the following are true." In addition, where a statute creates an exception to a general rule defining illegal conduct, the defending party bears the burden of proving that the exception applies. *Pennsylvania Liquor Control Board v. T.J.J.R., Inc.*, 548 A.2d 390 (Pa. Cmwlth. 1988).

The evidence at the hearing showed that SIMCO is a Connecticut corporation engaged in the purchase and sale of non-ferrous metals. (N.T. 9, 12, 17) It specializes in insulated copper wire, which it obtains from wire manufacturers. (N.T. 14, 32) The wire arrives at SIMCO's facility in bales or Gaylord boxes--large cardboard boxes on skids--the standard means of packaging wire in

the industry. (N.T. 33-34) SIMCO then sorts the wire according to whether it is insulated bare copper or insulated tin copper. (N.T. 31, 34) Otherwise, however, SIMCO itself does not process the insulated wire. (N.T. 34-35)

Although SIMCO sometimes sells the wire with the insulation intact, on other occasions it has the insulation removed. (N.T. 36, 65-66) Between December 3, 1981, and May 30, 1986, SIMCO had an agreement with Phillip and Anthony Cardinale (Cardinales) that SIMCO would send them insulated copper wire and Cardinales would remove the insulation, return the copper wire to SIMCO, and send the remains of the insulation to Franklin Smelting in Philadelphia. (N.T. 16, 17, 22, 31, 37, 43, 133-135)

Cardinales removed the insulation by placing the wire--along with wood and fuel oil--in a crude concrete bunker at the Crown site, then igniting it. (N.T. 133-135) The combustion reduced the insulation to ash, but the copper remained wire. (N.T. 37, 45-46, 64) Rather than selling the wire to Cardinales and buying it back afterwards, SIMCO simply retained ownership of the wire and paid Cardinales a fee to remove the insulation. (N.T. 65-66) After Cardinales did so, the ash from the insulation was taken to Franklin Smelting, which paid SIMCO for the copper extracted from the ash. (N.T. 37, 39) As for the stripped wire, Cardinales returned it to SIMCO loose on a trailer. (N.T. 31) SIMCO would then place the wire in a baler or high-pressure compactor before selling it to its customers. (N.T. 32)

We need not examine all of the various criteria under the scrap metal exception[4] because it

---

[4]While the evidence shows that the copper in the insulated wire was not to be reclaimed or reused through "melting" or "smelting," the word "refining" may be broad enough to encompass the removal of the plastic insulation from the copper wire. However, we make no decision on this issue which is hotly contested by the parties.

is clear, even on the basis of just two of those criteria, that SIMCO does not fall within the exception. SIMCO did not generate scrap material which are "obsolete metallic items," "new solid metallic by-products," "prepared grades of scrap metal," or "lead acid storage batteries," as required by subsection (i) of the exception, 35 P.S. § 701(b)(5)(i). Nor did SIMCO transfer the scrap materials "for valuable consideration," as required by subsection (iv), 35 P.S. § 701(b)(5)(iv).

I. SIMCO did not generate one of the required categories of scrap materials.

Subsection (i) of the scrap metal exception provides that, to fall within the exception, a generator of scrap materials must show, among other things, that its scrap materials consisted of:

> (A) obsolete metallic items, such as automobiles or appliances;
>
> (B) new solid metallic by-products, such as trimmings, turnings, cuttings or punchings;
>
> (C) prepared grades of scrap metal produced in accordance with recognized industry specifications by processing obsolete items or metallic by-products through shredding, cutting, compressing or other mechanical means; or
>
> (D) intact, nonleaking spent lead-acid storage batteries.

SIMCO argues that its scrap materials fall within categories (A), (B), and (C) above. We disagree for the reasons below.

(A) obsolete metallic items

SIMCO argues that its insulated wire is an "obsolete metallic item" within the meaning of subsection (i)(A) of the scrap metal exception. According to SIMCO, the wire is a "metallic item"

because it contains metal and "obsolete" because it has been discarded by wire manufacturers who can no longer use it. The Department disagrees, however. It argues that SIMCO's wire does not fall within subsection (i)(A) because the wire is not obsolete. According to the Department, "obsolete" means "that which is no longer used," and SIMCO's wire is not obsolete because the same type of wire is still in use and still being manufactured.

We agree with the Department that SIMCO's wire is not obsolete. In construing this portion of the scrap metal exception, we are guided by two principles of statutory construction: (1) an agency's interpretation of a statute it administers is controlling unless clearly erroneous, *Starr v. DER*, 607 A.2d 321, 323 (Pa. Cmwlth. 1992), and *Ferri Contracting Company, Inc. v. DER*, 506 A.2d 981, 985 (Pa. Cmwlth. 1986); and, (2) words not defined in a statute are interpreted according to their plain and ordinary meanings, 1 Pa.C.S.A. § 1903(a); *DeLillis v. Borough of Verona*, 660 A.2d 25 (Pa. 1995). Since the Department is the agency charged with administering the Hazardous Sites Cleanup Act, we must defer to its construction of subsection (i)(A) unless clearly erroneous.

The Department's interpretation of subsection (i)(A) is not clearly erroneous given the plain and ordinary meaning of "obsolete." *Webster's Ninth New Collegiate Dictionary* (1989) defines the word "obsolete" as "no longer in use or no longer useful." At a minimum, therefore, SIMCO had to show that the wire was at one time more used or useful than when SIMCO transferred the wire to Cardinales. SIMCO failed to present any evidence to this effect, however. Indeed, the evidence SIMCO presented tended to show that the wire was *not* obsolete. Bernard Schilberg, executive vice president of SIMCO, (N.T. 9) testified that the wire manufacturers gave SIMCO the wire because it did not meet their customers' specifications. (N.T. 33) Schilberg also explained that the reason the wire failed to meet those specifications varied:

> There are many reasons for scrapping insulated wire in a manufacturing sector. It could be short ends. It could be not enough plastic put on it. The copper gauge could be wrong. The print could be wrong. You could have short ends--things of that nature. (N.T. 33)

The factors Schilberg cites show that the wire had not become outmoded, but was simply defective from the outset. Because SIMCO failed to show that the wire's utility diminished after it was manufactured, the wire is not "obsolete" for purposes of subsection (i)(A).

(B) new solid metallic by-products

SIMCO also argues that its wire is a "new solid metallic by-product" within the meaning of subsection (i)(B) of the scrap metal exception. According to SIMCO, the wire is "new" because it has never been used; "solid" because the wire is not hollow; "metallic" because it contains metal; and a "by-product" because some of SIMCO's wire consists of "ends"--wire trimmed from the end of other wire during its manufacture. The Department focuses on the word "by-product" in the phrase "new solid metallic by-products," and argues that "by-product" refers to materials produced secondarily or incidental to the production of another item. According to the Department, SIMCO's wire is not a by-product because the wire was the goal of the manufacturing process, not simply an incidental product. The Department also argues that subsection (i)(B) applies to only four types of by-products: trimmings, turnings, cuttings, and punchings.

While SIMCO and the Department seem content to have the resolution of whether SIMCO's wire falls within subsection (i)(B) turn on their positions on the word "by-product," serious problems exist with both parties' arguments on that issue. For instance, SIMCO asserts that the wire is a

"by-product" because some of it consists of wire trimmed from the end of other wire during its manufacture. However, it is clear that much of the removable wire was not short ends but was wire which simply did not meet the customer's specifications. In addition, there is little factual support for SIMCO'S assertion in the record. SIMCO did elicit testimony that at least some of its wire consists of "short ends." (N.T. 33) But SIMCO failed to adduce any evidence explaining what "short ends" are. Instead, SIMCO simply asserted in its post-hearing brief that "short ends" are wire trimmed from the end of other wire, without citing any record support for its position.

The Department's argument is also troublesome. The Department argues that a "by-product" is an item which is the *object* of the manufacturing process, as opposed to a secondary or incidental product. Yet SIMCO's wire might well qualify as a "by-product" under that definition. As noted above, SIMCO received much, if not all, of the wire from manufacturers because the wire was defective in some way. Certainly defective products are not made intentionally. Therefore, one could argue that they are made incidentally during the manufacture of the desired product.

Fortunately, we need not resolve the question of whether defective materials are "by-products" within the meaning of subsection (i)(B). Even assuming SIMCO's wire were a by-product, it would not be a "solid metallic" by-product as required by subsection (i)(B). Instead, the insulated wire consists of more than metal as are the trimmings, turnings, cuttings or punchings referred to in the statute.

SIMCO's assumption that the words "solid" and "metallic" in subsection (i)(B) both modify "by-product" is mistaken. The word "solid" modifies "metallic," limiting the application subsection (i)(b) to by-products which are solid metal. While the punctuation of a statute is not controlling, section 1923 of the Statutory Construction Act of 1972, 1 Pa.C.S. § 1923, provides that punctuation

may serve as an aid in construing statutes, like the Hazardous Sites Cleanup Act, enacted after December 31, 1964. As a matter of grammar, when adjectives appear in sequence before a noun, each modifies the noun if separated by commas. *Harbrace College Handbook*, 9th. ed. (1982), p. 136. Otherwise, each modifies the word following it. *Id.* The courts have construed the language in statutes accordingly.[5]

"Solid" has a number of different meanings in common parlance: among them, "being without an internal cavity"--the definition SIMCO suggests-- and "of one substance or character." *Webster's Ninth New Collegiate Dictionary* (1989). If "solid" modified "by-product" in subsection (i)(B), both alternatives might seem equally viable. But when "solid" is understood to modify "metallic," only the latter alternative--"of one substance or character"--is plausible.[6] Therefore, to qualify as a "solid metallic" by-product within the meaning of subsection (i)(B), a by-product must consist entirely of metal. However, SIMCO's wire does not consist entirely of metal. The insulation on the wire is plastic. (N.T. 13-14, 33, 184, 189) Consequently, the wire is not a "solid metallic by-product" within the meaning of subsection (i)(B).

---

[5] In *Hawkins v. Zoning Hearing Board of Bristol Township*, 463 A.2d 1291 (1983), for instance, the Commonwealth Court construed a zoning ordinance which referred to "commercial recreational, amusement or athletic facilities." Noting that the absence of a comma between "commercial" and "recreational" rendered "commercial" an adverb modifying "recreational," the Court held that the ordinance referred only to facilities which were *both* commercial *and* recreational, not to all those which were *either* commercial *or* recreational.

[6] Policy concerns, as well as grammar, support this construction of "solid." When deciding whether a generator falls within the scrap metal exception under the Hazardous Sites Cleanup Act, it makes more sense to consider the proportion of metal its products contain than to consider the products' shape.

(C) prepared grades of scrap metal

SIMCO argues that the wire is a "prepared grade of scrap metal produced in accordance with industry standards" within the meaning of subsection (i)(C) of the exception. According to SIMCO, the wire is a "prepared grade of scrap metal" because insulated copper wire is a segregated grade of copper traded on the metals markets. SIMCO also contends that the wire is "produced in accordance with industry standards" because SIMCO baled the wire it received or placed it in Gaylord boxes. The Department maintains that SIMCO's wire does not fall within subsection (i)(C) because that subsection also requires that the scrap materials be produced by "processing obsolete items or metallic by-products through . . . mechanical means." According to the Department, SIMCO's wire does not qualify because it was not produced from "obsolete items" or "metallic by-products," and because the incineration of the wire's insulation does not constitute processing by "mechanical means."

SIMCO cannot prevail with respect to subsection (i)(C) of the exception because its insulated wire is not "scrap metal." Subsection (i)(C) is the only provision of the scrap metal exception which expressly refers to "scrap *metal*." (Emphasis added.) Elsewhere, the exception refers to "scrap materials," "obsolete metallic items," "lead-acid storage batteries," and "solid metallic by-products."

All but the last of these other phrases embrace certain items with non-metallic components. Lead-acid storage batteries, for instance, typically contain non-metallic components. So do automobiles and appliances, both items the exception lists as examples of "obsolete metallic items." Since subsection (i) refers to both the batteries and "obsolete metallic items" as "scrap materials," the term "scrap materials" also clearly embraces certain items with a non-metallic component.

Nevertheless, when the General Assembly drafted subsection (i)(C) of the exception, it did not refer to "prepared grades of scrap *materials*" or to "prepared grades of *metallic items*." It referred to "prepared grades of scrap *metal*." (Emphasis added.)

"Where different language is used in different parts of a statute, it is to be presumed that the language is used with a different intent." 73 Am. Jur. 2d *Statutes* § 235 (1974). Furthermore, it is a well-accepted rule of statutory construction that the mention of one thing implies the exclusion of others. *Jerry Davis, Inc. v. Nufab Corp.*, 677 A.2d 1256 (Pa.Super 1996). Given both of these doctrines, as well as the General Assembly's reference to "scrap *metal*" in subsection (i)(C) (emphasis added), and the broader terms used in other parts of the exception to refer to scrap materials containing non-metallic components, we construe the words "scrap metal" to refer only to items which consist entirely of metal. Since SIMCO's wire does not consist entirely of metal, it is not "scrap metal" within the meaning of subsection (i)(C).[7]

II. SIMCO did not transfer the scrap materials "for valuable consideration."

SIMCO also failed to show that it transferred the wire "for valuable consideration," as required by subsection (iv) of the exception, 35 P.S. § 701(b)(5)(iv). As noted previously in this opinion, SIMCO did not sell its wire to Cardinales; it retained ownership of the wire and simply paid

---

[7] Although SIMCO argues that the wire is "scrap metal" within the meaning of subsection (i)(C) because the wire is traded on the scrap metals market, that fact, even if true, is inconsequential. As noted previously in this opinion, words not defined in a statute must be interpreted according to their plain and ordinary meanings. The insulation on the wire is plastic, and plastic does not fall within the plain and ordinary meaning of "metal." Whether those trading scrap metals regard insulated wire as a "metal" is irrelevant absent some indication that the General Assembly meant to incorporate that definition of the word into the act.

Cardinales a fee to remove the insulation. Cardinales did not provide SIMCO with any consideration in exchange for the wire: no right or benefit accrued to SIMCO as a result of the transfer, nor did Cardinales assume any detriment or duty.

The fact that SIMCO had a contract with Cardinales for the processing of the wire is inconsequential. To satisfy subsection (iv) of exception, SIMCO had to show that the scrap materials were transferred *in exchange for* valuable consideration, not merely that they were transferred *as part of a contract supported by* valuable consideration. When scrap materials are transferred to a reclamation facility, the generator typically has less control over how the materials are handled if the generator has sold them than if it retains ownership of them. Presumably, the General Assembly recognized this disparity when it required that generators transfer the materials "for valuable consideration."

We reach this conclusion even though SIMCO stated in its brief that, "Counsel for [the Department] agreed at the Hearing that SIMCO transferred the insulated copper wire to the Cardinales for value." (SIMCO's post-hearing brief, p. 15.) There are a number of problems with SIMCO's argument: first, it does not accurately characterize what the Department agreed to; second, a statement made by counsel is not evidence; and, third, counsel for the Department made the statement after the Board finished receiving evidence.

Counsel for the Department never agreed that SIMCO transferred the wire *to Cardinales* for value. He simply stated that he agreed that SIMCO's material *had been transferred* for value. (N.T. 201) The difference is significant because SIMCO's wire was transferred *three* times. As noted above, SIMCO transferred the wire to Cardinales for removal of the insulation; Cardinales transferred the stripped wire back to SIMCO; and, SIMCO sold the stripped wire to its customers.

Counsel made the statement during oral argument at the hearing, after the Board finished receiving evidence.

Had the scrap materials been transferred only once and counsel for the Department made the same statement at the beginning of the hearing, we might be more sympathetic to SIMCO's position. Here, however, since the statement occurred after the presentation of all evidence, SIMCO cannot argue that it relied on the statement when deciding which evidence it would present. Furthermore, since counsel for the Department made the statement after the presentation of evidence concerning all three transfers, SIMCO should have realized that the statement was inherently ambiguous: since SIMCO knew there were three transfers, it should not have assumed that counsel for the Department was referring to the transfer to Cardinales when he conceded that SIMCO's scrap material had been transferred for value.

CONCLUSIONS OF LAW

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

2. A party seeking to invoke the scrap metal exception bears the burden of proving that the exception applies.

3. The insulated copper wire was not "obsolete" within the meaning of subsection (i)(A) of the scrap metal exception because the evidence does not show that the insulated copper wire which SIMCO sent to the facility for incineration was at one time more used or more useful than when the item was sent to the reclamation facility.

4. The insulated copper wire that SIMCO sent to the facility for incineration cannot qualify as "new solid metallic by-products" within the meaning of subsection (i)(B) of the scrap

metal exception, or as a "prepared grade of scrap metal" within the meaning of subsection (i)(C), because the insulated copper wire does not consist entirely of metal.

5. To satisfy subsection (iv) of the scrap metal exception, a generator must show that it transferred the scrap materials *in exchange for* valuable consideration; SIMCO cannot satisfy that requirement simply by showing that the scrap materials were transferred *as part of a contract supported by* valuable consideration for treatment of the copper wire.

6. Defendant SIMCO failed to show that insulated copper wire sent to the Crown site falls within one of the four categories of scrap materials set forth at subsection (i) of the scrap metal exception.

7. Defendant SIMCO failed to show that the wire sent to Crown was transferred for valuable consideration, as required by subsection (iv) of the scrap metal exception.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION,	:	
Plaintiff	:	
v.	:	**EHB Docket No. 92-429-CP-MG**
CROWN RECYCLING AND RECOVERY, INC., JOSEPHINE BAUSCH CARDINALE, Executrix for the Estate of Phillip Cardinale, NANCY CARDINALE, Executrix for the Estate of Anthony Cardinale, UNIVERSAL MANUFACTURING CORP., MAGNETEK, INC., SCHILBERG INTEGRATED METALS, CORP. and WIRE RECYCLING, INC.,	:	
Defendants	:	

ORDER

AND NOW, this 9th day of September, 1997, it is ordered that SIMCO is not exempt from liability by reason of the scrap metal exception at section 701(b)(5) of the Hazardous Sites Cleanup Act, 35 P.S. § 6020.701(b)(5).

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

Robert D. Myers

ROBERT D. MYERS
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: September 9, 1997

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

For the Commonwealth, DEP:
Dennis Abraham, Esquire
Southeast Region

For Defendants:
John R. Bashaw, Esquire
BRENNER SALTZMAN WALLMAN & GOLDMAN
New Haven, CT

jb/bl

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

M. DIANE SMITH
SECRETARY TO THE BOAF

AL HAMILTON CONTRACTING COMPANY	:	
v.	:	**EHB Docket No. 95-124-R**
	:	**(Consolidated)**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	**Issued: September 11, 1997**

OPINION AND ORDER ON APPELLANT'S MOTION FOR SUMMARY JUDGMENT AND DEPARTMENT'S CROSS MOTION FOR SUMMARY JUDGMENT

By Thomas W. Renwand, Administrative Law Judge

Synopsis:

Permits may not be conditioned on an applicant's compliance with a Consent Order and Agreement between the Department and another mining company for whom the applicant is a contract operator where the applicant was not a party to the Consent Order and Agreement and was not otherwise a related party to the other mining company.

OPINION

This matter is the consolidation of seventeen appeals filed by Al Hamilton Contracting Company ("Al Hamilton"). The appeals challenged the inclusion of certain special conditions in surface mining permits issued to Al Hamilton by the Department of Environmental Protection ("Department"). All of the conditions, with the exception of one, required Al Hamilton's

compliance with certain orders and penalty assessments issued by the Department in connection with other mine sites operated by Al Hamilton. The remaining condition required Al Hamilton's compliance with a Consent Order and Agreement signed by the Department and Thompson Brothers Coal Company ("Thompson Brothers"), for whom Al Hamilton is a contract operator. In an Opinion issued on April 19, 1996, the Environmental Hearing Board ("Board") granted summary judgment to the Department with respect to all but the latter condition. With regard to the latter condition, the Board ruled that the Department had not presented sufficient evidence to demonstrate that Al Hamilton was owned or controlled by Thompson Brothers or that Al Hamilton owned or controlled Thompson Brothers at the time the permits in question were issued, within the meaning of Section 3.1(d) of the Surface Mining Conservation and Reclamation Act ("Surface Mining Act"), Act of May 31, 1945, P.L. 1198, *as amended*, 52 P.S. § 1396.1 *et seq.*, at § 1396.3a(d).

On November 1, 1996, Al Hamilton moved for summary judgment with respect to the remaining condition. The Department filed a cross motion for summary judgment to which it attached additional documentation in support of its contention that Al Hamilton was a related party to Thompson Brothers.

Before reviewing the substantive issues raised by the parties in their motions, we must address a procedural matter raised by Al Hamilton. Al Hamilton states that it served interrogatories and a request for production of documents on the Department in October 1995. Al Hamilton requested the Department to produce and/or identify documents on which it intended to rely in preparation for trial or which it intended to introduce at trial. The Department responded on November 29, 1995 that it intended to rely on the documents attached to its original motion for summary judgment. Based on this response and the Board's subsequent determination that the

Department had not demonstrated that it was entitled to summary judgment on the remaining issue, Al Hamilton asserts that the Department is precluded from relying on any additional documents in support of its cross-motion for summary judgment.

We disagree with Al Hamilton's argument and, therefore, we will consider the documents attached to the Department's cross-motion for summary judgment. The Department's original motion was not denied with prejudice and this case has not yet been scheduled for hearing. Therefore, the Department was not precluded from filing a second motion for summary judgment providing the information we found to be lacking when ruling on the original motion. As to Al Hamilton's assertion that the Department should not be permitted to provide additional documentation in support of its cross-motion based on its response to Al Hamilton's discovery request, the Department reserved the right in its response to rely upon additional documents and subsequently supplemented its response to Al Hamilton's discovery request on November 7, 1996. Based on this, we find that the Department is not precluded from introducing additional documentation in support of its cross-motion for summary judgment.

The Board may grant summary judgment (1) whenever the record shows that no material facts are in dispute, or (2) whenever the record contains insufficient evidence of facts to make out a *prima facie* cause of action or defense. Pa. R.C.P. 1035.1-1035.5; *Bethenergy Mines, Inc. v. DEP*, EHB Docket No. 90-050-MR (Consolidated) (Opinion issued March 17, 1997), p. 4-5. The Board will grant a motion for summary judgment only where the movant's right to summary judgment is clear and free from doubt. *DEP v. Crown Recycling and Recovery, Inc.*, EHB Docket No. 92-429-CP-MG (Opinion issued February 20, 1997), p. 5. All doubts as to the existence of material facts are resolved against the moving party. *Tranguch v. DEP*, EHB Docket No. 95-255-C (Opinion

issued February 25, 1997), p. 3 (citing *Ducjai v. Dennis*, 656 A.2d 102 (Pa. 1995)).

Special Condition - Compliance with August 4, 1994 Consent Order and Agreement

The special condition in question reads as follows:

> This permit is issued conditionally based on Al Hamilton Contracting Company's compliance with the Consent Order and Agreement of August 4, 1994...(Thompson Bros. Coal Co., Inc.)

The August 4, 1994 Consent Order and Agreement was entered into between the Department and Thompson Brothers. The history behind the Consent Order and Agreement is set forth in affidavits provided by the parties pursuant to an order of the Board,[1] as well as affidavits provided by the parties in support of their motions.

On or about November 18, 1992, the Department suspended Thompson Brothers' mining license for failing to treat a degraded post-mining discharge at a mine site known as the Alder Run site, at which Thompson Brothers had been the permittee. (Smith Affidavit, paragraph 3) In addition, Thompson Brothers was assessed civil penalties for violations cited by the Department at the Alder Run site. (Smith Affidavit, paragraph 2) Thompson Brothers was also the permittee of another mine referred to as the Morris-Emigh site. (Smith Affidavit, paragraphs 4 and 5) Beginning in 1986 and continuing through the present, Al Hamilton has been a contract operator for Thompson Brothers at the Morris-Emigh site. (Smith Affidavit, paragraph 6; Carrello Supplemental Affidavit, paragraph 2) The suspension of Thompson Brothers' mining license as a result of violations at the Alder Run site also caused the cessation of mining at all sites permitted by Thompson Brothers,

---

[1] The affidavits are signed by George S. Test, attorney for Thompson Brothers, dated June 9, 1997 ("Test Affidavit") and Michael W. Smith, District Mining Manager of the Department's Hawk Run office, dated June 5, 1997 ("Smith Affidavit").

including the Morris-Emigh site. (Smith Affidavit, paragraph 7) At the time of the license suspension, between 65,800 and 82,000 tons of coal remained to be extracted from the Morris-Emigh site. (Smith Affidavit, paragraph 8) The August 4, 1994 Consent Order and Agreement restored Thompson Brothers' mining license for the purpose of allowing Al Hamilton to complete mining and reclamation of the Morris-Emigh site. (Smith Affidavit, paragraph 12) In addition, the Consent Order and Agreement set forth the terms for reclamation of the Morris-Emigh site. (Carrello Affidavit, paragraph 28) Although Al Hamilton was not a signatory to the Consent Order and Agreement, it actively participated in its negotiation. (Smith Affidavit, paragraph 11) Pursuant to an Assignment executed on the same date as the Consent Order and Agreement, royalties which Al Hamilton paid Thompson Brothers for coal removed from the Morris-Emigh site were assigned to the Department and were paid in nine monthly installments in satisfaction of Thompson Brothers' civil penalty obligation. (Carrello Supplemental Affidavit, paragraph 2 and 4, and Exhibit J; Smith Affidavit, paragraph 14) Subsequent to the execution of the Consent Order and Agreement, Al Hamilton continued to operate the Morris-Emigh site, including coal extraction and reclamation activities. (Smith Affidavit, paragraph 14)

At no time did Al Hamilton conduct any surface mining activities at the Alder Run site. (Test Affidavit) Nor was the Consent Order and Agreement precipated by any violations by Al Hamilton at the Morris-Emigh site. (Test Affidavit; Smith Affidavit, paragraph 15) The Consent Order and Agreement did benefit Al Hamilton, however, by restoring Thompson Brothers' mining license so that Al Hamilton could complete mining at the Morris-Emigh site.

Section 3.1(d) of the Surface Mining Act

Section 3.1(d) of the Surface Mining Act states in relevant part as follows:

> Any person, partnership, association or corporation which has engaged in unlawful conduct as defined in Section 18.6 [of the Surface Mining Act], which has a partner, associate, officer, parent corporation, subsidiary corporation, contractor or subcontractor which has engaged in such unlawful conduct or which controls or has controlled mining operations with a demonstrated pattern of wilful violations of any provisions of this act or the Surface Mining Control and Reclamation Act of 1977 (...30 U.S.C. § 1201 *et seq.*) shall be denied any permit required by this act, unless the permit application demonstrates that the unlawful conduct is being corrected to the satisfaction of the department.

52 P.S. § 1396.3a(d).

When a permit is issued on the basis that a violation is in the process of being corrected to the Department's satisfaction, the Department is authorized to issue the permit conditionally. 25 Pa. Code § 86.37(a)(8). *See also, Al Hamilton Contracting Company v. DEP*, 1996 EHB 444, 449 (DEP may expressly condition a permit on the applicant's demonstration that an outstanding violation is in the process of being corrected to the satisfaction of DEP.)

Here, the Department admits that the condition in Al Hamilton's permit does not pertain to any violations committed by Al Hamilton. The violations which led to the Consent Order and Agreement which is the subject of the condition were committed by Thompson Brothers at a mine site unrelated to the one where Al Hamilton performed work as a contractor. Thus, the only basis for conditioning Al Hamilton's permits pertaining to sites unrelated to Thompson Brothers' activities is if Thompson Brothers falls into one of the categories of relationships described in Section 3.1(d)

of the Surface Mining Act.

Section 3.1(d) authorizes the Department to condition Al Hamilton's permit upon the correction of a violation by Al Hamilton's "partner, associate, officer, parent corporation, subsidiary corporation, contractor or subcontractor which has engaged in such unlawful conduct." 52 P.S. § 1396.3a(d). Thompson Brothers was not a contractor or subcontractor of Al Hamilton. Rather, it was the other way around, and there is nothing in Section 3.1(d) that covers this type of relationship. Therefore, we must find that the condition in question, which conditions Al Hamilton's permit on the performance of Thompson Brothers' Consent Order and Agreement, is invalid.

We note, however, that this does not relieve Al Hamilton of liability for insuring that work at the Morris-Emigh site is performed in accordance with the terms of the August 4, 1994 Consent Order and Agreement. Section 3.1(d) of the Surface Mining Act further states as follows:

> Persons other than the applicant, including independent subcontractors...shall be jointly and severally liable with the permittee for such violations of this subsection as the permittee is charged and in which such persons participate.

52 P.S. § 1396.3a(d).

Thus, as the contractor for the Morris-Emigh site, Al Hamilton is jointly and severally liable with Thompson Brothers for any violations of the Consent Order and Agreement in which it participates.

Having determined that the Department may not include the condition which is the subject of this appeal in Al Hamilton's permits, we do not reach the arguments contained in the parties' supplemental briefs.

COMMONWEALTH OF PENNSYLVANIA
ENVIRONMENTAL HEARING BOARD

AL HAMILTON CONTRACTING COMPANY	:	
v.	:	**EHB Docket No. 95-124-R**
COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	

ORDER

AND NOW, this 11th day of September, 1997, the Motion for Summary Judgment filed by Al Hamilton Contracting Company is **granted**. The Department of Environmental Protection's Cross-Motion for Summary Judgment is **denied.** This matter is **remanded** to the Department of Environmental Protection to remove the permit condition which is the remaining subject of this appeal.

ENVIRONMENTAL HEARING BOARD

George J. Miller

GEORGE J. MILLER
Administrative Law Judge
Chairman

EHB Docket No. 95-124-R

ROBERT D. MYERS
Administrative Law Judge
Member

THOMAS W. RENWAND
Administrative Law Judge
Member

MICHELLE A. COLEMAN
Administrative Law Judge
Member

DATED: September 11, 1997

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

For the Commonwealth, DEP:
Paul J. Bruder, Esq.
Central Region

For Appellant:
Alan F. Kirk, Esq.
Kriner, Koerber & Kirk, P.C.
Clearfield, PA 16830